

Polar Bears and Global Warming – Are the Bears Endangered, Or Our Freedoms?

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Introduction

On May 14, 2008, Secretary of the Interior Dirk Kempthorne announced that the polar bear (*Ursus maritimus*) is being listed as a threatened species under the Endangered Species Act of 1973 (ESA). While the polar bear joins over 1,000 other protected species under the ESA, this listing stands out in that it is the first instance of a well-known animal whose at-risk status is based on concerns about global warming. Thus, two major environmental controversies – how to protect species and how to address global warming – are now linked, with the polar bear providing a sympathetic face for the latter.

However, there are reasons to doubt whether this step will either benefit the bear populations or lead to sensible global warming policy. The 35-year history of the ESA reveals a highly problematic approach that has regularly done more harm than good in protecting species. And the statute's adverse economic impacts and unnecessary infringements on Constitutional rights could expand greatly now that emissions of the greenhouse gas carbon dioxide, the ubiquitous byproduct of fossil fuel combustion, is considered an agent in harming a **species**.

Questions about the seriousness of global warming and concerns about the costs of federally-mandated reductions in greenhouse gas emissions have thus far stymied congressional efforts to enact such measures. In the absence of legislation specifically addressing global warming, the “backdoor” approach to regulating carbon dioxide emissions by utilizing existing authority under the ESA takes on added importance.

In his announcement of the listing, Secretary Kempthorne, echoing recent comments by President Bush, noted that the ESA is ill-suited to address global warming, but concluded that the listing was unavoidable. He also announced novel measures to limit the economic impact of the listing, but given the inflexible nature of the ESA these measures are on shaky legal ground. Most likely, the listing jeopardizes both energy production in Alaska, where the bear's American habitat is located, as well as any economic activity throughout the United States that can be linked to carbon dioxide or other greenhouse gas emissions. The result would be economic harm disproportionate to any environmental benefit. A better solution, both for species protection and global warming, is to turn away from prescriptive federal mandates and towards free market principles in addressing these concerns.

The ESA

Some critics have described the listing of the polar bear as a misuse of the ESA, but history shows that this was a deeply flawed statute from the start. The polar bear controversy is only the latest and potentially most far-reaching and damaging manifestation of these flaws.

The Early Years

The 1973 ESA was the last in wave of major environmental legislation enacted during the Nixon administration. Statutes like the National Environmental Policy Act of 1969, the Clean Air Act of 1970, the Clean Water Act of 1972 and several others continue to have a profound impact on the nation. But in some respects, the ESA was the most sweeping of them all. Replacing the 1966 ESA whose provisions were deemed too weak, the 1973 version imposed absolute duties on the government and citizens in protecting species, and left little room for compromise.

The statute defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range,” while a threatened species is one “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”¹

The ESA makes it unlawful to “take” a listed species, which means “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect....”² These are often referred to as the section 9 provisions. It also requires that “each federal agency shall, in consultation with and with the assistance of the Secretary [of Interior], insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat....”³ These are referred to as the section 7 provisions or section 7 consultations. Other sections impose additional requirements, such as the designation of critical habitat for each species and the development of recovery plans.⁴ The Department of the Interior’s (DOI) Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NMFS) implement most of these provisions, with the former handling those applicable to the polar bear.

Broad citizen suit provisions allow environmental activist groups to force the DOI to enjoin any activity alleged to be in violation of the provisions of the ESA, to list additional species, or to expand provisions for already-listed species.⁵

Public concerns about bald eagles, grizzly bears and a few other species ensured easy passage of the ESA, which sailed nearly unanimously through Congress and was enthusiastically signed by the President. But it soon became clear that the law went far beyond what many of its original supporters intended. For one thing, the number of species that fit the description of endangered or threatened was larger than most anticipated. Rather than several dozen species well known to the public, the ESA proved to be applicable to a long list of mammals, birds, reptiles, and fish, most of them quite obscure. Even plants and insects, of which there are now hundreds on the list, are accorded strong legal protections. Many issues, such as the fact that a species can be listed if endangered over only a part of its range while flourishing elsewhere, had been

¹ Endangered Species Act, § 3.

² Endangered Species Act, §§ 3, 9.

³ Endangered Species Act, § 7.

⁴ See, Endangered Species Act, §4.

⁵ Endangered Species Act, § 11(g).

scarcely noticed during the debate but greatly expanded the Act's applicability. Also, sub-species can be listed.

At the same time the number of listed species is extensive (and is still-growing, with litigation to list hundreds more pending at any given time), the restrictions on economic activity required to protect each one went well beyond initial expectations. The "take" provisions under section 9 came to define a whole series of actions beyond directly killing a listed species, including alterations of species habitat. This includes many routine activities of farmers, ranchers and other property owners. And the section 7 provisions requiring interagency consultation applies to federal projects such as highways and military installations, as well as the many private activities requiring federal approval such the construction of an electric power plant or drilling for oil.

And nowhere in applying any of the provisions of ESA could costs, impact on private property, or any other mitigating factor be taken into account. Indeed, each and every inclusion of phrases like "as practicable" or any other attempt at balancing the needs of species against the needs of people was excised from successive drafts and was gone in the final version. By several accounts, a few zealous environmental advocates involved in the legislative process essentially put one over on everyone else.⁶

That there is no flexibility in the ESA was amply proven in 1978 in the first Supreme Court case over the statute, *Tennessee Valley Authority v. Hill*.⁷ The snail darter, a small fish known only to a few ichthyologists, was claimed to be threatened with extinction should the massive Tellico Dam project in Tennessee, already mostly complete, be allowed to go into operation.⁸ Then-U.S Attorney General Griffin Bell, arguing for the federal government's desire to move ahead with the dam, famously passed a small glass vial containing a specimen of the snail darter to the justices. That such a big project could be held up by a tiny and seemingly inconsequential fish drew chuckles from the courtroom, but the Supreme Court's decision was no laughing matter. The Court held that the law clearly gave any endangered or threatened species protection which took precedence over all else, and that economic considerations are irrelevant.

Subsequent legislation carved out a specific exemption for the Tellico Dam, but the ESA's reach, now legally established, remained intact. Lee Greenwalt, former FWS director, said "I discovered we had a large caliber firearm here with virtually no end of ammunition. Tellico confirmed it."⁹

The ESA Today

This expansive statute, made even more expansive by decades of litigation, now applies to over 1,000 species throughout the nation. Vast areas, especially in the rural west, are habitat (or at least potential habitat) for at least one of these species, giving DOI

⁶ See, Charles C. Mann and Mark L. Plummer, *Noah's Choice: The Future Of Endangered Species*, (New York: Alfred A. Knopf, 1995), pp. 158-162.

⁷ 437 US. 153 (1978).

⁸ Years later, examples of the snail darter were found in other areas unaffected by the dam. Indeed, it is not uncommon for a species to be considered endangered based on a very incomplete initial inventory.

⁹ Quoted in Mann and Plummer, p. 218.

and the environmental organizations that file ESA lawsuits tremendous power over the economic activity throughout these areas.

Yet, after 35 years, the number of endangered and threatened species that have shown signs of recovery – the very purpose of the ESA - is quite small. While more and more species are added to the list each year, very few have actually recovered to the point of being removed from it. Among those delistings, most are species like the peregrine falcon that recovered for unrelated reasons such as the ban on DDT, or were species that were more common than initially believed and should not have been listed in the first place.¹⁰ Beyond delisting, the percent of listed species showing any significant progress towards future recovery is also small, with only 2 percent more than 75 percent recovered and 5 percent more than 50 percent recovered.¹¹

The reason is not surprising, given the incentives created by the ESA. Much of the habitat for listed species is on private land, and the way the statute works the presence of endangered species or habitat suitable for such species only serves to punish property owners with costly restrictions. These restrictions reduce the value of the land and can interfere with the livelihoods of farmers, ranchers, and other property owners.

Sam Hamilton, former Fish and Wildlife Administrator for the state of Texas, after a highly problematic episode involving some endangered birds in his state, noted that “[t]he incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies my land, its value disappears.”¹² Property owners, most of whom consider themselves environmentalists and would like to help at-risk species, are forced by economic necessity to do what many call “shoot, shovel, and shut up.” That is, secretly shoot any currently listed or candidate species on one’s property and modify the land so as to make it unsuitable habitat for any others. For example, the property owners in Texas cut down the types of trees preferred as nesting sites for soon-to-be-listed birds so as to avoid attracting this unwelcome guest.¹³ Attempts to reform the ESA by adding provisions requiring compensation to landowners whose property rights have been diminished by the statute have thus far been unsuccessful.

It may seem surprising that the environmental activist groups involved in this issue, the ones who claim to care deeply about endangered species, usually deny the ESA’s poor track record and insist the statute is an unqualified success.¹⁴ But in a sense they are right – the ESA may not be helping species, but it is a success as a tool for exerting substantial control over economic activity, which appears to be the real goal of the statute.

¹⁰ “Implementation of the Endangered Species Act of 1973,” Report of the House Committee on Resources, Majority Staff, 109th Congress, May 2006, pp. 7-12.

¹¹ *Id.*, pp. 19-21.

¹² Quoted in Iain Murray, *The Really Inconvenient Truths: Seven Environmental Catastrophes Liberals Don’t Want You To Know About – Because They Helped Cause Them*, (Washington, DC: Regnery, 2008), p. 241.

¹³ *Id.* at 242.

¹⁴ *Id.* at 243.

In practice, rather than seeking to protect truly deserving species and then fashioning minimally-intrusive but effective means to do so, the ESA often functions in reverse. Activists decide what economic activities they want to halt, and then go about the process of finding a candidate species in the vicinity of those activities. In the words of longtime ESA-critic RJ Smith, “whenever environmentalists want to stop a government dam, highway, airport or hospital from being constructed or expanded, or to stop a private landowner from harvesting trees on his tree farm, or building a home, or plowing a field, they simply find some obscure, little-known plant or animal and propose it for listing as an endangered species.”¹⁵

Regardless of the congressional intent in 1973, the ESA has become an example of the misuse of environmental concerns – and the public’s legitimate support for those concerns – as a tool for exerting economic control. The polar bear listing can be seen as a means to do the same, but on a grander scale.

Global Warming

Concern that anthropogenic emissions of carbon dioxide and other greenhouse gases are warming the planet has emerged as the major environmental issue of the day.¹⁶ However, carbon dioxide is the ubiquitous and unavoidable by-product of fossil fuel combustion (and of many non-anthropogenic processes), which currently provides fully 85 percent of America’s energy. Thus, any effort to substantially curtail such emissions would have extremely costly and disruptive impacts on the economy and on living standards. That may change over the long-term – indeed, the federal government is funding research into carbon-friendly energy technologies as well as means to store carbon emissions underground rather than releasing them into the air. But these efforts will likely take at least 20 years to reach fruition. There are no cost-effective solutions in the interim.

For this reason, the federal government has been extremely cautious about embarking on mandatory carbon reductions over shorter timeframes. In 1997, the Senate unanimously resolved to reject any climate change treaty that unduly burdened the American economy or failed to engage all major emitting nations. Although the Kyoto Protocol was signed by the U.S. later that year, neither President Clinton nor President Bush ever submitted this treaty to the Senate for the required ratification.

Legislatively, Congress has rejected every attempt to control carbon dioxide emissions, from proposed provisions in the 1990 Clean Air Act Amendments to ones in the 2005 energy bill. Even the current Congress, with its stated zeal to fight global warming, has actually done little. One climate change bill, the America’s Climate Security Act, has been debated before the full Senate, but was pulled after only three days of debate, largely due to concerns over costs.¹⁷ The House of Representatives has done

¹⁵ RJ Smith, “Replace the Endangered Species Act,” *Human Events* (March 12, 1999), pp. 12-13.

¹⁶ For a brief critique of global warming science and policy, see Ben Lieberman, “Frequently Asked Questions About Global Warming,” Heritage Foundation, May 21, 2007, at <http://www.heritage.org/Research/EnergyandEnvironment/wm1403.cfm>.

¹⁷ Ben Lieberman, “The Lieberman-Warner Climate Change Act: A Solution Worse Than The Problem,” Heritage Foundation Backgrounder, June 2, 2008, at <http://www.heritage.org/Research/EnergyandEnvironment/bg2140.cfm>.

nothing beyond creating a new committee, holding innumerable hearings, and introducing several bills none have which has received serious consideration.

Congress and the Bush administration have taken other measures well short of an economy-wide crackdown on fossil fuel use, such as renewable fuel standards, motor vehicle fuel economy standards, and home appliance efficiency standards. The administration has also spearheaded international efforts other than the Kyoto Protocol, such as the Asia Pacific Partnership that focuses on the development and deployment of carbon friendly technologies. However, none of these measures demand dramatic and binding reductions in fossil fuel use, and as such have been criticized by the environmental activist community as inadequate in the face of the perceived global warming crisis.

Backdoor Global Warming Policy

Recognizing the challenges of enacting stringent climate legislation and wanting additional avenues to advance a global warming agenda, several environmental activist organizations and some state governments have, over the past few years, initiated efforts to use existing regulatory authority as a means to limit carbon dioxide and other greenhouse gas emissions.

One example of this is the litigation to require the Environmental Protection Agency to begin regulating carbon dioxide from motor vehicles under the 1970 Clean Air Act. In 2007, the Supreme Court ruled in a 5 to 4 decision against the Environmental Protection Agency over the agency's refusal to do so. In *Massachusetts v. Environmental Protection Agency*,¹⁸ the Court ruled that carbon dioxide fits within the broad definition of an air pollutant and must be considered for regulation under the Clean Air Act. The decision does not affirmatively require EPA to change its position and regulate motor vehicle emissions of carbon dioxide, but it does require the agency to demonstrate that whatever it chooses to do complies with the requirements of the statute.

The Court rejected arguments that the Clean Air Act does not apply because it was enacted in the 1970s before global warming emerged as a concern (indeed the fear of global cooling was more prevalent at the time), or that Congress has on several occasions considered but rejected amendments to the Clean Air Act that directly address global warming. Nor was it swayed by arguments that the statute's existing provisions are not well suited to the task of reducing carbon dioxide emissions.

Many critics of such regulation fear that the Clean Air Act, once applied to carbon dioxide, would go well beyond motor vehicles and impose severe restrictions on all manner of activity producing or using energy, while providing limited environmental benefits.¹⁹ EPA has issued an Advance Notice of Proposed Rulemaking on the matter.²⁰

¹⁸ 127 S. Ct. 1438 (2007).

¹⁹ See, "Testimony Of Peter Glaser On The U.S. Environmental Protection Agency's Response To The Supreme Court's Decision in *Massachusetts v. EPA*," testimony before the House Select Committee On Energy Independence And Global Warming, March 13, 2008.

²⁰ Environmental Protection Agency, Advance Notice of Proposed Rulemaking, "Regulating Greenhouse Gas Emissions Under the Clean Air Act, July 30, 2008, at

In an April 16th Rose Garden speech about global warming, President Bush outlined the perils of “taking laws written more than 30 years ago . . . and applying them to global climate change.”²¹ The President mentioned both the Clean Air Act and the ESA in this regard. Rather than leave such decisions to unelected regulators and judges applying poorly tailored pre-existing authority, the President strongly suggested that global warming policy should be debated by Congress.

The Polar Bear Listing

As with the Clean Air Act, proponents of prescriptive global warming policy saw the ESA as legal authority already at hand whose broad provisions could be stretched for a purpose never originally envisioned.²²

The listing of the polar bear began, as do many other ESA actions, with litigation. The Center for Biological Diversity (CBD), the environmental organization most heavily involved in the ESA, filed suit in 2005 to have the bear listed as threatened. Their contention was that continued global warming will further erode the summer Arctic ice on which they bears rely for hunting and other purposes, creating the possibility of extinction decades from now.

At first blush, the polar bear seems like an unlikely target for ESA listing. The state of Alaska, a sharp critic of the listing, has noted that the bears’ global numbers have increased substantially, from an estimated 8,000-10,000 in 1965-1970 to 20,000-25,000 today.²³ This improvement was achieved since the 1970s after several international agreements as well as enactment of the Marine Mammal Protection Act of 1972 (MMPA), which includes several domestic protections. The Arctic region’s sea ice extent has declined since the 1970s, but this has obviously not had an adverse impact on polar bear numbers.²⁴ This is true of the two polar bear subpopulations in Alaska, as well as the 17 other subpopulations in Canada (home to most of the world’s polar bears), Russia, Greenland, and Norway.

History also argues against any assertions that polar bears are fragile. While true that the Arctic is warmer today than 30 – 40 years ago and that sea ice extent has declined over that span, the region was nearly as warm if not warmer during the 1930s, and almost

<http://www.uschamber.com/NR/rdonlyres/e2gc3jzfljvxhyadrzeplruafdfc2qhgenejmfnllofp47k3fimfjeau3mev3r7eeetpkrx4n33pkkzzz7owhiubtzna/ANPRonGHGsaspublishedintheFederalRegister.pdf>.

²¹ “President Bush Discusses Climate Change,” April 16, 2008, at www.whitehouse.gov/news/releases/2008/04/print/20080416-6.html.

²² Peyton Knight and Amy Ridenour, “Listing the Polar Bear Under the Endangered Species Act Because of Projected Global Warming Could Harm Bears and Humans Alike,” National Center for Public Policy Research, March 2008, at <http://www.nationalcenter.org/NPA566.html>.

²³ Alaska Department of Fish and Game, Comments to the U.S. Fish and Wildlife Service, April 9, 2007, pp. 23-24, at http://www.adfg.state.ak.us/special/esa/polarbears/state_comments4-9-07.pdf.

²⁴ Ken Green, American Enterprise Institute, “Is The Polar Bear Endangered, or Just Conveniently Charismatic,” May 2008, at http://www.aei.org/publications/filter.all.pubID.27918/pub_detail.asp.

certainly warmer at earlier times.²⁵ Yet polar bears have existed as a distinct species for at least 100,000 years.

Nonetheless, the requirements for listing have never been particularly rigorous, especially for threatened status. In the case of the polar bears, it may only require conjecture that continued warming will further reduce the amount of Arctic summer ice and pose a risk of extinction in the future.

DOI made just that determination on May 14, 2008, announcing the listing of *ursus maritimus* as threatened. In his announcement, Secretary Kempthorne detailed the declines in the extent of sea ice habitat in recent decades and pointed to evidence, derived from computer models, of continued declines in the decades ahead. Given the polar bears' need for sea ice to survive, he concluded that the best available science supports listing the bears as threatened because the species is "likely to become in danger of extinction in the foreseeable future."²⁶

The Secretary acknowledged that the ESA is "perhaps the least flexible law Congress has ever enacted."²⁷ Nonetheless, he announced a plan that tries to limit the impact of the listing. He noted, as the President did, that the ESA "should not open the door to use the ESA to regulate greenhouse gas emissions from automobiles, power plants, and other sources," that "ESA is not the right tool to set U.S. climate policy," and that "this listing will not stop global climate change or prevent any sea ice from melting."²⁸

Polar bears are already subject to the MMPA, which Kempthorne argues offers stronger protections for bears than threatened status under ESA. Thus, under section 4d of ESA, which gives the Secretary limited leeway with regard to threatened species, Kempthorne essentially proposed that these existing provisions satisfy the requirements of the ESA. Kempthorne was clear to state that the listing should in no way interfere with oil and gas operations in Alaska, which have long complied with MMPA and have a track record of posing no danger to the polar bears. He also asserted that specific sources of greenhouse gas emissions cannot be regulated under ESA because the causal link between them and harm to polar bears is too weak. In August 11th, DOI proposed a rule that would specifically exclude global warming considerations from section 7 consultations.²⁹

What The Listing Means

The CBD and other environmental activist organizations have made no effort to

²⁵ Marlo Lewis, Competitive Enterprise Institute, "Al Gore's Science Fiction: A Skeptic's Guide to An Inconvenient Truth," March 16, 2007, pp. 59-66, at <http://cei.org/pdf/5820.pdf>; I. Polyakov et al., "Variability and Trends of Air Temperature and Pressure in the Maritime Arctic, 1875-2000," *Journal of Climate*, Vol. 16, (2003) pp. 2067-2077; P. Chylek et al., "Greenland Warming of 1920-1930 and 1995-2000," *Geophysical Research Letters*, Vol. 33, (2006) p. L11707.

²⁶ Remarks By Secretary Kempthorne, Press Conference On Polar Bear Listing, May 14, 2008, at www.doi.gov/secretary/speeches/081405_speech.html.

²⁷ Id.

²⁸ Id.

²⁹ Department of the Interior Press Release, "Secretary Kempthorne Proposes Narrow Changes To ESA Consultation Process," August 11, 2008, at http://www.doi.gov/news/08_News_Releases/080811a.html.

hide their desire to use the ESA in order to implement as broad a global warming policy as is possible.³⁰ Needless to say, they oppose Secretary Kempthorne's effort to constrain the ESA in this instance, and within days launched a lawsuit that seeks to upgrade the polar bear's status from threatened to endangered and nullify the agency's efforts to limit the impact of the listing.³¹ The organization has also launched litigation to block offshore energy production in Alaska based on polar bear concerns, including a recent lease sea of the Chukchi Sea. Petitions to list a host of other Arctic species have also been filed.

On the other side of the ledger, the state of Alaska and the free-market Pacific Legal Foundation have sued to block the listing of the polar bear, arguing it does not meet the ESA's requirements.³²

The consequences of the listing will be determined by federal courts in the months and years ahead. However, based on the inflexibility of the ESA as interpreted by federal courts, it is likely that CBD will prevail on most of its effort to overturn DOI's attempts to restrict the consequences of the listing.

The most direct target would be oil and gas exploration and production in Alaska, both onshore but particularly offshore. CBD stated that "offshore oil development directly harms the polar bears in numerous ways," and that "for polar bears to survive in the face of global warming, we need to protect their habitat, not auction it off to oil companies."³³ This puts at risk America's most promising new source of oil and natural gas. A recent US Geological Survey study concluded that the portion of Alaska and surrounding waters above the Arctic Circle contains an estimated 40 billion barrels of undiscovered oil and related liquid fuels, as well as 221 trillion cubic feet of natural gas.³⁴ These amounts are in addition to those already known to exist in Alaska, and offer the potential for a substantial increase in oil and natural gas supplies.

The section 9 provisions, forbidding a take of any polar bears may be interpreted to mean that at least some oil and gas activities modify the habitat of bears enough so as to constitute such a take, and therefore must be avoided. In addition, the section 7

³⁰ Brendan R. Cummings and Kassie R. Siegel, "*Ursus Maritimus*: Polar Bears on Thin Ice," *Natural Resources & Environment*, (Fall 2007), pp. 3-7.

³¹ Center For Biological Diversity Press Release, "Environmental Groups Seek Full Protection for Polar Bear: Court Challenge Filed to Overturn Bush Administration 'Special Rule' That Undercuts Protection for Polar Bear," May 20, 2008, at http://www.biologicaldiversity.org/news/press_releases/2008/polar-bear-05-20-2008.html.

³² State of Alaska Press Release, "State to Sue Over Polar Bear Listing," May 31, 2008, at <http://www.gov.state.ak.us/news.php?id=1163>; Pacific Legal Foundation Press Release, "PLF Launches Legal Challenge To ESA Listing Of Polar Bear," July 30, 2008, at <http://community.pacificlegal.org/NETCOMMUNITY/Page.aspx?pid=673&srcid=667>.

³³ Center For Biological Diversity Press Release, "Lawsuit to Protect Polar Bears From Oil Development and Greenhouse Gases: Offshore Oil Development in Arctic Seas Challenged," June 9, 2008, at http://www.biologicaldiversity.org/news/press_releases/2008/polar-bear-06-09-2008.html.

³⁴ Donald L. Gautier and Brenda S. Pierce, United States Geological Survey, "Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle," July 2008, at http://energy.usgs.gov/flash/CARA_slideshow.swf.

provisions will halt or at least add delays to all of the many federal government approvals that such exploration and production activities require.

The more novel question is whether ESA can be used to block carbon dioxide emitting activities anywhere in the U.S. on the grounds that these emissions contribute to warming, which in turn contributes to sea ice loss and harms the bears. Again, the CBD has made clear its view that “the only way to avoid jeopardizing the polar bear is to reduce emissions.”³⁵ The ESA has thus far never been applied to something so far attenuated from species harm as a distant and individually trivial source of emissions into the air, but if such provisions are upheld in federal court they could constitute the most comprehensive regulation of the economy to date. Virtually any major economic activity producing or using coal-fired electricity, petroleum products, or natural gas would come under the ESA’s provisions, and could be delayed for long periods or stopped entirely. In effect, DOI would become the new Department of Energy, and a far more restrictive one at that, potentially holding hostage much of the American economy to ESA’s red tape. Whether this power would be widely or selectively used would depend on DOI and the litigation choices of environmental organizations.

All Economic Pain, No Environmental Gain

In any event, it is unlikely that the desired restrictions will do the polar bear any good. If so, the polar bear would then join the vast majority of listed species that are not being helped in any tangible way, but whose listing serves as a justification for controlling economic activity. Even assuming the worst of global warming and its impact on sea ice and polar bear survival (and there are reasons to doubt the link, such as a number of studies linking declining Arctic sea ice with factors unrelated to temperatures³⁶), the ESA is not capable of significantly changing the future numbers of bears or the extent of the sea ice on which they rely. Secretary Kempthorne made clear that “any real solution requires action by all major economies for it to be effective.”³⁷ China either has or soon will surpass the U.S. as the world’s largest carbon dioxide emitting nation, and the rate of emissions growth among it and other rapidly developing nations is greater than that of the U.S.³⁸ Among developed nations that are Kyoto Protocol signatories, many are also experiencing faster rates of greenhouse gas emissions increases than the U.S.³⁹ Thus, although America was far and away the largest emitter of the 20th century, any change in the future trajectory of emissions largely hinges on

³⁵ Kassie Siegel, Center for Biological Diversity, “Don’t Wait to Save the Polar Bear,” *Los Angeles Times*, January 8, 2007.

³⁶ Lewis at 63; C. Koberle et al., “Mechanisms Determining the Variability of Arctic Sea Ice Conditions and Export,” *Journal of Climate*, Vol. 16, (2003) pp. 2843-2858; I. Polyakov et al., “Arctic Ocean Variability Derived From Historical Observations,” *Geographic Research Letters*, Vol. 30, (2003) pp. 31-34.

³⁷ Kempthorne statement.

³⁸ See, Netherlands Environmental Assessment Agency, “China Now No. 1 in CO2 Emissions: USA in Second Position,” May 29, 2008, at <http://www.mnp.nl/en/dossiers/Climatechange/moreinfo/Chinanowno1inCO2emissionsUSAinsecondposition.html>.

³⁹ See, Energy Information Administration, “International Energy Annual 2005,” Table H.1co2, World Carbon Dioxide Emissions from the Consumption and Flaring of Fossil Fuels, 1980-2005, at <http://www.eia.doe.gov/emeu/iea/contents.html>.

other nations. Proponents of the Kyoto Protocol conceded that this multilateral treaty, assuming full compliance (in reality most nations are missing their emissions reductions targets and have actually experienced increases since the treaty was signed), would only reduce the earth's future temperature by 0.07 degrees C by 2050.⁴⁰ The unilateral targeting of the American economy under ESA in order to reduce emissions would likely accomplish considerably less.

Free Market Solutions To Environmental Challenges

Environmental policy often has less to do with protecting the environment and more to do with exerting control over the economy and constraining freedom.⁴¹ That certainly is the case both with endangered species policy as well as global warming policy, so it is perhaps fitting that the polar bear listing has brought them together.

The sad irony is that more economic freedom, not less, holds the key to better environmental protection.

Former Texas Fish and Wildlife Administrator Sam Hamilton, lamenting the fact that the threat of ESA listing induces property owners to destroy endangered bird habitat, added that "we've got to turn it around to make the landowner want the bird on his property."⁴² Indeed, there were numerous examples of private conservation efforts prior to enactment of ESA that helped save species like the buffalo and wood duck.⁴³ But the ESA now serves to punish good deeds, or at least make them risky.

The answer to species protection is true cooperation between property owners and the federal government, which begins with respect for property rights. The 5th Amendment requirement that property owners be compensated for any diminution in the value of their property should be applied when the ESA affects them. This would both encourage property owners to work with and not against the goal of species protection and also force the federal government to concentrate its resources where needed most.

While there are no farmers and ranchers above the Arctic Circle, and in fact nearly all of the land there is government owned, economic freedom can help protect polar bears too. In the zeal to list the bears, some of the lessons that gave rise to their increasing numbers since the 1970s have been ignored. One is the success of commercial hunting programs in Canada. By allowing limited hunts each year, the native tribes that live in polar bear habitat and run the hunts have a source of income (wealthy hunters are willing to pay tens of thousands of dollars to fly in and shoot a polar bear). Rather than reduce bear populations, these programs have increased them, as the local tribes have every incentive to manage the nearby populations so as to ensure that they remain numerous. Without hunting, polar bears are at best a nuisance to the people they interact with, and at worst an occasional cause of injury and death.

⁴⁰ Thomas Wigley, et al., "The Kyoto Protocol: CO₂, CH₄, and Climate Implications," *Geophysical Research Letters*, Vol. 25 (1998), pp. 2285-2288.

⁴¹ Murray, at 1-2, 259-260.

⁴² Quoted in Murray, p. 241.

⁴³ Smith, pp. 12-13

It is quite likely that these hunting programs will save more bears than would a speculative and roundabout effort to do so by cracking down on American carbon dioxide emissions in the hope of stemming future warming and thereby creating more Arctic ice than there would otherwise be. Unfortunately, the ESA listing may interfere with these programs.⁴⁴

Similar principles of economic freedom apply for global warming policy. Attempts to regulate carbon dioxide via the ESA (or equally prescriptive legislation) will be very expensive while accomplishing little. Over time, the high costs themselves exact an environmental penalty. A nation with a strong economy can better deal with whatever challenges the future brings – global warming or otherwise – than a nation whose economy has been weakened by years of growth-inhibiting but invariably misguided preventive measures. This is why the wealthiest and most free societies have the strongest environmental records, a lesson ignored by putative environmentalists who prefer measures that leave society less wealthy and less free.

The resilience that comes with a strong economy is the best climate policy, now and especially in the years ahead. In time, this wealth can be used to employ the means to adapt to any problems that may be brought on by higher temperatures, or put to better use if global warming turns out not to be very serious. In the meantime, rather than a costly ratcheting down of emissions from existing technology, the role for the federal government is best left to research into new technologies that may one day allow for emissions reductions without the prohibitive costs.

Conclusion

Listing the polar bear under the ESA is neither good species protection policy nor good global warming policy. The prescriptive approach embodied in the ESA has a poor track record for helping species, and the most likely result of the bear listing would be economic constraints out of proportion to any environmental benefits. The ESA, global warming policy, and environmental policy in general could be improved through an approach that places greater weight on economic freedom.

⁴⁴ Alaska Department of Fish and Game, pp. 13-14.