

PERSPECTIVE

Cascade of ESA listings unlikely, for now



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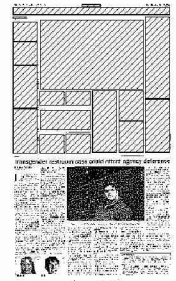
By James F. Rusk

The 9th U.S. Circuit Court of Appeals last month upheld the listing of the Pacific bearded seal as “threatened” under the federal Endangered Species Act based primarily on projections of climate change through the end of this century, reversing a district court deci-

sion that found the projections too speculative. *Alaska Oil & Gas Ass’n v. Pritzker*, 2016 DJDAR 10506 (Aug. 22, 2016). The opinion sparked concerns, in California and around the country, about a possible cascade of similar listings for species that, like the bearded seal, are currently widespread. After all, nearly any species could be considered in danger of extinction from climate

change over a sufficiently long planning horizon.

A slew of new listings — particularly for relatively abundant species — would complicate life for many developers, land managers, energy producers, infrastructure planners and others, because the presence of listed species or their designated critical habitat in a project area typically requires a lengthy consultation with the U.S. Fish and Wildlife Service or National Marine Fisheries Service, possible project changes, and/or costly mitigation. But the fears may be premature — the 9th Circuit’s opinion does not endorse the use of an 85-year modeling period for all ESA listing decisions, and its use in this case was justified by



factors unique to the bearded seal (and possibly other sea ice species), making it unlikely the services intend to adopt such a long-range analysis as standard practice, at least in the lower 48.

Taking the Long View

The ESA requires the services to list a species as “endangered” if it is currently in danger of extinction throughout all or a portion of its range, and to list it as “threatened” if it is likely to become endangered within the “foreseeable future.” 16 U.S.C. Sections 1532(6), 1536(20), 1533(a)(1). The services must base their listing decisions on the “best scientific and commercial data available.” 16 U.S.C. Section 1533(b)(1)(A). In recent years the services have listed as threatened, or proposed to list, several species based primarily on projected losses of essential habitat due to climate change. The U.S. Court of Appeals for the D.C. Circuit in 2013 upheld the Fish and Wildlife’s listing of the polar bear as threatened based on predicted climate change effects to sea ice habitat. *Safari Club Int’l v. Salazar (In re Polar Bear ESA Listing & Section 4(d) Rule Litig.)*, 709 F.3d 1, 15-16 (D.C. Cir. 2013). The 9th Circuit earlier this year upheld the service’s reliance on climate change models as the “best ... data available” for designating polar bear critical habitat under the ESA. *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 558-59 (9th Cir. 2016).

For the bearded seal, similar to the polar bear, the National Marine Fisheries Service found loss of sea

ice habitat due to climate change was the greatest threat to the species’ survival. What sets the bearded seal listing apart is the length of the “foreseeable future” period that NMFS considered in analyzing threats to the species. The polar bear listing only evaluated a 45-year “foreseeable future” period, but NMFS considered long-range climate modeling showing that, by 2100, global warming would result in total elimination of sea ice over shallower ocean waters — the bearded seal’s preferred habitat — during critical times of year.

The district court in *Alaska Oil & Gas* agreed with plaintiffs that the long-term projections were volatile, imprecise and “speculative and remote,” and vacated the listing rule, but the 9th Circuit reversed. It agreed with NMFS that, although the long-term (2050-2100) model results were more volatile than modeling through 2050, there was broad scientific consensus that the predicted warming effects would occur; the primary uncertainty was the rate of change. Given the seal’s dependence on sea ice, the court found this evidence sufficient to support the NMFS’ conclusion that the species will become endangered — while also suggesting that the more consistent modeling results through 2050 would have been sufficient to reach the same conclusion.

One Size Does Not Fit All.

Neither the NMFS listing rule nor the 9th Circuit’s opinion suggests that 85 years should become the “new normal” time period for analysis under the ESA. The bearded seal listing reflected guidance in a 2009 Department of Interior legal memorandum on how to define the “foreseeable future” timeframe for ESA listing purposes. The guidance contemplates a species-specific timeframe for each listing analysis based on the type and quality of in-

formation available regarding the species and the threats to its survival.

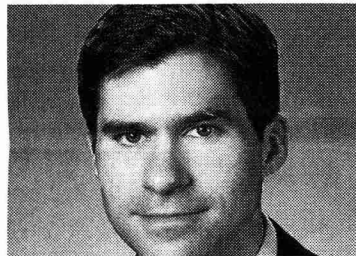
For the bearded seal, the NMFS found climate change to be the dominant threat, and it was able to predict the long-term effects of that threat on the seal’s essential habitat with reasonable certainty, if not with great precision. But for most species we encounter in the lower 48, including California, the relationship between climate change and habitat conditions is more complex, and other factors such as development of habitat are typically identified as greater threats to a species’ survival than climate change. These other threats tend to be more specific to certain regions and do not necessarily lend themselves to the type of long-range global modeling recently applied to climate change.

Perhaps as a result, the services typically limit their predictions of the “foreseeable future” to a shorter time period between 25 and 45 years for species in the continental United States. A notable exception — the proposed listing of the wolverine — may actually prove the rule. The wolverine has parallels to the bearded seal in that the Fish and Wildlife Service found it depends on persistent spring snow cover for successful denning, which is negatively correlated with warmer temperatures. The service relied on projections extending through approximately 2085 to find that suitable habitat would be greatly reduced. 78 Fed.Reg. 7864, 7876 (Feb. 4, 2013). Because most terrestrial species do not fill ecological niches with such a clear link to temperature, the bearded seal decision does not likely portend a rash of species listings in California based on long-term climate projections.

We do expect to see environmental advocacy groups place an increasing emphasis on climate change in petitions to the services

seeking to have new species listed. But a variety of factors, including the services' existing backlog of candidate species and listing petitions, and the coming change in political administrations, will likely preclude a radical acceleration in species listings under the ESA — at least for the foreseeable future.

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