

## Endangered Species Act May Hobble Trading Markets Under Climate Bill

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Existing requirements of the Endangered Species Act (ESA) could wreak havoc on carbon trading markets under a climate bill should the Obama administration seek—or find itself forced by the courts—to include mitigating global warming impacts as part of required efforts to protect threatened species. Such consideration could dramatically limit a facility's ability to buy credits under a cap-and-trade plan because an ESA permit could impose a hard cap on the amount of carbon dioxide (CO<sub>2</sub>) a facility is allowed to emit, sources on both sides of the issue say.

The House climate bill does not explicitly address the ESA, leaving its current requirements unchanged, and while no draft Senate bill has been issued, some industry officials are said to be seeking language in the bill that would preempt the ESA from addressing climate change impacts, according to environmentalists worried about such an effort.

The possible fights over ESA preemption in the climate bill comes as environmental groups are pushing the Obama administration to broaden ESA policies to require that consultations include impacts on species harmed by global warming, such as certain corals, penguins and polar bears.

But the administration is sending mixed signals on its view of how the ESA should be implemented to address global warming. In April the administration rescinded a December 2008 Bush administration final rule that allowed regulators to disregard climate impacts on endangered and threatened species. But then in May, Interior Secretary Ken Salazar announced his decision to retain a separate Bush rule, also issued in December 2008, that listed polar bears as threatened due to global warming but also said that consultations on the polar bear need not include the effect of CO<sub>2</sub> emissions from sources thousands of miles away from the bears' habitat.

"The Endangered Species Act is not in my view the best mechanism for controlling our nation's carbon emissions," Salazar said on a conference call with reporters to announce his decision. Instead, he urged Congress to pass a comprehensive climate bill that would cap the emissions that are contributing to global warming and the melting of the bears' Arctic ice habitat ([see related story](#)).

"The ESA has long been notorious as a litigation magnet, and the recent split decision on the consultation and special polar bear rules does not appear to have hindered the ability of those who see it as a useful tool for advancing large climate change policies, targeting unwelcome CO<sub>2</sub> emitting facilities and projects wherever they may be located," says a July Washington Legal Foundation (WLF) paper, *Climate Change and the ESA: Regulatory Decisions Keep Litigation Prospects Strong*.

For example, one industry source notes that the Center for Biological Diversity (CBD) earlier this year announced the formation of the Climate Law Institute, a \$17 million effort to address global warming through lawsuits targeting the ESA and other existing statutes. The source says this shows the ESA/climate link will not go away anytime soon even if Congress does adopt cap-and-trade legislation, should the bill fail to preempt the ESA.

The Feb. 12 announcement says CBD created the institute “to extend the reach of current environmental and human health laws to encompass global warming.” The center’s director, Kassie Siegel, wrote the petition that resulted in the polar bear’s threatened listing, the announcement notes. And it says one of its primary goals is to “establish legal precedents requiring existing environmental laws” including the ESA “to be fully implemented to regulate greenhouse gas emissions.”

One environmentalist says some groups are worried about ESA preemption language in a climate bill and are hoping to fight off any effort to include it. “I think it is fair to say that unless there is preemptive language in an ultimate bill, the ESA would still apply [and] in some situations it may well require the kind of consultation process that goes on” to address global warming impacts.

The industry source says if the ESA is used in that way, it could wreak particular havoc on facilities that want to buy credits under a cap-and-trade scheme rather than reduce emissions because the statute requires facilities to get an incidental take permit that could be crafted to limit their ability to participate in the trading market. “If a source exceeded its CO2 allowances [through buying credits], it would then potentially be subject to an enforcement action under the ESA because” an incidental take permit could impose a hard cap on the facility’s ability to emit. Should a facility seek to purchase CO2 credits above that limit, “someone would raise the argument they are exceeding the limit in their incidental take permit,” the source explains.

The environmentalist agrees. “The question is, if markets are forming, how would having [an ESA] regulatory process impact the markets? Markets are supposed to work efficiently and quickly [and this could] slow it down so the market is dysfunctional in some way. It is fair to say there is the possibility of that.” However, the source notes that to date ESA consultation has not been used to affect any type of energy decision making.

“So far there has not been a move . . . to do consultations on all of these more global type of impacts in the Arctic,” the source says. “But that is not to say that groups couldn’t push it through lawsuits. Where the ESA as been most effective is through citizen suits.”

However, the source adds it is unclear whether courts would be receptive to such an effort. “We don’t have any court decisions out there yet interpreting that. . . . But there are likely to be cases trying to push the agencies in that direction.”

The WLF paper cites a May 27 suit brought by a coalition of environmental groups against the Fish & Wildlife Service challenging its designation of critical habitat for the Canadian lynx for failure to take into account projected changes due to global warming.

Additionally, the environmentalist acknowledges growing concern among some activists that a vigorous approach to use the ESA on climate could backfire. “It has already been a statute under attack for many years, and some say if you push the envelope you may get legislative backlash . . . but others [in the community] disagree. It is a robust debate.”—*Dawn Reeves*