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Obama Admin Explains 'Threatened' Listing for Polar Bears

BY LAWRENCE HURLEY OF GREENWIRE

Ignoring calls from environmentalists to revisit the status of the polar bear, the Obama administration outlined yesterday its legal reasoning for why it should be listed as threatened under the Endangered Species Act.

The Fish and Wildlife Service was responding to a court order requiring it to further explain why polar bears should be considered threatened rather than endangered, which is a higher threat level.

Environmentalists argue that the bear should be listed as endangered, while industry groups say it shouldn't be listed at all.

Last month, in the court case arising from the dispute over the bear's status, U.S. District Judge Emmet Sullivan of the District of Columbia ordered FWS to provide a more detailed legal basis for its position, which is in line with the stance taken by the George W. Bush administration when it first listed polar bears as threatened in 2008 (E&ENews PM, Nov. 4).

There was never any indication from the government that it planned to change its position, although environmental groups challenging the listing, including the Center for Biological Diversity, had hoped that it would.

The memorandum filed with the court focused on the phrase "in danger of extinction," which is used in the ESA to define what constitutes an endangered species. Sullivan said the meaning of the phrase was unclear.

Under Supreme Court precedent, when the meaning of a statutory phrase is not easily discernible, government agencies have discretion to interpret the law, within certain boundaries.

Environmentalists have presented evidence that they say shows that the bear is in danger of extinction, but FWS maintains that, under its interpretation of the

statute, a species is only endangered when it is "currently on the brink of extinction in the wild."

When analyzing the polar bear, the agency found that the species "has not been restricted to a critically small range or critically low numbers, and has yet to suffer any substantial reduction in numbers or range," the memorandum says.

The polar bear does "face a serious threat" and is "likely to become an endangered species in the foreseeable future," the government concedes.

The findings justify a listing as threatened, which is defined in the ESA as a species "which is likely to become an endangered species in the foreseeable future," the agency added.

The court case has implications beyond the polar bear because environmentalists would like to see the Endangered Species Act used as a tool for reducing greenhouse gas emissions.

If the polar bear were listed as endangered, the government could be required to act to curb emissions to protect its habitat.

As long as the bear is listed as threatened, that cannot happen because of a Bush-era regulation, retained by the Obama administration, that states that a finding that polar bears were covered by the ESA could not be used as grounds for reducing greenhouse gas emissions nationwide. The regulation only applies to a threatened listing.

Andrew Wetzler, an attorney with the Natural Resources Defense Council, conceded he hadn't expected the government to change its position, but he said it was a lost opportunity for the administration.

"One would hope that the growing scientific consensus about the warming of the Arctic would have spurred them into action," he added.

The legal fight is not yet over. All the parties challenging the listing will have a chance to respond to the government's filing before Sullivan holds another hearing on Feb. 23