

1 RONALD J. TENPAS
 Assistant Attorney General
 2 United States Department of Justice
 Environment & Natural Resources Division
 3 JEAN E. WILLIAMS, Chief
 LISA LYNNE RUSSELL, Assistant Chief
 4 KRISTEN BYRNES FLOOM, Trial Attorney (DC Bar No. 469615)
 United States Department of Justice
 5 Environment & Natural Resources Division
 Wildlife and Marine Resources Section
 6 Benjamin Franklin Station, P.O. Box 7369
 Washington, DC 20044-7369
 7 Telephone: (202) 305-0340
 Facsimile: (202) 305-0275
 8 Kristen.Floom@usdoj.gov

9 Attorneys for Defendants

10
 11 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 **OAKLAND DIVISION**

13 CENTER FOR BIOLOGICAL DIVERSITY, <u>et al.</u> , 14 Plaintiffs, 15 vs. 16 DIRK KEMPTHORNE, United States Secretary of the Interior, and UNITED 17 STATES FISH AND WILDLIFE SERVICE, 18 Defendants.) Case No. C-08-1339 (CW)))) Date: May 8, 2008) Time: 2:00 p.m.) Judge: Hon. Claudia Wilken) Courtroom: Courtroom 2, 4 th Floor))
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 22 **DEFENDANTS' OPPOSITION TO PLAINTIFFS'**
 23 **MOTION FOR SUMMARY JUDGMENT**
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 27
 28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE

INTRODUCTION..... 1

STATUTORY AND REGULATORY BACKGROUND 1

FACTUAL BACKGROUND 4

STANDARD OF REVIEW 5

ARGUMENT 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

PAGE

Biodiversity Legal Found. v. Badgley, 309 F.3d 1166 (9th Cir. 2002) 7

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) 6

Center for Biological Diversity v. Norton, 208 F. Supp. 2d 1044, (N.D. Cal. 2002) 8

Center for Biological Diversity v. Norton, 212 F. Supp. 2d 1217, 1221 (S.D. Cal. 2002) 8

Center for Biological Diversity v. Norton, 304 F. Supp. 2d 1174, 1184 (D. Ariz. 2003) 8,9,10

Conservation Council for Hawai’i v. Babbitt, 24 F. Supp. 2d 1074, 1076 (D. Haw. 1998) 8

Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995) 8

Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir. 1992) 11

TVA v. Hill, 437 U.S. 153, 194 (1978) 7

United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 496 (2001) 7

STATUTES

5 U.S.C. § 553(d) 10, 11

16 U.S.C. § 1531 2

16 U.S.C. § 1531(b) 2

16 U.S.C. § 1532(15) 2

16 U.S.C. § 1532(19) 4

16 U.S.C. § 1533 4-6

16 U.S.C. § 1533(7) 11

16 U.S.C. § 1533(a)(1) 3

16 U.S.C. § 1533(b)(1)(A) 3

1
 2 16 U.S.C. § 1533(b)(3)(A) 3
 3 16 U.S.C. § 1533(b)(3)(B) 3
 4 16 U.S.C. § 1533(b)(6) 7
 5 16 U.S.C. § 1536(a)(2) 4
 6 16 U.S.C. § 1538(a)(1) 4
 7
 8 16 U.S.C. § 1540 4
 9 16 U.S.C. § 1540(g)(1) 7
 10 16 U.S.C. § 1540(g)(1)(C) 7
 11
 12

13 FEDERAL REGULATIONS

14 50 C.F.R. § 17.3. 4
 15 50 C.F.R. § 17.31(a)(c) 4
 16 50 C.F.R. § 402.01(b) 2, 3
 17
 18 50 C.F.R. § 402.14(a) 4
 19 50 C.F.R. § 424.11(b) 3
 20 50 C.F.R. § 424.14(b)(1) 3
 21 50 C.F.R. § 424.14(b)(3) 3, 4
 22 50 C.F.R. § 424.17(a) 4
 23
 24
 25
 26
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INTRODUCTION

Defendants, Dirk Kempthorne, Secretary of the United States Department of the Interior (“Department”), and the United States Fish and Wildlife Service (“Service”), hereby respond to Plaintiffs’ Motion for Summary Judgment, Docket No. 6 (“Pl. Mem.”). Defendants do not dispute that the Service has not yet issued a final listing determination for the polar bear under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* However, the Service has established a proposed date to release the final listing determination, which is reasonable and supported by the Declaration of the Assistant Secretary for Fish and Wildlife and Parks, Lyle Laverty, attached hereto as Exhibit 1. For the reasons set forth below and in the Declaration of Assistant Secretary Laverty, Defendants submit the Court should adopt Defendants’ schedule, and not order the unjustified relief sought by Plaintiffs.

STATUTORY AND REGULATORY BACKGROUND

The ESA was enacted in 1973 “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). An endangered species is “in danger of extinction throughout all or a significant portion of its range,” while a threatened species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(6), (20).

The Secretaries of the Department of the Interior and the Department of Commerce are responsible for implementing the ESA *see* 16 U.S.C. § 1532(15), in conjunction with their respective delegates the Service (for terrestrial and freshwater species) and the National Marine Fisheries Service (“NMFS”) (for marine species and anadromous fish). *See* 50 C.F.R. § 402.01(b); *see also id.* §§ 17.11, 224.101. Pursuant to Section 4(a)(1) of the ESA, the Secretary

1 determines whether to list a species based upon five statutory factors, any one of which is
2 sufficient to support a listing determination.¹ The Secretary must make the decision “solely on
3 the basis of the best scientific and commercial data available to [it] after conducting a review of
4 the status of the species and after taking into account those efforts, if any, being made by any
5 State or foreign nation, or any political subdivision of a State or foreign nation, to protect such
6 species” 16 U.S.C. § 1533(b)(1)(A); see also 50 C.F.R. § 424.11(b), (f).

8 Species may be listed in either of the following ways: (a) the Secretary initiates a review
9 of a species through the “candidate process” (see 16 U.S.C. § 1533(a)(1), (c)(2)); or (b) an
10 “interested person” petitions the Secretary to add a species to the list of endangered and
11 threatened species, as Plaintiffs did in this case. 16 U.S.C. § 1533(b)(3)(A). Under the petition
12 process the Secretary must, “to the maximum extent practicable,” make a finding within 90 days
13 after receiving a petition as to whether the petition presents substantial scientific or commercial
14 information indicating that the listing may be warranted (“90-day finding”). Id.; see also 50
15 C.F.R. § 424.14(b)(1).

18 If the finding is positive, the Secretary commences a review of the species’ status and,
19 within twelve months from receipt of the petition, must make a finding (“twelve-month finding”)
20 that either: (a) the petitioned action is not warranted; (b) the petitioned action is warranted; or (c)
21 the petitioned action is warranted but precluded by pending proposals. 16 U.S.C. §
22 1533(b)(3)(B); 50 C.F.R. § 424.14(b)(3). If the Secretary makes a “not warranted” twelve-
23 month finding, he must publish the finding in the Federal Register, and the “not warranted”
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27 ¹ The factors are: (A) the present or threatened destruction, modification, or curtailment of its
28 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).

1 finding is subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii). If, however, the Secretary
2 finds that listing is warranted, he must publish in the Federal Register a notice and proposed rule.
3 Id. § 1533(b)(3)(B)(ii). The Secretary must provide an opportunity for public comment and hold
4 a hearing upon request, id. § 1533(b)(5), and act on the proposed rule within one year of the date
5 of its publication by promulgating a final rule, withdrawing the proposed rule, or extending the
6 one-year period for not more than six months, id. § 1533(b)(6). See also 50 C.F.R. § 424.17(a).
7

8 Once a species is listed as endangered or threatened, it is afforded certain legal
9 protections. For example, the ESA prohibits any illegal or unauthorized “taking” of an
10 endangered or threatened species. 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.31(a)(c). “Take” is
11 defined to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.”
12 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3 (definition of “harm”). In addition, a Federal agency
13 must consult with the Service whenever any action authorized, funded, or carried out by the
14 agency “may affect” a threatened or endangered species, to ensure that the action “is not likely to
15 jeopardize the continued existence of any endangered species or threatened species or result in
16 the destruction or adverse modification” of designated critical habitat. 16 U.S.C. § 1536(a)(2);
17 50 C.F.R. § 402.14(a).
18

19 Section 11 of the ESA provides that “any person may commence a civil suit on his own
20 behalf,” 16 U.S.C. § 1540 (g)(1), “against the Secretary where there is alleged a failure of the
21 Secretary to perform any act or duty under [section 4] which is not discretionary with the
22 Secretary.” Id. § 1540(g)(1)(C), referring to 16 U.S.C. § 1533. Under this citizen suit provision,
23 the federal courts have jurisdiction to order the Secretary to perform any Section 4 duty which is
24 not discretionary. Id. § 1540(g)(1).
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FACTUAL BACKGROUND

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2 This case concerns the ESA listing status of the polar bear (*Ursus maritimus*). On
3 February 17, 2005, the Service received a petition from Plaintiff Center for Biological Diversity
4 requesting that the Service list the polar bear as threatened throughout its range and concurrently
5 designate critical habitat. See Declaration of Assistant Secretary for Fish and Wildlife and Parks
6 Lyle Laverty (“Laverty Decl.”), ¶ 2. By letter dated July 1, 2005, the Service acknowledged
7 receipt of the petition and advised the petitioner that it would not be able to consider the petition
8 at that time due to funding constraints and work related to existing court orders and settlement
9 agreements. See id.; see also 72 Fed. Reg. at 1065. By letter dated July 5, 2005, petitioner
10 advised the Service that two additional parties were joining as petitioners: Plaintiffs Natural
11 Resources Defense Council and Greenpeace. 72 Fed. Reg. at 1065. Petitioners also advised the
12 Service of two new scientific articles and requested that the Service consider those articles in
13 evaluating their petition. Id. Petitioners subsequently provided additional new information for
14 the Service’s consideration in a letter received by the Service on December 27, 2005. Id.

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18 On December 15, 2005, petitioners filed a lawsuit in this District challenging the
19 Service’s failure to issue a timely 90-day finding in response to their petition. Laverty Decl. at ¶
20 2. The Service issued its 90-day finding on February 7, 2006, concluding that the petition
21 presented substantial scientific information indicating that listing the polar bear may be
22 warranted. Id.; see also 71 Fed. Reg. 6745 (Feb. 9, 2006). In a stipulated settlement agreement
23 approved by the district court on July 5, 2006, the Service agreed to submit a 12-month finding
24 to the Federal Register by December 27, 2006. Laverty Decl. at ¶ 2. The finding, concluding
25 that listing the polar bear as a threatened species throughout its range is warranted, was
26 published in the Federal Register on January 9, 2007. 72 Fed. Reg. 1064 (Jan. 9, 2007). The
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1 listing proposal was based on current and projected future effects of threats to polar bear habitat
2 – specifically, receding sea ice – and the absence of regulatory mechanisms to address the
3 expected modifications to polar bear habitat. Lavery Decl. at ¶ 3.
4

5 When the Secretary announced the proposed rule, he also directed the U.S. Geological
6 Survey (“USGS”) to gather additional information to assist the Service in recommending a final
7 listing determination, and directed the Service to gather additional information on factors
8 affecting the species. Id. at ¶ 4. The USGS provided the results of its research to the Service in
9 September 2007, and the Service reopened the comment period on the proposed rule to allow the
10 public to respond to the USGS findings. Id. at ¶¶ 5-6. The Service received a total of 670,000
11 public comments on the proposed rule and the USGS report. Id. at ¶ 6. After analyzing and
12 responding to the public comments, incorporating the results of the USGS report, and working
13 with the Department’s Office of the Solicitor to address outstanding legal issues, the Service
14 completed a draft of the listing determination on February 22, 2008. See id. at ¶¶ 8-10. The
15 draft listing determination is currently undergoing review by the Department’s Assistant
16 Secretary for Fish and Wildlife and Parks, who anticipates that a final listing decision will be
17 completed by June 30, 2008. Id. at ¶¶ 11-12.
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21 STANDARD OF REVIEW

22 Summary judgment is appropriate if there is no genuine issue regarding any material fact
23 and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
24 moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a
25 sufficient showing on an essential element of its case. Celotex Corp. v. Catrett, 477 U.S. 317,
26 322-23 (1986). Here there is no dispute that the Service has not yet issued a final listing
27 determination for the polar bear; thus, this case is a proper subject for summary judgment.
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1 **ARGUMENT**

2 Defendants do not dispute that, pursuant to 16 U.S.C. § 1533(b)(6), the Service was
3 required to issue the final listing determination for the polar bear within one year of publication
4 of the proposed rule, and that the Service did not issue the determination. Thus, under the law of
5 this Circuit, it is appropriate for the Court to order the Service to issue the final listing
6 determination. Biodiversity Legal Found. v. Badgley, 309 F.3d 1166 (9th Cir. 2002), established
7 that a district court does not have the discretion to withhold an injunction for a violation of a
8 nondiscretionary deadline under the ESA. Id. at 1177 (citing TVA v. Hill, 437 U.S. 153, 194
9 (1978)). However, Defendants do dispute that Plaintiffs' proposed remedy is appropriate in this
10 case.
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13 A district court has discretion in fashioning injunctive relief, unless a statute clearly
14 provides otherwise. See United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 496
15 (2001). Such a clear and valid legislative command is not present in the citizen-suit provision of
16 the ESA, which is the jurisdictional basis for Plaintiffs' claim. See 16 U.S.C. § 1540(g)(1)(C).
17 ESA Section 11(g)(1)(C) authorizes actions "against the Secretary where there is alleged a
18 failure of the Secretary to perform any act or duty" under Section 4 which is not discretionary.
19 Id. The citizen-suit provision further provides that the district courts shall have jurisdiction "to
20 order the Secretary to perform such act or duty." 16 U.S.C. § 1540(g)(1). It does not contain
21 any text that can be plainly read as constraining the district court's discretion to fashion an
22 appropriate remedy. As stated by the Supreme Court, a grant of jurisdiction to provide for a
23 certain type of relief does not meet the requisite "clear and valid legislative command" needed to
24 preclude a court from exercising its discretion in fashioning an appropriate remedy. Oakland
25 Cannabis, 532 U.S. at 496.
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1 The Ninth Circuit's decision in Env'tl. Def. Ctr. v. Babbitt, 73 F.3d 867 (9th Cir. 1995), is
2 instructive here. In that case, as here, the plaintiffs sued to compel the Secretary to issue a final
3 listing determination under ESA Section 4. The Ninth Circuit held that the Secretary violated
4 his mandatory duty to make a final determination regarding the listing status of the red legged
5 frog, but recognized that any remedial schedule imposed by the district court should be governed
6 by a standard of reasonableness. Id. at 872 (remanding to district court with instructions to
7 modify its order to provide that compliance with statutory deadline would be "delayed until a
8 reasonable time after appropriated funds are made available"). District courts in the Ninth
9 Circuit have acted in accordance with this standard. See, e.g., Conservation Council for Hawai'i
10 v. Babbitt, 24 F. Supp. 2d 1074, 1076 (D. Haw. 1998) ("In setting a timetable for agency action,
11 the Ninth Circuit has instructed courts to follow a standard of reasonableness."); Center for
12 Biological Diversity v. Norton, 212 F. Supp. 2d 1217, 1221 (S.D. Cal. 2002) (in setting "a
13 reasonable timeline" for critical habitat determinations, court "exercise[d] its discretion to
14 consider the Service's budgetary shortfalls, workload constraints and other relevant factors");
15 Center for Biological Diversity v. Norton, 208 F. Supp. 2d 1044, 1050-1051 (N.D. Cal. 2002)
16 (noting that "the ESA does not divest the Court of its equitable discretion to fashion a reasonable
17 remedy," and adopting Service's proposed deadline for making final listing determination);
18 Center for Biological Diversity v. Norton, 304 F. Supp. 2d 1174, 1184 (D. Ariz. 2003) (although
19 district court found that Service had been in violation of mandatory duty to designate critical
20 habitat for ten years, court noted that "[i]n setting a timetable for agency action, the Ninth
21 Circuit has instructed courts to follow a standard of reasonableness"); Western Watersheds
22 Project v. Foss, Civ. No. 04-168, 2006 U.S. Dist LEXIS 73577, at *15 (Oct. 4, 2006) (noting that
23 "the Court may set a reasonable timetable for agency action" and ordering Service to issue final
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1 listing determination within 90 days) (attached hereto as Exhibit 2). Likewise, in this case the
2 Court should exercise its discretion to fashion a reasonable compliance schedule for the Service
3 to complete the final listing determination for the polar bear.
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5 Plaintiffs ask the Court to order Defendants to issue, and publish in the Federal Register,
6 a final listing determination within seven days of the hearing on their motion. Pl. Mem. at 16.²
7 In support of this request, they cite Marbled Murrelet v. Lujan, 1992 U.S. Dist. LEXIS 14645
8 (W.D. Wash. Sept. 15, 1992) (attached hereto as Exhibit 3). In that case the district court,
9 having found that the Service had improperly invoked the statutory provision permitting a six-
10 month extension, 16 U.S.C. § 1533(b)(6)(B)(I), ordered the Service to issue a final listing rule
11 within three days of the court's order. See id. at * 3. In its brief opinion, the court did not
12 expressly take into account any equitable considerations, such as the Service's workload, but did
13 note that a final rule had already been drafted by the regional office. Id. Marbled Murrelet is
14 inconsistent with the subsequent decision in Environmental Defense Center and the rule in this
15 Circuit that a remedial schedule imposed in a deadline case should be governed by a standard of
16 reasonableness, and the Court should decline to follow that case here.
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19 A reasonable compliance schedule in this case should take into account the complexity
20 of the proposed rule and the remaining steps necessary to ensure a thorough and scientifically
21 supportable final determination. The tremendous number of comments on the proposed rule –
22 approximately 670,000 – reflect the level of public interest in the listing status of the polar bear.
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26 ² Plaintiffs seek an order requiring not only that the Secretary make the final determination
27 within seven days of the hearing, but also that the determination be published in the Federal
28 Register by that date. Because Defendants cannot control the date of publication in the Federal
Register, any order should specify the date by which Defendants must submit the final
determination to the Federal Register, rather than the date of publication.

1 The positions reflected in the comments were widely varying, and addressing those views has
2 required considerable effort by the Department. See Laverty Decl. at ¶ 13. The Assistant
3 Secretary must ensure that the final determination has adequately addressed the public
4 comments, is supported by the best available scientific and commercial data, and is legally
5 sufficient. See id. The Assistant Secretary anticipates that his review, including a final legal
6 review by the Department's Office of the Solicitor, and the review and clearance by the
7 Department's Chief of Staff will require an additional ten weeks. See id. at ¶¶ 12-13. This time
8 is necessary to permit the Assistant Secretary, in coordination with the Office of the Solicitor
9 and the Service, to address the complex factual and legal issues raised by the listing
10 determination. See id. at ¶¶ 11-12 (issues to be resolved include "the meaning and application to
11 the polar bear of the term 'foreseeable future' within the definition of a threatened species,
12 whether the species is endangered through all or a significant portion of its range, what are the
13 significant portions of the range of the polar bear, the reliability of the data being used for the
14 listing determination, and the degree of uncertainty attached to the modeling tools available to
15 predict the future location and extent of Arctic sea ice"). Thus, the Service proposes to complete
16 a final determination by June 30, 2008. See id. at ¶ 12. This schedule is reasonable, and should
17 be adopted by the Court.

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22 Plaintiffs further ask the Court to order Defendants to make the final rule effective
23 immediately upon publication in the Federal Register, contrary to 5 U.S.C. § 553(d). This
24 provision of the APA requires that publication or service of a substantive rule shall be made not
25 less than 30 days before its effective date, unless: (a) the rule is for an exemption or relieves a
26 restriction; (b) the rule is an interpretive rule or statement of policy; or (c) as otherwise provided
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1 by the agency for good cause. 5 U.S.C. § 553(d). The purpose of this 30-day delay in
2 effectiveness is to accommodate those subject to the new regulation:

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4 Unlike the notice and comment requirements, which are designed to ensure public
5 participation in rulemaking, the 30-day waiting period is intended to give affected
6 parties time to adjust their behavior before the final rule takes effect. This is
7 sensible; until the final rule is published, the public is not sure of what the rule
8 will be or when the rule will actually be promulgated. In addition, a window of
9 time usually causes no harm.

10 Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir. 1992).

11 Here a waiting period as provided by 5 U.S.C. § 553(d) is appropriate to permit any
12 affected entities to become familiar with the substance of the final rule and adjust their behavior
13 accordingly. Moreover, a waiting period will have a negligible effect on the status of the polar
14 bear. The Service has determined that the species is adequately protected in the short-term by
15 the Marine Mammal Protection Act (“MMPA”). See Lavery Decl. at ¶ 13 (impact on polar
16 bears between now and June 30, 2008 will be negligible due to MMPA restrictions). Pursuant to
17 the MMPA, any take of polar bears is prohibited unless it is exempt (e.g., take incidental to
18 commercial fishing operations), or specifically authorized under the statute. See id. The Service
19 may not authorize incidental take of polar bears by activities other than commercial fishing
20 unless it finds that the take “will have no more than a negligible impact on the species. . . .” Id.
21 Further, at no time have Plaintiffs petitioned for emergency listing of the polar bear, as is
22 authorized by the ESA. See 16 U.S.C. § 1533(7). There is no evidence that a waiting period
23 will harm the polar bear, and the Court should decline to adopt Plaintiffs’ request to waive the
24 waiting period in this case.
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1 **CONCLUSION**

2 For the foregoing reasons, the Court should grant summary judgment in favor of
3 Plaintiffs, but should deny Plaintiffs' requested remedy and adopt the Service's proposed
4 deadline of June 30, 2008 for submission of the final listing determination for the polar bear to
5 the Federal Register.
6

7 Respectfully submitted this 17th day of April, 2008.

8 RONALD J. TENPAS
9 Assistant Attorney General
10 United States Department of Justice
11 Environment & Natural Resources Division
12 JEAN E. WILLIAMS, Chief
LISA LYNNE RUSSELL, Assistant Chief

13 /s/ Kristen Byrnes Floom
14 KRISTEN BYRNES FLOOM, Trial Attorney
15 DC Bar No. 469615
16 United States Department of Justice
17 Environment & Natural Resources Division
18 Wildlife and Marine Resources Section
19 Benjamin Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
Telephone: (202) 305-0340
Facsimile: (202) 305-0275
Kristen.Floom@usdoj.gov

20 Attorneys for Defendants
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment was submitted to the Court electronically on this 17th day of April, 2008 for filing and service on the following parties:

Kassia Siegel
ksiegel@biologicaldiversity.org

Brendan Cummings
bcummings@biologicaldiversity.org

Miyoko Sakashita
miyoko@biologicaldiversity.org

Attorneys for Plaintiffs

I further certify that, on this 17th day of April, 2008, a copy of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment was sent via first-class mail, postage prepaid, to:

Andrew E. Wetzler
Natural Resources Defense Council
544 White Oak Place
Worthington, OH 43085

Attorney for Plaintiffs

/s/ Kristen Byrnes Floom
Kristen Byrnes Floom