

1 **UNITED STATES DISTRICT COURT**
2 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
3 **OAKLAND DIVISION**

4 CENTER FOR BIOLOGICAL DIVERSITY, et al.,

5 Plaintiffs,

6 v.

7 DIRK KEMPTHORNE, Secretary of the Interior, et al.,

8 Defendants,

9 and

10 ALASKA OIL AND GAS ASSOCIATION,

11 Defendant-Intervenors,

12 and

13 ARCTIC SLOPE REGIONAL CORP.,

14 Defendant-Intervenors.

Civ. No. 08-1339 CW

**ORDER GRANTING
STIPULATED PARTIAL
SETTLEMENT AGREEMENT**

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18 This Stipulated Partial Settlement Agreement (“Agreement”) is made between Plaintiffs
19 Center for Biological Diversity, Natural Resources Defense Council, and Greenpeace, Inc.
20 (collectively “Plaintiffs”); Defendants Dirk Kempthorne, Secretary of the Interior, and the United
21 States Fish and Wildlife Service (“Service”) (collectively “Federal Defendants”); Defendant-
22 Intervenor Alaska Oil and Gas Association; and Defendant-Intervenor Arctic Slope Regional
23 Corporation.
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25 WHEREAS, on May 15, 2008, the Service issued a final rule listing the polar bear as a
26 threatened species throughout its range, 73 Fed. Reg. 28,212 (May 15, 2008) (“Final Rule”);

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1 WHEREAS, pursuant to Section 4(a)(3)(A) of the Endangered Species Act (“ESA”), 16
2 U.S.C. § 1533(a)(3)(A), the Service must, to the maximum extent prudent and determinable,
3 designate critical habitat concurrently with making a determination that a species is threatened or
4 endangered;

5 WHEREAS, the Service concluded in the Final Rule that critical habitat was not
6 determinable as of the date the Final Rule was issued;

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8 WHEREAS, on May 15, 2008, the Service also issued a special rule under Section 4(d) of
9 the ESA related to the polar bear, 73 Fed. Reg. 28,306 (May 15, 2008) (“4(d) Rule”);

10 WHEREAS, on July 16, 2008 Plaintiffs filed a Second Amended Complaint alleging that
11 the Final Rule violates the ESA, 16 U.S.C. §§ 1531 et seq.;

12 WHEREAS, Plaintiffs also allege that the Service violated the ESA, the Administrative
13 Procedure Act (“APA”), 5 U.S.C. § 551 et seq., and the National Environmental Policy Act, 42
14 U.S.C. § 4321, et seq. (“NEPA”) in promulgating the 4(d) Rule;

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16 WHEREAS, Plaintiffs further allege that the Service violated the ESA by failing to
17 designate critical habitat for the polar bear concurrently with the final listing rule;

18 WHEREAS, Plaintiffs also allege that the Service is in violation of the Marine Mammal
19 Protection Act (“MMPA”), 16 U.S.C. §§ 1361 et seq., because it has not published in the Federal
20 Register a list of guidelines for use in safely deterring marine mammals or promulgated specific
21 measures which may be used to nonlethally deter polar bears pursuant to 16 U.S.C. §
22 1371(a)(4)(B);
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1 WHEREAS, on September 25, 2008, the Court entered an order approving the parties'
2 Stipulation and Proposed Order to Extend Deadline for Administrative Record and Modify
3 Briefing Schedule, extending the deadline for filing the administrative records for the Final Rule
4 and the 4(d) Rule until November 17, 2008;

5 WHEREAS, the parties, through their authorized representatives, and without any
6 admission or final adjudication of the issues of fact or law with respect to Plaintiffs' claims, have
7 reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the
8 claims set forth in Plaintiffs' Third Claim for Relief (Failure to Designate Critical Habitat for the
9 Polar Bear) and Seventh Claim for Relief (Failure to Promulgate List of Measures for Nonlethal
10 Deterrence of Polar Bears), and the parties agree that settlement of these claims is in the public
11 interest;
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14 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS
15 FOLLOWS:

16 1. The Service shall submit for publication in the Federal Register a final critical
17 habitat determination by June 30, 2010.

18 2. The Service shall submit for publication in the Federal Register, pursuant to 16
19 U.S.C. § 1371(a)(4)(B), final guidelines for use in safely deterring polar bears, including specific
20 measures which may be used to nonlethally deter polar bears, by March 31, 2010.

21 3. The Service shall issue a proposed critical habitat determination and proposed
22 deterrence guidelines in sufficient time to comply with the requirements of the ESA, MMPA, and
23 APA.
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1 4. Upon approval of this Agreement by the Court, Count Three of the Second
2 Amended Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil
3 Procedure 41(a)(1). Count Seven of the Second Amended Complaint shall be dismissed with
4 prejudice with respect to any claims regarding deterrence guidelines for the polar bear, but
5 without prejudice to Plaintiffs' right to raise in a separate action any such claim regarding other
6 species.

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8 5. Notwithstanding the dismissal of these claims, the parties hereby stipulate and
9 respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this
10 Agreement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life
11 Ins. Co. of America, 511 U.S. 375 (1994). However, Federal Defendants assert that, in the event
12 this case is transferred to another district, the transferee court should have jurisdiction over this
13 Agreement. Any challenge to a critical habitat rule or MMPA guidelines completed in
14 accordance with this Agreement shall be raised in a new lawsuit.

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16 6. Any party may seek to modify the deadline for any actions specified in
17 Paragraphs 1 or 2 for good cause shown. In that event, or in the event that a party believes that
18 any other party has failed to comply with any term or condition of this Agreement, the parties
19 shall use the dispute resolution procedures specified in Paragraph 7.

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21 7. The Order entering this Agreement may be modified by the Court upon good cause
22 shown by written stipulation between the parties, filed with and approved by the Court, or upon
23 written motion filed by one of the parties and granted by the Court. In the event that any party
24 seeks to modify the terms of this Agreement, including the deadline for the actions specified in
25 Paragraphs 1 or 2, or in the event of a dispute arising out of or relating to this Agreement, or in

1 the event that any party believes that another party has failed to comply with any term or
2 condition of this Agreement, the party seeking the modification, raising the dispute, or seeking
3 enforcement shall provide the other parties with written notice of the proposed modification. The
4 parties agree that they will meet and confer (in-person not required) at the earliest possible time
5 after receipt of the written notice in a good-faith effort to resolve the claim before bringing any
6 matter to the Court.

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8 8. No party shall use this Agreement or the terms herein as evidence of what
9 does or does not constitute a reasonable timeline for a designation of critical habitat or deterrence
10 guidelines in any other proceeding regarding the Service's implementation of the ESA or MMPA.

11 9. Plaintiffs intend to seek from Federal Defendants reimbursement of attorneys' fees
12 and costs incurred in connection with their Third and Seventh Claims for Relief. Federal
13 Defendants agree that Plaintiffs are the prevailing parties with respect to their Third and Seventh
14 Claims for Relief, and agree to pay Plaintiffs their costs of litigation, including reasonable
15 attorneys' fees, with respect to these claims. Costs incurred in connection with the Third Claim
16 for Relief will be paid pursuant to Section 11(g)(4) of the ESA, 16 U.S.C. § 1540(g)(4). Costs
17 incurred in connection with the Seventh Claim will be paid pursuant to the Equal Access to
18 Justice Act, 28 U.S.C. § 2412 ("EAJA"). Plaintiffs and Federal Defendants agree to attempt to
19 resolve Plaintiffs' claim for fees and costs expeditiously and without the need for Court
20 intervention. The Court shall retain jurisdiction over the Third and Seventh Claims for the
21 purpose of resolving any dispute between the parties regarding Plaintiffs' claim for an award of
22 fees and costs. However, Federal Defendants assert that, in the event this case is transferred to
23 another district, the transferee court should have jurisdiction over any disputed claim for fees and
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1 costs. By this Agreement, Federal Defendants do not waive any right to contest fees claimed by
2 Plaintiffs, including the hourly rate, in any continuation of the present action or any future
3 litigation.

4 10. Plaintiffs recognize that Federal Defendants assert that no provision of this
5 Agreement shall be interpreted as or constitute a commitment or requirement that Federal
6 Defendants obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or
7 any other law or regulation. Federal Defendants recognize that Plaintiffs assert that (a) this
8 Agreement and its terms do not create a conflict with the Anti-Deficiency Act, 31 U.S.C. §
9 1341(a)(1)(B), because the subjects of this Agreement are required in non-discretionary terms by
10 the ESA and MMPA; and (b) the Anti-Deficiency Act would not excuse compliance with a
11 pre-existing, court-approved Agreement. Plaintiffs intend to assert this position if Federal
12 Defendants fail to comply with the terms of this Agreement for reasons of insufficient
13 appropriations. Federal Defendants reserve all legal and equitable defenses to such a claim.

16 11. No provision of this Agreement shall be interpreted as or constitute a commitment
17 or requirement that Federal Defendants take action in contravention of the ESA, the MMPA, the
18 APA, or any other law or regulation, either substantive or procedural. Nothing in this Agreement
19 shall be construed to limit or modify the discretion accorded to Federal Defendants by the ESA,
20 the MMPA, the APA, or general principles of administrative law with respect to the procedures to
21 be followed in making any determination required herein, or as to the substance of any final
22 determinations.

24 12. Wherever possible, each provision of this Agreement shall be interpreted in such a
25 manner as to be effective and valid. If any provision of this Agreement is prohibited by or invalid
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1 under applicable law, such provision shall be ineffective to the extent of such prohibition or
2 invalidity, without invalidating the remainder of such provision or the remaining provisions
3 hereof. However, in the event the Court does not accept any part of this Agreement, each party
4 reserves the right to withdraw from the Agreement and proceed with the existing litigation.

5 13. The parties agree that this Agreement was negotiated in good faith and it
6 constitutes a settlement of claims that were vigorously contested, denied, and disputed by the
7 parties. By entering into this Agreement, the parties do not waive any claim or defense.

8 14. The terms of this Agreement constitute the entire agreement of the parties, and no
9 statement, agreement or understanding, oral or written, which is not contained herein shall be
10 recognized or enforced.

11 15. The undersigned representatives of each party certify that they are fully
12 authorized by the party they represent to agree to the Court's entry of the terms and conditions of
13 this Agreement and do hereby agree to the terms herein.

14 16. The terms of this Agreement shall become effective upon entry of an order
15 by the Court ratifying this Agreement.

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19 Respectfully submitted,

20 Dated: October 6, 2008

21 /s/ Brendan Cummings (by KBF with permission)
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28 Counsel for Plaintiffs

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3 United States Department of Justice
4 Environment & Natural Resources Division
5 JEAN E. WILLIAMS, Chief
6 LISA LYNNE RUSSELL, Assistant Chief

7 Dated: October 6, 2008

8 /s/ Kristen Byrnes Floom
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20 Dated: October 6, 2008

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ORDER

IT IS SO ORDERED.

DATED this 7th day of October, 2008



Honorable Claudia Wilken
United States District Court Judge