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CLIMATE CHANGE

Global Climate Change and Endangered Species Act Practices

By Aaron J. Foxworthy

Expect climate change law to affect application of the Endangered Species Act — but don't expect clear answers up front. There's still a lot to be worked out.

PHOTO CREDIT

Effects to plant and wildlife species and habitat attributed to global climate change have implications for how the federal government administers and complies with the Endangered Species Act. Two recent administrative actions taken by the U.S. Fish and Wildlife Service and National Marine Fisheries Service present the latest examples of how those agencies grapple with how, or whether, to address anthropogenic greenhouse gas (GHG) emissions and climate change-related effects under the ESA.

BRIEF BACKGROUND

The ESA provides a legal mechanism for protection of vulnerable plant and wildlife species and their habitats. First, a species may be listed as threatened or endangered under the ESA if it is in danger of extinction within all or a significant portion of its range, or likely to become so. Once listed, the ESA prohibits the take (generally defined as harm, harass, hunt or kill) of listed wildlife species. Also, under Section 7(a)(2) of the ESA, federal agencies must determine whether their actions "may affect" a listed species or its designated critical habitat. If so, the agency must, in consultation with the FWS (or NMFS for most marine species), ensure that the proposed action is not likely to jeopardize the continued existence of a listed species or result in adverse modification of critical habitat. Under Section 7(b)(4) of the act, the services can permit limited "take" of a threatened or endangered species by a federal action if FWS or NMFS determines that the taking is incidental to an action that will not cause jeopardy or adverse modification, with reasonable and prudent measures to minimize the impact of the incidental taking.

POLAR BEAR LISTING

The Fish and Wildlife Service's May 15, 2008, decision to list the polar bear (Ursus maritimus) as a threatened species is the first to be based primarily on the adverse effects of global climate change to a species and its habitat, rather than localized effects. Dick Kempthorne, secretary of the Interior at the time of the listing, commented that, "most threatened and endangered species [have] a localized threat that we can seek to address, [but] the threat to the polar bear comes from global influences and their effect on sea ice [habitat]."

Based as it was on the threat to polar bears from continued decrease in sea ice habitat due to climate change, the listing posed two important questions for administration of the ESA. First, would all federal actions that result in additional GHG emissions be subject to the consultation provisions of the ESA with regard to potential effects on polar bears? And second, would incidental take authority be required for any federal or private actions that proposed to emit new or increased amounts of GHG emissions, because of their incremental contribution to decrease in polar bear sea ice habitat?

The service provided answers in the final listing. It pointed to the 2001 Ninth Circuit U.S. Court of Appeals decision in *Arizona Cattle Growers Ass'n v. United States Fish and Wildlife Service,* 273 F.3d 1229, which held that the service cannot force a federal agency to consult over the agency's proposed action if no take of a listed species is reasonably likely to occur from that action. Based on that premise, the service determined that although the

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significant cause of the decline of the polar bear is climate-change related loss of Arctic sea ice habitat, the best available scientific information has not established a causal connection between specific sources of emissions and impacts posed to polar bears and their habitat. Under the *Arizona Cattle Growers* rationale, unless additional scientific evidence links a particular proposed action to the take of polar bears through habitat reduction, no consultation would be required even if the action unquestionably results in additional GHG emissions. Therefore, federal agencies could not be required to consult over potential effects to polar bears, or to obtain incidental take authority for the bear, based solely on global climate change-related effects of a proposed action. The listing remains controversial, and currently is being challenged by a diverse set of plaintiffs.

RULEMAKING ON CONSULTATION

The polar bear listing was not the only rule promulgated in 2008 to address whether climate change impacts should be analyzed under the ESA. On Dec. 16, 2008, FWS and NMFS adopted final revisions to their regulations regarding federal agency consultation under Section 7(a)(2) of the ESA. The changes provide guidance on how agencies should administer the requirements of the ESA for listed species affected by climate change.

Recall that if an agency action "may affect" a listed species, under Section 7(a)(2) of the ESA the agency must consult with the appropriate service to determine whether the proposed action is likely to jeopardize the continued existence of the species (or adversely modify critical habitat for the species). The services' new regulations limit those circumstances where a federal agency would be required to consult by excluding those federal actions whose only effect to listed species would be, for example, "manifested through global processes" or whose effects "are not capable of being measured or detected in a manner that permits meaningful evaluation." Most noticeably, the services' new regulations exclude from the consultation requirement those federal actions that would be required to consult due to potential climate-change related effects of the action. The final rule specifically cites GHG emissions and their contribution to global climate change as a type of effect that would not, by itself, trigger the ESA's consultation requirement.

These new regulations most directly affect federal actions and private parties seeking federal permits for facilities that would directly result in additional GHG emissions (e.g., power generation or cement manufacturing facilities), but could also affect federal land management activities, such as forest management plans, that could have climate-change related effects. The new regulations represent a policy determination by the Bush administration that the ESA is not the most effective or efficient tool for regulating and minimizing the effects of global climate change on species and their habitat. Environmental groups have expressed strong disagreement, and have filed suit to invalidate the revisions. The Obama administration has also indicated a willingness to review the new regulations, possibly reversing the rulemaking or deciding not to take part in defending the rulemaking in current litigation.

If the rulemaking is reversed, many more federal actions would likely be subject to ESA Section 7 consultation, including federal permitting and licensing decisions for otherwise private projects. Also likely are additional petitions for listing species based on climate-change-related threats to habitat. Because any federal action could be seen as generating additional GHG emissions, the large prospective increase in Section 7 consultations and listing requests would represent a great additional cost and time burden for the FWS and NMFS. Also, the services' Section 7 consultation and listing determinations are subject to judicial review, raising the prospect of greatly increased litigation over climate-change related effects under the ESA.

OTHER WAYS FORWARD

The question of considering climate-change related effects under the ESA does not have to be an all-or-none proposition. One possible compromise would be to revise the new consultation regulations to require Section 7 consultation for federal actions at the programmatic level, where aggregate climate-change related effects are more likely to meet the *Arizona Cattle Growers* standard. Smaller federal actions less likely to meet that standard should be regulated under expected GHG emissions regulations at the federal level, either pursuant to the Clean Air Act or through a cap-and-trade system, or both. This would allow for regulation of GHG emissions from smaller federal actions by agencies better equipped than the services to regulate such emissions, in a manner that is arguably more efficient than through Section 7 consultation and imposition of attendant reasonable and prudent measures.

Regardless of whether the rules changes remain in effect or are revised or rescinded by the Obama administration, public and private attorneys who advise their clients on compliance with the ESA must watch closely for further rounds of species listings and other rules changes addressing climate change and its effects on protected species and habitats. ■