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Recommended Citation

Olsson, Justin. "The Future of the Polar Bear Rests on Thin Ice: Listing Under the ESA and Its Impacts." *Sustainable Development Law & Policy*, Fall 2007, 46, 85.

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THE FUTURE OF THE POLAR BEAR RESTS ON THIN ICE: LISTING UNDER THE ESA AND ITS IMPACTS

by Justin Olsson*

Satellite imagery revealed that the Arctic sea ice cover fell to its lowest level in recorded history during the 2007 melting season, opening up the Northwest Passage.¹ As the ice cover diminishes, the long sought wish of trade is becoming a reality—a shortened global shipping route through the northern waters. Polar bears depend on this same ice for their habitat, access to food, and breeding sites.² Experts predict that two-thirds of the world's polar bears will disappear by 2050.³

In an effort to protect the species, Greenpeace, the National Resources Defense Council, and the Center for Biological Diversity filed a lawsuit in December 2006 after the Bush Administration ignored a petition to list the polar bear as a threatened species.⁴ In January 2007, in response to the lawsuit, the U.S. Fish and Wildlife Service (“FWS”) proposed listing the polar bear as a threatened species under the protection of the Endangered Species Act (“ESA”).⁵ Consequently, the U.S. Geological Survey (“USGS”) generated new scientific data and models on polar bears and their sea ice habitats. The USGS issued a final report on the status of the polar bear on September 7, 2007.⁶

There are an estimated 20,000–25,000 polar bears worldwide.⁷ The polar bears facing the greatest risk of extirpation, or local extinction, are the bears located in the Seasonal Ice and Polar Basin Divergent ecoregions.⁸ The USGS models predict a forty two percent loss of optimal polar bear habitat by the middle of the century.⁹ Scientists characterize their findings as conservative because even they believe that the best available models underestimate the actual decline in Arctic ice.

Scientists predict that even if stringent greenhouse gas (“GHG”) emissions reductions are globally put into place, the sea ice in the Arctic will continue to rapidly decrease for the next fifty years.¹⁰ As the ice cover thins, more open ocean patches become exposed to sunlight, which in turn melts more ice in a process referred to as sea ice-albedo feedback.¹¹ This feedback cycle is a critical threat¹² to the sea ice habitat of polar bears and GHG emissions must be reduced to slow this cycle.

The increasing possibility of a seasonally ice-free Arctic also opens the question of territorial jurisdictional claims for its resources and control over its use as a shipping route. Reports

indicate the world's militaries are lining up to protect their economic “rights” in the Arctic and sovereignty over the land is being asserted by a number of countries.¹³ The influx of military and possibly commercial activity into the Arctic region further threatens the polar bear and its habitat. Even in a best-case scenario without an oil spill, increased traffic in the region presents a danger to the polar bear.

The FWS decision of whether to list the polar bear as threatened is expected by the end of January 2008. Listing a species entitles it to a host of protections. Specifically, the consultation clause of the ESA places a procedural obligation on federal government to evaluate its actions and policies on the species

and consult with the FWS so that its actions avoid jeopardizing a threatened species.¹⁴ Most importantly, listing the species would prevent private and state takings.¹⁵ “Taking” has been interpreted to bar habitat modification of the species where there is a showing of actual injury to wildlife.¹⁶ Additionally, listing the species would require permits for activities that result in incidental takings, the designation of a critical habitat zone,

and the preparation of a recovery plan.¹⁷

Listing the polar bear may be an effective tool to require the federal government to require a reduction in GHG emissions that threaten the polar bear's habitat. If GHG emissions are considered a “taking” of the species, it raises a legal question of whether the government can compel U.S. companies to reduce their emissions to prevent such takings. It is also uncertain how such a listing would interact with international Arctic conservation treaties, such as the Polar Bear Treaty.

U.S. courts may soon face the question of whether the ESA can be used as a mechanism to enact change in U.S. climate policy. Listing the polar bear as threatened under the ESA is only the first of many necessary steps to slow and eventually reverse the impacts of climate change.



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ENDNOTES: THE FUTURE OF THE POLAR BEAR RESTS ON THIN ICE *continued from page 46*

¹ European Space Agency News, *Satellites witness lowest Arctic ice coverage in history* (Sept. 14, 2007), available at http://www.esa.int/esaCP/SEMYTC13J6F_index_0.html (last visited Nov. 17, 2007).

² See Laura Hansen & Christopher R. Pyke, *Climate Change and Federal Environmental Law*, SUSTAINABLE DEV. L. & POL'Y, Winter 2007, at 28.

³ John M. Broder & Andrew C. Revkin, N. Y. TIMES, *Warming May Wipe Out Most Polar Bears, Study Says* Sept. 8, 2007, at A 11, available at <http://www.nytimes.com/2007/09/08/science/earth/08polar.html> (last visited October 14, 2007).

⁴ Press Release, Center for Biological Diversity, Conservation Groups Advance Protections For Polar Bear from Global Warming (Dec. 27. 2006), available at <http://www.biologicaldiversity.org/swcbd/PRESS/polar-bear-12-27-2006.html> (last visited Nov. 17, 2007).

⁵ U.S. GEOLOGICAL SURVEY, USGS SCIENCE TO INFORM U.S. FISH & WILDLIFE SERVICE DECISION MAKING ON POLAR BEARS EXECUTIVE SUMMARY, available at http://www.usgs.gov/newsroom/special/polar_bears/docs/executive_summary.pdf (last visited Nov. 14, 2007) [hereinafter U.S. GEOLOGICAL SURVEY].

⁶ U.S. GEOLOGICAL SURVEY, *id.* at 1.

⁷ Jeffrey Kluger, *A Big Win for Polar Bears*, TIME, Dec. 27, 2006, available at <http://www.time.com/time/health/article/0,8599,1572970,00.html> (last visited Oct. 14, 2007).

⁸ U.S. GEOLOGICAL SURVEY, *supra* note 5, at 4.

⁹ Press Release, U.S. Geological Survey, Future Retreat of Arctic Sea Ice Will Lower Polar Bear Populations and Limit Their Distribution (Sept. 7, 2007), available at <http://www.usgs.gov/newsroom/article.asp?ID=1773> (last visited Nov. 17, 2007).

¹⁰ John M. Broder & Andrew C. Revkin, *supra* note 3.

¹¹ ERIC DEWEAVER, U.S. DEP'T OF INTERIOR, UNCERTAINTY IN CLIMATE MODEL PROJECTIONS OF ARCTIC SEA ICE DECLINE: AN EVALUATION RELEVANT TO POLAR BEARS (2007), available at http://www.usgs.gov/newsroom/special/polar_bears/docs/USGS_PolarBear_DeWeaver_GCM-Uncertainty.pdf (last visited Nov. 19, 2007).

¹² See Thomas Homer-Dixon, Op-Ed, *A Swiftly Melting Planet*, N.Y. TIMES, Oct. 4, 2007, at A29.

¹³ ABC NEWS, *Arctic Melting Leaves Countries Sparring* (Sept. 18, 2007) available at <http://www.abcnews.go.com/WN/Story?id=3621021> (last visited Nov. 17, 2007).

¹⁴ See generally 16 U.S.C. § 1536 (2007) (requiring interagency cooperation).

¹⁵ 16 U.S.C. § 1532 (2007) (defining “taking” under the ESA as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”).

¹⁶ See *Babbitt v. Sweethome Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1985) (interpreting the term take to include significant habitat modification or degradation that actually kills or injures wildlife).

¹⁷ Kluger, *supra* note 7.