# Client Alert

**January 2013**

## Polar Bear Critical Habitat Rule Set Aside

On January 11, 2013, the U.S. District Court for the District of Alaska set aside a final rule issued by the U.S. Fish and Wildlife Service (Service) in 2010 that designated more than 187,000 square miles of land and coastal waters in Alaska as critical habitat for the polar bear. The polar bear is listed as "threatened" under the federal Endangered Species Act (ESA). Several oil and gas companies, Alaska Native groups, and the state of Alaska challenged the critical habitat rule. The court granted summary judgment for the plaintiffs in a 50-page ruling, finding that the Service failed to establish sufficient evidence to support the rule. In particular, the court held that the Service failed to demonstrate that much of the designated area contained the features needed to support critical habitat designation, such as area denning or rearing areas. The decision may establish an important landmark on the sufficiency of evidence and validity of scientific methods used by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) in ESA listing and designation decisions.

The court held that the critical habitat rule was arbitrary and capricious because the rulemaking record lacked evidence to support the Service's designation of 187,157 square miles as critical habitat for the polar bear. The ESA specifies that the Service can only designate "*specific* areas within the geographical area occupied by the species, at the time it is listed … , *on which are found* those *physical or biological features* (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i) (emphases added). The court explained in detail that the rulemaking record did not demonstrate the existence of required features on much of the designated land, and warned that "[a]n agency cannot simply speculate as to the existence of such features." (Slip op. at 37-38.) For example, in Unit 2 of the designated area—which was designated on the basis of its potential use for polar bear denning—the court found that "the Service has identified [necessary] physical or biological features in approximately one percent of Unit 2, but fails to point to the location of any [such] features in the remaining ninety-nine percent." (*Id*. at 40.) Notably, based on the lack of sufficient evidence to support the designation, the court did not reach the validity of the scientific methods employed by the Service. The court concluded that it was premature to decide whether the Service had used the "best scientific data available" in designating much of the land because there was "no clear scientific evidence to review." (*Id.* at 42.)

The court also held that the Service did not meet its procedural duties under the ESA because the Service failed to provide "a written justification for [declining] to adopt regulations consistent with" comments submitted by the Alaska Department of Fish and Game (Agency). *See* 16 U.S.C.§ 1533(i); 50 C.F.R. § 424.18(c). In a letter from the Service to Alaska Governor Sean Parnell, the Service did not address the letter to the Agency and failed to respond to all of the Agency's comments. The court observed that the designation had an "admirable" purpose, but cautioned "such protection must be done correctly." (Slip op. at 49.) The court ordered the Service to develop a rule that harmonizes "the twin goals of protecting a cherished resource and allowing for growth and much needed economic development." (*Id.*)

The court's decision is important to energy, development, and many other industries affected by ESA regulatory requirements and restrictions. The decision reinforces the need for the Services to support listing and designation actions with sound evidence and the application of valid scientific methods. The decision also recognizes the importance of balancing species protection with economic growth and

development. Accordingly, the decision could be especially important to industry as it responds to the pending wave of hundreds of listing and designation actions by the Services, particularly listing actions by the U.S. Fish and Wildlife Service under deadlines established by court-approved settlement agreements.

**Hunton & Williams LLP Endangered Species Act Practice**

We regularly counsel and represent industry and government clients on ESA matters. Our attorneys assist clients across virtually every sector of the economy in evaluating and responding to proposed ESA listings and designations. We assist clients with ESA consultation requirements in connection with permit applications and other proceedings, and in receiving "take" authorization. When litigation arises under the ESA, we advance and defend our clients' permits, authorizations, and interests. Our Endangered Species Practice is a key part of our overall Natural Resources Practice, which involves the Clean Water Act, National Environmental Policy Act, and other natural resources laws. Please contact us if you have any questions or if we may assist with your legal needs.

## Contacts

**Deidre G. Duncan**
dduncan@hunton.com

**Mark G. Weisshaar**
mweisshaar@hunton.com

**Kevin J. Finto**
kfinto@hunton.com

**Andrew J. Turner**
aturner@hunton.com

**Karma B. Brown**
kbrown@hunton.com

**Kerry L. McGrath**
kmcgrath@hunton.com

**Virginia S. Albrecht**
valbrecht@hunton.com

**Brooks M. Smith**
bsmith@hunton.com

**Kathy Robb**
krobb@hunton.com

**Andrea W. Wortzel**
awortzel@hunton.com

**E. Carter Chandler Clements**
eclements@hunton.com

**Elizabeth L. Horner**
ehorner@hunton.com