Blogs
September 05, 2012
California Land Use & Development Law Report

Ninth Circuit Upholds Fish & Wildlife Service Regulations Against Environmentalists' Challenge

The Chukchi Sea off the North Slope of Alaska is a promising place for oil and gas development. But it's also home to polar bears and walruses. This clash of interests led to a lawsuit by two environmental groups against the Fish & Wildlife Service, decided by the Ninth Circuit in the Service's – and industry's – favor. The polar bear is listed as threatened under the Endangered Species Act and both species are protected under the Marine Mammal Protection Act. In 2008, in response to a request by the Alaska Oil and Gas Association, the Fish & Wildlife Service issued a final rule authorizing the incidental take of polar bears and walruses, through non-lethal disturbances, covering defined exploration activities within a specified geographic area. The court determined the Service complied with the MMPA, the ESA, and NEPA in adopting the regulations. **"Small Numbers" and "Negligible Impact" under the Marine Mammal Protection Act** The court first addressed the claim that the Service, in authorizing an incidental take under the MMPA, must make distinct and independent findings that (1) only "small numbers" of protected mammals would be taken; and (2) the take would have only a "negligible impact" on the species. The court agreed with the plaintiffs that these are two separate requirements, and that taking "small numbers" can't be defined to mean the same thing as a "negligible impact" on the species. However, it upheld the incidental take rule, finding the regulations appropriately analyzed the two issues separately. With respect to the "small numbers" issue, the court ruled that a numeric cap is not required under the MMPA and that the Service was allowed to look at the relative number of mammals that would be affected by exploration in comparison with the overall population and distribution of the species. As to the "negligible impact" issue, it found the Service appropriately evaluated how the exploration activities would affect the species' mating and survival, independently of the number of affected individuals. **Numerical Take Limit Not Required under the Endangered Species Act** The court next addressed a claim that the Biological Statement and Incidental Take Statement the Service prepared under the ESA should have contained a numeric take limit for impacts on the polar bear. The court noted that while a numeric limit is preferable under the ESA, Congress recognized there would be situations where a precise number was not possible. Here, the court concluded that, although it was "a close question", the Service provided an adequate explanation of why a numeric limit was not possible: the dynamic nature of sea ice habitats, and its influence on the seasonal and annual distributions and abundance of species, limited the Service's ability to provide a precise numerical estimate of the incidental take. The court also found that the Service used an appropriate surrogate for a numerical cap by relying on its findings under the MMPA that only a "small number" of polar bears would be affected and that only a "negligible impact" to the species would occur. The court noted that the polar bears were spread out over a large area and traveled thousands of miles per year, and that the anticipated take would result only in short-term, minimal changes in behavior. The court also noted that the plaintiffs failed to articulate any alternative measure of take. **The Service Complied with NEPA** Finally, the court rejected claims that the Service's Environmental Assessment violated NEPA by failing to consider a reasonable range of alternatives and by failing to analyze the potential impacts of a large oil spill. The court easily disposed of the alternatives claim, noting that under NEPA an EA – in contrast to an EIS – need only include a brief discussion of alternatives. The court therefore brushed aside the objection that the only alternative the EA considered was the required "no action" alternative. With regard to the possibility of impacts from an oil spill, the court emphasized that the rule applies to exploration, which involves little likelihood of a spill, and doesn't authorize development and production.

* * * * *

This case is part of a growing line of starkly contrasting decisions by the Ninth Circuit this year addressing the

obligations of federal agencies under NEPA and the ESA. Some of the decisions, like this one, have deferred to the agency's analysis, while others – like the decisions in *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012), and *Pacific Rivers Council v. U.S. Forest Service*, -- F.3d --, 2012 WL 2333558 (9th Cir. June 20, 2012) – have triggered strenuous dissents claiming well-established precedents had been flouted and new legal rules created. This year's cases highlight the unpredictability of litigating environmental cases in the Ninth Circuit. *Center for Biological Diversity v. Salazar* (9th Cir. Aug. 21, 2012)
Blog series

California Land Use & Development Law Report

California Land Use & Development Law Report offers insights into legal issues relating to development and use of land and federal, state and local permitting and approval processes. View posts by topic. Subscribe ?

View the blog