

# The Outer Limits of Endangered Species Act Liability—The ESA’s Indirect Effect Regulation and Its Application to Climate Change

by Hanspeter Walter

Hanspeter Walter is a Senior Associate with the law firm of Kronick Moskowitz Tiedemann and Girard.

Good scientists have active minds and creative imaginations. These traits allow scientists to develop hypotheses and design experiments to test them with the hope of moving scientific inquiry and the state of knowledge ever further. While most laws do not implicate or emphasize science, the federal Endangered Species Act (ESA)<sup>1</sup> is among the few that does. Specifically, ESA §7 demands that during consultation on the potential effects of federal actions on ESA-listed species, “each [federal] agency shall use the best scientific and commercial data available.”<sup>2</sup> Unlike in pure scientific investigation, however, the ESA limits the scope of inquiry with regard to assessing the indirect effects of an action. Thus, where a scientist might conceive of a potential indirect effect from use of a pesticide, implementation of a resource management regime, or carbon emissions from a local power plant, the ESA demands more before such possibilities are labeled indirect effects of the action.

In particular, for an indirect effect to be cognizable under the ESA, more proof of that effect is necessary than the ordinary standard of foreseeability applied in other environmental analyses, such as under the National Environmental Policy Act (NEPA).<sup>3</sup> This higher standard is found in an ESA regulation that requires indirect effects be “reasonably certain to occur.” If properly applied, this regulation should limit imposition of ESA liability on federal action agencies and nonfederal applicants for alleged indirect effects for which little empirical evidence, but much scientific speculation, exists.

## I. The ESA’s Indirect Effect Regulation

In 1986, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (collectively, Services)

adopted regulations addressing ESA §7 consultations.<sup>4</sup> Those regulations define indirect effects as “those [effects] that are caused by the proposed action and are later in time, *but still are reasonably certain to occur.*”<sup>5</sup> The Services also included the “reasonably certain to occur” language in their definition of cumulative effects.<sup>6</sup> Any lawyer recognizes the phrase “reasonably certain to occur” as embodying some form of evidentiary or proximate standard, but how should it be applied in the context of ESA consultations?

The Services provided insight into this question in the preamble to their 1986 Final Rule adopting the ESA consultation regulations.<sup>7</sup> There, the Services addressed comments to the proposed regulations. One comment expressed dissatisfaction with the “reasonably certain to occur” standard, and instead suggested equating the scope of ESA cumulative effects with those under NEPA, which employs a “foreseeability” standard for cumulative and indirect effects.<sup>8</sup> The Services explained they had expressly chosen to impose a higher standard under the ESA than the mere “foreseeability” standard under NEPA:

If the jeopardy standard is exceeded, the proposed Federal action cannot proceed without an exemption. This is a substantive prohibition that applies to the Federal action involved in consultation. In contrast, NEPA is procedural in nature, rather than substantive, which would warrant a more expanded review of cumulative effects. Otherwise, in a particular situation, the jeopardy prohibition could operate to block “nonjeopardy”

4. 50 C.F.R. §§402.01 et seq.

5. 50 C.F.R. §402.02 (emphasis added).

6. *Id.*

7. 51 Fed. Reg. 19926 (June 3, 1986) [hereinafter Preamble].

8. See 40 C.F.R. §1508.8 (defining indirect effects as “those that are caused by the action and are later in time or farther in distance, but are still reasonably foreseeable . . .”); 40 C.F.R. §1508.7 (defining cumulative impact as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . .”).

1. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

2. 16 U.S.C. §1536(a)(2).

3. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

actions because future, speculative effects occurring after the Federal action is over might, on a cumulative basis, jeopardize a listed species.<sup>9</sup>

While the Services primarily focused on the “reasonably certain to occur” standard in the context of cumulative effects in the Preamble, they later confirmed that a similar rationale applies to indirect effects under the ESA. Specifically, in a 2008 *Federal Register* notice addressing amendments to the ESA consultation regulations, the Services explained:

[T]he preamble to the 1986 regulation explained the Services’ interpretation of the phrase “reasonably certain to occur.” 51 FR 19926, 19932 (June 3, 1986). The preamble notes that some commenters “believed that the proposed [definition] of ‘cumulative effects and effects of the action,’” both of which were defined to include only effects that are “reasonably certain to occur,” “were too narrow.” *Id.* . . . While the focus of the comments, and the Service’s response was on “cumulative effects,” rather than “indirect effects,” the Service’s reasoning in rejecting the suggestion that the regulations rely on a broader or more lenient standard than “reasonably certain to occur” applies equally to the use of the phrase in the definition of “indirect effects.”<sup>10</sup>

The Services also reaffirmed their view that:

Unlike NEPA, the prohibition in the ESA can stop an otherwise worthwhile Federal project from going forward. For that reason, it makes sense that the Service[s] would consider “indirect effects” to be only those “reasonably certain to occur,” rather than “merely foreseeable.”<sup>11</sup>

While the Services later rescinded the new consultation regulations they adopted in 2008, the Services’ official statements in the *Federal Register* regarding the “reasonably certain to occur” standard and the Services’ reaffirmation and explanation of the 1986 Preamble still inform the meaning of the “reasonably certain to occur” standard in the existing indirect effect regulation.

## II. Cases Applying the Indirect Effect Regulation

Shortly after its promulgation, the U.S. Court of Appeals for the Ninth Circuit confirmed that “[t]he reasonably certain to occur” standard applies to “indirect effects . . . caused by the proposed action,”<sup>12</sup> but the court did not have occasion to interpret or explain the regulation’s application.<sup>12</sup>

Since then, only a few cases have addressed the ESA’s indirect effect regulation, some of which are discussed below.

In *Florida Key Deer v. Paulison*,<sup>13</sup> the U.S. Court of Appeals for the Eleventh Circuit considered whether the Federal Emergency Management Agency (FEMA) had to consult under ESA §7 for its operation of the National Flood Insurance Program. Plaintiffs claimed that FEMA’s flood insurance program caused urban development within the critical habitat of the ESA-listed Florida Key deer, thus triggering ESA §7 and requiring FEMA to consult with the FWS. One of FEMA’s defenses was that it had no control over the subsequent urban development, and therefore no consultation was required.

The court held that subsequent urban development was, in fact, an indirect effect of FEMA’s flood insurance program for purposes of the ESA, and that FEMA had to consult with the FWS. To make this finding, the court relied on the fact that “development is encouraged and in effect authorized by FEMA’s issuance of flood insurance.”<sup>14</sup> Given these findings, the urban development discussed in this case seems to fit squarely within the regulatory scope of indirect effects under the ESA: (1) development was caused by FEMA’s flood insurance program because no development would occur absent insurance; (2) development would occur later in time, i.e., after FEMA provided flood insurance; and (3) while no specific findings are discussed, the court apparently found that such development was “reasonably certain to occur” as a result of providing flood insurance within the Florida Key deer’s habitat.

The opposite conclusion was reached in *Center for Biological Diversity v. U.S. Dept. of Housing and Urban Development*,<sup>15</sup> where plaintiff alleged that federal agencies violated the ESA each time they provided financial assistance for development, because they failed to consult with the FWS on impacts to the umbel and the flycatcher, ESA-listed species. Plaintiff’s theory was that the federal loan programs facilitated residential and commercial development and that groundwater pumping by those developments depleted the aquifer that sustained the listed species’ riverine habitat. Applying the ESA’s indirect effect regulation, the court rejected plaintiff’s claims:

[T]o fall under the definition of indirect effects, the degradation of the San Pedro watershed must not only be “caused” by the proposed action but must also be reasonably certain to occur. Plaintiff’s argument fails at the outset as this Court cannot say with any certainty that Defendants’ financial assistance programs will cause harm to the listed species or harm that is reasonably likely to occur. 50 C.F.R. §402.02. The financial assis-

9. Preamble, *supra* note 7, at 19933.

10. 73 Fed. Reg. 76272, 76278 (Dec. 16, 2008).

11. *Id.*

12. *Sierra Club v. Marsh*, 816 F.2d 1376, 1388, 17 ELR 20717 (9th Cir. 1987).

13. 522 F.3d 1133, 38 ELR 20083 (11th Cir. 2008).

14. *Id.* at 1143.

15. 541 F. Supp. 2d 1091 (D. Ariz. 2008).

tance programs at issue here are too attenuated to affect the listed species.<sup>16</sup>

A more recent summary judgment ruling in the *Consolidated Delta Smelt Cases*<sup>17</sup> provides another application of the ESA's indirect effect regulation. That case involved a challenge to the validity of a biological opinion issued by the FWS, finding that the operations of two of the largest water projects in the nation, the California State Water Project (SWP) and the federal Central Valley Project (CVP), would jeopardize the delta smelt, an ESA-listed fish species. One of the allegations brought by plaintiff water agencies that were dependent on SWP and CVP supplies was that the FWS had conducted a faulty and overbroad indirect effects analysis by essentially holding the water projects liable for numerous adverse effects caused by other factors or stressors. The court explained: "Plaintiffs assert that the BiOp inappropriately categorizes adverse effects on delta smelt from limited food supply, invasive species, and contaminants as 'indirect effects' caused by Project Operations."<sup>18</sup> The court reviewed the ESA indirect effect regulation, the Preamble, and other authority and concluded that these alleged indirect effects had to be addressed by applying the "reasonably certain to occur" standard.<sup>19</sup>

The court then went on to evaluate, for instance, the FWS' claim that SWP and CVP operations impact delta smelt-rearing habitat indirectly by increasing contaminant concentrations, explaining that "[t]he record must reflect that contaminant-related impacts indirectly caused by Project Operations are 'reasonably certain to occur.'"<sup>20</sup> The court found that the biological opinion provided a qualitative overview of the potential issue, but that "[i]t is not clear how the BiOp or any other documents in the record links the impacts of contaminants to Project Operations."<sup>21</sup> Thus, the court found the FWS' conclusions invalid, explaining that "FWS may only count indirect effects as effects of the action if they are 'reasonably certain to occur.' FWS's contaminants analysis does not demonstrate it has complied with this requirement. It must be done."<sup>22</sup>

### III. Potential Application to Climate Change

The ESA's indirect effect regulation may have applications in the climate change arena. One particular emerging issue is the attempt by some to use the ESA to regulate anthropogenic activities allegedly contributing to climate change. These scenarios often involve using climate-sensitive species, like the polar bear, as a means by which to attempt to regulate distant activities that create some greenhouse gas (GHG) emissions and thereby allegedly cause an adverse

effect to the species. For instance, a special interest group or the Services themselves might try to hold a subdivision in Florida accountable under the ESA for climate change effects to the polar bear, under the theory that the GHG emissions caused by the subdivision contribute to climate change and the loss of sea ice needed by the polar bear.

The weak link in attempts to so regulate these actions or projects is the tangential nature of available evidence to show how any specific project affects the species at issue. Conceptually, the causal chain may be plausible, and from a purely scientific standpoint the assumption or hypothesis may be logical. But in the legal context, especially when the ESA's indirect effect regulation is applied, it becomes clear that the available evidence is usually insufficient to support a conclusion that these alleged indirect effects are "reasonably certain to occur" from the action in question. For instance, sticking with the subdivision hypothetical, is there evidence to show that the loss of sea ice and the adverse effects of that loss on polar bear survival or recovery is "reasonably certain to occur" from construction of one subdivision in Florida? Likely not.

While some may criticize this analysis as allowing the proverbial death by a thousand cuts, it comports with the current ESA indirect effect regulation and cases that have applied it. Climate change and its potential effects on the human and natural environments may well require scientific, social, and legal attention, but lawyers and advocacy groups should not attempt to force the judicial system to address an issue with a law that was not intended for that purpose. There are at least three significant factors that undermine any argument that the current ESA should be used to make the complex policy choices that climate change will likely force on society: (1) the ESA was enacted prior to awareness of climate change, and the U.S. Congress gave the issue no thought; (2) the Services apply the ESA in a manner that often affords the benefit of any doubt or uncertainty to the species; and (3) the Services and some courts have interpreted the ESA as precluding consideration of economic or other environmental or social impacts when making decisions, essentially elevating the needs and existence of any single species above all other considerations. Instead, climate change issues should be addressed after careful deliberation and debate through new comprehensive and targeted laws or regulations to account for and accommodate the numerous social, political, legal, and economic issues implicated.

### IV. Conclusion

The U.S. Supreme Court declared that Congress did not intend the ESA to be "implemented haphazardly, on the basis of speculation or surmise."<sup>23</sup> The ESA's indirect effect regulation and its "reasonably certain to occur" standard comport with that intent by preventing the Services from holding federal agency actions liable under the ESA for tangential and remote indirect effects for which nothing but

16. *Id.* at 1100-01.

17. Lead Case No. 1:09-cv-00407-OWW-DLB (E.D. Cal.), slip opinion issued Dec. 14, 2010, 2010 WL 5422597.

18. Slip op. at 155.

19. *Id.* at 157.

20. *Id.* at 163.

21. *Id.* at 166.

22. *Id.* at 167.

23. *Bennett v. Spear*, 520 U.S. 154, 176, 27 ELR 20824 (1997).

scientific hypotheses and anecdotal evidence exist. While the regulation appears to have received little attention to date, emerging complexities and tensions in resource man-

agement, including those involving climate change, may give the regulation a more important role in defining the limits of ESA liability.