GLOBAL WARMING: WHO REALLY DECIDES IF IT EXISTS

Agree with it or not, global warming and greenhouse gas talk is everywhere. And whether it scientifically exists and is man-caused or not, federal agencies are going to have to deal with it as the agencies authorize actions, and comply with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). So while many of us are not convinced that global warming is anything except a natural phenomena if it scientifically exists at all, the legal fact is that in getting a federal agency to complete the necessary NEPA documentation and ESA Section 7 consultation to renew a livestock term grazing permit, authorize a mine, develop an oil and gas field, construct or maintain a road, prepare a land use plan, or even authorize a crop payment or EQUIP grant, global warming has to be part of the consideration if the agency wants its decision to survive a challenge in court.

Consider the consultation process under the ESA. It frankly does not help that both the NOAA-Fisheries and the U.S. Fish and Wildlife Service ("FWS") have either settled litigation or listed species as threatened to protect them and their critical habitats from global warming. Based upon these agency settlements, environmental groups have filed even more listing petitions and are in court to force the FWS or NOAA-Fisheries to list even more species due to alleged global warming harms. All scientific debate aside, with a determination from the federal government that global warming is a threat, all federal agencies now have to consider global warming and greenhouse emissions as part of the ESA Section 7 consultation process. Under the ESA, federal agencies are required to ensure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered or threatened species or its critical habitat. This is the ESA Section 7 consultation process. Agency actions include all decisions regarding issuance, transfer or renewal of all permits, leases, or other authorizations by a federal agency, even including federal loans or moneys offered to improve or use private property by agencies like the Farmers Home Administration or funds for projects on private land authorized by the Department of Agriculture.

To determine if an agency action may affect a listed species, the federal agency needs to evaluate the potential effects of the action on listed and proposed species and their critical habitats and determine whether they are likely to be adversely affected. The action area to be covered by the Section 7 consultation includes all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action. For example, under this broad definition, if a proposed project indirectly affects the polar bear's habitat, the polar bear's habitat may be part of the "action area."

Once the action area is determined, the next question is whether the proposed action causes an "effect." "Effects of the action" refers to the direct and indirect effects of an action on the species or habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone Section 7 consultation, and the impact of State or private actions which are contemporaneous in time. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur.

Given this background, there are some things that property owners, ranchers, farmers and private proponents who need a federal permit for a project can argue to limit the reach of the Section 7 consultation. First, the courts have held that the more tentative the connection between a project and the effect on the listed species or habitat, the more likely it is that an agency will not have to conduct a Section 7 consultation. Although the Section 7 consultation process has to include consideration of indirect impacts, the courts have not required the FWS or NOAA-Fisheries to engage in speculation.

Other courts have held that agencies need only place conditions on a project through a Section 7 consultation process based on more than the mere potential for harm. While the courts have also stated that the bar to determine "mere potential" is relatively low, courts have been at least willing to recognize that some bar does exist.

The FWS has also issued guidance stating that it does not anticipate that most projects will require Section 7 consultation based simply on the fact that they emit greenhouse gases. The FWS reasons that Section 7 consultation would only be necessary if it is established that the emissions from the proposed action cause an indirect effect to listed species or critical habitat. Indirect effects must be reasonably certain to occur, and in some cases, the best scientific data currently available does not draw a causal connection between greenhouse gas emissions and direct or indirect effects to listed species or their habitats. Without sufficient data to establish a causal connection--to a level of reasonable certainty--between greenhouse gas emissions and impacts to listed species or critical habitat, Section 7 consultation would not be required.

Despite the FWS guidance's attempt to limit the reach of Section 7 consultations for global warming, the final decision regarding whether a federal agency has to complete a Section 7 consultation will not be decided by the federal government, but will be decided by the courts. There is already one case in which a California federal court concluded that a federal agency must consider the impact of global warming on listed species through a Section 7 consultation. In that case, environmental groups challenged the Section 7 consultation for several major water diversion projects. The court determined that NOAA-Fisheries had ignored information about global warming and improperly assumed that the hydrology of the projects would remain the same. The court then found that by not discussing global warming, NOAA-Fisheries failed to analyze "an important aspect of the problem." The court declined to address what weight, if any, should be given to the issue of global warming, but only decided that NOAA-Fisheries must address the issue.

As with the federal government's recognition of global warming as a threat to some listed species and critical habitat, so too has the federal government included global warming as part of its NEPA analysis. NEPA requires federal agencies "to the fullest extent possible," prepare a detailed statement on the environmental impact of major federal actions significantly affecting the quality of the human environment. If there is a substantial question whether an action may have a significant effect on the environment, then the agency must prepare an environmental impact statement ("EIS") or an environmental assessment ("EA") in order to determine whether a proposed action may significantly affect the environment. Whether an action may significantly affect the environment requires consideration of context and intensity. Context includes the scope of the agency's action, including the interests affected. Intensity refers to the severity of impact, both beneficial and adverse.

At least one court has determined that an EA was insufficient to address global warming issues. While that determination was in the context of rulemaking regarding automobile emissions, the case shows that environmental groups and the courts are aware of the global warming allegations as they are related to NEPA compliance.

One of the arguments that project proponents, landowners, permittees and agencies can make in response to the sufficiency of a NEPA analysis' consideration of global warming is whether the challenger has standing to complain that an EA or EIS is insufficient. The courts will not grant standing to those who cannot assert a causal connection between the environmental harm and their direct or concrete injury. One court has already recognized that the connection between alleged increase in greenhouse gas and the harm suffered by the plaintiff was too speculative to support a claim that NEPA was violated.

The one thing that is certain, regardless of the scientific merits of global warming and greenhouse gas, this issue is ripe for litigation. Although NEPA is touted as a procedural statute and ESA Section 7 consultation has been held to not subvert the organic statutes of a federal agency, it will be the courts who decide whether projects and programs go forward based upon whether the federal agencies engaged in a complete analysis. The sooner it is recognized where the real decision maker lies, the easier it will be to build a record to defend a project, program or final decision.

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