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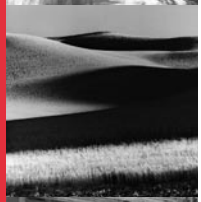
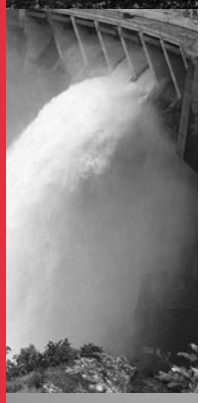

THE FEDERAL GOVERNMENT'S CLIMATE CHANGE POLICY AND THE ROLE OF CARBON CAPTURE AND STORAGE

Article by Nigel Bankes

In April 2007, the federal government introduced a new greenhouse gas policy, *Regulatory Framework for Air Emissions* (online: http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=4F2292E9-3EFF-48D3-A7E4-CEFA05D70C21).[1] On 10 March 2008, it tabled a series of additional documents: (1) *Taking Action to Fight Climate Change*, (2) *Regulatory Framework for Industrial Greenhouse Gas Emissions*, (3) *Canada's Offset System for Greenhouse Gases*, (4) *Canada's Credit for Early Action Program*, and (5) *Detailed Emissions and Economic Modelling* (online: http://www.ec.gc.ca/default.asp?lang=En&n=75038EBC-1#m10). These documents provide further guidance and detail on the implementation of the April 2007 proposals. Further details will be provided when the promised regulations appear in draft form but that will not happen before the fall of 2008.

In the meantime, we can see that the policy seeks to encourage the widespread adoption of carbon capture and storage (CCS) technology as a means of achieving the proposed intensity-based targets.[2] The purpose of this comment is analyse how the policy accommodates and encourages the adoption of CCS. In order to do that it describes the original April 2007 policy before turning to examine the elaborations and refinements contained in the most recent March 2008 documents.

The April 2007 Policy

The April 2007 policy is based on the concept of reducing the emissions intensity of key parts of Canada's industrial sector. Emissions intensity refers to the amount of carbon dioxide (or equivalent in terms of global warming potential) CO_2e emitted per unit of production. An improvement in emissions intensity therefore will reduce the amount of CO_2e emitted per unit of production but will not actually reduce total emissions if the industrial sector grows at a faster rate. The April 2007 policy adopted 2006 as its base year for these targets rather than the Kyoto base year of 1990.

The April 2007 policy distinguishes between existing facilities and new facilities. Existing facilities will be required to make a 6% improvement each year (from a 2006 base level) beginning in 2007. Since the regulations have yet to be put in place the policy contemplates that these reductions will not be enforceable until 2010 but by then existing facilities will have to have achieved a cumulative 18% reduction in emissions intensity (3 years @ 6% per year).

A new facility is a facility whose first year of operation is 2004 or later. New facilities will be allowed to come on stream and will have a three-year grace period before being required to reduce their emissions intensity. After that, the new facility will be required to improve its emission intensity by 2% a year. The initial standard will be based on so-called "clean-fuel standards" which in most cases will likely be the emissions profile that would result if the facility were to use natural gas.

The 2007 policy contemplated that regulated emitters would be able to comply with their

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RÉSUMÉ

Suite à la divulgation en avril 2007 de son nouveau plan d'action pour réduire les gaz à effets de serre, le gouvernement du Canada a dévoilé d'autres documents en mars 2008 qui développent divers aspects de cette politique. Des règlements ont été annoncés pour l'automne 2008. Les technologies de captage et de stockage du carbone (CSC) font partie intégrante de cette politique de quatre façons: (1) les émetteurs réglementés pourront atteindre leurs cibles en utilisant le CSC; (2) les projets de CSC se qualifieront comme projets de compensation; (3) une entité réglementée pourra allouer ses contributions à un fonds technologique à un projet de CSC; et (4) les technologies de CSC seront utilisées pour déterminer les cibles relatives à l'intensité des émissions pour les nouveaux projets (après 2012).

targets in a number of ways. These include: (1) actual reductions in emissions by the regulated entity through various means (including adoption of CCS technology), (2) contributions to a "climate technology fund", and (3) emissions trading.

Contributions to the climate technology fund will be at the rate of $15 per tonne from 2010 through 2012 and $20 per tonne effective 2013 and escalating thereafter at the rate of growth of nominal GDP. A firm cannot meet its entire reduction commitments through this mechanism but is subject to an initial cap of 70% falling to zero in 2018 such that contributions to the fund will no longer serve as a compliance option.

The 2007 policy contemplated that emissions trading could be used in several ways to meet commitments including, trading between regulated entities, purchasing credits through the Kyoto Clean Development Mechanism (maximum of 10% per firm) and purchasing credits through a domestic offset system with possible linkages to other trading systems both in North America and globally.

An offset system is designed to provide incentives to reduce emissions in other sectors of the economy beyond the regulated sector. The basic idea is that projects developed by non-regulated entities that produce actual, verifiable and additional (*i.e.*, not required by law) reductions in emissions may produce certifiable emission reduction credits than can be traded to a regulated entity and used to satisfy (*i.e.*, offset) the emission reduction obligations of the regulated entity.

Criticisms of the April 2007 Policy

There have been numerous criticisms of the 2007 policy.[3] Among the more important are these:

- The policy is based on the concept of improving emissions intensity rather than achieving absolute reductions in CO_2e emissions which is what the Kyoto Protocol actually requires.
- The policy adopts a 2006 base year rather than the Kyoto prescribed base year of 1990. Measured against a 1990 base year the federal proposals are far less aggressive than they appear when measured against 2006 emission levels.
- Significant sectors of the economy are not subject to direct regulation and estimates of the capacity of the unregulated sector to deliver actual reductions in emissions, whether by way of the offset program or in other ways, are speculative.
- Federal estimates as to absolute reductions in greenhouse gas emissions are therefore highly speculative and likely optimistic.
- The default price of carbon (effectively established by the contribution rates to the technology fund) is too low to stimulate real innovation and in particular too low to encourage the widespread adoption of CCS.

The March 2008 Policy Papers

The March 2008 policy papers are designed to flesh out the structure provided in April 2007 and to provide

some necessary clarifications. There have been no significant changes in the broad outlines of the 2007 policy but there have been interesting elaborations with respect to the coverage of the scheme, the technology fund and the offsets scheme. In addition, the documents also provide further guidance as to how carbon capture and storage may be integrated into the policy framework. Most of the discussion below is based upon the document entitled *Turning the Corner: Regulatory Framework for Industrial Greenhouse Gas Emissions*.

Coverage

The term "coverage" refers to the entities that are subject to direct regulation (as opposed to those who might be incented to participate in achieving sink or emission targets through an offset scheme). The regulatory framework contemplates "covering" ten major industrial sectors including the electricity sector, oil and gas and fertilizers and chemicals. Perhaps the most important point for present purposes is that the scheme's coverage is significantly broader than the provincial *Specified Gas Emitters Regulation* (*SGER*), Alta. Reg. 139/2007. The *SGER* applies to designated facilities that emit more than 100,000 tons CO_2e per year. The proposed federal regulations will apply to chemical, fertilizer and natural gas pipeline operations that emit more than 50,000 CO_2e per year, to electricity generators of more than 10 MW and to upstream oil and gas facilities with minimum emissions of 3,000 CO_2e "and 10,000 BOE/day/company." However, the federal framework does hold out the prospect of further discussions with the provinces in order to seek (at 8) "a common practical approach to emissions coverage".

The Technology Fund

The 2008 Regulatory Framework retains the fund approach as an alternative means of achieving compliance. This is significant for at least two reasons. First, it has some implications for how the federal government will seek to justify the constitutionality of the overall scheme. There is at least some reason for thinking that if a regulated entity can meet a supposed prohibition by contributing to a research fund, then it will be difficult to justify the overall regulatory scheme on the basis of the federal parliament's criminal law power. Second, and more pragmatically, the existence of the fund option for compliance may make it easier to integrate federal and provincial schemes and especially Alberta's *SGER*. In this context industry will no doubt take huge comfort from the suggestion in the federal policy that a contribution to a provincial fund may satisfy both provincial and federal requirements (at 16):

> "Contributions to other funds that meet all the necessary requirements could potentially be recognized; in particular, contributions to provincial funds. As with the federal fund, a firm contributing to such a fund would be eligible to receive credits, at the contribution rate and up to the contribution limit.
>
> The decision to recognize another fund will be the responsibility of the federal government. To ensure a nationally consistent approach, other funds would be required to fulfill equivalent mandate and criteria as those governing the technology fund."

Additional flexibilities that are built into the fund compliance option are dealt with below under the heading "carbon capture and storage".

The March 2008 documents also contain the important statement that fund contributions will not be used to effect inter-regional wealth transfers (at 3) suggesting that there will be considerable room for negotiations between the provinces and the federal government to determine eligible investments for the Fund.

The Offset Scheme

The March 2008 documents offer considerably more guidance on the proposed domestic offset scheme not least because they devote a specific paper to this topic. The main *Regulatory Framework* offers the following guiding principles (at 17):

- Offset projects must achieve emission reductions or removals and should provide a net environmental benefit.
- Reductions or removals must occur in Canada.
- The system will promote projects in as many sectors and for as many project types as practical.
- The system must be as simple and cost-effective to administer as possible, and the administrative burden for participants should be minimized.
- The system will build on the experience of Canadian pilot projects and the work of other jurisdictions.

Further guidance is offered on the incremental or additionality criterion as follows (at 17):

- Reductions or removals must be beyond a baseline;

- Reductions or removals must be surplus to all legal requirements, including the regulations under this framework, whether federal, provincial, territorial, or regional;
- Reductions or removals must be beyond what is expected from receipt of other climate change incentives from a provincial or territorial government, or the federal government;
- Only projects that began to achieve their emission reductions or removals after 1 January 2000, will be eligible; and
- Only those emission reductions or removals that take place after 1 January 2008, may generate credits.

Further discussion of the details of the offset scheme is properly the subject of another comment.[4]

Carbon Capture and Storage and the Federal Policy Documents

The federal policies contemplate that CCS projects may be relevant to compliance strategies in at least four ways. First, and most obviously, a regulated entity may engage directly or indirectly in a CCS project for its own emissions stream in order to meet its obligations. Second, a merchant CCS project created by a third party and sequestering emissions from non-regulated entities may qualify as an offset project, and a regulated entity may purchase credits generated by such a project in order to satisfy its own obligations. Third, a regulated entity may choose to dedicate contributions to the technology fund to a CCS project. In this context the current March 2008 papers offer considerably enhanced flexibility for regulated entities in targeting their contributions through a mechanism described as "pre-certified investments" (dealt with in more detail below). And finally, the policy indicates that CCS will be used (presumably in much the same manner as the clean fuel standard for post 2004 projects) to determine the emissions intensity target for new facilities that come on stream post-2012 in the oil sands and electricity sectors.

The policy also offers additional flexibility to so-called new projects in certain eligible sectors (oil sands, electricity, petroleum refining, chemical and fertilizer sectors) who seek to comply by using CCS. As stated above, new projects (*i.e.*, post 2004 facilities including significant expansions) must meet a continuous 2% improvement requirement after three years in service. The March policy provides (at 10):

> "In those sectors in which carbon capture and storage is a viable option for reducing emissions, for new facilities that do not meet the cleaner fuel standard but that are built capture-ready, the standard would not apply until 2018. This would mean that the 2% annual continuous improvement target would apply to the facility's actual emission intensity. This incentive for carbon capture and storage will apply to the oil sands, electricity, petroleum refining, chemical, and fertilizer sectors."

This seems to offer an additional opportunity to defer the entry into force of the requirement in much the same manner as existing facilities have been put on notice that they must achieve a 6% per annum improvement effective 2007 while understanding that this will not bite until 2010 when the regulations come into force. In the same manner a "new facility" within one of the eligible categories will be subject to the 2% per annum improvement but the cumulative requirement of this improvement will not enter into force until 2018 provided that the new facility is built "capture-ready". The effect of this is to create two categories of "new project" for the purposes of the regulatory framework.

Pre-certified Investments and CCS

The April 2007 policy as outlined above proposed to cap the extent to which a regulated emitter might meet its commitment by contributing to the Fund. The March 2008 documents maintain that general policy but add several flexibilities. The first is that a regulated entity instead of contributing to the general Fund may instead receive the same credits (but subject to the same caps) if it invests directly in "large-scale and transformative projects, either its own or joint-venture projects, selected by the firm from a menu set out by the federal government". Second, one such category of pre-certified investments will be CCS projects for the oil sands and coal fired electricity sectors. In this case the March 2008 policy contemplates that a company will be able to meet 100% of its regulatory obligation by investing in such a project. This additional compliance eligibility is stated to be limited (at 16) to "firms that can make direct use of carbon-capture-and-storage technology in the following sectors: oil sands, electricity, chemicals, fertilizers and petroleum refining".

An Assessment of the March 2008 Documents

The fundamental criticisms voiced above with respect to the original April 2007 policy statements remain. In particular the current scheme remains committed to an emissions intensity approach rather than an approach of absolute emission reductions.[5] This

seems particularly problematic given the three year free ride accorded to "new facilities". Similarly, the default price of carbon remains unrealistically low.

But in addition to these criticisms which retain their currency these most recent elaborations are open to the criticism that they add layer upon layer of complexity, especially with respect to the Fund mechanism of compliance and its application to pre-certified investments generally, and CCS projects specifically.[6] It is not hard to imagine the politics, lobbying and federal/provincial negotiations that will unfold as particular projects seek "pre-certified" approval. In short, while CCS is a vitally important mitigation technology which requires and deserves support it is questionable whether the federal government has adopted the best mechanism for encouraging its uptake. A higher price for carbon might be a cleaner, clearer, fairer and more efficient method of securing adequate investment in CCS technology.

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Notes

1. The Pembina Institute (Matthew Bromley) provides a useful analysis and critique (28 May 2007), online: http://pubs.pembina.org/reports/Reg_framework_comments.pdf.
2. For a review of the legal and regulatory issues associated with CCS, see N. Bankes, J. Poschwatta & E.M. Shier, "The Legal Framework for Carbon Capture and Storage in Alberta" forthcoming in the Alta. L. Rev. [tentatively, (2008), 45 Alta. L. Rev. 1-46].
3. See, for example, Bromley, *supra* note 1.
4. There is at least one surprise in the Offsets Paper (at 13, para. 54). It appears that the federal government proposes to treat forest management projects as eligible for generating sink credits even though Canada has not elected to include forest management in its national inventory for Kyoto compliance purposes.
5. The 2008 Regulatory Framework does refer somewhat obliquely to a continuing "in principle" commitment to transitioning to fixed emission caps in the 2020-2025 period but provides little guidance as to how this is to be achieved (at 21):
   "The anchor for the fixed cap will be the national objective of a 20% absolute reduction in greenhouse gas emissions from 2006 levels by 2020. The level of the cap on industrial emitters will be informed by the results of the application of the emission-intensity system.
   As well, any decision in Canada on the transition to a fixed-cap regime for greenhouse gas emissions would take into account developments occurring in other countries, especially the United States, with the aim of establishing a North American emissions trading system once the United States implements a greenhouse gas regulatory system."
6. It will be necessary, for example, to ensure that regulated entities don't engage in double dipping — investing in CCS projects and claiming Fund credits but also using the project to claim reduced emissions.

POLAR BEARS: THE IMPLICATIONS OF AN ESA LISTING FOR THE CONTINUING CONSERVATION HUNT OF BEARS

Article by Nigel Bankes ◆◆

The polar bear management regimes of northern Canada currently permit a quota harvest of bears. These regimes are based on the terms of territorial wildlife legislation and modern land claim agreements such as the Nunavut Land Claim Agreement.[1] A quota is determined for each discrete population of bears[2] and that quota is then allocated by agreement between the different communities that have access to the population. It is up to each community to allocate the resulting tags and the community may do so in a variety of ways. In particular, a community may decide to reserve a certain number of tags to be sold to foreign hunters as part of a so-called conservation or sport hunt. These hunts generate significant economic benefits for isolated communities and also offer cultural benefits insofar as the hunt is pursued by sled and dog team and helps keep hunters on the land pursuing culturally meaningful activities.[3] The hunt operates as an exception to the broad "no taking" provision of the international Agreement on the Conservation of Polar Bears (ACPB) negotiated by the polar bear range states in 1973.[4] The term conservation hunting refers generally to regulated quota hunts that provide both conservation benefits

to wildlife populations and social and economic benefits to local communities. Conservation hunting is practised worldwide often as a means of providing local communities with an incentive to conserve threatened or endangered species or their habitat and frequently in association with export quotas for animals that are listed under the Convention on International Trade in Endangered Species (CITES).[5]

There is currently much discussion in the media as to the continued viability of the hunt in light of the still outstanding proposal to list polar bears as threatened under the US *Endangered Species Act* (*ESA*) (1973), principally on the basis of habitat loss due to climate change.[6] This short comment unpacks that claim by examining the legal framework that currently permits the conservation hunt by US hunters. It then considers the consequences of an *ESA* listing. The comment concludes with an assessment of the effect of a possible listing decision on US climate change policy. The comment does not deal with the merits of the proposed listing decision[7] or more generally with the effect of climate change on polar bear habitat.[8] My focus is much narrower and the question for present purposes is simply this: assuming that the US decides to list polar bears what will be the implication of such a listing for a conservation hunt of bears by American hunters in Canada?

The conservation hunt is only viable for so long as foreign hunters are able to take the trophy home by exporting it from Canada and importing it into their home state, whether that be the United States, a European country or any other country in the world. International law does not prohibit such trade although it does regulate it under the terms of CITES. Polar bear is listed under Appendix II of that Convention which means that no trophy may enter into international trade unless the scientific authority of the state of export has issued a "no detriment" finding under the terms of Article IV of the Convention. Such findings are typically based on population surveys and quota determinations of the type used in northern Canada.[9]

In sum, polar bears and trophies can be exported from Canada for so long as the relevant authority is able to conclude that a population can sustain a hunt and that the specimen in question has been lawfully harvested as part of the quota for that population. Of greater concern to the sport hunter is the domestic law of his or her home state, the state of import. Such domestic laws may establish standards that are more stringent than the general rules provided by CITES[10] so long as such rules are compatible with international trade rules. The *Marine Mammal Protection Act* (*MMPA*) of the United States is particularly relevant in this context.

First enacted in 1972 at about the same time that both CITES and the ACPB were negotiated, the *MMPA* contains two main prohibitions, a very broadly framed prohibition on the taking of marine mammals and a prohibition on imports. The polar bear is treated as a marine mammal for the purposes of this statute. The *MMPA* contains a number of generic provisions allowing the Secretary to issue permits to authorize an import that would otherwise be prohibited but these general provisions (discussed in more detail below) proved to be onerous and difficult to trigger.

But in 1994 the US hunting and sustainable use lobby procured an amendment to the *MMPA* (now s. 104(c)(5)(A)) which provided a different permitting procedure for sport hunted bears from "approved" Canadian populations. The new section allowed Fish and Wildlife Service (FWS) to issue permits to import polar bear parts taken in sport hunts in Canada provided that FWS had made a finding that, *inter alia*, "Canada has a sport hunting program based on scientifically sound quotas ensuring the maintenance of the affected population stock at a sustainable level". Pursuant to that provision the US FWS "approved" a number of populations including South Beaufort Sea, North Beaufort Sea, Viscount Melville Sound, Lancaster Sound, and Norwegian Bay.[11] An approval that was issued for the M'Clintock Channel population was rescinded in light of revised population estimates.

It is this special provision of the *MMPA* which serves as one of the essential conditions precedent to a continued sport hunt of Canadian polar bears by American hunters. If this exception were to be removed it would still be lawful for communities in Nunavut to allocate a portion of the quota to a sport hunt, and it would still be lawful for a US hunter to shoot a bear in Nunavut, but that hunter would no longer be able to rely upon the "approved population" exception in order to be able to obtain the necessary permit for an import to the United States. Consequently, unless such a hunter was able to secure a permit under the general provisions of the *MMPA* importation into the United States would be illegal.

What then is the effect of an *ESA* listing on the Canadian polar bear permit exception? It seems fairly clear for reasons discussed below that an *ESA* listing

will render the Canadian polar bear permit exception nugatory. In summary the reasons are as follows: (1) the *MMPA* deems a species that is listed under *ESA* to be "depleted" within the meaning of the *MMPA*, (2) once a species or populations is considered to be depleted for the purposes of the *MMPA* the grounds upon which exceptions to the general prohibition on imports can be granted are narrowed, thereby effectively eviscerating the Canadian polar bear exception. The argumentation to support this conclusion is as follows.

The *MMPA* does not use the terms "endangered" or "threatened". Instead it uses the cognate term "depleted". Under the *MMPA* a species is depleted where the Secretary determines that a species or population stock is below its optimum sustainable yield, or if a species or population stock is listed as endangered or threatened under *ESA*. It follows therefore that any decision under *ESA* to list bears or particular populations as threatened will automatically result in the species or population also being considered to be depleted for the purposes of the *MMPA*. No further administrative action will be required; it will happen automatically.

ESA listing is pivotal for the purposes of the application of that statute (*i.e.*, *ESA*). Simply put the substantive provisions of that statute only apply to listed species. *ESA* has little to say about species that are not listed other than to describe the process for listing. But the *MMPA* is different. Curiously enough the key substantive provisions of the *MMPA* (the prohibition on taking and the prohibition on import) apply even though the particular species or population has yet to be determined to be depleted.[12] So what then is the incremental effect of depleted status?

Depleted status limits the grounds upon which the Secretary may issue a permit exempting an activity from the "no take" and "no import" provisions of the *MMPA*. The general "moratorium" provision of the *MMPA* (s. 101(a)) contemplates that permits may be granted for take or import on any of the following grounds: (1) scientific research, (2) public display, (3) photography for educational or commercial purposes, (4) for enhancing the revival or recovery of a species or stock, or (5) where the specimen was taken in a sports hunt in Canada. Each of these permit grounds is further elucidated in section 104 and I have discussed the Canadian exception as one such example above.

But this general statement of available exceptions is qualified in the very next section, the prohibition section (s. 102(b)), which provides that it is unlawful to import a marine mammal that is designated as depleted.[13] And unlike the general permitting provision, this paragraph goes on to provide that the Secretary may *only* issue a permit "for *enhancing* the survival or recovery of a species or stock" (emphasis supplied).[14] The necessary implication of this combination of provisions is that the Secretary *cannot* issue a permit on any other grounds and in particular *cannot* issue a permit on the basis of the Canadian sports hunt provision. Thus, deemed depleted status effectively suspends the operation of the Canadian sport hunt provision for so long as polar bear continues to be listed under *ESA* (and therefore depleted under the *MMPA*).[15] Furthermore, the threshold for triggering this highly restricted general permit provision is clearly much higher (and likely unattainable even where the bear is harvested from a healthy population[16]) than the applicable threshold under the Canadian permit provision. In sum, the more specific prohibition provision of subsection 102(b) applying to depleted stocks (and with its more limited category of permitted exceptions) will trump the more general moratorium provision of section 101 (with its broader and more generous range of exceptions).

Assessment

There are no doubt multiple concerns that led the petitioners to propose listing of polar bear, not just in the United States but throughout its range. Some were undoubtedly convinced of the threat posed by climate change to polar bear populations. Others would simply be opposed to hunting. Still others, perhaps most, believed that a listing decision would likely draw increased attention to the problem of climate change and US inaction on the issue. But will a listing decision result in concrete action with respect to US policy on climate change? There are reasons to be very sceptical. The most powerful provision of *ESA* is section 7 which provides that every federal agency shall ensure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. In order to implement this provision federal agencies may be required to prepare biological opinions or assessments.

There are several reasons for thinking that it will be difficult to apply this provision broadly in the context of agency decisions related to climate change (*e.g.*,

permitting decisions for new power plants in the lower 48 whose only impact on polar bears or polar bear habitat will be greenhouse gas emissions).[17] First, one key trigger requires the designation of critical habitat, but it seems clear that the FWS will be reluctant to do this any time soon.[18] Second, the recent decision of the US Supreme Court (*National Association of Homebuilders et al. v. Defenders of Wildlife et al.*[19]) suggests that the majority of the Court will be reluctant to accord *ESA*, and in particular section 7, a broad meaning in relation to agency activity in this context.

Will a listing decision offer US authorities greater input into Canadian polar bear management practices than it already has? Will it afford the US FWS any (or additional) influence over the number of bears harvested in Canada? The answer here is an unequivocal "no". The current Canadian permit provision of the *MMPA* affords US FWS significant oversight in relation to Canadian practices. The Fish and Wildlife Service gets to exercise this both directly (*approving* the management of specific populations) and indirectly (*e.g.*, by commenting on Canadian population estimates and methodologies and use of traditional ecological knowledge) at meetings of the international Polar Bear Specialists Group.[20] Listing, with the concomitant narrowing of the exemption provision of the *MMPA*, will *reduce* rather than *enhance* the influence of US FWS; Canadian managers and community harvesters will no longer need to pay heed to the view of US FWS since there will be no prospect of imports of polar bear trophies into the United States. Certainly, the US has long acknowledged in the context of *ESA* (rather than the *MMPA*, but the point is the same) that it is the permit provisions of *ESA* that affords the US some degree of influence over the management of threatened or endangered species beyond US borders since none of the main protective provisions of the legislation (no take, no jeopardy, critical habitat) have any application outside the US.[21]

In sum, the proposal to list polar bears under *ESA* has certainly attracted a lot of media attention. It may also have changed the minds of some climate change sceptics. But a listing decision will likely not require revision of US government climate change policies or have a serious effect on government decision making, except perhaps in relation to oil and gas and other resource activities directly within or connected to polar bear habitat.

On the other hand, it seems crystal clear that listing will have an immediate and detrimental effect on the conservation hunt currently conducted in Canada.

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Notes

1. For a discussion of the wildlife provisions of this agreement see N. Bankes "Implementing the Fisheries Provisions of the Nunavut Claim: Re-Capturing the Resource?" (2003) 12 J.E.L.P. 141-204.
2. Polar bear scientists currently identify some 19 different sub-populations of bear. See the most recent report of the IUCN Polar Bear Specialist Group (PBSG), Proceedings of the 14th Working Meeting of the IUCN/SSC Polar Bear Specialist Group, Seattle, Washington, 20-24 June 2005, at 33, online: http://pbsg.npolar.no/docs/PBSG14proc.pdf.
3. M.M.R. Freeman & G.W. Wenzel, "The Nature and Significance of Polar Bear Conservation Hunting in the Canadian Arctic" (2006) 59 Arctic 21.
4. Oslo, 15 November 1973. The best discussion of the Agreement is Donald C. Baur, "Reconciling Polar Bear Protection under United Sates Law and the International Agreement for the Conservation of Polar Bears" (1996) 2 Animal Law 9.
5. Washington, 3 March 1973, online: http://www.cites.org/. And for more general discussions of the sustainable-use debate under CITES and covering a range of species (elephant, leopard, black rhino), see, for example, John L. Garrison, "The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use" (1994) 12 P.E.L.R. 301-392; Andrew Heimert, "How the elephant lost his tusk international ban on ivory trade" (1995) 104 Yale L.J. 1473-1506; Michael J. Hickey, "Acceptance of Sustainable Use within the CITES community" (1998-99), 23 Vt. L.R. 861-884; Scott Hitch, "Losing the Elephant Wars: CITES and the 'Ivory Ban'" (1998) 27 Ga. J. Int'l & Comp. L. 167-197; Jon Hutton, "Exploitation and Conservation: Lessons from Southern Africa" in Milton M.R. Freeman, Robert J. Hudson & Lee Foote, eds., *Conservation Hunting: People and Wildlife in Canada's North*, Occasional Publication No. 56 (Edmonton: Canadian Circumpolar Institute, 2005) at 28-36.
6. For the proposed listing decision see (2007) 72 Federal Register 1063, online: http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/Polarbear_proposed_rule.pdf. US FWS should have made a final ruling in January 2008 but it has deferred that decision.
7. Listing is proposed on two grounds: (1) the effect of climate change on polar bear habitat (sea ice) and the habitat of its principal prey species, and (2) the lack of effective domestic and international regulation to deal with the loss of polar bear habitat. Rather curiously the

Draft rule completely fails to discuss the two international instruments that have the most to say about climate change: the Framework Convention on Climate Change and the Kyoto Protocol.

8. Scientists agree that some populations of bear will be affected earlier and more seriously by climate change than others (commentators frequently mention the southern Hudson Bay population as a population that is likely to be more vulnerable than others). The point for present purposes is simply this: not all populations are equally vulnerable (loss of sea ice will occur earlier in some areas than others); some populations may be considered to be healthy and may even experience increased recruitment in the near future. The fact that some populations may be threatened by climate change does not require the conclusion that all populations are so threatened. It is also important to note that the proposal is to list polar bear throughout its range. US FWS does not seem to be pursuing listing on the basis of distinct population segments (DPS). On the DPS policy see "Policy Regarding the Recognition of Distinct Vertebrate Population Segments under *ESA*" (1996) 61 Federal Register 4722 and for discussion of the DPS issue Holly Doremus, "Listing Decisions under the Endangered Species Act: why better science isn't always better policy" (1997) 75 Wash. U.L.Q. 1029.
9. Greenland imposed a temporary ban on exports of polar bear effective 1 April 2008, pending a report from its scientific authority on a no detriment finding, online: http://www.nanoq.gl/English/Nyheder/2008_feb_Temporary_bear_ban.aspx.
10. See CITES Article XIV(1).
11. US FWS will not approve a population that is shared by different user groups in the absence of an agreement on the allocation of a harvestable quota.
12. This feature of the *MMPA* renders it vulnerable to a trade law challenge in an appropriate case since it follows that it prohibits imports in some circumstances even where there is no conservation concern whatsoever — the prohibition on imports is triggered simply by something being a marine mammal.
13. The prohibition also applies to pregnant and nursing mammals and inhumane takings.
14. There is one other generic exception (scientific research) and a more specific exception (necessary for the protection of the welfare of the animal) which only applies to pregnant and nursing mammals.
15. In this context it seems somewhat disingenuous for US FWS in the Proposed Rule (*supra* note 6 at 1099) to state that: "Regarding ongoing importation of polar bear trophies taken from approved populations in Canada into the United States, we anticipate conducting an evaluation of the merits of continuing the presently authorized imports."
16. See *supra* note 8.
17. See John Kostyak & Dan Rohlf, "Conserving Endangered Species in an Era of Global Warming" (2008) 38 E.L.R. 10103-10213. The authors discuss (at 10209) the reach of s. 7 and note that if it does have a broad application it will exponentially increase the need for inter-agency consultations. They question whether this is "practical or even possible". They argue later (at 10212) that the Services (FWS and NMFS) "should construe any action that results in non-trivial net increases of greenhouse gases as meeting" the s. 7 threshold. They then propose a number of measures that might be adopted to deal with the ensuing applications. Key is the idea that projects that demonstrate compliance with a national cap would not trigger a need for further consultations (unless they posed a more direct threat to a listed species). But, as the authors acknowledge, the key difficulty here is that "no national GHG cap currently exists".
18. Proposed rule, *supra* note 6 at 1096.
19. 551 US ____ (2007) slip opinion.
20. The PBSG was created before the international agreement (ACPB) but it continues to meet to discuss polar bear science and management issues. In the past, the US and others have used this forum to question population modeling in Nunavut and the use of TEK in Nunavut. See the discussion at the most recent PBSG meeting in Seattle in 2005, *supra* note 2.
21. See in particular US FWS Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Federal Register 49512 (2003).

NEW PUBLICATIONS

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by Jenette Poschwatta, 2008. 54 pp. Occasional Paper #24. $20.00 (softcover) (download available)

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by Michael M. Wenig and Jenette Poschwatta, 2008. 41 pp. Occasional Paper #22. $15.00 (softcover) (download available)

Alberta policy makers are developing a "comprehensive energy strategy" which is sorely needed to guide Alberta through the many energy crossroads that it now faces. This paper focuses on the strategy's "comprehensive" aspect, by analyzing why the energy strategy needs to be "comprehensive", what factors must be considered in developing the strategy, and what components must be included in the strategy, to make it "comprehensive". Our analysis of "comprehensiveness" stems from an energy systems perspective, which attempts to account for all energy forms and all other physical and institutional energy system parameters, and the linkages among those energy forms and system parameters. After identifying these energy system characteristics, and several fundamental policy issues that need to be addressed, the paper cautions that, because of the inherent complexities, the development of a "comprehensive" energy strategy requires a continuous, iterative process and a special focus on cross-cutting tools.

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