

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL
DIVERSITY and PACIFIC
ENVIRONMENT,

Plaintiffs,

vs.

KENNETH L. SALAZAR, Secretary
of the Interior, and U.S. FISH
AND WILDLIFE SERVICE,

Defendants.

Case No. 3:08-cv-0159-RRB

ORDER REGARDING
PENDING MOTIONS

I. MOTION PRESENTED

Plaintiffs have filed a Complaint for Declaratory and Injunctive Relief challenging the alleged failure of Defendants to comply with the Marine Mammal Protection Act ("MMPA"),¹ the Endangered Species Act ("ESA"),² and the National Environmental Policy Act ("NEPA")³ in promulgating regulations authorizing the

¹ 16 U.S.C. § 1361 *et seq.*

² 16 U.S.C. § 1531 *et seq.*

³ 42 U.S.C. § 4321 *et seq.*

"incidental take" of otherwise protected polar bears and pacific walrus from oil and gas exploration activities in the Chukchi Sea.⁴ Specifically, Plaintiffs challenge a final rule promulgated by the Secretary on June 11, 2008, that authorizes the harassment of polar bears and pacific walrus resulting from oil and gas industry pre-leasing, leasing, and exploration activities in the Chukchi Sea and adjacent coastal areas of Alaska for five years.⁵ Plaintiffs complain that the incidental take regulations promulgated under the MMPA, any letters of authorization ("LOAs") issued pursuant to these regulations, and the underlying environmental analyses carried out under the ESA and NEPA must be set aside.⁶ Plaintiffs seek review under the Administrative Procedure Act ("APA").⁷

Plaintiffs have filed a Motion for Summary Judgment.⁸ The Federal Defendants have opposed the Motion and filed a Cross-Motion for Summary Judgment. They argue that injunctive relief is not appropriate because Plaintiffs have not shown that the challenged

⁴ Docket 12.

⁵ See 50 C.F.R. § 18.111 et seq.

⁶ *Id.* at 4-5.

⁷ 5 U.S.C. §§ 701-706.

⁸ Docket 41.

actions are arbitrary, capricious, or not in accordance with law.⁹ "Prior to issuing any injunction, the Court should hold a hearing or accept further briefing to determine the appropriate scope of injunctive relief."¹⁰ Defendant-Intervenor Alaska Oil and Gas Association ("AOGA") has also filed a Cross-Motion for Summary Judgment seeking dismissal of all claims.¹¹

II. BACKGROUND

This Court previously has held that the Beaufort Sea incidental take rule and/or regulations complied with all aspects of the MMPA and NEPA.¹² This decision was recently affirmed by the United States Court of Appeals for the Ninth Circuit.¹³ The 2006 provision previously challenged by the Center for Biological Diversity allowed nonlethal incidental take of small numbers of polar bear and pacific walrus during oil and gas exploration, development, and production activities in the Beaufort Sea and

⁹ Dockets 49 and 50.

¹⁰ Docket 49 at 45.

¹¹ Dockets 51 and 52.

¹² *Center for Biological Diversity and Pacific Environment v. Hemphorne, et al.*, 3:07-cv-141 RRB, Docket 91 at 8.

¹³ *Center for Biological Diversity and Pacific Environment v. Hemphorne, et al.*, 588 F.3d 701 (9th Cir. 2009).

adjacent northern coast of Alaska.¹⁴ The June 11, 2008, provision challenged here allows nonlethal, incidental take of small numbers of pacific walruses and polar bears during oil and gas exploration activities in the Chukchi Sea and adjacent western coast of Alaska.¹⁵

III. STANDARD OF REVIEW

Judicial review of administrative actions is governed by the Administrative Procedure Act ("APA").¹⁶ Under the APA, the Court must determine whether the agency action was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law,"¹⁷ or "without observance of procedure required by law. . . ." ¹⁸ When considering whether the action was arbitrary and capricious or an abuse of discretion, "we must ensure that the agency has taken a 'hard look' at the environmental consequences of its proposed action."¹⁹ However, "[t]he standard is narrow and the reviewing court may not substitute its judgment for that of the

¹⁴ 50 C.F.R. § 18.121.

¹⁵ 50 C.F.R. § 18.111.

¹⁶ 5 U.S.C. §§ 701-706.

¹⁷ 5 U.S.C. § 706(2)(A).

¹⁸ 5 U.S.C. § 706(2)(D).

¹⁹ *Blue Mountains Biodiversity Project*, 161 F.3d at 1211.

agency."²⁰ For example, the Ninth Circuit has held that a decision of whether to create or supplement an EIS is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise."²¹

IV. DISCUSSION

Having concluded that the 2006 regulation was lawful, and given the similarities between the regulations, both of which were supported by an extensive administrative record, the Court finds the agency action was not "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."²² Where "a court reviews an agency action involv[ing] primarily issues of fact, and where analysis of the relevant documents requires a high level of technical expertise, [the court] must defer to the informed discretion of the responsible federal agencies."²³ The Court so defers in this case.

²⁰ *Env'tl. Def. Ctr. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003) (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)).

²¹ *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1177 (9th Cir. 1990) (citing *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 374 (1989)).

²² 5 U.S.C. § 706(2)(A).

²³ *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th cir. 2004).

V. CONCLUSION

In light of the foregoing, the Motion for Summary Judgment at **Docket 41** is **DENIED**, the Motions for Summary Judgment at **Dockets 50** and **52** are **GRANTED**, and this matter is **DISMISSED**.

IT IS SO ORDERED.

ENTERED this 8th day of January, 2010.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE