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15
16 **UNITED STATES DISTRICT COURT FOR THE**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **OAKLAND DIVISION**

19 CENTER FOR BIOLOGICAL DIVERSITY, a
20 non-profit corporation, NATURAL RESOURCES
21 DEFENSE COUNCIL, a non-profit corporation,
and GREENPEACE, INC., a non-profit
22 corporation;

23 Plaintiffs,

24 v.

25 DIRK KEMPTHORNE, United States Secretary
26 of the Interior and UNITED STATES FISH AND
27 WILDLIFE SERVICE;

28 Defendants.

CASE NO.: C-08-1339-CW

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT

Date: May 8, 2008

Time: 2:00 p.m.

Judge: Honorable Claudia Wilken

Courtroom: Courtroom 2, 4th Floor

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that at 2:00 p.m. on May 8, 2008, or as soon thereafter as the matter
3 may be heard in the Honorable Judge Claudia Wilken’s courtroom of the United States District Court
4 for the Northern District of California, 1301 Clay Street, Oakland, California, Plaintiffs, Center for
5 Biological Diversity, Natural Resources Defense Council and Greenpeace, Inc., will move this Court
6 pursuant to Federal Rule of Civil Procedure 56 and Civil Local Rules 7-2, 7-4, and 56 for summary
7 judgment on their Claim for Relief in their Complaint. This motion is based on the accompanying
8 Memorandum of Points and Authorities, the Declarations of Melanie Duchin, Jack Lentfer, Jenny Ross,
9 the pleadings, records and files in this action, and other such documentary and oral evidence that may
10 be supplied at the hearing.

11 For the reasons set forth in the accompanying Memorandum of Points and Authorities, the
12 continuing failure of Defendants, Dirk Kempthorne, Secretary of the Interior, and the United States Fish
13 and Wildlife Service, to issue a final listing determination for the polar bear under the Endangered
14 Species Act (“ESA”) within one year of having proposed to list the species as “threatened” violates the
15 requirements of Section 4 of the ESA, 16 U.S.C. § 1533. Plaintiffs seek declaratory and injunctive
16 relief to remedy this violation, including an order requiring Defendants to make a final listing
17 determination for the polar bear by a date certain.

MEMORANDUM OF POINTS AND AUTHORITIES

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1 **I. INTRODUCTION**

2 This case concerns the fate of the polar bear (*Ursus maritmus*), undoubtedly one of the most
3 remarkable animal species on the planet. The polar bear is also, absent dramatic reductions in
4 greenhouse gas emissions, poised to become one of the first species to fall victim to global warming.
5 The polar bear’s Arctic sea-ice habitat is quite literally melting away. Under relatively optimistic
6 scenarios, summer sea ice will be largely gone by mid-century; under increasingly likely scenarios, the
7 seasonal sea ice upon which the bear depends will be gone in less than a decade. Without sea ice, there
8 will be no polar bears. The polar bear is clearly imperiled. As such, the species has been proposed for
9 listing as “threatened” under the federal Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544.
10 The finalization of that proposal is now overdue.

11 While the legal and political consequences of protecting the polar bear under the ESA are
12 highly significant, and the ultimate fate of the polar bear is intertwined with complicated and
13 controversial national and international climate policies, *this case* is legally quite simple. Defendants,
14 Dirk Kempthorne, Secretary of the Interior, and the United States Fish and Wildlife Service
15 (collectively, “the Secretary”), have failed to comply with the unambiguous, non-discretionary
16 deadlines contained in the ESA. They are in admitted violation of the law, with no legally relevant
17 excuses.

18 On January 9, 2007, in response to a petition submitted by Plaintiffs, Center for Biological
19 Diversity, Natural Resources Defense Council and Greenpeace, Inc., the Secretary published in the
20 Federal Register a proposed rule listing the polar bear as a “threatened” species under the ESA. 72 Fed.
21 Reg. 1064-1099 (Proposal to List the Polar Bear as a Threatened Species) (January 9, 2007). Under the
22 ESA, a proposed listing rule must be finalized or withdrawn within one year. 16 U.S.C. § 1533(b)(6).
23 Publication of the final listing determination was therefore required by January 9, 2008. That date has
24 come and gone with no such action from the Secretary.

25 There is no factual dispute as to the Secretary’s violations of law. By the date of the noticed
26 hearing on Plaintiffs’ Motion for Summary Judgment, a final listing determination will be four months
27 overdue. Because time is of the essence in all efforts to protect endangered species, Plaintiffs move for
28 summary judgment at this early juncture. Accordingly, through this motion, Plaintiffs respectfully

1 request that this Court find and declare that the Secretary is in violation of the ESA for failing to make
2 a final listing determination for the polar bear by January 9, 2008. Plaintiffs further request that this
3 Court order the Secretary to make and publish a final listing determination for the polar bear within 7
4 days of the Court’s order. Only such an order will ensure that the polar bear timely receives the
5 protections to which it is legally entitled and so desperately needs.

6 **II. LEGAL BACKGROUND**

7 The ESA is a federal statute enacted to conserve endangered and threatened species and the
8 ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA “is the most comprehensive
9 legislation for the preservation of endangered species ever enacted by any nation.” Tennessee Valley
10 Authority v. Hill, 437 U.S. 153, 180 (1978). The Supreme Court’s review of the ESA’s “language,
11 history, and structure” convinced the Court “beyond a doubt” that “Congress intended endangered
12 species to be afforded the highest of priorities.” Id. at 174. As the Court found, “the plain intent of
13 Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever
14 the cost.” Id. at 184.

15 The ESA protects species listed as either “endangered” or “threatened” by the Secretary. A
16 species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its
17 range.” 16 U.S.C. § 1532(6). A species is “threatened” if it is “likely to become an endangered species
18 within the foreseeable future.” 16 U.S.C. § 1532(20)

19 Once a species is listed, an array of statutory protections applies. For example, Section 7
20 requires all federal agencies to “insure” that their actions neither “jeopardize the continued existence”
21 of any listed species nor “result in the destruction or adverse modification” of its “critical habitat.” 16
22 U.S.C. § 1536(a)(2). Section 9 and its regulations further prohibit, among other things, “any person”
23 from intentionally “taking” listed species or “incidentally” taking listed species without a permit from
24 the Secretary. 16 U.S.C. §§ 1538-1539. Other provisions require the Secretary to designate “critical
25 habitat” for listed species, 16 U.S.C. § 1533(a)(3), require the Secretary to “develop and implement”
26 recovery plans for listed species, 16 U.S.C. § 1533(f), authorize the Secretary to acquire land for the
27 protection of listed species, 16 U.S.C. § 1534, and make federal funds available to states to assist in
28 their efforts to preserve and protect “threatened” and “endangered” species, 16 U.S.C. § 1535(d).

1 However, none of these protections come into force until a species is officially listed as
2 “threatened” or “endangered” under the ESA. See, e.g., Federation of Fly Fishers v. Daley, 131 F.
3 Supp. 2d 1158, 1163 (N.D. Cal. 2000) (“[L]isting is critically important because it sets in motion the
4 [ESA]’s other provisions, including the protective regulation, consultation requirements, and recovery
5 efforts.”). As a result, Congress aptly described Section 4 of the ESA, which sets out the process for
6 listing a species, as “[t]he cornerstone of effective implementation of the Endangered Species Act”
7 S. Rep. No. 418, 97th Cong., 2d Sess. at 10; see also H.R. Rep. No. 567, 97th Cong., 2d Sess. at 10
8 (“The listing process under Section 4 is the keystone of the Endangered Species Act”).

9 In order to ensure the timely protection of species, Congress set forth the listing process
10 described below. The process includes mandatory, non-discretionary deadlines for the three required
11 findings that the Secretary must make, deadlines to ensure that species in need of protection do not
12 languish in administrative purgatory, at risk of declining further or becoming extinct while awaiting
13 protection.

14 Any interested person can begin the listing process by filing a petition to list a species with the
15 Secretary. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a). Upon receipt of a petition to list a
16 species, the Secretary has 90 days “to the maximum extent practicable,” to make a finding as to
17 whether the petition “presents substantial scientific or commercial information indicating that the
18 petitioned action may be warranted.” 16 U.S.C § 1533 (b)(3)(A); 50 C.F.R. § 424.14 (b)(1).

19 If in the 90-day finding the Secretary finds that the petition presents substantial information
20 indicating that the listing may be warranted, the Secretary must publish a notice to that effect in the
21 Federal Register and initiate a full review of the status of the species. 16 U.S.C. §§ 1533(b)(1)(A) &
22 1533(b)(3)(A); 50 C.F.R. 424.14. In carrying out the status review the Secretary solicits information
23 from state and federal agencies, the general public, and, when appropriate, foreign nations. See 16
24 U.S.C. §§ 1533(b)(1)(A) & (B).

25 Once the status review is completed—but no later than one year from the date he received the
26 petition—the Secretary must make one of three findings: (1) that the petitioned action is not warranted;
27 (2) that the petitioned action is warranted; or (3) that the petitioned action is warranted but presently
28 precluded by other pending proposals for listing species, provided certain circumstances are present.

1 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This determination is known as a “12-month
2 finding.” There is no mechanism by which the Secretary can extend the deadline for making a 12-
3 month finding. See Biodiversity Legal Foundation v Badgley, 309 F.3d 1166, 1176 (9th Cir. 2002)
4 (holding that both 90-day finding and 12-month finding must be made within one year of receipt of
5 listing petition.)

6 If, in the course of the developing the 12-month finding, the Secretary determines that listing
7 the species is warranted, then he must publish in the Federal Register a proposed rule, for public
8 comment, to list the species as either “endangered” or “threatened.” 16 U.S.C. § 1533(b)(5). Within
9 one year of the publication of the proposed rule, the ESA requires the Secretary to render a final
10 decision on the listing petition. 16 U.S.C. § 1533(b)(6)(A). At such time, the Secretary must either list
11 the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a
12 final determination by no more than six months to solicit more scientific information. 16 U.S.C. §§
13 1533(b)(6)(A)(i)(III) & 1533(b)(6)(B)(i). Once the proposed listing determination is finalized, the
14 species is added to the appropriate list of “threatened” and “endangered” species, 50 C.F.R. §§ 17.11
15 (wildlife) & 17.12 (plants), and the protections of the ESA come into effect for that species.

16 If all the deadlines for petition processing and subsequent listing actions are met, the species
17 should in most cases be officially listed under the ESA no later than two years from the date of the
18 petition. Unfortunately, as is the case with the polar bear, the Secretary regularly ignores his statutory
19 obligations and only moves to protect species under court order.

20 Section 11(g)(1)(C) of the ESA, 16 U.S.C. § 1540(g)(1)(C), provides that “any person may
21 commence a civil suit on his own behalf...against the Secretary where there is an alleged failure of the
22 Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the
23 Secretary.”

24 **III. STATEMENT OF FACTS**

25 **A. Polar Bears in a Warming Arctic**

26 There are nineteen polar bear populations distributed throughout the Arctic. These populations
27 can be found within the jurisdiction of 5 countries: the United States (in Alaska), Canada, Denmark (in
28 Greenland), Norway, and Russia. 72 Fed. Reg. 1068-1069. Worldwide polar bear abundance was most

1 recently estimated at 20,000-25,000 bears. 72 Fed. Reg. 1068.

2 Polar bears are the largest of all bear species and adapted to life on the sea ice. 72 Fed. Reg.
3 1066. Adaptations to this life include: (1) white pelage with waterrepellent guard hairs and dense
4 underfur; (2) a short furred snout; (3) small ears for reduced surface area; (4) teeth specialized for a
5 carnivorous rather than an omnivorous diet; (5) feet with tiny papillae and “suction cups” on the
6 underside, for increased traction on ice; (6) large, paddle-like feet; (7) claws that are shorter and more
7 strongly curved than those of grizzly bears, and larger and heavier than those of black bears. Id.

8 As stated in the proposed rule,

9 [p]olar bears evolved to utilize the Arctic sea ice niche and are distributed throughout
10 most ice-covered seas of the Northern Hemisphere. They are generally limited to areas
11 where the sea is ice-covered for much of the year; however, polar bears are not evenly
12 distributed throughout their range. They are most abundant near the shore in shallow-
water areas, and in other areas where currents and ocean upwelling increase marine
productivity and serve to keep the ice cover from becoming too solidified in winter.

13 Id. (internal citations omitted.)

14 Polar bears are completely dependent upon Arctic sea ice for survival. Id. at 1067, 1071. Polar
15 bears need sea ice as a platform from which to hunt their primary prey of ice-dependent seals, to make
16 seasonal migrations between the sea ice where they feed and their terrestrial denning areas, and to find
17 mates. Id. Some polar bears even give birth to their cubs in snow dens on top of the drifting sea ice.
18 Id. Because polar bears can only hunt effectively when on the ice, when forced onto land either by the
19 seasonal retreat of the sea ice in some areas or to give birth to their cubs, polar bears generally undergo
20 a time of near complete fasting. Id.

21 The earth’s climate is warming due to society’s production of greenhouse pollution, primarily
22 from the combustion of fossil fuels for energy. The primary greenhouse pollutants include carbon
23 dioxide, methane, nitrous oxide, and black carbon. Increasing concentrations of greenhouse gases
24 cause the earth’s atmosphere to retain a greater proportion of the sun’s energy, warming the earth’s
25 climate much like the interior of a greenhouse. The average air temperature at the surface of the earth
26 has increased by 1.3° Fahrenheit (0.74° C) over the past century, and the rate of warming over the past
27 50 years is nearly twice that of the past century. Despite this accelerating warming trend, the melting
28 of the world’s glaciers, sea ice, and land-based ice sheets, many other ominous signs, and dire warnings

1 from climate scientists, anthropogenic greenhouse gas emissions are still increasing each year.

2 For a number of reasons, the Arctic has experienced greater and more rapid warming than the
3 temperate regions. 72 Fed. Reg. at 1071. Average winter temperatures in some areas of Alaska have
4 risen by over 9° Fahrenheit since 1949. Even using moderate projections of future greenhouse gas
5 emissions levels, average winter temperatures are projected to rise by 18° Fahrenheit over the Arctic
6 Ocean by the end of this century.

7 As a result of the warming, Arctic sea ice is melting very rapidly. 72 Fed. Reg. 1071-1072.
8 Moreover, the Arctic is warming and the ice is melting even faster than forecast just a few years ago.
9 72 Fed. Reg. 1071. Leading sea ice researchers believe that the Arctic will soon be entirely ice-free in
10 the summertime, a state that has not occurred for at least 800,000 years. Id. The rapidly melting Arctic
11 sea ice is driven in part by a positive climate feedback loop that occurs because snow and ice reflect
12 most of the sun's energy back into space, whereas open water absorbs most of the sun's energy. Id.
13 Thus, as the Arctic sea ice retreats further each summer, the warming accelerates. Id. When the
14 proposed rule was issued, some leading scientists estimated that the Arctic could be ice-free in the
15 summer as early as 2040. Id.¹

16 “Observed and predicted changes in sea ice cover, characteristics, and timing have profound
17 effects on polar bears.” 72 Fed. Reg. 1072. Simply stated, polar bears cannot survive the loss of their
18 sea-ice habitat. Scientists have long predicted adverse impacts to polar bears from warming
19 temperatures and changes in the sea ice and snow cover. Id. Canadian researchers were the first to
20 document changes in polar bear parameters such as declining body condition, lowered reproductive
21 rates, and reduced cub survival in the Western Hudson Bay population throughout the late 1980's and
22 early 1990's. Id. These scientists attributed these changes to climate warming and predicted that they
23 would ultimately lead to population declines. This has now been documented, with a 22% decline in
24 the Western Hudson Bay population between 1987 and 2004. Id. at 1070, 1076. The Southern
25 Beaufort Sea population is now also declining. Id. at 1076. Even short of complete disappearance of
26

27 ¹ In 2007 the Arctic sea ice hit a new record minimum, fully one million square miles below the average
28 minimum sea ice extent between 1979-2000. There was less ice in the Arctic in September, 2007 than
more than half of the world's leading climate models project for 2050. Some scientists now say
summer sea ice could disappear entirely as early as 2012.

1 sea ice, scientists have both predicted and observed a cascade of impacts to polar bears from global
2 warming that will affect virtually every aspect of the species' existence, in most cases leading to
3 reduced body condition and consequently reduced reproduction or survival. In the proposed rule to list
4 the species as threatened, the Fish and Wildlife Service summed up the impacts as follows:

5 Polar bears have evolved in a sea ice environment and sea ice serves as an essential
6 platform from which they meet life functions. Polar bear populations throughout the
7 Arctic are being affected by changes in their sea ice habitat. Increased temperatures,
8 earlier onset of and longer melting periods, increased rain-on-snow events, and positive
9 feedback systems which amplify these phenomena will all operate to decrease the extent
10 of sea ice during all seasons. This will result in fragmentation of habitat, increase the
11 extent of open water areas in all seasons, reduce the amount of heavier and more stable
12 multi-year ice, and affect the quality of shore fast ice. In turn, these factors will
13 negatively impact polar bears by increasing the energetic demands of movement in
14 seeking prey, redistributing substantial portions of populations seasonally into terrestrial
15 habitats with marginal values for feeding, and increasing levels of negative bear-human
16 interactions. As the sea ice edge retracts to deeper, less productive polar basin waters,
17 polar bears will face increased intraspecific competition for limited food resources and
18 increased open water swimming. We expect similar reductions in productivity for most
19 ice seal species (decreasing availability or timing of availability for polar bears as food),
20 composition changes of seal species in some areas, and eventually decreased levels of
21 seal abundance. Prey species, such as ringed seals, will likely remain distributed in
22 shallower, more productive southerly areas characterized by vast expanses of open water.
23 These factors will, in turn, result in the reduced physical condition of polar bears, which
24 leads to population-level demographic declines through reduction of survival and
25 recruitment rates. The ultimate effect of these interrelated events, factors, and effects
26 (Table 1) will be that polar bear populations will decline or continue to decline. Not all
27 populations will be affected evenly in the level, rate, and timing of impact, but within the
28 foreseeable future, it is predicted that all populations will be either directly or indirectly
impacted.

20 Id. at 1080.

21 The ways in which these changes manifest themselves in the polar bear population is often quite
22 brutal. Polar bears are drowning, starving, and even resorting to cannibalism as global warming
23 transforms the Arctic. Id. at 1076.

24 Not surprisingly, given the serious impacts polar bears are already suffering, the future is bleak
25 for this species. In September 2007, the U.S. Geological Service ("USGS"), a branch of the
26 Department of Interior, released a series of reports conducted as part of the ESA listing process which
27 addressed the future status of polar bears. 72 Fed. Reg. 53749-53751 (Reopening of comment period;
28 notice of availability of new information) (September 20, 2007).

1 In a series of substantial and well-documented reports, the USGS advanced the scientific
2 understanding of the impact of climate change on polar bears and the species future status in a warming
3 Arctic. The USGS stated its overall conclusion in an Executive Summary² to the reports as follows:

4 Projected changes in future sea ice conditions, if realized, will result in loss of
5 approximately 2/3 of the world's current polar bear population by the mid 21st century.
6 Because the observed trajectory of Arctic sea ice decline appears to be underestimated by
7 currently available models, this assessment of future polar bear status may be
8 conservative.

9 While the situation in the Arctic and for polar bears has reached a critical threshold, it is not too
10 late to save them, if we act quickly. This lends even greater urgency to the Endangered Species Act
11 listing process. Unfortunately, the Secretary has missed each deadline in the process, including the
12 January 9, 2008 deadline for a final listing determination. As a result, Plaintiffs have been forced to file
13 this action, as detailed below.

14 **B. Plaintiffs' Petition and the Secretary's Failure to Timely Respond**

15 On February 16, 2005, Plaintiff Center for Biological Diversity submitted to the Secretary a
16 Petition to List the Polar Bear (*Ursus maritimus*) under the Endangered Species Act ("Petition") due to
17 global warming and other threats. The Secretary received the Petition on February 17, 2005. The 154-
18 page Petition detailed the ways in which global warming and other factors threaten the polar bear with
19 extinction.

20 As described above, Section 4(b)(3) of the ESA and its implementing regulations required the
21 Secretary to respond to the Petition by making an initial determination within ninety days of receiving
22 the petition "to the maximum extent practicable." 16 U.S.C § 1533 (b)(3)(A). The Secretary did not
23 respond to the Petition within 90 days as required by law. When the Secretary had still not responded
24 after ten months, Plaintiffs filed an action on December 15, 2005 to compel a response. Center for
25 Biological Diversity v. Kempthorne, No. 05-5191 JSW (N. Dist. Cal.). Subsequently, the Secretary
26 issued a 90-day finding on the Petition to list the polar bear on February 9, 2006. 71 Fed. Reg. 6745
(Notice of 90-day Finding and Initiation of Status Review) (February 9, 2006). In the 90-day finding,

27 ² *USGS Science to Inform U.S. Fish & Wildlife Service Decision Making on Polar Bears - Executive*
28 *Summary*, at 2, available at http://www.usgs.gov/newsroom/special/polar_bears/ (last visited April 1,
2008).

1 the Secretary found that the Petition presented substantial information showing that listing of the polar
2 bear may be warranted under the Endangered Species Act, initiated a status review for the species, and
3 solicited public comment for a period of 60 days. Id.

4 Because the Secretary illegally delayed the 90-day finding until nearly one year had passed
5 from receipt of the Petition, compliance with the one-year deadline for issuance of the 12-month
6 finding was now impossible. The parties ultimately settled the then-pending litigation, setting a
7 deadline for the Secretary to issue the overdue 12-month finding by December 27, 2006.

8 On December 27, 2006, the Secretary announced a proposed rule to list the polar bear
9 throughout its range as a “threatened” species. The proposed rule was published in the Federal Register
10 on January 9, 2007. 72 Fed. Reg. 1064-1099 (Proposal to List the Polar Bear as a Threatened Species)
11 (January 9, 2007). Publication of the final listing determination and critical habitat designation was
12 therefore required by January 9, 2008. 16 U.S.C. § 1533(b)(6). On January 7, 2008, the Director of the
13 U.S. Fish and Wildlife Service, Dale Hall held a press conference and stated that the agency would not
14 meet the deadline, but intended to issue the decision within 30 days. The Secretary did not issue the
15 final listing determination within 30 days of January 7, 2008 and has still not done so. Accordingly, the
16 Secretary is now in violation of the law.

17 On January 9, 2009, pursuant to the requirements of Section 11(g)(2)(C) of the ESA, 16 U.S.C.
18 § 1540(g)(2)(C), Plaintiffs sent the Secretary a 60-Day Notice Letter of Intent to Sue for his failure to
19 publish a final listing determination for the polar bear in a timely manner. Plaintiffs have to date
20 received no response from the Secretary regarding the 60-Day Notice Letter. Following the running of
21 the required 60-days prior to filing suit, on March 10, 2008 Plaintiffs filed a Complaint challenging the
22 Secretary’s failure to publish a final listing determination for the polar bear. This Motion follows.

23 **IV. ARGUMENT**

24 As documented herein, there is no genuine dispute as to any of the material facts with regard to
25 Plaintiffs’ claim for relief. More than a year has passed since the Secretary published a proposed rule
26 on January 9, 2007 to list the polar bear under the ESA. A final listing determination was due by
27 January 9, 2008. By the time of the noticed hearing on Plaintiffs’ Motion for Summary Judgment, a
28 final listing determination will be four months overdue. The Secretary has no legally relevant excuses

1 for this delay. Plaintiffs’ motion must be granted and the Secretary ordered to make a final listing
2 determination for the polar bear by a date certain.

3 **A. Standard of Review**

4 A court shall render summary judgment if no genuine issue as to any material fact exists and
5 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). When the evidence
6 is “so one-sided that one party must prevail as a matter of law,” summary judgment is appropriate.
7 Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986). Where the moving party has demonstrated
8 that there is no material issue of fact for trial, the “adverse party may not rest upon the mere allegations
9 or denials of the adverse party’s pleadings, but . . . must set forth specific facts showing that there is a
10 genuine issue for trial.” Fed. R. Civ. P. 56(e). Summary judgment is not treated as “a disfavored
11 procedural shortcut” but as “an integral part of the Federal Rules as a whole, which are designed to
12 secure the just, speedy and inexpensive determination of every action.” Celotex Corporation v. Catrett,
13 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

14 Because the ESA does not contain an internal standard of review, this Court’s review is
15 governed by the Administrative Procedure Act (“APA”). Tribal Village of Akutan v. Hodel, 869 F.2d
16 1185, 1193 (9th Cir. 1988), cert. denied, 493 U.S. 873 (1989). Under the APA, the reviewing court is
17 directed to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706.
18 Plaintiffs ask this Court to compel agency action unlawfully withheld. Where, as here “Congress by
19 organic statute sets a specific deadline for agency action, neither the agency nor any court has
20 discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court
21 must compel the action unlawfully withheld.” Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th
22 Cir. 1999); see also Biodiversity Legal Foundation, 309 F.3d at 1178 (“The Service's failure to
23 complete the listing determinations within the mandated time frame compelled the court to grant
24 injunctive relief. The court had no discretion to consider the Service's stated priorities.).

25 **B. Plaintiffs Have Standing to Bring this Action**

26 Each of the Plaintiffs has standing to bring this action because: 1) their members have standing
27 to sue in their own right; 2) the interests at stake are germane to the organizations’ purpose; and 3)
28 neither the claim asserted nor the relief requested requires their members to participate directly in the

1 lawsuit. See Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1997);
2 Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000). Regarding
3 element (1), members have standing to sue in their own right if “they have suffered an injury in fact
4 that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical, . . .
5 the injury is fairly traceable to the challenged action of the defendant; and . . . it is likely, as opposed to
6 merely speculative, that the injury will be redressed by a favorable decision.” Ecological Rights
7 Foundation, 230 F.3d at 1147 quoting Friends of the Earth v. Laidlaw, 528 U.S. 167, 180-181 (2000).

8 Plaintiffs have established the facts necessary to establish each of these elements. See
9 Declarations of Melanie Duchin, Jenny Ross, and Jack W. Lentfer in Support of Plaintiffs’ Motion for
10 Summary Judgment, filed concurrently with this motion. This case is substantially similar to
11 Biodiversity Legal Foundation, 309 F.3d 1166, in which the Ninth Circuit held that environmental
12 groups that petitioned to list several species under the ESA had standing to challenge the Secretary’s
13 failure to make the required findings on those petitions. Biodiversity Legal Foundation, 309 F.3d at
14 1171-72. In the Ninth Circuit, “environmental groups have Article III standing if they allege
15 procedural violations in an agency process in which they participated.” Biodiversity Legal Foundation,
16 309 F.3d at 1172 quoting Portland Audubon Society v. Endangered Species Commission, 984 F.2d
17 1534, 1537 (9th Cir. 1993). Moreover, it is well settled that an individual’s desire to observe,
18 appreciate, and study a plant or animal species is “undeniably a cognizable interest for purposes of
19 standing.” Biodiversity Legal Foundation, 309 F.3d at 1172 quoting Lujan v. Defenders of Wildlife,
20 504 U.S. 555, 562-63 (1992). Just as in Biodiversity Legal Foundation, Plaintiffs here have established
21 standing to challenge the Secretary’s failure to make a final listing determination on their Petition to list
22 the polar bear under the ESA.

23 **C. The Secretary is in Violation of the ESA for Failing to Make a Final Listing**
24 **Determination regarding the Polar Bear**

25 There are only two pertinent facts, both undisputed, necessary for this Court to find the
26 Secretary in violation of the clear terms of the ESA. First, it is undisputed that on January 9, 2007, the
27 Secretary published in the Federal Register a proposed regulation listing the polar bear as “threatened”
28 under the ESA. 72 Fed. Reg. 1064. Second, it is also undisputed that more than a year has passed since

1 that time without the proposal being finalized or withdrawn. The Secretary's publication of the
2 proposed rule triggered a mandatory duty to take final action on the proposal within one year. 16
3 U.S.C. § 1533(b)(6). The Secretary has not done so and is therefore in violation of the law, and
4 consequently, summary judgment must be granted for Plaintiffs.

5 The language of the ESA is unambiguous on the Secretary's obligations with regard to
6 finalizing a proposed listing rule:

7 Within the one-year period beginning on the date in which a general notice is published
8 in accordance with paragraph 5(A)(1) regarding a proposed regulation, the Secretary
shall publish in the Federal Register-

9 (i) if a determination as to whether a species is an endangered species or
10 threatened species, or a revision of critical habitat is involved, either-

- 11 (I) a final regulation to implement such determination,
- 12 (II) a final regulation to implement such revision or a finding that such
13 revision should not be made,
- 14 (III) notice that such one-year period is being extended under subparagraph
(B)(i), or
- 15 (IV) notice that the proposed regulation is being withdrawn under
16 subparagraph (B)(ii), together with the finding on which such withdrawal is
17 based.

18 16 U.S.C. § 1533(b)(6) (emphasis added); see also Oregon Natural Resources Council v. Kantor, 99
19 F.3d 334, 338-39 (9th Cir. 1996) ("The language of the ESA regarding the deadlines for action could
20 hardly be more clear. ... within the one-year period beginning on the date on which the proposed
21 regulation is published, the Secretary must publish a final regulation, withdraw the proposed regulation,
22 or give notice that the one-year period is being extended.")(internal quotations omitted)(emphasis
23 added); Biodiversity Legal Foundation, 309 F.3d at 1175 (The ESA "imposes a firm twelve-month
24 deadline for making final determinations."); Center for Biological Diversity v. Norton, 254 F.3d 833,
25 837 (9th Cir. 2001) ("The statute is not at all ambiguous, but instead is exquisitely clear, concerning
26 what the Secretary must do when she receives a petition requesting action on a species.").

27 The Secretary cannot, as he has done here, simply disregard the plain language of the ESA and
28 refuse to finalize the overdue listing proposal. Congress' use of the word "shall" in Section 4 of the
ESA imposes a non-discretionary duty on the Secretary. The Supreme Court has stated with regard to
the use of the word "shall" in the ESA's listing provisions, "the terms of § 1533(b)(2) are plainly those
of obligation rather than discretion" Bennett v. Spear, 520 U.S. 154, 172 (1997). The Ninth

1 Circuit has likewise held that the use of the term “shall” creates “a mandatory, nondiscretionary duty
2 which may be enforced by citizen suit.” Environmental Defense Center v. Babbitt, 73 F. 3d 867, 871
3 (9th Cir. 1995).

4 By the time the Court hears this Motion, the Secretary will have missed the statutory deadline
5 for action on the polar bear by four months. This is unacceptable. As the Supreme Court concluded in
6 construing the ESA, “Congress has spoken in the plainest of words, making it abundantly clear that the
7 balance has been struck in favor of affording endangered species the highest of priorities.” Tennessee
8 Valley Authority, 437 U.S. at 173. Indeed, Congress explicitly amended the ESA in 1982 to remove
9 the Secretary’s ability to decide when to act and to replace his “discretion” with mandatory, non-
10 discretionary deadlines. H.R. Conf. Rep. No. 835, 97th Cong., 2nd Sess., reprinted in 1982
11 U.S.C.C.A.N. 2860, 2862 (“In several ways, these amendments will replace the Secretary’s discretion
12 with mandatory, non-discretionary duties.”).

13 Whatever excuses the Secretary might come up with, he cannot be allowed to re-interject his
14 “discretion” to delay listing decisions back into the ESA because Congress intentionally removed such
15 “discretion” from the statute. As the Supreme Court has found, where the language of a statute is clear,
16 a court may look no further than the language in determining the statute’s meaning. Sullivan v. Stroop,
17 496 U.S. 478, 482 (1990). “If the intent of the Congress is clear, that is the end of the matter; for the
18 court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”
19 Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 942-43 (1984). The Ninth Circuit
20 has explicitly stated “[t]he language of the ESA regarding the deadlines for action could hardly be more
21 clear.” Oregon Natural Resources Council, 99 F.3d at 338-39. Accordingly, even assuming the
22 Secretary can advance some colorable excuses for missing the mandatory, non-discretionary deadline
23 for final action on the polar bear, the Court should not indulge these efforts. Summary judgment must
24 be entered for Plaintiffs.

25 **D. The Court Must Compel the Secretary to Make a Finding by a Date Certain**

26 Given the Congressional intent, caselaw, and the plain language of the ESA itself all make clear
27 that the Secretary is in violation of the law for failing to make a final listing determination regarding the
28 polar bear by January 9, 2008, this Court must issue an order compelling the Secretary to make the final

1 listing determination for the bear by a date certain.

2 As the Supreme Court stated in the seminal ESA case of Tennessee Valley Authority:

3 Once Congress, exercising its delegated powers, has decided the order of priorities in a
4 given area, it is for the Executive to administer the laws and for the courts to enforce
them when enforcement is sought.

5 437 U.S. at 194. (emphasis added); see also Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9th Cir. 1987)
6 (“the Supreme Court held that Congress had explicitly foreclosed the exercise of traditional equitable
7 discretion by courts faced with a violation of [the ESA]”).

8 In Biodiversity Legal Foundation, 309 F.3d at 1178, the Ninth Circuit explicitly examined
9 whether a district court must issue an order compelling the Secretary to make an overdue ESA listing
10 determination by a date certain, and concluded that such relief was mandatory.

11 The Service’s failure to complete the listing determinations within the mandated time
12 frame compelled the court to grant injunctive relief. The court had no discretion to
13 consider the Service’s stated priorities. . .
14 . . . We AFFIRM the district court’s denial of the Service’s request for additional time
within which to make the warranted/not warranted findings in dispute. The exercise of
discretion is foreclosed when statutorily imposed deadlines are not met.

15 Id. at 1178 (emphasis added); see also Forest Guardians, 174 F.3d at 1190 (“[W]hen Congress by
16 organic statute sets a specific deadline for agency action, neither the agency nor any court has
17 discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court
18 must compel the action unlawfully withheld.”).

19 The repeated holdings of the Ninth Circuit, as well as those of the Supreme Court and other
20 circuits, leave no doubt that this Court must issue an order compelling the Secretary to make a final
21 listing determination regarding the polar bear by a date certain. The only issue remaining is how long
22 the Court should give the Secretary to come into compliance with the law.

23 In this case, the Secretary has no excuse for his continuing delay in issuing a final listing
24 determination for the polar bear. The final listing recommendation left the Alaska field office of the
25 U.S. Fish and Wildlife Service in December 2007. On January 7, 2008, Director Dale Hall of the
26 Service announced in a press statement that the agency would not meet the deadline but would make
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1 the finding “within the next month.”³ That month has come and gone with no action from the
2 Secretary. Whatever work was required to complete the listing determination has been done; there is
3 simply no justification for further delay.

4 In determining an appropriate timeline for setting a deadline for the Secretary to publish a final
5 listing determination for the polar bear, the case of Marbled Murrelet v. Lujan, 1992 U.S. Dist. LEXIS
6 14645 (W. Dist Wash. 1992), is instructive. In that case, the Secretary had unlawfully delayed a final
7 listing determination for the marbled murrelet, an imperiled forest-nesting seabird. In an order issued
8 September 15, 1992, the Court required the Secretary to publish its finding in the Federal Register by
9 September 18, 1992, three days later.

10 [T]he Secretary was legally bound by the ESA, 16 U.S.C. § 1533(b)(6)(A), to make a
11 determination on the status of the tri-state marbled murrelet population within one year
12 of June 20, 1991, the date on which the proposed rule for listing the murrelet was
published. 56 Fed. Reg. 28362 (June 20, 1991).

13 The court accordingly orders the Secretary to carry out his congressionally mandated
14 duty under the ESA, 16 U.S.C. § 1533(b)-(6)(A), to publish his determination in the
15 Federal Register no later than noon, Eastern Standard Time, on Friday, September 18,
1992. The court notes that the Secretary's task should be assisted markedly by the fact
that a final rule has already been drafted by the Region One Field Office of the United
States Fish and Wildlife Service.

16 Id. (emphasis added). Such is exactly the case here, as the final determination left the relevant field
17 office more than three months ago.

18 In light of the fact that there is no lawful reason for continued delay in issuing a final listing
19 determination for the polar bear, Plaintiffs respectfully request that this Court order the Secretary to
20 publish the final determination within seven days of the hearing on this motion. Such an order is
21 consistent with the nearly identical Marbled Murrelet case as well as other district court rulings
22 regarding overdue listing determinations under the ESA. See Forest Guardians, 174 F.3d at 1193
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27 ³ The U.S. Fish and Wildlife Service Press release is available at:
28 <http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=54D2A6BD-E928-94E6-6BA905F3F540B8F7>

1 (noting that in similar deadline cases district courts have ordered the Secretary to comply with its
2 statutory obligations within between 5 and 120 days).⁴

3 Finally, in normal rulemaking where the Secretary complies with the timelines of the ESA, the
4 APA, 5 U.S.C. 553(d), provides that a final rule not take effect until thirty days after its publication in
5 the Federal Register. However, when “good cause” exists, the thirty day delay in the regulations’
6 effective date may be waived. 5 U.S.C. 553(d)(3). A violation of a listing timeline constitutes such
7 “good cause” for waiving the delay in the effective date of a final listing rule. Again, Marbled Murrelet
8 is instructive.

9 Finally, it was brought to the court's attention during oral argument that under the APA,
10 5 U.S.C. § 553(d), a rule is normally not effective until thirty days after the date of
11 publication. However, an exception is available under § 553 (d)(3) if ‘otherwise
12 provided by the agency for good cause found and published with the rule.’ The court
13 finds that, in view of the unlawful delay which has already occurred in complying with
the ESA, a final determination by the Secretary to list the tri-state murrelet population as
threatened should be accompanied by an agency waiver for good cause of the 30-day
delay in the effective date of the determination.

14 992 U.S. Dist. LEXIS 14645. (emphasis added). This Court should do the same here and require the
15 Secretary to make a final listing regulation for the polar bear effective upon publication in the Federal
16 Register.

17 **V. CONCLUSION**

18 For the reasons stated above, Plaintiffs respectfully request that the Court grant their Motion for
19 Summary Judgment and order the Secretary to make, and to publish in the Federal Register, a final
20 listing determination for the polar bear under the ESA within 7 days of the Court’s hearing on this
21 Motion.

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27 ⁴ In instances where courts have granted the Secretary more time to come into compliance with the law,
28 there has usually been an additional required step in the process, such as a public comment period, the
conducting of a status review, or the issuance of a proposed rule. There are no such additional steps
preventing the Secretary from immediately issuing a final listing determination for the polar bear.

1 DATE: April 1, 2008

Respectfully Submitted,

2
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