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Judge sets deadlines in polar bear listing case

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ANCHORAGE, Alaska - A federal judge has given the Interior Department a Dec. 23 deadline to explain why polar bears were listed in 2008 as a "threatened" species instead of the more-protective "endangered."

The written order issued Thursday by Judge Emmet Sullivan of the U.S. District Court in Washington, D.C., follows an October hearing on multiple lawsuits challenging the "threatened" listing.

The polar bears' status has implications for issues ranging from national climate change legislation to Arctic offshore drilling and sport hunting.

Sullivan did not tell the U.S. Fish and Wildlife Service what the ultimate listing for polar bears should be, but he said the agency had inadequately explained its "threatened" listing.

"The federal defendants contend that, as a matter of law, an 'endangered species' must be in imminent danger of extinction," he wrote.

Sullivan said an "imminence" requirement was an erroneous conclusion.

Congress intentionally left the Endangered Species Act ambiguous, he wrote. The judge cited a previous case that concluded lawmakers need not supply regulators with a specific formula for their guidance where flexibility to respond to

variable conditions constitutes the essence of the program.

Imminence of harm could be one factor the agency weighs, Sullivan said, but not necessarily a limiting factor. The agency has broad discretion, he said, to weigh other factors.

The law says a listing determination must be made on the basis of one or more of five factors, including current or threatened destruction of a species habitat or range.

Former Interior Secretary Dirk Kempthorne in May 2008 declared polar bears were threatened, or on the way to extinction, because of the rapid disappearance of the Arctic sea ice that they use for hunting, breeding and traveling. Scientists predict sea ice will continue to melt because of global warming.

Kempthorne stopped short of declaring polar bears endangered, a move that would increase protections for the bear.

Among the immediate effects of the listing was the Fish and Wildlife Service decision to stop issuing permits to import sport-hunted polar bear hides from other countries.

The state of Alaska sued to overturn the listing, claiming it was not based on the best scientific evidence available. State officials fear the listing will impede offshore petroleum drilling on the outer continental shelf of the Chukchi and Beaufort seas.

Environmental groups have also

sued, saying an "endangered" listing is warranted.

Along with the listing, Kempthorne created a "special rule" stating that the Endangered Species Act would not be used to set climate policy or limit greenhouse gas emissions, which contribute to global warming and melting ice in the Arctic Ocean.

The Obama administration upheld the Bush-era policy, declaring that the endangered species law can't be used to regulate greenhouse gases emitted by sources outside of polar bears' habitat. If the bears are found to be endangered, however, that could open the door to using the Endangered Species Act to regulate greenhouse gases.

Kassie Siegel, an attorney for the Center for Biological Diversity who wrote the original petition for listing polar bears, said environmental groups were cheered by Sullivan's ruling. The judge correctly concluded that an imminent threat of extinction is not necessary for officials to declare polar bears endangered.

The decision opens the door for the Obama administration to break from a flawed decision by the Bush administration, she said, and give bears added protections.

"They can do the right thing now," she said. "We're going to be urging them to."

Sullivan set a hearing in the case for Feb. 23.