



his official capacity as Director of the United States Fish and Wildlife Service; and the United States Fish and Wildlife Service. This suit challenges the FWS's listing of the polar bear as threatened under the ESA. SCI and SCIF bring this suit under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA") and the ESA and challenge actions taken under the ESA.

3. Until the recent action by the FWS detailed in this Complaint, U.S. hunters, including members of SCI, could import polar bear trophies into the United States. An amendment to the Marine Mammal Protection Act ("MMPA") enacted in 1994, 16 U.S.C. § 1374(c)(5), authorizes such imports under certain conditions. Since 1994, over 900 U.S. hunters have relied on this provision to receive import permits and import polar bear trophies legally harvested in Canada.

4. Including in March, April, and May of 2008, members of SCI have successfully sport-hunted polar bears from several of the six populations of polar bears in Canada approved for imports under the MMPA, 16 U.S.C. § 1374(c)(5). Many of these individuals submitted to the FWS applications to import polar bear trophies into the United States.

5. On information and belief, other members of SCI who also successfully hunted polar bears, including during the months of March, April and May of 2008, have not yet submitted their applications for permits to the FWS. Other members of SCI have 2009 and 2010 polar bear hunts scheduled and in some cases paid for and for which they have not yet submitted permit applications. Members of SCI have cancelled or are planning to cancel hunts planned for 2009 and 2010 due to the import ban which the FWS claims arose from the listing of the polar bear.

6. Because polar bears, except for those within Alaska borders, are under the jurisdiction of foreign nations, the FWS has no direct jurisdiction to advance the conservation of

these animals. U.S. sport hunting and importation of polar bears represent one of the few if not the only guaranteed conservation impact that the FWS/United States has on foreign members of the species.

7. The FWS's decision to list the polar bear as threatened throughout its range under the ESA is unlawful for the following reasons:

- Invalid Standards for Threatened Determination;
- Invalid Listing Decision;
- Failure to Consider Impacts of Efforts to Reduce any Climate Change Predicted to Occur;
- Failure to Establish Distinct Population Segments or Portions of Range and Not List Some of Those as Threatened;
- Error in Adopting Uncertain and Speculative Predictions as the Accepted Conditions in 45 Years; and
- Failure to Properly Account for the Positive Conservation Benefits of Sport Hunting in Making the Listing Decision.

8. SCI and SCIF seek relief (a) declaring the FWS's listing decision erroneous, (b) setting aside the Final Rule, (c) enjoining the Federal Defendants from relying on or implementing the listing, and (d) removing the polar bear from the list of threatened species.

## **II. JURISDICTION AND VENUE**

9. This Court has jurisdiction over this action under the APA, 5 U.S.C. §§ 702, 706 (judicial review of final agency action); 28 U.S.C. § 1331 (federal question jurisdiction); and 16 U.S.C. § 1540(g) (ESA citizen suit provision). The Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201, 28 U.S.C. § 2202, and 5 U.S.C. §§ 701-706.

10. Venue is proper in the District of Columbia under 28 U.S.C. § 1391(e) as this action is brought against an agency of the United States and against officers of agencies of the United States in their official capacities; decisions and actions challenged here were made, at

least in part, in this District; Plaintiffs SCI and SCIF maintain an office in this District; and no real property is involved.

11. SCI and SCIF and members of SCI are currently adversely affected and aggrieved by the actions of the FWS in listing the polar bear as threatened throughout its range. This action also harms SCI and SCIF's interests in polar bear conservation and management efforts. SCI and SCIF are aggrieved parties and are entitled to judicial review of the actions challenged here under the APA and ESA. SCI and SCIF have standing to assert these claims.

12. SCI and SCIF satisfied the written notice requirements of the ESA citizen suit provision. 16 U.S.C. § 1540(g). On or around June 16, 2008, Defendants Dirk Kempthorne, *et al.* ("Federal Defendants") received a letter from SCI and SCIF dated June 12, 2008 and sent by certified mail. The June 12 letter provided notice of the violations of the ESA outlined in this Complaint. The Federal Defendants received notice more than 60 days ago.

13. The judicial review provisions of the APA and ESA waive the Federal government's sovereign immunity. 5 U.S.C. § 702, 16 U.S.C. § 1540(g).

### **III. PARTIES**

14. Safari Club International is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the Internal Revenue Code, with principal offices and place of business in Tucson, Arizona. SCI maintains an office in Washington D.C. Its membership includes approximately 53,000 individuals from the United States and many of the countries around the world. Its missions are the conservation of wildlife, protection of the hunter, and education of the public concerning hunting and its use as a conservation tool. Members of SCI have hunted polar bears in the past, including recently, and intend to hunt polar

bears in the future. All or most of them desire to import the trophy of any polar bear they have harvested or will harvest into the United States.

15. SCI carries out its conservation mission through its sister organization, Safari Club International Foundation. SCIF is a non-profit corporation, incorporated in the State of Nevada, operating under § 501(c)(3) of the Internal Revenue Code, with principal offices and place of business in Tucson, Arizona. SCIF maintains an office in Washington D.C. Its missions are conservation of wildlife, education of the public concerning hunting and its use as a conservation tool, and humanitarian services. The conservation mission of SCIF is: (a) to support the conservation of the various species and populations of game animals and other wildlife and the habitats on which they depend, and (b) to demonstrate the importance of hunting as a conservation and management tool in the development, funding and operation of wildlife conservation programs.

16. SCI and SCIF are organizations that promote the principle and practice of sustainable use conservation. SCI and SCIF's and SCI members' interests include the sound management and conservation of polar bears and SCI members' ability to import polar bear trophies into the United States from Canada, as was allowed under the law before the listing of the polar bear as threatened under the ESA on May 15, 2008.

17. SCI and SCIF and members of SCI are harmed and aggrieved by this final action because, as a direct result of the listing of the polar bear as threatened, members of SCI will not be able to import legally harvested polar bears from Canada. Before the FWS announced that an import ban arose as a result of the listing, U.S. citizens could import polar bear trophies from six approved populations in Canada upon the issuance of an import permit from the FWS and an export permit from Canada.

18. Many SCI members hunted polar bears from one of the six approved populations before May 15, 2008. Some of these members submitted an application to the FWS for an import permit. The FWS has noticed in the Federal Register for a 30-day comment period the applications of at least 11 SCI members. 73 Fed. Reg. 18808-09 (April 7, 2008); 73 Fed. Reg. 21979-80 (April 23, 2008); 73 Fed. Reg. 21980-81 (April 23, 2008); 73 Fed. Reg. 21981-82 (April 23, 2008); 73 Fed. Reg. 23266-67 (April 29, 2008).

19. Some or all of these members received a letter or other correspondence from the FWS dated around June 13, 2008, informing them that “the import of sport-hunted polar bear trophies from Canada is no longer available” and that the FWS was “holding all pending polar bear applications pending” a decision from a U.S. District Court in California.

20. Some or all of these members received a letter from the FWS dated on or around July 29, 2008, informing them that the FWS was “administratively closing” their application. The letter encouraged the recipient to “submit a new permit application” “should the MMPA be amended in a manner that would allow for the importation of polar bear sport-hunted trophies.”

21. On information and belief, other SCI members sport-hunted polar bears in one of the six approved populations but did not submit an import permit application. These members have no reason to submit an application because it would be futile. The FWS, in the Final Rule, and in other actions, has announced and made it clear that it believes it is without authority to grant such a permit.

22. The polar bears hunted by at least some of these members of SCI before May 15, 2008 remain in storage in Canada. On information and belief, the polar bears hunted by all these members of SCI before May 15, 2008 remain in storage in Canada.

23. As a result of the listing, other SCI members have lost an important incentive for travelling to Canada to hunt polar bears and contribute to the overall conservation of the species—the ability to import the trophy into the United States. Many members of SCI cancelled trips to Canada to hunt polar bears in 2008 and 2009 because of the inability to get a sport-hunted polar bear import permit. Some of them lost deposit money. Other members have put their future hunts on hold.

24. Other members of SCI who had planned to hunt polar bear in the near future have decided to not make those plans due to the listing and import ban.

25. Future sustainable use hunts by U.S. hunters, including SCI members, will not occur due to the inability to import the trophy and, consequently, the conservation benefits of that sport hunting will be lost.

26. SCI and SCIF commented at every available opportunity for public comments on the proposed listing. SCI and SCIF submitted extensive written comments in April 2006, April 2007, and October 2007. In March 2007, SCI and SCIF presented oral testimony on the proposed listing at a hearing conducted by the FWS in Washington D.C.

27. SCI and SCIF possess sufficient interests in the subject matter of this litigation to establish standing. SCI and SCIF and SCI members have suffered concrete injury in fact caused by the FWS's listing of the polar bear under the ESA. A court ruling setting aside the Final Rule and the listing would redress those injuries. SCI members could then import sport-hunted polar bear trophies from approved populations in Canada, as they could before the listing.

28. Defendant Dirk Kempthorne is the Secretary of the Interior and has ultimate responsibility for the administration of the ESA and MMPA within the United States Department of the Interior. He signed the Final Rule. He is sued in his official capacity.

29. Defendant H. Dale Hall is the Director of the Fish and Wildlife Service. He has responsibility for the administration and implementation of the ESA and MMPA, including with regard to the listing of the polar bear. He is sued in his official capacity.

30. Defendant U.S. Fish and Wildlife Service is an agency within the Department of the Interior that is authorized to administer and implement the ESA and MMPA.

#### **IV. LEGAL BACKGROUND**

##### **A. The Endangered Species Act**

31. The purposes of the ESA “are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.” 16 U.S.C. § 1531(b).

32. Among other things, the ESA provides for the listing of species as either endangered or threatened. *Id.* § 1533. The statute also authorizes the delisting of listed species. *Id.* A species is “endangered” if the agency determines it “is in danger of extinction throughout all or a significant portion of its range ...” *Id.* § 1532(6). A species is “threatened” if the agency determines it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). In the Final Rule, the FWS determined that the polar bear was “threatened” throughout its range.

33. The ESA provides protection to “endangered” species, subject to exceptions. *See, e.g.*, 16 U.S.C. § 1538. The ESA authorizes the Secretary (and the FWS by delegation) to issue regulations to protect a “threatened” species when it is listed under Section 4 of the ESA. 16 U.S.C. § 1533(d). The Secretary has promulgated regulations that make most of the prohibitions

of Section 9 (by statute only applicable to “endangered” species) also applicable to “threatened” species. 50 C.F.R. § 17.31. Thus, the general ESA prohibition on imports of “threatened” species is based on regulation and not statute.

34. The ESA allows the FWS to list by “species,” “subspecies,” or “distinct population segment.” 16 U.S.C. § 1532(15). The Department of the Interior and the Department of Commerce have promulgated a distinct population segment (“DPS”) policy that guides their determination of whether a group of animals is a DPS. Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996).

35. The FWS may also list different portions of a species’ range differently under the Department of the Interior’s interpretation of its authorities under the ESA. *See* U.S. Department of the Interior Solicitor, Memorandum (M-37013), “The Meaning of ‘In Danger of Extinction throughout All or a Significant Portion of Its Range,’” (Mar. 16, 2007).

**B. The Administrative Procedure Act**

36. The APA provides for judicial review of final agency action by persons “aggrieved” by the action. 5 U.S.C. § 702.

37. It also provides standards applicable when a Federal agency proposes and adopts final rules and regulations. 5 U.S.C. § 553; *id.* § 551(4).

38. Under the APA, Federal agencies must provide “general notice” of any “proposed rule making” to the public through publication in the Federal Register. That notice must include “(1) a statement of the time, place, and nature of the public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms and substance of the proposed rule or a description of the subjects and issues involved.” *Id.* § 553(b).

39. The APA requires that the agency “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.” *Id.* § 553(c).

## **V. FACTUAL BACKGROUND**

### **A. The Listing Decision**

40. The FWS, in the Final Rule signed by Defendant Dirk Kempthorne, listed the polar bear as a “threatened species” under the ESA, effective on May 15, 2008.

41. The FWS concluded “that polar bear habitat—principally sea ice—is declining throughout the species’ range, that this decline is expected to continue for the foreseeable future, and that this loss threatens the species throughout all of its range. Therefore, we find that the polar bear is likely to become an endangered species within the foreseeable future throughout all of its range.” 73 Fed. Reg. at 28212.

42. Currently, the total number of polar bears worldwide is estimated to be 20,000-25,000. *Id.* at 28215. They are unevenly distributed in “19 relatively discrete populations.” *Id.* The number of polar bears worldwide in the 1950s and 1960s has been estimated to be roughly between 6,000 and 8,000.

43. In making its final decision to list the polar bear, the FWS relied heavily on nine reports prepared by the U.S. Geological Survey on polar bears (“USGS Reports”). *Id.* at 28212. These nine reports were prepared “at the request of the Secretary of the Interior specifically for this [the polar bear listing] determination.” *Id.* Those reports, and others relied on by the FWS, acknowledge the great uncertainty involved in modeling climate change far into the future,

modeling sea ice change, and predicting the impacts of any reductions in sea ice on the polar bear.

44. In assessing whether the polar bear is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range,” 15 U.S.C. 1531(19), the FWS determined that 45 years was the foreseeable future. 73 Fed. Reg. at 28253. In the rule proposing to list the polar bear, the FWS also selected 45 years as the foreseeable future. 12 Month Petition Finding and Proposed Rule to List the Polar Bear as Threatened throughout Its Range, 72 Fed. Reg. 1064, 1070-71 (Jan. 9, 2007). In the proposed rule, the rationale related only to biological features of the polar bear and documented and projected changes in sea-ice. *Id.* In the Final Rule, the FWS explained, as the rationale for selecting 45 years, that “[a]vailable information indicates that climate change projections over the next 40-50 years are more reliable than projections over the next 80-90 years.” 73 Fed. Reg. at 28253.

45. The FWS considered but rejected listing the polar bear by distinct population segment (“DPS”). *Id.* at 28248-49. The FWS admitted that the threats they anticipate will affect the distinct populations differently. *Id.* Listing by DPS would have allowed the FWS to list some DPSs and not list other DPSs. The USGS Reports on which the FWS relied, and other information, predicts that the threats to polar bears will differ by population or areas of the polar bear’s range. *Id.* The FWS has concluded that the 19 recognized polar bear populations are “relatively discrete.” *Id.* at 28215.

46. The FWS considered listing the polar bear by “significant portion of range” as permitted by the ESA. *Id.* at 28248-49. The FWS concluded that the perceived threats will affect the different portions of the polar bears range differently. *Id.* While the FWS considered whether the polar bear should be listed as “endangered” instead of “threatened” in certain

portions of the polar bears' range, the FWS did not consider whether the polar bear should not be listed at all in certain portions of the polar bears' range. The USGS Reports conclude that, within the chosen foreseeable future, polar bears in certain areas will persist in high numbers.

**B. Impact of Listing and Resulting Import Ban on Sport Hunting and Conservation**

47. The sport hunting and importation of polar bears benefits polar bear conservation and management in a number of ways. The FWS "acknowledge[s] the important contribution to conservation from scientifically-based sustainable use programs." 73 Fed. Reg. at 28242.

48. As noted above, each issued import permit requires the payment of \$1,000 to the FWS for polar bear research and management in Alaska and Russia.

49. U.S. hunters in particular pay upwards of \$40,000-50,000 per polar bear hunt. A large percentage of those funds go to the local native communities, who provide guiding services, goods, and other services to the foreign hunters. This infusion of cash into the cash-strapped native communities provides another incentive for these people to accept the Western-based science and management that facilitates polar bear conservation and that is required before the FWS will approve a population for import. The local people who co-exist with the polar bear can help ensure that harvest of polar bears falls within established quotas and, by whatever means, is done in a sustainable way. As noted above, the FWS, in the Final Rule and elsewhere, has recognized the benefits of sport hunting of polar bears.

50. Sport hunting by U.S. and other foreign hunters in Canada does not increase polar bear mortality in any given year. Canadian authorities establish quotas for polar bear populations. These quotas are assigned to the local communities. The local communities use the majority of their quota (provided as "tags" representing the number of bears that can be taken, by whatever means, by that community) for subsistence and management purposes. The

communities sell a number of the tags to sport hunters. In most cases, the meat and other non-trophy portions of the harvested polar bear remain with the native communities to be used for subsistence purposes. If U.S. hunters did not purchase these tags because of the FWS-imposed ban on imports, the native communities will sell them to other foreign hunters or use the tags themselves for subsistence purposes. If U.S. hunters do not purchase the tags, the value of the individual polar bears to the residents of the native communities are likely to diminish, as are the incentives for community residents to strictly accept the quota system and the science behind it.

51. SCI and SCIF have filed a separate complaint challenging the FWS's legal determination that the listing of the polar bear under the ESA creates an import ban under the Marine Mammal Protection Act. *Safari Club International, et al. v. Kempthorne, et al.*, Civil Action No. 1:08-cv-00881-EGS, Complaint filed May 23, 2008. The present case involves issues that are legally distinct from the previously filed case.

## **VI. CLAIMS FOR RELIEF**

### **First Claim for Relief (Invalid Standards for Threatened Determination) Violation of the APA and ESA**

52. SCI and SCIF reallege and incorporate herein by reference all the allegations of this Complaint, as though fully set forth below.

53. The FWS did not properly establish the standard for assessing the best available scientific and commercial data about the threats to the polar bear. A "threatened" listing requires a high level of certainty about future impacts and threats that is not present with the polar bear listing. The ESA does not define what is meant by the terms "likely" and "foreseeable future" as used in the definition of "threatened": "The term "threatened species" means any species which

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(19) (emphasis added).

54. The FWS failed to articulate any standard or meaning for the term “likely,” as used in the “threatened” definition. To the extent the FWS did establish a standard or meaning, it was not reasonable. The word “likely” describes something having a high probability of occurring or being true; very probable. The FWS simply concluded that the polar bear was likely to be in danger of extinction in the foreseeable future without establishing or at least explaining the standard that applied to reach this conclusion.

55. Scientific bodies on which the FWS has heavily relied in this rulemaking should have further guided the FWS’s understanding of the meaning of “likely.” They define “likely” in the range of a 66-89% certainty of happening. Climate Change 2007: The Physical Science Basis, *Summary for Policymakers*, Intergovernmental Panel on Climate Change, at 4 n.6 (“In this Summary for Policymakers, the following terms have been used to indicate the assessed likelihood, using expert judgment, of an outcome or a result: ... *Very likely* > 90%, *Likely* >66% ....”); ACIA, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment*, Cambridge University Press, 2004, Preface (“Likely” denoted in 65-85% range).

56. In determining that the polar bear should be listed as “threatened,” the FWS relied on conclusions about occurrences and impacts that are possible or could potentially happen. Such speculation does not satisfy the statutory requirement that it is “likely” the species will “become an endangered species within the foreseeable future.” To list the polar bear in accordance with ESA mandates, the FWS needed to affirmatively determine with a high degree of certainty and probability that the species will become endangered in the “foreseeable future” time period, here a period of 45 years that the FWS ultimately designated for polar bears. At the

very least, the FWS should have defined or articulated the standard it applied to satisfy the “likely” requirement.

57. As with the term “likely,” the ESA does not define the phrase “foreseeable future” as used in the definition of a “threatened” species. The ordinary meaning of the phrase establishes that it should be short enough that the agency can determine the future state of things with a relatively high degree of certainty.

58. The foreseeable future into which the agency must assess the potential threats to the polar bear is that time period within which the agency can actually predict the future state of things with a high degree of certainty or probability. It should not be based primarily on the length of a species’ generation or any other biological factor. Congress did not define the “future” into which the FWS must peer as biologically or scientifically based. Instead, it used “foreseeable,” which dictates the certainty with which the agency can “see” or predict the future. If that future is not seeable or predictable with some high level of certainty, it is not foreseeable and the agency must pick a shorter period of time to represent the foreseeable future.

59. In the Final Rule, but not in its discussion in the proposed rule, the FWS claims that 45 years is a reasonably foreseeable future because the data they reviewed regarding projected conditions in this time period is more reliable than data concerning time periods beyond 45 years. 73 Fed. Reg. at 28239. This proves nothing except that the FWS believes in general that nearer-term projections are more reliable than further-term projections. It does not establish a meaning or standard for foreseeable future or that 45 years is a reasonable or allowable “foreseeable future.”

60. In addition, the extent and impact of social and political changes underway related to global climate change make the future in 45 years less than foreseeable. As the nature and

extent of those changes, and what they mean in terms of global climate change and impacts on the polar bear, cannot be known with sufficient certainty now, the FWS has proposed a “foreseeable future” that is too long.

61. As the FWS must be able to conclude that there are “likely” to be future threats to the species and that those threats will put the species in danger of extinction, the more complex and uncertain the set of factors affecting the species, the shorter the future time period must be. When the issue is as complex and uncertain as the nature, extent, and impact of future global climate change, the FWS cannot conclude with any degree of certainty that an affected species, particularly a currently healthy species, is going to be in danger of extinction within 45 years.

62. SCI and SCIF and members of SCI are harmed and aggrieved by this final action because members of SCI cannot import from Canada polar bears legally harvested before May 15, 2008; members who choose to hunt polar bears in Canada in the future will not be able to import their trophies or will cancel or choose not to make future polar bear hunt plans; future sustainable use hunts by U.S. hunters, including SCI members, will not occur due to the inability to import the trophy; and the conservation benefits of that sport hunting will be lost. No other remedy at law exists.

63. These actions by the Secretary constitute a violation of the ESA and the APA. 5 U.S.C. § 706(2); 16 U.S.C. § 1533.

64. The remedies requested in this Complaint would remedy SCI and SCIF’s and SCI’s members’ injuries, as outlined in this Complaint.

**Second Claim for Relief  
(Invalid Listing Decision)  
Violation of the APA and ESA**

65. SCI and SCIF reallege and incorporate herein by reference all the allegations of this Complaint, as though fully set forth below.

66. The listing of the polar bear was not warranted at this time due to scientific uncertainty about the nature and extent of any future global climate change, and the impact of any climate change on the arctic ecosystem and the polar bear. Because of the complexity of the issue and the inherent uncertainty involved in predicting the future of complex systems with unknown future parameters, a great deal of scientific uncertainty continues to surround this issue. This uncertainty prevents the FWS from making the affirmative determination the ESA requires.

67. For example, one of the nine USGS Reports issued in September 2007 discusses in detail the uncertainty inherent in the types of projections contained in the other reports. The USGS Report entitled “Uncertainty in Climate Model Projections of Arctic Sea Ice Decline: An Evaluation Relevant to Polar Bears,” DeWeaver (2007) (“Uncertainty Report”), addresses the uncertainty of the climate and sea ice models. This report confirms there is significant uncertainty surrounding this crucial underlying scientific information.

68. In particular, two of the USGS Reports rely on these models for establishing the status of the polar bear and its habitat at certain time periods in the future. “Forecasting the Range-wide Status of Polar Bears at Selected Times in the 21<sup>st</sup> Century,” Amstrup et al., at 8, 10, 23-24 (2007) (“Forecasting Report”); “Predicting the Future Distribution of Polar Bear Habitat in the Polar Basin from Resource Functions Applied to 21<sup>st</sup> Century General Circulation Model Projections of Sea Ice,” Durner et al., at 1, 5-6 (2007) (“Habitat Report”). The modeling in the Forecasting Report not only relies on speculative sea-ice conditions at the 45, 75, and 100 year

time points, but itself attempts to make predictions about the future of polar bears based on mathematical modeling that cannot replicate natural variable conditions in such a complex and incompletely understood system, and relies on “interpretation of data,” and the expert judgment of only one polar bear expert. *Id.* at 16.

69. The Forecasting Report acknowledges that using a single expert is undesirable and was done only because of the deadline by which the FWS had to make a final determination. *Id.* The report also acknowledges that the Bayesian Network model the authors devised is only a “prototype” that needs significant refinement. *Id.*

70. In addition, in the Range-Wide Status Review of the Polar Bear (FWS 2006) (“Status Review”), the FWS itself acknowledges that there is a “large degree of uncertainty” about the actual increase in global temperatures and the “future of the Arctic sea ice.” Status Review at 67.

71. The scientific documents on which the FWS chiefly relies also readily acknowledge this scientific uncertainty and unpredictability. For example, the Intergovernmental Panel on Climate Change’s Special Report on Emissions Scenarios, states:

Scenarios help in the assessment of future developments in complex systems that are either *inherently unpredictable*, or that *have high scientific uncertainties*. In all stages of the scenario-building process, uncertainties of different nature are encountered. A large *uncertainty surrounds future emissions* and the possible evolution of their underlying driving forces, as reflected in a wide range of future emissions paths in the literature. The uncertainty is further compounded in going from emissions paths to climate change, from climate change to possible impacts and finally from these driving forces to formulating adaptation and mitigation measures and policies. The uncertainties range from inadequate scientific understanding of the problems, data gaps and general lack of data to inherent uncertainties of future events in general. Hence the use of alternative scenarios to describe the range of *possible future emissions*.

Section 1.2, Box 1-1: Uncertainties and Scenario Analysis (emphasis added),

<http://grida.no/climate/ipcc/emission/025.htm>.

72. These reports also echo the Uncertainty Report's concern over the greater uncertainty regarding the potential impacts of global climate change at the "sub-region" level.

73. As the documents discussed above and others demonstrate, the science of predicting climate change on a global scale, and for projections reaching out 45 or more years, is full of uncertainty and speculation. This level of uncertainty does not allow the FWS to make the affirmative determination that a currently healthy species is "likely" to become extinct in the "foreseeable future," here arbitrarily determined to be the next 45 years.

74. SCI and SCIF and members of SCI are harmed and aggrieved by this final action because members of SCI cannot import from Canada polar bears legally harvested before May 15, 2008; members who choose to hunt polar bears in Canada in the future will not be able to import their trophies or will cancel or choose not to make future polar bear hunt plans; future sustainable use hunts by U.S. hunters, including SCI members, will not occur due to the inability to import the trophy; and the conservation benefits of that sport hunting will be lost. No other remedy at law exists.

75. These actions by the Secretary constitute a violation of the ESA and the APA. 5 U.S.C. § 706(2); 16 U.S.C. § 1533.

76. The remedies requested in this Complaint would remedy SCI and SCIF's and SCI's members' injuries, as outlined in this Complaint.

**Third Claim for Relief  
(Failure To Consider Impacts of Efforts To Reduce any  
Climate Change Predicted To Occur)  
Violation of the APA and ESA**

77. SCI and SCIF reallege and incorporate herein by reference all the allegations of this Complaint, as though fully set forth below.

78. As the definition of a “threatened species” in Section 3 of the ESA requires the FWS to predict that the polar bear is likely to become in danger of extinction within the next 45 years (or some more appropriate foreseeable future), the FWS should have taken account or better account of current and future events. Failing to do so means that the FWS made predictions about the future without the benefit of all available relevant scientific information. In fact, a failure to account for this information means that the FWS predicted what will happen over the next 45 years based on what is in place today. At the same time, in the Final Rule, the FWS states that it “remain[s] optimistic that the future can be a bright one for the polar bear” and that “[w]ith the world community acting in concert, we are confident the future of the polar bear can be secured.” 73 Fed. Reg. at 28302. This optimism went unaccounted for in the agency’s actions.

79. The governments of the world will supplement the regulatory forces at work today with additional ones in the coming years. The current widespread and massive attention being paid to this issue assures that the response will be significant and will affect future climate change, and possible impacts on the arctic ecosystem and the polar bear. Considering the definition of a “threatened species” in ESA Section 3, it was arbitrary and capricious for the FWS to ignore this development.

80. In addition, two of the listing factors of Section 4 of the ESA require the FWS to consider these future actions. Under the first factor, the FWS must consider the threatened destruction of the polar bear’s habitat or range. 16 U.S.C. § 1533(a)(1)(A). As the concern is the reduction of arctic sea ice caused by future warming, the FWS must analyze the causes of any future warming. Thus, the FWS must analyze all the factors that might cause or not cause warming to occur and to what degree. Certainly, mandated reductions in greenhouse gases (and

other actions taken to address global climate change) in the next 5, 10, 20 years and beyond will impact the extent of any future warming. *See* Status Review at 67 (“Hansen et al. (2005) (suggesting that the warming trend would change considerably if actions were taken soon enough to keep the atmospheric gases from increasing.”).

81. Under the fifth factor, the FWS must consider any “other natural or manmade factors affecting [the species’] continued existence.” 16 U.S.C. § 1533(a)(1)(E). The projected human response, in all its varied forms, to the issue of global climate change certainly is a factor that will affect the extent and nature of future climate change and sea ice changes and, consequently, (in the FWS’s own view) the continued existence of the polar bear. That the fourth factor, as interpreted by the courts, restricts the agency’s consideration of “existing regulatory mechanisms” to those currently being implemented does not affect the analysis the agency must conduct under other listing factors.

82. Finally, until it is more certain that the human race will not effectively respond to global climate change, and how any warming will affect the arctic environment and, more importantly for present purposes, polar bear populations, the FWS should not have made assumptions that led to a premature listing of a currently healthy species.

83. SCI and SCIF and members of SCI are harmed and aggrieved by this final action because members of SCI cannot import from Canada polar bears legally harvested before May 15, 2008; members who choose to hunt polar bears in Canada in the future will not be able to import their trophies or will cancel or choose not to make future polar bear hunt plans; future sustainable use hunts by U.S. hunters, including SCI members, will not occur due to the inability to import the trophy; and the conservation benefits of that sport hunting will be lost. No other remedy at law exists.

84. These actions by the Secretary constitute a violation of the ESA and the APA. 5 U.S.C. §§ 706(2), 553; 16 U.S.C. § 1533.

85. The remedies requested in this Complaint would remedy SCI and SCIF's and SCI's members' injuries, as outlined in this Complaint.

**Fourth Claim for Relief  
(Failure To Establish Distinct Population Segments or  
Portions of Range and Not List Some of Those as Threatened)  
Violation of the APA and ESA**

86. SCI and SCIF reallege and incorporate herein by reference all the allegations of this Complaint, as though fully set forth below.

87. If the FWS was going to list the polar bear, it at least should have established DPSs and should have listed only those DPSs that met the requirements for listing established under the ESA. It also should have not listed certain portions of the range of the polar bear.

88. The ESA and FWS policy allow the establishment of DPSs and listing or not listing them separately. "Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act" 61 Fed. Reg. 4722 (Feb. 7, 1996) ("DPS Policy").

89. The Final Rule to list the polar bear as threatened recognizes that the species occurs in 19 relatively discrete populations throughout the Arctic. 73 Fed. Reg. at 28215. The Proposed Rule noted that the boundaries between the 19 populations are "sufficiently discrete to manage the populations independently." 72 Fed. Reg. 1064, 1068 (Jan. 9, 2007).

90. To justify its decision not to establish any DPSs, the FWS noted that "relatively discrete populations" did not equate to DPSs. 73 Fed. Reg. at 28215. But as indicated in the DPS Policy, the standard for designating DPSs "does not require absolute separation of a DPS

from other members of its species” such that the existence of interaction between these populations should not defeat the designations. 61 Fed. Reg. at 4724.

91. An alternative to designating individual DPSs would be to list different portions of the polar bear’s range differently. *See* U.S. Department of the Interior Solicitor, Memorandum (M-37013), “The Meaning of ‘In Danger of Extinction throughout All or a Significant Portion of its Range,’” (Mar. 16, 2007). In that memorandum, the Solicitor examined the legislative history of the ESA to reveal that the drafters of the law intended to give the FWS the authority and discretion to list or not list the animals in portions of the species’ range. The Solicitor also referenced *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1146 (9<sup>th</sup> Cir. 2001), in which the Court implied that different portions of a species’ range may require different degrees of protection.

92. The FWS has the authority to list or choose not to list less than the entire species (whether “species” is defined as species as a whole, subspecies or distinct population segment) and can choose not to list certain portions of the polar bear’s range.

93. As the FWS determined (incorrectly) that it could not establish DPSs for the polar bear, it never even considered whether certain DPSs might *not* warrant a threatened listing. Final Rule, 73 Fed. Reg. at 28248. In addition, while the FWS considered whether to list different portions of the polar bear’s range differently, it only considered whether to list some portions of its range as endangered rather than threatened. *Id.* The FWS failed to consider whether to *not* list certain portions of the range at all (*i.e.*, maintain a not-listed status in those portions of the range in which the FWS cannot affirmatively establish that the polar bear will be at risk of extinction in the foreseeable future). These acts and failures were arbitrary and capricious and contrary to law.

94. The available science, including portions of the USGS Reports, supports distinguishing population segments or range areas for different listing status. Because the USGS Reports are a major source of the scientific information driving the listing decision, the FWS should have reviewed them to analyze the predicted status of each population or eco-region. These Reports indicate that many populations, for example those in the Archipelago and Convergent Ice regions, do not even appear to be in danger of extinction within 45 years.

95. Under the science it has accepted as sufficiently certain to establish a threatened status, the FWS should have established DPSs or portions of the polar bears range and then separately determined the listing status of each DPS or portion of range.

96. Two interrelated factors that create distinction between the populations or animals within a particular portion of the overall range are how the listing will affect the population and whether the population is currently hunted (particularly by U.S. hunters who would then import their trophies into the United States). These factors relate to the regulatory mechanisms applicable to the populations. The FWS's DPS Policy notes that "international boundaries" are a factor in determining discreteness because of differences between foreign nations' "management, status, or exploitation of a species." 61 Fed. Reg. at 4723. Management of the various polar bear populations includes regulation of hunting and authorization of hunting tags being made available to native hunters and to non-native hunters who intend to import their take into the United States. In the six populations in Canada (Nunavut and the Northwest Territories) from which U.S. hunters could, before the listing decision, import any trophies taken into the United States, the regulatory authorities have established quotas for the numbers of polar bears that may be taken by hunters. The governmental authorities assign the tags to

local communities and the communities assign some portion of the tags issued pursuant to the quota to non-native hunters, most of whom are U.S. hunters.

97. The fees paid by the foreign hunters and the money brought into the local economies by these foreign hunters raise the value of the polar bears within the native communities. The value of the animals discourages poaching and encourages further acceptance by native hunters of quotas based not only on traditional knowledge but also largely on western scientific management principles (*e.g.*, sustainable use conservation). Consequently, the higher value of polar bears introduced by sport hunting helps the regulatory authorities maintain a controlled take of the species. *See* Comments of Dr. Mitchell K. Taylor, Manager, Wildlife Research, Department of Environment, Government of Nunavut, Apr. 6, 2006; Comments of Milton M.R. Freeman, Senior Research Scholar, Canadian Circumpolar Institute, University of Alberta, Apr. 5, 2007; Comments of the Canadian Polar Bear Administration, at 8-9, Jun. 16, 2006. In addition, each polar bear import permit generates fees that currently fund polar bear research. *See* SCI and SCIF Apr. 2007 Comments at 3.

98. The regulatory mechanisms that differentiate between hunted and importable vs. non-hunted or non-importable populations provided a mechanism that the FWS should have used to designate DPSs or portions of range as *not* threatened while maintaining the threatened status for other populations or portions of range. The FWS's failure to do so was arbitrary and capricious and contrary to law.

99. SCI and SCIF and members of SCI are harmed and aggrieved by this final action because members of SCI cannot import from Canada polar bears legally harvested before May 15, 2008; members who choose to hunt polar bears in Canada in the future will not be able to import their trophies or will cancel or choose not to make future polar bear hunt plans; future

sustainable use hunts by U.S. hunters, including SCI members, will not occur due to the inability to import the trophy; and the conservation benefits of that sport hunting will be lost. No other remedy at law exists.

100. These actions by the Secretary constitute a violation of the ESA and the APA. 5 U.S.C. § 706(2); 16 U.S.C. § 1533.

101. The remedies requested in this Complaint would remedy SCI and SCIF's and SCI's members' injuries, as outlined in this Complaint.

**Fifth Claim for Relief  
(Error in Adopting Uncertain and Speculative  
Predictions as the Accepted Conditions in 45 Years)  
Violation of the APA and ESA**

102. SCI and SCIF reallege and incorporate herein by reference all the allegations of this Complaint, as though fully set forth below.

103. The ESA requires the FWS to base its listing determination solely on the "best available scientific and commercial information" (after taking account of conservation programs in foreign nations). 16 U.S.C. § 1533(b)(1)(A). But this mandate does not mean that the FWS must accept as "fact" speculative and uncertain predictions about the habitat and population status of the species in 45 years for purposes of making the listing determination today. A prediction or projection is just that, an uncertain statement of the way someone thinks things might be in the future. The best available science mandate of the ESA does not convert a prediction into something the FWS must accept as true or certain to happen. Whether it is the "best" prediction available or not, a prediction remains uncertain.

104. The FWS should have read the best available science directive in conjunction with the standard for listing a species as threatened. In short, the statutory standard requires some high level of certainty that the species will be in danger of extinction within the

“foreseeable future,” – that period of time into which the agency can peer and ascertain the status of the species, again, with some high level of certainty.

105. Here, the best available science only can indicate that the species may be in danger of extinction in some portion of its range in 45 years (the chosen foreseeable future) if certain speculative predictions about climate change and sea ice loss, and the polar bear’s ability to respond to a changing environment, come true. It cannot establish the high level of certainty the statute requires. Thus, the best available science establishes that the FWS *should not* have listed the species, regardless of uncertain “predictions” that the species may be in danger of extinction (at least in some portion of its range) in the chosen foreseeable future.

106. The FWS erred by treating the nine new USGS Reports, and other uncertain predictions about climate change and impacts on sea ice and polar bears, as the best available science and by assuming that these “predictions” meet the listing standard for threatened species. In other words, even assuming the information is the best available and it *predicts* extinction (at least for certain populations) within the 45-year foreseeable future, it does not necessarily meet the “likely”—high degree of certainty of occurring—standard demanded by Sections 3 and 4 of the ESA. The conclusions in the Reports must meet this standard regardless of whether the Reports constitute the best available science. The FWS erred by according too much weight to these predictions.

107. Several factors undermine the USGS Reports’ status as the “best available” scientific information, or at least suggest that the FWS should have accorded less weight to these reports. The Reports in general, but the Forecasting Report in particular, appear designed to rebut criticisms of the state of the science before the USGS Reports came out. While this may be acceptable in some cases, with the high level of subjective input involved in the

Bayesian Network modeling, this situation is ripe for bias and result-driven information to creep into the analysis. For example, the authors used “input nodes” involving four of the five ESA listing factors. All this indicates that these reports do not always represent science done for science’s sake.

108. Although the ESA does not itself define the meaning of “best available science,” FWS policy requires a critical evaluation of all information and data the FWS may consider in a listing decision.

109. Consequently, the apparent presence of unavoidable bias in some or all of the nine USGS Reports at least undermines reliance on these studies as the “best available science.”

110. SCI and SCIF and members of SCI are harmed and aggrieved by this final action because members of SCI cannot import from Canada polar bears legally harvested before May 15, 2008; members who choose to hunt polar bears in Canada in the future will not be able to import their trophies or will cancel or choose not to make future polar bear hunt plans; future sustainable use hunts by U.S. hunters, including SCI members, will not occur due to the inability to import the trophy; and the conservation benefits of that sport hunting will be lost. No other remedy at law exists.

111. These actions by the Secretary constitute a violation of the ESA and the APA. 5 U.S.C. § 706(2); 16 U.S.C. § 1533.

112. The remedies requested in this Complaint would remedy SCI and SCIF’s and SCI’s members’ injuries, as outlined in this Complaint.

**Sixth Claim for Relief  
(Failure To Properly Account for the Positive Conservation  
Benefits of Sport Hunting in Making the Listing Decision)  
Violation of the APA and ESA**

113. SCI and SCIF reallege and incorporate herein by reference all the allegations of this Complaint, as though fully set forth below.

114. In the Final Rule, the FWS recognized the benefits of polar bear sport hunting in and importation from Canada, but concluded that it could not consider them under the listing factors and that the benefits did not offset or reduce the overall threats to the species. 73 Fed. Reg. at 28242.

115. Two provisions guiding the listing process direct and allow the FWS to consider these issues. Before the FWS even considers the five listing factors, it must “tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area within its jurisdiction.” 16 U.S.C. § 1533(b)(1)(A). In addition, the fifth listing factor requires the FWS to consider “other natural or manmade factors affecting its continued existence.” *Id.* § 1533(a)(1)(E).

116. The sport hunting of polar bears in Canada and subsequent importation into the United States is both an effort by Canada and its political subdivisions to conserve and manage the polar bear and a manmade factor that positively affects the polar bear’s continued existence overall. The FWS’s failure to consider the sport hunting issue under the listing criteria was arbitrary and capricious and violated the ESA and the APA.

117. SCI and SCIF and members of SCI are harmed and aggrieved by this final action because members of SCI cannot import from Canada polar bears legally harvested before May 15, 2008; members who choose to hunt polar bears in Canada in the future will not be able to

import their trophies or will cancel or choose not to make future polar bear hunt plans; future sustainable use hunts by U.S. hunters, including SCI members, will not occur due to the inability to import the trophy; and the conservation benefits of that sport hunting will be lost. No other remedy at law exists.

118. These actions by the Secretary constitute a violation of the ESA and the APA. 5 U.S.C. § 706(2); 16 U.S.C. § 1533.

119. The remedies requested in this Complaint would remedy SCI and SCIF's and SCI's members' injuries, as outlined in this Complaint.

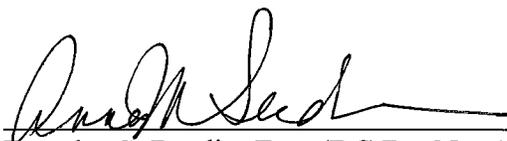
## **VII. PRAYER FOR RELIEF**

For the reasons stated above, SCI and SCIF respectfully request that the Court grant the following relief:

1. Declare that the Federal Defendants violated the ESA and the APA in promulgating the Final Rule for polar bears and therefore the Final Rule is invalid.
2. Declare that the Federal Defendants' listing of the polar bear as threatened under the ESA was arbitrary and capricious, contrary to law, an abuse of discretion and not in accordance with law and therefore the Final Rule is invalid.
3. Set aside the Final Rule and remand it back to the Federal Defendants, including, if appropriate, for consideration of not listing certain DPSs or certain portions of the polar bears range.
4. Enjoin the Federal Defendants from relying on or enforcing the threatened status determination for the polar bear.
5. Award SCI and SCIF the costs of litigation, including reasonable attorneys' fees.
6. Award SCI and SCIF such other relief that is just and proper.

Dated this 8th day of September, 2008

Respectfully submitted,



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