INSIDEEPA.COM
an online news service from the publishers of Inside EPA

ESA Climate Rulings Could Thwart Any EPA Reversal Of GHG Risk Finding

February 22, 2018
by Lee Logan

A growing number of appellate court rulings are upholding federal decisions to list species as threatened under the Endangered Species Act (ESA) because climate change is degrading their habitat, a dynamic that one attorney says could further undermine any Trump EPA effort to take regulatory action at odds with mainstream climate science.

Chief among those efforts would be an attempt to reverse EPA's landmark 2009 greenhouse gas endangerment finding that forms the basis of all of its climate rules, a move that EPA Administrator Scott Pruitt has repeatedly refused to rule out.

In the latest ESA-related ruling, the U.S. Court of Appeals for the 9th Circuit in Alaska Oil & Gas Association (AOGA), et al. v. Ross, et al. on Feb. 12 upheld the National Marine Fisheries Service's decision to list the ringed seal as threatened because their Arctic sea ice habitat is likely to recede "within the foreseeable future" due to climate change.

The court cites an October 2016 ruling by the 9th Circuit in AOGA v. Pritzker -- concerning a similar ESA listing for the bearded seal -- which held that Intergovernmental Panel on Climate Change (IPCC) "climate models constituted the 'best available science' and reasonably supported the determination that a species reliant on sea ice likely would become endangered in the foreseeable future."

The Supreme Court in an unsigned Jan. 22 order declined to review the 2016 AOGA ruling regarding bearded seals.

"If courts of appeal believe that the IPCC climate models are the 'best available science,' that doesn't really bode well for any Trump administration efforts to undo the [EPA] endangerment finding or take other regulatory action based on the view that mainstream climate science is not reliable," says Foley Hoag attorney Seth Jaffe in a Feb. 14 blog post.

Jaffe's commentary underscores prior arguments from both industry and environmentalist attorneys that Pruitt would face a near-hopeless legal fight if he were to attempt to revoke the GHG endangerment finding by questioning climate science.

Several major industry groups have urged Pruitt to avoid such an endeavor, even as hard-line conservatives continue to call for scrapping the finding in a bid to eradicate all carbon controls.

Perhaps due to this split among right-leaning groups, Pruitt has taken a mixed stance on the issue. He has not ruled out an attack on the GHG risk finding and has often questioned mainstream climate science. Most recently, he asked if climate change is "necessarily" a "bad thing" -- comments that drew sharp pushback from scientists.

He has also pledged to launch a public review of climate science -- an effort that has yet to materialize and reportedly has been blocked by the White House.

Nevertheless, he has also not taken any steps to reconsider the endangerment finding and is also moving to replace the Obama-era Clean Power Plan utility GHG rule with a much narrower version that would leave the endangerment finding in place.

Legal experts believe that once the Trump EPA finalizes a CPP replacement, it would further complicate the already-tough task of reversing the endangerment finding, given that such a rule would be predicated on the finding.

Among the other complications would be the Trump administration's November release of a major scientific report finding it "extremely likely" humans are the dominant force behind climate change; the D.C. Circuit's 2012 ruling upholding the endangerment finding and the agency's first round of GHG rules; and the Supreme Court's landmark 2007 ruling in Massachusetts v. EPA that held carbon dioxide and other GHGs can be regulated under the Clean Air Act as a "pollutant" because they cause global warming.

'Amply Supported'

In addition to the recent 9th Circuit ESA rulings regarding seals, that court and the D.C. Circuit have also issued separate rulings upholding ESA decisions for polar bears, rulings that further elaborate on the courts' views of climate science.

For instance, the 9th Circuit in a February 2016 ruling in AOGA, et al. v. Jewell, et al. upheld the Fish & Wildlife Service's (FWS) designation of critical habitat for the bears. "Because of global climate change, the extent and quality of Arctic sea ice is declining, and the polar bear population is declining with it," the court said.

The court said that opponents of the designation argue that climate is not an appropriate ESA consideration and "there is no record evidence to explain how the proposed critical habitat is currently eroding due to climate change."

But, the appellate court says FWS relied on "numerous published studies and reports describing the effects of climate change" both when making the habitat designation and listing the animals as threatened.

The court cites a March 2013 ruling by the D.C. Circuit in In Re: Polar Bear ESA Listing and Section 4(d) Rule Litigation. That court found FWS' listing decision was based on "scientific conclusions [that] are amply supported by data and well within the mainstream on climate science and polar bear biology."

“FWS looked at the most widely accepted climate models, as compiled by, among others, the IPCC,” the D.C. Circuit wrote. “It found that there was general agreement in these models about warming and sea ice trends until about mid-century, at which point they diverge on the basis of uncertainties about, inter alia, population growth, technological improvements, and regulatory changes.”