

Puget Sound BUSINESS JOURNAL

May 23-29, 2006 Vol. 29, No. 5

Species listing is a bigger boon for lawyers than polar bears

The U.S. Fish and Wildlife Service's long-awaited Endangered Species Act (ESA) listing of the polar bear as a threatened species is sure to please almost no one. The decision, while lengthy and detailed, stops well short of recommending any different actions to protect the polar bear, although the very listing itself may give rise to legal challenges by proponents of greater protection and opponents of any listing. The greatest impact of the listing, however, may be that federal agencies no longer will consider climate change impacts unless a direct link can be drawn from a specific facility's emissions to a listed species or its habitat.

The ESA listing of the polar bear came in response to a federal court order requiring that Fish and Wildlife make a final decision by May 15. The 368-page listing describes in great detail numerous scientific studies documenting the rise in global temperatures that have reduced the extent, thickness, quality and durability of the sea ice that polar bears rely on for hunting, transport and mating. The listing concludes that the loss of this habitat puts the species at risk of becoming extinct in the next 45 years.

In qualifying the polar bear for protection under the ESA, Fish and Wildlife concluded that other existing statutes, such as the Marine Mammal Protection Act, actually provide stricter standards to ensure protection of the bear. Therefore, the agency is not planning any additional measures to protect polar bears, and a draft ruling issued with the listing advises that activities permissible under the Marine Mammal Protection Act that might affect polar bears also will be permissible under the ESA.

The ESA also requires the Fish and Wildlife Service to the maximum extent prudent and practicable to designate critical habitat at the time a species is listed as endangered or threatened. The "critical habitat" is the geographic area occupied by a species that is essential to the conservation of the species, and may require special management or consideration, as well as specific areas outside the geographic area that a species occupies that are essential to its survival.

In its listing for the polar bear, Fish and Wild-

GUEST OPINION



Michael
Nesteroff

life declined to make a designation of any critical habitat. The agency said it needs more time to fully evaluate physical and biological features essential to the conservation of the polar bear and how those features are likely to change over the foreseeable future, and it needs to gather sufficient economic and other data on the impacts of a critical habitat designation to include in its designation procedure.

Fish and Wildlife's reluctance may be understandable, since a large part of the area occupied by the polar bear includes Alaska's oil and gas fields. Nevertheless, it is a prescription for more, rather than less, litigation on this issue.

Amid all the attention on the listing itself, a key overlooked point was the agency's one-two punch on the larger issue of whether climate-change effects need to be considered in the context of the ESA. The decision concluded that climate change should be excluded from consideration for the polar bear because "the best scientific data available today cannot make a causal connection between harm to listed species or their habitat and greenhouse gas emissions from a specific facility, or resource development project or government action."

By itself that would have been significant, but Fish and Wildlife went further and issued a separate guidance memorandum to its regional directors that is not limited to the polar bear listing. The memo from the director of Fish and Wildlife instructs regional directors to exclude consideration of climate change from their ESA consultations because of the absence of a causal connection. Thus, the memo states, "The mere fact that a federal agency authorizes a project that is likely to emit greenhouse gases" will not require Fish and Wildlife to be consulted on the ESA implications.

The memo further advised, "Without sufficient data to establish the required causal connection — to the level of reasonable certainty

— between a new facility's greenhouse gas emissions and impacts to listed species or critical habitat, section 7 consultation (by Fish and Wildlife under the Endangered Species Act) would not be required to address impacts of a facility's greenhouse gas emissions."

Of all the aspects of the polar bear listing, this is perhaps the most far-reaching and significant because it rejects what has been a growing trend by the courts to require federal agencies and local jurisdictions to include climate change considerations in their permitting and planning.

The cases have ranged from the U.S. Supreme Court's ruling last year that the federal Environmental Protection Agency must consider greenhouse gases as air pollutants under the Clean Air Act when establishing emissions standards for automobiles, to recent federal court decisions in California sending Endangered Species Act biological opinions on smelt and salmon back to the agencies with directions to include analysis of climate change impacts, to California and public interest groups suing counties and cities for their failure to include greenhouse gas emissions in their environmental reviews.

The trend has been significant enough to prompt state Department of Ecology Director Jay Manning to convene a working group that will look into how the state can incorporate climate change considerations into state Environmental Policy Act decisions by state and local agencies and avoid "policy by litigation."

While it remains to be seen if Washington will be successful in avoiding policy by litigation, the most likely product of Fish and Wildlife's actions probably will be more litigation over the role and scope of climate change impacts in the ESA, with potential spillover into many other federal and state laws.

This may change depending on the outcome of the presidential election in November, but for now, the listing only raises the temperature on what has been a simmering conflict between law and policy concerning climate change.

MICHAEL NESTEROFF is a shareholder at the Seattle office of Lane Powell PC.