

Litigating Against Government Agencies: Case Studies in Challenges to Agency Decisions Under Federal Environmental Statutes

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Summary

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. Several case studies from the highly regulated oil, gas, and commercial fisheries industries reveal insights into successful strategies. These case studies suggest that for lawsuits won by industry plaintiffs, common notions of record review cases as simpler, quicker, less costly, and more predictable are untrue, and that the risk of Pyrrhic procedural victories is high. Plaintiffs looking to actually prevail, not just fight the good fight, must demonstrate commitment and stamina, significant forethought, and case-specific procedural and substantive strategies.

The exercise of government authority by the executive branch and its agencies—whether at the federal, state, or local level—is a ubiquitous factor in the lawful conduct of business in the United States. As government agencies have grown in number and importance, their involvement in establishing applicable process, requirements, and guidance; in reviewing proposals and issuing essential permits and other approvals; in monitoring, inspecting, and reporting on facilities, employees, contractors, and activities; and in pursuing enforcement has become seemingly limitless. In intensely regulated industries, such as oil and gas, mining, and commercial fisheries, interactions with government agencies in their proprietary capacities as land and resource owners, and in their multiple administrative capacities as rulemakers, permittees, enforcers, and adjudicators, have increased from occasional and routine in just a few specific areas, to common, unavoidable, and exhaustive in scope and effect.

With the proliferation of agencies and administrative responsibilities, so too has litigation with agencies exponentially expanded. The general principles that apply fill treatises. The procedures vary for each local, state, and federal agency, board, and commission, as well as for each judicial jurisdiction. The substantive issues are dictated by a myriad of federal and state statutes, local ordinances, regulations, guidance, reported administrative decisions, and reported judicial decisions. As with litigation in any context, a successful case entails developing and implementing strategies that integrate all these factors, as well as knowledge of your opposition (in this case, the agency staff and decisionmakers) and their counsel, an honest assessment of the strength and weaknesses of your arguments, and a thoughtful set of case goals and objectives. Even if it were possible to generalize about litigation across such a broad expanse of agencies, processes, substantive law, and precedent, doing so offers little prospect of insight.

In order to narrow the discussion to a manageable topic, this Article focuses on litigation with federal agencies pursuant to federal environmental statutes and the judicial review standards established by §706 of the federal Administrative Procedure Act (APA).¹ However, even within this specific subject matter focus, litigation with government agencies arises in numerous and varied contexts under any of a wide variety of federal statutory schemes, including but not limited to, water, air, and waste pollution prevention and discharge compliance programs,² wildlife protec-

1. 5 U.S.C. §706.

2. *E.g.*, the Clean Air Act, 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618, the Clean Water Act, 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405, the Oil Pollution Act of 1990, 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001, the Resource Conservation and Recovery Act, 42

tion programs,³ and federal land and resource management and evaluation programs.⁴ Under these myriad of regulatory programs, common categories of litigation with agencies include: (1) challenges to agency decisions through administrative or judicial process, both as to promulgation of new or amended rules, and as to the grant or denial of a permit or other authorization; (2) administrative, civil, and criminal enforcement actions for alleged statutory and regulatory violations; (3) cost recovery and natural resource damages litigation; and (4) intervention in support of agency decisions in the face of a challenge filed by conservation advocacy groups.

Because agency decisions that are subject to review based upon the agency administrative record—principally, rulemaking and issuance or denial of permits or other authorizations—are frequent sources of dispute, often impracticable to settle and, arguably, the most difficult to win, this Article addresses record review litigation with federal agencies in the environmental context. After introducing this topic in more detail below, several case studies are presented and analyzed to identify the resulting insights.

I. Record Review Litigation—The Good, the Bad, and the Ugly

Federal agency decisions promulgating new or amended rules, or granting or denying permits and other authorizations, are generally reviewed based only upon the information contained in the administrative record assembled by the decision agency. This defining principle of so-called record review cases drives a series of primary litigation characteristics that, from the perspective of a party litigating against an agency, are essential to understand and, for the most part, inherently biased for the agency.

The good news is that in the absence of efforts to obtain preliminary injunctive relief, record review cases do not require witnesses and do not allow for discovery. This renders the *process* radically more predictable than most litigation and, at least in theory, less costly. Indeed, the judicial litigation process for record review cases most frequently resembles appellate practice, with the production of a record, exchanges of summary judgment briefs premised

on the record, oral argument, and a decision resolving the entire case.

Unfortunately, just about everything else is bad news and ugly for those challenging agency decisions. First and foremost, the standard of review—“arbitrary, capricious, an abuse of discretion or otherwise not in accordance with applicable law”—is a formidable mountain for any litigant to climb.⁵ This deferential standard, under which the agency’s action is presumed valid, is bolstered by both *Chevron*⁶ deference to agency interpretations of statutory provisions and heightened deference to agency judgments in areas of special scientific and technical expertise, complexity, or uncertainty.⁷

In addition, although record review generally results in a more predictable litigation process, the absence of discovery insulates agency decisionmakers from direct inquiry, and the prohibition on use of new information absent extraordinary circumstances severely limits the ability of challengers to either elaborate on initial contentions or develop new contentions after a final agency decision has been made. Accordingly, in effect, potential record review challengers to agency decisions must identify their contentions at the draft decision stage, ensure the record contains all of the necessary information to support these contentions, *and* explicitly present their contentions to the agency for consideration and response. After doing so, challengers must then nonetheless demonstrate, despite substantial deference and a presumption of validity, that the agency’s action was unlawful, procedurally defective, entirely ignored an important aspect of the problem, or otherwise so unreasoned that it reflects a clear error of judgment.

Application of these standards and other deferential principles of administrative law to an agency’s decision, defended by the formidable resources of the U.S. Department of Justice and agency counsel, presents an insurmountable hurdle for all but the most determined and strategic litigants and their counsel. Moreover, the reward for prevailing is a remand to the same agency to make another decision, not a judgment establishing a different rule or issuing a permit that was denied. And yet, despite these odds, challenges are won, and remands result in new and favorable redeterminations. The remainder of this Article presents several case studies as a means of elucidating principles that define successful and unsuccessful record review litigation strategies in the environmental context from the perspective of businesses and industry associations.

U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011, the Safe Drinking Water Act, 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465, the Solid Waste Disposal Act, and the Toxics Substances Control Act, 15 U.S.C. §§2601-2692, ELR STAT. TSCA §§2-412.

3. *E.g.*, the Bald and Golden Eagle Protection Act, the Endangered Species Act, 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18, the Marine Mammal Protection Act, 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-410, and the Migratory Bird Treaty Act.

4. *E.g.*, the Coastal Zone Management Act, 16 U.S.C. §§1451-1466, ELR STAT. CZMA §§302-319, Federal Land Policy and Management Act, the Magnuson-Stevens Fishery Conservation and Management Act, the Marine Protection, Research and Sanctuaries Act, the Mineral Leasing Act, the National Environmental Policy Act, 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209, the Natural Gas Act, the Outer Continental Shelf Lands Act, and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§1201-1328, ELR STAT. SMCRA §§101-908.

5. 5 U.S.C. §706(2)(A).

6. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 14 ELR 20507 (1984).

7. *See generally* *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 13 ELR 20672 (1983); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc), *overruled on other grounds*, *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

II. Case Study #1

A. Polar Bear ESA Listing and §4(d) Rules

In May 2008, the U.S. Fish and Wildlife Service (FWS) issued a 91-page final rule determining that the polar bear species should be listed under the federal ESA as a “threatened” species.⁸ The agency’s decision was the culmination of a successful campaign initiated by a leading nongovernmental organization (NGO), the Center for Biological Diversity (CBD), to brand the polar bear as the international icon for the climate change debate. Through establishing links between Arctic sea ice and polar bear health and survival, sea-ice recession and climate change, and climate change and greenhouse gas (GHG) emissions, in listing the polar bear under the ESA, CBD hoped to force federal regulation of climate change, at least in significant part by requiring consultations under §7 of the ESA for large emission sources of GHGs operating in the lower 48 states (e.g., coal-fired power plants and petroleum refineries) and federal emissions authorization programs. Secondarily, CBD intended to delay, impede, or defeat Arctic oil and gas leasing, exploration, and development because these operations are unavoidably located within the U.S. range of polar bears.

At the same time that FWS promulgated its polar bear listing decision, the agency also enacted a special polar bear rule pursuant to §4(d) of the ESA.⁹ Section 4(d) of the ESA authorizes FWS to apply the “take” prohibition in the ESA to all, some, or none of the activities that may affect a species listed as “threatened.”¹⁰ The special polar bear §4(d) rule limited the scope of the ESA’s “take” prohibition in a manner that, in effect, excluded GHG emissions occurring in the lower 48 states, and that also excluded activities affecting polar bears that are authorized under the preexisting requirements of either the Marine Mammal Protection Act (MMPA)¹¹ or the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Arguably, the net effect of FWS’ listing and §4(d) rules was, on the one hand, to vindicate CBD’s efforts to establish precedent for listing otherwise healthy and abundant species under the ESA on the basis of climate change, while, on the other hand, through the §4(d) rule, denying CBD the ability to either actually drive regulation of GHGs through the ESA or to impede otherwise lawful oil and gas activities occurring within the range of polar bears in the United States. This result—significant new climate change precedent, combined with a limiting §4(d) rule foreclosing the consequences NGOs intended the listing to achieve—set the stage for the litigation that followed.

B. Litigation Round One—Venue and Intervention

In March 2008, CBD and other NGOs filed a so-called deadline lawsuit against FWS in its venue of preference, the U.S. District Court for the Northern District of California.¹² The lawsuit sought to compel FWS to promulgate a final listing decision for the polar bear, which was past due under the applicable statutory deadline. Seeking to capitalize on its venue of choice, CBD filed the first-in-time challenges to the polar bear listing and §4(d) rules by amending its complaint the day after the rules were published. CBD’s amended claims targeted the §4(d) rule through two strategies. First, CBD argued that the agency’s listing of the polar bear species as threatened instead of endangered violated the ESA and the APA. Second, CBD alleged direct challenges to the §4(d) rule, contending that the §4(d) rule violated the ESA and the APA, and that FWS had also failed to comply with the requirements of the National Environmental Policy Act (NEPA) by not preparing either an environmental assessment (EA) or an environmental impact statement (EIS).

CBD’s assertion of challenges to the polar bear listing and §4(d) rule prompted a series of motions by a diverse group of parties to seek to intervene, including organizations representing sport hunting groups whose members would not be able to import polar bear trophies otherwise lawfully hunted in Canada prior to the listing decision, national, and Alaska-based oil and gas industry associations, other national industry associations, an Alaska Native regional corporation, and an additional NGO.¹³ Although no party opposed intervention, the district court denied intervention as of right and permissive intervention to non-NGOs on the merits of the asserted NEPA claims, the APA claims, and portions of the ESA claims, and then limited intervention in the remaining claims to the filing of a 15-page brief.

In the meantime, three additional challenges to either or both the polar bear listing and §4(d) rules were filed in the U.S. District Court for the District of Columbia. The state of Alaska filed a challenge to the listing decision that was the mirror image of CBD’s claims in arguing that FWS violated the ESA and the APA in listing the polar bear at all. The American Petroleum Institute, in collaboration with several other national industry associations, filed a separate lawsuit contending that the scope of the §4(d) rule was unlawfully narrow. Finally, Safari Club filed a lawsuit both challenging the listing of the polar bear under the ESA, and challenging FWS’ determination that, once

8. 73 Fed. Reg. 28212 (May 15, 2008).

9. FWS initially promulgated an interim final §4(d) rule that became effective immediately. 73 Fed. Reg. 28306 (May 15, 2008) (promulgated at 50 C.F.R. §17.40(q)). A final §4(d) rule, nearly identical in content, was adopted six months later after a public comment period. 73 Fed. Reg. 26249 (Dec. 16, 2008).

10. The ESA’s “take” prohibition applies without exception to any species listed under the more direct category of “endangered.”

11. 16 U.S.C. §§1361-1421h, ELR STAT. MMPA §§2-410.

12. Center for Biological Diversity v. Kempthorne, Case No. C-08-01339 (CW), 38 ELR 20103 (N.D. Cal. 2008). The NGO plaintiffs besides CBD were Greenpeace, Inc. and the Natural Resources Defense Council.

13. The parties seeking intervention were The Safari Club International, Conservation Force, Inc., the Alaska Oil and Gas Association, the Arctic Slope Regional Corporation, the American Petroleum Institute, the National Petrochemical and Refiners Association, the Edison Electric Institute, the Chamber of Commerce of the United States of America, the National Mining Association, the National Association of Manufacturers, the American Iron and Steel Institute, and the Defenders of Wildlife.

the polar bear became an ESA-listed species, the import of sport-hunted polar bear trophies was statutorily banned.

In light of the apparent hostility of the court in California, the U.S. defendants and the Alaska Native corporation intervenor moved for a change of venue to either the District of Columbia or Anchorage; however, these motions were denied. Pursuant to 28 U.S.C. §1407, the Alaska Oil and Gas Association (AOGA) then petitioned the Judicial Panel on Multidistrict Litigation to transfer all of the related actions to the district court of the District of Columbia in order to avoid the risk of inconsistent decisions and proceedings, leading to multiple appeals before different federal courts of appeal. Over the opposition of CBD and the other NGOs, the Panel granted AOGA's motion and transferred, consolidated, and coordinated all the pending listing and §4(d) rule challenges in the U.S. federal district court for the District of Columbia.¹⁴

Seven months after FWS issued its polar bear rules, venue and intervention were resolved. All challenges were consolidated by the Panel on Multidistrict Litigation in the District of Columbia. Subsequent to transfer, the parties stipulated to, and the court granted, all parties seeking intervention as plaintiffs or defendants with full rights of participation as parties to the consolidated cases.

C. *Litigation Round Two—The Merits*

Initial proceedings in the consolidated litigation involved the filing of various amended claims and answers, the resolution of disputes regarding the adequacy of the administrative record, and trifurcation of the issues into (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. Generally summarized, the amended parties' claims and positions were as follows:

- **NGOs:** As was the case from the start, CBD and the NGOs affirmatively alleged that polar bears should have been listed as "endangered," thereby rendering the §4(d) rule irrelevant. In addition and alternatively, the NGOs contended that the §4(d) rule was unlawful under the ESA and the APA, and further promulgated without engaging in the required NEPA environmental review process. The NGOs also opposed challenges posed by others who argued that polar bears should never have been listed under the ESA, and opposed challenges to the import ban as well.
- **State of Alaska:** The state of Alaska challenged the polar bear listing decision, contending that it violated the ESA and the APA by extending the reach of the ESA to a healthy species, occupying its entire historical range based entirely on unscientific and unproven modeling projections of future climate change, future

effects on sea ice and future impacts on the polar bear species. In the alternative, the state defended the lawfulness of the polar bear §4(d) rule.

- **Sport Hunters:** Sport hunter associations challenged the polar bear listing decision on grounds similar to the state of Alaska, and challenged application of the import ban to lawfully hunted polar bear trophies.
- **Native Alaskans:** The Arctic Slope Regional Corporation (ASRC) asserted no affirmative challenges. Instead, the ASRC intervened to defend against the NGO challenges to both the listing and §4(d) rules.
- **Industry Associations:** The AOGA, similar to the ASRC, intervened to defend both the listing and §4(d) rules against NGO challenges. The national industry associations defended only the §4(d) rule.

District court proceedings were completed in November 2010, approximately 2.5 years after FWS issued its polar bear rules. 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 §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 §4(d) rule; and (4) sustained the import ban on polar bear trophies. Because of the court's NEPA holding, the final §4(d) rule was vacated and remanded; however, pending completion of the remand, the court reinstated the substantially identical interim §4(d) rule (which also had not undergone any NEPA process).

D. *Litigation Round Three—Appeals and Remand*

Appeals to the Court of Appeals for the District of Columbia were filed by the state of Alaska, certain industry groups, and by the sport hunter associations. The court of appeals sustained the decisions of the district court regarding the listing of the polar bear as a threatened species.¹⁵ The separate appeal by sport hunters concerning the import ban on polar bear trophies was argued on May 9, 2013; however, a decision remains pending.

As for the remand of the §4(d) rule, in 2012, FWS published a draft EA and proposed final §4(d) rule, and conducted a public comment period. Pursuant to court order, the final EA and §4(d) rule were issued in February 2013.¹⁶ The EA concludes that a polar bear §4(d) rule would have no significant environmental impacts, and the reissued §4(d) rule reinstates the same §4(d) rule previously enacted by FWS.

14. *See In re Polar Bear Endangered Species Act Listing and §4(d) Rule Litigation*, 588 F. Supp. 2d 1376 (J.P.M.L. 2008).

15. *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F.3d 1 (D.C. Cir. 2013).

16. *See* 78 Fed. Reg. 11766 (Feb. 20, 2013).

III. Case Study #2

A. Rule Designating Critical Habitat for Polar Bears

Section 4(a)(3)(A) of the ESA requires FWS to designate critical habitat for threatened and endangered species listed by the agency. Pursuant to ESA §3(5)(A), critical habitat is limited to:

the specific areas within the geographical area occupied 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.

Physical or biological features that are determined to be “essential to the conservation of the species” and that “may require special management” represent the species primary constituent elements (PCEs) upon which critical habitat designations are based.¹⁷

At the time that the polar bear species was listed under the ESA as threatened, FWS decided that critical habitat was not determinable. Two months later, in July 2008, NGOs sued FWS alleging that the agency had unlawfully failed to designate critical habitat concurrently with the listing rule. FWS and the NGOs then entered into a court-approved settlement establishing a deadline for the agency to designate critical habitat.

The final rule, issued in December 2010, designated over 187,000 square miles of Alaska’s North Slope and the adjacent U.S. Outer Continental Shelf (OCS) as critical habitat for the polar bear.¹⁸ By far the largest critical habitat in the history of the ESA, FWS designated an area substantially larger than any of 48 states, including the state of California. Moreover, the designated area included virtually all of the existing U.S. Arctic onshore and offshore oil and gas leasing, exploration, development, and production facilities and activities.

As a component of the designation process, pursuant to §4(b)(2) of the ESA, FWS solicited economic impact information and contracted for an estimate of the economic impacts of its critical habitat designation. Although the state of Alaska, Alaska Natives, and the oil and gas industry submitted information indicating economic impacts ranging from tens of millions to billions of dollars, FWS valued all nonadministrative economic costs of the designation at \$0 and concluded that the incremental administrative costs over a 30-year period would range from \$677,000 to \$1.2 million.

Finally, as a part of the critical habitat process, FWS solicited proposals for areas to be excluded from the designation based upon balancing of benefits, economic impacts, and other relevant factors authorized by §4(b)(2) of the ESA. In response, the agency received detailed proposals for exclusion of various state-owned lands, Alaska Native-owned lands, and areas of oil and gas exploration

and development. Nevertheless, the final rule rejected all of the proposed exclusions without explanation. This result appeared particularly inexplicable in light of repeated conclusions by FWS that the designation of such a vast area of polar bear critical habitat would not result in any conservation benefits:

- FWS “is unable to foresee a scenario in which the designation of critical habitat results in changes to polar bear conservation requirements.”
- FWS “does not anticipate that the designation of critical habitat will result in additional polar bear conservation requirements.”
- FWS “believes that critical habitat will not result in more protective measures than those already required.”
- FWS “cannot foresee any activity that would cause an adverse modification to the designated critical habitat areas that we have identified.”

Unsurprisingly, litigation challenging this critical habitat designation ensued.

B. Litigation Summary

The final rule designating critical habitat for the polar bear was challenged in federal district court in Alaska in three separate lawsuits filed by (1) the AOGA and the American Petroleum Institute, (2) a consortium of a dozen Alaska Native organizations and the North Slope Borough, and (3) the state of Alaska. These cases were consolidated and the merits jointly briefed.

The primary claims asserted by the plaintiffs concerned overdesignation of vast areas without demonstrating the presence of polar bear PCEs or the need for special management. As described in the plaintiffs’ briefing:

The statutory provisions at issue in this litigation were added to the ESA in 1978 to correct a dysfunctional critical habitat designation process. In the 1978 ESA amendments, Congress expressly reversed the pre-existing presumption that the Service may reflexively designate “virtually all” of a species’ United States range as “critical habitat” simply because feeding, movement, resting, and breeding occur somewhere within the area. Instead, Congress required the Service to give meaning to the term “critical” through “a very careful analysis of what is actually needed for survival of [a] species.” . . . Congress acted to narrow the scope of the term “critical habitat” by limited critical habitat designations to those “specific areas,” “essential to the conservation of the species,” that may require “special management considerations or protection[s].”

...

An overarching flaw in the Final Rule is that the required analysis connecting the identified elements “essential” to conserving polar bears (i.e., the “primary constituent ele-

17. See 50 C.F.R. §424.12(b).

18. 75 Fed. Reg. 76086 (Dec. 7, 2010).

ments” or “PCEs”) within the “specific areas” in which those elements “are found” is missing. Instead, the Service stated the obvious—that polar bears need places to eat, travel, rest and breed—and then designated virtually all the U.S. range of the polar bear because these behaviors occur somewhere within this vast area. This approach improperly removes the Service’s statutory burden to designate “essential” habitat in “specific areas” and places the burden on stakeholders to disprove the existence of PCEs within a huge area[.]

The plaintiffs also contended that FWS gave inadequate consideration to economic impacts and exclusions proposed pursuant to §4(b)(2), and unlawfully designated certain areas around barrier island habitat as a “no disturbance zone.” Distinct from the other plaintiffs, the state of Alaska asserted that FWS had failed to comply with the unique procedural requirements of §4(i) of the ESA in responding to the comments of the state.

On January 11, 2013, the district court entered an order of summary judgment resolving the parties’ claims.¹⁹ In relevant part, the court agreed with the plaintiffs’ principal contention that FWS “went too far and was too extensive.” For example, as to the agency’s designation of a 5,600-square-mile area larger than three U.S. states as “terrestrial denning critical habitat” the court held that FWS “cannot designate a large swath of land in northern Alaska as ‘critical habitat’ based entirely on one essential feature that is located in approximately one percent of the entire area set aside.” The court similarly concluded that FWS “has not shown, and the record does not contain, evidence that Unit 3 contains all of the required physical or biological features of the barrier island habitat PCE, and thus the Final Rule violates the APA’s arbitrary and capricious standard.” Based upon these holdings, the court vacated and remanded to FWS the entire rule designating polar bear critical habitat.

IV. Case Study #3

A. Seismic Exploration Whale Exclusion Zone

Since the 1970s, when oil and gas exploration began in the Arctic Ocean adjacent to Alaska, the National Marine Fisheries Service (NMFS) required, at most, a 180-decibel (dB) whale “exclusion zone”—an area surrounding the seismic source that must be maintained free of whales—in conjunction with seismic exploration. A 180-dB safety radius or exclusion zone for cetaceans was first required in 1997, based upon informal guidance adopted by NMFS establishing 180 dBs as the threshold above which the agency presumes whales experience “Level A harassment” for purposes of the MMPA.²⁰ Over this same 40-year period, notwithstanding substantial seismic exploration and sub-

sistence harvest of approximately 40 bowhead whales per year on average, the Western Arctic bowhead whale population has increased at a steady and healthy rate, recovering to pre-exploitation abundance levels at or near the carrying capacity of their range habitat.²¹

In September 2005, the U.S. Department of the Interior, then acting through the Minerals Management Service (MMS), announced plans to hold an oil and gas lease sale in the Chukchi Sea, Arctic Ocean offshore of north-west Alaska. Early the following year, several oil and gas companies, including ConocoPhillips, applied to MMS for permits to conduct seismic exploration. Pursuant to the MMPA, ConocoPhillips also applied to NMFS for an Incidental Harassment Authorization (IHA) under the MMPA to authorize the anticipated incidental take of small numbers of bowhead whales through harassment resulting from exposure to seismic sounds. NMFS later issued a draft IHA including the standard 180-dB exclusion zone, explaining:

The relatively short-term impact of conducting seismic surveys in the U.S. Chukchi Sea may result, at worst, in a temporary modification in behavior by certain species of marine mammals and/or low-level physiological effects (Level B Harassment). While behavioral and avoidance reactions may be made by these species in response to the resultant noise, this behavioral change is expected to have a negligible impact on the affected species and stocks of marine mammals.

NMFS further explained that ConocoPhillips’ seismic program was not likely to result in the death, serious injury, or temporary or permanent hearing impairment of any marine mammal.

In early July 2006, just as the short open-water season in the Arctic approached, NMFS issued ConocoPhillips an IHA imposing an unprecedented 120-dB exclusion zone, a 160-dB aerial and vessel monitoring zone, and additional power-down and shutdown requirements if certain numbers and age/sex classes of whales were sighted within these zones. Associated documentation candidly acknowledged that “[l]ogistical complications and engineering limitations make effective monitoring of the 120-dB isopleth-exclusion zone . . . very difficult and overall not feasible.” In response to comments submitted by ConocoPhillips regarding safety risks, diminished ability to collect seismic data and disproportionate costs, the agency responded that it recognized the 120-dB exclusion zone “would be the least efficient for collection of seismic data, most costly, and most difficult to implement.”

19. Alaska Oil and Gas Ass’n v. Salazar, 2013 WL 222259, Case No. 3:11-cv-0036 (D. Alaska Jan. 11, 2013).

20. Under similar guidance, NMFS has designated 160 dBs as the threshold for Level B harassment of whales.

21. When commercial whaling of the western Arctic stock ended around 1914, this Bering, Chukchi, and Beaufort Sea population of bowhead whales had declined to between 1,000 and 3,000 animals from historical abundance exceeding 10,000 whales. Notwithstanding its recovery in the Arctic Ocean, bowhead whales continue to be listed under the ESA as an endangered species.

B. *Litigation Summary*

ConocoPhillips simultaneously filed a lawsuit in federal district court in Alaska challenging the 120-dB exclusion zone and other unreasonable conditions in the IHA issued by NMFS, and petitioning the Interior Board of Land Appeals (IBLA) for review of the corresponding decision by MMS to incorporate these same conditions into its seismic exploration permit.²² Citing to evidence of immediate and irreparable harm resulting from the impracticability of implementing these restrictions, ConocoPhillips sought and obtained a preliminary injunction from the federal court staying implementation of the objectionable federal permit conditions.

Although the parties, and a host of NGO intervenors, subsequently briefed the full merits of ConocoPhillips' claims on the merits, the 2006 seismic exploration program was completed prior to the end of the summary judgment process. Because IHAs may only be issued for a single year, NMFS then moved for and obtained an order dismissing ConocoPhillips' claims for mootness. ConocoPhillips later voluntarily dismissed its IBLA appeal as well.

V. *Case Study #4*

A. *Swordfish Fishery Jeopardy Biological Opinion and Closure*

The Hawaii-based commercial longline fisheries consist of two components: the tuna-target (deep-set fishery) and the swordfish-target (shallow-set fishery). Although the two fisheries are based together out of Hawaii, they currently operate in different ocean areas, using different equipment and operational techniques, with different regulatory requirements and with different impacts on non-target marine mammals, seabirds, and other protected species. Among other forms of bycatch, Pacific longline fleets, of which the Hawaii-based fisheries are a very small part, interact with ESA-listed sea turtle species at widely varying rates.

In 1999, several NGOs sued NMFS in Hawaii federal district court challenging both a 1998 no jeopardy biological opinion (BiOp) regarding interactions between the two Hawaii-based fisheries and ESA-listed sea turtles and compliance with NEPA. The 1998 BiOp was sustained; however, the district court determined that NMFS had failed to comply with NEPA and entered an injunction imposing significant time and area closures on the fisheries pending completion of an EIS. Shortly thereafter, NMFS reinitiated consultation under the ESA in order to reconsider its no jeopardy opinion. In 2001, NMFS completed an EIS and issued a new BiOp. During the BiOp preparation, NMFS refused efforts by the Hawaii Longline Association (HLA), whose membership included 100% of the fisheries, to participate in the ESA consultation process as an "applicant."

The 2001 BiOp concluded that the combined fisheries jeopardized three sea turtle species, and that swordfish fishing should be prohibited. The Hawaii federal court then issued an amended injunction implementing the prohibition on Hawaii-based swordfish-target longline fishing.

B. *Litigation Round One—Venue and Applicant Status*

Shortly after issuance of the 2001 BiOp, HLA filed suit against NMFS in the U.S. District Court for the District of Columbia. In essence, the lawsuit alleged that the 2001 BiOp was both procedurally and substantively flawed, and sought an order vacating and remanding the 2001 BiOp to NMFS. Several NGOs subsequently filed a separate challenge to the 2001 BiOp with the district court in Hawaii and also sought intervention in HLA's litigation in Washington, D.C.

Acting on its own initiative in light of the preexisting litigation history, the district court in Washington, D.C. directed the parties to show cause why HLA's claims should not be transferred to Hawaii. However, based upon the opposition of both HLA and NMFS, and finding that there were no exceptional circumstances warranting a transfer of otherwise proper venue on the court's own initiative, the court determined it was inappropriate to transfer HLA's claims to Hawaii. Thereafter, the district court in Hawaii transferred the claims of the NGOs to Washington, D.C.

HLA subsequently moved for summary judgment on its claims, arguing that the 2001 BiOp was procedurally unlawful because HLA was denied essential rights of participation in the consultation as an "applicant," and that the 2001 BiOp was also substantively unlawful on numerous grounds. On the date the agency was required to file its summary judgment response, it instead notified the court that it was reinitiating ESA consultation because of new information and would issue a new superseding BiOp within six months. Based upon the agency's notice, the court determined it would decide HLA's procedural claims, but otherwise stay the litigation pending reconsultation.

Thereafter, a magistrate judge determined, and the district judge affirmed, that HLA was an "applicant" under the agency's own regulations, and that NMFS had denied HLA substantial rights of participation in the ESA consultation process resulting in the 2001 jeopardy BiOp.²³ As a result, the district court vacated and remanded the 2001 BiOp, but left the current regulatory regime in place pending completion of the reinitiated ESA consultation. Assuming that the new consultation and the court's other decisions rendered the remainder of the case moot, upon issuance of a new BiOp in late 2002, the court vacated and remanded the 2001 BiOp, dismissed HLA's substan-

22. See *ConocoPhillips Alaska, Inc. v. NMFS*, Case No. 3:06-cv-0198 (D. Alaska, filed Aug. 24, 2006).

23. *Hawaii Longline Ass'n v. NMFS*, 2002 WL 732363, Civ. No. 01-0765 (D.D.C. Apr. 25, 2002) (magistrate judge's opinion); see *Hawaii Longline Ass'n v. NMFS*, 281 F. Supp. 2d 1, 16 (D.D.C. 2002).

tive claims and the claims of the NGOs, and dismissed the case with prejudice.

C. *Litigation Round Two—New BiOp and Amended Claims*

After NMFS represented to the court that it would reinstate ESA consultation on the fisheries, thereby mooted HLA's claims, the agency proceeded to nevertheless implement the results of the 2001 BiOp by promulgating regulations pursuant to the Magnuson-Stevens Act (MSA) that closed the swordfish fishery on the basis of the jeopardy finding in the 2001 BiOp. Thereafter, the ESA consultation conducted by NMFS identified the proposed action as conduct of the Hawaii-based fisheries subject to a prohibition on swordfish fishing, the conduct of the Hawaii-based fisheries as they operated prior to the 2001 BiOp. Unsurprisingly, NMFS then concluded in its 2002 BiOp that the proposed action did not jeopardize sea turtle species; however, through this manipulative process, the agency circumvented its obligation to determine whether the swordfish fishery did or did not jeopardize sea turtles by assuming the swordfish fishery was prohibited from operating.

Upon HLA's motions, the district court reconsidered its order dismissing the case with prejudice, and allowed HLA to amend its claims to challenge both the 2002 regulations implementing the 2001 BiOp and the 2002 BiOp. In the extended summary judgment briefing that followed, the agency sought to defend both the 2002 regulations and the 2002 BiOp, which were entirely premised on the vacated 2001 BiOp, on the grounds that the procedural infirmities of the 2001 BiOp posed no legal impediment to the agency's subsequent reliance on its conclusions. However, in a very lengthy opinion that details the complicated history of the litigation, the court rejected these contentions:

In some respects, this can be distilled to one discrete issue: After violating Plaintiff's procedural rights, can Defendants continue to rely on the substantive conclusions of a vacated BiOp? The Court has determined that Defendants cannot. To reach a contrary holding would be to allow Defendants to flout the procedural rights of Plaintiff, circumvent judicial review, and ignore some of the most basic tenets of administrative law.²⁴

As a consequence, the court vacated and remanded both the 2002 MSA regulations and the 2002 BiOp.

D. *Remand and Subsequent Agency Actions*

In 2004, NMFS issued a new no jeopardy BiOp that consulted on a proposal to reopen the Hawaii-based swordfish-target longline fishery subject to use of several innovative fishing techniques, with 100% federal observer coverage and a limit on fishing effort substantially below

historical levels. Fishing pursuant to MSA regulations implementing this proposal resulted in reductions in sea turtle bycatch of approximately 90%, and further reductions in the severity of the few remaining interactions with sea turtles that occurred.

In 2008, NMFS issued another no jeopardy BiOp and implementing regulations reopening the Hawaii-based swordfish-target longline fishery without fishing effort constraints. However, NMFS later entered into a consent decree with NGOs agreeing to reconduct yet again on the swordfish fishery, to vacate the incidental take limits in the 2008 BiOp and regulations, and to reinstate the incidental take limits established with the 2004 BiOp pending completion of reconduction. In 2012, NMFS again issued a no jeopardy BiOp for the unconstrained swordfish-target fishery, along with new implementing regulations and expanded incidental take limits.²⁵

VI. Record Review Litigation Insights From Case Studies

The litigation case studies described above are examples of complex record review cases. The precise characteristics of the four cases summarized above are unlikely to be repeated. Each arises under a unique set of circumstances, and several are examples of unusually protracted multi-party, multidistrict consolidated cases. Nevertheless, there are important insights regarding record review litigation with federal agencies that may be gleaned from these brief case studies.

First, in the author's opinion, selection of venue in a challenge to an agency decision, though often ignored or undervalued, is very important. This is a lesson long ago learned and very ably applied by NGOs. No party is ever assured of winning a challenge to agency action, but venue can virtually assure a party of losing such a challenge. Had the polar bear challenges remained pending before the federal district court in California, which was the venue of the first-in-time filing, industry voices would have been silenced until the remedy phase and the outcome would have been entirely different. It is very unlikely that any of the other cases described above would have succeeded if filed in the alternative venues available to the parties. Accordingly, challengers of federal agency action are wise to give careful thought to the available choices of venue. There are frequently at least two venue options, and often more. For identical reasons, careful thought should be given to employing strategies to obtain a change of venue if an opposing party has dictated where a case is initially pending.

Second, give careful thought to possible strategies to constrain the role of parties seeking to intervene in defense of the agency decision you are seeking to challenge. At a

24. HLA v. NMFS, 281 F. Supp. 2d 1, 37 (D.D.C. 2003).

25. As with every decision rendered by NMFS since 1999 regarding the Hawaii-based swordfish-target longline fishery, the 2012 BiOp and regulations, and other related federal agency decisions, have been challenged by NGOs in Hawaii federal district court.

minimum, intervenors complicate cases, thereby increasing time and cost. Moreover, capable intervenors can make a significant difference by providing important context or by providing more effective advocacy in support of the agency's decision. Federal counsel are commonly far less familiar with the issues and the record, and far more diverted by a large caseload, than counsel for intervenors.

Third, challenges to agency decisions premised upon technical disputes, especially on the cutting edge of science, have very limited judicial appeal in record review cases. Scientific disputes are the kinds of issues that are most readily susceptible to agency arguments grounded in deference. Agency counsel are able to point to the voluminous record to demonstrate that the agency reviewed the available information and made a considered choice among two or more competing views. Generally, the larger the record, the more impracticable it is to get a court interested in seriously reviewing the content and quality of the record, let alone rebalancing the evidence. In the polar bear listing challenges, the competing arguments and interpretations of the evidence by NGOs, the state of Alaska, and sport hunters almost ensured that the decision of the FWS would be sustained as a reasoned choice among a range of options on the frontiers of science and policy.

One possible option for gaining a quick and focused look by a court at technical decisions with immediate and arguably irreparable consequences is to combine the filing of the case with a motion for preliminary relief. Courts addressing motions for preliminary injunctive relief are not limited to the administrative record (which generally has not been assembled yet) and are more receptive to a hard look behind decisions that have very harsh and seemingly unreasonable consequences. Because preliminary injunctive relief is intended to preserve the status quo and involves a balancing of hardships and public interest, compelling extra-record evidence of harm combined with quick briefing and decision process can, as with the ConocoPhillips case, succeed even where the issues are highly technical matters within an agency's area of special expertise.

Fourth, procedural arguments, such as NEPA claims, are easiest to win, but the victory is most often pyrrhic. The most common source of successful challenges to agency action concerns errors of process. Process is often dictated by statute or rule, which is familiar territory for courts and subject to limited room for arguments of agency discretion, expertise, and deference. Among the process defects that most commonly result in favorable challenges are the requirements of NEPA, which mandates agencies take a "hard look" at the probable and foreseeable past, present, and future direct, indirect, and cumulative environmental impacts of a proposed major federal action and a range of alternatives. In circumstances where delay alone may result in a beneficial outcome, prevailing in procedural challenges, such as based upon NEPA, may be useful. However, for most companies and industry associations, advancing NEPA law is counterproductive. More importantly, in the absence of a successful substantive claim, merely procedural

successes are often short-lived. For example, following remand of the polar bear §4(d) rule successfully challenged by CBD on NEPA grounds, an EA was prepared and the original §4(d) rule reissued. Spending years in litigation only to win a NEPA claim that results in further administrative process leading back to the same outcome on the merits is, in most instances, a time-consuming and costly venture of no benefit.

Similarly, purely procedural victories are often too susceptible to manipulation of process by agencies. As in Case Study #4, even though HLA quickly prevailed on its procedural challenge to an agency biological opinion, NMFS succeeded in avoiding a decision on the merits of HLA's challenge by repeatedly manipulating the ESA consultation and MSA rulemaking process. Although the agency's actions eventually caught up with it and HLA prevailed, the involved commercial fishery was entirely closed for a three-year period. Few industries or companies would remain financially sustainable, let alone capable of funding complex litigation, through a three-year total closure.

Fifth, the simple truth is that most record review challenges to agency decisions are won by the agency. Run-of-the-mill cases virtually never win because of the presumptions favoring agencies. Unless a litigant is in the right venue, there are unusual aspects to a case that draw the attention and interest of the reviewing court, and it is possible to employ uncommon strategies to overcome the burdens of deferential review, record review challenges almost never succeed.

In the author's experience, the four most common categories of winning claims are as follows:

- Procedural challenges: As stated above, these are the simplest to win, but often result in only temporary delays or no practical success at all on the substance of the agency's decision. Success in requiring preparation of an EA for the polar bear §4(d) rule, and in some respects, HLA's success in its procedural challenge, are examples.
- Failure to consider an important aspect of a problem: Although it should be exceedingly difficult for an agency to entirely ignore or overlook an important aspect of the decision being made, this type of agency error occurs surprisingly often. Although courts are very reticent to reconsider and rebalance technical disputes, they are far less reluctant to vacate a decision where a plaintiff is able to demonstrate that there is an important gap in the factors considered by an agency in making a decision. All four case studies included claims alleging that the agency patently failed to consider a key aspect of the matters before it.
- Absence of support or unexplained contradictions in the record: Alternative variations on the gap in the record type of contention include allegations that an important aspect of an agency decision is either entirely unsupported in the record, or that the record contains findings that are mutually contradictory

and unexplained. In order to succeed, the gaps or contradictions must be central to the decision made and relatively simple to demonstrate. Again, all four case studies included claims of this nature. The polar bear critical habitat challenge and the ConocoPhillips IHA challenge were won primarily on the basis of these types of contentions. Winning on these types of contentions is unlikely to result in broadly applicable precedents, but most likely to be both sustainable on appeal and to result in significant substantive changes on remand.

- **Statutory interpretation:** Pure legal issues of statutory construction are more susceptible to challenges because courts are comfortable with and well-suited to engage in statutory interpretation. Nevertheless, the *Chevron* review standards are highly deferential and exceedingly difficult to overcome if the statutory language is ambiguous. Several of the case studies discussed above included claims premised upon disputed statutory or regulatory construction. However, with the exception of HLA's interpretation of NMFS' procedural guidance regarding "applicants," none of the statutory or regulatory interpretation claims pre-

vailed. Winning these types of cases is most likely to both result in broadly applicable precedent and to be susceptible to reversal on appeal.

Sixth and finally, common notions that record review cases are simple, quicker, less costly, and more predictable are generally false for cases that are won by plaintiffs. Administrative records are increasingly voluminous, requiring substantial effort to review. Preliminary disputes regarding the adequacy of records, and attempts to supplement a record, are more common than not. Agency process is a minefield for the unwary, and agency counsel are extraordinarily proficient in defeating claims on any of a wide range of jurisdictional or procedural contentions or strategies. Moreover, the weaker an agency perceives its case to be and/or the greater the interest in a case by agency headquarters, the more likely an agency is to wage a war of attrition, using reinitiated agency process, voluntary remands, stays, delays, and other tactics to stall an unfavorable decision while wearing down the challenger's business, financial, and emotional resolve to maintain its claims. In sum, only those cases pursued with true commitment, stamina, and careful strategic thought prevail.