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Federal Judge Requires USFWS to Conduct NEPA Review of Polar Bear Rule

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On October 17, 2011, U.S. District Court Judge Emmett Sullivan issued a long-awaited ruling on the so-called "4(d) rule" for threatened polar bears. *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, No. 08-764, Dkts. 282, 283 (D.D.C. Oct. 17, 2011) (the "4(d) ruling").[1] The Court rejected plaintiffs' ESA challenge but ruled favorably on their NEPA claim, finding that the USFWS failed to conduct the required environmental review.

Plaintiffs (environmental groups Center for Biological Diversity, NRDC, Defenders of Wildlife, and Greenpeace) have heralded the ruling as at least a partial victory for their cause—broadly, "'press[ing] the Obama administration to use all available tools, including the Endangered Species Act, to address greenhouse emissions and the climate crisis.'" [2] The practical effect of the ruling, however, may not be very dramatic. The ruling requires the USFWS to comply with NEPA, a procedural statute, by preparing an environmental assessment ("EA") on the 4(d) rule. The EA will enable the USFWS to determine whether it must prepare a more elaborate environmental impact statement ("EIS") on the rule, or just issue a Finding of No Significant Impact ("FONSI"). Judge Sullivan's ruling neither requires an EIS nor dictates any particular outcome of the USFWS's NEPA analysis.

Judge Sullivan vacated the final 4(d) rule while the USFWS prepares an EA, reinstating the interim 4(d) rule in the meantime. The interim rule was in place for eight months in 2008 while the Service finalized the rule and is substantially similar to the final rule. Thus, while the final 4(d) rule undergoes NEPA review, very little will change in terms of day-to-day Interior management in the bear's circumpolar range, or available litigation options for environmental and industry groups. [3]

Polar Bear Litigation Background

In May 2008, the USFWS listed the bear as threatened. Judge Sullivan upheld this listing rule in June 2011. The Service found that, "based on the best available scientific and commercial information, polar bear habitat—principally sea ice—is declining throughout the species' range, that this decline is expected to continue for the foreseeable future, and that this loss threatens the species throughout all of its range." [4]

The listing itself marked a turning point in the USFWS's treatment of climate change effects on listed wildlife. Elements of the rule and regulations and guidance issued concurrently, however, significantly narrowed its practical effect. These led to a proliferation of lawsuits by environmental, industry, hunting and other interest groups, which were consolidated before Judge Sullivan. [5]

The polar bear was not the first species to be listed based on climate change effects, [6] but the listing decision was the first rule in which the Service explicitly acknowledged: (1) the potential for extinction of a vertebrate species

due largely to climate change effects; (2) that atmospheric concentration of carbon dioxide has increased in a "dramatic and unprecedented" manner, particularly in the last 20 years "due to global increases in [greenhouse gas ("GHG")] emissions and land use changes"; and (3) that "existing regulatory mechanisms to address anthropogenic causes of climate change … are not expected to be effective in counteracting the worldwide growth of GHG emissions within the foreseeable future." [7]

Under the statutory listing factors, the USFWS determined that while the polar bear is threatened by ongoing and projected changes in sea ice habitat, "there are no known regulatory mechanisms in place at the national or international level that directly and effectively address the primary threat to polar bears—the rangewide loss of sea ice habitat within the foreseeable future." [8] The Service acknowledged that "some existing regulatory mechanisms… address anthropogenic causes of climate change," but found that "these mechanisms are not expected to be effective in counteracting the worldwide growth of GHG emissions within the foreseeable future." [9]

Based on this absence, environmental groups encouraged, and then attempted through litigation to force, the Services to use the ESA to address the source of the threat and broaden the statute's application. Both the Bush and Obama administrations have rejected the use of the ESA as a regulatory tool to directly combat climate change or regulate GHG emitters. [10] The 4(d) ruling requires more environmental review, but does not affect or require a change in the federal government's consistent position on the issue.

The Interim and Final Polar Bear 4(d) Rules

When the USFWS listed the polar bear, it also promulgated a special interim rule under section 4(d) of the ESA. Under the plain language of the statute, the strict "take" prohibitions of ESA section 9 apply only to endangered species. [11] The administering Services (USFWS and NOAA Fisheries) must, however, issue those regulations that they deem "necessary and advisable to provide for the conservation" of threatened species. [12] Such regulations may include the extension of section 9 protections to threatened species. Normally, the USFWS extends those protections to threatened species by general regulation. [13] In the case of the polar bear, however, the USFWS employed the exception to its general regulation, and instead issued its superseding 4(d) rule.

In its May 2008 interim 4(d) rule, the USFWS adopted the existing regulatory requirements under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") and the Marine Mammal Protection Act ("MMPA") as the protective measures for polar bears. [14] Accordingly, if incidental take had been authorized under the MMPA, the USFWS would not require additional authorization under the ESA. [15] The USFWS based this decision in large part on its conclusion that the MMPA's incidental take standards and CITES requirements provide a comparable or stricter level of protection for the bear than would adoption of ESA standards. [16]

Following a 60-day comment period, on December 16, 2008, the USFWS replaced the interim 4(d) rule with a substantially similar final 4(d) rule[17] and codified the final rule at 50 C.F.R. § 17.40(q).

Under both the interim and final 4(d) rules, any activity that was already permitted or exempted from the MMPA or CITES would not require additional authorization under the ESA as a result of the listing. Under the interim rule, incidental take not otherwise authorized under the MMPA was not prohibited under the ESA except in Alaska. [18] This changed under the final 4(d) rule, under which an incidental take not otherwise authorized under the MMPA is not prohibited under the ESA if it occurs *outside* the current range of the polar bear; such act will only be subject to MMPA penalties. An incidental take not otherwise authorized under the MMPA that occurs *within* the polar bear's range, on the other hand, will be considered a prohibited take under both the ESA and MMPA. [19]

Judge Sullivan's 4(d) Ruling

In the 4(d) litigation, plaintiffs argued that the USFWS "cannot effectively provide for the conservation of the polar bear without addressing global [GHG] emissions, which the agency itself identified as the cause of increasing Arctic temperatures that are expected to lead to a significant decline of the polar bear's sea ice habitat." [20] They accused the USFWS of "purposely and unlawfully craft[ing] its [4(d)] Rule in such a way as to avoid addressing this threat, in contravention of the ESA's conservation mandate." [21] The USFWS defended its position by reasoning that the evidence before the agency led it to conclude that section 4(d) is not an appropriate tool to address threats to the

bear wrought by climate change. Defendant-Intervenors the Alaska Oil and Gas Association, Arctic Slope Regional Corporation, and State of Alaska supported the USFWS's final 4(d) rule, filing a cross-motion for summary judgment and opposition to plaintiffs' motion. [22] Additional defendant-Intervenors (multiple national trade associations including but not limited to the American Petroleum Institute, Chamber of Commerce of the United States, and National Mining Association) also supported the USFWS's 4(d) rule, filing memoranda in support of the federal defendants' cross-motion. [23]

In dicta, Judge Sullivan commiserated with plaintiffs, stating that he "understands their frustration." [24] However, acknowledging his limited judicial role in the matter, he explained that "climate change poses unprecedented challenges of science and policy on a global scale, and this Court must be at its most deferential where the agency is operating at the frontiers of science." [25] The only question before the Court for plaintiffs' ESA claims, then, was whether, under the narrow APA standard of review, the USFWS "reasonably concluded that its Special Rule provides for the conservation of the polar bear even if it does not reverse the trend of Arctic sea ice loss." The Court determined that the USFWS had done so, so ruled for defendants and defendant-intervenors on plaintiffs' ESA claim.

ESA Analysis

In its 4(d) rule, the USFWS concluded that additional ESA protections were not "necessary or advisable" within the meaning of 16 U.S.C.A.A. § 1533(d), to address the primary threat identified in the listing rule—loss of sea ice habitat from climate change and related effects—because that threat "'would not be alleviated by the additional overlay of provisions in the general threatened species regulations… or even the full application of the provisions in section 9 and 10 of the ESA… Nothing within our authority under section 4(d) of the ESA, above and beyond what we have already required in this final special rule, would provide the means to resolve this threat.'" [26] The Court found this determination reasonable, and also noted that the ESA does not even require the Services to issue regulations protecting threatened species from take. [27] The more relevant question before the Court was whether the USFWS reasonably concluded that the specific prohibitions and exceptions in its 4(d) rule are "necessary and advisable" for the conservation of the polar bear. Plaintiffs argued that the Service couldn't meet that standard because the rule fails to address the primary threat to the species, from GHGs and loss of sea ice habitat.

The parties did not dispute that the 4(d) rule does not address GHGs, but the court also noted that the rule also does not expressly exempt GHG emissions from regulation under the ESA or any other statute. [28] The USFWS based its omission on the determination that available climate modeling does not allow it to draw a causal connection between GHG emissions from a specific source and their impact on a particular polar bear. Thus, the Service decided that even extending the full section 9 prohibitions to the bear would not address the threat from sea ice loss caused by GHGs. [29] The court found ample record evidence supporting this determination—including Interior's statement that the consequences suffered as a result of climate change result from "the collective [GHG] accumulation from natural sources and the world-wide anthropogenically produced [GHG] emissions since at least the beginning of the industrial revolution." The Court found that plaintiffs did not contradict that record evidence by, for example, providing proof of a scientific mechanism by which an agency could establish causation between a GHG emitter and a member of a listed species. Accordingly, the Court found that the rule survived rational basis review.

NEPA Analysis

Under NEPA, the Court found the Service's rule deficient. Plaintiffs claimed that the Service violated NEPA by failing to analyze the potential environmental impacts of its 4(d) rule, "which is generally required for all 'major Federal actions significantly affecting the quality of the human environment.'" [30] The USFWS claimed an exemption. The Court rejected its argument, stating that it "was required to conduct at least an initial assessment to determine whether its [4(d)] Rule for the polar bear warranted a full [EIS]." Thus, the Court vacated the final 4(d) rule pending NEPA compliance, and reinstated the May 2008 interim 4(d) rule in the meantime. [31]

As a result of the NEPA holding, in the D.C. district court at least, rules promulgated under ESA section 4(d) are not automatically exempt from NEPA. Federal defendants attempted to achieve this result by relying on a 1983 USFWS policy that exempts from NEPA routine actions associated with section 4(a) rules. The policy lists exempt 4(a) actions as listings, delistings, reclassifications, and critical habitat designations. [32] Despite the lack of any reference to 4(d), a federal district court in California held in 2005 that 4(d) rules were also exempt from NEPA as a

matter of law. Judge Sullivan rejected that court's reasoning and the federal defendants' associated arguments. His holding is in line with multiple appellate decisions and D.C. district court decisions in which courts have held that various ESA actions require NEPA review, including consultations, incidental take statements, and critical habitat designations. [33]

Federal defendants also argued that the 4(d) rules were exempt from NEPA because they are subject to APA notice-and-comment rulemaking procedures. The Court rejected this argument as well, noting that under this approach, any APA rulemaking would be exempt from NEPA, and "[a]n exception of such staggering breadth would render NEPA meaningless." [34]

The Court also rejected federal defendants' final NEPA argument—that the rule is not a major federal action under NEPA because it does not change the regulatory status quo, leaving the existing MMPA and CITES management regime in place. The Court refused to allow the USFWS to shortcut the NEPA process in this way, and instead required it to determine—through an EA—whether a FONSI or EIS is appropriate.

Conclusion

The question "at the heart" of the polar bear litigation and the larger debate over whether the ESA has a role to play in GHG regulation, remains outside the judicial purview: "whether the ESA is an effective or appropriate tool to address the threat of climate change—is not a question that this Court can decide based upon its own independent assessment, particularly in the abstract. The answer to that question will ultimately be grounded in science and policy determinations that are beyond the purview of this Court." [35]

In the 4(d) element of the polar bear case, the next significant development will be the Service's NEPA review. If the USFWS issues a FONSI, then the final 4(d) rule will be reinstated and the status quo will continue until voluntary or litigation-driven regulatory change occurs. If the Service decides it must prepare an EIS, then it will likely delve deeper into climate change impacts and perhaps sources; but again—because NEPA is a procedural statute that mandates review but no particular substantive result—the issuance of such a document may not bring major changes either. Only a statutory or regulatory amendment or policy reversal, supported by science that apparently does not yet exist, would be likely to significantly change the manner in which the USFWS addresses climate change threats to listed species.

[FN1] The same day, Judge Sullivan also rejected a challenge brought by hunting groups seeking the green light to import polar bear carcasses into the United States. *See In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, No. 08-764, Dkts. 280, 281 (D.D.C. issued Oct. 17, 2011).

[FN2] CBD, Statement of Conservation Groups on Court Ruling Regarding Endangered Species Act Protection for Polar Bears (Oct. 17, 2011) (statement of John Hocevar, oceans director at Greenpeace).

[FN3] Discussing the prospect of the 4(d) rule foreclosing ESA citizens' suits against GHG emitters, the Court noted that the rule would not preclude such suits against emitters operating within the range of the bear. It also noted that, "assuming a violation of th[e MMPA] can be identified," the 4(d) rule does not preclude the agency from pursuing an enforcement action against a GHG emitter within the bear's range. 4(d) Ruling at 36, n.16. Either action would require the citizen plaintiff or USFWS to establish with reasonable certainty that the emissions of a particular facility led directly to the loss of sea ice habitat and a polar bear "take." Based on the extensive administrative record in the polar bear litigation, Judge Sullivan concluded that

scientific models do not yet enable such specific causal lines to be drawn. Unless the science improves or the legal bar is lowered, then, such suits and enforcement actions are unlikely to be successful.

[FN4] 50 CFR Part 17, 73 Fed. Reg. 28,212-28,303 (May 15, 2008).

[FN5] *See generally In re Polar Bear Litigation*, D.D.C. case no. 1:08-mc-00764-EGS.

[FN6] *See generally* J. **Ferrell**, Polar Opposites: State of Alaska, Hunting and Environmental Groups Challenge Polar Bear Listing, Marten Law News (June 11, 2008); Settlement Requires Federal Government to Designate Critical Habitat for Species Listed Due to Global Warming Concerns, Marten Law Envt'l News (Oct. 17, 2007).

[FN7] Final Listing Rule, 73 Fed. Reg. at 28,244.

[FN8] Final Listing Rule, 73 Fed. Reg. at 28277.

[FN9] Final Listing Rule, 73 Fed. Reg. at 28,288.

[FN10] *See generally* J. **Ferrell**, New ESA Consultation Regulations Draw Immediate Fire, Marten Law News (Jan. 13, 2009); Obama Administration Revokes Bush-Era ESA Consultation Rule; Decision on Polar Bear Rule Still Pending, Marten Law News (May 3, 2009). This policy position is reflected in the USFWS's language in guidance and the interim and final 4(d) rules as well. *See* J. **Ferrell**, Polar Opposites: State of Alaska, Hunting and Environmental Groups Challenge Polar Bear Listing, Marten Law News (June 11, 2008).

[FN11] 16 U.S.C.A. § 1538(a)(1), -1532(19).

[FN12] 16 U.S.C.A. § 1533(d).

[FN13] *See* 50 C.F.R. § 17.31(a) (general regulation extending all section 9 prohibitions to all threatened species).

[FN14] 73 Fed. Reg. 28306 (May 15, 2008). Because the polar bear's primary habitat is sea ice, it is usually considered a marine mammal. *See* Final Listing Rule, 73 Fed. Reg. at 28,212. Congress enacted the MMPA "to protect and conserve marine mammals so that they continue to be significant functioning elements of the ecosystem of which they are a part." 73 Fed. Reg. at 28,283 (citing 16 U.S.C.A. § § 1361 *et seq.*). The MMPA establishes a general moratorium on taking and importing marine mammals, and sets forth a number of prohibitions, subject to exceptions. Take is defined in the MMPA to include "harassment" of marine mammals, which includes any act of pursuit, torment, or annoyance that could potentially: (a) injure a marine mammal in the wild; or (b) disturb a marine mammal in the wild by disrupting "behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." 16 U.S.C.A. § 1362(18).

[FN15] 73 Fed. Reg. at 28310.

[FN16] 73 Fed. Reg. at 28311-313.

[FN17] 73 Fed. Reg. 76249 (Dec. 16, 2008).

[FN18] 73 Fed. Reg. at 28318 (codified at 50 C.F.R. § 17.40(q)(4); superseded Dec. 18, 2008 by 73 Fed. Reg. at 76269; reinstated temporarily pending NEPA review by 4(d) Ruling Oct. 17, 2011).

[FN19] 73 Fed. Reg. at 76269 (codified at 50 C.F.R. § 17.40(q)(4), vacated Oct. 18, 2011); *see also* 4(d) Ruling, Dkt. 283 at 14-15. The modified regulatory language provides:

None of the prohibitions in Sec. 17.31 of this part apply to any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within the United States, except for any incidental taking caused by activities in areas subject to the jurisdiction or sovereign rights of the United States within the current range of the polar bear.

50 C.F.R.§ 17.40(q)(4).

[FN20] 4(d) Ruling, Dkt. 283 at 3.

[FN21] 4(d) Ruling, Dkt. 283 at 3.

[FN22] 4(d) Ruling, Dkt. 283 at 18.

[FN23] 4(d) Ruling, Dkt. 283 at 18.

[FN24] 4(d) Ruling, Dkt. 283 at 3.

[FN25] 4(d) Ruling, Dkt. 283 at 3.

[FN26] 4(d) Ruling, Dkt. 283 at 15-16 (quoting 4(d) rule).

[FN27] 4(d) Ruling, Dkt. 283 at 29 (citing cases).

[FN28] 4(d) Ruling, Dkt. 283 at 32.

[FN29] 4(d) Ruling, Dkt. 283 at 33-35.

[FN30] 4(d) Ruling, Dkt. 283 at 33-35 (quoting 42 U.S.C.A.§ 4332(2)(c)).

[FN31] 4(d) Ruling, Dkt. 283 at 4-5.

[FN32] 4(d) Ruling, Dkt. 283 at 43 (citing 48 Fed. Reg. at 49244).

[FN33] 4(d) Ruling, Dkt. 283 at 46 (citing cases).

[FN34] 4(d) Ruling, Dkt. 283 at 47.

[FN35] (d) Ruling, Dkt. 283 at 40.

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