

From “Frisbees to Flatulence?” What’s Next for Regulation of Climate Change

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I. Introduction



Village of Shishmaref, North Alaska

I. Introduction (cont.)

On April 16, 2008, President Bush stated:



The Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act were never meant to regulate global climate. For example, under a Supreme Court decision last year, the Clean Air Act could be applied to regulate greenhouse gas emissions from vehicles. This would automatically trigger regulation under the Clean Air Act of greenhouse gases all across our economy -- leading to what Energy and Commerce Committee Chairman John Dingell last week called, "a glorious mess."

- Can the Endangered Species Act and/or the Clean Air Act be the future legal infrastructure for regulating greenhouse gasses (GHGs)?
- If not, then what?

II. How Did We Get Here?

Elkhorn Coral



Staghorn Coral



May 9, 2006

- On, two species of Caribbean coral, Elkhorn and Staghorn coral, were listed as "threatened" for their entire range under the ESA.
- The listing decision noted that "the major threats to the species' persistence (*i.e.* disease, elevated sea surface temperature, and hurricanes) are severe, unpredictable, likely to increase in the foreseeable future, and, at current levels of knowledge, unmanageable." 71 Federal Register 26,852.

II. How Did We Get Here? (cont.)



December 27, 2006

- The United States Fish and Wildlife Service submits a 12 month finding and proposes to protect the polar bear as a threatened species under the ESA.
- Secretary Kempthorne states that: “Polar bears are one of nature’s ultimate survivors, able to live and thrive in one of the world’s harshest environments. But we are concerned the polar bears’ habitat may literally be melting.”

April 2, 2007

- The United States Supreme Court decides Massachusetts v. EPA, a case under the Clean Air Act, in which the majority declares that it must review the case because the “risk of catastrophic harm [from climate change], though remote, is nevertheless real.”
- Justice Scalia, in dissent, says that the “Court’s alarm over global warming may or may not be justified, but it ... has no business substituting its own desired outcome for the reasoned judgment of the responsible agency,” and that “everything air borne, from Frisbees to flatulence, qualifies as an ‘air pollutant.’ This reading of the statute defies common sense.”

A. The Endangered Species Act (ESA):

The stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *16 USCS § 1531* (2000).

The Key Operative Provisions of the ESA:

- Section 4 (how species are listed);
- Section 7 (how Federal agencies behave after a species is listed);
- Section 9 (what can happen if Federal agencies behave badly or perhaps not at all).

The ESA protects vulnerable animals with two classifications:

- An “endangered” species is in danger of extinction
- A “threatened” species is likely to become an endangered species in the foreseeable future.

A species may be listed under Section 4(a) of the ESA on the basis of one or more of five factors:

1. Present or threatened habitat decline;
2. “Overutilization” for recreational or scientific purposes;
3. Disease or predation;
4. “Inadequacy” of existing regulatory mechanisms, or
5. Other natural or manmade factors affecting its existence.

B. The Clean Air Act (CAA):

The stated purpose of Title IV of the CAA is "to reduce the adverse effects of acid deposition." *42 USCS § 7651* (2003).

Section 202(a)(1) of the Clean Air Act provides:

The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare"

The CAA definition of “air pollutant” includes:

"any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."

“Welfare” is also defined broadly:

Among other things, it includes "effects on ... weather ... and climate."

Massachusetts v. EPA, 549 U.S. 497 (2007)

The Supreme Court looked at two questions concerning the meaning of § 202(a)(1) of the Act:

- Whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and, if so,
- Whether its stated reasons for refusing to do so are consistent with the statute.

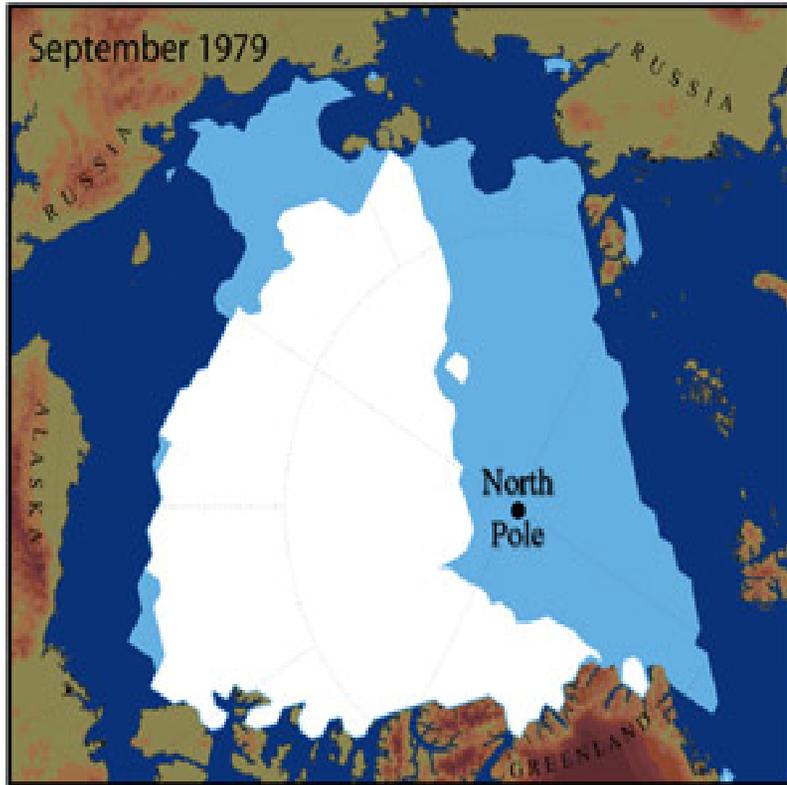
Supreme Court held:

- GHGs meet the CAA definition of “air pollutant;”
- Section 202(a)(1) of the CAA authorizes EPA regulation of GHGs subject to agency determination that new motor vehicle emissions contribute to air pollution that may “endanger” public health;
- “EPA must ground its reasons for action or inaction in the statute.”

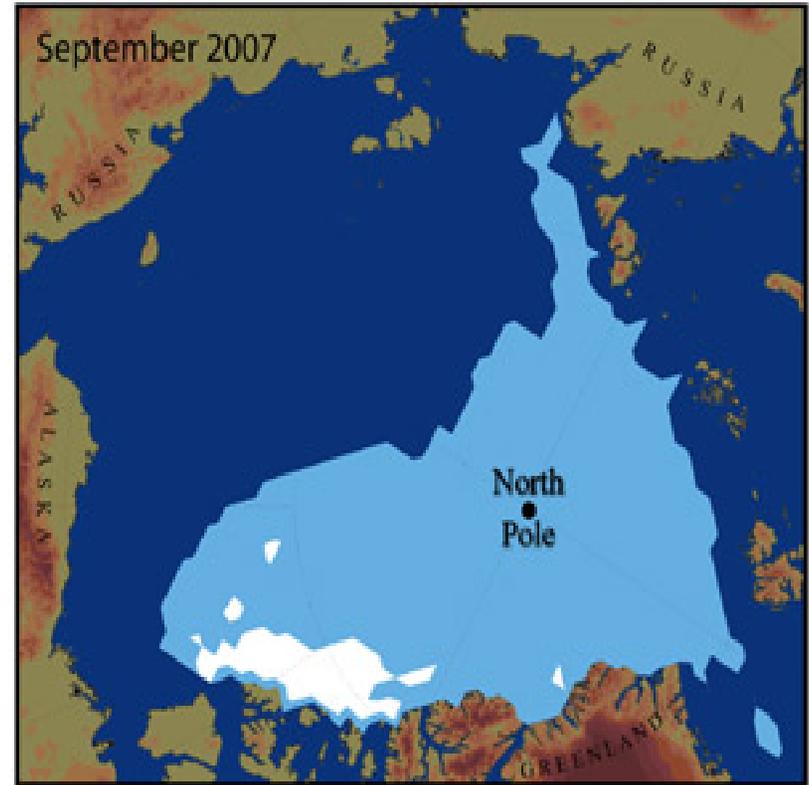
Polar Bears

- On May 14, 2008, Secretary Kempthorne, noting that “in light of the scientific record and the restraints of the inflexible law that guides me”, listed the polar bear as “threatened” species under the ESA.”
- Secretary stated that “The ESA is not the right tool to set U.S. climate policy.”
- He also promulgated a rule under section 4(d) of the ESA using the Marine Mammal Protection Act as a means to further protect the species; and
- The United States Fish and Wildlife Service issued policy guidance on the issue of Section 7 consultation.

IV. What Happened Next? (cont.)



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Advance Notice of Proposed Rulemaking (ANPR)

July 11, 2008, EPA Administrator Steven Johnson released an ANPR, 73 Federal Register 44354, soliciting input on the effects of climate change and the potential ramifications of the Clean Air Act in relation to GHGs.

- The ANPR reflected the complexity and magnitude of the question of whether and how greenhouse gasses could be effectively controlled under the CAA;
- Administrator Johnson noted that potential regulation of GHGs under the CAA would “have a profound effect on virtually every sector of the economy,” and that the CAA is “ill-suited” for the task of regulating global GHGs.

ESA Section 7 Regulations

Key elements of finalized changes to the Endangered Species Act (ESA) Section 7 consultation regulations in December, 73 Fed. Reg. 76,272 (Dec. 16, 2005):

- Amended key regulatory definitions in 50 C.F.R. Part 402 as well as setting forth consultation triggers, including, among others, that Section 7 is not triggered by effects “manifested through global processes” (*i.e.*, climate change))
- It is not possible to draw a direct causal link between greenhouse gas (GHG) emissions and distant observations of impacts affecting species.

V. What is Happening Now?

March 2009: Presidential Memorandum on ESA Consultation

On March 3, 2009, President Obama issued a memorandum directing all Agency heads “to determine whether to undertake the new rulemaking procedures” and to exercise their discretion “to follow the prior longstanding consultation and concurrence practices” with the Federal consulting agencies.

March 2009: Omnibus Act Authority to Withdraw Regulations Without Public Comment

On March 11 Congress authorized the December 2008 ESA regulations (as well as the ESA Section 4(d) rule for the Polar bear) to be withdrawn without the usual requirements of the Administrative Procedure Act requiring notice or public comment.

April 2009: EPA Clean Air Act Endangerment Finding

- On April 24, 2009, the Administrator for the Environmental Protection Agency published a proposed rule for the often-referred to “endangerment” finding under the Clean Air Act, 74 Fed. Reg. 18,886 (April 24, 2009)
- The proposed rule is not necessarily instructive as a regulatory path addressing new vehicle emissions but is instead a potential harbinger of how climate change may permeate future Federal decision making across all sectors.

May 2009: ESA Regulations Withdrawn and Request for Comment on Section 7 Process

- On May 4, 2009, the Interior and Commerce Secretaries published a “final” rule replacing the new ESA regulations with those on the books prior to Bush Administration changes, 74 Fed. Reg. 20,421 (May 4, 2009);
- The Federal Register notice offered to take comment, due August 3, on “ways to improve the section 7 regulations while retaining the purposes and policies of the ESA.”

May 2009: Polar Bear 4(d) Rule Maintained, No ESA Regulation of Green House Gas Emissions

- On May 8, 2009, Interior Secretary Salazar announced that, notwithstanding Omnibus Act authority to withdraw, the 4(d) rule promulgated May 15, 2008, for the Polar bear would remain in effect.
- Addressing the prospect of ESA regulation of climate change, the Secretary's press statement declared that "the Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions"

May 2009: Waxman-Markey “American Clean Energy and Security Act of 2009”

“The American Clean Energy and Security Act of 2009,” is complex and massive. It has four titles: (1) a “clean energy” title; (2) an “energy efficiency” title; (3) a “global warming” title that places limits on green house gases (GHGs) and creates an allowance-based market for GHG emissions; and (4) a “transitioning” title that addresses economic dislocation as the legislation’s provisions become effective.

May 2009: 90-day ESA Finding on Petition to List American Pika

- On May 7, 2009, the United States Fish and Wildlife Service published a 90-day finding that the listing of the American pika may be warranted, 74 Fed. Reg. 21,301 (May 7, 2009).
- Although the final listing determination may be many months away, what is of note is the underlying bases for the petition to list, specifically, “global climate change,” which is allegedly impacting the pika’s habitat.

- **Obama Administration:**
 - Will climate change dominate NEPA, elsewhere?
 - What are emanations from “endangerment” penumbras? Is agriculture caught in the maelstrom, e.g., methane a conventional “pollutant” under the Clear Air Act?
- **Litigation, litigation, litigation:**
 - Do lower 48 state GHG emitters “take” the Polar bear in Alaska? May be tested by CBD.
- **Capitol Hill:**
 - What is outcome of Waxman-Markey global approach to climate change regulation, e.g., impact on state programs and price paid for accepting Federal dollars?

Closing Questions:

- Where does the business community want to be two years from now (not necessarily tomorrow)? Answer may involve analysis of all three branches of government.
- For State programs with some nexus to Federal funding, pressure to do something addressing climate change may be great. Debate and analysis will be no different than that which is well underway on, e.g., whether to accept primacy of NPDES permitting program.
- What existing State/Federal programs do not advance goals of preparing for climate change?