Alaska Court Sets Aside Expansive Polar Bear Critical Habitat Designation

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by Murray Feldman

Last week, the U.S. District Court for the District of Alaska set aside the U.S. Fish & Wildlife Service's (FWS) earlier December 2010 rule designating over 187,000 square miles of Alaska's coastline (including the resource-rich North Slope area) and adjacent state and federal waters as critical habitat for the polar bear. This ruling came in three consolidated challenges to the habitat designation brought by the State of Alaska; the Alaska Oil & Gas Association and American Petroleum Institute; and the Arctic Slope Regional Corporation, North Slope Borough, and other Alaska Native interests.

The court vacated the designation and sent it back to FWS to reconsider a designation that complies with all of the Endangered Species Act's (ESA) legal requirements. As the court noted, "in its current form, the critical habitat designation presents a disconnect between the twin goals of protecting a cherished resource and allowing for growth and much needed economic development. The current designation went too far and was too extensive."

The court specifically faulted FWS for designating broad areas of the North Slope and offshore barrier island habitat without documenting the necessary physical or biological features in those areas that would support such a designation. In these areas, the State owned 20% of the designated terrestrial habitat denning area (or some 1,131 square miles), and 65% of the barrier island habitat (some 2,625 square miles). The court also held that FWS failed to follow the required procedures by not providing the State with an adequate justification for adopting a final rule that was in conflict with the State's comments on the proposed designation.

As a result of the decision, natural resource projects and municipal developments like roads, infrastructure, ports, bridges, and airport improvements, and oil and gas exploration and development in the North Slope and related areas that may require federal permits or approvals can now proceed without having to address the potential for the destruction or adverse modification of polar bear critical habitat. There is now no designated polar bear critical habitat in place until it is properly addressed by FWS on remand to cure the errors noted in the court's decision. The polar bear itself remains protected under numerous state, federal, and

international programs, including the Marine Mammal Protection Act, State of Alaska Comprehensive Wildlife Conservation Strategy, conditions or limitations imposed on state oil and gas leases to benefit the bear, and the bear's present listing status as "threatened" under the ESA. Even FWS itself in the vacated rulemaking indicated that it did not expect the critical habitat designation to result in any significant changes to polar bear conservation requirements. Thus, last week's decision should mean that polar bear protections will properly focus on the bear itself, and not on areas that might someday or could possibly be polar bear habitat, even though there is no documentation of their present use or value as possible habitat.

Read the District Court's polar bear critical habitat decision

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