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Legal fray likely after ruling on polar bear status

LISTING: No matter what the decision is, somebody will sue.

By TOM KIZZIA
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If U.S. Fish and Wildlife Service director Dale Hall really thinks he can do nothing about greenhouse gases to save the polar bear, he'll be hearing soon from Kassie Siegel.

Hall told a congressional hearing last week he doesn't think the Endangered Species Act is the right law to force reduction of emissions blamed for warming the planet and shrinking the polar bear's ice habitat.

But environmentalists like Siegel, a lawyer and climate specialist for the Center for Biological Diversity, say they'll go to court if the federal government decides this month to declare the polar bear a "threatened" species -- but does nothing about the fundamental cause of global warming.

It's no idle threat. Her group, based in Tucson, Ariz., has filed more than 500 petitions and lawsuits over endangered species since it was founded in 1989. Two years ago, the center joined with two powerful environmental groups, Greenpeace and the Natural Resources Defense Council, to begin the push for polar bear protection.

The polar bears' future may be in the hands of biologists and climate scientists right now, as

the Fish and Wildlife Service is expected to decide within days on an endangered species listing. But after that decision, the lawyers take over.

Nobody knows whether the Endangered Species Act, invoked for the first time due to climate change forecasts, could extend its reach as far from polar bear habitat as the auto factories of Michigan and the coal-fired power plants of the Southwest.

Whichever way the Fish and Wildlife Service moves, the agency is certain to be second-guessed in court, with lawsuits from environmentalists on one side and industry on the other.

"It is wide-reaching, but that is a really good thing," Siegel said of the endangered-species law. She dismissed Hall's reluctance to take on emissions as "utterly outrageous."

"We don't save the polar bear without reducing greenhouse gas emissions rapidly," she said. "In the absence of laws that do that, we have to look at the laws we have."

On the pro-industry side, critics of the environmentalists say Congress never intended the endangered species law to reach so far. They predict a long siege of lawsuits aimed at the nation's energy-consuming economy.

Rep. Don Young, R-Alaska, described last week's legal challenge of a pending federal oil and gas lease sale in the Chukchi Sea as "the first of an endless series of court challenges and appeals" using the polar bear to clamp down on energy production in Alaska and the Lower 48.

The logic of the endangered-species law invites citizen lawsuits, said Marlo Lewis, a senior fellow at the Competitive Enterprise Institute in Washington, D.C.

"I think they'll go slow and pursue an incremental strategy," Lewis said. "They know that incrementalism is really the key to success in American politics."

TRICKY CROSS-CURRENTS

The Fish and Wildlife Service has a \$152.5 million budget this year for dealing with endangered species. That's not for efforts like buying habitat -- it's just for the paperwork, studies and legal briefs necessary to grapple with new petitions and protection plans for listed species.

If the polar bears are deemed threatened, the federal agency will have to take steps in three areas: designate critical habitat, prepare a recovery plan, and "consult" with federal agencies on new permits for activities that could affect the bears. All three areas are subject to litigation.

The political cross-currents can be tricky, however. Not every group is lining up clearly on one side or the other.

Audubon Alaska officials, for example, said last week they hope to see the polar bear listed and federal protection concentrate on Alaska, particularly on denning habitats and the ice edge frequented by bears. A focus on distant emissions would make regional protective efforts less effective, they said.

“The polar bear helps raise the profile of climate change, but the Endangered Species Act is not ultimately the tool for addressing global warming on a national and international scale,” said Audubon Alaska executive director Stan Senner.

On the other hand, the North Slope Borough, which opposes a threatened-species listing for the bear, says it would be unfair to focus restrictions solely on the Arctic.

Rapid decrease of ice is “beyond credible debate,” the borough said in its formal comments, and a serious concern for indigenous people.

“We recognize that the causes of a changing northern climate lie outside of our region, and firmly believe that any action to counter the warming trend must focus on those causes at their sources,” wrote borough Mayor Edward Itta.

The Fish and Wildlife Service will have a difficult job if it tries to tie emissions from a particular new project to the polar bear’s fate, said Larry Bell, an agency spokesman in Anchorage.

“How do you assign blame?” said Bell. “How can you say which was

the straw that broke the camel’s back?”

The agency has some discretion in how it tackles emissions, said Andrew Wetzler, a lawyer with the Natural Resources Defense Council. Federal courts are not likely to get involved in dictating, for example, exactly what level of emissions are allowable, he said.

“If they completely ignore global warming, that would clearly be a violation of the law,” Wetzler said.

Siegel, with the Center for Biological Diversity, said the recent one-month delay in making a final polar bear decision was a sign of politics trumping science within the Bush administration.

“I imagine what they’re doing right now is editing the final rule in order to make it less in conflict with the Bush do-nothing policy on global warming,” she said.

There’s more at stake than just the polar bear. Siegel’s group has already filed a petition seeking protection for the ribbon seal, which they say is another victim of warming in the Arctic. Other likely candidates for protection, according to Audubon, are the walrus, Kittlitz’s murrelet, Ivory gulls, and bearded, ringed and spotted seals.

Critics of the law say that overreaching by environmental groups could bring a backlash and prove to be the Endangered Species Act’s downfall.

“Compared to this decision, the Spotted Owl and Snail Darter cases were pimples on an elephant,” said Chuck Cushman of the American Land Rights Association in a recent e-mail to supporters.

Environmentalists seem untroubled by such rumblings. They say they’ve been hearing overstated warnings about the law’s draconian effects for years. The law has proven popular and durable. But they concede there are better ways for Congress to address climate issues, and hope the polar bear will bring attention to the need.

“Right now nothing is happening. Right now we’re still approving technologically obsolete coal-fired power plants,” said Siegel. “We clearly need new federal legislation.”

Threatened status

If the polar bear is listed as “threatened,” the U.S. Fish and Wildlife Service is supposed to take steps in three areas:

- Designate critical habitat. The final rule may include extra protective measures aimed at key bear habitats such as denning areas. Economic factors can be considered here, unlike in the listing process itself.
 - Prepare a recovery plan. Fish and Wildlife draws up a “recovery outline” showing how the bears can be helped, and convenes a multi-agency team, possibly including state and Native representatives, to develop a comprehensive and detailed plan. Such efforts can take several years.
 - Consult with permitting agencies on activities that could jeopardize the bears. Any federally funded project could be subject to this consultation process, in which Fish and Wildlife is required to provide “reasonable and prudent measures” to reduce any negative impacts.
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