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No. 11-5219
(consolidated with Nos. 11-5221; 11-5222; and 11-5223)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE POLAR BEAR ENDANGERED
SPECIES ACT LISTING AND § 4(d) RULE LITIGATION

SAFARI CLUB INTERNATIONAL, *et al.*,
Plaintiffs–Appellants,

v.

KEN SALAZAR, in his official capacity as
United States Secretary of the Interior, *et al.*,
Defendants–Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,
Defendant/Intervenors–Appellees.

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GLOSSARY

This brief uses the following abbreviations and acronyms not in common use:

AR4	IPCC Fourth Assessment Report 2007
ARL	Administrative Record (followed by Bates number or range of documents) for Listing Rule, as filed in district court
BM	Bayesian network model
CF	Conservation Force, the Inuvialuit Game Council, and numerous hunting and trapping organizations and individuals
CM	Carrying Capacity model
DPS	Distinct population segment
ESA	Endangered Species Act
FAB	Federal Appellees' Brief
Federal Appellees	Kenneth Salazar, United States Fish & Wildlife Service, and Daniel M. Ashe
IB	Intervenors' Brief
Intervenors	Center for Biological Diversity, Greenpeace, Inc., Natural Resources Defense Council, Defenders of Wildlife, The Humane Society of the United States, and The International Fund for Animal Welfare
IPCC	Intergovernmental Panel on Climate Change
Joint Appellants	State of Alaska, Safari Club International, Safari Club International Foundation, California Cattlemen's Association, Congress of Racial Equality, Conservation Force, Inuvialuit Game Council; Arviat Hunters and Trappers Organization; Resolute Bay Hunters and Trappers Organization; Louie Nigiyok d/b/a Arctic Hills Tour Company; Nanuk Outfitting, Ltd.; Canada North Outfittings, Inc.; Ameri-cana Expeditions, Inc.; Webb Outfitting Nunavut, Ltd.; Henik

	Lake Adventures, Ltd.; Joseph Verni d/b/a Natura Sport; Dallas Safari Club; Houston Safari Club; African Safari Club of Florida, Inc.; Mark Beeler; Timothy Decker; Chris Hanks; Don Hershey; Steve Hornady; William Keene; Rob Kreider; Allyn Ladd; Ethel Leedy; Everett Madson; Aaron Neilson; Major Roger Oerter; Bradley Pritz; Kevin Reid; Robert Remillard; Jeff Sevor; Steve Smith; Ted Stallings; Larry Steiner; Darwin J. Vander Esch; Tim Walters
NMFS	National Marine Fisheries Service
OB	Joint Appellants' Opening Brief
PBSG	Polar Bear Specialist Group
SCI	Safari Club International and Safari Club International Foundation
Service	United States Fish and Wildlife Service
USGS	United States Geological Survey

Joint Appellants submit this Joint Reply Brief in response to the briefs of Federal Appellees and Intervenor Appellees (collectively, "Appellees"). All Joint Appellants join in the arguments presented, except where otherwise indicated.

INTRODUCTION

In listing the polar bear, the United States Fish and Wildlife Service (the "Service") for the first time listed as threatened under the Endangered Species Act ("ESA") a species that occupies the entirety of its historic range and has population numbers at an all-time high. The Service did so based on uncertain projections about habitat conditions and population trends 45 years into the future.

In response to Joint Appellants' arguments, Appellees focus on the size of the administrative record, the fact that some peer reviewers supported the listing decision, and their belief that unreliable projections about declining polar bear populations justified a listing. Yet, despite some observations of declining sea ice extent, Federal Appellees admit that "the species is not currently experiencing substantial population or range reductions and is not on the brink of extinction." FAB4.[1] In fact, nearly three-quarters of the 19 polar bear populations are stable, increasing, or indeterminate in number, and only one population was verified to be in a statistically significant decline. OB7; ARL117300 (Listing Rule); Dkt.237-1,p.15.

[1] "OB," "FAB," and "IB" refer to, respectively, Joint Appellants' Opening Brief, Federal Appellees' Brief, and Intervenors' Brief.

Listing the polar bear as "threatened" requires a very specific finding under ESA Section 4, based on all the listing factors, that this currently widespread and numerous species will likely become endangered, *i.e.*, on the brink of extinction, within the foreseeable future. The Service did not adequately make or explain such a finding here. Rather, it failed to provide a rational connection between its uncertain projections about polar bear population trends and future conditions and its "threatened" determination; it applied a standard so imprecise that the Service could conceivably use it to list any healthy species whose habitat is projected to be affected by climate change, without making a future "on-the-brink" determination; it relied on population models that were based on assumptions bearing no rational relationship to reality; and it failed to define or apply key terms and satisfy other requirements before listing a species as threatened. The Court therefore should vacate and remand the Listing Rule.

SUMMARY OF ARGUMENT

Appellees fail to effectively respond to most of Joint Appellants' arguments. *First*, they do not rebut Joint Appellants' showing that the Service (1) failed to rationally connect the data projecting habitat loss to the conclusion that the polar bear is likely to be on the brink of extinction within 45 years; and (2) arbitrarily relied on two population models that made critical, faulty assumptions and then failed to rationally connect the models' outputs with the listing decision. The

Listing Rule was arbitrary and capricious because Appellees offer only conclusory assertions—but neither reliable data nor rational reasoning—to support the Service's "threatened" determination.

Second, Appellees disavow the Service's chosen meaning of the term "likely" in the definition of "threatened" as having a 67 to 90 percent probability, thus admitting the Service never applied this meaning. Their current argument—that "likely" means only "more likely than not"—is new, as the Listing Rule did not incorporate that standard. Either way, the rule was arbitrary and capricious for failing to define and apply a standard for that vague, key term.

Third, Appellees do not rebut Joint Appellants' showing that the Listing Rule was arbitrary and capricious in its use of a 45-year foreseeable future period for the polar bear. The Service failed to support that period through either the climate models or the biology-based analysis tied to the bear's generation length.

Fourth, Appellees implicitly concede that the Service failed to properly account for Canada's conservation practices. The plain language of the ESA's "taking into account" provision, 16 U.S.C. § 1533(b)(1)(A), the statute's legislative history, and the Service's prior application of the statutory language defeat Appellees' arguments that the ESA does not mandate consideration of a listing's effects on a foreign nation's conservation programs.

Fifth, Appellees do not rebut the showing of some Joint Appellants, in the alternative, that the Service wrongly deemed the polar bear threatened throughout its range and wrongly failed to designate distinct population segments ("DPSs") for certain polar bear populations and ecoregions.[2]

Sixth, Federal Appellees concede that the Service did not rely solely on the inadequacy of existing regulatory mechanisms to justify its listing decision, which moots Joint Appellants' argument that it would have been improper to do so.

Seventh, through their silence, Federal Appellees admit that, if the Court agrees that the Listing Rule violates the Administrative Procedure Act ("APA") or the ESA, it should vacate and remand the invalid rule. The case law does not support Intervenors' arguments against vacatur.

ARGUMENT

I. The Service's "Threatened" Determination Was Arbitrary And Capricious.

A. The Service Failed To Adequately Explain How The Data It Relied On Justified Its Listing Decision.

Appellees assert that the Listing Rule's discussion of polar bears' dependence on sea ice and current and projected declines in sea ice is sufficient to explain the steps in the Service's decisionmaking and to connect the scientific data

[2] Only Safari Club International and Safari Club International Foundation ("SCI") and Conservation Force, the Inuvialuit Game Council, and numerous hunting and trapping organizations and individuals ("CF") join in these arguments.

with the ultimate conclusion that the polar bear is currently "threatened." FAB17-35; IB12-16; *see also* OB18-26. This only highlights what the rule did *not* do.

The Listing Rule did not articulate any real connection between sea ice dependence, sea ice decline, and the Service's conclusion, *i.e.*, that the polar bear is likely to become "endangered," or "on the brink of extinction[,]" within the foreseeable future throughout all or a significant portion of its range. *See* 16 U.S.C. § 1532(6), (20); 794 F. Supp. 2d 65, 82-83 (D.D.C. 2011) (district court decision noting that the Service defined "in danger of extinction" as "currently on the brink of extinction in the wild" for purposes of the Listing Rule). The rule also did not explain how a loss of some portion of polar bear habitat would affect populations throughout the species' vast range. Rather, in relying in part on the carrying capacity model ("CM") and the Bayesian network model ("BM"), the rule assumed—without justification—that any reduction in sea ice would lead to a corresponding or greater reduction in polar bear population size, and would necessarily put the species on the brink of extinction. *See* ARL117276-117281 (Listing Rule); OB27-37; *infra* at 9-14.

Appellees misinterpret Joint Appellants' argument as simply requiring the Service to quantify some precise amount of habitat and population loss that would cause the polar bear to become "threatened." FAB30; IB17-19. The Service's failures are far more fundamental. Under APA and ESA standards, the Service

was required—but failed—to fully explain the connection between the data forecasting some loss of habitat and population and its prediction that, at year 45, the polar bear likely will be on the brink of extinction. OB18-26.[3] Joint Appellants also do not argue that a "threatened" determination can never be made on a precautionary basis. *See* FAB36; IB20-21. Rather, such a determination, if made, must be adequately explained and supported. OB19-21.[4]

Habitat loss may not necessarily justify a listing decision, and "'[a] species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat.'" OB22-23 (quoting *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001)); *see also* OB23 (noting the Service's admission that "'some species that have suffered fairly substantial declines in numbers or range do not warrant listing'"). Here, the Service failed to adequately consider that the polar bear has a

[3] Intervenors' citation of two unpublished cases rejecting such arguments is, thus, inapposite. IB17-18 (citing *Home Builders Ass'n of N. Cal. v. FWS*, 321 Fed. App'x 704 (9th Cir. 2009), and *Heartwood v. Kempthorne*, 2007 WL 1795296 (S.D. Ohio 2007), *aff'd*, 302 Fed. App'x 394 (6th Cir. 2008)). Only one of these cases concerns an ESA listing decision; and it does not specify the connection the Service made between habitat loss data and its "threatened" decision, other than to say the Service did not have to establish a numerical threshold of habitat loss necessary to render a species threatened. *Home Builders*, 321 Fed. App'x at 705.

[4] That some peer reviewers—who were neither lawyers nor judges, and were not checking for legal or procedural compliance—agreed with the Service's findings, FAB32, neither excuses the Service's deficient analysis nor provides this Court with the basis to fully review the Listing Rule.

remarkably large historic range, occupies the full extent of that range, has a robust population, and is declining in very few portions of its range, while increasing or remaining steady in others. OB6-7, 22.[5] Ultimately, the Service failed to explain how speculative habitat trends alone, unmoored from time and numbers, could establish that the species is likely to be on the brink of extinction within 45 years.[6]

Federal Appellees do not even attempt to distinguish either *Defenders of Wildlife* or *San Luis & Delta-Mendota Water Authority v. Badgley*, 136 F. Supp. 2d 1136 (E.D. Cal. 2000). *See* OB20-23. Intervenors note only that here, unlike *Defenders of Wildlife*, the Service did not rely on a "predetermined percentage of habitat or range loss[.]" IB21 (quotation omitted). They ignore the key point, namely, the Ninth Circuit's warning that habitat loss by itself—in any amount—

[5] Appellees claim that sea ice losses have already caused two polar bear populations to decline. FAB26-27; IB4. In fact, the Service "documented a statistically significant decline" in only one population, the Western Hudson Bay population. ARL117300-117301 (Listing Rule); *see also* Dkt.237-1,p.15. However, that "population remains greater than 900 bears, . . . reproduction and recruitment are still occurring," and any decline is "gradual rather than precipitous," with "the current size of the population remain[ing] reasonably large." ARL117300 (Listing Rule).

[6] The Service dismisses the United States Geological Survey's ("USGS") concern about the lack of "a clear linkage between the forecasted decline and the finding" in the draft rule, arguing that the USGS' comment pertained only to its supposition that one of its reports could support an "endangered" determination in some portions of the range. FAB35-36; *see also* OB21. But the USGS' statements are not so constrained. They suggest that the Service failed to fully connect the scientific data with its overall findings. ARL080025. The Service failed to correct that error in the final rule. OB18-26.

does not necessarily equate to a threat of extinction. 258 F.3d at 1143. They also ineffectively respond to *Badgley*, stating that "[t]he . . . court did not hold that a quantitative threshold is required for a species to be listed under the ESA[.]" IB19. Beyond misconstruing Joint Appellants' argument, Intervenors miss the thrust of *Badgley*: the agency "must show the relationship between the data [it] relied upon and the conclusion that [a species] is a threatened species." 136 F. Supp. 2d at 1149. In *Badgley*, as here, the agency failed to adequately consider overall population increases in the species, to assess how much habitat the species actually required, or to connect habitat loss with such severe population impacts as to threaten extinction in the foreseeable future. *Id.* at 1147-51.

Consequently, Appellees do not satisfactorily defend the Listing Rule's fundamental flaws: (1) the rule failed to comply with APA and ESA standards requiring the Service to fully explain each step in its decisionmaking process; (2) it precluded effective judicial review by not precisely explaining the basis for the decision; and (3) it applied a standard so broad and indeterminate that it would allow agencies to list any species that relies upon habitat projected to decline.[7] For all these reasons, the rule is arbitrary and capricious.

[7] Federal Appellees do not address this flaw on the merits, calling it "unfounded" because Joint Appellants did not identify other species that would warrant listing under the Service's analysis. FAB37 n.16. In fact, under the Service's analysis, it could list *any species* whose habitat is projected to be impacted by climate change.

B. The Service's Reliance On The Population Models Violated The APA And The ESA.

Joint Appellants' Opening Brief explained that the Service violated APA and ESA standards by relying on the BM and CM population models without justifying their faulty assumptions or providing a rational connection between their outputs and the listing decision. OB26-37. Like the district court, Appellees conflate these arguments with a "best science" argument, urging that the Service had to use the best scientific data available, even if it was imperfect, and that Joint Appellants have not cited any "better" scientific data. FAB38, 43; IB18.

But Joint Appellants are not making a "best science" argument. OB28. Even where models do represent the best available science, that does not render an agency's reliance upon those models *per se* permissible, if the agency fails to comply with other statutory requirements. OB27-30. Nor does the ESA "best science" provision override the APA rationality standards that govern all agency rulemaking. *See generally Bennett v. Spear*, 520 U.S. 154, 160, 175 (1997); *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1008 (D.C. Cir. 2002).

1. The Service Was Required To Justify Its Reliance On The Models.

Appellees contend the Service did not actually rely on the CM and the BM, but merely used them to bolster other evidence in the record. FAB8-9, 14, 41-42; IB23-24. Appellees' repeated reliance on the models in their briefs belies that

assertion. FAB33-34, 39-42; IB5-7, 14-16, 19-20, 29. At any rate, because the Service repeatedly relied on both models in the Listing Rule, and because the models provided the only rangewide future population estimates cited in the rule, the Service was required to defend and rationally connect the models with its decision. OB27-28. This it failed to do.[8]

Federal Appellees also make the conclusory statement that the Listing Rule's reliance on the models satisfies the APA's requirements that an agency (1) "explain[] the methodology and assumptions" of its chosen model; (2) "draw[] reasonable conclusions from a model"; (3) rely on "a model that bears a rational relationship to the reality it purports to represent"; and (4) "'examine [the model's] key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule[.]'" FAB38-39 (citing cases); *accord* IB22.

This is an implicit admission, despite Appellees' citation to "best science" principles, that the APA's independent requirements apply. Additionally, this Court has cautioned that "simply to state such a claim," *i.e.*, that the agency "made a reasonable choice" in relying on particular models, "does not make it so." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053 (D.C. Cir. 2001). *See also*

[8] Appellees note that Joint Appellants do not challenge separate modeling concerning the Southern Beaufort Sea. FAB27-28; IB15. This is irrelevant. That model relates to only one polar bear population; the Service did not directly tie that model's projections to the rangewide "threatened" determination; and Joint Appellants have shown that the Service relied extensively on two flawed models and need not attack every other piece of evidence in the record.

OB28-30 (citing APA standards, including that an agency must "provide a full analytical defense" if its model is challenged). Here, the Service's reliance on the models failed to satisfy APA and ESA requirements.

2. The Service Impermissibly Relied On The CM.

Federal Appellees ignore most of the problems Joint Appellants identified with the Service's unfounded reliance on the CM, stating that the Service "fully recognized . . . the limitations of this relatively simplistic model." FAB39; *accord* IB24. Yet merely recognizing a model's limitations does not satisfy APA and ESA standards requiring an agency to provide a full analytical defense of its models and to show the data's relationship to promulgated regulations. If that were so, those statutory standards would be meaningless.[9]

Moreover, Appellees still fail to acknowledge, much less address, the CM's limitations. Federal Appellees aver that the CM's assumption of a linear or fixed relationship between sea ice and polar bear numbers "clearly bears a rational relationship" to the underlying reality. FAB39. They thus ignore both the USGS' admission that this assumption "is almost certainly not valid," and the Service's acknowledgement in early drafts of the rule that the assumption was problematic. OB31-33. Nor is this assumption a mere "oversimplification," as Intervenors

[9] The fact that admitting modeling uncertainties may be one of many "safety valves in the use of . . . sophisticated methodology," *NRDC v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985), *cited in* IB26, does not eradicate the requirements of the APA or the organic statute.

suggest. IB24-25. Instead, it underscores that the Service assumed the modeled relationship was representative, but in fact it "'bears no rational relationship to the reality it purports to represent.'" *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) (citation omitted). The Service's reliance on this model is therefore arbitrary. *See id.*[10]

Appellees ignore Joint Appellants' other arguments, including that the Service (1) used the CM as a demographic model, although it was not intended for that purpose; and (2) failed to explain how the CM's projected reduction of 10 to 22 percent in carrying capacity by year 45 supports a finding that polar bears will be on the brink of extinction at that time. OB32-34. These additional, unrebutted defects render the Service's reliance on the CM arbitrary and capricious.

3. The Service Impermissibly Relied On The BM.

Federal Appellees' primary response as to why the Service relied on the BM—a first-generation prototype with input from only one expert—is that it "acknowledged those shortcomings" but still deemed the BM useful because that expert had considerable experience and a few other scientists reviewed his results. FAB41; *accord* IB26-27. But the Service admitted that the BM required "inputs from multiple experts . . . before it can be considered final," and the USGS warned

[10] Intervenors argue that the Service was entitled to use "carrying capacity" differently from the normal usage of that term. IB25. But the error is not in the Service's mere use of the term; it is the Service's equation of current polar bear density with carrying capacity, *i.e.*, the maximum population an area will support.

that the BM required various "additional steps" for verification. OB35-36. Peer review of the BM's end results does not correct these inherent defects. Equally irrelevant are other agencies' self-serving and conclusory statements about the validity of the Service's reliance on the BM. IB27.

Federal Appellees contend that the Service "did not rely on the numerical probabilities of the model outcomes." FAB41-42 (footnote omitted). But the BM is the sole basis for the Listing Rule's statement that "the projected changes in sea ice conditions could result in loss of approximately two-thirds of the world's current polar bear population by the mid-21st century." ARL117278. Federal Appellees repeat that claim in this Court: "Research further indicates that future declines in sea ice . . . could cause losses of up to two-thirds of the current polar bear population by mid-century." FAB13. Although they offer no record support for this statement, the BM is its only possible source. *See* ARL082484 (USGS Report on the BM asserting that "[p]olar bears in . . . approximately 2/3 of the current range-wide population, are projected to become extinct by mid century"); *accord* ARL082453, ARL082487.[11] Thus, Federal Appellees' statements disprove the Service's supposed rejection of numerical outputs derived from the BM results.

In any event, Federal Appellees fail to explain how the Service could simultaneously (1) discount the BM's numerical outcomes based on the model's

[11] Intervenors similarly rely on the numeric outputs from the BM that the Service supposedly rejected. *See, e.g.*, IB6 (Table 1).

inadequacies, and (2) rely on "the 'general direction and magnitude' of those outcomes" to support the listing decision. FAB41-42 (citing ARL117278 (Listing Rule)). Intervenors urge that the BM's numerical outcomes and the "general direction and magnitude" of those outcomes "are one and the same," and trying to distinguish between them creates "a distinction without a difference." IB27 (quotations omitted). Joint Appellants agree. Because the numerical outputs and the trends of those outputs are indistinguishable, for the same reasons the Service decided it could not rely on the outputs themselves, it could not rationally rely on the trends from those outputs. Moreover, those trends mean nothing without appropriate parameters to establish their severity or immediacy. OB36-37.

Finally, Appellees suggest that Joint Appellants failed to show that the BM bears no relationship to the reality it purports to represent. FAB40; IB26. Yet it is *the Service*, not Joint Appellants, that must provide a "full analytical defense" to its model, and must "examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, noncapricious rule." *Columbia Falls*, 139 F.3d at 923. The Service failed to satisfy that burden, by not adequately addressing the issues discussed above and by not showing that the BM's carrying capacity assumptions (the same problematic assumptions underlying the CM) bore a rational relationship to reality. Therefore, the Service's reliance on the BM was arbitrary and capricious.

C. The Service Failed to Apply Its Chosen Definition Of "Likely" Or, Alternatively, It Failed To Define This Vague Term.

On appeal, Federal Appellees disavow the standard the Listing Rule used for the statutory term "likely." Instead, they substitute a *post hoc* definition, implicitly admitting the Service's failure to define a key, but vague, term in the Listing Rule.

1. The Service Adopted, But Failed To Apply, The AR4 Standard For "Likely."

The Opening Brief demonstrated that the Service provided meaning to the term "likely" in the statutory definition of a "threatened species" by citing the 67 to 90 percent probability standard used in the Fourth Assessment Report ("AR4") of the Intergovernmental Panel on Climate Change ("IPCC"), but then failed to apply that meaning in making its threatened determination. OB38-41. Federal Appellees concede the Service did not apply the AR4 standard, but claim the Service cited it only with respect to climate models and their projected trends, and not to define "threatened." FAB44-45; *accord* IB17 n.4.

However, the public comment that triggered the Service's response citing the AR4 standard best indicates the purpose for which the Service adopted that standard. That comment asserted: "The proposed rule does not sufficiently question the reliability of scientific models used. Science is not capable of responding to vague terms such as 'it is likely' [and] 'foreseeable future.'" ARL117241 (Listing Rule). In response, the Service addressed, in order, the

reliability of the models, how it determined the "foreseeable future," the meaning of "likely" (citing the AR4 probability values), and the models' limitations. *Id.*

Significantly, the Service's adoption of the AR4 values was unqualified. The Service said in its response that it "attempted to use those terms ['likely,' etc.] in a manner consistent with how they are used in the IPCC AR4," *id.*—not that it "attempted to use those terms *when discussing climate models* in a manner consistent with how they are used in the IPCC AR4." The plain language of the response thus defeats Federal Appellees' current position. Also, the "next sentence" on which Federal Appellees rely, FAB45, is actually the start of a new paragraph related solely to the modeling aspects of the comment, confirming that the Service was not limiting the meaning of "likely" to climate models when it discussed the AR4 standard in the prior paragraph. ARL117241 (Listing Rule). Finally, if the Service did not intend that its reference to the AR4 values would explain the term "likely" in the definition of "threatened," then it failed to respond at all to that part of the comment, despite responding *in detail* to the part of the comment concerning its interpretation of "foreseeable future." *See id.*

In short, Federal Appellees' after-the-fact construction of the Service's response defies logic, while Joint Appellants' reading of that response comports with both its plain language and common sense.

2. Alternatively, The Service Failed To Apply Any Standard For The Term "Likely."

Joint Appellants are not arguing, as Appellees assume, that the Service had to define "likely" with "absolute certainty or numerical precision." FAB47; *accord* IB17.[12] However, when a key statutory term is vague and susceptible to a range of meanings, an agency must give clear meaning to the term before basing a decision on it. OB41-42. Here, the parties' arguments demonstrate that "likely" is a vague term. Even the dictionary definitions suggest a wide range of meanings, from "more likely than not" to "highly probable." *Compare* OB38 (quoting definition as "high probability of occurring"), *with* FAB46 (quoting definition as "having [a] better chance of existing or occurring than not").

Accordingly, the Service was required to supply clear meaning to the term "likely." Federal Appellees now claim that "[t]hroughout the Listing Rule, [the Service] interpreted the word 'likely' in the phrase 'likely to become an endangered species' to mean 'probable' or 'having a better chance of occurring than not,' which is its ordinary meaning." FAB45-46. But they cannot cite any place in the Listing Rule where the Service offered that interpretation. "Having a better chance of occurring" appears nowhere in the rule; and "probable" occurs five times, but never as a synonym for "likely." *See, e.g.*, ARL117278.

[12] Intervenors conflate this argument with Joint Appellants' argument concerning the Service's failure to fully explain its decisionmaking process. IB17-18. But the two arguments present separate issues and apply different standards.

This case is therefore unlike *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 946 (D. Or. 2007), where the National Marine Fisheries Service ("NMFS") adopted a definition of "likely" in its decision withdrawing its proposal to list a species as "threatened." Here, the only definition referenced at the administrative level was the one the Service now disclaims—the AR4 standard. Appellees cite *Trout Unlimited* as adopting a "more likely than not" definition of "likely." FAB46; IB17. In fact, the court confirmed the word's ambiguity. 645 F. Supp. 2d at 945 (quoting dictionary definitions to show that "[t]he word 'likely' clearly means something less than 100% certain, but how much less is not as clear"). Although the court, applying *Skidmore* deference, accepted the interpretation NMFS gave in that case, *id.* at 946-49, it nowhere suggested that a more stringent definition would not be equally plausible.

Ultimately, if the Service did not adopt the AR4 standard for "likely," then the record lacks any definition at all. The Court should reject Federal Appellees' belated attempt to give meaning to a vague term the agency failed to define in the Listing Rule itself. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action . . . ."). The Court should either hold the Service to the meaning it articulated, but failed to apply, in the Listing Rule, or remand for rulemaking so the Service can articulate a meaning and apply it to the record data.

D. The Service Failed To Justify Its 45-Year Foreseeable Future Period.

The selection of 45 years as the "foreseeable future" period under 16 U.S.C. § 1532(20) is indefensible on both bases offered by the Service. *First*, the climate model predictions on habitat loss do not address the other listing factors, and the Service failed to analyze shorter periods as a way to test the appropriateness of 45 years. OB44, 46-48. *Second*, the Service's biological support for a 45-year period—based on the length of three generations of polar bears—is objectively flawed. OB49-52. Because there was no reasonable basis for the 45-year period, the decision to use that period was arbitrary and capricious. OB45-46, 51-52.

1. The Court Should Reject The Climate-Models Justification.

In response to Joint Appellants' demonstration that the Service's climate-models justification did not support a 45-year foreseeable future period, OB46-48, Appellees allege that climate and sea ice modeling are reliable out to 45 years and claim that despite uncertainty about such modeling, this longer period was necessary to conduct "a multigenerational analysis." FAB49-50; *accord* IB30. But in determining what is foreseeable, the issue is the species' status—not climate change. The chosen future period must be sufficiently foreseeable for the Service to determine, based on all the listing factors, whether the polar bear likely would be on the brink of extinction at the end of that period. Notably, the Listing Rule does not try to justify 45 years based on any alleged reliability of the USGS

reports, which provided the only rangewide population forecasts at year 45, OB48—a deficit Appellees do not dispute.

Federal Appellees also make the counter-intuitive claim that "use of a *shorter period* would not have been appropriate because 'the reliability of biological information and, therefore, population status projections, increases if a multigenerational analysis is used.'" FAB50 (citing ARL117258 (Listing Rule)). But neither their brief nor the Listing Rule explains why the alleged need for "multigenerational analysis" could not be accomplished with a shorter foreseeable future and a look backwards to obtain needed data. Indeed, the Service at times relied on past data to assess future threats to the species. For example, it relied on projections that were "based upon events that have already occurred," FAB50, and cited a study analyzing data going back to 1980. ARL117258 (Listing Rule) (citing Stirling and Parkinson (2006)).

Finally, Federal Appellees cite peer reviewers' support for a 45-year period and that period's consistency with the approach of the Polar Bear Specialist Group ("PBSG"). FAB49. But the peer reviewers reviewed the *proposed* rule, which employed a biological analysis of the foreseeable future period; they did not review or support the climate model analysis the Service invoked in the final rule. OB44, 48 n.4. Additionally, there is no indication that these scientists are experts in the meaning of "foreseeable future" under the ESA.

Federal Appellees ultimately fail to address Joint Appellants' arguments that (1) the Service must establish and justify a foreseeable future period based on an assessment of all the listing factors, not just habitat; (2) the relative reliability of climate projections for 45 years as compared to 80-90 years does not prove foreseeability; and (3) the Service failed to analyze whether an assessment of a shorter period would reveal flaws in the choice of 45 years. *See* OB46-48.

Intervenors try, but fail, to refute these arguments. *First*, their claim that the Listing Rule analyzed threats other than habitat loss is misguided. They cite the rule's discussion of the five listing factors, not its discussion of foreseeable future, confusing two wholly distinct issues. IB29 (citing ARL117281-96). *Compare* ARL117257-59 (the Service's explanation of its foreseeable future rationale).

Second, Intervenors assert that the relative reliability of 45-year climate projections was not the Service's sole justification for selecting 45 years, but was merely why it declined to select a longer period. IB29. Joint Appellants never claimed this was the "sole" justification, but it certainly was the primary one, whether or not it also informed the Service about a longer period. Indeed, right after characterizing the foreseeable future as the period in which it can "reliably assess the effect of threats," the Service noted its belief that "climate changes projected within the next 40-50 years are more reliable than projections for the second half of the 2lst century[.]" ARL117243 (Listing Rule).

Third, Intervenors misunderstand, as did the district court, Joint Appellants' argument about shorter periods, stating that "[t]he fact that shorter periods are also foreseeable does not undermine the selection of 45 years." IB30. Citing the Service's own criticism of a draft rule, however, Joint Appellants explained the error as "failing to consider a relevant factor—analyzing shorter periods—that would help determine whether 45 years is a reasonable and justifiable foreseeable future." OB47-48. Intervenors, like Federal Appellees, fail to address *this* error.

2. The Court Should Reject The Biological Justification.

Federal Appellees' claim that the precise length of the polar bear generation is "immaterial," FAB51, is wrong. They ignore that, even after the Service adopted an alternate explanation for its selection of a 45-year foreseeable future period, the Listing Rule still relied on a purported three-generation calculation to support that period. OB45, 49. Additionally, even on appeal, Federal Appellees try to justify the Service's failure to consider a shorter period based on the alleged need for a multi-generational biological analysis. FAB50.

Federal Appellees, like the district court, assert that Joint Appellants waived the argument that the Service relied on a flawed biological basis to support the foreseeable future determination. FAB50-51. In fact, various public comments—which Federal Appellees ignore—challenged the length of and the Service's basis for determining the foreseeable future period. OB49-50 n.5. And regardless of the

comments, the Service had a duty to examine and explain its key assumptions as part of its affirmative burden to promulgate a non-arbitrary and non-capricious rule. *See, e.g.*, *Am. Maritime Ass'n v. United States*, 766 F.2d 545, 566 n.30 (D.C. Cir. 1985). The accuracy of the biological inputs was a material assumption underlying the chosen 45-year period. ARL117258-117259 (Listing Rule). The Service therefore had to justify that assumption, even absent specific objections.

Appellees never confront the flaws in the Service's assumption of a 25-year lifespan and 20-year lifetime reproductive period for polar bears. *See* OB49-52. Intervenors say nothing about these numbers, IB30-31, and Federal Appellees say only that the PBSG used a 15-year generation length. FAB51. But the Service provided a formula for calculating generation length—age of sexual maturity plus 50 percent of the length of the lifetime reproductive period—without explaining what numbers it plugged into that formula, or why they were accurate. Those failures are especially egregious because the only information available to the Service indicated that its numbers were *not* accurate. OB49-51. The Service's selection of a 45-year foreseeable future was therefore arbitrary and capricious.

E. The Service Did Not Properly Take Into Account Canada's Conservation Practices.

The Service failed to satisfy its statutory duty to "tak[e] into account" Canada's conservation practices—despite acknowledging that those practices provide many benefits to the polar bear and implicitly conceding that listing the

species as "threatened" would impede those benefits. OB52-59. The Service thus violated the APA and the ESA. OB57-59.[13]

Appellees' primary response is that the ESA requires the Service to consider foreign conservation practices only in determining whether a species is threatened or endangered, and does not permit it to consider a listing decision's effects on those foreign practices. FAB51-52; IB31-32. They also try to narrow the meaning of "tak[e] into account" to signify only those conservation efforts that bear directly on the particular threat that is the basis for the listing. FAB56-57; IB32.

Such a narrow approach contravenes the plain language of, the purpose behind, and the Service's prior application of the statutory language requiring agencies to make listing determinations only "after taking into account those efforts, if any, being made by any State or foreign nation . . . to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices[.]" 16 U.S.C. § 1533(b)(1)(A).[14]

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[13] Intervenors misleadingly suggest that Canada's practices may hurt, rather than help, the polar bear. IB31 n.7. The Service did *not* find Canada's practices are a threat to the bear. Rather, it acknowledged the many benefits of Canada's program—including its hunting conservation program. OB57; *see also* FAB55-56.

[14] Intervenors' reliance on *Fund for Animals, Inc. v. Norton*, 322 F.3d 728 (D.C. Cir. 2003), IB31, and *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011), IB34, is misleading. *Norton* presented a different issue—whether a foreign nation may intervene in a listing challenge to argue impacts on its people and natural resources. 322 F.3d at 736. And *Servheen* does not even cite, much less apply, the "taking into account" provision. 665 F.3d at 1015.

First, the ESA requires agencies to "tak[e] into account" foreign conservation efforts as a separate mandate from the five listing factors in 16 U.S.C. § 1533(a)(1)—including Factor (D) regarding the inadequacy of existing regulatory mechanisms. The statutory structure indicates that Congress intended agencies to consider not only the effects *of* foreign efforts, and whether they are adequate to protect the species, but also the effects *on* foreign efforts should a species be listed. OB52-53.[15] Contrary to Appellees' assumption, FAB52-53; IB33-34, those effects on foreign efforts *do* relate to the biological question of whether a species is "threatened," because any interference with successful efforts may harm a species, outweighing any potentially positive impacts of listing.

Second, the ESA's legislative history makes clear that Congress intended for agencies making listing decisions to consider both the benefits of foreign efforts and a listing regulation's potential detrimental impacts on those efforts. OB54. Appellees ignore this point. Instead, they cite authority suggesting that listing decisions cannot be based on economic considerations. FAB52-55; IB33-34. Thus, they wrongly assume that considering the impacts of foreign programs necessarily means considering economic impacts, simply because many programs

[15] Failing to give the "taking into account" provision some meaning separate from the listing factors violates a cardinal principle of statutory interpretation. OB53. Intervenors' suggestion that one can give separate meaning to this provision by assuming that it mandates a review of foreign efforts, whereas listing factor (D) might not, IB32-33, is senseless. Listing factor (D) nowhere indicates that it is limited to *domestic* regulatory mechanisms. *See* 16 U.S.C. § 1533(a)(1)(D).

(like Canada's) generate revenues that are then used to fund conservation efforts. But the point is *not* that the listing would decrease foreign revenues; it is that Canada's program funds research and conservation efforts, incentive programs, and other benefits to the species, much of which will be lost due to the listing.

Third, in a series of decisions, the Service has considered a listing's impact on a foreign nation's conservation practices. OB55-57. Federal Appellees contend that the Service based each decision on the listing factors, FAB57 n.19, but they fail to acknowledge that the decisions also considered—per the separate statutory requirement—the impact of listing on foreign conservation efforts. OB56-57.

Finally, Appellees ignore the fact that Canada's conservation practices *do* bear directly on the habitat threat that was the basis for the listing. Canada's program—in part through well-regulated hunting by United States citizens—funds research, incentivizes habitat protection, and provides revenues to native hunters and communities sharing the bear's habitat. OB57. These efforts are tied directly to habitat management and require greater support due to projected habitat declines. Perversely, the listing decision will cause those efforts to receive *less* support, while providing few benefits. OB57-59.[16]

[16] The Service said it was listing in all areas because it was "fiscally" efficient for itself to list at one time. OB59 n.8. Contradictorily, it did not take into account the effect of listing worldwide upon Canada's fiscal operating needs.

Ultimately, this listing will harm the polar bear by adversely affecting Canada's conservation practices for the species. This is exactly the type of consideration the Service was required to "tak[e] into account"—yet it refused to do so. That refusal violated the APA and the ESA.

F. The Service Failed To Justify Its Conclusion That The Polar Bear Is Threatened Throughout Its Range.[17]

As an alternative argument, SCI and CF demonstrated that the Service's conclusion that the polar bear is threatened throughout its range cannot be squared with record data about polar bears inhabiting the Convergent Ice and Archipelago ecoregions. OB60-66. Federal Appellees respond that bears in these ecoregions would be "affected" by any future ice loss, and that this is enough. FAB58-61. But the Service never found in the Listing Rule, and never asserts in its brief, that bears in these ecoregions will likely be "on the brink of extinction" at year 45—the only finding that would justify a threatened listing. Nor can Federal Appellees refute the record evidence demonstrating the lack of any basis for such a finding.[18]

Federal Appellees' arguments confirm that the Service never made or justified a finding that polar bears in these two ecoregions will likely be on the brink of extinction on or before year 45:

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[17] Only SCI and CF join in this argument. OB60 n.9.

[18] Intervenors simply restate the Service's conclusions that the polar bear is threatened throughout its range and do not dispute any particular point. IB34-35.

> The amount and quality of sea ice are *declining*, and are projected to continue to decline, across the range, including in the Archipelago and Convergent Ice ecoregions. . . . [I]mprovements [in conditions for polar bears in some high latitude areas] will only be transitory. Continued warming will lead to *reduced* numbers and *reduced* distribution of polar bears range-wide. . . . [M]ost northerly polar bear populations will experience *declines* in demographic parameters similar to those observed in the Western Hudson Bay population. . . .

FAB58-60 (emphases added) (citations and quotation marks omitted). Predictions about unquantified "declines" in habitat and population, even if reasonable, establish only that polar bears in the Archipelago and Convergent ice ecoregions may be "affected"—not that they will be on the brink of extinction—in the next 45 years. The comparison to the Western Hudson Bay population is instructive, as the Service concluded that this population, while suffering some declines, is not currently endangered. ARL117300 (Listing Rule).

SCI and CF showed how the models on which the Service relied actually support the finding that the polar bear is not threatened throughout its range. OB61-65. Federal Appellees cannot refute that the USGS concluded, in broad terms and based on its (speculative) modeling, that 6,600-8,300 polar bears would likely persist in the Archipelago Region in 45 years. OB61-62.[19] While Federal

[19] These figures are derived from the BM's projections. The BM suggested a "loss of ~2/3 of the world's current polar bear population by mid-century," ARL082453, with "a core of polar bear habitat and some number of polar bears . . . likely . . . persist[ing] in and around the Archipelago Ecoregion." ARL082480. That means

Appellees break down the specific projections from the BM for these two ecoregions, they ignore the USGS' broader conclusion. FAB61 n.22. Even the specific outcomes for these ecoregions do not support the determination that polar bears will be on the brink of extinction in 45 years: Convergent Ice, "fewer than 2,200 and potentially far less"; and Archipelago, "fewer than 5,000." *Id.* As the CM projected even more robust populations in these areas, OB33-34, the record data contradicts a brink-of-extinction conclusion for these ecoregions.[20]

Finally, Federal Appellees ignore the fact that the USGS seriously questioned the Service's rangewide conclusion. OB62. The failure to address this issue raised by the expert sister agency highlights the Service's error in concluding that the polar bear is threatened throughout its range.[21]

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approximately 1/3 of the current population of 20,000 - 25,000 (or 6,600 - 8,300) bears would still persist in and around that area. *See* ARL117219 (Listing Rule).

[20] The most Federal Appellees can say about the CM with respect to these two ecoregions is that the Service projected an initial increase, followed by a "decline in carrying capacity." FAB60 n.20. The estimated change in carrying capacity for these ecoregions in 45 years ranges between +4 and -24 percent. ARL117277 (Listing Rule). This projected "decline" defeats the conclusion that the current estimated population of around 7,200 bears in these ecoregions will be on the brink of extinction in 45 years.

[21] The "taking into account" requirement discussed *supra* at 23-27, is another reason the Service should have concluded the species was not threatened throughout its range—particularly in the Canadian Archipelago (5,000 bear) and Convergent Ice (2,200 bear) ecoregions. Properly taking into account the Canadian management programs would have made it even clearer that the bears in these ecoregions are not threatened. The Service failed to heed a concern

Based on these errors, remand is necessary for the Service to determine whether the polar bear is threatened in a "significant portion of its range," so as to warrant a range-wide listing.

G. The Service Erred In Its DPS Determination.[22]

The errors in the Service's threatened-throughout-its-range determination also undermine its DPS determination. The Service should have considered establishing DPSs for the purpose of listing or not listing certain DPSs. As the district court did, Federal Appellees largely ignore the views of the USGS and the Service's own scientists and instead focus on the commonality, not discreteness, of polar bear populations and ecoregions. FAB64-65. Within a single species, however, significant commonality is to be expected.[23]

The Service initially determined that all 19 populations "meet the ESA criteria for [DPSs]." OB67. Federal Appellees try to brush this aside by citing other statements that the 19 populations are not completely stationary and will likely change over the 45-year foreseeable future. FAB66-67. But the DPS policy

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expressed to Congress, and noted in Federal Appellees' brief: "the Secretary has listed some foreign species . . . throughout their entire range without considering [taking into account] whether their *population status* varies from country to country [or area to area]." FAB55 (quoting S. Rep. No. 97-418, at 16 (1982)).

[22] Only SCI and CF join in this argument. OB66 n.16.

[23] In the district court, Intervenors challenged the Service's failure to designate DPSs. Dkt.125,pp.36-40.

"does not require absolute separation of a DPS from other members of its species, because this can rarely be demonstrated in nature for any population of organisms." 61 Fed. Reg. 4722, 4724 (Feb. 7, 1996). In addition, possible future shifts in populations do not change the fact that those populations qualify as DPSs now. Nothing in the Listing Rule justifies the Service's failure to establish a current DPS based on possible future changes to that DPS' boundaries.

Both USGS and Service scientists supported the Service's initial determination that the populations were DPSs, emphasizing the discreteness and differences between the four ecoregions and the populations. OB68-69. The USGS pointedly disagreed with the Service's conclusion that there were no morphological, physiological, or behavioral differences between ecoregions. OB68-69. Federal Appellees try to explain away this disagreement as a "nuance" between saying there are "no" differences and saying there are "minor" differences. FAB67. In fact, the USGS concluded that there were "'major differences in the ice regimes that do influence how polar bears make a living in the different parts of their range.'" OB68 (quoting ARL096841). Other statements by the USGS, Service scientists, and others echo the conclusion that major differences between the ecoregions and populations make them discrete and qualified them as DPSs. OB68-69; *see also* ARL108485 (Service letter to Marine Mammal Commission, Feb. 28, 2008: "The species has been delineated into 19

somewhat discrete populations for management purposes by the PBSG (Aars et al. 2006 p. 33)"). Neither the Listing Rule nor Federal Appellees' Brief reconciles these facts with the Service's conclusion that there are only minor differences.

Additionally, SCI and CF explained that the Service should have considered international boundaries—in particular Canada's—as a basis for DPS designations. OB70. Federal Appellees respond, with no citation to any authority, that "[w]here [the Service] has recognized a DPS based on intergovernmental boundaries, it is because conservation practices do or will affect threats to the species." FAB68. The DPS policy, however, states that "it appears to be reasonable for national legislation, which has its principal effects on a national scale, to recognize units delimited by international boundaries when these coincide with *differences in the management, status, or exploitation of a species*." 61 Fed. Reg. at 4723 (emphasis added). As explained *supra* at 23-30, polar bears in Canada *do* differ in regard to their population status and Canada's management of the species.

For these reasons, the Court should remand for a new determination on DPSs and listing status in those DPSs.

H. Federal Appellees Concede That The Inadequacy Of Existing Regulatory Mechanisms Is Not An Independent Listing Basis.

Intervenors do not respond to Joint Appellants' argument that listing Factor (D), the inadequacy of existing regulatory mechanisms, cannot, by itself, justify the listing decision. *See* OB71-72. Federal Appellees argue that Joint Appellants

waived the issue. FAB69. They are mistaken. Joint Appellants explicitly preserved it. *See, e.g.*, Dkt.284,Tr.2/23/2011,55:2-6 ("[O]nce you look at the arguments we have about the habitat projections and unlink them and find that the Service didn't rationally support them then, then *the Factor D analysis under inadequacy of regulatory mechanisms*, it's free-floating, *it's not an independent reason*.") (emphases added); *see also id.* at 53:25-55:21.

In any event, Federal Appellees concede that the Service did not rely on Factor (D) alone in its listing decision, but relied on factors (A) (a claimed risk to the polar bear's habitat) and (D) in tandem. FAB69. Because the Service failed to show that polar bears are "threatened" due to habitat loss, OB21-23; *supra* at 4-8, Factor (D), which Federal Appellees acknowledge is "tied to" habitat loss, FAB69, necessarily drops out of the analysis as well.

II. Federal Appellees Implicitly Concede, And Intervenors Do Not Effectively Challenge, That Vacatur Is The Appropriate Remedy.

Federal Appellees do not argue the question of the appropriate remedy on remand. *See* FAB74. Therefore, they impliedly recognize that if the Court should find error with the Listing Rule based on any of the APA or ESA violations raised by Joint Appellants, it should vacate and remand the rule. *See* OB72.

Intervenors urge that the rule should not be vacated during any remand. IB35-37. However, under the legal standards for considering vacatur—standards on which Intervenors and Joint Appellants agree, OB72-73; IB35-36—vacatur is

warranted. Given the fundamental nature of the APA and ESA errors in the Listing Rule, this Court cannot presuppose that the Service is likely to reach the same "threatened" determination on remand. This is especially so where the case involves novel listing issues, the worldwide population is currently at an all-time high and occupies its entire historic range, and no record evidence indicates a current or imminent significant decline in population. *See* Dkt.138,pp. 2-3.

Intervenors cite no authority for their contention that the passage of time since issuance of the Listing Rule "has only strengthened the case for ESA listing." IB36. Instead, they impermissibly speculate on the merits of the agency's potential decision on remand. They also invite this Court to substitute its judgment for that of the Service, or speculate as to the Service's eventual judgment—both of which the APA precludes. *See, e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1036 (D.C. Cir. 2012); *Nat'l Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990). And their claim that some of the USGS' work was "subsequently . . . published in a peer-reviewed scientific journal," IB36, is irrelevant to what might occur on remand.

Nor does the record support Intervenors' argument that vacatur would be "highly disruptive" to the ESA species protection program. IB36. The appropriate inquiry is whether vacatur would be disruptive to the specific species listing and management program at issue, not to the ESA species protection scheme generally.

See, e.g., *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002); *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990). Moreover, the Service anticipates that few additional conservation actions would result from the listing beyond those already imposed by the Marine Mammal Protection Act of 1972, international agreements, and other programs and requirements. OB73. Because these existing programs would continue during remand, vacating the Listing Rule would not be "highly disruptive" to the species' conservation and management.[24]

Thus, if the Court agrees that the Service violated the APA or the ESA in promulgating the Listing Rule, it should vacate the Listing Rule during remand.

CONCLUSION

For the reasons stated in Joint Appellants' Opening Brief and above, this Court should reverse the judgment below, vacate the Listing Rule, and remand to the Service for further proceedings consistent with the Court's decision.

[24] Intervenors' cases, IB36-37, are inapposite. Either the rulemaking errors did not rise to a level warranting vacatur, or the need to protect the environmental values covered by the rule outweighed the factors supporting vacatur. In other cases, the subject species would have had no protection at all during remand, and the regulations affected only limited geographic areas as compared to the wide-ranging listing at issue here. *Idaho Farm Bur. Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995); *Endangered Species Comm. of the Bldg. Ass'n of S. Cal. v. Babbitt*, 852 F. Supp. 32, 42-43 (D.D.C. 1994).

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/s/ Murray D. Feldman
Attorney for State of Alaska
Dated: August 7, 2012

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I hereby certify that on August 7, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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