Last Polar Bear (Arne Naevra)

Environmentalists have been absolutely thrilled with the EPA under the leadership of President Obama and Administrator Lisa Jackson. The Department of Interior under Secretary Ken Salazar has drawn more mixed reviews so far. (Dan Tarlock and I wrote about the first 100 days at Interior on the Center for Progressive Reform blog.) Recent news out of Interior has led environmental groups to question the Department's commitment to conservation.

From the outside, I find it difficult to understand the agency's thinking. On one hand, to the delight of environmentalists, Salazar (and Commerce Secretary Gary Locke) announced that they were revoking the Bush administration's last-minute rule generally weakening the ESA consultation process. (My post on that decision is here.) On the other hand, Salazar declined to revoke the special rule issued by the Bush Administration with respect to the polar bear (Dan's post on that decision is here, and the special rule that will remain in effect is here.) And this week the gray wolf was officially removed from the endangered species list in the western Great Lakes and much of the northern Rocky Mountains region. The Great Lakes delisting seems not to be controversial, but the same cannot be said of the Rocky Mountains decision, which has brought strong criticism from Defenders of Wildlife and the Natural Resources Defense Council.

Can a coherent picture be assembled from these decisions? I'm not at all sure. But here's one possible sketch: (1) Salazar's Interior Department is ready to take a long-overdue serious look at the overall functioning of the section 7 consultation process, including how to deal with greenhouse gas emissions; but (2) is worried about the political fallout of ESA suits seeking to block private actions; (3) either the White House has little interest in Interior and therefore is not seeing its importance for climate change policy, or the White House has decided that the Clean Air Act threat is sufficient to push climate change legislation; and (4) because there is a vacuum of experienced leadership at Interior, the agency is deferring to the views of its career staff, for better and for worse.

Points (1) and (2) together might account for the seemingly conflicting decisions to revoke the consultation rule but not the polar bear rule. The revoked section 7 rule was the only protection against federal consultation requirements for GHG emissions. The polar bear special rule addressed only section 9's prohibitions on takings. It quite explicitly did not attempt to soften section 7:

> [T]his special rule does not negate the need for a Federal action agency to consult with the Service to ensure that any action being authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered or threatened species, including the polar bear.

Indeed, it could not have done so. Section 4(d), the ESA provision under which the special rule was issued, allows some softening of section 9's restrictions for threatened species, but no such out is available from the federal obligations under section 7.

As the rules currently stand, then, environmental groups like the Center for Biological Diversity are free to sue federal agencies for approving activities that threaten the polar bear by increasing GHG emissions, but cannot claim that power companies or other private actors are violating the ESA by "taking" polar bears. That seems reasonably sensible to me, in part because I think it's appropriate to set the ESA bar higher for federal than for private actions, and in part because even without the special rule it would be darned hard to prove that any individual action that increases GHG emissions is the proximate cause of harm to an identifiable polar bear (the standard set by the Supreme Court for take in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)).

That said, there are two reasons why Interior might nonetheless have wanted to revoke the polar bear rule. The first is addressed by supposition (3) above. In announcing his decision, Salazar said that "the 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." No one I know disagrees with that. But climate legislation is currently stalled in the Congress. if the Obama administration really wants a GHG law this session, it ought to have a concerted strategy of making the legal status quo look worse than the alternative. EPA seems to be on that page, heading at least for regulation of GHG emissions from mobile sources, quite possibly having put itself on track to regulate new stationary sources or impose a national CO2 standard, and suggesting that it might need to tighten water quality standards for ocean acidity. Rigorous application of the ESA to the impacts of GHG emissions can be another brick in that wall. My own view (expressed in Slate back when the polar bear was listed) is that the section 7 consultation requirement is a more effective political tool in that game than section 9's take prohibition, but if that were the game Interior was playing it might as well leave the potential for take liability in place as well.

Quite independent of any climate change repercussions, the second (and in my view better) reason why Interior should have revoked the polar bear rule is that it unjustifiably, and

unnecessarily, protects oil and gas operators in the Arctic from ESA liability. The special rule provides that activities consistent with the Marine Mammal Protection Act will not be considered to violate the ESA. When the Bush administration issued the special rule, it asserted that the MMPA had historically adequately protected polar bears. Perhaps that is true, but the ESA brings stronger protections than the MMPA, and I see little downside to requiring that arctic energy development (the primary activity at issue) go through the ESA incidental take process instead of the MMPA process. If streamlining is the goal, that can be achieved by saying that the more protective ESA process satisfies the MMPA requirements.

Which brings us to point (4) and the gray wolf. Political leadership at Interior is not strong yet on wildlife issues. Salazar came in with a focus on energy issues. Tom Strickland, who was only recently confirmed as Assistant Secretary for Fish, Wildlife, and Parks, has little experience in the regulatory arena. David Hayes, the nominee for Deputy Secretary and an experienced Clinton administration hand, has yet to be confirmed. The position of Interior Solicitor is also currently vacant, while nominee Hilary Tompkins awaits confirmation, and there is not yet even a nominee for FWS Director. It looks to me like, in the face of that leadership vacuum, Interior is avoiding strong or controversial new initiatives, and giving career staff a great deal of control. The Bush consultation rules were highly controversial and resisted by career staff; they have been revoked. The polar bear rule was less controversial, and career staff may genuinely believe that the MMPA is doing the job for activities within polar bear habitat.

The wolf rule may be the clearest evidence of deference to strong career views from an understaffed political branch at Interior. Although wolf delisting was a Bush administration initiative, a lot of the pressure for it has come from career staff like Ed Bangs, FWS wolf recovery coordinator and a leading architect of the Clinton-era reintroduction program. Bangs has long believed that the wolf population in the northern Rockies has grown to levels sufficient to withstand controlled hunting, and that delisting will ease some of the political controversy over the presence of wolves in the region. I'm quite sure that Bangs knows his wolf biology, but I wonder if his ideas about the politics or the more abstract legal and policy question of how widely wolves ought to be distributed before they are delisted were sufficiently vetted by people somewhat less invested in proving the "success" of reintroduction.

I believe those questions merit more serious review than Salazar's Department has given them, but that review may well have to wait for stronger leadership in the front office. Perhaps a key lesson here is that although political appointees at executive agencies can do a great deal of harm (as the Julie MacDonald saga makes clear), they can also be essential

to agency willingness to take on difficult but important issues.