 In an opinion released earlier today, the D.C. Circuit Court of Appeals unanimously rejected challenges to the listing of the polar bear as a threatened species under the Endangered Species Act. **Read the full opinion, *In re: Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation* – MDL No. 1993.**

Holly has discussed the ongoing litigation over the polar bear listing in depth here and here.

As I mentioned in a previous post, the polar bear is one of a few climate-imperiled listed species. The U.S. Fish and Wildlife Service (FWS) listed the polar bear as threatened in 2008 due to its shrinking sea-ice habitat. Shortly thereafter, multiple industry groups challenged the listing determination under the Administrative Procedure Act's "arbitrary and capricious" standard, arguing that the agency failed to establish a foreseeable extinction risk. Environmental groups also challenged the listing as insufficiently protective, arguing that the polar bear warranted a listing as endangered. All challenges were consolidated into a multidistrict litigation before the D.C. District Court. The District Court rejected all challenges on summary judgment, finding that the claims "amount to nothing more than competing views about policy and science," an issue on which the agency receives deference.

On appeal, appellants Safari Club International, et al. specifically claimed that FWS misinterpreted the record and failed to adequately articulate the grounds for its listing determination. Interestingly, the State of Alaska separately claimed that FWS failed to comply with section 4(i) of the Endangered Species Act, which requires FWS to provide a state with a "written justification" should it fail to adopt regulations consistent with a state's suggestions. (Alaska had submitted comments on FWS's proposed rule, to which FWS responded with a 45-page letter. Apparently, Alaska "simply disagree[d] with the substantive content" of FWS's response.)

In today's decision, the Court of Appeals affirmed the District Court ruling, emphasizing that "a court is not to substitute its judgment for that of the agency" (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)). The Court further noted, "The Listing Rule

is the product of FWS's careful and comprehensive study and analysis. Its scientific conclusions are amply supported by data and well within the mainstream on climate science and polar bear biology."

The holding reads (p. 16):

> Where, as here, the foundational premises on which the agency relies are adequately explained and uncontested, scientific experts (by a wide majority) support the agency's conclusion, and Appellants do not point to any scientific evidence that the agency failed to consider, we are bound to uphold the agency's determination.

Today's opinion is a win for agencies like FWS that routinely base administrative decisions on scientific modeling and other complex data. On a lighter note, it may also be a win for those of us who regularly read law review articles, since the D.C. Circuit has now confirmed that 45 pages is sufficient to "adequately address" a disputed issue.