

INSIGHTS

## Two Polar Bear Decisions in Two Weeks: Their Significance for Climate Change, Endangered Species and Project Development

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The end of February saw a flurry of news regarding the status of the Polar Bear under the Endangered Species Act (ESA). On February 20, the US Fish and Wildlife Service reissued its so-called "4(d)" rule regarding the Bear, outlining the rules "necessary and advisable" to protect it. Nine days later, the U.S. Court of Appeals for the DC Circuit upheld FWS's listing of the Polar Bear as a "threatened" species under the ESA. Each development is significant in its own right: together, they offer solid guidance as to where FWS is heading on using the ESA to address climate change and how climate change is affecting the listing of potentially endangered species.

### **Endangered v. Threatened**

The latter question was at the heart of the litigation decided by the DC Circuit. There, the court faced the question of whether FWS correctly identified the Polar Bear as "Threatened," rather than "Endangered." Under the ESA, the difference between the two is essentially whether the species is currently in danger of extinction (Endangered) or whether it is likely to become endangered in the foreseeable future (Threatened).

### **The Polar Bear's Listing**

The Polar Bear is heavily dependent on sea ice, and climate change is decreasing the amount of arctic sea ice. FWS's decision that the Bear was Threatened, rather than Endangered, was based, essentially, on the Service's view of how quickly climate change was causing arctic sea ice to melt. If it is happening "quickly," FWS would list the Bear as Endangered. If it is happening very slowly, FWS wouldn't list the Bear at all. FWS took the middle path, deciding that climate change is happening fast enough that those species face the threat of extinction in the foreseeable future. Given the limitations of climate science, FWS chose 45 years as the "foreseeable" future and the Court upheld FWS's use of this timeframe.

### **What the Listing Shows about FWS's View of Climate Change's Impact on Species**

The Court upheld FWS's listing decision, doing so in the face of challenges on both sides of the

decision - some argued that the Bear shouldn't be listed at all and others argued that it faces an imminent risk of extinction and should be considered Endangered, not just Threatened. The takeaways from FWS's listing decision and the court's refusal to strike it down are that, at least for the ESA:

- climate change is occurring
- it will have significant adverse impacts to species in the foreseeable future
- those impacts are still reversible

#### **The 4(d) Decision**

So, since FWS has determined that climate change is adversely affecting species, will it use the ESA to regulate climate change? That question was at the heart of the other major development: FWS's issuance of the "4(d)" rule for the Polar Bear. At a very high level, a 4(d) rule outlines the steps FWS believes are necessary and advisable to protect a Threatened species. These steps can include either restrictions on public action, such as limitations on development in the species' habitat, or the allowance of otherwise prohibited activity, such as permitting certain specified, limited adverse impacts to the species.

#### **What the Polar Bear 4(d) Decision Means for Using the ESA to Regulate Climate Change**

For the Polar Bear's 4(d) rule, the main public policy question was how to address activities outside of the Bear's range that increased the potential for climate change. Since we know the Polar Bear needs sea ice to survive and that climate change is reducing arctic sea ice, would FWS's 4(d) rule attempt to protect the Bear from further reductions in sea ice by addressing activities that affect the climate change? Boiled down to its core, would the 4(d) rule require greenhouse gas-emitting projects far from the Polar Bear's range to obtain an ESA permit for those emissions? FWS's rule says no.

#### **The Takeaways**

The rule is consistent with FWS's prior 4(d) rule for the Polar Bear, issued in 2008 and struck down by US District Court for the District of Columbia in 2011. The rule is also consistent with Bush Administration guidance addressing how FWS should examine the ESA impacts of GHG emissions. It is therefore a reliable and useful marker as to FWS's view of the ESA. The new 4(d) rule is more likely to be upheld than the prior one - the prior one was struck down for largely procedural reasons and for a few inadequate findings which FWS appears to have since corrected.

The takeaway here is that FWS has taken a consistent position over time on the use of the Act to regulate GHGs. The Service has used and will continue to use the Act to protect species affected by climate change, but only from actions taken against them directly or in their range - it will not use the ESA to regulate GHGs on a national or global level.