MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

14 July 2008

Mr. Lyle Laverty
Assistant Secretary for Fish and Wildlife and Parks
Department of the Interior
Attn: Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Dear Mr. Laverty:

On 15 May 2008 the Fish and Wildlife Service published a final rule listing the polar bear (*Ursus maritimus*) as a threatened species under the Endangered Species Act (ESA). Concurrent with that listing, the Service published an interim final rule (73 Fed. Reg. 28306) establishing protective regulations for the species as required by section 4(d) of the Act. The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the interim rule and provides the following comments and recommendations.

RECOMMENDATIONS

The Marine Mammal Commission recommends that —

- the Service publish a new proposed rule that includes provisions tailored to the specific conservation needs of polar bears and the threats that they face, including ongoing and projected loss of sea ice habitat;

- any final 4(d) rule adopted by the Service specifically include as prohibited acts any elements of taking included under the ESA definition that are not covered under the Marine Mammal Protection Act (MMPA) definition;

- the Service revise the interim rule to require henceforth that a polar bear used to create authentic native articles of handicrafts and clothing for sale be taken primarily for subsistence purposes as defined at 50 C.F.R. § 17.3;

- authorizations for scientific research and enhancement permits involving polar bears be treated like similar authorizations for other endangered and threatened marine mammals and be subject to concurrent review under both the ESA and the MMPA;

- either paragraph (4) of the interim rule be deleted or the Service provide additional explanation concerning the perceived need for incidental taking authorization under both the MMPA and the ESA and provide the Commission and the public an additional opportunity to comment on this issue before a final rule is issued; and

- if paragraph (4) of the interim rule is retained in the final rule, it be revised to clarify that the exception does not apply in Alaska, in other waters subject to U.S. jurisdiction contiguous with Alaska, and in other areas of the high seas where polar bears naturally occur.

RATIONALE

Section 4(d) of the ESA requires that, when a species is listed as threatened under the Act, the Service "issue such regulations as [it] deems necessary and advisable to provide for the conservation of the species." Such regulations may include, but are not explicitly limited to, any of the prohibitions applicable under section 9(a)(1) of the Act to species listed as endangered. As explained by the Service in the preamble to the interim rule, a special rule under section 4(d) "will also include provisions tailored to the specific conservation needs of the listed species."

Unless the Service issues a special rule setting forth other requirements or exceptions, default regulations apply to a threatened species. Regulations published at 50 C.F.R. § 17.31 set forth the generally applicable prohibitions, which through reference to the Service's endangered species regulations, include all of the prohibitions applicable to endangered species under section 9(a)(1). Section 17.32 of those regulations set forth exceptions under which otherwise prohibited activities may be permitted (e.g., taking for scientific research or species enhancement, incidental taking, etc.). In this case, the Service has opted to issue a special rule (i.e., the interim rule).

The interim rule adopted by the Service under section 4(d) contains four elements. Although it includes all of the prohibitions and exceptions generally applicable to threatened species under sections 17.31 and 17.32 of its regulations, the applicability of those provisions is subject to two exceptions unique to this rule. The first exception specifies that none of the prohibitions set forth under section 17.31 applies to "any activity conducted in a manner that is consistent with the requirements of the Marine Mammal Protection Act (MMPA)…and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), provided that the person carrying out the activity has complied with all terms and conditions that apply to that activity under [those other laws]." The second exception specifies that none of these prohibitions applies to "any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within any area subject to the jurisdiction of the United States except Alaska." The fourth element of the interim rule specifies that the provisions of 50 C.F.R. parts 14 (concerning the importation, exportation, and transportation of wildlife), 18 (implementing the MMPA), and 23 (implementing CITES) must be met.

When read as a whole, the interim rule does little to add protections to polar bears beyond those already provided under the MMPA and CITES. As reflected in the analyses provided in the preamble to the interim rule, many of the provisions of the MMPA are stricter than or comparable to those that would be applicable under the ESA. In such cases, the Service does not believe that additional authorization under the ESA should be required. The Service recognizes that "[a] few of the provisions of the MMPA or CITES are less strict than the ESA regulations generally applied to threatened species under 50 C.F.R. 17.31 and 17.32" but concludes that the provisions of the MMPA and CITES "are still the appropriate regulatory mechanisms to apply to the polar bear." For the most part, the Commission agrees with the Service's analyses concerning the provisions of the MMPA, ESA, and CITES. However, we do not concur with the Service's conclusion that its 36-year history of implementing the MMPA and 33-year history of implementing CITES demonstrate that these laws "provide appropriate regulatory protection to polar bears for activities that are regulated by these laws." To the contrary, applying this historical perspective clearly demonstrates that relying

solely on the provisions of the MMPA and CITES has been inadequate to provide protection to polar bears sufficient to avoid the need to list them under the ESA. As such, the Commission does not see how perpetuating these same management regimes without any supplementation satisfies the mandate of section 4(d) of the ESA that these protective regulations provide for the conservation of polar bears— i.e., will bring the species to the point where the measures provided by the Act are no longer necessary. The Marine Mammal Commission therefore recommends that the Service publish a new proposed rule that includes provisions tailored to the specific conservation needs of polar bears and the threats that they face. In this regard, the listing determination was based primarily on the ongoing and projected loss of sea ice habitat, yet the protective regulations lack any provisions specifically designed to address this threat.

In assessing the need to supplement existing protections available under the MMPA, the Service has identified many of the differences among the provisions of that Act and the ESA. However, it has not considered all such differences. Among other things, these statutes define one of their most basic terms, the term "take," in slightly different ways. Under the MMPA, take is defined to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." The ESA defines take to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The Commission believes that several of the additional elements in the ESA take definition (harm, pursue, shoot, wound, and trap) are captured within the MMPA's definition of the term "harassment," which includes acts of pursuit, torment, or annoyance that have the potential to injure or disturb a marine mammals or marine mammal stock in the wild. Also, the terms trap and collect arguably are forms of capture, with the latter term having been explicitly included in the Service's regulatory definition of the term "take" under the MMPA. Nevertheless, the Commission believes that it would be useful for the Service to provide its view on any differences it sees in the definitions under the two Acts. To the extent that the Service believes there are differences, the Marine Mammal Commission recommends that any final 4(d) rule adopted by the Service specifically include as prohibited acts any elements of taking included under the ESA definition that are not covered under the MMPA definition.

It may be that this issue has already been addressed in the preamble to the interim rule, but this is not clear. On page 28306 of the *Federal Register* notice, the Service indicates that

> …if an activity is authorized or exempted under the MMPA or CITES, we would not require any additional authorization under our regulations to conduct the activity. However, if the activity is not authorized or exempted under the MMPA or CITES and the activity would result in an act that would be otherwise prohibited under 50 C.F.R. § 17.31, the prohibitions of section 17.31 apply and we would require authorization under 50 C.F.R. § 17.32 or our regulations.

Under this guidance, it depends on what the Service considers to be the underlying activity to determine if it is covered by an MMPA authorization or whether an additional ESA authorization is needed. For example, if the Service believes that an activity that might harm a polar bear is not covered by the MMPA definition of taking, would an additional authorization be needed for such an activity? Arguably not, if the Service is looking only at the underlying action that causes the harm

and it requires no MMPA authorization. However, as a technical point, the MMPA does not authorize a person to engage in the activity that results in a taking; it only authorizes the taking that results. This being the case, for the analysis set forth by the Service, it would be much more appropriate to view taking as the activity being authorized. Here, too, it depends on how the activity is identified as to whether an additional ESA authorization is needed. If one only looks at whether the taking is generally authorized or exempted by the MMPA, this may be a sufficient basis for determining that no additional ESA authorization is needed. If, however, the activity is defined more narrowly (e.g., as taking by harm) it might not be authorized under the MMPA, but would be prohibited under the otherwise applicable ESA regulations. As such, an additional ESA authorization would be needed. Because of the potential for confusion and inconsistent application, the Commission believes that clearer guidance is needed concerning what activities will require additional authorization under the ESA. Consistent with our previous recommendation, the Commission believes that the Service should adopt an interpretation that gives full effect to each element of the ESA taking definition.

Among the differences between the provisions of the ESA and the MMPA identified by the Service are those pertaining to taking by Alaska Natives. Whereas the MMPA allows taking both for subsistence purposes and for purposes of creating and selling authentic native articles of handicrafts and clothing, the ESA authorizes the use of non-edible by-products for creating and selling authentic native articles of handicrafts and clothing only when the initial taking is primarily for subsistence purposes. The Service has opted for the MMPA provision in the interim rule. The Commission questions this choice. Although most, if not all, polar bears currently being used to create handicrafts were taken primarily for a subsistence purpose, the possibility persists under the interim rule that polar bears could be taken exclusively for purposes of creating and selling handicrafts. The Marine Mammal Commission believes that the stricter provision of the ESA is more appropriate for a listed species such as the polar bear and recommends that the Service revise the interim rule to require henceforth that a polar bear used to create authentic native articles of handicrafts and clothing for sale be taken primarily for subsistence purposes as defined at 50 C.F.R. § 17.3. Provided that the taking of polar bears by Alaska Natives is primarily for subsistence purposes, the Commission believes that it is appropriate to allow hunters to use registered tanneries to process the hides and to allow Alaska Natives to use products from such bears in cultural exchanges as provided for in section 101(a)(6) of the MMPA.

In general, the Commission agrees with the other ways that the Service has opted to reconcile the different provisions of the MMPA and the ESA. For example, the Commission agrees that the standards for authorizing the incidental taking of marine mammals under section 101(a)(5) of the MMPA are more restrictive than under the counterpart provisions of section 7(b)(4) of the ESA. However, inasmuch as incidental take authorizations under the MMPA will remain subject to section 7 consultation requirements, the Commission does not see that it would be administratively burdensome to comply with both sets of requirements. Doing so may provide the Service with greater flexibility to respond promptly to unexpected events (e.g., greater than anticipated levels of taking) or to revise the conditions of authorizations.

The Commission also concurs that generally, the importation and permitting provisions of the MMPA pertaining to depleted species are equally or more restrictive than those applicable under the ESA. Nevertheless, permit applications for scientific research or enhancement activities involving ESA-listed marine mammals are routinely submitted and reviewed jointly under the two statutes. We see no reason to establish a different set of procedures for polar bears that considers only the MMPA requirements. As such, the Marine Mammal Commission recommends that authorizations for scientific research and enhancement permits involving polar bears be treated like similar authorizations for other endangered and threatened marine mammals and be subject to concurrent review under both the ESA and the MMPA.

As noted above, the interim rule provides a general exemption under the ESA for the taking of polar bears incidental to lawful activities within areas subject to the jurisdiction of the United States except Alaska. We see several problems with this provision as drafted. First, the Service has provided no analysis concerning what types of incidental taking, if any, would be subject to authorization under the ESA that would not also require an authorization under the MMPA. If there are none, it is not clear why compliance with the provisions of the MMPA would not also authorize such taking under the ESA in accordance with paragraph (2) of the interim rule. The Commission does not believe that it is appropriate for the Service to give blanket authorization for the incidental taking of polar bears under the ESA if that same taking would run afoul of the MMPA's taking prohibition, which would still be applicable to areas outside of Alaska. If the Service believes that there are types of incidental taking that would be prohibited under the ESA, but not the MMPA, this creates a set of different problems. Depending on what differences the Service believes exist, it may be inappropriate to rely solely on compliance with the MMPA incidental take provisions as a basis for assessing compliance with the ESA. In light of these problems, the Marine Mammal Commission recommends that either paragraph (4) of the interim rule be deleted or the Service provide additional explanation concerning the perceived need for authorizations under both the MMPA and the ESA and provide the Commission and the public with an additional opportunity to comment on this issue before a final rule is issued.

The second problem with paragraph (4) is the exclusion of all areas outside of Alaska. The term "Alaska" has a precise meaning under applicable law, with a seaward extent only out to three nautical miles (see e.g., *United States* v. *Alaska*, 521 U. S. 1 (1997)). Presumably, the Service did not intend to exempt all activities from the otherwise applicable incidental take prohibitions under the ESA and its implementing regulations in waters within the U.S. Exclusive Economic Zone (EEZ) contiguous to the State of Alaska. If this is the case, more precise wording to describe the area subject to the exception is needed. Third, whether intentional or not, limiting the exception in paragraph (4) to areas "subject to the jurisdiction of the United States" sets up different rules within the 200 nautical mile EEZ surrounding Alaska and the area of international waters beyond 200 miles, which remains subject to the taking prohibitions of both the ESA and MMPA. The Commission believes that it is preferable to have one set of provisions applicable to incidental taking in all areas where polar bears naturally occur and which are subject to the taking prohibitions of the ESA and MMPA. The Marine Mammal Commission therefore recommends that, if paragraph (4) is retained in the final rule, it be revised to clarify that the exception does not apply in Alaska, in other

waters subject to U.S. jurisdiction contiguous with Alaska, and in other areas of the high seas where polar bears naturally occur.

In several places the preamble to the interim rule states that the rule does not negate the need for consultation under section 7(a)(2) of the ESA for any federal action that may affect a listed species, including the polar bear. The Commission agrees with this assessment. However, the Commission does not necessarily agree with the Service's analysis on pages 28312-28313 of the *Federal Register* notice as to when the requirements of section 7(a)(2) would be triggered. Because this issue is not germane to the need for or content of protective regulations under section 4(d) of the ESA we do not intend to comment on this issue now, but plan to do so later in a separate letter.

SPECIFIC COMMENTS

Page 28308, col. 3—This discussion states that section 101(a)(3)(B) of the MMPA "makes it clear that the importation of a specimen from a depleted species is prohibited unless it qualifies as one of the excepted activities: scientific research, photography for educational purposes, or enhancing the survival or recovery of the species." While technically correct, it should be noted that section 101(a)(3)(B) applies both to taking and importation of depleted species. When read in conjunction with section 102(b) it is apparent that the exception for commercial and educational photography applies only to taking and not to importations. To avoid any confusion, the preamble to the final rule should clarify that, notwithstanding this provision, the importation of polar bears for commercial or educational photography is not allowed.

Page 28309, col. 2—The first full paragraph discusses non-lethal deterrence of marine mammals under section 101(a)(4) of the MMPA. While the discussion notes that subparagraph (D) clarifies that authority to deter marine mammals under this provision applies to depleted species, it fails to mention subparagraph (B), which includes requirements specific to species listed as endangered or threatened under the ESA. Under that provision, the Service is directed to recommend specific measures that can be used to deter listed marine mammals non-lethally. Although this provision has been in place for more than 14 years, the Service has yet to publish any such guidance. It is unclear where deterrence of listed species is authorized under section 101(a)(4) absent the publication of such guidance. The Commission therefore encourages the Service to develop and publish such guidance as quickly as possible.

Page 28310, col. 1—The first full paragraph discusses the availability of incidental take permits under 50 C.F.R. § 17.32(b). Such permits are the threatened-species equivalent of incidental take permits available under section 10(a)(1)(B) for endangered species. Although theoretically available to authorize the incidental taking of marine mammals, in practice, such permits are, as a rule, not sought and are not needed. As explained in the preamble published with revisions to the Service's MMPA incidental take regulations (50 C.F.R. § 18.27) in 1989, issuance of an incidental take authorization under section 101(a)(5) of the MMPA, even for non-federal applicants, is a federal action that triggers consultation under section 7 of the ESA. As such, for listed marine mammals, incidental take authorization is provided in a statement under section 7(b)(4) of the ESA rather than a permit under section 10(a)(1)(B) of the Act or section 17.32(b) of the regulations. The discussion

in the preamble to the interim rule is likely to create confusion about how incidental taking is authorized under the ESA that the Service should address in the final rule.

Page 28313, col. 2—The second sentence of the second full paragraph suggests that permits for public display can still be issued for polar bears. As explained earlier in the preamble, such permits are not available for depleted species and, as such, are no longer available for polar bears. This paragraph should be revised accordingly. In addition, the Service may want to clarify in the final rule that a waiver of the MMPA's moratorium on taking or importing polar bears under sections 101(a)(3)(A) and 103 of the Act are not available now that the species is depleted.

This same paragraph also notes that the requirements for obtaining an enhancement permit under the MMPA are stricter than those under the ESA. It describes the MMPA provisions but not those applicable under the ESA. Thus, there is no basis for comparing the requirements under the two statutes.

Please contact me if you have questions or would like to discuss any of the Commission's comments or recommendations.

Sincerely.

Timothy J. Ragen, Ph.D.
Executive Director