

ESA: A Tool For Shaping Climate Change Law

Law360, New York (February 12, 2009) -- Throughout the Bush administration, environmental groups tried to use the Endangered Species Act (ESA) as a tool to establish U.S. global climate change law and policy.

Their efforts are nearing fruition, as signaled by the listing of the polar bear as a threatened species due to climate change effects on the bears' icy habitat.

Failure to understand this initiative by environmental groups will inevitably lead to conflict with any new federal climate change legislation or regulations that likely will be enacted during the Obama administration.

Without action, even in the new administration, deciding on appropriate cap-and-trade levels for greenhouse gasses and limits on greenhouse gas emissions may be set in an ad hoc fashion by the courts, not by Congress or the U.S. Environmental Protection Agency.

The Tool

Congress enacted the ESA in 1973 to protect threatened and endangered plants and animals and their habitat. The statute is expansive; it is often characterized as the most comprehensive legislation to protect species ever enacted.

The instrument that environmental groups have come to rely on to pursue their climate change agenda is the ESA's section 7 consultation requirement.

This provision requires that if a listed threatened or endangered species (or its habitat) may be affected by federal action (such as issuing permits to coal-fired power plants under the Clean Air Act), the federal action agency must either consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service to ensure that the continued existence of the species is not jeopardized.

Depending on the species affected, the responsible service drafts a biological opinion that details the effects of the federal action on the species or its critical habitat.

If the service finds jeopardy to the species or its habitat, it then suggests reasonable and prudent alternatives (RPAs) that would prevent jeopardy from occurring. RPAs can be as severe as recommending that a permit not be issued.

While RPAs are referred to as suggestions in the act, failure to comply with them would provide sufficient basis for government action or a citizen suit alleging that the action agency has violated the ESA, or a private party has "taken" a species.

The Plan

The first step to using the ESA as a tool to address climate change is to get species listed under the Act as threatened or endangered because of the effects of climate change. Environmental groups have been busy in this regard.

Because climate change is occurring most rapidly in the Arctic, Antarctic and high-altitude regions where ice loss and rapid glacial melting is a high profile and visual phenomenon, environmental groups have focused their efforts on getting cold-climate dependent species listed.

Here is what has occurred in the past few years:

In response to a petition and subsequent suit, the polar bear was listed this past May as threatened due to persistent loss of its Arctic sea ice habitat.

There is a pending petition to list the ribbon seal, and the Fish and Wildlife Service has agreed to review the status of all ice-dependent seals in the Arctic.

A lawsuit has been threatened against the service for failure to respond to a petition to list the pacific walrus.

There is a pending suit against the Fish and Wildlife Service for refusing to list the American pika, which is a small mammal related to rabbits that lives in high-elevation cold-climate boulder fields and alpine meadows in the mountains of the American West.

There is a pending suit against the Fish and Wildlife Service for refusing to list the wolverine, which depends on alpine snow to successfully raise its young.

There is a pending petition to list the Kittlitz's murrelet, an avian species that depends on glacial habitat.

The Fish and Wildlife Service agreed in response to a suit to make a listing decision by February 2009 regarding the yellow billed loon, which is an Arctic avian species found in Alaska.

Finally, despite the fact that penguins are not found anywhere in the United States, there is a suit pending against the Fish and Wildlife Service for refusal to take action to list 10 penguin species.

The Polar Bear

Because the polar bear is the only cold-climate species that so far has been listed, it is at the vanguard and may provide the test case for the effectiveness of the ESA to set climate change law.

The polar bear's fate is linked to the presence of sea ice in the arctic. The ice acts as a platform to reach the seals the bears eat, and is also the bears' primary breeding and denning habitat. The ice also grows and shrinks with the seasons.

However, the data show that from 2002 through 2007 all previous record lows for sea ice extent were exceeded and that each of 2002, 2005, and 2007 had successively lower minimum extents.

In fact, sea ice extents were so low in 2007 that the fabled Northwest Passage opened for the first time in recorded history. Based on this and related information, the Fish and Wildlife Service decided to list the polar bear as threatened.

The service calculated the expected continuation of sea ice decline is anticipated to cause the bear to become endangered within the foreseeable future throughout all of its range.

The service also acknowledged when it listed the polar bear that the retreat of sea ice in the Arctic is at least in part due to emissions of greenhouse gases from human activities.

But much to the chagrin of the environmental groups, former Interior Secretary Kempthorne announced in a press release that it was his intention "to make certain the ESA isn't abused to make global warming policies." His express concern was that federal agencies would be subject to the ESA's consultation requirement.

To try and prevent this, the Fish and Wildlife Service issued a "Special Rule" at the same time it listed the polar bear that created an exemption from the ESA's consultation requirement for federal actions involving green house gas emissions and activities occurring outside Alaska.

The service reasoned that consultation is not required because there is insufficient data to establish a causal connection between green house gas emissions from a new facility and impacts to polar bears.

Clearly distressed, the service was of the opinion that unless it creates such an exemption, every agency action that arguably contributes to greenhouse gas emissions would require consultation.

Of course, this is precisely what was intended.

Ghosts in the Machine

Unhappy with the declared exemption, environmental groups have gone back to court to try and vacate the Special Rule. Having already admitted when it listed the polar bear that human-generated greenhouse gas emissions are causing loss of sea ice necessary for the bear's survival, the service may face an uphill battle.

In an attempt to stack the deck, former Secretary Kempthorne proposed a new rule in August that seeks to restrict consultations only to those actions that are an "essential cause" of the alleged harm to threatened or endangered species.

This new rule was finalized in the waning days of the Bush administration and was immediately challenged by environmental groups.

As the new rule would have it, unless the construction of a coal-fired power plant was the root cause of ice loss in the arctic, consultation would not be required. By all accounts, the new Secretary of Interior, Ken Salazar, is already revisiting this rule, and it is unlikely to stand.

However, without waiting for the fate of the Special Rule or the new consultation rule to play out in the courts, environmental groups filed an administrative appeal this past September challenging a recent decision by EPA granting a Clean Air Act permit to construct the Desert Rock coal-fired power plant in New Mexico.

One petition in particular filed by the Center for Biological Diversity alleges that EPA failed to consider the impact on already listed species from additional green house gas emissions that would result from construction of another coal-fired plant in the region.

In a turn of events, this challenge is not based on global warming's effects on cold-climate regions, but instead focuses on what appears to be a decrease in water resources in the arid western United States that may be a result of global warming.

This January, the Environmental Appeals Board granted review of the Desert Rock permit and severed the issue of carbon dioxide emissions, which it would address separately.

Most recently, a statement on EPA's Web site indicates that the new EPA Administrator, Lisa Jackson, will review the proposed action in its entirety. One thing for certain is that any decision by Administrator Jackson will be immediately challenged.

The Fix

The question of whether the listing of the polar bear (or any other species for that matter) can be used to successfully challenge the federal permitting of power plants and other greenhouse gas-emitting sources is thus apparently teed up for court decision.

None of the climate change bills that have been introduced to date have included an express or implied exemption from ESA consultations that may impact a decision regarding deciding levels of green house gas emissions.

Further, former Secretary Kempthorne's Special Rule and consultation rule will likely not survive legal scrutiny. The only certain fix for this problem is legislative.

Without such action, it is very likely that the issue will be litigated for some time to come and instead of a legislative solution, the courts may be tasked with setting limits on emissions in an ad hoc manner.

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