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The Battle May be Over, but What About the War? Examining the ESA in the Crusade Against Global Warming After In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation

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THE BATTLE MAY BE OVER, BUT WHAT ABOUT THE WAR? EXAMINING THE ESA IN THE CRUSADE AGAINST GLOBAL WARMING AFTER IN RE POLAR BEAR ENDANGERED SPECIES ACT LISTING AND SECTION 4(D) RULE LITIGATION

"The ESA is not some mystical expression of legislative wonder at the miracle of life; nor is it an economic apocalypse. The ESA tries to do something mankind has not tried before: save other species and allow them to exist for their own benefit regardless of their value to humanity. It attempts great things; sometimes with success, usually with failure."¹

I. INTRODUCTION

The controversy surrounding global warming has undoubtedly shifted during the last decade, and, as a result, the conversation no longer centers on whether humans are causing palpable impacts on the environment through global warming.² Rather, the question now is: What can be done about it?³ One measurable effect of global climate change is seen in the polar bear’s steadily dwindling population, as a record eight out of nineteen polar bear subpopulations are now in decline.⁴ Polar bears are “ice-obligate” in that they

⁴ See Polar Bear Status Report, Polar Bears Int’l, http://www.polarbearsinternational.org/science/polar-bear-status-report (last visited Oct. 15, 2013) (describing statistical reports on polar bear’s nineteen subpopulations). As a note, the polar bear’s subpopulations are distinguishable from the ESA’s distinct population

(529)
depend entirely on Arctic sea ice for species survival; specifically, polar bears have evolved to rely on sea ice for hunting, feeding, seasonal migration, denning, and breeding. Some experts predict that by mid-century the Arctic Ocean will be almost completely free of sea ice during the summer season, with some predicting this may occur as soon as the year 2020. Consequently, reports estimate that the polar bear may be wholly extinct by the end of this century, and more than two-thirds of the world’s polar bear population will be lost by the year 2050.

In light of these estimations, a multitude of individuals and interest groups have engaged in a lengthy litigation process that hinges on the polar bear’s listing as a “threatened species” under the Endangered Species Act (ESA or Act), primarily in the District of Columbia Circuit case of In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation (In re Polar Bear V). The polar segments and are not to be equated. See In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation (In re Polar Bear V), 709 F.3d 1, 6 (D.C. Cir. 2013) (clarifying potential confusion as to language of the polar bear subpopulations). According to the International Union for Conservation of Nature Polar Bear Specialist Group, eight polar bear subpopulations are now in decline, three are stable, and one is increasing, compared to 2005 when five were declining, five were stable, and two were increasing. Id. There is no dispute as to the data’s insufficiency with regard to the status of the remaining seven subpopulations of polar bears. Id.; see also Ctr. for Biological Diversity, On Thin Ice 2 (2013), available at http://www.biologicaldiversity.org/species/mammals/polar_bear/pdfs/On Thin_Ice.pdf (outlining polar bear’s status five years after ESA listing); Scott L. Schliebe, What Has Been Happening to Polar Bears in Recent Years?, Nat’l Oceanic & Atmospheric Admin., http://www.arctic.noaa.gov/essay_schliebe.html (last visited Oct. 18, 2013) (noting polar bear and ice seal populations may gauge climate change’s impact).

5. See Convention on Int’l Trade in Endangered Species of Wild Fauna and Flora, Consideration of Proposals for Amendment of Appendices I and II 2 (2013) [hereinafter CITES], available at http://www.cites.org/sites/default/files/eng/cop/16/prop/E-CoP16-Prop-03.pdf (last visited Oct. 18, 2013) (describing polar bear’s dependency on sea ice). At the March 2013 CITES meeting in Bangkok, Thailand, the United States was listed as the proponent for a suggested amendment to transfer the polar bear species from Appendix II to Appendix I under CITES. Id.; see also CTR. FOR BIOLOGICAL DIVERSITY, PETITION TO LIST POLAR BEAR AS A THREATENED SPECIES iv (Feb. 16, 2005), available at http://www.biologicaldiversity.org/species/mammals/polar_bear/pdfs/15976_7338.pdf (describing polar bear’s reliance on sea ice).

6. CTR. FOR ICE, CLIMATE AND ECOSYSTEMS, NORWEGIAN POLAR INST., MELTING SNOW AND ICE: A CALL FOR ACTION 10 (2009), available at http://www.regjeringen.no/upload/UD/Vedlegg/klima/melting_ice_report.pdf (describing Arctic sea ice loss predictions); see also ON THIN ICE, supra note 4, at 2 (observing predicted Arctic sea ice loss timeline); Schliebe, supra note 4 (describing sea ice loss predictions).

7. On Thin Ice, supra note 4, at 2 (observing one predicted timeline for polar bear species loss).

8. In re Polar Bear V, 709 F.3d at 2 (debating listing polar bear as “threatened species” under ESA); see also In re Polar Bear Endangered Species Act Listing and
bear has become known as an “international icon” for the war on global climate change, in part because discussion surrounding the ESA listing highlights the polar bear’s dissipating Arctic habitat.9

In addition, the polar bear’s listing has become the most controversial ESA listing in the Act’s forty-year history.10

While global climate change’s effects may be bearable to humans for the time being, the same cannot be said for the immediate and substantial effects climate change is having on polar bear habitats.11 The unique circumstances surrounding the polar bear’s

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10. See Brendan R. Cummings & Kassie R. Siegel, Ursus Maritimus: Polar Bears on Thin Ice, 22 NAT. RES. & ENV’R 3, 3-4 (2007) (describing attention garnered by listing “high-profile species”). Cummings and Siegel noted:

The announcement of the proposed listing rule triggered a whirlwind of media attention, resulting in more than 250 television stories, 1,000 print stories, and 240 editorials. The continuing media frenzy associated with listing proposal has cemented the polar bear as the iconic example of the devastating impacts of global warming on the Earth’s biodiversity. By the time the official comment period on the proposed listing rule closed in April 2007, over half a million comments had been submitted to FWS urging protection of the species, the most ever for any rulemaking under the ESA.

Id.; see also Brief of Defendants-Appellees, In re Polar Bear V, 709 F.3d 1 (D.C. Cir. 2013) (Nos. 11-5219, 11-5221, 11-5222, 11-5223), 2012 WL 2394425, at *1, *9 (describing FWS receiving approximately 670,000 comments during public comment period).

11. See In re Polar Bear V, 709 F.3d at 6 (quoting Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28,212, 28,292-293 (May 15, 2008) [hereinafter Listing Rule] (detailing effects on polar bear species as basis of listing determination)). Specifically, the Listing Rule stated that:

Productivity, abundance, and availability of ice seals, the polar bear’s primary prey base, would be diminished by the projected loss of sea ice, and energetic requirements of polar bears for movement and obtaining food would increase. Access to traditional denning areas would be affected. In turn, these factors would cause declines in the condition of polar bears from nutritional stress and reduced productivity. As already evidenced in . . . populations, polar bears would experience reductions in survival and recruitment rates. The eventual effect is that polar bear populations would decline. The rate and magnitude of decline would vary among
predicament include the fact that global warming has affected the Arctic more than any other area on earth. Additionally, the ESA’s framework for critical habitat and threatened species designations has created a perfect storm for litigation. In re Polar Bear V reveals a remarkable overlap between animal rights and environmental law. This litigation demonstrates interested citizens’ attempts to tackle global warming through ESA litigation and regulatory protections, the unyielding power of private and political interests, and the ESA’s ineffectiveness as a solution to the global warming problem.

This Note examines the Court of Appeals for the District of Columbia's analysis in In re Polar Bear V. Part II of this Note summarizes In re Polar Bear V's facts, including its procedural posture. Part III provides the legal background that informed the issues in this case. Part IV of this Note reviews the D.C. Circuit's legal anal-

populations based on differences in the rate, timing, and magnitude of impacts. However, within the foreseeable future, all populations would be affected, and the species is likely to become in danger of extinction throughout all of its range due to declining sea ice habitat.


15. Cummings & Siegel, supra note 10, at 4 (describing polar bear’s unique plight).

16. For a narrative analysis of In re Polar Bear V, see infra notes 170-210 and accompanying text.

17. For further discussion of the facts of In re Polar Bear V, see infra notes 22-60 and accompanying text.

18. For further discussion of the regulatory background informing In re Polar Bear V, see infra notes 61-169 and accompanying text.

ysis in In re Polar Bear V. Next, Part V analyzes the court’s reasoning, specifically addressing whether the court’s analysis was in line with precedent. Finally, Part VI concludes by discussing In re Polar Bear V’s impact, including the status of polar bear populations in the wake of the ESA listing, as well as the effect, or lack thereof, that the decision will have on climate change litigation.

II. FACTS

On February 16, 2005, the Center for Biological Diversity (CBD) petitioned the Secretary of the Interior and the United States Fish and Wildlife Service (FWS) to list the polar bear as a protected species under the ESA. The petition was made in light of the growing concern that global climate change was threatening the species and its habitat. On December 21, 2006, after peer review and opportunities for public comment, the FWS published a 262-page “Status Review” pursuant to the ESA’s Section 4(b)(3). After a three-year research period, the FWS issued a detailed finding concluding that the polar bear was likely to become an endangered species and face the threat of extinction within the foreseeable future as a result of global climate change. In essence, the FWS’ Listing Rule, created as a result of the FWS’ findings, can be summarized in a “three-part thesis”: (1) “the polar bear is dependent on sea ice for its survival;” (2) “sea ice is declining;” and (3) “climatic changes have and will continue to dramatically

19. For further discussion of the legal issues surrounding In re Polar Bear V, see infra notes 170-210 and accompanying text.
20. For a critical analysis of the D.C. Circuit’s reasoning, see infra notes 211-254 and accompanying text.
21. For further discussion of In re Polar Bear V’s impact, see infra notes 255-275 and accompanying text.
22. PETITION TO LIST, supra note 5, at 3-4 (outlining CBD’s petitioning of FWS).
24. In re Polar Bear V, 709 F.3d 1, 4 (D.C. Cir. 2013) (describing length of FWS’ findings). On January 9 2007, the FWS published a proposed rule to list the species as threatened, which triggered the 90-day public comment period. Id.
25. In re Polar Bear III, 794 F. Supp. 2d 65, 68-69 (D.D.C. 2011) (detailing FWS’ extensive research process). The court pointed out that the FWS considered “over 160,000 pages of documents and approximately 670,000 comment submissions from state and federal agencies, foreign governments, Alaska Native Tribes and tribal organizations, federal commissions, local governments, commercial and trade organizations, conservation organizations, nongovernmental organizations, and private citizens.” Id.
reduce the extent and quality of Arctic sea ice to a degree sufficiently grave to jeopardize polar bear populations.”

On May 15, 2008, the FWS issued its Final Listing Rule that listed the polar bear as a “threatened species” under the ESA. Concurrently, however, the agency published a Special Rule for the polar bear pursuant to the ESA’s Section 4(d) that became effective immediately as the Interim Final Special Rule. On December 16, 2008, the Final Special Rule was codified, and made effective as of January 15, 2009. With regard to the loss of sea ice habitat due to greenhouse gas emissions, the agency reached the conclusion that no additional ESA protections were warranted, nor would the full extent of protections be offered under the ESA because the protections would not alleviate global climate change’s threat. On May 14, 2008, a policy memorandum was issued clarifying that “the future indirect impacts of individual [greenhouse gas] emitters cannot be shown to result in ‘take’ based on the best available science at this time,” emphasizing that listing the polar bear would not lead to the regulation of greenhouse gas emissions.

By listing the polar bear as a threatened species and issuing the accompanying Special Rule, the FWS instigated an onslaught of liti-

26. In re Polar Bear V, 709 F.3d at 5-6 (quoting Listing Rule, supra note 11, at 28,212, 28,214, 28,244) (discussing FWS’ Listing Rule).

27. Id. at 2 (noting FWS listed polar bear as “threatened species”).


31. Id. at 224 (quoting FWS policy memorandum); see also Press Release, U.S. Dep’t of the Interior, Secretary Kempthorne Announces Decision to Protect Polar Bears under Endangered Species Act (May 14, 2008), available at http://www.doi.gov/news/archive/08_News_Releases/080514a.html (describing limited scope of polar bear’s listing). As Secretary Kempthorne clarified:

While the legal standards under the ESA compel me to list the polar bear as threatened, I want to make clear that this listing will not stop global climate change or prevent any sea ice from melting. Any real solution requires action by all major economies for it to be effective. That is why I am taking administrative and regulatory action to make certain the ESA isn’t abused to make global warming policies.

Id.
In one case, *In re Polar Bear IV*, plaintiffs challenged the Special Rule, arguing it violated the ESA by reducing the protections afforded to the polar bear "without demonstrating a valid conservation basis for not applying the default rule." Conversely, another action, *In re Polar Bear II*, was filed by "big game hunting groups" against the FWS' listing decision, alleging the polar bear's classification as a threatened species violated the Administrative Procedure Act (APA) because it "created a ban on the import of sport-hunted polar bear trophies otherwise legal under the Marine Mammal Protection Act" (MMPA). The FWS and the Secretary of the Interior (collectively, FWS) responded by moving for judgment on the pleadings on the basis that (1) the plaintiffs failed to state a claim upon which relief could be granted because they did not challenge a "final agency action," which is required for judicial review under the APA, and alternatively (2) the plaintiffs lacked standing to bring the action.

32. In *re Polar Bear II*, 748 F. Supp. 2d 19, 20-21 (D.D.C. 2010) (outlining separate actions filed by parties in response to Listing Rule). In *In re Polar Bear II*, the issues raised in the initial proceedings were: "(1) challenges to the polar bear listing decision, (2) challenges to the polar bear §4(d) rule, and (3) challenges to the sport-hunted polar bear trophy import ban." Leppo, supra note 9, at 10578. 33. 818 F. Supp. 2d 214 (D.D.C. 2011).

34. Id. at 229 (describing plaintiffs' challenges to Special Rule). The District Court for the District of Columbia rejected the plaintiffs' argument that the Special Rule was not "necessary and advisable to provide for the conservation of the polar bear because it does not address the primary threat to the species from greenhouse gas emissions and the loss of its sea ice habitat." *Id.* The court observed that the Special Rule did not "expressly exempt[] greenhouse gas emissions from regulation under the ESA or any other statute," rather it simply mentioned greenhouse gases in the preamble. *Id.* at 231. The court went on to support the FWS' conclusion in light of the administrative record demonstrating ample support that there was "no way to determine how the emissions from a specific action both influence climate change and then subsequently affect specific listed species, including polar bears." *Id.* (citation omitted). Denying the plaintiffs' motion for summary judgment against the FWS in part, the court observed: The question at the heart of this litigation -- whether the ESA is an effective or appropriate tool to address the threat of climate change -- is not a question that this Court can decide based upon its own independent assessment, particularly in the abstract. The answer to that question will ultimately be grounded in science and policy determinations that are beyond the purview of this Court. *Id.* at 234.


36. Id. at 18-19 (identifying big game hunting groups bringing APA claim against FWS for creating ban on import of sport-hunted bear trophies otherwise legal under MMPA).

37. See *id.* at 18-19 (analyzing grounds for moving for judgment on pleadings); see also *In re Polar Bear III*, 794 F. Supp. 2d 65, 78 n.17 (D.D.C. 2011) (describing §4(d) Rule). The *In re Polar Bear III* court did not address challenges regarding the codification of regulations published by the Secretary, as well as four remaining actions against the FWS for its "subsequent refusal to issue permits for
district court denied the motion after determining (1) the challenge was subject to review under the APA and (2) the plaintiffs had standing because the parties suffered an injury-in-fact and established a causal connection between the Listing Rule action and the alleged injury.³⁸

In *In re Polar Bear II*,³⁹ the District Court for the District of Columbia faced an even greater challenge in the wake of an order consolidating five actions under its regular district jurisdiction with six related actions from other districts.⁴⁰ Among the challenging parties were: the State of Alaska, Safari Club International & Safari Club International Foundation (SCI); California Cattlemen’s Association and the Congress of Racial Equality; the CBD and Greenpeace; and Conservation Force, the Inuvialuit Council, hunting and trapping organizations, and other interested individuals.⁴¹ Furthermore, several groups intervened on behalf of both sides, including the Alaska Oil and Gas Association and the Arctic Slope Regional Corporations, which intervened as defendants against the CBD’s challenge.⁴² SCI, as a plaintiff in its own action against the FWS, intervened as a defendant against the CBD, while plaintiff CBD intervened as a defendant in the remaining challenges to the Listing.⁴³

On October 20, 2009, the plaintiffs filed motions for summary judgment against the FWS.⁴⁴ The CBD alleged the Listing Rule was “arbitrary and capricious” under the APA because the polar bear was entitled to higher protection under the ESA, while the remaining plaintiffs alleged it was arbitrary and capricious because the polar bear did not even qualify as a threatened species.⁴⁵ Specifically, one element of the CBD’s argument was that the FWS employed such a narrow statutory interpretation that it “set[ ] the bar for an ‘endangered’ listing impossibly high . . . [and] contravene[d] the purpose of the ESA, which is to provide a flexible approach to pro-

³⁸. See *In re Polar Bear I*, 627 F. Supp. 2d at 21-27 (outlining court’s holding).
⁴⁰. *Id.* at 21 (explaining consolidation of claims by Judicial Panel on Multi-District Litigation).
⁴¹. See *id.* at 20-21 (outlining five separate actions parties filed in response to Listing Rule and listing parties).
⁴². *In re Polar Bear III*, 794 F. Supp. 2d at 78 (detailing intervening parties in case).
⁴³. See *id.* (describing parties intervening on behalf of FWS).
⁴⁴. See *id.* (outlining case’s procedural posture).
⁴⁵. See *id.* (describing parties’ claims).
tecting species so that they can be recovered and delisted."46 On December 7, 2009, the FWS filed a cross-motion for summary judgment.47

On October 20, 2010, the district court held an initial hearing that centered on the issue of "whether it must review the agency’s interpretation of the ESA listing classifications under step one or step two of the familiar framework set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc."48 In an opinion issued on November 4, 2010, the court in In re Polar Bear II found the FWS “failed to adequately explain the legal basis for its Listing Rule.”49 Specifically, the district court rejected the FWS’ argument that to be considered an endangered species under the ESA the species must be in “imminent danger of extinction,” instead finding the statutory definition of “endangered species” was ambiguous.50 The court noted that because the FWS “failed to acknowledge [the] ambiguities in the definition of an endangered species,” it could not “defer to the agency’s plain-meaning interpretation nor impose its own interpretation of the statute.”51 As a result, the district court remanded the Listing Rule to the agency due to ambiguity and declined to rule on the merits of the cross-motions for summary judgment at that time.52

On December 22, 2010, however, the FWS provided the court with a supplemental explanation, finding that even in light of treating “the phrase ‘in danger of extinction’ in the definition of an endangered species as ambiguous,” the record did not support the conclusion that the polar bear met the statutory requirements

46. Id. at 85 (describing agency decision as contrary to Congressional intent). The In re Polar Bear III court noted, “According to CBD, nothing in the text, structure, or legislative history of the ESA supports the [FWS]’s conclusion that the temporal proximity of an extinction threat is the controlling distinction between a threatened and an endangered species.” Id.

47. See In re Polar Bear III, 794 F. Supp. 2d at 85 (outlining timeline of motions filed in case). The defendant-intervenors filed their cross-motions for summary judgment on January 19, 2010. Id.


49. In re Polar Bear II, 748 F. Supp. 2d 19, 22 (D.D.C. 2010) (noting CBD argued Listing Rule was “arbitrary and capricious” by focusing on term “imminent”). The CBD believed the FWS violated the APA because the polar bear should have been listed as endangered rather than threatened. Id. at 25.

50. Id. at 22 (rejecting interpretation of endangered as “imminent”).

51. Id. (noting underlying ambiguity).

52. Id. (citing to Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006)) (explaining reason for not ruling on merits).
under Section Four to be classified as an endangered species. After allowing parties to submit responses to the FWS' supplemental explanation, the court heard arguments on all of the plaintiffs' Listing Rule challenges at a second motions hearing on February 23, 2011. More than six years after the FWS was petitioned to designate the polar bear as a protected species under the ESA, the listing determination was finally upheld. On June 30, 2011, the District Court for the District of Columbia granted summary judgment the FWS' favor and rejected all challenges raised against it with regard to the Listing Rule.

On March 1, 2013, in response to the plaintiffs' appeals, the Court of Appeals for the District of Columbia Circuit in In re Polar Bear V affirmed the lower court's ruling in the FWS' favor. The issue before the appellate court was whether the Listing Rule was a product of reasoned decisionmaking in light of the record FWS considered. Relying in part on the fact that the appellants did not specifically identify any mistake or oversight in the agency's data or reasoning, the court found the appellants' challenges "amount[ed] to nothing more than competing views about policy and science." A request for a rehearing was denied on April 29, 2013, and the

53. In re Polar Bear III, 794 F. Supp. 2d at 79 (outlining case's procedure). The In re Polar Bear III court articulated, "The FWS reiterated that the polar bear met ESA's the [sic] definition of a threatened species at the time of listing." Id. 54. Id. (outlining case's argument history). 55. Id. (holding that agency action was not arbitrary and capricious). 56. Id. at 68-70 (upholding agency's listing of polar bear as threatened species under ESA). District court proceedings were completed in November 2010, approximately two and a half years after the FWS issued its polar bear rules. Leppo, supra note 9, at 10578 (summarizing In re Polar Bear V's procedural posture). In relevant part, the district court: (1) sustained the polar bear Listing Rule, rejecting both challenges to the listing at all and NGO contentions that the listing should have been "endangered" not "threatened;" (2) sustained the polar bear Section 4(d) rule against all ESA and APA challenges; (3) held that FWS had violated NEPA in failing to prepare either an EA or EIS for the Section 4(d) rule; and (4) sustained the import ban on polar bear trophies." Id. Because of the court's NEPA holding, the final Section 4(d) rule was vacated and remanded; however, pending completion of the remand, the court reinstated the substantially identical interim Section 4(d) rule, which also had not undergone any NEPA process. Id. 57. In re Polar Bear V, 709 F.3d 1, 9 (D.C. Cir. 2013) (upholding agency's listing of polar bear as threatened species under ESA). For a discussion of the D.C. Circuit's rationale, see infra notes 170-210 and accompanying text.


Supreme Court denied certiorari on October 7, 2013, marking the apparent conclusion to the eight-year saga.60

III. BACKGROUND

The complex listing process outlined in the ESA’s statutory framework is integral to the challenges brought before the D.C. Circuit in In re Polar Bear V.61 The motivation behind enacting the ESA, the species listing regulations, and the subsequent protections afforded to a protected species are at the heart of the litigation in this case.62 Additionally, global warming’s effect on the polar bear lends to the controversy of the polar bear’s listing. Furthermore, both the standard of review agency action is afforded under the APA and related listing rule litigation play a large role in the outcome of a challenge to an ESA Listing Rule.63

A. Global Climate Change

The United States Environmental Protection Agency (EPA) has identified several categories or “sectors” that are, or stand to be, affected by global climate change.64 These sectors include: agriculture and food supply, coastal and marine ecosystems and living, energy supply and demand, frequency and intensity of wildfires, air quality and heat-related illnesses affecting human health, water quality and supply, transportation infrastructure, and ultimately United States national security.65 While data shows that the global climate fluctuates naturally over extended cycles of time, scientists maintain that the recent and significant changes in the global climate cannot be attributed to natural causes alone.66

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61. In re Polar Bear V, 709 F.3d at 3 (describing relevant ESA background); see also Lawrence R. Liebesman et al., The Endangered Species Act and Climate Change – Current Issues, SR021 ALI-ABA 227, 236 (2009) (describing critical distinction).

62. In re Polar Bear V, 709 F.3d at 8 (describing standard of review).


64. Climate Change Impacts, supra note 2 (explaining areas global climate change impacts).

65. Id. (describing areas global climate change impacts).

66. Causes of Climate Change, ENVTL. PROT. AGENCY, http://epa.gov/climatechange/science/causes.html (last updated Sept. 9, 2013) (observing human activities as most likely source for warming especially since mid-twentieth century). Fluctuations in the climate system can result from natural causes including volcanic eruptions and natural changes in solar energy and greenhouse gas concentrations. Id.
Notably, since the Industrial Revolution began in 1750, human activities have added substantial levels of heat-trapping gases, primarily carbon dioxide (CO$_2$), into the atmosphere, which, in turn, increase the "greenhouse effect" and result in a measurable increase in the Earth's surface temperature. Furthermore, between 1990 and 2011, "the total radiative forcing from greenhouse gases added by humans to the Earth's atmosphere increased by 30 percent," with CO$_2$ accounting for approximately eighty percent of that increase. As a result, "seven of the top 10 warmest years on record have occurred since 1990," and the decade between "2001-2010 was the warmest decade on record worldwide."69

Global warming poses a distinct problem for the polar bear, which relies on sea ice for survival. The Arctic Ocean, home to the polar bear, goes through a fluctuation of sea ice levels year-round. In September, the area covered by ice is at its smallest due to the summer melting season. On the whole, the total Arctic area covered by sea ice has decreased, and as of September 2012, it

67. Id. (describing greenhouse effect's science). The EPA provides an accessible explanation of how the greenhouse effect works, describing:

When sunlight reaches Earth's surface, it can either be reflected back into space or absorbed by Earth. Once absorbed, the planet releases some of the energy back into the atmosphere as heat (also called infrared radiation). Greenhouse gases (GHGs) like water vapor (H$_2$O), carbon dioxide (CO$_2$), and methane (CH$_4$) absorb energy, slowing or preventing the loss of heat to space. In this way, GHGs act like a blanket, making Earth warmer than it would otherwise be.

68. CLIMATE CHANGE INDICATORS, supra note 11, at 6 (describing climate forcing). According to the EPA, "Climate or 'radiative' forcing is the measurement of how substances such as greenhouse gases affect the amount of energy absorbed by the atmosphere. An increase in radiative forcing means a heating effect, which leads to warming." Id.

69. Id. at 7 (describing global temperature statistics).

For further information on the United States' specific greenhouse gas emission data, see 2014 Climate Action Report (Draft/Not Final), U.S. DEPARTMENT OF STATE, Chapter 3, 8 (Sept. 26, 2013), available at http://www.state.gov/e/oes/climate/ccreport2014/ (noting atmospheric concentrations of CO$_2$ have risen approximately thirty nine percent since 1750). In 2011, fossil fuel combustion accounted for 94.0 percent of the United States' CO$_2$ emissions. Id.


71. Id. (describing changes in Arctic sea ice); see also CLIMATE CHANGE INDICATORS, supra note 11, at 48 (describing seasonal pattern of Arctic sea ice levels).

72. CLIMATE CHANGE INDICATORS, supra note 11, at 8 (noting September as month with lowest level of sea ice).
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was the smallest amount ever recorded.\textsuperscript{73} The Arctic sea ice that is present has become thinner overall, putting sea ice at a greater risk for further melting.\textsuperscript{74}

Unfortunately, however, as of March 2013, there were “no known regulatory mechanisms in place at the national or international level that directly and effectively address” the Arctic’s sea ice loss caused by greenhouse gas emissions.\textsuperscript{75} In September 2013, President Obama released a draft of the 2014 U.S. Climate Action Plan, the first comprehensive national plan to address the issue of climate change.\textsuperscript{76} The Climate Action Plan outlines a summary of the United States’ past and current greenhouse gas emissions, as well as projections of future emissions, impacts of climate change in the United States, and proposed policy measures to address the issue.\textsuperscript{77} Currently pending before the Supreme Court, is the issue of whether the EPA has the authority to regulate greenhouse gases under the Clean Air Act as part of President Obama’s Climate Action Plan, absent congressional action.\textsuperscript{78}

B. The Endangered Species Act

The ESA’s history began when Congress passed the Endangered Species Preservation Act of 1966, which centered on protection for endangered species.\textsuperscript{79} By 1969, the Act became the Endangered Species Conservation Act, adding a listing possibility

\textsuperscript{73} Id. at 48 (noting lowest sea ice extent on record).

\textsuperscript{74} Id. at 8 (describing thinning ice trend and growing risk of melting).

\textsuperscript{75} CITES, \textit{supra} note 5, at 13 (describing inadequate laws addressing greenhouse gas emissions issue).


\textsuperscript{77} \textit{See} id. (describing topics covered by Climate Action Report). For further information about the Climate Action Report’s policies and measures aimed to reduce greenhouse gas emissions see id. at Chapter 4, \textit{available at} http://www.state.gov/documents/organization/214946.pdf (last visited Apr. 28, 2014).


\textsuperscript{79} McAnaney, \textit{supra} note 63, at 437-38 (outlining ESA’s early history).
for "subspecies," as well adding the language "at risk of worldwide extinction" to the definition of a endangered species.\footnote{80} President Nixon, however, was not satisfied with the changes, noting that the 1969 act "simply d[id] not provide the kind of management tools needed to act early enough to save a vanishing species."\footnote{81} Thus came the birth of the ESA of 1973, which incorporated subspecies and populations into the definition of species and added the threatened category to cover species threatened throughout a Significant Portion of its Range (SPR) rather than only those facing extinction worldwide.\footnote{82} Furthermore, the new Act defined "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided . . . are no longer necessary."\footnote{83} As Congress stipulated, the Act's purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."\footnote{84} 

1. Listing Rule Process

Under the ESA, a species may be listed as "threatened" when it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range" and "endangered" when a species or subspecies "is in danger of extinction throughout all or a significant portion of its range."\footnote{85} Because the Act's listing designations come with regulatory prohibitions for


\footnote{81} Id. (quoting President Nixon urging stronger protections for species); \textit{see also} McAnaney, \textit{supra} note 63, at 438 (describing President Nixon's view on inadequacy of United States law to save species early enough).

\footnote{82} Morse, \textit{supra} note 80, at 565 (explaining amendments to ESA). A "species" is a "biological classification comprising a 'group of populations which are . . . reproductively isolated from other such groups, but which are actually or potentially capable of interbreeding among themselves' and thereby producing fertile offspring." \textit{Id.} (quoting \textit{Michael Thain & Michael Hickman, The Penguin Dictionary of Biology} 582 (9th ed. 1994)). While a subspecies "ranks immediately below a species and designates a population of a particular geographic region genetically distinguishable from other such populations of the same species and capable of interbreeding successfully with them where its range overlaps theirs." \textit{Id.} (quoting Merriam-Webster Online Dictionary). \textit{See also} In re Polar Bear V, 709 F.3d 1, 3 (D.C. Cir. 2013) (citing 16 U.S.C. § 1531(b) (2012)) (providing background on ESA enactment via Congress' stated purposes for enactment).


\footnote{84} 16 U.S.C. § 1531(b) (outlining Act's purpose).

\footnote{85} 16 U.S.C. § 1532(6),(20) (defining threatened and endangered species).
states, federal agencies, and people who use or rely on the land in the species’ range, the greater flexibility the threatened species classification created substantially broadened the potential impact that ensuing protective regulations have on those parties.86

Pursuant to ESA’s Section Three, the Secretary of the Interior and the Secretary of Commerce (collectively, Secretary) are vested with the power to designate species listings and promulgate protective regulations for those designated species, along with the sole power to “delist” a species that has been listed under the ESA.87 The ESA’s listing authority is delegated pursuant to the FWS and the National Marine Fisheries Service’s (NMFS) codified joint regulations, granting each jurisdiction over different species types.88

Aside from the option to make an independent finding to list a species, under the Citizen Suit Provision, “interested persons” may also petition the listing agency to list a species, at which time the agency is mandated to investigate and issue findings on the listing determination within ninety days of receiving the petition.89

Upon a finding that action is warranted, the listing authority must issue a proposed regulation to implement the action including a “summary of the data upon which the proposed rule is based, a showing of the relationship of the data to the proposed rule, and a summary of factors affecting the species.”90 A sixty-day period for public comment and peer review follows the rule proposal.91 Then,
the agency must issue a final listing rule or formally withdraw the proposal within one year.92

Under Section Four, the ESA outlines five listing factors, any of which can provide a basis for a listing determination: "(A) the present or threatened destruction, modification, or curtailment of [the species'] habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting [the species'] continued existence."93 Section Four further requires listing determinations be made:

[S]olely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation . . . whether by predator control, protection of habitat and food supply, or other conservation practices.94

The same five listing factors apply when the Secretary delists a species.95

2. Critical Habitat Designation

Section Four of the ESA requires a listing agency to designate a listed species' "critical habitat" concurrently to listing the species.96 Critical Habitat Designations (CHD) are an important facet of the ESA framework for many reasons, but particularly because of the direct relationship between the animal's survival and the sustenance of its habitat, as well as the legal ramifications that follow listing the habitat as protected under the ESA.97 CHDs are confined to "the specific areas within the geographical area occupied

92. McAnaney, supra note 63, at 440-41 (describing ESA listing process' procedural requirements).
94. 16 U.S.C. § 1533(b)(1)(A) (emphasis added) (discussing further requirements for listing).
96. Id. (outlining Section Four rules regarding endangered and threatened species determination). Additionally, Section 4(f) imposes an affirmative duty on a listing agency to create and enforce recovery plans to recover and improve the listed species' status, however, recovery plans do not need to be complete at the time of listing. McAnaney, supra note 63, at 441; accord 16 U.S.C. 1533(f).
by the species, at the time it is listed . . . on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations."98

In 1978, Congress amended the ESA’s definition of “species” to include “any subspecies of fish or wildlife or plants[ ] and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”99 Pursuant to a joint policy on Distinct Population Segments (DPS), a listing agency will deem a species’ sub-population a DPS based on “whether the particular population is discrete, in trouble (‘conservation status’), and significant (which probes in various ways whether the population is important to the taxon).”100 Congress expressly noted that this designation should be used “sparingly,” however, and the internal “Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act” (DPS Policy) notes that only thirty species out of more than three hundred species listed under the ESA had been given DPS status when the DPS Policy was created in 1996.101 The DPS’s two-prong requirement of being both discrete and significant can be challenging to satisfy, however there have been recent instances where a DPS was designated.102

The designation of critical habitat is important for the biological reason that habitat is the crucial parameter for species survival, for the legal reason that critical habitat is protected from impairment or modification under Section 7, and for the political reason that the geography staked out as “critical” suddenly is burdened by servitudes for the benefit of the protected species. It is hardly surprising, then, that the “critical habitat” issue has been embroiled in controversy and the focus of legislative attention throughout the history of the ESA.

Id.98 16 U.S.C. § 1532(5)(A) (defining critical habitat); accord Leppo, supra note 9, at 10579 (describing CHDs’ limitations).

99. 16 U.S.C. § 1532(16) (defining species); accord Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722-01 (Feb. 7, 1996) [hereinafter DPS Policy] (explaining DPS amendment to ESA). The DPS policy states, "Because the Secretary must * * * determine whether any species is an endangered species or a threatened species’ . . . it is important that the term 'distinct population segment' be interpreted in a clear and consistent fashion. Furthermore, Congress has instructed the Secretary to exercise this authority with regard to DPS's." DPS Policy, supra, at 4,722.

100. Rodgers, supra note 97 (describing DPS’s definition).

101. DPS Policy, supra note 99, at 4725 (emphasizing limited nature of DPS Policy’s use).

102. See National Ass’n of Home Builders v. Norton, 340 F.3d 835 (9th Cir. 2003) (discussing discrete and significant requirements). In Home Builders, the United States Court of Appeals for the Ninth Circuit found that the FWS did not act arbitrarily and capriciously by designating the Arizona pygmy-owls as a DPS. Id.
3. Regulatory Consultation and Take Protections

Section Seven of the ESA governs what actions federal agencies are prohibited from undertaking once a species is listed under Section Four. Section Seven states that any federal agency action that may interfere with a protected species must consult with the listing agency and obtain a biological opinion to determine if the proposed project will jeopardize the survival of the listed species and similarly if it will result in adverse modification. The consultation process, as it is commonly called, makes the CHD an extremely important aspect of the ESA because it not only provides listed species with Section Seven's broad protections, but ensures agencies consult the FWS if an agency's project will affect a CHD. Agency "action" is broadly defined as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States." Furthermore, "action" encompasses actions that "directly or indirectly caus[e] modifications to the land, water, or air." Broader than the Section Seven consultation process, which applies only to federal action, the ESA's Section Nine applies to "any person subject to the jurisdiction of the United States" with respect to what actions are unlawful and prohibited in light of an ESA listing. Under Section Nine, a person is prohibited from taking a listed species. Defined broadly, the term "take" includes "harassing, harming, pursuing, hunting, shooting, wounding, killing, etc."

at 838. Specifically, the court observed that first "the FWS must find that a population is discrete 'in relation to the remainder of the species to which it belongs' and significant 'to the species to which it belongs.'" Id. at 839 (citing DPS Policy, supra note 99, at 4725).

106. 50 C.F.R. § 402.2 (2009) (defining "action" for purposes of ESA Section Seven); accord Armstrong, supra note 105, at 437-38 (discussing "action"); see also Owen, supra note 104, at 10,662 (describing Section Seven's meaning).
107. 50 C.F.R. § 402.2 (defining "action"); accord Armstrong, supra note 105, at 438 (defining actions encompassed under ESA Section Seven).
108. 16 U.S.C. § 1538(a) (2012) (describing who is governed under ESA Section Nine); see also McAnaney, supra note 63, at 441 (explaining Section Nine protections).
109. McAnaney, supra note 63, at 441 (defining acts Section Nine prohibits); see also 16 U.S.C. § 1538(a)(1)(B) (prohibiting taking of any species within United States or territorial sea thereof).
The term "harass" is further defined as "an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include breeding, feeding and sheltering." Furthermore, "harm" is "any action that actually kills or injures wildlife through significant habitat modification or degradation by significantly impairing essential behavioral patterns, including breeding, feeding, and sheltering."

In contrast to the expansive protections provided for endangered species under the ESA, a threatened species may not necessarily receive the same protections because under Section 4(d) the agency can opt to give the species only what is deemed "necessary for the conservation of the species." Section 4(d) allows the Secretary to issue "special rules" to either increase or decrease the normal protections of threatened species. Thus, if a species is listed under a Special 4(d) rule, the rule's broad discretion allows the agency, for example, to eliminate either Section Seven or Section Nine protections for a species if it is listed as threatened rather than endangered.

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110. McAnaney, supra note 63, at 441 (describing broad meaning of harm under ESA); accord 16 U.S.C. § 1532 (19) (defining "take").
111. McAnaney, supra note 63, at 441 (detailing level of destruction needed to constitute harassment and harm).
112. Id. (describing harm for critical habitats). In Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., the Supreme Court found that the definition of "harm" includes habitat modification or degradation, but only "where actual death or injury of a protected animals [sic] occurs and where the plaintiff can prove that the challenged action is a proximate cause of that injury or death." Armstrong, supra note 105, at 439-440 (quoting Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 695-697 (1995)).
113. 16 U.S.C. § 1533(d) (detailing lack of protections afforded to designated threatened species); see also McAnaney, supra note 63, at 443 (explaining distinction under ESA Section 4(d)); Liebesman et al., supra note 61, at 236 (describing distinction's impact).
114. See Welch, supra note 13, at 676-77 (describing Special Rule's discretion and impact on protections for threatened species).
C. Standard of Review for Agency Action

The APA governs the judicial review standard for administrative agency actions. Review of an agency’s action is subject to the APA’s “arbitrary and capricious” standard. In 1983, the Supreme Court explained in Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co. (State Farm), that an agency acts arbitrarily or capriciously if it:

[R]elied 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.

Furthermore, a court’s task is “a narrow one,” in that a court must only determine whether the agency action was the product of “reasoned decisionmaking.” A court may “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” While this establishes a strong presumption in favor of the agency action, an agency must still “articulate a rational connection between the facts found and the choice made.”

Courts have established several deference tests for when an agency’s action is interpreting a statute or its own regulation.
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Skidmore v. Swift & Co.,124 the Supreme Court examined the level of deference given to an agency's interpretive rules.125 The Court held that where an Administrator of an Act reaches a conclusion based on a "body of experience and informed judgment," a court may use the experience and judgment as guidance where it has "power to persuade," even if it is not controlling.126

The year after State Farm, the Supreme Court established a two-prong test in Chevron v. Natural Resources Defense Council127 that governs the judicial review of an administrative agency's statutory interpretation when that agency holds the authority to administer the statute.128 According to the Chevron test, a court must first determine if Congress spoke directly to the question at issue.129 If Congress did speak directly to the issue, the court does not afford deference to the agency.130 If there is ambiguity as to the Congressional intent, however, the second inquiry is "whether the agency's answer is based on a permissible construction of the statute."131 In the presence of doubt as to Congressional intent on an issue, it is not a court's place to "substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"; rather, the court should afford the interpretation deference.132 In the case of Auer v. Robbins,133 which dealt with a question of an agency's interpretation of its own regulation, rather than a statute, the Court noted that under Chevron step two, the

125. Id. at 140.
126. Id. at 139 (noting that even absent controlling authority of agency's determination, court may still use determination for guidance).
128. Id. at 842-45 (establishing two-prong framework for determining agency's ability to interpret statutory language).
130. Chevron, 467 U.S. at 842 (explaining deference granted at Chevron step one).
131. Id. at 843 (detailing Chevron step two analysis permitting reasonable agency interpretation). The underlying rationale of Chevron step two surrounds Congress' statutory empowerment of an agency to administer a program that by definition entrusts the agency to formulate policy and rules to accomplish Congress' intent, including filling any gaps implicitly or explicitly left by Congress. Id. at 843-44.
132. Id. at 844 (describing judicial deference to agency's statutory interpretation).
133. 519 U.S. 452 (1997).
agency’s interpretation is controlling unless “plainly erroneous or inconsistent with the regulation.”

The Supreme Court recently clarified the relationship between *Chevron* and *Auer* in *Gonzales v. Oregon*. In *Gonzales*, the Court noted that *Auer* applies when an administrative rule interprets the issuing agency’s own regulation. By contrast, *Chevron* applies when the interpretation is of a statute and Congressional intent delegated power to the agency to make rules that carry the force of law. Absent these circumstances, an agency interpretation is only “entitled to respect” if it is persuasive under *Skidmore*.

Other cases have demonstrated just how high the level of deference should be when a court reviews agency action under the APA. For example in *Marsh v. Oregon Natural Resources Council*, the Supreme Court noted that in matters where the issues “require[ ] a high level of technical expertise,” an even higher level of deference should be accorded to agency judgments. With respect to the range of regulatory measures afforded to listed species under the ESA, listing agencies are also entitled to great deference in their determinations. In *Tennessee Valley Authority v. Hill*, the Supreme Court reinforced the breadth of Congress’ discretion to protect species with regulating measures under the ESA’s Section Seven. In its analysis, the Court stated that the ESA may be ap-

134. Id. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)) (internal quotation marks omitted) (finding *Auer* easily met deferential standard).

135. See *Gonzales v. Oregon*, 546 U.S. 243, 244 (2006) (holding Controlled Substance Act does not allow Attorney General to prohibit doctors from prescribing drugs used for physician-assisted suicide permissible under state law).

136. Id. at 244 (citing *Auer*, 519 U.S. at 461-463) (describing applicability of *Auer* deference).

137. Id. (citing United States v. Mead, 533 U.S. 218, 226-27 (2001)) (clarifying when *Chevron* interpretation applies).


139. For a discussion of administrative deference under APA review, see supra notes 132-138 and infra notes 140-145 and accompanying text.


141. Id. at 377 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)) (internal quotation marks omitted) (describing standard of review involving technical expertise involved).

142. For a discussion on judicial deference of agency listing of endangered species, see infra notes 143-145 and accompanying text.

143. 437 U.S. 153 (1978) (affirming agency authority to list endangered species under ESA regardless of government appropriation to dam construction project threatening same listed, endangered species).

144. Id. at 192-94 (describing ruling). The Court in *Tenn. Valley Auth.* declined to find Congressional project appropriations could repeal the ESA application. Id. at 191.
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plied retroactively and can “supersede ‘specific’ congressional appropriations,” essentially holding that there are no exceptions to the ESA’s power to protect listed species from jeopardy, at least with respect to federal agency action.145

D. The Litigious History of ESA Interpretation in Listing Rule Determinations

Despite the well-established rules for when courts should defer to agency decisionmaking, the level of deference accorded to listing agencies is not uniform among the different circuits.146 The D.C. Circuit has closely followed the rationale in State Farm and Marsh regarding deference to agency decisionmaking, noting that “reviewing court must be ‘at its most deferential’ when examining conclusions ‘at the frontiers of science.’”147 The D.C. Circuit has also emphasized courts “must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives.”148

Other circuits do not afford as much deference to agency decisionmaking; the United States Court of Appeals for the Ninth Circuit in particular has demonstrated that deference does not mean certain victory for a listing agency.149 In Defenders of Wildlife v. Norton (Defenders),150 the Ninth Circuit heard a challenge to the FWS’ listing of the flat-tailed horned lizard as a threatened species concerning the proper focus of conservation efforts.151 The court had to tackle the meaning of the phrase “in danger of extinction


146. For a discussion of variability of deference accorded listing agencies, see infra notes 116-145 and accompanying text.


148. Id. at 1000 (citing Int’l Fabricare Inst. v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992)) (establishing judicial limitations for review of agency decisionmaking). In Am. Wildlands, groups brought suit against the FWS for its failure to list the west slope cutthroat trout as a threatened species under the ESA, arguing the FWS’ decision was arbitrary and capricious. Id. at 993. The Court of Appeals for the District of Columbia Circuit disagreed, noting (1) the high level of deference afforded an agency’s determination and (2) that none of the plaintiffs several claims demonstrated that the agency acted unreasonably. Id. at 998.

149. For a discussion of Ninth Circuit deference to agency action, see infra notes 150-157 and accompanying text.

150. 258 F.3d 1136 (9th Cir. 2001) (Defenders (Lizard)).

151. Id. at 1136-37 (describing challenge to FWS’ decision not to list flat-tailed horned lizard as threatened).
throughout . . . a significant portion of its range" (SPR). The Ninth Circuit ultimately looked to the ESA's legislative history, which revealed that the amendment adding the threatened species listing classification appeared to be Congress' attempt to add more flexibility to providing wildlife protection. The history covered the issue of a species being "endangered" in some areas, while overpopulated in others, allowing the "discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction." The Ninth Circuit concluded that the FWS "necessarily has a wide degree of discretion in delineating a 'significant portion of its range,' since the term is not defined in the statute." The court noted, however, that in a case such as the one before them, where the record showed that the area in which a species would be expected to live is substantially less than the range the species historically inhabits, the agency must justify why that area would not constitute an SPR. The court admonished the agency for failing to apply the "flexible standard" for determining the lizard was indeed in danger of extinction throughout an SPR and found that the decision to withdraw the proposed listing rule was arbitrary and capricious.

In 2010, in Center for Biological Diversity v. Lubchenco, the District Court for the Northern District of California faced a challenge to the decision not to list the ribbon seal as either threatened or endangered under the ESA. The challengers in that case argued the NMFS acted arbitrarily and capriciously by failing to consider whether any DPS warranted listing in an SPR and utilizing an "irrational time frame" with respect to the "foreseeable future." Despite that global climate change was affecting the ribbon seal in its Arctic habitat, the court upheld the agency's determination that listing was not warranted.

153. Defenders (Lizard), 258 F.3d at 1144 (describing ESA's legislative history).
154. Id. (describing Congressional purpose of SPR language).
155. Id. at 1145 (describing breadth of agency's discretion in SPR determination).
156. Id. (outlining agency's duty to explain SPR rationale).
157. Id. at 1146 (holding listing agency acted arbitrarily and capriciously).
158. 758 F. Supp. 2d 945 (N.D. Cal. 2010).
159. Id. at 947-48 (describing case's background).
160. Id. at 955 (outlining plaintiffs' arguments).
161. See generally id. (finding NMFS did not act arbitrarily and capriciously). The Lubchenco court noted, "[T]he FWS actually used a mid-century date (forty-five
The court noted the NMFS compared the ribbon seal to the polar bear's recent ESA listing, specifically where the NMFS found "ocean acidification, which is a result of increased carbon dioxide in the atmosphere... may impact ribbon seal survival and recruitment... but that the nature and timing of such impacts are... extremely uncertain." Furthermore, "anticipated... habitat changes resulting from ocean warming, and loss of sea ice, have the potential for negative impacts, but these impacts are not well understood." Instead, the NMFS placed the ribbon seal on the "Species of Concern List" for the purpose of "increase[ing] public awareness about the species,... further identify[ing] data deficiencies and uncertainties in the species' status and the threats it face[d]," and provoking research efforts to ascertain the species' status and threats.

With respect to the polar bear, environmental organizations sued the FWS in July 2008 for failing to issue a CHD concurrently with its species listing. After reaching a court-approved settlement, the FWS issued a final rule in December 2010, designating a record 187,000 square miles of Alaska's North Slope and adjacent area on the Outer Continental Shelf as critical habitat for the polar bear, the largest CHD in the ESA's history. In *Alaska Oil & Gas Ass'n v. Salazar*, however, the United States District Court for the District of Alaska rejected the FWS' CHD with respect to the polar bear, finding the designation did not meet the statutory requirements for CHD under Section Four and the FWS failed to comply with procedural requirements. Since January 11, 2013, there has been no critical habitat designated for the polar bear.
IV. NARRATIVE ANALYSIS

The United States Court of Appeals for the District of Columbia Circuit framed its opinion with the highly deferential arbitrary and capricious standard of review entitled to agency action under the APA. The court observed that its task as an appellate court was narrow, with the “principal responsibility” being “to determine, in light of the record considered by the agency, whether the Listing Rule is a product of reasoned decisionmaking,” citing State Farm. From the outset, the court opined that the Listing Rule was the product of a “careful and comprehensive study and analysis.” In support of the determination, the court highlighted that thirteen of the fourteen parties that participated in peer review of the Listing Rule found the FWS’ conclusion was justified, compared to one reviewer who “express[ed] concern that the proposed rule was flawed, biased, and incomplete.”

Furthermore, the court noted that because the foundation the agency relied upon was “adequately explained and uncontested, scientific experts (by a wide majority) support the agency’s conclusion,” and because the appellants did not bring forth any scientific evidence not considered by the FWS, the court was “bound to uphold the agency’s determination.” The court rejected each of the seven different objections raised against the FWS’ listing determination as meritless.

172. Id. at 8 (noting agency’s “scientific conclusions [were] amply supported by data”).
173. Id. (quoting Listing Rule, supra note 11, at 28,292-293) (internal quotation marks omitted) (discussing peer reviewers’ comments).
174. Id. at 9 (justifying court of appeals’ holding).
175. In re Polar Bear V, 709 F.3d at 9 (observing flaws in appellants’ claims failed before fully addressing each claim individually). As the court noted, the appellants’ seven separate allegations were:

(1) FWS failed to adequately explain each step in its decisionmaking process, particularly in linking habitat loss to a risk of future extinction; (2) FWS erred by issuing a single, range-wide determination; (3) FWS relied on defective population models; (4) FWS misapplied the term “likely” when it determined that the species was likely to become endangered; (5) FWS erred in selecting a period of 45 years as the “foreseeable future”; (6) FWS failed to “take into account” Canada’s polar bear conservation efforts; and (7) FWS violated Section 4(i) of the ESA by failing to give an adequate response to the comments submitted by the State of Alaska regarding the listing decision.

Id. at 7-8.
A. Inadequate Justification

The challengers first alleged the FWS failed to explain the causation between the predicted decrease in the polar bear habitat and the species' endangerment pursuant to the APA's arbitrary and capricious standard. The court distinguished the case from Defenders, where the Ninth Circuit rejected the FWS' decision not to list the flat-tailed horned lizard, because the Listing Rule discussed in In Re Polar Bear V provided an explanation supplemented by ample evidence to support the agency's theory. The FWS' Listing Rule evidence was further bolstered by numerous experts who made the same predictions. The D.C. Circuit noted that the FWS not only provided a "discernible path" of decisionmaking, which is owed deference from the court, but that "it also firmly articulate[d] a rational connection between the facts found and the choice made."

The second claim alleged that the polar bear species was not sufficiently threatened "throughout its range" to meet the statutory listing requirement under Section 4(a)(1)(A). The court embarked on the highly fact-intensive inquiry, addressing the effects of declining sea-ice on specific ecoregions of the polar bear’s habitat in light of the FWS' findings. In a related challenge, appellants argued that the FWS “should have divided the species into Distinct Population Segments for the purposes of this listing decision.” The D.C. Circuit, however, found that the FWS properly employed its DPS Policy and concluded a DPS was unwarranted. The appellants did not challenge the policy, but rather alleged the FWS misapplied the policy. The court outlined the criteria for a DPS

176. Id. at 9 (restating appellants' claim); accord 5 U.S.C. 706(2)(A).
177. Id. at 9-10 (noting agency both considered and explained causation). The court pointed to the Listing Rule where the FWS stated that “polar bears will face increased competition for limited food resources, increased open water swimming with increased risk of drowning, increasing interactions with humans with negative consequences, and declining numbers that may be unable to sustain ongoing harvests.” Id. at 9 (citing Listing Rule, supra note 11, at 28,275).
178. Id. (explaining "wide majority" of scientific experts support agency’s determination).
179. Id. at 9 (quoting Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 241 (D.C. Cir. 2008)) (discussing FWS’ path of decisionmaking); see also Keating v. F.E.R.C., 569 F.3d 427, 433 (D.C. Cir. 2009) (finding agency provided sufficient explanation).
180. In re Polar Bear V, 709 F.3d at 10-12 (addressing appellants' claims that FWS erred in concluding polar bear species was threatened throughout its range).
181. Id. (describing court’s analysis).
182. Id. at 11 (describing appellants' challenges).
183. Id. (finding in FWS' favor on application of DPS Policy).
184. Id. (classifying appellants' claim).
under the policy, defined the terms, and noted that the FWS properly considered whether all of the polar bear's nineteen subpopulations of the four ecoregions satisfied the DPS criteria and ultimately concluded the subpopulations were not DPS – a conclusion that the court explained was entitled to deference. Like with other challenges that the FWS misapplied its DPS Policy, the court pointed to the FWS' responses found in its Listing Rule that specifically addressed each claim, rather than inserting the court's own opinion as to the claims' validity. Regarding the DPS claim, the court concluded the FWS did not act arbitrarily or capriciously in its action, noting there was nothing "to suggest that the agency's decision to make a single, range-wide listing determination was 'plainly erroneous or inconsistent with' the DPS Policy."

The appellants' third claim charged that the FWS mistakenly relied on two population models that the United States Geological Survey (USGS) developed, noting that the FWS did not "explain the assumptions and methodology used in preparing the model and provide a complete analytic defense should the model be challenged." The D.C. Circuit found the appellants' charge was "plainly meritless." The court further noted, "[T]hat a model is limited or imperfect is not, in itself, a reason to remand agency decision based upon it." In addition, the court noted that the accusation was contradicted by the fact that the USGS itself criticized the FWS for not relying heavily enough on the models, thus finding that the FWS' narrow reliance was not arbitrary and capricious.

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185. In re Polar Bear V, 709 F.3d at 12 (defining criteria for "discreteness") (citing DPS Policy, supra note 99, at 4725). Specifically, the three criteria for a Distinct Population Segment according to the DPS Policy are:

- (1) Discreteness of the population segment in relation to the remainder of the species to which it belongs;
- (2) The significance of the population segment to the species to which it belongs; and
- (3) The population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

Id. at 11.

186. Id. (emphasizing deference to agency).

187. Id. (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)) (noting court's task is to give "controlling weight" to agency's interpretation, not to choose between competing interpretations).

188. Id. at 13 (quoting Appalachian Power Co. v. EPA, 249 F.3d 1032, 1053-54 (D.C. Cir. 2001)) (alterations in original) (discussing appellants' third claim).

189. Id. (noting model did not have to be perfect).

190. In re Polar Bear V, 709 F.3d at 13 (citing Appalachian Power, 249 F.3d at 1052) (describing deference entitled to agency on agency models).

191. Id. at 14 (finding for FWS regarding challenge on population models).
B. Ambiguity in the Statutory Language

The appellants' fourth challenge was that the FWS appeared to adopt one definition of "likely" as the ESA standard for its threatened species definition, but then subsequently failed to apply it.\textsuperscript{192} The court, however, found this accusation "facially implausible" because there was no evidence in the Listing Rule that indicated the FWS used this definition, and it accepted the FWS' explanation that it interpreted "likely" as having its "'ordinary meaning' or 'dictionary definition.'"\textsuperscript{193} The appellants made an alternative argument that the FWS "failed to apply any standard of 'likelihood' at all," but the court rejected the argument because rulemaking agencies are "free to rely on common English usage without adopting specialized definitions."\textsuperscript{194} The court further noted that the appellants supplied no evidence that an ESA listing was ever struck down for failing to define "likely" expressly.\textsuperscript{195}

The appellants' fifth claim challenged the FWS' understanding of the term "foreseeable" in the ESA's threatened species definition, particularly objecting that the FWS "failed to justify its definition of 'foreseeable' as a 45-year period."\textsuperscript{196} The issue stemmed from the fact that the term foreseeable is not defined by either statute or regulation, and the FWS assesses what is foreseeable on a case-by-case basis.\textsuperscript{197} The court rejected the appellants' definition of foreseeability, which meant the "furthest period of time in which [FWS] can reliably assess, based on predicted conditions," because (1) there was no legal authority suggesting the FWS must adhere to the appellants' definition, and (2) even applying that definition, the FWS' definition was reasonable.\textsuperscript{198} Furthermore, the court pointed out that once again the appellants did not challenge the underlying data of the FWS' decision, rather, they merely challenged the FWS' interpretation and application of statutory language.\textsuperscript{199} The D.C. Circuit concluded on this claim by stating the

\textsuperscript{192.} \textit{Id.} (describing appellants' challenge).
\textsuperscript{193.} \textit{Id.} (accepting FWS' interpretation). The court noted, "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." \textit{Id.} at 15 (quoting Perrin v. United States, 444 U.S. 37, 42 (1979))
\textsuperscript{194.} \textit{Id.} at 15 (describing general rule of statutory interpretation).
\textsuperscript{195.} \textit{In re Polar Bear V}, 709 F.3d at 15 (noting lack of express definition of term does not impede review process).
\textsuperscript{196.} \textit{Id.} at 7 (noting appellants' claim challenging FWS' definition of foreseeability).
\textsuperscript{197.} \textit{Id.} at 15 (describing lack of statutory definition of foreseeability).
\textsuperscript{198.} \textit{Id.} (explaining rejection of appellants' challenge).
\textsuperscript{199.} \textit{Id.} at 16 (describing why appellants' challenge failed).
agency's decision merely had to be "justifiable and clearly articulated" to receive deference, rather than meet the APA's arbitrary and capricious standard outlined in *State Farm*, and the court was satisfied that the FWS passed on both elements.\textsuperscript{200}

C. State Complaints in The Peer Review Process

The D.C. Circuit next addressed the appellants' attack on the FWS for failing to consider Canada's conservation practices when determining whether to list the Polar Bear because Section 4(b)(1)(A) requires the FWS to "take into account those efforts . . . made by any State or foreign nation."\textsuperscript{201} Once again, the court rebuffed the appellants' claim, finding the FWS satisfied the ESA's statutory criteria and noting the FWS specifically addressed this issue in the Listing Rule.\textsuperscript{202} The appellants argued in the alternative that the FWS was under "an 'independent obligation' to 'take into account' foreign conservation efforts in addition to" the ESA listing requirements.\textsuperscript{203} The D.C. Circuit stated that regardless of whether there was an obligation, the fact that the FWS addressed the issue in its Listing Rule meet its obligation.\textsuperscript{204}

Lastly, the D.C. Circuit addressed a separate argument the State of Alaska raised accusing the FWS of failing to provide a sufficient "written justification for [its] failure to adopt regulations consistent with the [state's] comments or petition" pursuant to the ESA's Section 4(i) requirement.\textsuperscript{205} While the court rejected the FWS' notion that the response was not reviewable because it deemed the response as a "procedural step" that becomes reviewable only upon final agency action, the court went on to find that the argument from Alaska "plainly lack[ed] merit."\textsuperscript{206} As with the previous claims, the court noted that the FWS acted in accordance with the statutory requirement in Section Four, here responding in


\textsuperscript{201} *Id.* at 17 (noting appellants' argument regarding Canada's polar bear conservation efforts); accord 16 U.S.C. 1533(b)(1)(A).

\textsuperscript{202} *In re Polar Bear V*, 709 F.3d at 16-17 (describing and rejecting state's claim against Listing Rule process).

\textsuperscript{203} *Id.* at 16 (describing Canada's claim against FWS).

\textsuperscript{204} *Id.* at 16-17 (concluding FWS met statutory requirements under 16 U.S.C. 1533(b)(1)(A)).

\textsuperscript{205} *Id.* at 17 (citation omitted) (restating Alaska's claim against FWS).

\textsuperscript{206} *Id.* at 17-18 (rejecting Alaska's claim).
a timely manner with a forty-five-page letter specifically addressing the concerns Alaska raised.\textsuperscript{207}

Despite that the ESA does not define what constitutes a "sufficient written justification," particularly in terms of what substance would render a response as inadequate, the court found that the FWS acted reasonably in its response.\textsuperscript{208} Further, the court clarified that Section 4(i) did not require the state be satisfied, or even agree, with the agency's response; rather, the statute ensures the agency was fully informed as to the state's "interests and concerns" relating to its listing determination and regulation.\textsuperscript{209} The court concluded by affirming the judgment of the district court below.\textsuperscript{210}

V. CRITICAL ANALYSIS

With respect to the claims against the FWS regarding the insufficiency of its justification and the individual state's complaints regarding the peer review process, the D.C. Circuit reasonably reached the conclusion that the FWS did not act arbitrarily and capriciously.\textsuperscript{211} With respect to Section Four's statutory ambiguity, however, the case might have had a different outcome had the court reviewed these particular claims directly under \textit{Chevron} instead of though a general arbitrary and capricious analysis.\textsuperscript{212} Further, the D.C. Circuit failed entirely to consider or discuss the actual impact of the distinction between whether the polar bear is listed as threatened rather than endangered, thereby avoiding the specific impact of the Special Rule and the failure to protect the listing of the species that resulted in this case.\textsuperscript{213}

A. Arbitrary & Capricious: The FWS Glides By Under \textit{State Farm}

\begin{quote}
The United States Court of Appeals for the District of Columbia Circuit reasonably arrived at the conclusion that the FWS' polar bear listing as threatened under the ESA's Section Four was not
\end{quote}

\begin{itemize}
\item \textsuperscript{207} \textit{In re Polar Bear V}, 709 F.3d at 17 (stating case's facts).
\item \textsuperscript{208} \textit{Id.} at 18 (noting ESA did not provide guidance for what written justification requires).
\item \textsuperscript{209} \textit{Id.} at 19 (holding Section 4(i) did not require further justification to appease State); \textit{accord} 16 U.S.C. 1533(i).
\item \textsuperscript{210} \textit{Id.} (affirming District Court for District of Columbia's judgment).
\item \textsuperscript{211} \textit{Id.} at 15-19 (noting length of justification and adherence to listing rule process deadlines).
\item \textsuperscript{212} \textit{In re Polar Bear V}, 709 F.3d at 15-19 (finding FWS' interpretation of Section 4(i) was reasonable).
\item \textsuperscript{213} \textit{Id.} (failing to address impact of distinction between listing polar bear as threatened as opposed to endangered).
\end{itemize}
arbitrary or capricious. In light of the highly deferential standard afforded to agency action under the APA, which is reflected in the precedent of both the D.C. Circuit and the Supreme Court, the court’s holding is neither surprising nor inconsistent with precedent. The D.C. Circuit’s analysis was particularly appropriate because the FWS had conducted an extensive review over the course of three years, the matter involved scientific information, and the FWS addressed each concern raised during the extensive peer review process. Thus, in the absence of an outright violation of a procedural requirement in the listing process, it was extremely unlikely that the court would not ultimately uphold the agency’s determination.

For example, from the outset, neither Canada nor Alaska stood much of a chance against the presumption in favor of the FWS on their complaint regarding the peer review process. Challenging the FWS’ responses during the peer review process is equivalent to asking the court to rule on the scientific information itself, which the court repeatedly has emphasized is not its role. Had the agency failed to address the state concerns entirely or had they addressed the concerns only briefly, the result may have been different; however, that was simply not the case here.

B. Chevron vs. Skidmore

While ultimately affirming the district court below, the court bypassed the two-step framework established in Chevron – an ap-


215. See id. (describing court’s deference due to technical nature underlying listing determination); see also Leppo, supra note 9, at 10575 (describing frequency of record challenges and difficulty in prevailing over agency). As Leppo described, “Record review challenges to federal agency decisions in the environmental context are, arguably, among the most frequently litigated and, yet, the least frequently won or favorably settled federal cases.” Id.

216. See Brief of Defendants-Appellees, supra note 10, at *2-4 (noting FWS’ extensive review).


218. See Leppo, supra note 9, at 10583 (describing difficulty in prevailing over agency in record review challenges).

219. See In re Polar Bear V, 709 F.3d 1, 3 (D.C. Cir. 2013) (noting court’s refusal to rule on scientific information).

220. See Leppo, supra note 9, at 10583 (describing procedural challenges being most likely avenue to succeed over agency).
approach diametrically opposed to the district court below, other circuits and district courts, and the court's own precedent. While the D.C. Circuit outlined the same standard of review as the district court below it with respect to the standard being "narrow," with a strong presumption of validity in favor of the agency, and only in light of the record before the agency when it made its decision, the D.C. Circuit sharply diverged from the rationale applied below thereafter. While this was in the D.C. Circuit's power because it reviewed the agency's determination directly, the court could have still employed Chevron, as the Ninth Circuit did in the case of Defenders, because this case involved agency interpretation. Instead, the court appeared to employ a more "common-sense" approach in its analysis, rather than utilize Chevron.

The D.C. Circuit instead elected to employ Skidmore with respect to the challenge to the peer review process under Section 4(i), rather than Chevron and Auer, finding that the agency action was not entitled to deference under Gonzalez. The court noted that Auer did not apply where the regulation "merely parrots" the statute and the "interpretation does not itself carry the force of law warranting deference." Thus, the court found that under Skidmore, the FWS' interpretation was "'entitled to respect' only to the extent it has the 'power to persuade.'"

Alternatively, with respect to the meaning of "likely" in the definition of "threatened," the court conceded that there was no explicit definition of the term in the statute. That would put the

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221. See Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007) (noting court reviewed FWS' ESA interpretation according to Chevron framework); see also Center for Biological Diversity v. Luchchenc, 758 F. Supp. 2d 945, 963 (N.D. Cal. 2010) (examining whether Chevron applied to agency's interpretation of "foreseeable future"). The district court in Luchchenc ultimately found Chevron did not apply, noting the cases defendants supplied "rel[ied] instead ... [on] formal policies or criteria used to evaluate all kinds of petitions, not the specific interpretation of a term in the context of a single petition." Luchchenc, 758 F. Supp. 2d at 964.


224. See Leppo, supra note 9, at 10576 (noting that Chevron bolsters deference in judicial review of administrative action under APA).


226. Id. at 18.

227. Id. (quoting Gonzales, 546 U.S. at 256) (outlining standard of review).

228. Id. at 19 (interpreting ESA's language).
issue directly under the ambit of Chevron's framework under step two because the challenge was to the agency's statutory interpretation absent explicit congressional intent. Rather than mention Chevron, Auer, or even Skidmore, however, the court pointed to the fact that no evidence was presented showing that any ESA listing had been struck down due to the agency failing to define the term "likely." In examining the FWS' standard for foreseeability with regard to the definition's foreseeable future requirement under 16 U.S.C. 1532(20), the D.C. Circuit similarly acknowledged that "foreseeable" was not defined, but it did not employ Chevron. The court echoed the agency's argument that foreseeability is determined on a case-by-case basis, noting that the issue was not whether the agency could have chosen another time period "so long as the agency's decision was justifiable and clearly articulated," following State Farm. The D.C. Circuit's finding is problematic, however, when evaluating the agency's interpretation in light of Congress' explicit purpose in creating the ESA: "[T]o halt and reverse the trend toward species extinction, [at] whatever the cost." Consequently, under Chevron, the court would have evaluated whether the agency's interpretation was a permissible statutory construction in light of Congress' intent, as the Ninth Circuit did in Defenders. By avoiding the Chevron framework, the court failed to address the overarching issue of whether the failure to list the polar bear as endangered was an ESA violation. Instead, the court reviewed the individual agency interpretations of "foreseeable," "likely," "significant portion of its range," and "distinct population," all absent

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230. See In re Polar Bear V, 709 F.3d at 15 (describing why challenge to agency's interpretation "likely" failed); see also U.S. v. Mead Corp., 533 U.S. 218, 220 (2001) (holding if Chevron deference not owed, Skidmore may still apply).

231. In re Polar Bear V, 709 F.3d at 15 (acknowledging "foreseeable future" not defined in statute).

232. Id. at 16 (describing low threshold for upholding agency's interpretation under State Farm).


234. Cf. In re Polar Bear V, 709 F.3d at 7 (declining to use Chevron or analyze agency's interpretations in relation to Congressional intent), with Defenders (Lizard), 258 F.3d 1136, 1146 (9th Cir. 2001) (relying on Chevron and comparing agency interpretation to Congressional intent).

235. See In re Polar Bear V, 709 F.3d at 3 (reviewing challenges "narrowly").
the contextual consideration of the implications of the threatened versus endangered classifications.\textsuperscript{236}

C. The Special Rule: Contrary To The Purpose of The ESA?

Though the D.C. Circuit applied the factors from \textit{State Farm} to the agency's statutory interpretation, the court did not flesh out the issue of whether the agency "relied on factors which Congress has not intended it to consider" with respect to the Listing Rule determination on the whole.\textsuperscript{237} Had the court done so, the analysis might have resembled the Ninth Circuit's analysis in \textit{Defenders}, which demonstrated deference does not take a listing agency off the hook when it fails to justify its decision between multiple alternatives.\textsuperscript{238} Specifically, the Ninth Circuit in \textit{Defenders} held the FWS accountable for failing to apply the "flexible" standard and taking a more restrictive approach in its determination because it ran contrary to Congress' intent in adding the threatened category.\textsuperscript{239}

The court here, however, expressly stated that the agency's choice only had to be justifiable and articulated, rather than having to be the interpretation that better adheres to the Act's purpose.\textsuperscript{240} While the court's task in reviewing the issue was narrow, it appears counterintuitive to interpret the "parts" so narrowly that the "whole" argument is lost.\textsuperscript{241} The FWS chose to list the polar bear as threatened rather than endangered, which in fact resulted in lesser-to-no protection for the species, making it an agency action in direct contradiction to the ESA's plain purpose.\textsuperscript{242}

Furthermore, the D.C. Circuit similarly declined to address the consequences of the agency's Special Rule compared to a standard ESA listing rule.\textsuperscript{243} Not long after the agency listed the polar bear, the Bush administration made it clear that greenhouse gas emis-

\textsuperscript{236} \textit{Id.} at 7-8 (outlining claims individually and narrowly).
\textsuperscript{237} \textit{Id.} at 16 (citation omitted) (applying arbitrary and capricious review).
\textsuperscript{238} \textit{See Defenders (Lizard),} 258 F.3d at 1145-46 (finding agency's action arbitrary and capricious and remanding proposed rule listing).
\textsuperscript{239} \textit{Id.} (observing that Secretary should have employed more "flexible standard").
\textsuperscript{240} \textit{In re Polar Bear V,} 709 F.3d at 16 (declining to decide whether agency's interpretation was best interpretation in light of Congressional intent).
\textsuperscript{241} \textit{Compare In re Polar Bear V,} 709 F.3d at 8 (stating narrow scope of review), with 16 U.S.C. \textsection 1531(c)(1) (outlining Congressional policy). One of Congress' ESA policy points was "that all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. \textsection 1531(c)(1).
\textsuperscript{242} \textit{See Welch, supra} note 13, at 680 (describing FWS' interpretation as running contrary to ESA's purpose).
\textsuperscript{243} \textit{See In re Polar Bear V,} 709 F.3d at 18 (neglecting to discuss Special Rule).
sions would not be regulated as a result of an ESA listing. The court itself admitted that the main premises on which the FWS listed the polar bear was that greenhouse gas emissions were causing Arctic sea ice to melt that polar bears rely on for survival. The court did not, however, find issue with the fact that the FWS’ Special Rule listed the animal while simultaneously stating that it would be provided no protection from the sole cause of its threat.

The D.C. Circuit’s approach is inconsistent with the precedent set forth by the Supreme Court in Tenn. Valley Auth, which emphasized that the ESA’s Section Seven “admits of no exception” and affords endangered species ‘the highest of priorities.” As President Nixon urged, having protection just for “endangered” species near extinction “simply [did] not provide the kind of management tools needed to act early enough to save a vanishing species,” the very notion that spurred the creation of the ESA to offer greater flexibility in offering protection to species at an earlier point in their man-created demise. In contrast to the evaluation of the ribbon seal in Lubchenco, the D.C. Circuit’s opinion does not discuss the unique aspects of greenhouse gas emissions and the time it would take to halt global climate change’s effects, the delay of which could potentially mean that action needs to be taken now if it will have any positive impact on the species’ ultimate survival.

The major flaw in this case is the D.C. Circuit’s treatment of the FWS as a neutral, non-political entity to whom deference is owed. The reality is that there are a multitude of political and personal interests at stake with ESA listings, and it is hard to find a case that demonstrates this reality better than In re Polar Bear V.

244. See Cummings & Siegel, supra note 10, at 6 (citing Bush administration’s claim that greenhouse gas emission was beyond ESA’s scope).
245. In re Polar Bear V, 709 F.3d at 5-6 (describing polar bear’s reliance on sea ice).
246. Id. (failing to discuss Special Rule).
248. See McAnaney, supra note 63, at 438 (describing President Nixon’s view on inadequacy of U.S. law to save species early enough).
250. See Judi Brawer, The Endangered Species Act: A Year In Review In the Ninth Circuit, 50 JUL ADVOCATE 23, 23 (2007) (describing increase in ESA litigation in Ninth Circuit resulting from industry groups and state and local governments challenging species’ listings and critical habitat designations).
251. See Leppo, supra note 9, at 10582 (stating complexity of In re Polar Bear as unlikely to be repeated).
Congress created the Citizen Suit Provision to enable citizens to provoke agency action; the provision indicates Congress' intent for courts to be the battleground when agency and private interests clash under the ESA because Congress' main goal in enacting the ESA was to protect the future of species and their ecosystems.252 The court's true task should be to ensure - on a case-by-case basis - that the listing determination is in fact the result of neutral decisionmaking with the at-risk species and the ESA's intent as the primary consideration.253 By relying entirely on due deference to the FWS and neglecting to consider whether the FWS relied on permissible statutory constructions of the ESA, the D.C. Circuit at the very least cast doubt as to whether the FWS' interpretations were in accordance with Congress' intent in creating the threatened species category and thus for enacting the ESA itself.254

VI. IMPACT

The issue at the heart of In re Polar Bear V is two-fold: (1) can the ESA protect the polar bear from the main threat to its species' survival and (2) is the ESA the proper mechanism to combat global climate change.255 At the conclusion of In re Polar Bear V, eight years after the initial petition and five years after the polar bear's listing, the answer to both is a resounding no.256

A. Polar Bears: Slipping Through the Cracks of the ESA Framework

The FWS' Listing Rule designating the polar bear as an endangered species under the ESA is by no means a victory for the polar

252. See McAnaney, supra note 63, at 442-43 (describing citizen suit provision's purpose).

253. See Morse, supra note 80, at 567 (describing ESA's purpose).

Id. (quoting President Nixon's request for stronger species protections).

254. See Welch, supra note 13, at 675 (describing D.C. District Court's allowance of FWS to bypass meaningful action to protect polar bear by upholding Listing Rule). Specifically, Welch observed that the "interpretation significantly reduces FWS' responsibility to protect species threatened by climate change, and runs counter to the purpose of the ESA." Id. at 676.

255. See Secretary Kempthorne Announces, supra note 31 (stating polar bear listing not route to combat greenhouse gas emissions).

256. For a further discussion of the possible effects of In re Polar Bear V, see infra notes 257-275 and accompanying text.
At most, the listing is an empty gesture. As former Secretary Dirk Kempthorne emphasized in his decision to list the polar bear in 2008: “While the legal standards under the ESA compel me to list the polar bear as threatened, I want to make clear that this listing will not stop global climate change or prevent any sea ice from melting.”

After achieving a CHD of 187,000 square miles for the polar bear in 2010, the District Court for the District of Alaska in Alaska Oil & Gas vacated the CHD in January of 2013. Furthermore, the current ESA recovery plan for the polar bear is nonexistent. Currently, polar bears are “drowning from lack of sea ice, starving from lack of access to food, and engaging in cannibalism presumably triggered by food stress.” As the USGS observed in Alaska, one female polar bear recently swam nine days before finally reaching an ice flow 426 miles offshore, losing twenty-two percent of her body fat and her one-year-old cub during the process. Despite being listed as a threatened species under the ESA five years ago and being considered the “international icon” for the reality of global climate change, the polar bear has received virtually no benefit from the attention with regard to its steadily declining habitat.


258. See id. (noting D.C. District Court allowed FWS to bypass meaningful action to protect polar bear by upholding Listing Rule).

259. Secretary Kempthorne Announces, supra note 31 (describing limited scope of polar bear’s listing).


262. See Cummings & Siegel, supra note 10, at 7 (describing polar bear’s present condition).


264. See On Thin Ice, supra note 4, at 2 (describing lack of benefit to polar bear despite attention).
B. Global Warming Continues On

Global climate change's unique nature presents a new and difficult threat for animal species threatened by its effects, as is demonstrated after the outcome of *In re Polar Bear V*.

Unfortunately, by the time a species is 'endangered,' any regulation of greenhouse emissions as a result of the 'endangered' status would not save that species, because climate change would persist decades or even centuries beyond the date of regulation.\(^\text{265}\)

In light of the present lack of "clear causal connections between greenhouse gas emissions," its sources, the ability to halt or reverse the effects, and the uncertainty of how long that would or could take, the ESA will not be able to stand up to the task simply by listing species threatened by global climate change until it is too late.\(^\text{266}\)

The ribbon seal's plight in *Lubchenco* is a prime example of *In re Polar Bear V*'s impact on ESA use for animal species affected by global climate change.\(^\text{267}\) In *Lubchenco*, the court pointed to the FWS' determination in *In re Polar Bear V* of the "foreseeable future" as forty-five years to find that the NMFS's rejection of the ribbon seal was consistent with the polar bear decision.\(^\text{268}\) Beyond 2050, the NMFS found that "enormous uncertainty about future social and political decisions on emissions" will affect projection of conditions after that point.\(^\text{269}\) Thus, the FWS' polar bear listing will act as a bar for protection to animal species even in the same threatened habitat, particularly because the listing left the issue of greenhouse gas emissions unchanged.\(^\text{270}\) Absent a clearer standard for what

\(^{265}\) See Armstrong, supra note 105, at 448 (describing ESA's failure for only being effective when its too late).

\(^{266}\) Id. at 448 (discussing why ESA fails to address global climate change).

\(^{267}\) Center for Biological Diversity v. Lubchenco, 758 F. Supp. 2d 945, 967 (N.D. Cal. 2010) (citing *In re Polar Bear V* in analysis).

\(^{268}\) Id. at 962-63 (comparing FWS definition of foreseeable future in *In re Polar Bear V* with NMFS's definition for ribbon seal).

\(^{269}\) Id. (restating NMFS's reasoning for not extending projection beyond 2050).

\(^{270}\) Cf. Alaska v. Lubchenco, 825 F. Supp. 2d 209, 211 (D.D.C. 2011) (finding agency listing of beluga whales in Alaska Cook inlet as endangered was rational), with *In re Polar Bear III*, 794 F. Supp. 2d 65, 89-90 (D.D.C. 2011) (finding agency did not act arbitrarily and capriciously in listing polar bear as threatened) and *Lubchenco*, 758 F. Supp. 2d at 945 (finding agency did not act arbitrarily and capriciously by declining to list ribbon seal as threatened or endangered). In *Alaska v. Lubchenco*, the District Court for the District of Columbia dealt with the regulation and effects of subsistence hunting on the DPS, rather than dealing with
constitutes foreseeable, the case-by-case approach allows the FWS to avoid addressing the very real, but unfortunately political, impact of global climate change on Arctic species. 271

By contrast, when an agency lists an animal whose primary threat is unrelated to global climate change, the ESA listing process remains the same and both agencies and courts are less reluctant to offer the full extent of protection under the ESA. 272 Many other species stand to be affected by global climate change and are currently not afforded any protection under the ESA, including the American pika, coral reef, and Pacific walrus species. 273 While the ESA’s purpose does not explicitly include combatting global climate change and regulating greenhouse gas emissions, if no other regulatory mechanisms are put in place, the time will inevitably come when the ESA will be forced to tackle the issue in light of the direct harm to, and extinction of, various species. 274 Should the extinction of the polar bear occur first, the outright failure of the ESA may call for a complete reworking of the statutory framework; only time will tell. 275

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the uncertainty of greenhouse gas emissions and global climate change. Alaska, 825 F. Supp. 2d at 211.

271. See Lubchenco, 758 F. Supp. 2d at 945 (relying on In re Polar Bear V in analysis).

272. See Alaska, 825 F. Supp. 2d at 211 (finding agency listing of beluga whales in Alaska Cook inlet as endangered was rational).

273. See J.B. Ruhl, Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future, SR021 ALI-ABA 203, 205 (2009) (describing threat to American pika); Rod Downie, Declining Arctic Sea Ice Forces Thousands of Walrus Ashore, HUFFINGTON POST (Sept. 19, 2013), http://www.huffingtonpost.co.uk/rod-downie/arctic-sea_b_3953420.html (describing thousands of Pacific walruses washing up on shore in Alaska in light of sea ice decline); Armstrong, supra note 105, at 429-432 (describing threat to coral reefs as result of global climate change).

274. See Welch, supra note 13, at 682 (describing future implications of In re Polar Bear in light of other species climate change threatens).

275. See Liebesman, supra note 61, at 235 (addressing status of ESA climate change litigation).

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