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On October 3, 2008, the Department of the Interior ("DOI") issued a Solicitor's Opinion¹ concluding that proposed actions involving the emission of greenhouse gases ("GHGs") do not meet the "may affect" threshold set forth in the regulations implementing the Endangered Species Act ("ESA"), and, therefore, these actions do not trigger the consultation requirements under section 7 of the ESA.² In a separate action also on October 3, 2008, in a letter ("EPA's Letter") addressed to the Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"), the Environmental Protection Agency ("EPA") sought concurrence with its conclusion that issuing permits under the Clean Air Act for activities emitting GHGs in amounts equal to or less than a modeled facility does not require section 7 consultation.³

Solicitor's Opinion

Section 7(a)(2) of the ESA requires federal agencies, in consultation with FWS and/or the National Oceanic and Atmospheric Administration ("NOAA") Fisheries to ensure that actions authorized, funded or carried out by agencies are not likely to jeopardize the continued existence of federally listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat of such species.⁴ The ESA's implementing regulations require consultation only for actions that "may affect" listed species or critical habitat that are present in the action area of the proposed action.⁵ The regulations do not establish criteria for determining when the "may affect" test is satisfied, but it is generally understood that a proposed action passes the "may affect" test when an agency determines there is some likelihood the proposed action will have an effect on listed species or designated critical habitat.⁶ The effects of an action include both the direct and indirect⁷ effects on species or critical habitat.⁸

The Solicitor's Opinion recognizes that for climate change to be considered a "direct effect" in a proposed action involving GHG emissions, the emissions would need to cause an immediate effect. While GHG emissions from a single source may ultimately contribute to global concentrations of GHGs, such emissions do not themselves have a discernibly direct or immediate effect on climate change. Moreover, as the Solicitor's Opinion notes, for climate change to be considered an indirect effect, the observed effect would have to be "caused by" the proposed action, occur later in time than the "direct effects" of the proposed action, and be reasonably certain to occur.

Because the causal links required for the "may affect" test cannot be made between GHG emissions from a proposed agency action and a specific localized climate change impacting a listed species or critical habitat, the Solicitor's Opinion concludes that a proposed action involving GHG emissions is not subject to consultation under the ESA and its implementing regulations solely as a result of such emissions.

EPA's Letter to FWS and NMFS

The purpose of EPA's Letter is twofold: to confirm that EPA's understanding of relevant ESA obligations is consistent with the views of FWS and NMFS and to confirm that FWS and NMFS concur with EPA's assessment that issuance of permits under the Clean Air Act for activities emitting GHGs in amounts equal to or less than a modeled facility do not, in and of themselves, require section 7 consultation.

In concluding that section 7 consultation is not required to address the remote potential risks that GHG emissions from an individual source could pose for a listed species, EPA first took into account FWS's conclusion, reached in the context of its polar bear listing, that the best available scientific data did not support a causal connection between GHG emissions from a particular facility and effects on listed species or their habitats. Independently, EPA then analyzed whether the GHG emissions from a single source could be modeled to determine whether the risk of harm to any listed species from the anticipated emissions of that single source would trigger ESA section 7(a)(2) consultation.

As the letter confirms, EPA decided that because the current tools for simulating climate change generally focus on global and regional scale modeling, there is limited scientific capability in assessing, detecting, or measuring the relationship between emissions of GHGs from a specific single source and any localized impact on a listed species or its habitat. In light of the difficulty of attempting to use the outputs of various models to predict impacts at a local level, EPA determined that the risk of harm to any listed species or the habitat of such species based on the anticipated emissions of the model facility (as described in detail in EPA's Letter), or any facility with lower emissions, is too uncertain and remote to trigger ESA section 7(a)(2) obligations. Although this reasoning is consistent with the conclusion reached by FWS and DOI, EPA requested confirmation from FWS and NMFS that consultation under ESA section 7(a)(2) is not required for GHG emissions from a single source.

Conclusion

The Solicitor's Opinion and EPA's Letter recognize that because there are numerous sources contributing to climate change and the actual environmental impacts from these sources vary, it is not possible, using the technology currently available, to establish a causal connection triggering the ESA's consultation requirements for proposed actions involving GHG emissions. Section 7's underlying "purpose of ensuring no likely jeopardy to listed species and no destruction of adverse modification of designated critical habitat is not implicated by such remote potential

risks."⁹

1. Memorandum from David Bernhardt, Solicitor, U.S. Department of the Interior, "Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases," to Dirk Kempthorne, Secretary, Department of the Interior (Oct. 3, 2008).
 2. The Solicitor's Opinion applies only to the consultation requirements for proposed actions involving GHG emissions and does not limit a federal agency's requirement to consult if other potential effects to a listed species are present.
 3. Letter from Bob Meyers, Principal Deputy Assistant Director, EPA Office of Air and Radiation, to H. Dale Hall, Director, U.S. Fish and Wildlife Service, and James Lecky, Director, Office of Protected Resources, National Marine Fisheries Service (Oct. 3, 2008).
 4. 16 U.S.C. § 1536(a)(2).
 5. 50 C.F.R. § 402.14.
 6. Endangered Species Consultation Handbook, Glossary of Terms Used in Section 7 Consultation, at xvi, U.S. Fish and Wildlife Service and National Marine Fisheries Service, March 1998.
 7. Indirect effects are those caused by the action and are later in time but are still reasonably certain to occur. 50 C.F.R. § 402.02.
 8. See *id.*
 9. EPA Letter, at 8 (citing *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082 (9th Cir. 2004)).
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