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The Future of Project Permitting Under the ESA

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"[The polar bear listing] should not open the door to use the ESA to regulate green house gas emissions from automobiles, power plants, and other sources. That would be a wholly inappropriate use of the Endangered Species Act. ESA is not the right tool to set U.S. climate policy. The Endangered Species Act neither allows nor requires the Fish and Wildlife Service to make such interventions."

Remark of Secretary Dirk Kempthorne, Press Conference on Polar Bear Listing, May 14, 2008.

"[T]he Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts – including the loss of sea ice [for polar bears]. Both President Obama and I are committed to achieving that goal."

News Release "Salazar Retains Conservation Rule for Polar Bears" (May 8, 2009).

It is the action agencies that have the ultimate authority under section 7.

See Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71 (1992).

The Service "performs strictly an advisory function under section 7," and the Services could not "use the consultation procedures of section 7 to establish substantive policy for Federal agencies."

51 Fed. Reg. 19,926, 19,928 (June 3, 1986).

The Services have a semblance of regulatory influence only in:

(1) providing the "reasonable and prudent measures" that need to be adopted to render effective an incidental take statement under section 7(b)(4); and

(2) suggesting a "reasonable and prudent alternative" action under section 7(b)(3) if the agency's proposed project is found to violate section 7(a)(2).

16 U.S.C. § 1536(b)(3) and (b)(4).

Section 7(b)(4) allows the Services to recommend reasonable and prudent measures whose purpose is limited to "minimiz[ing]" the "impact" of identified "incidental taking."

16 U.S.C. § 1536(b)(4).

Rather, section 7 operates only to the extent the agency has discretionary authority under its statutory mandate to take action based on impacts to listed species.

E.g., *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998); *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992).

The preamble to the polar bear listing rule seems to be legally correct when it states:

"Some commenters to the proposed rule suggest that the Service should require other agencies (e.g., the Environmental Protection Agency) to regulate emissions from all sources, including automobile and power plants. . . . [The Service's] consultative role under section 7 does not allow for encroachment on the Federal action agency's jurisdiction [to decide which action to propose and which complies with ESA §7(a)(2)] or policy-making under the statutes it administers."

Section 9 identifies the prohibited acts that apply to "any person subject to the jurisdiction of the United States."

16 U.S.C. § 1538.

The similar rules adopted by FWS and NMFS define "harm" as "an act which actually kills or injures [listed] wildlife . . . [including] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns."

50 C.F.R. §§ 17.3 (FWS) and 222.102 (NMFS).

The limiting construction "emphasize[s] that actual death or injury of a protected animal is necessary for a violation," and that the plaintiff must prove the challenged action is or would be the "proximate cause" of the injury or death of a specific animal.

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 at 691 n.2. 696-703, 697, n.9 and 700 n.13 (1995). *See also* Justice O'Connor's concurring opinion, 515 U.S. at 708-09.

"[G]oing through the consultation process at the individual project level for all federal actions that may affect listed species as a result of GHG emissions would pose a virtually insurmountable obstacle for federal agencies."

John Kostyack and Daniel Rohlf, "Conserving Endangered Species in an Era of Global Warming," 38 Envtl. Law Reptr. 10203, 10212 (April 2008).

Revising the section 7 rule to create a "streamlined programmatic method for ensuring ESA compliance with" section 7.

John Kostyack and Daniel Rohlf, "Conserving Endangered Species in an Era of Global Warming," 38 Envtl. Law Reptr. 10203, 10212 (April 2008).

Or requiring consultation only if an action "contributes an appreciable amount of GHG emissions to the atmosphere."

Brendan R. Cummings and Kassie R. Seigel, "Ursus Maritimus: Polar Bears on Thin Ice," 22 Nat. Resources & Env't 3, 7 (Fall 2007).

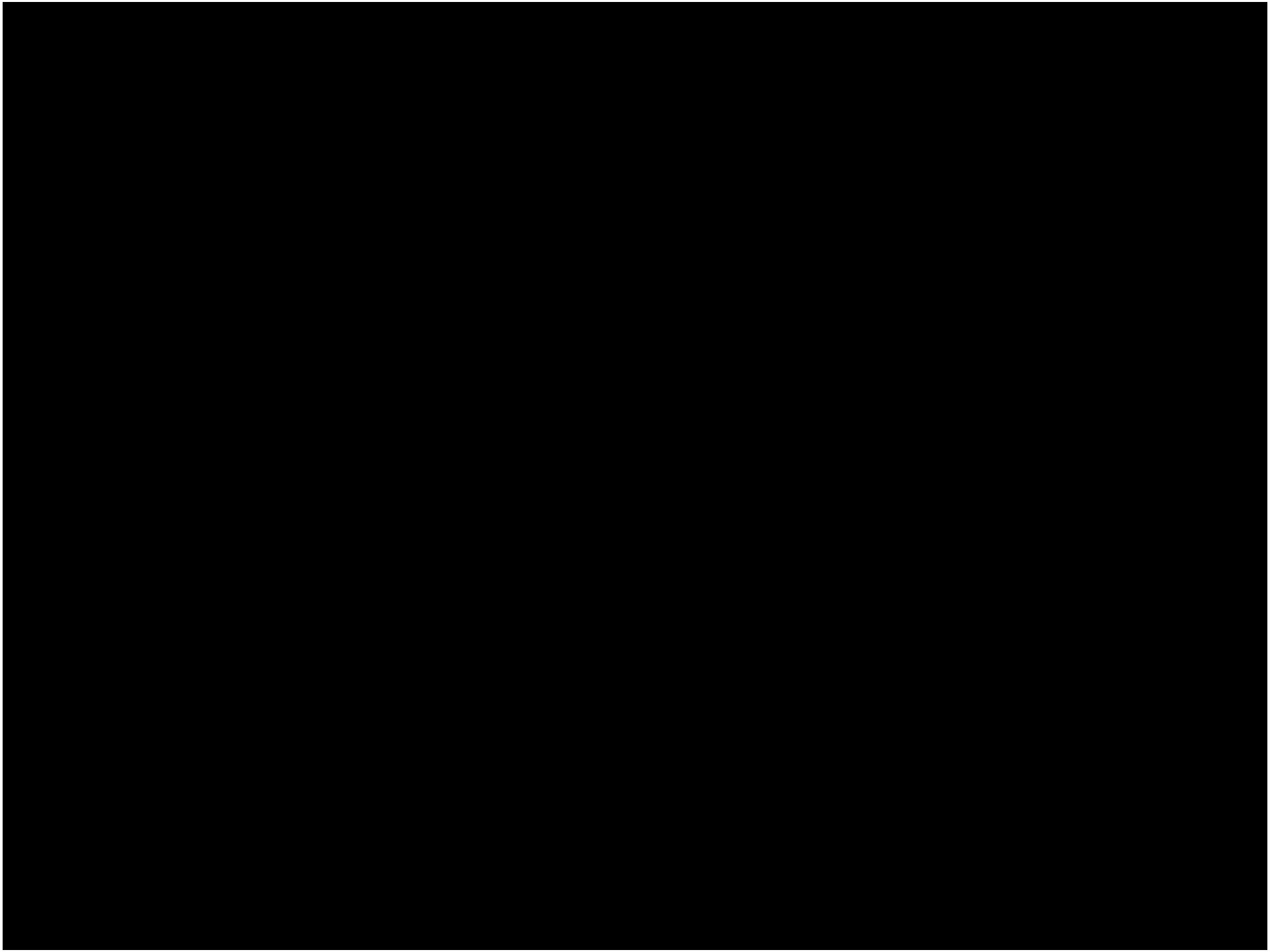
The Services have the statutory authority to eliminate the regulatory informal consultation requirement – that is, not require consultation on an action found by the action agency not likely to adversely affect listed species or critical habitat.

Defenders of Wildlife v. Kempthorne, 2006 WL 2844232 (D.D.C 2006).

Critical habitat, as defined in section 3, is presumptively limited to "specific areas within the geographic area occupied by the species," and does "not include the entire geographical area which can be occupied by" a listed species, subject to the Secretary's discretionary authority to extend the size of critical habitat designations in certain circumstances. 16 U.S.C. § 1532(5).

Critical habitat includes only those "specific areas . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." *Id.*

The Secretary has discretionary authority to reduce the size of, or eliminate, critical habitat designations due to "economic impact" and other public interest factors. 16 U.S.C. § 1533(b)(2). This one exception to the limitation of ESA decision making to reliance on scientific data serves as an inviting opportunity for landowners and project proponents to argue that certain lands should not be designated as critical habitat.



"No one can anticipate or control the implications that judges might discover in the polar bear designation. Given litigious environmentalists and a compliant judge, and the Endangered Species Act might become what New Dealers wanted the National Industrial Recovery Act of 1933 to be – authority to regulate almost everything."

George Will, "The March of the Polar Bears," Washington Post (May 22, 2008)

"We think this victory on coral critical habitat actually moves the entire Endangered Species Act onto a firm legal foundation for challenging global warming pollution."

Mark Clayton, "New tool to fight global warming: the Endangered Species Act?," Christian Science Monitor (Sept. 7, 2007) (quoting Kieran Suckling, Policy Director, Center for Biological Diversity).