
Photo credit: Nick Cobbing

The first big opinion in the polar bear listing case is out. Score two for the Fish and Wildlife Service: the agency’s decision to list the bear as threatened under the Endangered Species Act prevailed against challenges from the Center for Biological Diversity on one side and the state of Alaska and hunting groups on the other.

The overriding theme of the opinion in *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation* is deference. Judge Sullivan begins by emphasizing the scientific difficulty of the decision FWS had to make, and the correspondingly narrow role for a reviewing court:

> As the briefing in this case makes clear, the question of whether, when, and how to list the polar bear under the ESA is a uniquely challenging one. The three-year effort by FWS to resolve this question required agency decision-makers and experts not only to evaluate a body of science that is both exceedingly complex and rapidly developing, but also to apply that science in a way that enabled them to make reasonable predictions about potential impacts over the next century to a species that spans international boundaries. . . .
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> In view of these exhaustive administrative proceedings, the Court is keenly aware that this is exactly the kind of decision-making process in which its role is strictly circumscribed. Indeed, it is not this Court’s role to determine, based on its independent assessment of the scientific evidence, whether the agency could have reached a different conclusion with regard to the listing of the polar bear. Rather, as mandated by the Supreme Court and by this Circuit, the full extent of the Court’s authority in this case is to determine whether the agency’s decision-making process and its ultimate decision to list the polar bear as a threatened species satisfy certain minimal standards of rationality based upon the evidence before the agency at that time.

A bit later in the opinion, he again noted the need for deference to agency decisions requiring a high level of technical expertise and indicated that he would apply a starting presumption that FWS decisions should be upheld.

Not surprisingly given that preface, Judge Sullivan went on to hold that all aspects of the agency’s listing decision survived the “highly deferential standard” of review. He rejected claims that the polar bear should have been listed as endangered; that it should not have been listed at all; that individual populations should have been broken out for separate consideration; and that FWS had committed procedural errors in the listing process.

I sympathize with Judge Sullivan in this case. Clearly, he grappled in detail with the voluminous record in light of what he understands to be the governing legal standards. He rightly rejected efforts to flyspeck the agency’s decision.

The most important, and the most troubling, aspect of the decision is the judge’s treatment of the additional explanation he demanded from FWS after the initial hearing in the case of the distinction it drew between endangered and threatened status.

To refresh your memory, in November Judge Sullivan asked FWS for a more detailed explanation of its reading of the ESA’s definition of an endangered species as limited to species “in imminent danger” of disappearing. At the time, I suggested that the Obama administration should take the opportunity to reconsider the polar bear decision and adopt an interpretation more in line with the purpose of the ESA. Specifically, I urged the administration to “consider a species endangered if the irreversible effects of actions occurring now create a high risk of extinction, even though extinction won’t happen right away.”

Of course, I didn’t really think that would happen, and it didn’t. Instead, the U.S. filed a brief asserting that FWS considers species “endangered” only if they are “currently on the brink of extinction in the wild.” FWS has found that standard to be met, the brief argued, only in four specific circumstances, none of which applied to the polar bear: when the species is faced with a threat of “imminent and certain” extinction if an action is carried out, as the snail darter was thought to face from the closing of the Tellico Dam gates; when a species is highly vulnerable because it is endemic to such a small area; when a once widespread species has been reduced to such critically low numbers or restricted range that it has become highly vulnerable; or when a species “has suffered ongoing major reductions in its numbers, range, or both.” The polar bear isn’t endangered, according to FWS, because it doesn’t fall in any of those categories: there’s not a single action that, if it occurs, will certainly cause the polar bear’s extinction; with a pan-Arctic range it’s not what is conventionally thought of as a narrow endemic; and it has not yet suffered drastic declines in its population or range.

I think the definition articulated in that brief is inconsistent with the ESA. A species is “in

danger of extinction” (the statutory language) if actions taken now are irreversibly committing it to a future decline in range or population. That’s exactly what is happening to the polar bear, as current greenhouse gas emissions are irreversibly committing the world to both present and future reductions in the Arctic sea ice essential to the bear’s survival. At a minimum, I wouldn’t give FWS’s interpretation *Chevron* deference, articulated as it was only in the course of litigation, without any consideration of public comment and without any claim that it has the force of law.

Judge Sullivan, though, disagrees with me on both counts. Following what appears to be a very curious line of DC Circuit cases, he decided that an explanation demanded by a judge is entitled to *Chevron* deference and that FWS’s “imminent danger” interpretation is reasonable. He also rejected CBD’s argument that the record showed that the polar bear met even that stingy definition of “endangered,” deferring to the agency’s interpretation of the available evidence.

In a minor victory (or perhaps more accurately, not a major loss) for environmental interests, Judge Sullivan rejected attempts by the anti-listing plaintiffs to confine “threatened” status to species likely to become endangered in the very near future, and to require that the evidence relied on in support of listing be conclusive or nearly so.

If this opinion survives and FWS applies the definition of endangered articulated in this case broadly, it will be difficult in the near term to find that any species is “endangered” by climate change. That suits this administration just fine, because it minimizes the likelihood that the ESA will provide any leverage against greenhouse gas emissions. Interior Secretary Salazar made it clear early on that he didn’t want to use the ESA as an emission-control tool. Whatever you think about the appropriate role of the ESA in the climate change context, though, FWS’s interpretation will have broader consequences. It encourages an unhealthy formalism — does the species fit one of these categories — and discourages a more functional look at threats with potentially long time lags.

And reading the tea leaves, I think this decision doesn’t bode well for CBD’s challenge to the polar bear 4(d) rule, which tries to define the ESA’s regulatory provisions into irrelevance with respect to this species. Given the level of deference Judge Sullivan showed here, I find it hard to imagine that he’ll upset that rule.