**Center for Biological Diversity v. Haaland**—Ninth Circuit rejects as insufficiently reasoned FWS decision reversing candidate listing of Pacific walrus under ESA

The United States Fish and Wildlife Service classified the Pacific walrus in 2011 as a candidate species for endangered or threatened status but whose listing under the Endangered Species Act was presently precluded because of other more urgent listings. The Pacific walrus mostly winters in the Bering Sea and migrates north during the spring to the Chukchi Sea. This migration corresponds to the loss of sea ice in the former and presence of such ice in the latter year-round. The Pacific walrus uses the ice for various purposes including hunting, travel to new feeding grounds, breeding, birthing, nursing and avoiding predation. Some species members use “haulouts” on the Bering Sea coastline in lieu of migration which expose them to increased energy costs, trampling events, predation and disease. FWS’s 45-page determination identified several reasons for candidate status: loss of sea-ice habitat, subsistence hunting, and the lack of adequate greenhouse gas emission mechanisms “to stem sea-ice loss or ensure that harvests decrease at a level commensurate to predicted population declines.”

FWS renewed this status determination annually through 2016. Following a lawsuit settlement requiring the agency to “to submit a proposed rule or not-warranted finding for the Pacific walrus by September 30, 2017[,]” FWA issued a non-decisional species status assessment in May 2017 that

concluded that “environmental changes over the last several years such as sea-ice loss and associated stressors are impacting Pacific walruses, but that other stressors that were identified in 2011 have declined in magnitude.” The review team believed that “Pacific walruses are adapted to living in a dynamic environment and have demonstrated the ability to adjust their distribution and habitat use patterns in response to recent shifting patterns of sea ice.” The team acknowledged, however, that the species’ ability “to adapt to or cope with increasing stress in the future is uncertain.”

Five months later, the agency issued a three-page final decision determining that the Pacific walrus “no longer qualified as a threatened species.” Incorporating the assessment’s analysis as to the sea-ice loss issue, the decision found that, although a future loss will occur, “‘we are unable to reliably predict the magnitude of the effect and the behavioral response of the Pacific walrus to this change, and we therefore do not have reliable information showing that the magnitude of this change could be sufficient to put the subspecies in danger of extinction now or in the foreseeable future.’” Similarly, “‘while it is likely that the increased use of land habitat [i.e., haulouts] will have some negative effects on the population, the magnitude of effect is uncertain given the demonstrated ability of Pacific walruses to change their behavior or adapt to greater use of land.’”

The Center for Biological Diversity filed suit challenging the 2017 determination principally on the ground that “the Service violated the [Administrative Procedure Act] by failing to sufficiently explain its change in position from the 2011 Decision.” The district court disagreed and granted the federal defendants’ motion for summary judgment. *Ctr. for Biological Diversity v. Bernhardt*, No. 3:18-cv-00064-SLG, 2019 WL 4725124 (D. Alaska Sept. 26, 2019). A unanimous Ninth Circuit panel reversed. *Ctr. for Biological Diversity v. Haaland*, No. 19-35981, 2021 WL 2232487 (9th Cir. June 3, 2021).

The panel began by explaining that “[w]hen an agency changes its position, it must (1) ‘display[] awareness that it is changing position,’ (2) show ‘the new policy is permissible under the statute,’ (3) ‘believe[]’ the new policy is better, and (4) provide ‘good reasons’ for the new policy.” It added that “if a ‘new policy rests upon factual findings that contradict those which underlay its prior policy,’ the agency must provide ‘a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy.’” In applying this review standard, the panel stated that “[i]f an agency’s decision document explains the reasons for a change in position, we may be able to adequately review that decision by looking to see whether the record supports the reasons offered” and that “if a published decision incorporates by reference a separate, fully reasoned document explaining why the agency changed positions, that may suffice.” Nevertheless, “[w]e are ... limited to the reasons given by the agency for its action.”

The latter limitation constituted the 2017 determination’s “essential flaw”:

The 2011 Decision, 45 pages in length, contained specific findings, replete with citations to scientific studies and data, that detailed the multiple stressors facing the Pacific walrus and explained why those findings justified listing. ... The 2017 Decision, by contrast, is a spartan document, simply containing a general summary of the threats facing the Pacific walrus and the agency’s new uncertainty on the imminence and seriousness of those threats. ... Because the 2017 Decision inherently rejects the specific findings underlying the 2011 Decision, more is needed.

And the incorporated assessment did not provide that “more”:

The Assessment does not purport to be a decision document; it provides information but does not explain the Service’s reasons for its change in position in the 2017 Decision. Unlike the 2011 Decision, which arrived at specific conclusions as to each of the identified threats, the Assessment reflects substantial disagreement and uncertainty—both among the team and with respect to the relevant threats—and does not identify the agency’s rationale for concluding that the specific stressors identified as problematic in the 2011 Decision no longer pose a threat to the species within the foreseeable future.

The panel, although having previously observed that “an agency must provide its ‘reasoned explanation’ in a form that can adequately be examined on judicial review, not simply present arguments in its briefing how the decision might have been reached[,]” devoted the remainder of its opinion largely to “a review of the reasons offered by the Service in its appellate briefing [that] shows why we cannot conduct the required appellate review unless the decision document offers the agency’s own reasoned explanation.”

So, for example, as to “localized prey depletion, ... the Service merely cites the location of that study in the Assessment’s appendix, while identifying no part of the document relevant to the agency’s prior findings.” Likewise, as to the ability of female walruses to travel longer than expected to forage, “the Service again just cites the study’s location in the appendix to the Assessment, without explaining how the ability to travel further relates to the risk of increased energy expenditure due to increased forage trip length, which the Assessment again identifies as potentially problematic.” As to the effect of subsistence harvest, “the Service’s appellate brief cites new information in the Assessment showing that harvest levels are the ‘lowest’ on record, which the Service argues contradicts its 2011 expectation that harvests would continue at similar levels” but “does not explain, for instance, why the finding in the 2011 Decision that hunting may increase as use of coastal haulouts increases no longer applies ... or whether this level of hunting will remain sustainable given that the Assessment still predicted a decline in the Pacific walrus population.” In sum, “[t]he Service may be able to issue a decision sufficiently explaining the reasons for its change in position. But, the 2017 Decision does not do so, and we may not ourselves come up with those reasons from the large and complex record.”

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/03/19-35981.pdf