



Does the Endangered Species Act (ESA) Listing Provide More Protection of the Polar Bear?: A Look at the Special Rules

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Summary

The polar bear has been protected under the Marine Mammal Protection Act (MMPA) since 1972, meaning that it is illegal to kill or harass the bear or to transport or trade its parts (with a few exceptions). The Endangered Species Act (ESA) also prohibits killing or harming listed species. Some ask: If it was already illegal to kill or harm the bear when the U.S. Fish and Wildlife Service placed the polar bear on the list of protected species on May 15, 2008, what protections were provided by the listing?

One example of increased protection is that being listed as a threatened species categorized the polar bear as a depleted species under the MMPA, meaning that polar bear trophies may no longer be imported from sport-hunts in Canada, under that MMPA exception. Approximately 80 bears a year were permitted for import under this program.

Another protection offered by the ESA listing is habitat protection. The ESA has several provisions that function to protect not just the bear, but its habitat. While the MMPA has habitat protection as a purpose, it does not require any habitat conservation measures or punish habitat destruction. The FWS has agreed to designate critical habitat by June 30, 2010; therefore, that environmental protection would be available then. The ESA requires another system that might protect the bear—establishing a recovery plan—but the FWS has not completed the process. At a time a recovery plan is prepared, it would establish recovery goals and trigger congressional monitoring of the polar bear's progress.

Special Rules may be created under Section 4(d) of the ESA for threatened species. The Special Rules for the polar bear describe when the MMPA applies and when the ESA applies, harmonizing some provisions of the two laws, a possible benefit for MMPA permit holders. The polar bear Special Rules also eliminate some protections that the ESA might have provided—such as those relating to incidental takes, subsistence users, or citizen suits—by continuing the MMPA protections. The Special Rules also add a different standard for certain military actions. Had the polar bear been listed as an endangered species, rather than threatened, there would be no Special Rules. Arguably, polar bears would have been more protected.

The Omnibus Appropriations Act of 2009 (P.L. 111-8) gave the Secretary of the Department of the Interior discretion to withdraw or reissue the Special Rules within 60 days.

Contents

Protections	1
Prohibitions	1
Special Rules	2
Exceptions	3
Sport-Hunted Polar Bears	4
Incidental Takes in General.....	4
Special Rules for Polar Bears	5
Incidental Takes.....	6
Climate Change Issues Related to Incidental Takes.....	6
Incidental Takes and Military Actions	7
Citizen Suits	7
Subsistence Users.....	8
Section 7 Consultations	8
Habitat and Critical Habitat.....	9
Recovery Plans	11
Difference If Listed As Endangered	11
Conclusion.....	12

Contacts

Author Contact Information	13
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On May 15, 2008, the Fish and Wildlife Service (FWS) listed the polar bear as a threatened species under the Endangered Species Act (ESA).¹ Some have questioned the need to use the ESA to protect the bear, citing other treaties, statutes, and regulations that protect polar bears, primarily the Marine Mammal Protection Act (MMPA).² This report discusses what additional protections are provided by the ESA listing that were not available before.

The FWS considered existing regulatory protections before listing the polar bear. That is one of the five factors ESA requires when making a listing determination.³ The FWS found that “potential threats to polar bears from direct take, disturbance by humans, and incidental or harassment take are, for the most part, adequately addressed through international agreements, national, State, Provincial or Territorial legislation, and other regulatory mechanisms.”⁴ However, the polar bear was listed because the bear’s primary habitat of sea ice was threatened with destruction due to global climate change. The FWS found that the bear was likely to become endangered in the foreseeable future.

Protections

The ESA and the MMPA have similar provenances. Both appeared during the high tide of environmental legislation of the late 1960s and early 1970s. Both are written to protect species and their habitats. The Endangered Species Act has a broad purpose. It is intended to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species....”⁵

Similarly, the MMPA addresses both habitat and individual protection: “efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man’s actions.”⁶

Prohibitions

Both the MMPA and the ESA prohibit taking or transporting species protected under the acts.⁷ The ESA definition of *take* includes *harm*, which means killing or injuring wildlife including significant habitat disruption that impairs essential behavioral patterns.⁸ Take also includes *harass*, meaning an action likely to injure by significantly disrupting normal behavioral patterns.⁹

¹ 73 Fed. Reg. 28212 (May 15, 2008). P.L. 93-205; 16 U.S.C. §§ 1531-1544, as amended. For a detailed discussion of the polar bear listing process and related litigation, see CRS Report RL33941, *Polar Bears: Listing Under the Endangered Species Act*, by Eugene H. Buck, M. Lynne Corn, and Kristina Alexander.

² P.L. 92-522; 16 U.S.C. §§ 1361 *et seq.*, as amended.

³ ESA § 4(a)(1), 16 U.S.C. § 1533(a)(1).

⁴ 73 Fed. Reg. 28212, 28288 (May 15, 2008).

⁵ ESA § 2(b); 16 U.S.C. § 1531(b).

⁶ MMPA § 2(2), 16 U.S.C. § 1361(2).

⁷ ESA § 9, 16 U.S.C. § 1538(a)(1); MMPA § 101, 16 U.S.C. § 1371(a).

⁸ 50 C.F.R. § 17.3. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (upholding the regulation).

⁹ 50 C.F.R. § 17.3.

Under the MMPA the term *take* includes “harass, hunt, capture, or kill, or attempt to do those activities.”¹⁰ *Harass* means an act with “the potential to injure a marine mammal” (Level A harassment), or “has the potential to disturb a marine mammal ... by causing disruption of behavioral patterns” (Level B harassment). By being listed under both statutes, the bear enjoys the protections of both.

The ESA regulatory definition of *harm* has been interpreted to mean habitat disturbance by itself can function as a *take*, although courts have not uniformly agreed on this. The courts’ disagreement centers on whether a species must be injured or killed before the statute has been violated. The Ninth Circuit (whose jurisdiction includes Alaska, the bear’s U.S. habitat) has interpreted *taking* broadly as it applies to habitat modification. The court held that if an injury to wildlife occurs as a result of the habitat change, either in the past, present, or future, the definition’s injury requirement is satisfied.¹¹ This could be an advantage to ESA polar bear protection, as the MMPA does not directly prohibit habitat destruction.

However, not all courts will find a take based on habitat destruction without an actual injury. For example, one district court said that an injury must occur before a prohibited taking may be found and that “habitat modification or degradation, standing alone, is not a taking pursuant to section 9.”¹²

Special Rules

The ESA allows the FWS to issue special rules for species listed as threatened where the agency deems it “necessary and advisable to provide for the conservation of such species.”¹³ They are known as Section 4(d) rules or Special Rules. Special Rules supplant the general regulations that apply to all threatened species, and can reduce those protections.¹⁴ The rules apply just to that one species. Special Rules were issued for the polar bear at the time of the listing¹⁵ and made final in December 2008.¹⁶ In essence, the polar bear Special Rules harmonize the requirements of the MMPA and the ESA, saying that compliance with the MMPA will be treated as compliance with the ESA.¹⁷ They are discussed in more detail later in this report.

Only four other species protected under the MMPA are also listed as threatened under the ESA: the eastern population of the stellar sea lion, the Guadalupe fur seal, and the northern and

¹⁰ MMPA § 3(13), 16 U.S.C. § 1362(13).

¹¹ *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir.1995); *see also* *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064 (9th Cir. 1996) (evidence of a threat of future harm to the threatened marbled murrelet supports a permanent injunction; evidence of past harm is not required), *cert. denied*, 117 S. Ct. 942 (1997).

¹² *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 11 F. Supp. 2d 529, 553 (D.N.J. 1998).

¹³ ESA § 4(d), 16 U.S.C. § 1533(d).

¹⁴ Several environmental groups have submitted comments to FWS stating that the Special Rules fail to “provide for the conservation of the species,” as is required by Section 4(d). *See* Letter from Center for Biological Diversity, NRDC, and Greenpeace, to FWS Public Comments Processing, “Comments on the Interim Final Section 4(d) Rule for the Polar Bear,” (July 14, 2008); Letter from Marine Mammal Commission to Lyle Laverty (July 14, 2008).

¹⁵ 73 Fed. Reg. 28305 (May 15, 2008). The rule was effective immediately as an “interim final rule.”

¹⁶ 73 Fed. Reg. 76249 (Dec. 16, 2008) (effective January 15, 2009).

¹⁷ 73 Fed. Reg. at 76251 (Dec. 16, 2008) (“if an activity is authorized or exempted under the MMPA or CITES, we will not require any additional authorization under the ESA regulations associated with that activity”).

southern sea otters. Of these, only the northern sea otter has special rules, which apply only to one distinct population of the species.¹⁸

Congress authorized the Secretary of the Interior to “withdraw or reissue” the Special Rules within 60 days of the Omnibus Appropriations Act of 2009 (Omnibus Act).¹⁹ Public notice and comment were waived by the Omnibus Act. If the Special Rules are withdrawn, it seems that the polar bear would be regulated under the general regulations that apply to all threatened species.²⁰ Holders of existing MMPA permits may also need an ESA permit, something the Special Rules had ruled was unnecessary.

It is not clear whether the statutory term *reissue* in Section 429 of the Omnibus Act means the Secretary may *revise* the Special Rules without undergoing the public notice and comment period that otherwise would be required by the Administrative Procedure Act. The remainder of Section 429 refers only to *withdraw* and says nothing about *reissue*.²¹ *Reissue* could be literal: the exact Special Rules would be promulgated again (presumably after some time to consider them by the current Administration). Or *reissue* could refer to reissuing *some* special rules in general, but not necessarily the identical version. It is not clear why the Secretary would need special authority to issue identical rules that it had already promulgated, suggesting that the alternative interpretation of permitting revised regulations was what was intended. If that is the case, the Omnibus Act gives the Secretary authority to draft regulations for a very controversial topic without any public input.²²

Exceptions

Both statutes have exceptions to their prohibitions. Permits may be issued under either the ESA or the MMPA for taking a species for scientific purposes or to enhance the survival of the species.²³ Both have provisions for incidental takes.²⁴ Both have exceptions for national security.²⁵ Only the MMPA, however, provides for issuing permits to take marine mammals for public display; for photography, educational, or commercial purposes; and to import polar bear parts from bears

¹⁸ 50 C.F.R. § 17.40(p).

¹⁹ P.L. 111-8, Tit. IV, § 429 (March 11, 2009).

²⁰ 50 C.F.R. Part 17, Subpart D. According to P.L. 111-8, if the Special Rules are withdrawn, the Secretary will implement such regulations that were in effect prior to the Special Rules. Because there were no prior regulations specific to the polar bear before its listing, the generally applicable regulations would appear to apply to the bear.

²¹ The Explanatory Statement submitted by Chairman Obey, which was intended to be a “joint explanatory statement of a committee of conference,” indicates that Section 429 allows the Secretary to “withdraw the final rule” relating to the polar bear, but says nothing about reissuing the rule. 155 Cong. Rec. H1653, H2115 (Feb. 23, 2009).

²² Sen. Mark Begich expressed concern on this point in a letter to Chairman Inouye, saying “the existing legislative history of the Omnibus Bill does not explain how Congress intends the term ‘reissue’ to be interpreted. This lack of clarity will only cause more legal uncertainty.” 155 Cong. Rec. H2650 (Feb. 25, 2009).

²³ ESA § 10, 16 U.S.C. § 1539(a)(1)(A); MMPA § 101(a)(1), 16 U.S.C. § 1371(a)(1).

²⁴ ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B); MMPA § 101(a)(2), 16 U.S.C. § 1371(a)(2)(for commercial fishing), and MMPA § 101(a)(5), 16 U.S.C. § 1371(a)(5)(for other activities).

²⁵ ESA: 16 U.S.C. 1536(j) (allows a special committee to exempt agency actions deemed necessary for reasons of national security by the Secretary of Defense); MMPA: 16 U.S.C. § 1371(f) (allows the Secretary of Defense to exempt actions deemed necessary for national defense after conferring with the Services).

sport-hunted in Canada.²⁶ Some limits apply to those MMPA permits. The MMPA also provides specific incidental take permit standards for military readiness activities.²⁷

Sport-Hunted Polar Bears

Under Section 1371(a)(3)(B) of the MMPA, once a species is designated as depleted under the act, no permits may be issued for importing sport-hunt trophies. Being listed as a threatened species is one way a species is declared to be depleted. Accordingly, the ESA listing eliminated the MMPA permit for importing polar bear trophies from Canada.²⁸ Approximately 80 permits a year were issued under this program. That is one way in which the May 15, 2008, listing increased protection of the bears.

Incidental Takes in General

As stated above, both the ESA and the MMPA allow incidental takes of species protected under the acts.²⁹ There are differences between the two programs. Under the ESA, incidental takes are divided into two categories: Section 10 takes by citizens, which are authorized by incidental take permits; and Section 7 consultations for takes by federal agencies, which are authorized by incidental take statements.³⁰ The MMPA has two types of takes based on the severity of the action: incidental take authorizations (ITAs), also known as Letters of Authorization, for killing or injuring animals; and incidental harassment authorizations, for lesser takes.³¹ All have statutory authorization, but the details are in the regulations.

Ordinarily, ESA incidental takes for threatened species are governed under regulations found at 50 C.F.R. § 17.32. An incidental take permit is issued. The rules require that applicants for such a permit include a description of the activity, the names and numbers of the species, and a habitat conservation plan (HCP). The HCP requires the applicant to describe the steps it will take to monitor, minimize, and mitigate any impacts to the threatened species; alternative actions and why they are not being used; and any other necessary and appropriate measures imposed by the FWS.³²

Permission for an MMPA incidental take requires an applicant to submit data about the project and the impacted animals, and to suggest mitigation.³³ The agency is required to review the

²⁶ MMPA § 101(a)(1), 16 U.S.C. § 1371(a)(1).

²⁷ 16 U.S.C. § 1371(a)(5)(ii).

²⁸ Safari Club International has filed suit against FWS arguing that general prohibition regarding depleted species does not supersede the specific authorization for import permits. *See Safari Club International v. Kempthorne*, No. 1:08-cv-00881-EGS (D.D.C. filed May 23, 2008).

²⁹ The terms are defined slightly differently by the regulations of each act. In the MMPA, *incidental, but not intentional, taking* is defined as “takings which are infrequent, unavoidable, or accidental.” 50 C.F.R. § 18.27(c). In the ESA *incidental taking* is defined as “any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 50 C.F.R. § 17.3 The ESA definition essentially leaves the definition of *incidental* to the dictionary, which, according to Webster’s New Collegiate Dictionary, means “occurring merely by chance or without intention; or being likely to ensue as a chance or minor consequence.”

³⁰ ESA § 10, 16 U.S.C. § 1539; ESA § 7, 16 U.S.C. § 1536.

³¹ MMPA § 101, 16 U.S.C. § 1371.

³² 50 C.F.R. § 17.32(b)(1)(iii)(C).

³³ 50 C.F.R. § 18.27(d).

application using the best scientific evidence. The MMPA requires monitoring and reporting during the time the take is authorized.

Even though both statutes allow incidental takes, the steps to obtain those permits are different. Under the ESA, the incidental take permits are issued to an individual (which can be a corporation).³⁴ Under MMPA the incidental take authorizations are issued for an activity, instead. The language of the MMPA allows U.S. citizens to seek authorization for specified activities to allow the incidental take of “small numbers of marine mammals” for five-year periods, provided that the taking will have a negligible impact on such species and will not overdeplete animals available to subsistence users.³⁵ Similar permission may be provided for one-year periods for activities that incidentally *harass* small numbers of marine mammals.³⁶ Another difference between the incidental take permit under the ESA and the MMPA equivalent is that the ESA permit can be valid for decades, even 100 years. The MMPA authorization is valid for five-year periods, although it can be renewed. It is not clear if this difference protects the polar bear, however.

The two acts diverge regarding military activities that could result in an incidental take. The MMPA exempts activities “necessary for national defense”³⁷ from the permitting process. The exemption is limited to a two-year period, which can be renewed. There is also a separate standard for military readiness activities seeking incidental take authorizations.³⁸ That standard provides that when determining whether such an activity will have the “least practicable adverse impact” on a species, the Service will consider “personnel safety, practicality of implementation, and impact on the effectiveness” of the activity. Under the ESA, a special committee may exempt military actions deemed by the Department of Defense (DOD) as necessary for national security.³⁹ The exemption applies only to a specific action, and not to a category of actions as allowed under the MMPA.

Special Rules for Polar Bears

For the most part, the Special Rules for the polar bear establish that the MMPA, not the ESA, governs. They address incidental takes, subsistence users, military exemptions, and citizen suits. In contrast, the Special Rules for the distinct population segment of the northern sea otter pertained only to use of sea otter parts in native handicrafts.

³⁴ 50 C.F.R. § 17.22(b)(1). *Person* is defined in the ESA to include individuals, corporations, partnerships, and officers, employees, agents, departments, or instrumentalities of a federal, state, or local government. ESA § 3(13), 16 U.S.C. § 1532(13).

³⁵ MMPA § 101(a)(5)(A), 16 U.S.C. § 1371(a)(5)(A). *Citizens of the United States* is defined broadly to include corporations organized under U.S. law, and even federal, state, and local agencies. 50 C.F.R. § 18.27(c).

³⁶ MMPA § 101(a)(5)(D), 16 U.S.C. § 1371(a)(5)(D).

³⁷ 16 U.S.C. § 1371(f).

³⁸ 16 U.S.C. § 1371(a)(5)(A)(ii).

³⁹ 16 U.S.C. § 1536(j).

Incidental Takes

The incidental take provisions of Section 17.32 generally apply to threatened species, but because there are Special Rules under Section 4(d) for the polar bears, that regulation does not apply. Instead the special rules provide the process. In those rules the FWS states that there will be no change for incidental takes of polar bears now that the species is listed under the ESA. The rules for taking polar bears will be the same as they were under the MMPA. The FWS states: “if incidental take has been authorized under section 101(a)(5) of the MMPA, either by the issuance of an Incidental Harassment Authorization or through incidental take regulations, we will not require an incidental take permit issued in accordance with 50 CFR 17.32(b).”⁴⁰

The FWS states that the standard under the MMPA is more restrictive. According to the FWS, the MMPA definition of *negligible impact*, which is defined as “an impact that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species through effects on annual rates of recruitment or survival”⁴¹ is “a more protective standard than [the ESA] requirement.”⁴² Based on this representation by the FWS, following the ESA would not increase protections for the polar bear.

Having an MMPA incidental take authorization instead of the ESA equivalent could provide an advantage for applicants: no HCP has to be negotiated and approved. The HCP application process can be involved—the FWS recommends creating steering committees to develop the scope of the HCP and mitigation programs, and has issued a handbook to guide applicants.⁴³ However, it is not clear if this provides additional protection of the bear. The HCP is one way in which the ESA protects habitat of listed species. HCPs are intended to provide for the restoration and protection of the listed species’ habitat.⁴⁴ No such plan is required by the MMPA, and no habitat protection or restoration is required, although applicants are required to discuss methods to make the least impact on the species and habitat.

MMPA Incidental Take Authorizations (ITAs) are currently valid for the oil and gas industry in polar bear habitat. An ITA has been in place for oil and gas activities in the Beaufort Sea since 1993. The most recent ITA for Beaufort Sea was issued in 2006.⁴⁵ An ITA for the Chukchi Sea is effective from June 11, 2008, to June 11, 2013.⁴⁶

Climate Change Issues Related to Incidental Takes

The Special Rules alter how climate change may be considered in the context of the polar bear in two ways: limiting the areas in which private actions may be liable for a taking of a bear; and limiting the ability of citizens to sue. Some believed listing the polar bear under the ESA would

⁴⁰ 73 Fed. Reg. 28306, 28310 (May 15, 2008).

⁴¹ 50 C.F.R. § 18.27(c).

⁴² 73 Fed. Reg. at 28311.

⁴³ FWS and NMFS, Habitat Conservation Planning and Incidental Take Permit Processing Handbook (November 4, 1996), online at <http://www.fws.gov/Endangered/pdfs/HCP/HCPBK3.PDF>.

⁴⁴ 50 C.F.R. § 17.3.

⁴⁵ 71 Fed. Reg. 43926 (August 2, 2006).

⁴⁶ 73 Fed. Reg. 33212 (June 11, 2008).

allow challenges to actions that adversely affected the climate.⁴⁷ The theory was that projects that would increase greenhouse gas emissions, such as power plant operations or automobile emission standards, would adversely affect the bear by contributing to habitat loss. The FWS addresses this theory in the Section 4(d) rules, at 50 C.F.R. § 17.40(q)(4). Specifically, under the Special Rules, if an incidental take of polar bears results from activities outside of the current range of the polar bear, that act is not prohibited by the ESA.⁴⁸ This suggests that operating a power plant, for example, in any state but Alaska would not require an incidental take permit for harming polar bears because that activity is outside of the polar bear's current range.

However, this exclusion applies only to private parties. The Special Rules explicitly state “the special rule does not remove or alter in any way the consultation requirements under section 7 of the ESA.”⁴⁹ Section 7, of course, is the process by which federal agencies obtain permission for incidental takes. Federal agencies would have the same consultation requirements for their actions in Alaska as outside of Alaska.

However, the Special Rules limit citizen suit challenges against the federal government for actions that may harm polar bears. The Special Rules limit citizen suits for takings to actions that occur in the current range of the polar bear. This appears to bar citizen suits against the federal government for issuing a permit for a power plant outside of Alaska, for example.

Incidental Takes and Military Actions

Because the Special Rules categorize incidental takes as being governed by the MMPA, the exemption available to the military will apply to actions affecting the polar bear. The ESA equivalent exemption is more limited in that it applies to only one action, not a category of actions. As mentioned above, two types of military actions are addressed by the MMPA: activities “necessary for national defense,”⁵⁰ which are exempted; and military readiness activities, which have separate standards for incidental take authorizations.⁵¹

Citizen Suits

The ESA contains an enforcement provision that the MMPA does not; however, the Special Rules limit its reach. The ESA allows citizens to take action against other citizens to halt violations of the act.⁵² The citizen suit provision could provide additional protection for the polar bear, if citizen enforcers use it. It allows “any person” to give 60 days’ written notice of a violation to an alleged violator and the FWS. If the FWS or the United States has not begun an action to redress the violation or otherwise punish the violator by the end of 60 days, a civil suit may be filed to enjoin the violation. In practice, however, the citizen suit provision primarily is used against federal agencies and rarely against anybody else. Citizens may bring suit against a federal agency for violations of the MMPA by using the Administrative Procedure Act (APA).

⁴⁷ For details on this, see CRS Report RS22906, *Use of the Polar Bear Listing to Force Reduction of Greenhouse Gas Emissions: The Legal Arguments*, by Robert Meltz.

⁴⁸ 73 Fed. Reg. at 76251.

⁴⁹ *Id.*

⁵⁰ 16 U.S.C. § 1371(f).

⁵¹ 16 U.S.C. § 1371(a)(5)(A)(ii).

⁵² ESA § 11(g), 16 U.S.C. § 1540(g).

The Special Rules limit the citizen suit provision by recategorizing many possible incidental take claims as an MMPA issue. According to the FWS, the citizen suit provision would apply in two circumstances: 1) claims not based on incidental takes; or 2) claims based on incidental takes where the activity occurred within Alaska.⁵³ This means that only the government could enforce MMPA violations regarding an unauthorized take based on an activity outside of the current range of the polar bear.⁵⁴

Subsistence Users

The two acts have different provisions regarding how Native Alaskans may take polar bears. It is not clear that the ESA listing provides additional protections for the polar bear regarding subsistence users. The FWS says that the MMPA rule is more restrictive and that under the Special Rules it will treat compliance with the MMPA as compliance with the ESA,⁵⁵ in essence neutralizing any additional protections the ESA may have provided. Both laws provide exemptions for Alaskan Natives to take species for subsistence purposes.⁵⁶ The definition of subsistence users is more restrictive in the MMPA than the ESA. Both allow Indians, Aleuts, and Eskimos to kill polar bears for subsistence use. However, the ESA also allows non-native permanent residents of an Alaska native village to take for subsistence use under Section 10(e).⁵⁷ On the other hand, the ESA allows only subsistence use in its exception, while the MMPA also permits Alaskan natives to use polar bears for commercial sale of traditional handicrafts made of polar bear parts.⁵⁸

Section 7 Consultations

The Section 7 consultation provision under the ESA has no parallel in the MMPA. Under Section 7 federal agencies must consult with the FWS before committing significant resources toward an action that may jeopardize a listed species or harm its critical habitat.⁵⁹ This requirement is known as a Section 7 consultation. There is no similar separation of federal and private actions in the MMPA.

The Section 7 consultation can be a time-consuming and litigious activity. A look at 51 cases since 2001 in which a court found that the FWS or NMFS did not comply with the ESA shows that 15 of those cases involved Section 7 consultations. It is a primary reason given by the State of Alaska for its lawsuit against the FWS for listing the polar bear under the ESA.⁶⁰ Alaska fears that the oil and gas industry will forgo exploration and development in the state due to the extra requirements that the ESA imposes.⁶¹

⁵³ 73 Fed. Reg. at 76255.

⁵⁴ *Id.*

⁵⁵ 73 Fed. Reg. 28305, 28307 (May 15, 2008).

⁵⁶ ESA § 10, 16 U.S.C. § 1539(e); MMPA § 101(b), 16 U.S.C. § 1371(b).

⁵⁷ See 73 Fed. Reg. 28282, 28300 (May 15, 2008).

⁵⁸ MMPA § 101(b)(2), 16 U.S.C. § 1371(b)(2); 50 C.F.R. § 216.23.

⁵⁹ ESA § 7, 16 U.S.C. § 1536.

⁶⁰ Governor Sarah Palin, *State to Sue Over Polar Bear Listing*, Press Release No. 08-076 (May 21, 2008).

⁶¹ *Id.*

Under the ESA, federal agencies are required to consult with the FWS or NMFS to ensure that federal actions are not likely to jeopardize the continued existence of a listed species or result in the adverse modification of habitat.⁶² The FWS indicated the Special Rules do not alter Section 7 consultations:

These requirements under the ESA remain unchanged under this rule regardless of whether the action occurs inside or outside the current range of the polar bear. This special rule does not negate the need for a Federal action agency to consult with the Service to ensure that any action being authorized, funded, or carried out is not likely to jeopardize the continued existence of the polar bear.⁶³

As for existing MMPA incidental take authorizations for federal actions relating to the oil and gas industry, the FWS says that it believes the ITAs are harmonious with ESA consultation requirements and that no additional measure would be required:

to the extent that any Federal actions comport with the standards for MMPA incidental take authorization, we would fully anticipate any such section 7 consultation under the ESA would result in a finding that the proposed action is not likely to jeopardize the continued existence of the polar bear. In addition, we anticipate that any such proposed action(s) would augment protection and enhance agency management of the polar bear through the application of site-specific mitigation measures contained in authorization issued under the MMPA.⁶⁴

Similarly, the FWS anticipates no additional administrative burden for federal actions related to commercial fisheries: “[we anticipate that] a consultation on commercial fishery activities in Alaska would result in a ‘no effect’ determination under section 7 of the ESA.”⁶⁵

Habitat and Critical Habitat

The polar bear was listed as a threatened species because the loss of its habitat made it likely to become endangered. Habitat protection, therefore, is significant to the bear. The United States committed by treaty to protect the habitat of the polar bear. In 1973, the United States, Canada, Denmark, Norway, and the former Union of Soviet Socialist Republics entered an international agreement to protect polar bears.⁶⁶ The United States ratified the Agreement on the Conservation of Polar Bears in 1976. In addition to prohibiting the take of polar bears, the Agreement also requires actions to protect their habitat. Article II requires the Parties:

- to take appropriate action to protect the ecosystem of which polar bears are a part;

⁶² ESA § 7, 16 U.S.C. § 1536(a)(2).

⁶³ 73 Fed. Reg. at 76252. The consultation regulations were revised in 2008, limiting how effects from “global processes” such as climate change would be considered in the Section 7 process. For an analysis of the revised regulations, see CRS Report RL34641, *Changes to the Consultation Regulations of the Endangered Species Act (ESA)*, by Kristina Alexander and M. Lynne Corn.

⁶⁴ 73 Fed. Reg. 28305, 28311 (May 15, 2008).

⁶⁵ 73 Fed. Reg. 28305, 28312 (May 15, 2008).

⁶⁶ Agreement on the Conservation of Polar Bears, T.I.A.S. No. 8409, 27 U.S.T. 3918 (November 15, 1973).

- to give special attention to habitat components such as denning and feeding sites and migration patterns; and
- to manage polar bear populations in accordance with sound conservation practices based on the best available scientific data.

In addition to the international obligation to protect polar bear habitat, the ESA prohibits habitat destruction that injures an animal and requires parties planning actions that could result in incidental takes to develop plans to protect habitat. Additional habitat protections under the ESA apply at a time critical habitat is designated for a species when federal agencies must consult with a Service regarding the effects of its actions on critical habitat. No critical habitat has been designated for the polar bear.

The ESA defines critical habitat as “the 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.”⁶⁷ It also includes areas *outside* the geographical area occupied by the species if those areas are deemed essential for the conservation of the species. There is no similar provision in the MMPA.

The ESA requires the FWS to designate areas of critical habitat and to make that designation based on the best scientific data available after taking into consideration the economic impact.⁶⁸ Critical habitat has not been designated for every listed species, however.⁶⁹ The advantage to a species of having critical habitat designated is that the Section 7 consultation for federal agencies requires them to ensure their actions do not destroy or adversely modify critical habitat in addition to not jeopardizing species.⁷⁰

Beginning with its 90-day finding for the polar bear in 2006, the FWS has said that it would make its critical habitat designation separately from the listing.⁷¹ The Center for Biological Diversity sued the FWS for not designating critical habitat at the time of listing.⁷² Pursuant to a settlement agreement, the FWS agreed to make its final designation of critical habitat by June 30, 2010.⁷³

⁶⁷ ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A).

⁶⁸ ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2).

⁶⁹ According to FWS, as of July 3, 2008, it has listed between 1927 and 1985 species (depending on which FWS website is used), and designated critical habitat for 508 of those species. (Compare FWS websites at http://ecos.fws.gov/tess_public/CriticalHabitat.do?nmfs=1 with http://ecos.fws.gov/tess_public/SpeciesReport.do and http://ecos.fws.gov/tess_public/SpeciesReport.do.) In some cases the agency can determine that the public designation of habitat could put the species in danger, but that is an exception to the rule of naming the area.

⁷⁰ ESA § 7, 16 U.S.C. § 1536(a)(2).

⁷¹ 71 Fed. Reg. 6745, 6746 (February 6, 2006) (“If we determine in our 12-month finding that listing the polar bear is warranted, we will address the designation of critical habitat in a subsequent proposed rule”).

⁷² Center for Biological Diversity v. Kempthorne, No. C 08-1339 CW (N.D. Cal. 2008).

⁷³ Center for Biological Diversity v. Kempthorne, No. C. 08-1339 CW (N.D. Cal. *stipulated partial settlement agreement filed* October 6, 2008).

Recovery Plans

A recovery plan provides recovery goals for listed species and is required by the ESA.⁷⁴ The FWS is required to produce a plan with public input (which may include teams to prepare the plan) that identifies by specific, measurable criteria when a species has recovered, showing when it can be removed from listing. A recovery plan is intended to provide for the conservation and survival of listed species, giving priority to those species most likely to benefit from such a plan, “particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.”⁷⁵ It would appear the polar bear would be such a priority.

A recovery plan is one of the areas under the ESA where expense is considered—a recovery plan must provide estimates of the time and money needed to achieve the plan’s goal.⁷⁶ The FWS and NMFS are required to report to Congress every two years on recovery plans they have prepared and the status of the species in those plans. While the MMPA has a reporting requirement in conjunction with monitoring efforts under the ITAs, there is no similar requirement for identifying any success in protecting species.

In some instances a recovery plan is issued at the time of the listing. No plan for the polar bear has been issued. Upon completion of a plan, Congress would receive biennial updates on the polar bear’s status.

Difference If Listed As Endangered

There would be different protections if the polar bear had been listed as an endangered species, rather than a threatened one. However, as it was already forbidden to kill, harm, or harass the bear under the MMPA, an endangered status would not improve that protection. Primarily, the endangered listing would mean no Special Rules. Without the Special Rules, there would be no harmonization of the incidental take permission, military exemptions, citizen suits, and subsistence users, possibly causing confusion as to which law applied. Incidental takes would require development of HCPs, which would focus more attention on habitat restoration and protection. Takes of the polar bear would not be limited to actions in Alaska, and takings based on climate change could be more of a factor in determining harm. Without the Special Rules, there would be no special standard for military readiness activities. Without the Special Rules, citizen suits would not be limited in scope beyond what was provided by the ESA. Also, without the Special Rules, there would not be an exception allowing the killing of polar bears for commercial sale of handicrafts by subsistence users.

Also, an endangered listing could enhance international protection of the bear. The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) provides additional trade protections for those species threatened with extinction, known as Appendix I species. The polar bear is listed as an Appendix II species, meaning that it does not have all of the protections

⁷⁴ ESA § 4(f), 16 U.S.C. § 1533(f). Approximately two-thirds of the listed species have such plans. See http://ecos.fws.gov/tess_public/Boxscore.do.

⁷⁵ ESA § 4(f)(1)(A), 16 U.S.C. § 1533(f)(1)(A).

⁷⁶ ESA § 4(f)(1)(B)(iii), 16 U.S.C. § 1533(f)(1)(B)(iii).

available to an Appendix I species. A country cannot unilaterally place a species on either list. However, the United States' determination that the polar bear was in danger of extinction would likely be persuasive in changing the bear's status from Appendix II to Appendix I, providing the additional trade protections afforded to Appendix I species.

Conclusion

The polar bear was already protected under the MMPA before the FWS listed it as threatened under the ESA, but some additional protections would inure to the polar bear's benefit by being covered by the ESA. Being listed as a threatened species meant permits for importing sport-hunted polar bear parts from Canada were discontinued—a practice that permitted approximately 80 bears per year to be imported. The ESA protects the bear and its habitat, meaning that some protection may accrue if habitat destruction is prosecuted. Otherwise, there appears to be little additional protection provided by the listing. Critical habitat designation and recovery plans are two areas in which the ESA provides protection, but the MMPA does not. However, as neither was prepared at the time of the listing, the potential for such additional protections remains unaddressed.

Moreover, some of the protections the ESA may have added were obviated by the creation of Special Rules. For example, the Special Rules end any difference between incidental takes of polar bears under the ESA and under the MMPA by declaring that compliance under the MMPA would be evidence of compliance with the ESA. This could clarify the permitting process by showing only one permit was required, possibly benefitting current and future permit holders. The Special Rules allow categories of military activities to be exempted, rather than an action-by-action review as required under the ESA. The Special Rules limit takes to activities occurring in Alaska, and allow the MMPA ITA process to control, which could be argued as being less protective of polar bear habitat. The citizen suit provision was an ESA tool that could be used to halt activities that harmed the bear, but was limited in scope by the Special Rules. The Special Rules also declare that the MMPA rules for subsistence users apply, ending any distinction that might have protected the polar bear had just the ESA been used.

The Omnibus Appropriations Act of 2009 allows the Secretary of the Interior to “withdraw or reissue” the Special Rules without having to undergo the rulemaking procedures required by the Administrative Procedure Act.⁷⁷ The Secretary must act by May 11, 2009. If the Special Rules are revoked, the general rules that apply to all threatened species would likely regulate the polar bear, in which case none of the exceptions created by the Special Rules would apply.

⁷⁷ P.L. 111-8, Tit. IV, § 429(a)(2).

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