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15 Attorneys for Plaintiffs

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

NOTICE RE FILING OF FIRST AMENDED
COMPLAINT

1 Pursuant to Federal Rule of Civil Procedure 15(a), Plaintiffs Center for Biological Diversity,
2 Natural Resources Defense Council, and Greenpeace, Inc., file concurrently with this Notice their First
3 Amended Complaint.

4 On March 10, 2008, Plaintiffs filed a Complaint against Defendants Dirk Kempthorne, United
5 States Secretary of the Interior and the United States Fish And Wildlife Service (collectively “the
6 Secretary”) to compel the Secretary to comply with the non-discretionary listing provisions of the
7 Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), with regard to the protection of the polar
8 bear. On April 28, 2008 this Court issued an order granting Plaintiffs’ Motion for Summary Judgment
9 and found Defendants in violation of the ESA for failing to publish a final listing decision for the polar
10 bear by January 9, 2008. See Center for Biological Diversity v. Norton, Case No. C-08-1339-CW
11 (N.D. Cal., April 28, 2008) (Order Granting Plaintiffs’ Motion for Summary Judgment and Injunction,
12 Docket # 35) (hereinafter (“April 28 Order”)). The Court ordered Defendants to publish a final listing
13 determination for the polar bear by May 15, 2008, and to make any final regulation effective upon
14 publication pursuant to 5 U.S.C. § 553(d)(3). Id. at 10.

15 On May 13, 2008, the Court issued an amended Order granting in part motions to intervene and
16 to file amicus briefs by Conservation Force and Safari Club, et al., respectively. See Center for
17 Biological Diversity v. Norton, Case No. C-08-1339-CW (N.D. Cal., May 13, 2008) (Amended Order
18 Granting Motions to Shorten Time, Granting Safari Club’s Motion for Leave to File an Amicus Brief,
19 and Granting For Limited Purposes Conservation Force’s Motion to Intervene, Docket # 69),
20 hereinafter (“Amended Order”)). The Amended Order requires additional briefing from the parties
21 regarding the implications of the listing of the polar bear under the ESA on the ability of individuals to
22 import trophy-hunted polar bear carcasses from Canada. Id. at 2.

23 While the Court has ruled on Plaintiffs’ Motion for Summary Judgment, final judgment has not
24 been entered in this case and no answer or other responsive pleading has been filed by the Secretary.

25 On May 15, 2008 the Secretary published a final listing determination for the polar bear.
26 Endangered and Threatened Wildlife and Plants, Determination of Threatened Status for the Polar Bear
27 (Ursus maritimus) Throughout its Range (“Final Listing Rule”). 73 Fed. Reg. 28212. Concurrently
28 with publishing the Final Listing Rule, the Secretary also published an “Interim Final Rule,” which

1 purports to eliminate the protections of Section 9 of the ESA against “taking” polar bears, 16 U.S.C. §
2 1538, 17 C.F.R. § 17.31, which would otherwise apply absent the Interim Final Rule.

3 In response to the Secretary’s actions, on May 15, 2008, Plaintiffs filed with the Secretary a
4 notice of intent to sue pursuant to the citizen suit provisions of ESA, 16 U.S.C. § 1540(g). Sixty Day
5 Notice of Intent to Sue Over Violations of Section 4 of the Endangered Species Act; Failure to List the
6 Polar Bear as an Endangered Species and Designate Critical Habitat and Unlawful Authorization of
7 Take of Polar Bears (May 15, 2008, herinafter “Notice Letter”) (attached as Exhibit A). Plaintiffs’
8 Notice Letter details the Secretary’s violations of the ESA by, among other things, failing to use the
9 best available science in determining that polar bears were “threatened” rather than “endangered” in all
10 or parts of their range; failing to designate critical habitat for the polar bear concurrently with the Final
11 Listing Rule, 16 U.S.C. § 1533(a)(3)(A)(i); and issuing the Interim Final Rule in contravention of the
12 requirements of the ESA, 16 U.S.C. § 1533(d). While not required to do so, the notice letter also
13 informed the Secretary that he had violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 551
14 et seq., by promulgating the Interim Final Rule without providing for public notice and comment, and
15 the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., by failing to comply with
16 NEPA’s environmental review provisions.

17 Some of Plaintiffs’ new Claims regarding the Secretary’s violations of law are properly brought
18 pursuant to the citizen suit provision of the ESA, and may require 60-days notice prior to being brought
19 before this Court. Other claims are brought pursuant to the judicial review provisions of the APA.
20 Plaintiffs’ First Amended Complaint includes only those claims for which no notice under 16 U.S.C. §
21 1540(g) is required. Specifically, Plaintiffs challenge the Secretary’s violations of the APA and of
22 NEPA. Plaintiffs will seek to amend their Complaint following the running of the 60-days notice
23 period to add additional Claims brought under the citizen suit provisions of the ESA as outlined above
24 and in their Notice Letter.

25 Additionally, while this Court has granted summary judgment on Plaintiffs’ Claim for Relief in
26 their original Complaint concerning the Secretary’s failure to comply with the listing deadlines of the
27 ESA, as final judgment has not yet been entered, Plaintiffs retain this claim and the factual allegations
28 underlying it in their First Amended Complaint. Plaintiffs’ Second Claim for Relief concerns the

1 Secretary's violations of the APA in promulgating the Interim Final Rule without providing for notice
2 and comment. Plaintiffs' Third Claim for Relief concerns the Secretary's violations of the NEPA and
3 the APA in promulgating the Interim Final Rule without preparing an Environmental Assessment or
4 Environmental Impact Statement pursuant to NEPA.

5 According to the initial case management scheduling order in this case (Docket # 3), a case
6 management conference is scheduled for June 17, 2008. A case management statement is due on June
7 10, 2008. Because time is of the essence in all efforts to protect threatened and endangered species,
8 Plaintiffs will attempt to work with Defendants to develop a schedule for the rapid resolution of all
9 claims in this case.

10
11 DATE: May 16th, 2008

Respectfully Submitted,

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13 By: /s/ Kassia Siegel

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