

**CLIMATE CHANGE AND THE ESA:  
Regulatory Decisions Keep  
Litigation Prospects Strong**

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# **CLIMATE CHANGE AND THE ESA: Regulatory Decisions Keep Litigation Prospects Strong**

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## **INTRODUCTION**

In two contradictory decisions announced within the space of ten days—both relating to the polar bear, climate change, and the Endangered Species Act—the Obama Administration has managed to anger parties across the political spectrum and create uncertainties about the implications of its actions and the resulting state of the law. On April 28, Interior and Commerce Secretaries Salazar and Locke announced their rescission of a December 2008 Bush Administration final rule modifying requirements for the consultation process under section 7 of the Endangered Species Act (“ESA”) (“consultation rule”).<sup>1</sup> This decision was consistent with the tone of a March 3 memorandum from President Obama directing Interior and Commerce to review the consultation rule and in the meantime requesting other agencies to use

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<sup>1</sup>Final Rule, “Interagency Cooperation under the Endangered Species Act,” 74 Fed. Reg. 20421 (May 4, 2009). The Endangered Species Act can be found at 16 U.S.C. § 1531 *et seq.*

discretion permitted under the rule to disregard parts of it.<sup>2</sup> The decision also followed a strong congressional signal later in March: in the 2009 Omnibus Appropriations Act<sup>3</sup> Congress provided explicit authority for Interior and Commerce to revoke, without ordinary administrative process, both the consultation rule and a second December 2008 rule adopted in connection with the listing of the polar bear (“special polar bear rule”<sup>4</sup>). Environmental groups like the Center for Biological Diversity hailed the April 28 revocation of the consultation rule as a “huge victory in favor of sound science and common sense,” while homebuilders and other industry groups denounced the move as adding to confusion about the role of climate change factors in ESA determinations.<sup>5</sup>

At the same time, the Center’s spokesman cautioned, “it’s only half the pie,” citing the special polar bear rule, which limited consideration of greenhouse gas and other factors outside the bears’ current range in ESA assessments: “We need to get rid of that bad Bush rule on polar bears and global warming to allow a fresh start for all wildlife under the Obama

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<sup>2</sup>White House, “Memorandum for the Heads of Executive Departments and Agencies,” Mar. 3, 2009, available at [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies/).

<sup>3</sup>Section 429, Department of the Interior, Environment, and Related Agencies Appropriations Act, 2009, part of the Omnibus Appropriations Act, Pub.L. 111-08.

<sup>4</sup>Final Rule, “Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear,” 73 Fed.Reg. 76249 (Dec. 16, 2008).

<sup>5</sup>A. Winter, *As Deadline Looms, Interior Mulls Bush’s Polar Bear Rule*, GREENWIRE, May 4, 2009, available at <http://www.nytimes.com/gwire/2009/05/04/04greenwire-as-deadline-looms-interior-mulls-bushs-polar-b-10572.html>.

administration.”<sup>6</sup> But on May 8, despite receiving letters signed by 41 House members, 130 environmental groups, 1000 scientists, and 53 law professors, all urging rejection of the special polar bear rule, Secretary Salazar declared he would keep it in place, to accompanying applause from business interests.<sup>7</sup> At a minimum, these opposite-leaning actions have left ambiguity in their wake, and a closer analysis suggests the results are not what the Administration hoped to achieve.

## **I. THE ENDANGERED SPECIES ACT AND THE CONSULTATION QUAGMIRE**

The ESA, enacted in 1973, is often cited as a prime example of federal environmental statutes that were intended for other purposes but have become enmeshed in the U.S. climate change debate.<sup>8</sup> Section 4 of the ESA provides authority to the Secretaries of the Interior (through the Fish and Wildlife Service (“FWS”)) and Commerce (through the National Marine Fisheries Service (“NMFS”)) of the National Oceanic & Atmospheric Administration (“NOAA”)) to determine which species warrant listing as endangered or threatened.<sup>9</sup> Once a species is listed, agencies that grant permits or take other federal action

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<sup>6</sup>*Id.*, quoting Bill Snape, attorney for the Center for Biological Diversity.

<sup>7</sup>A. Revkin, “U.S. Curbs Use of Species Act in Protecting Polar Bear,” N.Y. TIMES, May 8, 2009, available at [http://www.nytimes.com/2009/05/09/science/eaerth/09bear.html?\\_r=1](http://www.nytimes.com/2009/05/09/science/eaerth/09bear.html?_r=1); A. Winter, *supra* note 6.

<sup>8</sup>The other frequent example is the Clean Air Act, which the U.S. Supreme Court ruled in 2007 requires EPA to classify carbon dioxide (“CO<sub>2</sub>”) as a pollutant, *Massachusetts v. EPA*, 549 U.S. 497.

<sup>9</sup>16 U.S.C. § 1533.

affecting those species (“action agencies”) must consult with the relevant “service agency”—either FWS or NMFS, depending on the species—under ESA section 7 to ensure that the action does not jeopardize the species or result in the destruction or adverse modification of its critical habitat.<sup>10</sup> FWS and NMFS have issued joint regulations governing the consultation process;<sup>11</sup> the regulations date back to 1986 and have been criticized as cumbersome, a problem made worse by chronic under-resourcing of both agencies for implementing the consultation program.<sup>12</sup> Numerous attempts to amend the regulations have failed, due to the politically charged atmosphere surrounding ESA issues.

Under the 1986 regulations, the only way to avoid the consultation process is if an action agency determines the permit or action will have “no effect” on the species. Courts have strictly interpreted this language, and there is no de minimis way out. Indeed, even beneficial effects are subject to consultation. Once consultation occurs, the service agency can provide the action agency with assurance that the action is not likely to have an adverse affect on the species only if FWS or NMFS find the effects are wholly beneficial, insignificant, or discountable. However, this process can take a great deal of

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<sup>10</sup>16 U.S.C. § 1536. Typically, FWS has jurisdiction over terrestrial species – examples include the bald eagle and gray wolf – while NMFS is responsible for marine species such as the right whale and numerous species of salmon.

<sup>11</sup>51 Fed. Reg. 19926 (June 3, 1986).

<sup>12</sup>Passage of the 2009 stimulus legislation will add further pressure; many infrastructure and renewable energy projects will affect endangered or threatened species and require consultation.

time, and the overworked service agencies' lengthy backlogs can bring large, complex projects to a halt. And if the service agency's biologists find that the action is likely to adversely impact the species, the project may not move forward at all.<sup>13</sup>

The ESA is highly contentious due to its traditional mode of operation—it looks into how geographically close and clearly linked effects of an action impact an endangered or threatened species. The law inspires arguments over the degree of impact on the spotted owl from cutting down parts of a forest where it nests; the risks to desert creatures from new roads or developments; or the harm to salmon from diversion of water away from streams in which they spawn. But that level of controversy pales in comparison to what happens when questions relating to climate change are added to the mix.

## **II. ESA, CO<sub>2</sub>, AND A “REGULATORY NIGHTMARE”**

ESA-related climate change concerns actually predate the polar bear listing determination. In 2006, with the overall climate change debate still going strong at the national level, NMFS quietly analyzed and listed two species

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<sup>13</sup>The most famous example of this set of consequences comes from the 1978 snail darter case, in which the U.S. Supreme Court barred completion of a Tennessee Valley Authority dam on which \$100 million had already been spent, because the FWS concluded the project would result in the extinction of the snail darter, a small fish found nowhere else. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). After the Supreme Court's ruling, Congress enacted an exemption to allow completion of the dam involved in the litigation; additional populations of the snail darter were subsequently discovered in nearby streams, avoiding its extinction. See J. Widlak, *30 Years of Endangered Species Conservation in Tennessee*, at [http://www.fws.gov/cookeville/docs/endspec\\_widlak.htm](http://www.fws.gov/cookeville/docs/endspec_widlak.htm). In 1984, the species was reclassified downward from endangered to threatened, see <http://www.fws.gov/cookeville/docs/endspec/snldtrsa.htm>.

of Atlantic corals—elkhorn and staghorn corals—as threatened species under the ESA.<sup>14</sup> The listing notice identified several stressors as responsible for threatening the survival of these corals, but two climate change factors were among them: elevated sea surface temperature (a major stressor) and increased ocean acidification.<sup>15</sup> In 2007 and 2008, two decisions by a federal court in California struck down FWS and NMFS biological opinions in ESA consultations involving various species of fish in the salmon family. The court found the service agencies had failed to give due consideration to climate change effects that are likely to make the region more drought-susceptible in the future.<sup>16</sup>

But these developments were low profile compared to the poster-child appeal of cuddly polar bears desperately clinging to melting icebergs—the visual image that accompanied the polar bear listing decision. Increasing the stakes, the only factor in question in the polar bear determination was climate change, unlike the situation with corals. However, when it comes to consultation, the

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<sup>14</sup>Final Rule, “Endangered and Threatened Species: Final Listing Determinations for Elkhorn Coral and Staghorn Coral,” 71 Fed. Reg. 26852 (May 9, 2006).

<sup>15</sup>*Id.*, at 26857. In another indication of the litigious nature of these issues, the Center for Biological Diversity recently sued EPA for failure to specify ocean acidification caused by CO<sub>2</sub> emissions as a category of impaired waters under the Clean Water Act. *See*, Center for Biological Diversity, “Lawsuit Filed Against Environmental Protection Agency for Failure to Combat Ocean Acidification,” press release (May 14, 2009), [http://www.biologicaldiversity.org/news/press\\_releases/2009/ocean-acidification-05-14-2009.html](http://www.biologicaldiversity.org/news/press_releases/2009/ocean-acidification-05-14-2009.html).

<sup>16</sup>*Natural Resources Defense Council v. Kempthorne*, 506 F.Supp.2d 322 (E.D. Cal. 2007); *Pacific Coast Federation of Fishermen’s Associations v. Gutierrez*, Mem. Dec. and Order Granting in Part and Denying in Part Plaintiffs’ Motions for Summary Judgment and Granting in Part and Denying in Part Federal Defendants’ Cross-Motions for Summary Judgment, Docket 1:06-cv-00245-OWW-GSA (E.D. Cal. April 16, 2008).

issue is analytically the same whether the subject is corals, polar bears, or any other creature. After a species is listed under the ESA because of climate-change related factors, any federal “action” that adds more CO<sub>2</sub> to the atmosphere arguably makes it harder for that species to survive and recover. In such circumstances, can an action agency conclude that the CO<sub>2</sub> emissions from a new power plant, manufacturing facility, road-building project—or even a new hospital, a school, or additions to the federal vehicle fleet—would have “no effect” on a threatened or endangered species, as the courts have interpreted that term? If the actions require a federal permit, federal grant, or action of any type, many would argue consultation with either FWS or NMFS must occur.<sup>17</sup> Once the consultation process begins, as noted above, unless the service agencies conclude that the effects of the project are beneficial, insignificant, or discountable, they must find that it jeopardizes the species, unleashing the even more demanding jeopardy and take provisions of the ESA, which could easily kill the project.

It is a question of science whether the CO<sub>2</sub> emissions from a particular project can be linked to impacts on sensitive species, perhaps thousands of miles away and if so, whether those impacts should be classified as insignificant or discountable, including evaluation in light of emissions from other sources.

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<sup>17</sup>Some commentators argue that even existing federal projects trigger the obligation to consult with regard to species listed because of climate change factors. They also see the potential for enforcement actions and citizen suits under the environmental laws and ESA. See J. Kostyack and D. Rohlf, *Conserving Endangered Species in an Era of Global Warming*, 38 ENV'T'L L. REP. NEWS & ANALYSIS 10203, 10209, 10213 (2008).

At the time of the polar bear listing decision, environmental groups were lining up to argue the point, at least partly with the goal of taking the larger climate change policy issue into the courts.

Faced with this prospect, the Interior Department's May 2008 listing of the polar bear as threatened<sup>18</sup> included a number of documents setting forth the view that consultation would not be required for CO<sub>2</sub> emissions. For example, the U.S. Geological Survey, part of the Department of Interior, issued a statement that was mentioned in the polar bear press release, expressing its skepticism: "It is currently beyond the scope of existing science to identify a specific source of CO<sub>2</sub> emissions and designate it as the cause of specific climate impacts at an exact location."<sup>19</sup> Even more pointedly, FWS guidance stated, "GHG [greenhouse gases] that are projected to be emitted from a facility would not, in and of themselves, trigger section 7 consultation...."<sup>20</sup>

The Department received some support for this position: a *Washington Post* editorial the day after the polar bear listing acknowledged the need to avoid

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<sup>18</sup>Final Rule, "Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range," May 14, 2008, [http://www.fws.gov/home/feature/2008/polarbear012308/pdf/FR\\_notice.pdf](http://www.fws.gov/home/feature/2008/polarbear012308/pdf/FR_notice.pdf).

<sup>19</sup>Memorandum from Mark Myers, Director of the U.S. Geological Survey, to Dale Hall, Director of the U.S. Fish and Wildlife Service, "Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming, and Consequential Impacts," at 2 (May 14, 2008), [http://www.fws.gov/home/feature/2008/polarbear012308/pdf/Memo\\_to\\_FWS-Polar\\_Bears.PDF](http://www.fws.gov/home/feature/2008/polarbear012308/pdf/Memo_to_FWS-Polar_Bears.PDF).

<sup>20</sup>Memorandum from Dale Hall, Director of the U.S. Fish and Wildlife Service to Regional Directors, "Expectations for Consultations on Actions that Would Emit Greenhouse Gases," at 1 (May 14, 2008), <http://www.fws.gov/home/feature/2008/polarbear012308/pdf/Guidance%20to%20Employees.pdf>.

the ESA being “used as a back door way to regulate greenhouse gas emissions,” an outcome that would have been, in its words, “a potential regulatory nightmare.”<sup>21</sup> Describing the guidance documents as a “contort[ion]” to avoid FWS’s getting “dragged into setting U.S. climate change policy,” the *Post* concluded: “Though the polar bear deserves protection, the Endangered Species Act is not the means and the Fish and Wildlife Service is not the agency to arrest global warming.”<sup>22</sup>

But Interior, and, to the extent that it shared jurisdiction, Commerce, went beyond the interpretive documents issued in May. In October 2008,<sup>23</sup> the Solicitor of the Interior issued a memorandum incorporating these principles in a formal opinion. Interior and Commerce published the consultation and special polar bear rules in final form in December 2008. Environmental groups immediately challenged both rules in court and both were also subject to fast track review under the March 2009 Obama memo and the Omnibus Appropriations legislation.

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<sup>21</sup>Editorial, *The Threatened Polar Bear*, W. POST, A14 (May 15, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/14/AR2008051403241.html>.

<sup>22</sup>*Id.*

<sup>23</sup>Memorandum from Interior Solicitor Bernhardt to Interior Secretary Kempthorne, “Guidance On the Applicability of the Endangered Species Act’s Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases” (Oct. 3, 2008), <http://www.doi.gov/solicitor/opinions/M-37017.pdf>.

### **III. THE APRIL-MAY 2009 DECISIONS AND THEIR AFTERMATH**

In its most controversial provisions, the consultation rule authorized action agencies to make consultation determinations without involving FWS or NMFS in circumstances where no take was anticipated and the effects of the action were “manifested through global processes” and “cannot be reliably predicted or measured” at the individual species scale, “would result at most in an extremely small, insignificant impact,” or would pose a “remote” potential risk of harm.<sup>24</sup> Reacting sharply, environmental groups characterized the rule as “lethal,” saying that allowing action agencies to make such a determination on their own—even with the threat of judicial review—would “eviscerate the Endangered Species Act process.”<sup>25</sup>

Similarly, the special polar bear rule sparked immediate and deep-seated opposition. That rule reiterated much of the reasoning of the polar bear guidance documents and specifically excluded consideration in ESA assessments of adverse effects from actions outside the bear’s normal habitat, such as CO<sub>2</sub> emissions from facilities or projects thousands of miles away. Critics raised a number of concerns. Some felt it “falsely asserted that there was

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<sup>24</sup>73 Fed. Reg. at 76287. The rule, which was considerably narrower than the version that was originally proposed, left action agencies free to consult, presumably if they were uncertain of the analysis or wanted additional support for their conclusions in cases likely to undergo judicial review.

<sup>25</sup>See, e.g., Center for Biological Diversity, *Cleaning Up the Bush Legacy*, (undated) ([http://www.biologicaldiversity.org/campaigns/cleaning\\_up\\_the\\_bush\\_legacy/index.html](http://www.biologicaldiversity.org/campaigns/cleaning_up_the_bush_legacy/index.html)).

no direct link between specific greenhouse gas emissions and the decline in the polar bear's habitat,"<sup>26</sup> while others not only disagreed with excluding CO<sub>2</sub> emissions, but also feared the "blanket exemption" in the rule would additionally exempt more conventional sources of contaminants that could negatively affect polar bears, such as oil and gas drilling.<sup>27</sup>

With such intense objection to both rules, the Administration's decision to revoke the consultation rule came as no surprise, but Secretary Salazar's retention of the special polar bear rule sent shock waves: "Salazar's decision today is a gift to Big Oil and an affirmation of the pro-industry/anti-environmental policies of the Bush Administration," said [Center for Biological Diversity's Noah] Greenwald. "This is not the change Obama promised."<sup>28</sup> But even more tellingly, the environmental groups' reactions pointed out the inconsistency: "It makes little sense for Salazar to rescind Bush's national policy barring consideration of global warming impacts to endangered species

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<sup>26</sup>John Kostyack, Executive Director for Wildlife Conservation and Global Warming at the National Wildlife Federation, quoted in A. Revkin, *op cit. supra* note 7.

<sup>27</sup>Letter from Law Professors to Interior Secretary Salazar (May 7, 2009), [http://www.biologicaldiversity.org/campaigns/save\\_the\\_act\\_save\\_species\\_from\\_the\\_climate\\_crisis/pdfs/4\\_d\\_LawProfessorLetter-5-7-2009.pdf](http://www.biologicaldiversity.org/campaigns/save_the_act_save_species_from_the_climate_crisis/pdfs/4_d_LawProfessorLetter-5-7-2009.pdf).

<sup>28</sup>Center for Biological Diversity, "Obama Administration Adopts Bush's Polar Bear Extinction Plan As Its Own," press release, quoting Noah Greenwald, Biodiversity Program Director at the Center (May 8, 2009), [http://www.biologicaldiversity.org/news/press\\_releases/2009/esa-regulations-05-08-2009.html](http://www.biologicaldiversity.org/news/press_releases/2009/esa-regulations-05-08-2009.html).

in general, but keep that exact policy in place for the one species most endangered by global warming—the polar bear,’ said Greenwald.”<sup>29</sup>

Secretary Salazar’s press release explained his reasoning for retaining the special polar bear rule: “[T]he Endangered Species Act is not the proper mechanism for controlling our nation’s carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts – including the loss of sea ice.”<sup>30</sup> Ironically, Secretary Kempthorne said virtually the same thing one year earlier: “Listing the polar bear as threatened can reduce avoidable losses of polar bears. But it should not open the door to use the ESA to regulate greenhouse gas emissions from automobiles, power plants, and other sources. That would be a wholly inappropriate use of the Endangered Species Act. ESA is not the right tool to set U.S. climate policy.”<sup>31</sup>

## CONCLUSION

However noteworthy such concurrence in views between the former and current Administrations may be, it is not a universal sentiment. In February 2009 the Center for Biological Diversity inaugurated a \$17 million legal

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<sup>29</sup>*Id.*

<sup>30</sup>Department of Interior, “Salazar Retains Conservation Rule for Polar Bears Underlines Need for Comprehensive Energy and Climate Change Legislation,” press release (May 8, 2009), <http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=20FB90B6-A188-DB01-04788E0892D91701>.

<sup>31</sup>Department of Interior, “Remarks by Secretary Kempthorne, Press Conference on Polar Bear Listing, May 14, 2008,” <http://www.fws.gov/home/feature/2008/polarbear012308/pdf/press-conference-remarks.pdf>.

operation, the Climate Change Institute, one of the goals of which is to “establish legal precedents requiring existing environmental laws such as the Clean Air Act, Endangered Species Act [and others] to be fully implemented to regulate greenhouse gas emissions....”<sup>32</sup> Environmental groups still have legal challenges pending against the special polar bear rule, but even if it is upheld, the contrary decisions announced in April and May—rescinding the consultation rule and keeping the special polar bear rule—give rise to another set of possibilities that the Climate Change Institute or others are likely to see as an opportunity. The special polar bear rule precludes the consideration of greenhouse gas issues in assessments relating to polar bears, but it says nothing about potential impacts of those gases on other species that were also listed for climate change-related reasons, such as elkhorn and staghorn corals and, more recently, the black abalone.<sup>33</sup> Opponents of power plants had raised the issue of climate change impacts on corals even before the polar bear listing, and there is no reason to think that removing one species from the calculation will avoid the outcome Secretaries Kempthorne and Salazar both feared.

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<sup>32</sup>Center for Biological Diversity, “Center for Biological Diversity Announces Climate Law Institute, Dedicates \$17 Million to Combat Global Warming,” press release (Feb. 12, 2009), [http://www.biologicaldiversity.org/news/press\\_releases/2009/climate-law-institute-02-12-2009.html](http://www.biologicaldiversity.org/news/press_releases/2009/climate-law-institute-02-12-2009.html).

<sup>33</sup>Final Rule, “Endangered and Threatened Wildlife and Plants; Endangered Status for Black Abalone,” 74 Fed. Reg. 1937 (Jan. 14, 2009), [http://swr.nmfs.noaa.gov/bfrp/Black\\_Abalone\\_Final\\_Rule.pdf](http://swr.nmfs.noaa.gov/bfrp/Black_Abalone_Final_Rule.pdf). Climate change-related factors cited in the listing were increases in ocean temperatures and rising sea levels.

For that matter, even if the new Administration had kept the consultation rule in place, it is unlikely that ESA-climate change lawsuits would have died away. On May 27, a coalition of environmental groups sued the FWS, challenging its designation of critical habitat for the Canadian lynx (invoking another part of the ESA) for failure to take into account projected changes attributable to climate change.<sup>34</sup>

The ESA has long been notorious as a litigation magnet, and the recent split decision on the consultation and special polar bear rules does not appear to have hindered the ability of those who see it as a useful tool for advancing larger climate change policy objectives, targeting unwelcome CO<sub>2</sub> emitting facilities and projects wherever they may be located.

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<sup>34</sup>P. Reis, *Climate Concerns Prompt Lawsuit over Lynx Habitat*, GREENWIRE (May 27, 2009), <http://www.nytimes.com/gwire/2009/05/27/27greenwire-climate-concerns-prompt-lawsuit-over-lynx-habi-19713.html>. Critical habitat designation falls under section 4 of the ESA, 16 U.S.C. § 1533.