Legal Backgrounder

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ACTIVISTS PROPOSE DRASTIC EXPANSION OF SPECIES ACT TO REGULATE AIR EMISSIONS

by

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The Center for Biological Diversity ("CBD") has recently taken the first step toward using the Endangered Species Act ("ESA") to regulate industries accused of contributing to global warming. If CBD is successful, virtually every segment of U.S. industry will become subject to the ESA's standard to insure no harm to ESA-protected species. That means U.S. industry will be forced to implement actions to prevent any harm which global warming might be causing protected species.

The CBD Proposal and Petition. On February 1, 2007, the CBD and other groups filed an Administrative Procedure Act petition demanding that the federal government act to stop the adverse impacts CBD believes global warming is having on species protected by the ESA. CBD cites several studies predicting that global warming will cause the extinction of 12-24% of all species globally.

CBD's petition demands that the Environmental Protection Agency ("EPA") and six Departments (Interior, Commerce, Energy, Agriculture, Transportation and Defense) issue regulations requiring each to examine whether any of their actions, including issued permits, will adversely impact ESA protected species because of the effect of the action or permit on global warming. To provide a roadmap on the effects of global warming and required remedial actions, the CBD petition demands that the Secretaries of Commerce and the Interior, which jointly administer the ESA: (1) "identify all species with the potential to be adversely impacted by global warming;" (2) "identify actions or conditions, including climate change factors" which would jeopardize the recovery of listed species; and (3) amend the recovery plans for all ESA-listed species to identify the corrective actions necessary to address the effects of global warming. Based on the amended species recovery plans, the EPA and the six Departments are to implement the actions necessary to address the impacts of global warming on listed species.

CBD argues that given the significance of global warming it is only common sense and sound policy to ask that federal agencies consider if what they are doing or permitting will impact global warming and ESA-protected species. Regardless of how the Bush Administration reacts to the CBD petition, one can easily imagine a provision being inserted into one of the global warming bills being considered by Congress

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implementing CBD's request that federal agencies determine if their actions are harming endangered species.

If CBD's idea is codified in regulation or law, it is an automatic on-ramp into the incredible regulatory world of the ESA. The implications for virtually all segments of U.S. industry are enormous.

The ESA's Prohibition on Taking Protected Species. Under the ESA, no person may "take" a protected species. "Take" is defined to include killing, injuring or harming a listed species. 16 U.S.C. § 1538, 16 U.S.C § 1532(19). The Supreme Court has ruled that an action harms a protected species if it is reasonably foreseeable that the action will result in habitat modification which kills or injures wildlife. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 708 (1995).

When first enacted, the ESA left businesses whose activities would take a listed species, such as dams whose power systems caught protected fish, with only two options – stop the activity or face the ESA's civil and criminal penalties. Confronted with the conflict between the ESA's absolute prohibition on taking listed species and the need to allow otherwise lawful business activities to continue, Congress amended the ESA to allow people engaged in otherwise lawful activities to get a permit allowing the incidental taking of ESA-protected species. 16 U.S.C. § 1539(a). These incidental take permits are issued by the Secretary of the Interior, acting through the Fish and Wildlife Service ("FWS"), or the Secretary of Commerce, acting through the National Marine Fisheries Service ("NMFS"). However, to obtain a permit, one must create and fund an appropriate Habitat Conservation Plan ("HCP") for the benefit of the species.

Consider for a moment any smokestack industry or any business with air emissions. If there is an evidentiary chain linking the air emissions to global warming, and if climate change is harming an ESA protected species, then you have a prohibited taking and are suddenly in negotiations over the adequacy of an HCP so you can get a permit from FWS or NMFS allowing your business to continue. But standing in the middle of this HCP process are environmental groups, which the ESA has empowered with a citizen suit provision allowing them to go to court to argue that the HCP does not adequately offset the harmful effects of the action at issue.

Imagine public utilities, oil refineries, power generation plants, automobile manufacturers, railroads, truckers, etc. negotiating with FWS, NMFS and environmental plaintiffs over the adequacy of the substance of or funding for their HCPs and one can see the implications of CBD's seemingly simple proposal. And remember that in *Tennessee Valley Authority v. Hill* the Supreme Court said the ESA was intended "to reverse the trend toward species extinction, whatever the cost" because Congress "intended endangered species to be afforded the highest of priorities." 437 U.S. 153, 174 and 184 (1978).

The ESA's "Insure" No Harm Standard. The opportunities for regulation under the ESA do not stop with the Act's prohibition on taking listed species. CBD's proposal provides a second on-ramp into the ESA's regulatory world which is equally fearsome. Section 7 of the ESA requires federal agencies to "insure" their actions are not likely to jeopardize a listed species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). Thus, any federal action or permit which may directly or indirectly affect an ESA-listed species is subject to the "insure" no harm standard. Federal air emissions standards, federally approved clean air plans, etc. may suddenly be subject to review by FWS and NMFS under the ESA. Assuming an evidentiary chain linking a federal activity or federally permitted action to global warming, and an evidentiary link between global warming and habitat changes which harm a protected species, the ESA's "insure" no harm standard gives environmental litigators another legal hammer. The CBD petition helpfully asks FWS and NMFS to identify the species which may be affected by global warming and to also

identify those federal actions (and permits) which could affect these species.

The ESA's "insure" no harm standard is enforced through the Act's consultation process. Agencies authorizing or undertaking actions which "may affect" a listed species must consult with either FWS or NMFS, depending on the species, about the effect of that action on the listed species. 50 C.F.R. 402.14(a). The consultation ends with a biological opinion ("BiOp") setting forth the FWS or NMFS decision on whether the proposed federal action or permit is likely to jeopardize the continued existence of the species or adversely modify its critical habitat. If either jeopardy or adverse habitat modification are found, FWS or NMFS will identify actions which the federal agency (or its permittee) must implement to prevent that jeopardy or adverse habitat modification from occurring so that the "insure" no harm standard is met. These recommended mitigation actions are, in fact, non-negotiable demands. As the Supreme Court stated in *Bennett v. Spear*:

> [A federal] agency is technically free to disregard [the FWS or NMFS biological opinion and its conservation recommendations] and proceed with its proposed action, but it does so at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.

520 U.S. 154, 197 (1997).

Once again, environmental activists sit in the middle of the process. The ESA's citizen suit enforcement provision allows activists to argue the ESA's insure no harm standard has been violated because FWS/NMFS: (1) incorrectly concluded the federal activity/permit will not cause jeopardy to the species or adversely modify its critical habitat; or (2) have found jeopardy or adverse habitat modification but have not imposed sufficiently restrictive mitigation requirements to prevent that jeopardy or adverse habitat modification.

CBD Files a Second Petition. Anyone doubting CBD's resolve to use the ESA and other vehicles to regulate global warming may also want to know that CBD's February 1 petition was followed by a February 27 petition to the State of California. The petition asked the State to prevent the acidification of coastal waters by regulating carbon dioxide emissions pursuant to authority delegated under the federal Clean Water Act. CBD notes that approximately half of the carbon dioxide emissions from burning fossil fuel are absorbed by the oceans and that this absorption is rendering the oceans more acidic. CBD goes on to note the impacts of acidification on oceanic food webs and ecosystems. CBD's February 27 petition asserts that carbon dioxide can be regulated as a pollutant under the Clean Water Act because EPA lists pH as a pollutant. 40 C.F.R. 401.16.

There are two significant aspects of CBD's February 27 petition. First, it is but a small step to imagine CBD's petition serving as the foundation for further ESA claims to protect coastal ocean species from ocean acidification since the ESA prohibits any person from taking a species. Second, CBD's statement accompanying its petition stated CBD plans to file similar petitions in every other coastal State.

Implications for U.S. Industry. CBD's proposals have been characterized by proponents as a common sense proposition simply asking that Federal agencies think about how their actions may affect global warming with attendant affects on ESA protected species. But that simple statement is an on-ramp to the ESA's "insure" no harm standard, its prohibition on taking listed species, its HCP provisions, and its citizen suit enforcement provisions. FWS, NMFS, and the courts could well be determining U.S. global

warming policy through the ESA.

Consider the ESA's restrictive requirements, inject these standards into the global warming debate, add the CBD petition, and then imagine the range of activities which can be regulated under the ESA. And for those who think the CBD petition will never be adopted by the Bush Administration or the Congress, please note CBD's petitions state quite clearly that CBD believes what it is asking for is already required by the ESA. In short, ignoring CBD's petitions will likely lead to court challenges. Businesses involved in the global warming debate should be aware of the potential regulatory effects of the ESA and should prepare accordingly. This matter is already before the Administration and the State of California. It may soon be before the Congress, the courts and every coastal state.

In short, CBD and its allies have developed a coordinated strategy to use the ESA as a means to regulate air emissions. No doubt CBD intends to pursue this ESA strategy before the regulatory agencies, the Congress, and the courts. Regardless of the pathway by which CBD's various efforts manifest themselves, without a coordinated response U.S. industry may someday awaken to discover a new regulatory world imposed by the Congress, the courts, and/or regulatory agencies in which air emissions are being regulated via the ESA.