

STATE OF ALASKA

DEPARTMENT OF FISH AND GAME OFFICE OF THE COMMISSIONER

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Public Comments Processing
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
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Attn: Docket ID FWS-R7-ES-2008-0027 (submitted via portal <http://www.regulations.gov>)

Dear Fish and Wildlife Service:

Thank you for this opportunity to comment on the interim final special rule for the polar bear as noticed in the May 15, 2008 Federal Register (Volume 73, Number 95) with RIN 1018-AV79.

The State of Alaska reserves its arguments and points that the polar bear should not have been listed under the Endangered Species Act, as indicated in the State's May 23, 2008 letter to Secretary Kempthorne, Director Hall, and the Service, and as indicated in Alaska's earlier comments to the Service during the polar bear proposed listing rulemaking proceeding. Nevertheless, should the polar bear remain listed as a "threatened" species under the ESA, then the State of Alaska agrees with the Fish and Wildlife Service findings that the existing conservation regulatory requirements under the Marine Mammal Protection Act of 1972 as amended (MMPA) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) are sufficient and adequate to conserve the polar bear and that additional protections and authorizations under the ESA are not warranted at this time. The State also agrees that the MMPA and CITES are the appropriate regulatory tools for the polar bear.

Section 4(d) Regulatory Requirements

Section 4(d) of the Endangered Species Act (ESA) requires that when a species is listed as threatened, "the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1733(d). "The Secretary may by regulation prohibit with respect to any threatened species any act

prohibited under section 9(a)(1)—[the unauthorized “take” of listed species]—in the case of fish or wildlife.” *Id.* Under the authority in Section 4(d), the Fish and Wildlife Service has generally applied all the protections against “take” of endangered species in Section 9(a)(1) to threatened species. 50 C.F.R. § 17.31. However, the Service has authority under Section 4(d) to promulgate “special” rules for threatened species that provide exceptions to the Section 9 take prohibitions.

The Secretary must find that a special rule issued under Section 4(d) be “necessary and advisable to provide for the conservation of threatened species.” 16 U.S.C. § 1533(d). The Service’s Section 4(d) rule is to be supported by the record before the agency.

The Polar Bear Interim Final Rule is Necessary and Advisable for the Conservation of the Species

The Service has demonstrated the conservation benefits of the Section 4(d) rule for the polar bear. The Service has determined that “requiring additional authorization to carry out activities already strictly regulated under the MMPA and CITES would not increase protection for polar bears.” 73 Fed. Reg. at 28,315. Indeed, the requirements of the MMPA are in many cases more protective than the “take” prohibitions under the ESA. For example, under the ESA, the Service can issue an incidental take permit when the applicant’s activity will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. In contrast, under the MMPA, authorization cannot be issued unless the Service finds that the taking will “have no more than a negligible impact on the species.” *Id.* at 28,313. Adding a layer of administrative requirements under the ESA would do nothing to alleviate the threat to the polar bear from loss of habitat and related effects. *Id.* at 28,315.

Additionally, the Service has provided sufficient justification for why the special rule is necessary and advisable for the conservation of the species. For example, the special rule permits subsistence hunting and the import and export of polar bears by Alaska Natives for subsistence purposes. Subsistence hunting by Alaska Natives is already highly regulated. Through cooperative agreements with Alaska Natives, the Service has been better able to understand and track the status of the species. Further, the Service has found that “subsistence take by Alaska Natives does not threaten the polar bear throughout all or any significant portion of its range.” *Id.* at 28,315. The State of Alaska agrees with the Secretary’s decision to continue to provide an exemption for Alaskan Natives to take and import polar bears if such taking is primarily for subsistence purposes, including the provisions made for the cultural exchange between Alaska Natives and Native inhabitants of Russia, Canada, and Greenland.

To examine effects outside the footprint of a proposed action, the Service’s regulations require that effects be caused by the action under consultation and reasonably certain to occur. 50 C.F.R. § 402.02. The State of Alaska agrees that currently, there is no reliable method to determine how emissions from a specific project under review and

consultation could affect or influence climate change and subsequently the polar bear or designated critical habitat. Given this, the final 4(d) rule should explicitly exempt proposed actions from Section 7 consultations under the ESA when the sole issue is the effect of greenhouse gas emissions from the proposed action. The Service has authority to promulgate such a rule under Section 4(d) of the ESA for the conservation of the species. In this case, limiting consultation to actions with a reasonably certain causal connection to species effects will best conserve the species. Without an express limitation, agency resources will be squandered consulting on every greenhouse gas emitting project, regardless of how or attenuated the potential impact, rather than focusing on actions with real tangible impacts to the polar bear or its designated critical habitat.

The final regulation should be revised to include a new subsection 50 C.F.R. § 17.40(q)(5), which states:

(5) Section 7(a)(2) of the Endangered Species Act (16 U.S.C. § 1536(a)(2)) requires federal agencies to consult with the Service if their actions “may affect” listed species. With respect to federal actions which “may affect” polar bears, federal actions for which the sole potential effect to polar bears is the effect of greenhouse gas emissions related to such actions on polar bear habitat, are exempt from the consultation requirements of Section 7(a)(2) with respect to potential effects to polar bears.

Incidental Take During the Course of Authorized Oil and Gas Activities

The State of Alaska agrees that the MMPA, in combination with existing state protections in place, allows for the continued conservation of polar bears and that additional incidental take standards are not necessary under the ESA at this time. Given this, we agree with the decision to align ESA incidental take provisions for polar bears with the incidental take provisions of the MMPA and its implementing regulations.

The Exception to Incidental Take Prohibitions Should Apply Equally to Areas Outside Polar Bear Habitat in Alaska and the United States

The interim final rule exempts activity outside the State of Alaska from the incidental take prohibitions of 50 C.F.R. § 17.31. However, the Service has provided no reasonable basis for not excepting areas of Alaska outside the normal range of the polar bear from this incidental take exemption. The Service states that the causal link required for Section 7 narrows the consultation requirement to “listed species and critical habitat in the ‘action area’ rather than to all listed species or all designated critical habitat.” 73 Fed. Reg., 28,313. There is no rational distinction between activity in areas of Alaska outside the polar bear’s normal range and activity throughout the rest of the United

States. The Service's decision to treat areas of Alaska where polar bears do not exist differently from the rest of the United States is arbitrary.

The State of Alaska requests that the final rule be amended to clarify that all activity outside the polar bear's normal range, as defined by the USGS (Amstrup et al 2005),¹ be exempted from incidental take prohibitions. The final regulation, at 50 C.F.R. § 17.40(q)(4) should read:

(4) Except in the area bounded by the Canadian border west to Hooper Bay and within 25 miles of the coast and extending seaward out to the seaward margin of the EEZ, none of the prohibitions in § 17.31 of this part apply 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.

Prohibition Against Importing Canadian Trophies Should be Removed

The State of Alaska disagrees with the Service's decision to prohibit the import of sport-hunted polar bear trophies from Canada as authorized under section 104(c)(5) of the MMPA. Permitting the import of sport-hunted trophies will not threaten the existence of the polar bear throughout all or a significant portion of its range, and would provide for the conservation of the species. The Canadian government has found that there was insufficient information to list the polar bear as either threatened or endangered under its Species at Risk Act. Canadian hunts generate over \$2.5 million a year for the Nunavut and Northwest Territories providing significant economic vitality in areas where few other economic opportunities exist, economic incentives for sound management and conservation, and funding for research and conservation activities to benefit polar bears. In previous assessments, the Service has determined that the management of hunted Canadian polar bear populations meets the standards of sustainable management under the MMPA. For these reasons, the State of Alaska supports allowing the continued import of sport-hunted polar bear trophies as authorized under section 104(c)(5) of the MMPA, and the final rule should permit this activity.

NEPA Compliance is Not Required

As the Service states in the interim final rule, there is no requirement that the Service prepare an environmental analysis under the National Environmental Policy Act (NEPA) for a Section 4(d) special rule. 73 Fed. Reg. at 28,317. In 1983, the Service determined, on the recommendation of the Council of Environmental Quality, that Section 4(d) rules are exempted from the requirements of NEPA.

¹ Amstrup, S.C., G.M. Durner, I. Stirling, and T.L. McDonald, *Allocating harvests among polar bear stocks in the Beaufort Sea* 247-259, *Arctic*:58(3) (2005).

Conclusion

The State of Alaska supports the Section 4(d) interim rule for polar bears. The State urges its immediate adoption, with the changes discussed above, as a final rule. If you have questions regarding these comments, please contact me at (907) 267-2339.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Lang", written in a cursive style.

Doug Vincent-Lang, ESA Coordinator
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cc: Mike Nizich, John Katz, Denby Lloyd, Ed Fogels, Gary Mendivil, Ken Taylor, Tina Cuning, Steven Daugherty, Brad Meyen