

An Animal to Save the World

Climate Change and the Polar Bear

Lawyers at the Center for Biological Diversity (CBD), an Arizona-based environmental group, spent years looking for what *Newsweek* termed “an animal to save the world.” Their criteria: a charismatic animal dependent upon an Arctic ice habitat threatened by global warming so that the animal could be listed under the Endangered Species Act (ESA). With the right species, the CBD hoped to use the act to drive global warming policy in the United States and abroad.

The Kittlitz’s murrelet didn’t cut it. Neither did an Arctic spider or a species of Caribbean coral. The polar bear, though, was another story. Citing research showing that the polar bear’s “sea ice habitat is literally melting away,” CBD attorneys in February 2005 filed a petition with the U.S. Fish and Wildlife Service (FWS) to list *Ursus maritimus* as a “threatened”

species. Under the ESA, a species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” A species is “endangered” if it is “in danger of extinction.” According to CBD, the “ongoing and projected” loss of Arctic sea ice, largely due to anthropogenic global warming, posed a readily foreseeable threat to the bear. “Only by implementing major cuts in greenhouse gas emissions in the very near future will a scenario be possible in which sufficient sea ice remains that the polar bear can persist as a species,” CBD maintained.

Some three years and two lawsuits later, in May 2008, the FWS officially declared polar bears “threatened,” adding them to the nearly 2,000 species listed under the ESA. Citing record low levels of sea ice in the Arctic and global climate models that predict

further declines, Dirk Kempthorne, the Secretary of the Department of the Interior (of which the FWS is a bureau), conceded that “the legal standards under the ESA compel me to list the polar bear as threatened.” Yet he also cautioned that the listing would do little to stem the loss of sea ice, and warned that it “should not open the door to use of the ESA to regulate greenhouse gas emissions from automobiles, power plants, and other sources.” Such actions “would be a wholly inappropriate use of the ESA law,” he explained, and could not produce emission reductions sufficient to limit projections of future warming anyway.

The polar bear’s ESA listing is unquestionably a public-relations victory for CBD and other environmental groups. It may not do much to help polar bear conservation, let alone cool the globe, but it may well bring greater urgency to climate activism. Saving polar bears may be a more saleable cause than abstract appeals to stabilize global climate. Now the Berlin Zoo’s polar bear, cute and cuddly Knut, can replace former Vice President and global scold Al Gore as the face of global warming. The polar bear is “*the* iconic example of the devastating impacts of global warming on the Earth’s biodiversity,” according to CBD attorneys.

Soon, though, the polar bear may also become a symbol of how the Endangered Species Act can be exploited to impose substantial regulatory burdens without actually conserving species in the wild. Secretary Kempthorne is certainly correct that

the ESA was not intended as a back-door to regulating emissions. Congress enacted the ESA in 1973 to create a safety net for the nation’s most vulnerable species. Listing a species under the ESA is like admitting it into the “emergency room” so urgent measures may be taken. How well the act has fulfilled its intended purpose is a matter of perennial dispute. In thirty-five years, very few species listed under the act have actually gone extinct, but just as few have recovered sufficiently to be removed from intensive care.

Given its current status, the polar bear might not have been the most obvious candidate for listing. There are an estimated 20,000 to 25,000 polar bears worldwide; some experts believe there are more alive today than in decades past. Of the nineteen polar bear subpopulations inhabiting the Arctic, only five are declining. Five other subpopulations are stable, and two are actually increasing. Not much is known about the others, but there is little reason to believe they are facing a precipitous decline.

Insofar as the listing is based upon climate models, ice-melt projections, and assumptions about the effects of habitat loss on the bear’s prospects for survival in the wild, its scientific basis is quite speculative. Polar bears managed to survive prior warm periods when there was little Arctic ice, but there were no conservation biologists around to see it. If they survived warm weather before, perhaps they could do it again. At the very least, argued those who opposed the polar bear’s ESA

listing, shouldn't we *know* the answer before making a decision that could trigger costly government regulations? Perhaps that would be wise policy, but that is not how the ESA works.

Indeed, most of those who advocated listing the polar bear under the act acknowledge the uncertainty about the extent to which climate change imperils the bear's future. They can make such admissions because the ESA does not require absolute certainty to list a species as threatened or endangered—in fact, several species have been subsequently “de-listed” as additional evidence about their populations rolled in. All the law requires is the “best” science available, even if the “best” science is not all that good. Even highly contestable scientific studies can sustain a species listing if that's the only science available.

In this instance, there is no question that the Arctic ice cover has declined significantly over the past few decades. Government-sponsored climate studies suggest that Arctic sea ice could melt further if polar regions continue to warm. And it is clear that polar bears like sea ice for hunting, mating, transport, and just hanging out. After a review of the evidence, the U.S. Geological Survey concluded last year that projected losses of sea ice could reduce bear populations by two-thirds within fifty years. This conclusion, and the supporting scientific evidence, provided more than sufficient basis for listing the polar bear as a threatened species given the standard written into law.

While there was a strong *legal* case for the polar bear listing, there is ample justification to question whether the ESA will do anything to advance polar bear conservation. Indeed there are actually some reasons to suspect that listing the polar bear could be both costly and counterproductive. One thing is certain, however: Industry and environmental groups will spend years in federal court litigating the polar bear's ESA listing and the proper regulatory response.

One immediate consequence of the listing will be an end to trophy-hunting imports from Canada. Listing the bear as “threatened” under the ESA automatically triggers a parallel listing as a “depleted species” under the Marine Mammal Protection Act (MMPA). This is somewhat ironic as Congress specifically amended the MMPA to allow American sport hunters to import trophies from polar bear hunts conducted in accordance with Canadian conservation efforts. It is also bad news for polar bear conservation in Canada, as fees paid by American sport hunters generated several hundred thousand dollars to support conservation efforts by the Canadian government and local communities. Such programs have been important for polar bear conservation in Canada, and will only become more important if the loss of Arctic sea-ice is as big a threat to polar bear survival as some project.

It is also likely that the polar bear listing will make it more difficult to approve oil and gas exploration in the Arctic. Just before the listing became

official, the Interior Department approved the first of five scheduled oil and gas leases in the Beaufort and Chukchi Seas. Whether or not this timing was accidental, the next four leases may not go through. What is more, CBD has already announced its intent to get the first development lease revoked, citing the inevitable impact of Arctic oil and gas development on polar bear populations and habitat. For this reason, officials in the state of Alaska hope to challenge the polar bear listing in court, although such a suit is unlikely to be successful.

Far less certain is the effect the bear's ESA listing will have on government actions that may contribute to climate change by sponsoring or permitting activities that produce greenhouse gas emissions. Under Section 7 of the ESA, the federal government is prohibited from funding, authorizing, or undertaking any action "likely to jeopardize the continued existence" of a listed species or contribute to the loss of its critical habitat. Compliance with this requirement is ensured by mandated "consultation" between FWS and other federal agencies. Expansive citizen suit provisions enable environmental groups to challenge government actions that either threaten listed species or were not preceded by adequate consultation. And so, even though Interior Secretary Kempthorne rightly said it would be "wholly inappropriate" to use the ESA as a means to regulate greenhouse gas emissions, CBD and other groups hope the polar bear's listing will give them a new

weapon to use in legal battles against power plant permits and various federal projects that contribute, on the margin, to global climate change.

Yet even if this tactic is successful, it won't reduce greenhouse gas emissions enough to alter projections of future sea-ice decline. And it could even have the unintended effect of harming conservation. The consultation requirement is, in practice, a source of costly delays, and provides opportunities for environmentalist lawsuits claiming whatever consultation occurred was insufficient. If consultation is required for any government action that will lead to increased greenhouse gas emissions, many projects will be stalled if not stopped altogether—which is, of course, precisely what some environmental groups hope. Yet burdening the Fish and Wildlife Service with widespread climate-related consultation could hamper other species conservation efforts. The FWS hardly has the staff or resources to fulfill its existing legal obligations. Widespread climate consultations could bring many FWS activities to a halt.

The FWS maintains that only those activities which "appreciably diminish" the habitats of listed species violate Section 7 and that consultation will not be required unless it is "reasonably certain" that the emissions from a specific project will lead to the loss of Arctic sea ice. But federal courts have been somewhat reluctant to interpret the ESA so narrowly, holding instead that even indirect habitat modification that undermines future species

recovery can violate the ESA's prohibitions. Moreover, existing regulations already establish that the ESA's prohibitions apply to indirect impacts on species and their habitats. Greenhouse gas emissions from major projects, by definition, contribute to climatic warming to some degree.

In *Massachusetts v. EPA* (2007), the Supreme Court held that marginal contributions to climate change, even if virtually imperceptible, were sufficient to establish legally cognizable injuries for the purposes of citizen suit standing. Under this reasoning, even marginal contributions to global climate change, such as those from a major transportation project or coal-fired power plant, would suffice to trigger consultation, if not actual emission limits under Section 7 of the ESA. So opponents of new projects could use the consultation process to bog them down, while defenders of the projects will be in an awkward position: It is one thing to argue that new projects may proceed, but much more difficult to argue that other agencies need not consult with the FWS to make sure.

While the polar bear will continue to command the spotlight, it won't be alone for long. CBD and other groups are already aiming to get other ice-dependent species on the threatened and endangered lists. Knut may soon be joined by Mumble the tap-dancing Emperor penguin of the Oscar-winning *Happy Feet*. If enough species are listed, the legal pressure to control greenhouse gas-emitting activities will become too great to withstand, and the

ESA will be transformed from a species-conservation statute to the source of a broader emission-control regime. "We are trying to change national and international policy," CBD Director Kierán Suckling told the *Arizona Daily Star*.

It is likely, then, that the polar bear listing and consequent regulatory restrictions will be the subject of court battles for many years. CBD is already challenging the Interior Department's efforts to limit the listing's legal fallout and failure to designate critical habitat. Whatever the outcome of this litigation, one thing is certain: The listing will do very little if anything to slow human contributions to climate change or conserve polar bear populations. Even CBD attorneys admit that "under any scenario, the future of ice-dependent species such as the polar bear is grim."

So the polar bear's ESA listing will do little to preserve bear populations in the wild. It could complicate other conservation efforts. It will have no effect on the projected loss of sea ice over the next few decades. And it will have no effect on global warming. Getting a handle on anthropogenic climate change will require broad international efforts; jury-rigging a decades-old species-conservation statute just won't cut it. The polar bear may be an "animal to save the world," but the Endangered Species Act will do little to save the bear.

—*Jonathan H. Adler is Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law.*