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*Attorneys for Plaintiff  
Alaska Oil & Gas Association*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

ALASKA OIL AND GAS ASSOCIATION, )

Plaintiff, )

v. )

KENNETH L. SALAZAR, SECRETARY OF )  
THE INTERIOR; and UNITED STATES FISH )  
AND WILDLIFE SERVICE, )

Defendants. )

Civ. No.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF  
(5 U.S.C. §§ 701-706; 16 U.S.C.  
§§ 1532-1533, 1536, 1540(g))**

**I. SUMMARY OF ACTION**

1. The Alaska Oil and Gas Association (“AOGA” or “Plaintiff”) hereby challenges the United States Fish and Wildlife Service’s (the “Service”) decision to designate critical habitat for the Polar Bear under the Endangered Species Act (“ESA”). *See* 75 Fed. Reg. 76,086 (December 7, 2010) (“Final Rule”). Under Section 4(a)(3)(A) of the ESA, the Service set aside 187,157 square miles of terrestrial lands and the U.S. Outer Continental Shelf (“OCS”) as “essential” to the conservation of the polar bear. This is an area larger than 48 of the 50 states, exceeding the size of the State of California by nearly 25,000 square miles. This critical habitat

designation is unprecedented not only because it is the largest area set aside in the history of the ESA, but also because the designation arises in the context of an abundant species (20,000 – 25,000 polar bears in 19 recognized subpopulations) that occupies its entire historical range. AOGA challenges the Final Rule because it violates the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*, and Sections 3 and 4 of the ESA, 16 U.S.C. §§ 1532 and 1533.

2. The Service’s designation of polar bear critical habitat is arbitrary and capricious, and violates the ESA, because it improperly and excessively designates vast areas that (a) lack the physical and biological features “essential to the conservation of the species” and that (b) the Service has admitted do not currently, or in the foreseeable future, require special management measures.

3. The Service’s designation of polar bear critical habitat is arbitrary and capricious, and violates the ESA, because the Service did not reasonably assess, and therefore did not take into consideration, the actual economic impact and other relevant impacts of designating the identified areas as critical habitat.

4. The Service’s designation of polar bear critical habitat is arbitrary, capricious and an abuse of discretion, and violates the ESA, because the Service failed to balance the conservation benefits and the economic effects to exclude areas where the benefits of exclusion outweigh the benefits of specifying such areas as part of the critical habitat.

5. The Service’s designation of polar bear critical habitat is arbitrary and capricious, and violates the ESA, because the Service’s designation of critical habitat, assessment of economic impact and decision not to exclude certain areas from the critical habitat designation are neither based on, nor consistent with, the best scientific data available.

6. Plaintiffs respectfully request that the Court declare the Final Rule unlawful, and vacate and remand the Final Rule to the Service for further consideration in compliance with the APA and the ESA.

## II. PARTIES

7. AOGA is a private, non-profit trade association located in Anchorage, Alaska. AOGA's fifteen member companies account for the majority of oil and gas exploration, development, production, transportation, refining, and marketing activities in Alaska. AOGA's members are the principal industry stakeholders that operate within the range of, and that incidentally interact with, polar bears in Alaska and in the adjacent OCS. AOGA and its members are also longstanding supporters of polar bear conservation, management and research in Alaska and western Canada. AOGA and its members are committed to the protection of the environment of the Alaskan Arctic and the adjacent U.S. Arctic OCS, to ensure that the living resources of the Arctic, including polar bears, are responsibly managed and conserved according to the best available science to maintain the health of the ecosystem.

8. Because of the direct and significant interests of its members, AOGA has been an active stakeholder in all of the processes taking place under Section 4 of the ESA regarding the polar bear, including the designation of critical habitat. AOGA and its members have previously submitted written comments, dated December 23, 2009 and July 6, 2010, regarding the Service's proposal to designate polar bear critical habitat.

9. As a result of the location and nature of oil and gas activities in Alaska, AOGA's members have substantial direct experience, data, and knowledge about the habitat identified in the Final Rule, about polar bear behavior and activity on and adjacent to the North Slope, and about interactions between the oil and gas industry and polar bears. This experience, data, and

knowledge bears directly upon, among other issues, the location of essential biological features, the economic consequences of designating active oil and gas fields as critical habitat, and the need for special management measures.

10. Defendant Kenneth L. Salazar is the Secretary of the United States Department of Interior. Secretary Salazar directs all business of the Department of Interior, including the Service. In his official capacity as Secretary of the Interior, Secretary Salazar is responsible for the Service's polar bear critical habitat designation and for the Service's associated failure to comply with the APA and the ESA.

11. The Service is an agency of the United States Department of the Interior responsible both for administering the provisions of the ESA with regard to threatened and endangered wildlife, including, but not limited to the polar bear species. The Service's statutory duties and responsibilities encompass designation of polar bear critical habitat subject to and in compliance with the applicable requirements of the APA and the ESA.

### **III. JURISDICTION AND VENUE**

12. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706 (APA), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgments), and 28 U.S.C. § 2202 (injunctive relief). Jurisdiction in this Court is also established under 16 U.S.C. § 1540(g)(1). Pursuant to ESA Section 11(g)(2)(A), 16 U.S.C. § 1540(g)(2)(A), by letter dated December 8, 2010, AOGA provided Secretary Salazar with the requisite sixty-days notice of its intent to bring this suit under the ESA. A copy of that letter is attached hereto as Exhibit A.

13. Venue is properly vested in this court under 28 U.S.C. § 1391(e) because: (1) AOGA resides and does business in this district, as do AOGA's members; (2) the geographic

areas and species affected by the critical habitat designation are located in this district, and (3) the Service maintains an office in this district. *See* 16 U.S.C. §1540(g)(3)(A).

#### IV. STATUTORY FRAMEWORK

##### A. The Administrative Procedure Act

14. The APA authorizes courts reviewing agency action to hold unlawful and set aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 702(2)(A). Agency decisions to designate critical habitat under ESA Section 4 are reviewed under this provision of the APA.

##### B. The Endangered Species Act

15. For any species listed as endangered or threatened under ESA Section 4, the Service is required to designate that species' critical habitat at the time of the initial listing. 16 U.S.C. § 1533(a)(6)(C).

16. As relevant here, "critical habitat" is defined under the Act to mean the specific areas within the geographical area occupied by the species on which are found those physical or biological features (a) essential to the conservation of the species and (b) which may require special management considerations or protection. Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the species. 16 U.S.C. § 1532(5)(A)(i).

17. The physical or biological features which satisfy the statute's definition of critical habitat are known as "primary constituent elements" ("PCEs"). 50 C.F.R. § 424.12(b)(5). PCEs must be "found" on occupied land before that land can be eligible for critical habitat designation, 16 U.S.C. § 1532(5)(A)(i). PCEs must be present at the time of designation; lands cannot be designated on the expectation that PCEs will be present at some time in the future.

18. Under ESA Section 4(b)(2), the Secretary is required to use the best scientific data available and to take into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. 16 U.S.C. § 1533(b)(2). The Secretary “may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.” *Id.*

19. Pursuant to ESA Section 7(a)(2), once a species is listed as endangered or threatened, each federal agency that takes an action that may affect that species must “insure,” in consultation with the FWS that any such action “is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [the species’ designated critical] habitat.” 16 U.S.C. § 1536(a)(2). If an agency determines that its proposed action is likely to jeopardize a species or adversely modify its critical habitat, it is required to undertake a formal consultation with the Service that results in a Biological Opinion setting forth “reasonable and prudent alternatives” that avoid those results. 50 C.F.R. § 402.14.

## V. STATEMENT OF FACTS

20. The polar bear species is comprised of a single global population estimated to be between 20,000 and 25,000 in abundance. The distribution of polar bears in most areas varies seasonally with the extent of sea ice cover and the availability of prey. Currently, the global polar bear population is divided among nineteen loosely-defined, low-density sub-populations. The polar bear is the only bear species, and one of the few large predators in the world, that still

occupies its entire historical range. There is no evidence of an overall decline in the global polar bear population or in its historical range.

21. On May 15, 2008, the Service issued a final rule determining that the polar bear species should be listed under the ESA as “threatened.” 73 Fed. Reg. 28212 (May 15, 2008). In the listing rule, the Service determined that critical habitat was “not determinable at this time.” *Id.* at 28298.

22. The primary threat to the polar bear identified by the Service is the projected loss of sea ice due to a forecasted increase in Arctic temperatures over the foreseeable future. In the final listing rule, the Service expressly determined that no “on-the-ground” activities, such as oil and gas exploration, development and production, or Native subsistence uses, pose reasonably foreseeable threats to the polar bear species. Indeed, the Service has consistently and repeatedly found, over many years, that the oil and gas industry in Alaska has no more than a negligible impact on polar bears, does not pose a threat to the survival or recovery of the species, and is more rigorously regulated under the applicable provisions of the Marine Mammal Protection Act (“MMPA”) than the provisions of the ESA. Thus, in listing the polar bear as “threatened,” the Service determined that the polar bear species is threatened by global processes that may cause population declines in the future, not by activities currently or foreseeably occurring within the polar bear’s range.

23. In the polar bear critical habitat Final Rule, the Service set aside 187,157 square miles of critical habitat for the polar bear -- an area larger than 48 of the 50 states, exceeding the size of the State of California by nearly 25,000 square miles. The designation is divided into

three “units” – Unit 1 (Sea-Ice Habitat), Unit 2 (Terrestrial Denning Habitat), and Unit 3 (Barrier Island Habitat).

24. The Service’s sea-ice critical habitat (Unit 1), constituting nearly 96 percent of the proposed critical habitat for the polar bear, extends from the Alaskan coast a maximum distance of 200 miles into the Arctic Ocean to the limits of the United States Exclusive Economic Zone (“EEZ”) boundary. This enormous unit alone is far larger than any currently existing critical habitat designation.

25. The Service’s terrestrial denning critical habitat (Unit 2) consists of a five-mile wide swath of the North Slope coastline from Barrow to the Kavik River, and a twenty-mile wide coastal zone, including the Arctic National Wildlife Refuge (“ANWR”) extending to the Canadian border. Unit 2 encompasses 5,657 miles of land, which is an area larger than the state of Connecticut. The portion of Unit 2 west of ANWR includes areas encompassing a majority of the oil and gas exploration, development and production occurring in Alaska.

26. The Service’s barrier island critical habitat (Unit 3) consists of all barrier island habitat within the Beaufort and Chukchi Seas, as well as a 1.6 kilometer (1 mile) buffer zone of water, ice or land surrounding all barrier islands. These buffer areas, which encompass all or portions of several Native Alaskan villages, are identified in the Final Rule as “no disturbance zones.” At 4,083 square miles, Unit 3 is more than one-and-a-half times the size of the state of Delaware.

27. The final critical habitat designation applies to an incomprehensibly vast area that includes enormous areas that do not contain any biological or physical attributes essential to



conservation of the polar bear species, and that require no special management considerations or protections.

28. The Service cannot reasonably make the required special management finding because the MMPA already adequately manages polar bear habitat. There is a long and well documented history showing that interaction between polar bears and the oil and gas industry in Alaska is minimal and that, to date, all oil and gas activity in Alaska has had no more than a “negligible impact” on the polar bear or its habitat. The MMPA achieves this result through regularly promulgated incidental take regulations that provide required mitigation measures applicable to oil and gas activities in polar bear habitat.

29. The Service itself has repeatedly concluded that the MMPA regulations referred to above “have ensured that industry effects on the polar bear have remained at the negligible level” and provide a greater level of protection to the polar bear than the ESA. *See* 74 Fed. Reg. 56,058, 56,072 (Oct. 29, 2009).

30. The Service concluded that the designation of critical habitat for the polar bear will provide no conservation benefit to the polar bear species. In light of this conclusion, and the determination that existing management under the MMPA already adequately protects the polar bear and polar bear habitat, the Service cannot reasonably justify any finding that polar bear habitat may require special management considerations or protections.

31. In designating polar bear critical habitat, the Service concluded that the designation will impose no more than *de minimis* economic impacts. In so doing, the Service identified the polar bear listing decision and associated regulatory consequences as part of the “baseline” from which the economic impacts of the critical habitat designation are assessed. The

Service then assumed that all economic costs associated with ESA regulation of the polar bear are derived from the listing decision and, therefore, concluded that the economic impact of designating critical habitat is, at most, the incremental costs associated with Section 7 processes.

32. The Service's "baseline" approach, as set forth in the preceding paragraph is unlawful and inconsistent with the ESA.

33. The designation of essentially all oil and gas exploration areas on the North Slope and in the adjacent Beaufort and Chukchi Seas as polar bear critical habitat, including the resulting threatened and actual litigation, will delay and impede oil and gas activities, will increase costs, such as ESA Section 7-related costs due to project delay, project slippage, or deferred production or closure, and is likely to result in less exploration, fewer opportunities to discover economic reserves and, therefore, less development and production of domestic oil and gas resources in these areas. The Service's economic analysis in support of the polar bear critical habitat designation does not account for these costs.

34. Conservatively, the Service's economic analysis underestimates reasonably identifiable and certain economic impacts attributable to the Service's designation of polar bear critical habitat of between tens of millions and billions of dollars.

35. The Service expressly requested public comment on whether it should use its authority under ESA Section 4(b)(2) to exclude certain areas from designation. In response, AOGA's comment letters, comment letters from AOGA's members and the comment letters of others, provided concrete and detailed information identifying existing oil and gas leases and facilities, planned developments, exploration areas and potential future developments, and

leasing plan areas that should be excluded, and the associated reasons that in balancing the benefits of exclusion with the benefits of inclusion, these areas should be excluded.

36. Nowhere in the final rule does the Service adequately respond to the comments the agency received or actually make a finding that the benefits of excluding the areas identified by AOGA, AOGA's members and others do not outweigh the benefits of including them in the designation of polar bear critical habitat as required by ESA Section 4(b)(2).

## **VI. FIRST CLAIM FOR RELIEF**

37. Plaintiff incorporates by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

38. Areas designated as critical habitat must include those physical or biological features essential to the conservation of the species. 16 U.S.C. § 1532(5)(A)(i).

39. The Service has designated vast areas as polar bear critical habitat in the Final Rule despite the absence of those physical or biological features essential to the conservation of the species.

40. The APA authorizes reviewing courts to set aside federal agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with the law. 5 U.S.C. § 706(2).

41. By improperly designating areas that lack the physical and biological features "essential to the conservation of the species," Defendants have acted in a manner that is arbitrary, capricious, an abuse of discretion and contrary to applicable law in violation of the APA, and that violates ESA Sections 3 and 4.

## **VII. SECOND CLAIM FOR RELIEF**

42. Plaintiff incorporates by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

43. Areas may be included within a critical habitat designation only if they may require special management considerations or protection. 16 U.S.C. § 1532(5)(A)(i).

44. The Service has designated vast areas as polar bear critical habitat in the Final Rule despite the absence of any present or foreseeable need for special management measures.

45. The APA authorizes reviewing courts to set aside federal agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. § 706(2).

46. By including areas that do not present any current or foreseeable special management considerations or protections, the Service acted in a manner that is arbitrary, capricious, an abuse of discretion and contrary to applicable law in violation of the APA, and that violates Sections 3 and 4 of the ESA.

## **VIII. THIRD CLAIM FOR RELIEF**

47. Plaintiff incorporates by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

48. The Service was required by Section 4 of the ESA to consider the economic impact of specifying any particular area as critical habitat. 16 U.S.C. § 1533(b)(2).

49. The Service completed an inaccurate and incomplete economic impact evaluation that failed to account for real and significant costs of the designated critical habitat and that, accordingly, underestimates the economic impact by between tens of millions and billions of dollars. The Service's analysis renders the statutory requirement that the Service evaluate and consider economic impact a meaningless act.

50. The APA authorizes reviewing courts to set aside federal agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. § 706(2).

51. The Service's economic impact analysis is arbitrary, capricious, an abuse of discretion and contrary to applicable law in violation of the APA, and violates Section 4 of the ESA.

#### **IX. FOURTH CLAIM FOR RELIEF**

52. Plaintiff incorporates by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

53. The ESA provides that the Service may exclude areas that qualify as critical because the relative benefits of excluding such lands outweigh the relative benefits resulting from their inclusion. 16 U.S.C. § 1533(b)(2).

54. In response to the Service's request for proposals identifying lands that should be excluded on the basis of the balancing of relative benefits, AOGA, its members and others asked the Service to exclude specified areas under ESA Section 4(b)(2). However, despite these petitions for exclusion and robust supporting submissions, the Service failed and refused to perform the balancing required under ESA Section 4(b)(2). 16 U.S.C. § 1533(b)(2). Alternatively, if the Service engaged in the required balancing, the Final Rule does not provide any explanation for the decision of the Service to reject the submitted petitions for exclusion of specified areas.

55. The APA authorizes reviewing courts to set aside federal agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with law, and to enjoin the taking of action that an agency has unreasonably delayed or unlawfully withheld. 5 U.S.C. §§ 706(1)-(2).

56. The Service's failure to engage in a balancing analysis and to rationally explain its conclusion in response to the requested information and the submitted petitions for exclusion is arbitrary, capricious, an abuse of discretion, and contrary to applicable law, or agency action unreasonably delayed or unlawfully withheld, in violation of the APA. In addition, the Service's action, or failure to act, violates Section 4 of the ESA.

**X. FIFTH CLAIM FOR RELIEF**

57. Plaintiff incorporates by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

58. The Service's decision to designate critical habitat must be made "on the basis of the best scientific data available." 16 U.S.C. § 1533(b)(2).

59. The Service's designation of polar bear critical habitat, including the Service's accompanying economic impact analysis and failure to exclude specified lands after balancing, is not based upon, or has been made contrary to, the best scientific data available.

60. The APA authorizes reviewing courts to set aside federal agency action that is arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. § 706(2).

61. By failing to issue a critical habitat designation for the polar bear that is based upon, and supported by, the best available scientific data, the Service has acted in a manner that is arbitrary, capricious, an abuse of discretion and contrary to applicable law in violation of the APA, and that violates Section 4 of the ESA.

**XI. SIXTH CLAIM FOR RELIEF**

62. Plaintiff incorporates by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

63. The Service's Final Rule establishes a "no disturbance zone" extending one mile around all designated barrier island habitat as part of polar bear critical habitat Unit 3.

64. Section 4 of the ESA does not authorize the Service to enact regulatory measures or protections, such as the polar bear "no disturbance zone."

65. The Service's presumptive determination that no activity may occur within certain designated critical habitat areas adjacent to barrier islands – substantial portions of which also lack suitable polar bear topography or other habitat features necessary for essential polar bear behaviors – is without basis in the ESA, contrary to the consultation requirements of Section 7 of the ESA, contrary to the best available science and otherwise an unsupported prejudgment.

66. By establishing a "no disturbance zone" around barrier islands under authority of designating polar bear critical habitat, the Service has acted in a manner that is arbitrary, capricious, an abuse of discretion and contrary to applicable law in violation of the APA, and that violates Sections 4 and 7 of the ESA.

## **XII. REQUEST FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Declare that the Service, in designating critical habitat for the polar bear species, violated the APA and ESA;

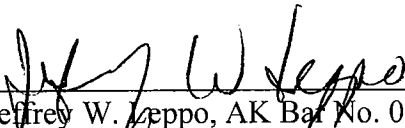
B. Vacate, or otherwise enjoin the implementation of, the Final Rule, and enjoin the Service to prepare a new critical habitat designation for the polar bear that complies with the mandates set forth under ESA Sections 3 and 4.

C. Award Plaintiff its reasonable attorney fees, costs, expenses and disbursements, including attorney fees associated with this litigation; and

D. Award Plaintiff such other and further relief as this Court may deem just and equitable.

DATED: March 1, 2011.

STOEL RIVES LLP

  
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