

## Polar Bear Listed as a Threatened Species Under the Endangered Species Act Due to Climate Change Effects on Sea Ice Habitat

On May 14, complying with a court-imposed deadline, Secretary of the Interior Dirk Kempthorne announced a final rule listing the polar bear (*Ursus maritimus*) as a “threatened” species under the Endangered Species Act (ESA). The listing determination, issued by the U.S. Fish and Wildlife Service (FWS), concluded that the polar bear’s sea ice habitat “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.”

In addition to the listing determination, FWS issued guidance regarding compliance with the consultation requirements under Section 7 of the ESA, concluding that the best scientific information available has not established a causal connection between specific sources of greenhouse gas emissions and the specific impacts to polar bears or their habitat. Further, FWS separately promulgated an interim final rule identifying protective measures necessary for the conservation of the polar bear pursuant to Section 4(d) of the ESA. While immediately effective, **comments on the interim final Section 4(d) rule will be accepted through July 14, 2008.**

While the listing determination is based on the predicted decline in sea ice habitat for polar bears due to climate change impacts, Secretary Kempthorne clarified that the Department of the Interior (DOI) intends to act “to make certain the ESA isn’t abused to make global warming policies.” To that end, Secretary Kempthorne announced that DOI will be proposing modifications to existing regulations which are intended to ensure that the listing is not used to set climate change policies. Further, as part of the listing determination, FWS stated that the listing of the polar bear neither allows nor requires the FWS to direct that other agencies such as the Environmental Protection Agency regulate greenhouse gas emissions from all sources, including automobiles and power plants.

### THE EFFECT OF DESIGNATING THE POLAR BEAR AS A “THREATENED” SPECIES

Listing a species as “threatened” under the ESA invokes a suite of protective measures. First, at the time of the listing determination, the Secretary is required to designate critical habitat for the species to the “maximum extent prudent and determinable.” Here, FWS concluded that critical habitat is not determinable at this time and that further assessment will be required to identify the specific biological features and geographic areas for consideration as critical habitat. While a specific timetable has not been set, FWS committed that a proposed designation of critical habitat will be published in the “near future.”

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Section 7 of the ESA requires federal agencies to consult with FWS to ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. As detailed in the listing determination and published guidance, FWS does not anticipate that the listing of the polar bear as a threatened species will result in the initiation of new Section 7 consultations on proposed permits or licenses for facilities in the United States that would emit greenhouse gases. Particularly, FWS determined that the best scientific data available today is insufficient to reach a conclusion with “reasonable certainty” that there is a causal connection between greenhouse gas emissions from a facility in the lower 48 States to effects posed to polar bears or their habitat in the Arctic.

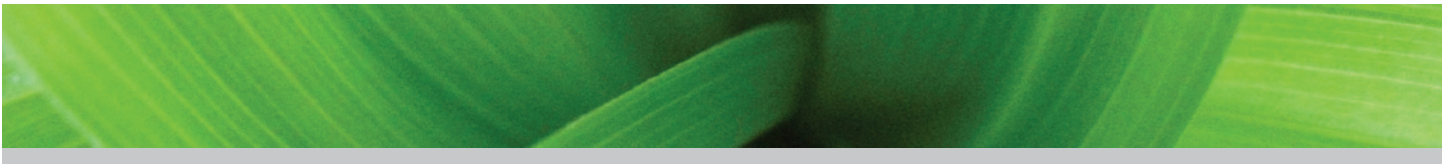
Pursuant to Section 4(d) of the ESA, FWS may develop a special rule specifically tailored to the conservation needs of a threatened species. Under FWS regulations, unless such a special rule is issued, the general “take” prohibitions under Section 9 of the ESA will apply. The ESA defines “take” to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Further, the definition of “harm” includes any act resulting in significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

Concurrent with the listing determination, FWS issued a special interim final rule under Section 4(d) setting forth the measures deemed “necessary and advisable” to provide for the conservation of polar bears. The interim rule, effective immediately, adopts the existing conservation regulatory requirements under the Marine Mammal Protection Act of 1972 (MMPA) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as the protective measures for polar bears under Section 4(d). The Section 4(d) rule also provides that the production, interstate sale, and export of native handicrafts by Alaska Natives may continue and that the subsistence harvest of polar bears is not affected.

To the extent an activity is *authorized or exempted* under the MMPA or CITES, then no further ESA authorization will be required to conduct the activity. For instance, as long as the oil and gas industries operating in the Arctic comply with the restrictions imposed by the MMPA, the interim final rule would allow such operations to continue. Further, as part of its Section 4(d) rule, FWS repeated its conclusion that the best scientific information available does not support a conclusion that there is a causal connection between greenhouse gas emissions resulting from a *specific* federal action and effects on listed species or its critical habitat from climate change.

## IMPLICATIONS

The decision to list the polar bear as a threatened species is not likely to remove this issue from further litigation or from the ongoing debate over climate change legislation. The listing determination as well as the concurrent actions on critical habitat and the interim final Section 4(d) rule almost certainly will be litigated. Similarly,



the announced guidance regarding compliance with the ESA Section 7 consultation requirements will place considerable scrutiny on pending or soon-to-be initiated consultations involving projects with greenhouse gas emissions. Moreover, this determination introduces an iconic symbol to the greenhouse gas emissions debate and may serve as the impetus for further legislation addressing resource use activities and climate change impacts on wildlife and their supporting habitat.

#### FOR ADDITIONAL INFORMATION

Van Ness Feldman regularly counsels clients on issues related to endangered species, climate change and regulatory compliance with federal environmental laws. If you are interested in additional information regarding this listing determination, the Section 4(d) Interim Final Rule, or any compliance matter regarding the Endangered Species Act or other federal environmental laws, please contact Joseph Nelson or Sam Kalen in our Washington, DC office at (202) 298-1800 or Richard Agnew in our Seattle, WA office at (206) 623-9372.

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