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Recommended Citation

Logan, Chris. "Is the Endangered Species Act the Right Place to Set U.S. Climate Change Policy?" *Sustainable Development Law & Policy*, Winter 2009, 30, 70.

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IS THE ENDANGERED SPECIES ACT THE RIGHT PLACE TO SET U.S. CLIMATE CHANGE POLICY?

by Chris Logan*

The Endangered Species Act (“ESA”) was enacted in 1973 to prevent extinction of species caused by human impacts on natural ecosystems.¹ On December 11, 2008, the Bush Administration finalized a rule change to the ESA, which relieves the Department of the Interior of a duty to assess the impact of climate change on endangered species, and further allows federal agencies to bypass consultation with the Fish and Wildlife Service (“FWS”) or the National Marine Fisheries Service (“NMFS”) when determining whether federal actions might threaten protected species.²

Prior to the eleventh-hour rule changes, the ESA arguably allowed the consideration of climate change impacts during the consultation process with FWS and NMFS scientists to assess the potential threats to endangered species.³ Under the new rule, which took effect on January 15, 2009, federal agency actions no longer require scientific review if “the effects of such action [on a species] are manifested through global processes” and “are not capable of being measured or detected in a manner that permits meaningful evaluation.”⁴

The rule change has engendered fervent debate between those who believe that the ESA should not determine U.S. climate change policy and those who believe that the rule changes will further harm endangered species already threatened by global warming. In April 2008, President Bush stated that the ESA, the Clean Air Act, and the National Environmental Policy Act “were never meant to regulate global climate change.”⁵ Former Secretary of the Interior, Dick Kempthorne, echoed the president’s sentiment after listing the polar bear as a threatened species under the ESA, stating, “Listing the polar bear as threatened can reduce avoidable losses of polar bears. But it should not open the door to use the ESA to regulate greenhouse gas emissions The ESA is not the right tool to set U.S. climate policy.”⁶ The proponents of the change argue that investments in wind and solar energy and clean coal technology, instead of federal regulations, will foster greenhouse gas emissions reduction.⁷

Supporters of the amended ESA emphasize that the new rules are a narrow regulatory change which will provide clarity and certainty to a broad and ambiguous issue.⁸ Further, they contend that the new regulations give FWS and NMFS scientists the ability to focus their resources on evaluating projects that pose a greater risk of harm to endangered species instead of attempting to evaluate hard-to-measure threats such as climate change. In December 2008, the Washington Post editorialized, “Where Mr. Kempthorne got it right is in preventing the effects of ‘global processes’ ([or] climate change) from triggering consultation

‘because of the inability to separate out the effect of a specific Federal action from a multitude of other factors that contribute through global processes.’”⁹ Proponents of the ESA rule-change believe that the direct impact on endangered species by climate change cannot be measured in a “meaningful” way that shows that the federal agency actions are directly responsible for the adverse effects on all species.

On the other side, Congress and environmental groups have opposed the Bush Administration’s last minute amendments to the ESA, seeing it as a last ditch attempt to reduce ESA protections for species threatened by global warming. Bob Irvin, the Defenders of Wildlife Senior Vice President for Conservation Programs, argues that the new rule “means that consideration of the impacts of global warming is completely off limits,” calling it a narrow definition that will affect all listed species and further keep critical habitat from being protected from indirect effects resulting from federal actions.¹⁰ Environmentalists are specifically concerned about the new rule’s impact on the polar bear and other arctic species. Advocates construe the rule change as an admission by the Bush Administration that “greenhouse gas emissions are driving species like the polar bear to extinction.”¹¹ Many environmental groups see this as a final attempt by the Bush Administration to ensure that greenhouse gas emissions are not regulated or reduced.

The Obama Administration may be able to appease both sides of this debate. Passing a climate change statute to ensure that greenhouse gas emissions are reduced and regulated could eliminate the need to use the ESA as a vehicle for setting domestic climate change policy. Such a statute would provide the reductions sought by environmentalists through another channel thus allowing the ESA to continue protecting endangered species, as it has for over thirty years, safely distanced from the heated politics of climate change.



Endnotes:

As this article went to press, the Obama Administration was considering repealing the ESA rule change.

¹ Endangered Species Act of 1973, 16 U.S.C. § 1531 (2009).

² Interagency Cooperation Under the Endangered Species Act, Final Rule, 73 Fed. Reg. 76,272 (Dec. 16, 2008) (to be codified at 50 C.F.R. 402).

³ Endangered Species Act, *supra* note 1, § 1536.

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⁴ Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. at 76,287.

⁵ Press Release, U.S. Department of the Interior, Secretary Kempthorne Announces Decision to Protect Polar Bears Under the Endangered Species Act (May 14, 2008), *available at* http://www.doi.gov/news/08_News_Releases/080514a.html (last visited Feb. 25, 2009).

⁶ *Id.*

⁷ *Id.*

⁸ See Bryan Walsh, *Endangered Species: In More Danger*, TIME, Aug. 12, 2008, *available at* <http://www.time.com/time/nation/article/0,8599,1832164,00.html?xid=feed-cnn-topics> (last visited Feb. 22, 2009).

⁹ Editorial, *Protections in Peril*, WASH. POST, Dec. 27, 2008, at A14.

¹⁰ Press Release, Bob Irvin, Defenders of Wildlife, Bush Administration Takes Aim at Endangered Species Act, (Aug. 12, 2008), *available at* http://www.defenders.org/newsroom/press_releases_folder/2008/08_12_2008_bush_administration_takes_aim_at_endangered_species_act.php (last visited Feb. 25, 2009).

¹¹ Press Release, Center for Biological Diversity, Bush Administration Proposes Draft Regulations Gutting Protections for Nation's Endangered Species; Proposal Would Exempt All Greenhouse Gas Emissions From Endangered Species Act Oversight (Aug. 11, 2008), *available at* http://www.biologicaldiversity.org/news/press_releases/2008/esa-regulations-08-11-2008.html (last visited Feb. 25, 2009).