

ORAL ARGUMENT NOT YET SCHEDULED

No. 11-5354

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

Atcheson, *et al.*,

Plaintiffs-Appellants,

v.

SALAZAR, *et al.*,

Federal Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA
Case No. 09-cv-00941 (Judge Emmet G. Sullivan)

OPENING BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**(A) Parties**

Plaintiffs-Appellants are Keith Atchenson, Keith Halstead, Ben Hamel, Marcus C. Hansen, Aaron Neilson, Kevin Wieczorek, and Dennis Dunn – who will be collectively referred to as “conservation hunters” – and Conservation Force.

Defendants-Appellees are Ken Salazar, Secretary of the Interior; Daniel Ashe, Director of the Fish and Wildlife Service; and the U.S. Fish and Wildlife Service, who will be collectively referred to as “FWS” or “Defendants.”

Intervenors-Appellees are Center for Biological Diversity; Greenpeace, Inc.; Natural Resources Defense Council; Defenders of Wildlife; International Fund for Animal Welfare; and Humane Society of the United States.

(B) Rulings Under Review.

This Appeal seeks review of the October 17, 2011, Order (Dkt. No. 281) and Memorandum Opinion (Dkt. No. 282) of Judge Emmet G. Sullivan of the United States District Court for the District of Columbia in 09-941, reported as *Atcheson v. Salazar*.

(C) Related Cases.

This case has not previously been before this Court. This case is tangentially related to In re: Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation - MDL 1993, No. 11-5353, 1:08-MC-00764-EGS, which had been

consolidated with this matter, both in the District Court and on appeal, until this Court's May 5, 2012 Order terminating the consolidation. That appeal is related insofar as it stems from the denial of applications to import trophies of Canadian polar bears. However, case No. 11-5353 raises entirely different legal issues, as the permits are based on a distinct provision of the MMPA, and involves different plaintiffs, who hunted polar bears from different populations.

CORPORATE DISCLOSURE STATEMENT

Conservation Force is a nonprofit conservation foundation that directly participates in the conservation of endangered and threatened game species; it is not a parent company, subsidiary, or affiliate of any publicly-held company.

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

APA	Administrative Procedure Act
AR	Administrative Record
ESA	Endangered Species Act
FWS	United States Fish and Wildlife Service
MMPA	Marine Mammal Protection Act
PBAC	Polar Bear Administrative Committee
PBTC	Polar Bear Technical Committee

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under the Administrative Procedure Act (APA) 5 U.S.C. §706; and 28 U.S.C. §1331 (federal question jurisdiction). The Court may grant declaratory relief under 28 U.S.C. §1361 (mandamus), 28 U.S.C. §2201, 28 U.S.C. §2202, and 5 U.S.C. §706. The judicial review provisions of the APA and MMPA waive Defendants' sovereign immunity. 5 U.S.C. §702, 706; 16 U.S.C. §1374(d)(6).

This Court has jurisdiction pursuant to 28 U.S.C § 1291 and Article III Section 1 and 2 of the United States Constitution. Plaintiffs appeal from the denial and dismissal of their Motion for Summary Judgment and granting of FWS's Cross

Motion for Summary Judgment. The judgment is a final judgment pursuant to Fed. R. Civ. Pro. 58(c) and ripe for appeal pursuant to Fed. R. App. P. 4(a).

The District Court's orders were issued on October 17, 2011. Plaintiffs-Appellants' Notice of Appeal was timely filed on December 13, 2011.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. Was FWS arbitrary and capricious in finding that Plaintiffs failed to submit sufficient information to meet the standard for "enhancement" import permits under 16 U.S.C. §1374(c)(4)(A)?
- II. Did FWS fail to take into account all of the information submitted by Plaintiffs?
- III. Did FWS fail to provide a reasoned analysis of its decision and a satisfactory explanation basis for its factual findings and supporting reasons?
- IV. Did FWS improperly base its decisions on unstated, unexplained, and interpretations of §1374(c)(4)(A)?
- V. Alternatively, did FWS engage in improper rulemaking by creating and applying substantive rule without following required notice and comment procedures and by applying interpretive rules not published in the Federal Register?

STATUTES AND REGULATIONS

MMPA Enhancement Permits

When the FWS listed the polar bear as “threatened,” it was categorized as “depleted” under the MMPA by operation of law, not in fact. Plaintiffs have proceeded with the object of obtaining an “enhancement” permit to import these trophies.¹ Enhancement permits are provided for in 16 U.S.C. §1374(c)(4)(A), instead of 16 U.S.C. §(c)(5):

A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultations with the marine mammal commission and after notice and opportunity for public comment, has first determined that –

(i) taking or importation is likely to contribute significantly to **maintaining or increasing** distribution **or numbers** necessary to ensure the survival or recovery of the species or stock; and

(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under [16 USCS § 1383b(b)] or any recovery plan developed under [16 USCS § 1533(f)] for the species or stock, or (II) if there is no conservation or recovery plan in place, with

¹ Both the FWS and the Solicitor General have stated that importation of polar bear hunting trophies may still be permitted under the MMPA’s enhancement provision. AR 333 (Solicitor finding that “polar bear parts may continue to be imported under one of the exceptions listed in sections 101(a)(3)(B) and 102(b), provided that all legal standards are met); AR 338 (FWS, in Federal Register publication announcing Final Rule listing polar bear as threatened, noting that “[a]s a depleted species, imports could only be authorized under the MMPA if the import enhanced the survival of the species or was for scientific research”). Furthermore, in litigation related to the polar bear’s threatened status under the ESA, FWS has taken the position that listing the species as threatened does not “bar future applications for permits under other sections of the MMPA.” AR 560 (using as an example the exception for scientific research and enhancement of the survival or recovery of the species).

the Secretary's evaluation of the actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation plan or a recovery plan.

16 U.S.C. §1374(c)(4)(A) (emphasis added).

The language in Subsection (i) (“prong 1”) includes several alternatives, creating a number of different ways to satisfy the requirement. Most notably, the action must contribute significantly to either “maintaining or increasing” *Id.* Further, this maintenance or increase may apply to polar bear “distribution or numbers.” *Id.* The effect may cover either the entire species or a single stock. *Id.* Finally, the effected quality of the target group must be necessary to that group’s “recovery or survival.”

The requirement of Subsection (ii) (“prong 2”) is rooted in the concept of a “conservation plan.” “Conservation” is defined by the MMPA as “collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population.” 16 U.S.C. §1362(2). Among the expressly enumerated methods used to achieve conservation goals is “regulated taking”. *Id.* Conservation plans are discussed in 16 U.S.C. §1385(b)(2), entitled “Conservation Plans: Preparation and Implementation,” which provides:

1. The Secretary shall prepare conservation plans . . .

2. Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population.² The Secretary shall model such plans on recovery plans required under section [16 U.S.C. 1533(f)].

From this definition, conservation plans under the MMPA and recovery plans under the ESA are essentially the same. In evaluating a foreign program that does not have a U.S.-created plan, an agency should look to the criteria contained in 16 U.S.C. §1533(f), which requires that:

The Secretary, in development and implementing recovery plans, shall, to the maximum extent practicable –

* * *

(B) incorporate in each plan –

i. a description of such site-specific management actions as may be necessary to achieve a plan's goal for the conservation and survival of the species;

ii. Objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

iii. Estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

As the U.S. cannot have a recovery or conservation plan for Canadian polar bear, in this case it is only necessary to meet the second prong of 16 U.S.C.

² “[O]ptimum sustainable population” means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.” 16 U.S.C. §1362(9).

§1374(c)(4)(A)(ii). Thus, the taking or import must be “consistent with” those actions the Secretary determines are “required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation plan or a recovery plan.” *Id.* To be “consistent” is “having agreement with itself or something else; accordant; harmonious; congruous; compatible; compliable; not contradictory.” *Black’s Law Dictionary*, West 6th Edition, 1990; *see also* Merriam-Webster’s Collegiate Dictionary (11th Ed.) (defining “consistent” as “free from variation or contradiction . . . marked by agreement: compatible – usu. Used with *with*”).

Rulemaking under the APA and Federal Register Act

Defendants also applied an improperly adopted and noticed rule in violation of the Federal Register Act and APA because the denials of plaintiffs’ permit applications rely on conditions that do not correspond to existing published regulations. The Federal Register Act, found at 44 U.S.C. 1505, states that “there shall be published in the Federal Register . . . documents or classes of documents that may be required so to be published by Act of Congress.” One of the types of documents Congress requires to be published is a rule promulgated by an executive agency. The Administrative Procedures Act defines a “rule” as

(4) the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or

practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

5 U.S.C. §551(4). Furthermore, “‘rule making’ means agency process for formulating, amending, or repealing a rule.” 5 U.S.C. §551(5).

When it enacted the APA, Congress created two different categories of rules that must be published in the federal register. 5 U.S.C. §553 imposes a duty to undertake notice-and-comment procedures when an agency has created a substantive rule:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.

Under 5 U.S.C. §552(a)(1), both substantive rules and interpretive and procedural rules must be published, for:

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

* * *

b. Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

c. Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

d. Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency

Furthermore, 5 U.S.C §552(a)(1) ensures that “except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.”

STATEMENT OF THE CASE

Around the world, hunting and conservation are inextricably linked. The FWS has summarized the relationship well:

What do hunters do for conservation?

A lot. The sale of hunting licenses, tags, and stamps is the primary source of funding for most state wildlife conservation efforts.

By respecting seasons and limits, purchasing all required licences, [*sic*] and paying federal excise taxes on hunting equipment and ammunition, **individual hunters make a big contribution towards ensuring the future of many species of wildlife** and habitat for the future.

“Hunting,” U.S. Fish and Wildlife Service website, Dec. 12, 2007, <http://www.fws.gov/hunting/whatdo.html> (emphasis added). In the United States and abroad, sustainable-use hunting programs allow for the take of a limited number of animals; the meat from the hunted animal is typically consumed, the revenue from the sale of hunting licenses funds conservation and anti-poaching efforts, and the species thrives because the threat of poaching and over-take is diminished. These are the concepts behind, for example, the federal duck stamp

program. (see <http://www.fws.gov/duckstamps/Info/Stamps/stampinfo.htm>) With hunters' participation, many species that once dwindled now thrive.

“[T]he history of carefully regulated harvest regimes by local people has powerfully rejuvenated waning populations across North America.” AR 492.

The same concepts apply to foreign species, including the Canadian polar bear. This case concerns the strategically-designed conservation hunting strategy for Canadian polar bear population in the Gulf of Boothia, a region of Nanavut. The management unit for the Gulf of Boothia polar bear stock – in coordination with the local Inuit communities, Canada's Wildlife Management Division of the Department of Renewable Resources, and the Nanavut provincial government – are effectively managing the population of bear such that it remains slightly below its carrying capacity. Conservation hunting, in which non-local sportsmen pay large sums for the opportunity to harvest older male polar bears, is an integral part of this management strategy. These hunts comprise part of the scientifically determined, sustainable quota established for the population, which sets the total yearly harvest allowed for all manners of taking (including subsistence hunting, escorted non-native sport hunting, and problem animal control).

Conservation hunting is not merely sustainable use. It positively benefits polar bear, both the hunted population and the species, in a number of important ways. It directly enhances the health of the population by efficiently maintaining

the population at slightly below carrying capacity, culling members of the population that place the greatest individual strain on the available resources and contribute the least to the population's breeding potential. The funds generated from conservation hunting provide a necessary incentive for local Inuit communities to comply with the quota system, avoid alternative land uses, and actively participate in the management of the stock, providing invaluable practical experience with and traditional knowledge of the stock and its habitat. A portion of the fees paid by conservation hunters also goes to support conservation of Canadian polar bear on a provincial and national scale, including important research on population status and threats like global warming. All of these benefits will help the Gulf of Boothia polar bear stock survive the projected habitat loss projected to occur as a result of global warming in the foreseeable future.

Approximately three-quarters of polar bear conservation hunting in Canada is performed by U.S. residents. Hence, the continued success of conservation hunting, and effective polar bear management, in Canada is largely dependent on U.S. hunters, most of whom will choose not to hunt Canadian polar bear if they cannot bring their trophies home with them. Until the threatened listing, the 1994 Amendments to the MMPA permitted trophy imports, but when the FWS listed polar bear as an endangered species, the FWS declared that provision inapplicable.

This case raises, for the first time, the importation of Canadian polar bear trophies under the more general “enhancement” provision of the MMPA.

Between April 18, 1999 and May 29, 2005 the conservation hunters in this action – Keith Atcheson, Keith Halstead, Ben Hamel, Marcus C. Hansen, Aaron Nielson, Kevin Wieczorek and Dennis Dunn – each lawfully hunted a polar bear in the pristine and well managed Gulf of Boothia, which stock was on the verge of being approved for trophy imports when the polar bear ESA listing petition was filed. Considering the Gulf of Boothia population to be ideal population for import permitting in the wake of the ESA “threatened” listing, on July 9, 2008, Plaintiffs – the conservation hunters and their representative, Conservation force – submitted applications for MMPA enhancement permits under 16 U.S.C. §1374(c)(4)(A). In those applications, plaintiffs included information demonstrating the benefits of that hunting to polar bear conservation, its importance to the Canadian management strategy, and the unique status of the Gulf of Boothia stock and habitat. Most of the information was never considered.

On February 2, 2009, FWS denied the conservation hunters’ permits, concluding that Plaintiffs “were not able to provide information or documentation that the issuance of the requested import permit for a sport hunted trophy meets

these statutory requirements.” AR 450.³ In response to the denial, Plaintiffs submitted a Request for Reconsideration on March 18, 2009, which further clarified and explained how the conservation hunting both maintained the Gulf of Boothia stock at a level needed for survival and was consistent with the actions that would be required in a conservation plan for polar bears in the Gulf of Boothia. Plaintiffs also attached expert reports, prepared by the leading Canadian polar bear and social scientists, on the important benefits of the permitted activity in the Gulf of Boothia, which FWS did not consider in their decision-making process.

Defendants affirmed the permit denials on reconsideration, incorrectly concluding plaintiffs “failed to clarify how the trophy importations actually maintain or increase populations and how the imports ameliorate the primary threat to polar bear populations – global warming and sea-ice melt.” AR 593.⁴ Defendants also incorrectly stated that the applicants had failed to explain “how Canada’s polar bear management plan constitutes a conservation plan, or is consistent with the factors that would be addressed in a conservation plan. *Id.*

³ Although the FWS issued separate denial letters to each applicant, they are the same. For convenience, Plaintiffs cite only to the denial letter for Mr. Atcheson, AR 449-450.

⁴ As with the original denial letters, the applicants received separate letters denying reconsideration with substantially the same content. Thus, Plaintiffs refer only to the letter to Mr. Dunn, AR 592-93.

The District Court adopted Defendants' position and rendered summary judgment in their favor. Dkt. Nos. 280, 281.

STATEMENT OF THE FACTS

Canadian Polar Bear and Management Program

The current worldwide population of polar bears is estimated to be 20,000-25,000, up from an estimated low of 8,000-10,000 in the 1960s. Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout its Range, 73 F.R. 28212, at 28215 (May 15, 2008); *see also* AR 141, 204, 228. Approximately 60% of the species is "subject to the Canadian conservation regime." AR 477.

"[P]olar bear conservation and management in Canada is the responsibility of nine separate Canadian jurisdictions," all of which "work together under the Polar Bear Administrative Committee (PBAC)." AR 477. Moreover, "polar bear management and research is an expressly cooperative venture between the local users, their representatives, and government." AR 155. In fact "[o]ne of the strongest aspects of the program is that the management decision process is integrated between jurisdictions and with local hunters and management boards. A main feature of this approach is the development of Local Management Agreements between the communities that share a population of polar bears." AR 219.

A significant aspect of polar bear management in Canada is regulating harvest by humans. To this end, every population of Canadian polar bears is subject to a quota limiting the number of polar bears that may be harvested each year.

The polar bear quota is based on the population estimate, the estimated growth rate of that population, and the sex ratio of the kill. . . . The rationale of this approach is that if a polygamous population is managed such that the reproduction potential is not diminished or exceeded, the harvest will be sustainable.

AR 158 (internal citation omitted)⁵; *see also* 73 F.R. 28212, 28277 (“All human-caused mortality (i.e., hunting, defense of life, and incidental kills) is included in a total allowable harvest. . . . [E]ach community obtains an annual harvest quota that is based on the best available scientific information and monitored”). “Canadian management objectives for polar bears focus on maintaining productive

⁵ By 2002, Nunavut had slightly altered its method of determining harvest quotas to incorporate a “newer and potentially more predictable approach, known as ‘risk management,’ which assigns a given polar bear population a risk factor” based on essentially the same information described above. AR 238. Through this methodology, “Nunavut recognizes the level of risk that is acceptable for each polar bear population, and the plan is to adjust quota levels to maintain the risk factor at or below that level.” *Id.* What the risk value actually measures is “the number of bears that can be taken per year with not more than 10% risk of a population decline that would require more than 5 years of harvest moratorium to recover the current number over a 15-year period starting from the most recent population inventory.” AR 532. While less direct, this method “is highly accurate in predicting such effects long in advance of actual decline.” AR 238. Furthermore, “the latest figures show that the Gulf of Boothia [the stock at issue in this case] has the lowest risk factor of any population of polar bears in Canada, at current harvest levels.” AR 238.

populations.” AR 27; *see also* 73 F.R. at 28277 (“The Canadian system places tight controls on the size and design of harvest limits and harvest reporting. Quotas are reduced in response to population declines”).

“Managers in Canada believe functioning adaptive co-management arrangements offer the greatest hope for ensuring the conservation of the 13 polar bear populations that occur, in whole or in part, in northern Canada, a view shared by managers in Alaska.” AR 485; *accord* 73 F.R. at 28286 (“Canada manages polar bears in an effective and sustainable manner”). Furthermore, conservation hunting is “without question an integral part of Canada’s polar bear conservation plan.” AR 477.

The Gulf of Boothia Population and American Tourist Hunting

“The Gulf of Boothia subpopulation of polar bears is estimated to number about 1528 bears.” AR 475. This is slightly above the “target number” of 1500 for the Gulf of Boothia population. AR 533. This population is not in fact depleted, nor is it likely to become depleted in the near future. The Gulf of Boothia stock is one of the healthiest populations of bear, and the harvest is sustainable. *See* 73 F.R. at 28217 (FWS finding that “[t]he Gulf of Boothia population estimate is 1,523 animals (2000); the trend is thought to be stable, and status is designated as not reduced”). In fact, the population has grown extensively

in the last 15 years, as the population was estimated at 900 bears as late as 1997. AR 227.

The “Archipelago ecoregion,” which includes the Gulf of Boothia is not forecasted to experience significant habitat loss within the next 36 or 45 years, with only “modest changes in habitat and polar bear carrying capacity.” AR 308; *accord* 73 F.R. at 28217 (FWS finding that global warming and subsequent habitat loss will affect the Gulf of Boothia “to lesser degrees and later in time” because it is one of the “more northerly populations [that] are expected to be affected last due to the buffering effects of the island archipelago complex, which lessens effects of oceanic currents and seasonal retractions of ice and retains a higher proportion of heavy, more stable, multi-year sea ice”). Furthermore, the USGS reports that “the Archipelago Ecoregion would provide refuge to polar bears well into the century.” AR 311.

“Nunavut bears are well-managed and protected, from unsustainable use. The basis of this successful management program is sound research, strict quotas, and effective monitoring.” AR 260. “Polar bears in Canada are managed at the population level because each population faces a different set of conditions that affect productivity, survival, and ultimately, population size.” AR 268. Polar bears in the Gulf of Boothia are managed, including regulation of all forms of harvest, according to a Memorandum of Understanding between the local

communities and the government of Nunavut. *See* AR 532-55 (2005 Polar Bear Management Memorandum of Understanding “MoU”). This comprehensive memorandum provides a detailed quota system, not just setting a number but describing how the quota is determined and allocated, compliance monitoring, specific restrictions and requirements for the different methods of harvest, and even a provision for automatic harvest reductions or moratorium in response to populations declining below the target number. *Id.*

Among the objectives of the MoU are:

To manage polar bears to . . . ensure good conservation of polar bears by keeping the risk of population decline due to overharvest within the acceptable level in accordance with the best information available, including comprehensive harvest statistics.

* * *

To ensure that the [Gulf of Boothia] polar bear population remains abundant and productive.

* * *

To conserve female polar bears in order to mitigate the impact of harvesting on the [Gulf of Boothia] population, and encourage the number of polar bears in the [Gulf of Boothia] population to attain and retain the target number. This requires harvesting the [Total Allowable Harvest] at 2 or more males per female taken. It is recognized that it would be to the benefit of the [Gulf of Boothia] population to keep the proportion of males harvested as high as possible.

To minimize detrimental effects on human activities, especially commercial activities, to the polar bears and polar bear habitat of the [Gulf of Boothia] population.

To identify research priorities and ensure participation of local people in research activities and the collection of harvest data for the [Gulf of Boothia] population.

AR 533-34.

For the Gulf of Boothia stock, “[t]he current [total] harvest is limited to 74 bears/year, while the average offtake for each of the five years 2001-2006 was 56.4.” AR 472. At all relevant times, the total harvest has actually been below the quota. The amount of the total harvest allocated to conservation hunting is “determined by local hunters deciding how many of their legal subsistence harvest will be offered each year to non-resident (often U.S.) hunters.” AR 473.

General Benefits

It cannot be disputed that conservation hunting of Canadian polar bear positively contributes to conservation of the species. The FWS has regularly admitted the conservation benefits:

We [the FWS] recognize the important contribution to conservation that scientifically based sustainable use programs can have. We further recognize the past significant benefits to polar bear management in Canada that have accrued as a result of the 1994 amendments to the MMPA that allow U.S. citizens who legally sport-harvest a polar bear from an MMPA-approved population in Canada to bring their trophies back into the United States. In addition, income from fees collected for trophies imported into the United States are directed by statute to support polar bear research and conservation programs that have resulted in conservation benefits to polar bears in the Chukchi Sea region.

AR 338; *see also* AR 490 (“U.S. and other non-Canadian hunters must purchase a C\$750 trophy fee and an additional C\$50 tag fee from the government of the

territory where the hunt will occur”), 491 (“Nunavut, with a population of about 31,000 spends about C\$1 Million annually on polar bear research and monitoring”).

These conservation benefits are also generally apparent from the negative consequences of eliminating conservation hunting. Experts recognize that preventing U.S. hunters from importing legally hunted Canadian polar bear trophies would “seriously disrupt[] the highly effective Canadian conservation strategy.” AR 477. In fact, “[t]he single factor that most impacts the Nunavut sport hunt is the *U.S. Marine Mammal Protection Act* (MMPA). This is because U.S. hunters can only take trophies into the U.S. if they fully satisfy all requirements set down in the MMPA.,” and removing their ability to import trophies will cause “[t]he loss or restriction of this client base.” AR 261, 262.

Additionally, the export reports submitted by Plaintiffs reveal numerous ways conservation hunting enhances the survival of the Gulf of Boothia polar bear stock, particularly by helping maintain the population at its optimum size.

Conservation hunting enhances the health of the population by removing bigger, older males.

Because the Gulf of Boothia population is growing and/or stable, harvesting excess adult male bears is an important means of maintaining a healthy population that is best situated for long-term survival. “There are widely recognized

biological benefits to maintaining a wildlife population below the environmental carrying capacity.” AR 472.

“The carrying capacity of a population fluctuates in relation to reductions in recruitment and survival rates that may result from reduced availability of prey species and/or secondary sources of food, from same-species aggression or predation.” AR 472. In other words, when population numbers meet or exceed the carrying capacity of the habitat, the health of the stock benefits if the excess bears are harvested, instead of allowing the entire population to suffer while it decreases naturally. Thus, conservation hunting that keeps polar bear populations below carrying capacity in the Gulf of Boothia “results in individual animals being in better condition, close to or at maximum rates of productivity, and exhibiting better survival outcomes for all sex, age, and family status groups.” AR 472.

Furthermore, the fact that “[c]ubs remain with the [mother] until they are about 2.5 years old, during which time the female avoids associating with adult males” leaves “fewer females available to breed in any one year than males,” and consequently “intrasexual competition among males for access to breeding females.” AR 218. More specifically, for the Gulf of Boothia stock, “[i]n current management, males are considered to be surplus.” AR 259 (2005 report by IUCN Polar Bear Specialist Group). Thus, “[a]s male bears represent a lethal threat to adult female, cub, and juvenile bears, hunting that favors reducing numbers of

predatory large males may exert a positive influence on population numbers.” AR 479.

The permitting decisions did not discuss, analyze, or make any finding regarding this fundamental wildlife management practice, nor is there any indication FWS even considered it as a factor.

Conservation hunting further enhances the population’s ability to reproduce by reducing the number of females harvested.

“Mating in polar bears is promiscuous, thus recruitment is primarily a function of the number of adult females.” AR 195; *see also* AR 225 (“the two most critical parameters for estimating sustainable harvest are population numbers and adult female survival rate”). For this reason, “[i]f females are harvested at rates less than the sustained yield, the number of females and consequently recruitment can increase.” AR 157. Accordingly, “[a] common technique in wildlife management is to emphasize males in the harvest as a method of increasing sustainable yield and conserving the reproduction potential of a population. AR 156.⁶ Additionally, “[m]odeling [has] demonstrated that in a long-

⁶ Although this kind of “sex-selective harvest will change relative abundance over time . . . hunter selectivity will compensate in a dynamic fashion to keep the sex ratio of the kill constant.” AR 161-62. In other words, “the female segment (and recruitment of both males and females) increases over time,” so “the increased rate at which males are recruited eventually compensates for the initial over-harvest of males.” AR 167.

lived, slow reproducing species like the polar bear the most critical portion of the population are the adult females.” AR 187.

For these reasons, in 1978-79 Canada instituted a “special quota [that] was an attempt to target older larger males.” *Id.* However, “[t]he sport hunt appears more effective at targeting the male portion of the population than the special quota.” *Id.* Conservation hunting helps reduce the number of females taken because “trophy hunters selectively hunt large male bears, whereas local subsistence hunters take bears in a more opportunistic manner.” AR 473; *accord* AR 186, 198, 214, 479; *see, e.g.* AR 154 (“[In the Northwest Territories and Nunavut] [t]here were 37 tags assigned to the sport hunt in 1992-93; 29 of the 31 bears killed in the sport hunt were male”). Conservation hunting therefore “provides an additional measure of protection to adult females.” AR 214.

Ultimately, this effect improves the ability of the population to reproduce at higher rate.

the conservation hunt, by deliberately taking few female bears **results in a greater than anticipated reproductive potential** for that particular regional subpopulation, with the increase providing immigrant bears to adjacent populations and/or increasing the number of bears in the Gulf of Boothia subpopulation. Such potential for increase resulting from the selective hunting associated with sport hunts **will be beneficial if polar bear recovery programs are required in the future.**

AR 473 (emphasis added). This effect is also one of the reasons why the population has increased dramatically over the last two decades, even though the

level of harvest has not decreased. Thus, it contributes to either increasing or maintaining the Gulf of Boothia stock to the optimum size for its future survival.

FWS did not discuss, analyze, or make any finding regarding this effect, nor is there any indication it was even considered.

Conservation hunting leads to fewer bears being harvested overall.

Conservation hunting also causes fewer total bears to be harvested each year. “Quota tags for sport hunting (about 15% per year) that are not filled by the sport hunter are not used.” AR 171. As approximately 30% of conservation hunts, which comprise 15% of the total harvest quota, are unsuccessful, “[t]here is a conservation benefit from this activity [viz. conservation hunting],” in that “the total harvest of polar bears is reduced.” AR 479 (quoting PBAC 2007 submission to FWS)⁷.

This benefit is clearly evident in the statistical information provided to the FWS. In a study of hunts throughout what is now the Northwest Territories and Nanavut from 1979-1990, “26% of the sport hunts resulted in no bear being taken,” leading the researchers to conclude that “[f]rom a conservation perspective, sport hunting may be preferable to the domestic harvest.” AR 186. Another study stated that “[t]he 1989-1994 seasons are characterized by [trophy hunt] success rates of

⁷ By contrast, unused tags that were not allocated for conservation hunts are “counted as credits to the community” and may be “allocated in future years”. AR 537, 540.

76 to 84 percent.” AR 220. In 1992/93 and 1993/94 seasons, 4 of the 15 sport hunts from the Gulf of Boothia population were unsuccessful. *Id.* Similarly, for the 2004/05 season in the Gulf of Boothia, 9 tags were allocated for sport hunting, but only 6 of those hunts were successful. AR 274.

Each of these unsuccessful hunts corresponds to a polar bear that would have been harvested if the tag had not been allocated to conservation hunting; as discussed below, the local Inuit communities would have to harvest the full quota, if not more, to survive if they did not receive income from conservation hunting. Thus, the total harvest is less than it would be without the tourist hunting. The benefit of fewer bears being harvested because of conservation hunting may also be seen in the overall increase in the Gulf of Boothia population since the 1990’s. *Compare* AR 213, 227 *with* AR 475; 73 F.R. at 28217.

FWS did not analyze this evidence or explain how it did not demonstrate that conservation hunting “actually reduces the number of bears taken from the set quota.” AR 449-50. There is no indication FWS considered this information in its decision, particularly why it did not contribute to increasing or maintaining the population?

The economic benefits of conservation hunting provide a crucial incentive for natives to comply with regulations and participate in management of the species.

One of the most pervasive benefits of conservation hunting is that it makes the conservation of polar bears economically and socially viable for the local Inuit communities who are most important to ensuring the survival of the population inhabiting their land.

Generally, “[t]he high value of the outfitted hunts and the traditional subsistence hunt to community members result in a high value placed on the polar bears as a resource and a concomitant high level of compliance with conservation measures.” AR 272-73. Specifically, “in every community that stages trophy hunting, the polar bear conservation hunt provides some community members the means to obtain essential income in their communities where employment opportunities are scarce.” AR 481. “Whereas the gross economic return from obtaining a polar bear in a subsistence hunt may be around \$1000 . . . , the revenue flowing to the community from hosting one conservation-hunting visitor may be 15 to 25 times as great (whether or not a polar bear is taken).” AR 482. Additionally, “the estimated total return in food and hunting equipment purchased from each dollar earned during the short conservation hunting season is large in socio-cultural and nutritional terms.” *Id.*

In this way, “[t]he **economic importance of this species to northern communities is fundamental to the long-term management of these populations.**” AR 481 (emphasis added). The importance of this economic incentive led one expert to conclude:

The main benefit of sport hunting in the Gulf of Boothia subpopulation management area is that it provides an indisputable economic incentive for hunters to follow the regulations governing long-term polar bear conservation, even when, on occasion, communities may be required to lower the agreed-upon Total Allowable Catch (quota) to accommodate defense, accidental, non-permitted kills, or any reduction in polar bear subpopulation size due to natural environmental variability.

AR 473. Thus, once conservation hunting became a significant part of the polar bear harvest in Canada, the total harvest actually declined. AR 207 (while the number of sport hunts in the Northwest Territories and Nanavut increased dramatically after 1994, both the quota and actual number of polar bears harvested decreased, with the quota being reduced by 12%, or 75 bears, and the actual harvest decreasing by nearly 20%, or 109 bears). This decrease resulted from the increased understanding that the harvest was too great and from the increased income to local communities that enabled a decrease in subsistence hunting. *Id.*

Equally as important, conservation hunting supports a management system in which local Inuit communities are active participants, who contribute their extensive traditional knowledge of the land and the population to the formulation of management plans and actively participate in managing the stock and protecting

it from many kinds of harm. In other words, “conservation hunting programs in the Canadian Arctic were introduced almost forty years ago and continue to provide considerable incentive for local resource users to fully comply with management and conservation programs that they participate in formulating and implementing.” AR 473; *accord* AR 480 (“Currently there exists a high degree of cooperation and goodwill afforded by Inuit hunters and community members to the co-management institutions in Nunavut”).

The expertise of local communities is an invaluable resource for population-specific conservation strategies:

The adaptive (co)management decisions affect[ing] each sub-population’s sustainability are both accepted and complied with by local hunters because, among other considerations, respectful attention is given to the local expertise provided by Inuit hunters. This locally-generated information relates, *inter alia*, to observed changes in body condition, denning areas, sea ice, and availability of the bears’ principle source of food (ringed seals). Such information is taken into account when establishing population estimates derived from scientific surveys, when setting hunting quotas, and when making other appropriate conservation decisions.

AR 472.

Furthermore, the importance of Inuit active participation in conservation and management efforts cannot be understated. “WWF believes that well managed hunting by local people in these northern regions constitutes a very important conservation tool, whereby future generations will continue to value highly these natural areas for the wildlife populations they support.” AR 484.

Inuit, in common with many other traditional hunting peoples, consider themselves to be the stewards of wildlife. They do not think of themselves as “managers” in the western understanding of the term, for “management” implies the exercise of control over animals and nature, which is antithetical to their understanding of human/animal relationships. The relationship between Inuit and animals is one of mutuality, where animals will thrive and freely offer themselves to hunters as long as the animals are treated with respect. The challenge for Inuit elders and hunters is to insure that such beliefs continue to be valued in an increasingly transformed and secular world. Despite the magnitude of the challenge, there is evidence that such beliefs persist in Inuit societies.

AR 231 (internal citations omitted). As long as conservation hunting gives the polar bear sufficient economic value, Inuit communities in the Gulf of Boothia can continue in their traditional role as stewards of the polar bear population.

Unfortunately, since the U.S. has begun “ignor[ing] Northerners’ relevant knowledge and understanding about polar bear adaptation to changing environmental conditions,” starting with the FWS’s decision to list polar bear as “threatened” under the ESA, “a rapid and significant deterioration in trust and cooperation has occurred.” AR 480. If the U.S. continues along its current path of refusing to allow conservation hunters to import their legally acquired Canadian polar bear trophies, it will “detract from the acceptability of current (co)management programs [and] diminish the efficacy of the successful (as measured by the known sustained growth of polar bear numbers over the past forty years) conservation and adaptive management regime currently in place in Arctic Canada.” AR 473. Ultimately, “removing these economic incentives will very

likely compromise, if not destroy, current conservation program in northern Canada (where about two-thirds of the global polar bear population lives), whilst offering no improvement to the status of polar bears locally or globally, at a time when polar bears are currently at their highest population level in recent history.” AR 474.

FWS’s permitting decisions did not explain why this was not sufficient evidence that conservation hunting has and can contribute significantly to increasing the Gulf of Boothia population and that it currently contributes significantly to maintaining the stock at its optimum size.

Conservation hunting mitigates human-animal conflicts.

“[P]olar bear management in Nunavut is a success story, insofar as research and IQ have demonstrated that most polar bear populations have increased in size, to the point where high polar bear numbers in some locations have become a threat to public safety.” AR 264. On the other hand, “[polar bear] populations with individuals (especially subadults) that are in good condition probably present less danger to humans as it is hungry animals that are more fearless and aggressive.” AR 472. Culling excess bears from the Gulf of Boothia is important to reduce human-animal conflicts that discourage communities from complying with harvest regulations and provide incentives to tolerate a higher number of bear.

Hence, “[p]olar bear management requires balancing the economic and hunting values that favor higher numbers of bears with the real threat to life and property that increases with higher population densities.” AR 473. Conservation hunting is a critical tool to achieve this balance.

A secondary, but also significant benefit of maintaining conservation hunting is that local community residents are more likely to accept the damage to their meat caches, cabins, and equipment (that occurs more often in the presence of a high density polar bear population) if polar bears retain high commodity value, which certainly results when some of the community polar bear quota is allocated to visiting conservation hunters.

AR 473; *accord* AR 485 (conservation hunting “[i]ncreas[es] the consumptive-use value of a potentially dangerous species, such as the polar bear, [which] helps offset the dangers and associated opportunity costs”). Without the incentives created by conservation hunting, local Inuit communities in the Gulf of Boothia populations would not tolerate such a large population of bears.

FWS failed to analyze, discuss, make a finding on, or otherwise consider this information.

The benefits of conservation hunting mitigate the threat of global warming/habitat loss on the Gulf of Boothia stock.

Considering the forecasted decline in polar bear habitat as a result of global warming, the benefits of conservation hunting described above will be particularly important for the survival of polar bears in the Gulf of Boothia, and range-wide.

“In the Archipelago Ecoregion, [USGS] projected total carrying capacity to decline 3-14% from present levels by year 45, 18-21% by year 75, and 21-24% by year 100.” AR 307 (report: Forecasting the Range-wide Status of Polar Bears at Selected Times in the 21st Century). Thus, conservation hunting’s effect on the health of the population is doubly important, since “[w]hen animals are in better conditions, they are less likely to be infected by disease, and are more resilient to environmental fluctuations (such as climate change or climate variability) or other stressors, than are individuals from populations at or near carrying capacity.” AR 472.

Furthermore, “Environmental instability affects the number of females available for breeding, and the number that actually produce offspring, by affecting survival rates of cubs and the nutritional status of breeding females.” AR 193. Thus, conservation hunting will also help Gulf of Boothia polar bears survive global warming, as “reducing numbers of predatory large males . . . may become more important if, as some scientists believe, polar bears’ reproductive success will be negatively impacted by a shortened feeding period due to less sea ice in the future.” AR 479.

Conservation hunting is also needed to maintain management practices capable of quickly and effectively responding to the effects of global warming, as they arise.

In most of the Arctic it is the indigenous peoples who will play the key role in management and conservation of wildlife... Direct involvement of the users of wildlife in its management at the local level has the potential for rapid management response to changes in wildlife population... Rapid response to changes in numbers and distribution of wildlife is a prerequisite for effective management...and conservation under present conditions of limited predictability of ecosystem responses to climate change.

AR 479-80. For example, conservation hunting supports a “periodic inventory [that serves as] an independent check to insure that declines could be detected and reversed before the population was damaged by over-harvest, or some environmental effect that altered vital rates.” AR 171; *accord* AR 227 (“Because of both the monitoring program and the contribution of local knowledge, the DRR anticipates they would likely detect any overharvest or significant change in the population due to natural ecological reasons”).

In fact, the Canadian polar bear management strategy is already addressing for the threat of climate change. “Canadian management and conservation initiatives are already in place to respond to changes in population size. Canadian jurisdictions have a proven history of taking corrective measures to ensure that polar bear populations remain productive.” AR 274. Furthermore:

Canadian research has been undertaken to identify and monitor the immediate impacts of threats to polar bears that include not only climate change but also environmental contaminants, industrial development, and human harvest.

Management includes a high level of local community input as well as regional, national and international involvement. In some areas,

where polar bears are at the extreme southern edge of their range, such as in the western Hudson Bay, reduced sea ice conditions, likely related to climate change, are having a negative impact on polar bears. The responsible management authorities are closely watching these populations and new management approaches are being discussed to address the decreasing habitat capacity.

AR 269; *see also* AR 271 (Canadian management programs have incorporated “monitoring and preventive management . . . to ensure that a species remains healthy”). This includes “annual reviews,” which “provide an appropriate framework within which to respond to the impact of climate change on polar bear populations.” AR 272. Conservation is necessary to maintain these effective practices.

Finally, conservation hunting more directly combats the threat of future habitat loss. As the FWS has stated:

In addition to the effects of climate change on sea ice, we have also evaluated changes to habitat in the Arctic as a result of increased pressure from human activities. Increased human activities include a larger footprint from the number of people resident to the area, increased levels of oil and gas exploration and development and expanding areas of interest, and potential increases in shipping. Cumulatively, these activities may result in alteration of polar bear habitat.

73 F.R. at 28276. Conservation hunting thus prevents habitat loss from competing uses that will compound and exacerbate the effects of global warming:

The socio-cultural and economic value that is placed on Polar Bears contributes to their conservation in important ways. First, the greatest threat to bears – as to almost all living resources – is habitat loss. The Canadian Inuit are aware of the habitat requirements of bears,

especially denning areas where the females construct birth lairs in the snow where their (usually twin) cubs are born. Females with cubs are not hunted, and any land use activities that would negatively impact denning (e.g., oil and gas or mining activities) are forbidden. It should be noted that Canadian Inuit communities, having made wildlife conservation their highest legislated priority, enjoy virtual veto power over issuance of land use permits in areas they customarily occupied and used (and continue to use and value) for hunting, trapping, fishing, and other culturally-important activities.

AR 231.

Furthermore, “the taxable income and license fees derived from commercial use of wildlife allows the important economic value of wildlife to become more visible and less-seriously underrated,” which is “important when assessing the full economic costs of industrial development projects (e.g. mineral and hydrocarbon exploration, development and transportation to southern markets) that may threaten ecosystem integrity.” AR 484.

In sum, conservation hunting will protect Gulf of Boothia polar bears from the threat of global warming by making the population better suited to survive the resulting habitat loss, supporting management and conservation practices that can further help them survive the specific effects that arise, and preventing alternative land uses that would compound the effects of global warming. “Listing polar bears under the US ESA will not stop the impacts of climate change on loss of sea ice and polar bears,” AR 274, but as the threat of global warming progresses,

conservation hunting will continue to be necessary and even become more important than ever.

SUMMARY OF THE ARGUMENT

The Gulf of Boothia population is particularly well-suited for enhancement by U.S. tourist hunting. Plaintiffs submitted reams of expert reports that explained how conservation hunting has *increased* the population to its optimum level, is necessary to *maintain* these numbers, and would contribute significantly to any future increase that may become necessary. It is further clear that conservation hunting is consistent with the activities that would be included in any polar bear recovery plan, even one focused on the threat of global warming with resulting habitat loss. Because U.S. hunters make up a vast majority of conservation hunters, and because the inability to bring home their trophies would substantially reduce their participation, both the taking and import of these trophies enhance the survival of the Gulf of Boothia polar bear stock.

FWS wholly ignored, failed to consider and failed to explain why the benefits itemized in the expert reports and other information submitted did not demonstrate enhancement. The reasons given are insufficient, in that they are not supported by the record evidence or do not address all of the means of enhancement supported by the record. At minimum, the decision is based on

conclusory determinations not supported by any analysis or explanation. The permit denials were therefore arbitrary and capricious.

Moreover, FWS relied on improper, unexplained interpretations of the enhancement permit requirements in 16 U.S.C. §1374(c)(4)(A). Alternatively, FWS's decision was based on improper substantive and interpretive rules, which were adopted and applied without observing proper procedure.

ARGUMENT

Standard of Review:

This is a suit for judicial review of an agency action under the APA, 5 U.S.C. §§ 702, et seq.. Therefore, the Court of Appeals reviews the issues *de novo*, as if the agency's decision had been appealed directly to this Court. *Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002). *See also City of New York v. U.S. Dept. of Health & Human Serv.*, 34 F.3d 1161, 1166 (2d Cir. 1994) ("On appeal from a grant of summary judgment on an APA claim, we review the administrative record *de novo* and render our own independent judgment, according no deference to the district court's decision.")(citation omitted).

In particular, Plaintiffs claim the FWS's decision to deny the permits was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of 5 U.S.C. § 706(2)(A). As such, "the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry."

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (U.S. 1971).

Although “the Secretary's decision is entitled to a presumption of regularity . . . that presumption is not to shield his action from a thorough, probing, in-depth review.” *Id.*

This Court has explained the “arbitrary and capricious” standard as follows:

That standard requires an agency to **examine the relevant data** and articulate a **satisfactory explanation** for its action including a rational connection between the facts found and the choice made. The agency **must cogently explain** why it has exercised its discretion in a given manner, and that explanation must be sufficient to enable us to conclude that the agency's action was the product of **reasoned decisionmaking**.

Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006) (quotation marks and internal citations omitted) (emphasis added); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (U.S. 1983) (“an agency must cogently explain why it has exercised its discretion in a given manner”). This standard further requires agency decision makers to offer a “reasoned analysis” any time they “change their minds, reject earlier analyses, decide between conflicting pieces of evidence, and make policy decisions.” *Conservation Force v. Salazar*, No. 10-1057, 2012 U.S. Dist. LEXIS 44297 (D.D.C. March 30, 2012) (citing *National Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 667-68 (D.C. Cir. 2009)).

Additionally, an agency is arbitrary and capricious when it:

has relied on factors which Congress has not intended it to consider, **entirely failed to consider an important aspect** of the problem, offered an explanation for its decision that runs **counter to the evidence** before the agency, or **is so implausible** that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43 (U.S. 1983) (emphasis added). In such cases, “[t]he reviewing court should not attempt itself to make up for such deficiencies,” for it “may not supply a reasoned basis for the agency's action that the agency itself has not given.” *Id.*

Moreover, the administrative record must contain evidence and factual support for the decision made; unsupported agency statements and resulting legal conclusions will not survive scrutiny under arbitrary and capricious review. *Morall v. DEA*, 412 F.3d 165, 180 (D.C. Cir. 2005). A Court must “**reject conclusory assertions of agency ‘expertise’** where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation.” *Northern Spotted Owl v. Hodel*, 716 F. Supp 479, 483 (W.D. Wash. 1988), (emphasis added; internal citations omitted). When FWS “fail[s] to provide its own or other expert analysis supporting its conclusions,” its decisions will not be upheld.” *Id.* at 483.

I. Plaintiffs’ applications satisfied the enhancement requirements of 16 U.S.C. §1374(c)(4)(A).

Plaintiffs submitted sufficient information and clearly explained how the

conduct at issue, legally taking and importing polar bear trophies from the Gulf of Boothia, satisfies the requirements for an enhancement permit under 16 U.S.C. §1374(c)(4)(A). FWS failed to recognize that Plaintiffs' submission reasonably addressed all of the necessary elements, providing information that the hunts and subsequent imports would likely contribute significantly to maintaining the numbers of polar bears in the Gulf of Boothia at the level necessary for the survival of the species.

A. Prong 1: conservation hunting, and therefore the importation of Plaintiffs' trophies, contributes significantly to both increasing and maintaining the number of polar bears in the Gulf of Boothia, depending on which result is necessary for the survival of the stock.

Plaintiffs do not contend that the species-wide effects of conservation hunting, alone, satisfy prong 1 of the enhancement permit requirements, but focus instead on the Gulf of Boothia population. Any benefits to the entire species, such as funding for research and support for the national aspects of the management program, should have been considered as further evidence of enhancement of the Gulf of Boothia stock. Furthermore, Plaintiffs have demonstrated that the Gulf of Boothia stock population is not in need of recovery, as its population of 1528 polar bear is slightly above the "target number" considered the optimum population number for that habitat. AR 533. Nor did FWS ever find that increasing the size of the population was necessary to ensure its survival.

Plaintiffs have submitted information addressing two of the alternatives under prong 1. First, the information demonstrates that conservation hunting has, in fact, contributed to the increase in the Gulf of Boothia population from 900 bears in the early 1990's to above the target number of 1500 by the year 2000. Without the benefits of conservation hunting, the population would not have increased to this optimum level. Furthermore, the information shows that conservation hunting is a vital piece of the management strategy that will enable the population to increase in the future, if such increases become necessary for the population's recovery or survival.

By taking fewer females and removing older males who use a disproportionate amount of resources, conservation hunting increases the health and reproductive ability of the remaining population. These attributes will allow the population to increase more readily than a population of the same size that is less healthy and has a smaller proportion of females. If future circumstances require a reduced harvest to enable needed population growth, conservation hunting will also make it financially viable for local communities to accept and comply with such reductions. Unsuccessful conservation hunts will also contribute to greater reductions in harvest without decreasing the economic incentive. However, if U.S. sportsmen stop participating in Canadian polar bear conservation

hunts because they cannot bring their trophies home, these important effects will be greatly diminished.

Second, the information before FWS shows that conservation hunting contributes significantly to maintaining the Gulf of Boothia stock at the current target number of 1500 bears. FWS has not disputed the Gulf of Boothia management unit's determination that this population number is currently the optimum size for that stock. Thus, under current circumstances, maintaining the Gulf of Boothia population at or near 1500 bears gives it the best possible chance of survival.

As demonstrated in depth in the Statement of Facts, conservation hunting is an integral part of the management strategies that are currently maintaining the Gulf of Boothia stock at its optimum population size. The economic benefits of conservation hunting provide an important incentive for local communities to continue complying with sustainable quotas, and thereby prevent overharvesting from reducing the stock to a size that jeopardizes its survival. This economic incentive also encourages local Inuit communities to continue protecting the stock's habitat from competing land uses and, further, to actively participate in management of the population, which is a vital aspect of the overall success of Canada's management plan. With more females and fewer old males, the stock is healthier and generally more likely to remain at current size. Again, however, if

U.S. hunters cannot import their legally taken Canadian polar bear trophies, the resulting substantial decrease in conservation hunting will damage the delicate management agreements that are essential to Canada's renowned management strategy.

FWS could not rationally dismiss these contributions as insignificant without any sort of explanation or analysis, yet it provided no such analysis or explanation for the Court to judge the rationality of its decision.

B. Prong 2: Conservation hunting and importation of the resulting trophies is consistent with any reasonable recovery or conservation plan for the Gulf of Boothia

Plaintiffs have also clearly provided sufficient information and explanation to satisfy Prong 2, for the record demonstrates that conservation hunting of Canadian polar bear is consistent with Defendants' limited "evaluation" of actions required to enhance the survival the stock in light of the factors that would be addressed in a conservation or recovery plan, as well as any reasonable evaluation thereof.

Defendants state only that "a recovery plan would likely focus on actions needed to prevent or reduce habitat degradation or loss," AR 450, and further claim that "recovery plan" actions must "ameliorate the primary threat to polar bear populations – global warming and sea-ice melt." AR 593. Under this interpretation, the hunting strategy must be "consistent with" actions that protect

the polar bear habitat in the Gulf of Boothia and otherwise combat global warming and sea-ice melt. Conservation hunting is clearly “consistent with” with these actions, as it is an important and necessary management practice to maintain the population and does not prohibit any conceivable action that might be prescribed to combat global warming or habitat-loss.

Furthermore, reason dictates that an action is compatible with a conservation plan focusing on a specific threat when it is currently preventing another threat that could endanger the survival of the species as quickly if not more so than the threat on which the plan focuses. Conservation hunting enables the Gulf of Boothia management unit to effectively restrict polar bear harvesting and prevent over-harvest from reducing the population to dangerously low levels. If it could no longer serve this function, over-harvest would suddenly become a very serious threat to all polar bear populations in Canada. It does not make sense for a conservation plan to address the future threat of global warming, yet allow over-harvest to become an equally dangerous present threat.

The FWS has also stated that a “prudent and precautionary” measure to address habitat loss would be “[a]djusting harvest levels based on the consequences of habitat loss and corresponding reduction in physical condition, recruitment, and survival rates” and that “such adjustments may be addressed through existing and future harvest management regimes.” 73 F.R. at 28237. This

statement shows that harvest management would at least be a “factor” in a conservation plan focused on habitat loss and global warming. Considering how important conservation hunting is to managing polar bear harvests in the Gulf of Boothia, and all other Canadian management units, it is certainly consistent with any conservation plan that takes harvest management into account.

The FWS’s statement also reveals its agreement that a “prudent” conservation or recovery plan for polar bear, including those in the Gulf of Boothia, would not just attempt to prevent global warming and habitat loss, but would also prescribe actions to mitigate the detrimental effects of the threat. This approach is consistent with Canada’s actual management practices, which provides the “appropriate framework within which to respond to the impact of climate change on polar bear populations.” AR 271. In this light, conservation hunting becomes relevant for its myriad effects that combine to directly enhance the ability of the Gulf of Boothia population to survive decreased or worsened habitat and enhance ability of those who manage it to effectively conserve the stock. For example, the increased breeding potential from decreased female harvest “will be beneficial if polar bear recovery programs are required in the future.” AR 473.

The FWS has also found that “other factors, while not currently rising to a level that threatens the species, may become more significant in the future as populations face stresses from habitat loss.” 73 F.R. at 28241. Thus, it reasoned

that “continued harvest and increased mortality from bear-human encounters or other forms of mortality may become a more significant threat factor in the future, particularly for populations experiencing nutritional stress or declining population numbers as a consequence of habitat change.” *Id.* Certainly, then, actions that enhance the ability of the Gulf of Boothia population to survive these “other factors” would be consistent with a polar bear conservation plan.

“For other populations affected to a lesser degree by environmental changes and habitat impacts, effective implementation of existing regulatory mechanisms is necessary to address issues related to overutilization.” 73 F.R. at 28280.

II. Defendants Failed to consider all of the relevant factors and to provide a reasoned analysis of its unsupported conclusions and assumptions.

FWS concluded that “sport hunting and the import of the resulting trophies . . . in and of themselves do not meet the requirements of enhancement under the MMPA.” AR 593. It provides no reasons to support that conclusion other than the determination that Plaintiffs “were not able to provide information or documentation that the issuance of the requested import permit for a sport hunted trophy meets [the MMPA’s] requirements.” AR 450. However, Plaintiffs’ argument above reveals that sufficient information was provided, but FWS failed to consider or accept it. Even if FWS could have provided a rational explanation for its decision, which Plaintiffs dispute, it utterly failed to do so.

FWS failed to explain why it found that “it is not evident that sport hunting actually reduces the number of bears taken from the set quota,” AR 449, when the record clearly shows that fewer bears are harvested because failed conservation hunts count against the quota, whereas other tags that go unused in a season are reallocated in future seasons as “credits.” AR 537, 540. Furthermore, FWS did not explain how this finding affected their determination, considering the action does not have to increase the population to satisfy the enhancement requirements. By contrast, FWS never addressed the ways conservation hunting contributes to the maintenance of the Gulf of Boothia stock, as demonstrated in multiple expert reports.

FWS concluded that Plaintiffs failed to meet Prong 1 of enhancement analysis under 16 U.S.C. §1374(c)(4)(A) because Plaintiffs failed to provide scientific evidence that “sport hunting actually reduces the number of bears taken from the set quota.” (AR 449-50). There is simply no requirement that an enhancement activity reduce the number of bears taken. The statute in question requires that “taking or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock.” §1374(c)(4)(A)(i). Congress deliberately used the words “maintaining *or* increasing” to denote that an applicant need not necessarily prove that his action will increase the number of bears (or other marine

mammals) taken. By the terms of the statute the applicant may also prove the action will contribute to maintaining the population, and the evidence provided with Plaintiffs' applications and requests for reconsideration have certainly demonstrated that conservation hunting in the Gulf of Boothia serves to maintain the population at its optimum size. Defendants conspicuously ignored all evidence and arguments supporting the principle that this form of sustainable use "maintains" population.

Moreover, it cannot be disputed that fewer bear are taken by tourist hunters because of the lower success rate of those hunters. There is no record evidence contradicting this fact, nor did FWS give any reason for not accepting the evidence provided.

Similarly, FWS did not explain why it considered it determinative that "[i]t is unlikely that sport hunting of polar bears in Canada and the subsequent importation of the trophies into the United States would likely be a factor identified in a recovery plan as an action required to enhance the survival or recovery of the species." AR 450. Without further explanation, it appears FWS ignored the possibility that conservation hunting and subsequent trophy imports could be consistent with a recovery plan focused on reducing habitat loss and preventing global warming without actually being one of the actions required by such a plan.

FWS also failed to state whether a conservation or recovery plan focused on

the “primary threat” of global warming and sea-ice melt would include actions designed to mitigate the effects of that threat as well as actions directed at the underlying cause. In the absence of any analysis, or even any recognition of the possibility, Defendants’ decision entirely failed to take this important factor into account.

Finally, Defendants’ failed to specifically address and analyze almost all of the itemized ways conservation hunting contributes to the management – increasing or maintaining as needed – of polar bears in the Gulf of Boothia: the benefits of taking fewer females; of culling older (surplus), larger males; of the lower number of bear taken than with subsistence hunting alone; of the incentive for local communities to avoid alternative land uses and tolerate more bear, particularly more bear in less habitat; and of active participation by local communities in managing and conserving the stock. The expert reports and explanation submitted by Plaintiffs clearly laid out these reasons, yet FWS wholly ignored them.

The FWS decision is almost entirely devoid of any explanation or analysis, such that many of its points are irrational. It further failed to address numerous important factors to the enhancement determination. At the very least, FWS owes Plaintiffs a more subtle and complete consideration of the important, significant facts and factors involved in this determination. These overwhelming deficiencies

render the action arbitrary and capricious and irrational under the APA.

III. Defendants' implied and unexplained statutory interpretations are arbitrary, capricious, and an abuse of discretion.

Instead of providing a reasoned analysis or rational explanation for its decision, FWS relied upon unstated and fundamentally flawed interpretations of the MMPA. These interpretations contradict the plain language of §1374(c)(4)(A) and therefore violate the MMPA and the APA.

A. Any statutory interpretations relied upon in the permitting decisions are not entitled to deference and were improperly applied without rational explanation.

As a preliminary matter, it should be noted that, in its decisions, the FWS never expressly interpreted the MMPA enhancement requirements. Nor has FWS published any interpretive or substantive rule regarding the standard for enhancement permits under §1374(c)(4)(A). Thus, any interpretation of the statute relied upon in the decisions at issue is new and has not been previously stated or explained. Novel, unjustified statutory interpretations that form an implied basis for an informal adjudication are entitled to no deference from the Court. *United States v. Mead Corp.*, 533 U.S. 218 , 303 (2001) (“administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was

promulgated in the exercise of that authority,” and deference should be accorded based on “the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position”); *see also Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (an agency must “explain its interpretation in order to permit the parties before the agency to understand its decision”).

In fact, the court need not go further to decide whether such interpretations are permissible, for the FWS has offered no explanation for the interpretations implied in its decisions, let alone a rational one. *See Shays v. FEC*, 414 F.3d 76, 97 (D.C. Cir. 2005). Nor can they be justified by the subsequent explanations of counsel during litigation, either in the District Court or on appeal. The U.S. Supreme Court has “declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that Congress has delegated to the administrative official and not to [] counsel the responsibility for elaborating and enforcing statutory commands.” *Bowen v. Georgetown Univ. Hosp.* 488 U.S. 204, 212 (1988); *see also Mead*, 533 U.S. at 304.

B. The FWS's reasoning relies on two interpretations of the MMPA that are contrary to the plain meaning of §1374(c)(4)(A).

Finally, FWS relied on the finding, which Plaintiffs dispute, that Plaintiffs failed to show that “sport hunting actually reduces the number of bears taken from the set quota,” AR 449, but it did not making any corresponding finding on the contributions of conservation hunting to maintaining the population at its target number. This could be explained by an implied interpretation of prong 1 that excludes maintenance as an alternative means of satisfying prong 1. Such an interpretation is undoubtedly precluded by the plain language of the statute.

“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Gross v. FBL Fin. Servs.* 557 U.S. 167, 175 (2009). It is also a basic principle of statutory interpretation that the agency must “give effect, if possible, to every clause and word of a statute.” *Moskal v. United States*, 498 U.S. 103, 109 (1990). Thus, because §1374(c)(4)(A)(i) provides that the action may contribute to “increasing or maintaining” the “numbers or distribution” of the “species or stock,” all of these alternatives must be given effect. Defendants cannot simply interpret the statute in a way that allows it to ignore “maintenance” as a means of satisfying prong 1; rather, it was required to give this factor and the evidence supporting it the full consideration and analysis required by the APA.

The FWS also justified its decision by finding that Plaintiffs “failed to clarify . . . how the imports ameliorate the primary threat to polar bear populations – global warming and sea-ice melt.” AR 592-93. This statement implies that the enhancement requirements could have been satisfied by such a showing. In the original denial letter, the FWS even went so far as to suggest that an action does not satisfy prong 2 unless it would be identified in a recovery plan as required to enhance the survival or recovery of the species. AR 450.

The latter interpretation is blatantly contrary to the text of §1374(c)(4)(A)(ii), which states that taking or importation need only be “consistent with” actions prescribed in a recovery plan. The interpretation implied by Defendants fails to give these words their plain meaning. Had Congress intended to limit the scope of enhancement activities to only those actually prescribed, or found likely to be prescribed, in a recovery plan, it would have used language to that effect, such as “included in” or “part of.” As written, however, the plain meaning of the statute unambiguously includes actions beyond those that would be specifically described in a recovery plan.

While the former interpretation, that Plaintiffs could have shown enhancement if the importation had contributed to ameliorating global warming or resulting habitat loss, does not contradict the text of the second prong, considering Defendants’ determination that a polar bear recovery plan would focus on this

“primary threat” to the species, it is unreasonable when considered with the rest of the statutory requirements. The enhancement provision only applies to two kinds of actions, taking and importation of the species, and prong 1 requires such an action have the effect of maintaining or increasing the population’s numbers or distribution. There is no conceivable way for either kind of action regarding any species of marine mammal, or any effect contemplated under prong 1, to ameliorate global warming or the resulting habitat loss. The FWS understands this, and acted arbitrarily and capriciously by indicating otherwise. Furthermore, it was unreasonable for Defendants to expect an impossible result from Plaintiffs, particularly when it was possible to meet the enhancement requirements in other ways.

Because these impermissible interpretations of the §1374(c)(4)(A) underlie the reasoning for Defendants’ permitting decisions, the FWS acted arbitrarily and capriciously by relying “on factors which Congress has not intended it to consider.” *State Farm*, 463 U.S. at 43.

IV. Improper rulemaking.

In the alternative, the FWS’s decision is based on improper, extra-statutory requirements for an enhancement permit and interpretive rules that are procedurally improper. Defendants simultaneously created and applied a substantive rule without any legal authority to do so and without following the

required procedures for substantive rule making. It also relied improperly on interpretations of the MMPA that were not published in the Federal Register.

A. Substantive Rules

The FWS's decision essentially denied Plaintiffs' applications because the conduct at issue would not directly combat the "primary threat" to polar bears stated in the FWS's listing decision, the amelioration of which it also found would be the focus of any conservation or recovery plan. As the MMPA "enhancement" provision requires only that importation or taking of a depleted species be consistent with the actions that would be required in a conservation or recovery plan, the FWS imposed one or more additional conditions not required by §1374(c)(4)(A). The additional rule applied by Defendants, stated most narrowly, holds that taking or importation of a depleted species, or stock, does not enhance its survival or recovery unless it is or would be required by the recovery or conservation plan for the species or stock. However, the FWS's decision suggests it may have applied a broader rule, defining enhancement as only those actions which a recovery or conservation plan does or would prescribe to combat the primary threat to the species.

In either case, the rule applied to plaintiffs' enhancement permit applications is substantive because it has no basis in statutory law. The D.C. Circuit has established that a rule is substantive when "without the rule, the agency lacks an

‘adequate legislative basis’ for its action.” *American Mining Congress v. Mine safety and Health Administration*, 99 F.2d 1106, 1112 (D.C. Cir. 2003). Clearly, as noted above, there no legislative basis for the rule itself. The plain language of §1374(c)(4)(A)(ii) does not require an action be explicitly prescribed in a conservation or recovery plan, nor these conditions as necessary, and no part of the MMPA links the granting of an enhancement permit with the basis for a listing under the ESA. Defendants denied Plaintiffs’ permits based on a rule that was not legislatively authorized.

Furthermore, Plaintiffs have already demonstrated that the permitting decisions do not explain why plaintiffs’ submission failed to satisfy the statutory requirements for an enhancement permit, so this additional condition must have been the true substantive basis for the permit denials. In other words, Defendants applied a substantive rule because it “effect[s] a change in existing law or policy or . . . affect[s] individual rights and obligations.” *Paralyzed Veterans of Am. V. West*, 138 F.3d 1434, 1436 (Fed. Cir. 2001). Solely based on the standard set out in §1374(c)(4)(A), Plaintiffs’ permit applications were sufficient to demonstrate enhancement. This rule therefore changed existing law and policy and affected the rights of Plaintiffs and other individuals who wish to participate in Canadian conservation hunts.

For substantive rules like this, the APA requires that “[g]eneral notice of

proposed rule making shall be published in the Federal Register” and that the notice include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. §553(b). After the notice is published “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” *Id.* None of these actions occurred before FWS applied this non-statutory requirement to Plaintiffs’ permit applications.

While “the distinction between rules or statements which are subject to the notice and comment requirements of §553 and rules or statements which are exempt from those procedures is notoriously ‘hazy’,” the D.C. Circuit has “been careful to construe §553(b)(A)’s exceptions to the rulemaking requirements narrowly.” *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). This rule clearly alters the substantive requirements for an MMPA enhancement permit, and FWS may not avoid its notice to those affected by “label[ing] a substantive change to a rule an interpretation simply to avoid the notice and comment requirements.” *Paulsen v. Daniels*, 413 F.3d 999 (D.C. Cir. 2005).

B. Interpretive Rules

Even if the “primary threat” requirement underlying the permitting decisions is not a “substantive” rule, it is still an interpretive rule, as are the other statutory interpretations discussed above. “An interpretive rule ‘simply indicates an agency’s reading of a statute or a rule. It does not intend to create new rights or duties, but only reminds affected parties of existing duties.’” *Coalition for Common Sense in Gov’t Procurement v. Sec’y of Veterans Administration*, 464 F.3d 1306, 1317 (Fed. Cir. 2006). Additionally, 5 U.S.C. §552(a)(1) requires agencies to publish in the federal register “statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available” and “and statements of general policy or interpretations of general applicability formulated and adopted by the agency.” §552(a)(1)(B),(D).

FWS has not published anything regarding their interpretation of the relationship between enhancement permits under the MMPA and bases for ESA listing in the Federal Register. They have not published any statement interpreting the meaning of “maintaining” or “increasing” in §1374(c)(4)(A)(i), nor the meaning of “consistent” in §1374(c)(4)(A)(ii). Thus, none of the implied interpretations relied upon by FWS were proper bases for its decisions to deny Plaintiffs’ permit applications, as “a person may not in any manner be . . .

adversely affected by, a matter required to be published in the Federal Register and not so published.” 5 U.S.C. §552(a)(1). The challenged permit denials should therefore be set aside as contrary to law and remanded for reconsideration of the applications without regard to Defendants’ unpublished rules.

CONCLUSION

The substantive information and expert reports submitted to FWS clearly demonstrated enhancement through increasing and maintaining the Gulf of Boothia polar bear population. This material was not considered. Had it been considered, the permit denials still would have been irrational, arbitrary, and capricious, because there was no explanation or analysis of why each itemized reason was not enhancement. Worse, the denial of these permits is likely to actually detriment the population, detracting from its successful, necessary maintenance and potentially causing it to decline.

Defendants went even further afield, unreasonably narrowing the scope of a hypothetical polar bear recovery plan to a lone threat, habitat loss from global warming, which is impossible to address through the management of the species. No increase or decrease in polar bear numbers and distribution, or any other action by FWS or Candada, can create more arctic sea-ice, and habitat loss is not projected to threaten the survival of the Gulf of Boothia population in the foreseeable future. Even if the threat could be addressed in a recovery plan, it is

unreasonable to find that a polar bear recovery plan would not address any other issues or actions necessary for the maintenance, management, and survival of the bear.

For all of these reasons, the FWS's denial of the conservation hunters' enhancement permit applications should be set aside as arbitrary, capricious, an abuse of discretion and otherwise contrary to law and required procedure, and the applications should be remanded to the agency for a proper decision in accordance with the APA standards for agency action and the MMPA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C). As determined by the Microsoft Word software used to produce this brief, it contains 13,521 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

Dated: August 17, 2012.

/s/ John J. Jackson, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing brief was filed electronically with the Court via the CM/ECF system on August 17, 2012. All parties registered with the Court's CM/ECF system will receive notice of access to this filing *via* that system.

/s/ John J. Jackson, III