



Does the Endangered Species Act Listing Provide More Protection of the Polar Bear?

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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 listed the bear as threatened on May 15, 2008, what protections were provided by the listing?

One example of increased protection is that ESA threatened species are categorized as 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. Proposed legislation would change that. H.R. 1054 would allow import of polar bears that were legally taken prior to the ESA listing, and H.R. 1055 would revise the MMPA to allow continued import of polar bears, regardless of their status. S. 1395 would also allow continued import of polar bear trophies, but would further modify the act to allow imports even when it would have a significant impact on the Canadian population of bears and regardless of whether it is otherwise consistent with the MMPA. H.R. 5379 would statutorily revoke the listing.

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. FWS proposed designating critical habitat in May 2010 (revising a proposed designation of October 2009); therefore, that environmental protection would be available when final. FWS estimates that the additional expense of considering adverse impacts on critical habitat could total \$53,900 per year. The ESA requires another system that might protect the bear—establishing a recovery plan—but FWS has not completed the process. When a recovery plan is prepared, it would establish recovery goals and trigger congressional monitoring of the polar bear's progress.

The Special Rule for the polar bear, under Section 4(d) of the ESA, may have minimized some protections the listing otherwise may have provided. The Special Rule describes 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 Rule also eliminates 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 Rule also adds 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 Rule. Arguably, polar bears would have been more protected.

A November 2010 court ruling could lead to the end of the Special Rule. The D.C. District Court remanded the listing decision, requiring FWS to justify its rationale by December 23, 2010. If FWS cannot satisfy the court, and the court directs an endangered determination, the Special Rule would cease to apply.

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 Rule within 60 days. No change was made.

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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 Others are concerned that the listing could inhibit natural resource development in the bear's Arctic habitat. This report discusses what additional protections are provided by the ESA listing that were not available before.

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 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. FWS found that the bear was likely to become endangered in the foreseeable future.

A federal court held that FWS's rationale for listing the bear as threatened, instead of endangered, was not consistent with the ESA.⁵ FWS had found that to be endangered under the act, a species must be in imminent danger of extinction, and since the polar bear was not in immediate risk of extinction, it was not endangered. The court found no such support for an immediacy factor in the ESA. Instead, it said the statute was deliberately ambiguous. The court directed FWS to provide support for its interpretation. FWS's submission is due by December 23, 2010, with the other parties given the opportunity to respond. A hearing is scheduled for February 23, 2011. In the meantime, the threatened status of the polar bear remains unchanged.

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...."⁶

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."⁷

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 *In Re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, No. 08-764 (D.D.C. Nov. 4, 2010).

⁶ ESA § 2(b); 16 U.S.C. § 1531(b).

⁷ MMPA § 2(2), 16 U.S.C. § 1361(2).

Prohibitions

Both the MMPA and the ESA prohibit taking or transporting species protected under the acts.⁸ The ESA definition of *take* includes *harm*, which means killing or injuring wildlife, including significant habitat disruption that impairs essential behavioral patterns.⁹ *Take* also includes *harass*, meaning an action likely to injure by significantly disrupting normal behavioral patterns.¹⁰ Under the MMPA the term *take* includes “harass, hunt, capture, or kill, or attempt to do those activities.”¹¹ *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.¹² This could be an advantage to polar bear protection under the ESA, 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.”¹³

Special Rule

The ESA allows 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.”¹⁴ 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.¹⁵ The rules apply just to that one

⁸ ESA § 9, 16 U.S.C. § 1538(a)(1); MMPA § 101, 16 U.S.C. § 1371(a).

⁹ 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).

¹⁰ 50 C.F.R. § 17.3.

¹¹ MMPA § 3(13), 16 U.S.C. § 1362(13).

¹² *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).

¹³ *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 11 F. Supp. 2d 529, 553 (D.N.J. 1998).

¹⁴ ESA § 4(d), 16 U.S.C. § 1533(d).

¹⁵ Several environmental groups have submitted comments to FWS stating that the Special Rule fails 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).

species. A Special Rule was issued for the polar bear at the time of the listing¹⁶ and made final in December 2008.¹⁷ In essence, the polar bear Special Rule harmonizes the requirements of the MMPA and the ESA, saying that compliance with the MMPA will be treated as compliance with the ESA.¹⁸ It is 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 southern sea otters. Of these, only the northern sea otter has a Special Rule, which applies only to one distinct population of the species.¹⁹

Congress authorized the Secretary of the Interior to “withdraw or reissue” the Special Rule within 60 days of the Omnibus Appropriations Act of 2009 (Omnibus Act).²⁰ Public notice and comment were waived by the Omnibus Act. The Secretary did not act to change the Special Rule.

Exceptions

Both the MMPA and the ESA have exceptions to their prohibitions. Permits may be issued under either statute for taking a species for scientific purposes or to enhance the survival of the species.²¹ Both have provisions for incidental takes.²² Both have exceptions for national security.²³ 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 sport-hunted in Canada.²⁴ Some limits apply to those MMPA permits. The MMPA also provides specific incidental take permit standards for military readiness activities.²⁵

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.²⁶ Approximately 80 permits a

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

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

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

¹⁹ 50 C.F.R. § 17.40(p).

²⁰ P.L. 111-8, Tit. IV, § 429 (March 11, 2009).

²¹ ESA § 10, 16 U.S.C. § 1539(a)(1)(A); MMPA § 101(a)(1), 16 U.S.C. § 1371(a)(1).

²² 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).

²³ 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).

²⁴ MMPA § 101(a)(1), 16 U.S.C. § 1371(a)(1).

²⁵ 16 U.S.C. § 1371(a)(5)(ii).

²⁶ 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). This action is part of the consolidated case *In re Polar Bear Endangered* (continued...)

year were issued under this program. That is one way in which the May 15, 2008, listing increased protection of the bears. (See “Congressional Action,” below, for a discussion of legislation that would reinstate this program.)

Incidental Takes in General

As stated above, both the ESA and the MMPA allow incidental takes of species protected under the acts.²⁷ 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.²⁸ 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.²⁹ 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 applicant must describe the steps it will take to monitor, minimize, and mitigate any impacts to the threatened species in an HCP; alternative actions and why they are not being used; and any other necessary and appropriate measures imposed by FWS.³⁰

Permission for an MMPA incidental take requires an applicant to submit data about the project and the impacted animals, and to suggest mitigation.³¹ The application is reviewed 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).³² Under MMPA the incidental take authorizations are issued for an activity, instead.³³ The language of the MMPA allows U.S. citizens to seek authorization for specified

(...continued)

Species Act Listing and §4(d) Rule Litigation, No. 08-764 (D.D.C.).

²⁷ 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.”

²⁸ ESA § 10, 16 U.S.C. § 1539; ESA § 7, 16 U.S.C. § 1536.

²⁹ MMPA § 101, 16 U.S.C. § 1371.

³⁰ 50 C.F.R. § 17.32(b)(1)(iii)(C).

³¹ 50 C.F.R. § 18.27(d).

³² 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).

³³ See *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009) (holding that “oil and gas exploration” is not too broad a description to be considered a *specified activity* under the MMPA).

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.³⁴ Similar permission may be provided for one-year periods for activities that incidentally *harass* small numbers of marine mammals.³⁵ 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 whether 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”³⁶ 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.³⁷ 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.³⁸ The exemption applies only to a specific action, and not to a category of actions as allowed under the MMPA.

Special Rule for Polar Bears

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

Incidental Takes

The incidental take provisions of 50 C.F.R. § 17.32 generally apply to threatened species, but because there is a Special Rule under Section 4(d) of the ESA for the polar bears, that regulation does not apply. Instead the Special Rule provides the process for incidental takes. In the rule FWS states that there will be no change for incidental takes of polar bears now that the species is listed under the ESA. The rule for taking polar bears will be the same as it was under the MMPA: “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).”³⁹

³⁴ 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 federal, state, and local agencies. 50 C.F.R. § 18.27(c).

³⁵ MMPA § 101(a)(5)(D), 16 U.S.C. § 1371(a)(5)(D).

³⁶ 16 U.S.C. § 1371(f).

³⁷ 16 U.S.C. § 1371(a)(5)(A)(ii).

³⁸ 16 U.S.C. § 1536(j).

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

According to FWS, the standard for incidental takes under the MMPA is more restrictive. FWS says that 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,”⁴⁰ is “a more protective standard than [the ESA] requirement.”⁴¹ Based on this representation, 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—FWS recommends creating steering committees to develop the scope of the HCP and mitigation programs, and has issued a handbook to guide applicants.⁴² 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.⁴³ 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 2006.⁴⁴ An ITA for the Chukchi Sea is effective from June 11, 2008, to June 11, 2013.⁴⁵

Climate Change Issues Related to Incidental Takes

The Special Rule alters 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 allow challenges to actions that adversely affected the climate.⁴⁶ 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. FWS addresses this theory in the Section 4(d) rule, at 50 C.F.R. § 17.40(q)(4). Specifically, under the Special Rule, 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.⁴⁷ 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 and not to actions of the federal government. The Special Rule explicitly states “the special rule does not remove or alter in any

⁴⁰ 50 C.F.R. § 18.27(c).

⁴¹ 73 Fed. Reg. at 28311.

⁴² FWS and NMFS, Habitat Conservation Planning and Incidental Take Permit Processing Handbook (November 4, 1996), at <http://www.fws.gov/Endangered/pdfs/HCP/HCPBK3.PDF>.

⁴³ 50 C.F.R. § 17.3.

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

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

⁴⁶ 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.

⁴⁷ 73 Fed. Reg. at 76251.

way the consultation requirements under section 7 of the ESA.”⁴⁸ Section 7 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. So an agency issuing a permit for a power plant outside of the polar bear’s range still needs to conduct a section 7 consultation.

However, the Special Rule limits citizen suit challenges against the federal government for actions that may harm polar bears. The Special Rule limits citizen suits for takings to actions that occur in the current range of the polar bear. To continue the example, if a citizen is dissatisfied with the results of a consultation that found a permit for a non-Alaskan power plant would not jeopardize the polar bear, the citizen would not be able to challenge this conclusion under the ESA.

Incidental Takes and Military Actions

Because the Special Rule categorizes incidental takes as being governed by the MMPA, the exemption available to the military applies 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,”⁴⁹ which are exempted; and military readiness activities, which have separate standards for incidental take authorizations.⁵⁰

Citizen Suits

The ESA contains an enforcement provision that the MMPA does not; however, the Special Rule limits its reach. The ESA allows citizens to take action against other citizens to halt violations of the act.⁵¹ 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 FWS. If 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).

The Special Rule limits the citizen suit provision by recategorizing many possible incidental take claims as an MMPA issue. According to 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.⁵² 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.⁵³

⁴⁸ *Id.*

⁴⁹ 16 U.S.C. § 1371(f).

⁵⁰ 16 U.S.C. § 1371(a)(5)(A)(ii).

⁵¹ ESA § 11(g), 16 U.S.C. § 1540(g).

⁵² 73 Fed. Reg. at 76255.

⁵³ *Id.*

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. FWS says that the MMPA rule is more restrictive and that under the Special Rule it will treat compliance with the MMPA as compliance with the ESA,⁵⁴ in essence neutralizing any additional protections the ESA may have provided. Both laws provide exemptions for Alaskan Natives to take species for subsistence purposes.⁵⁵ 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).⁵⁶ 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.⁵⁷

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 FWS before committing significant resources toward an action that may jeopardize a listed species or harm its critical habitat.⁵⁸ 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 in the last decade in which a court found that 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 FWS for listing the polar bear under the ESA.⁵⁹ 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.⁶⁰

Under the ESA, federal agencies are required to consult with 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.⁶¹ FWS indicated the Special Rule does 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

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

⁵⁵ ESA § 10, 16 U.S.C. § 1539(e); MMPA § 101(b), 16 U.S.C. § 1371(b).

⁵⁶ See 73 Fed. Reg. 28282, 28300 (May 15, 2008).

⁵⁷ MMPA § 101(b)(2), 16 U.S.C. § 1371(b)(2); 50 C.F.R. § 216.23.

⁵⁸ ESA § 7, 16 U.S.C. § 1536.

⁵⁹ Governor Sarah Palin, *State to Sue Over Polar Bear Listing*, Press Release No. 08-076 (May 21, 2008).

⁶⁰ *Id.*

⁶¹ ESA § 7, 16 U.S.C. § 1536(a)(2).

action being authorized, funded, or carried out is not likely to jeopardize the continued existence of the polar bear.⁶²

As for existing MMPA incidental take authorizations for federal actions relating to the oil and gas industry, 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.⁶³

Similarly, 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.”⁶⁴

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.⁶⁵ 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;
- 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

⁶² 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.

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

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

⁶⁵ Agreement on the Conservation of Polar Bears, T.I.A.S. No. 8409, 27 U.S.T. 3918 (November 15, 1973).

a Service regarding the effects of its actions on critical habitat. No critical habitat has been designated for the polar bear, although a proposed designation has been made.⁶⁶

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 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

After being sued for not designating critical habitat at the time of listing,⁷¹ FWS issued a proposed designation in October 2009,⁷² with the final designation of critical habitat scheduled to be completed by June 30, 2010.⁷³ However, because of an incorrect calculation of U.S. territorial waters, the proposed designation was revised and reissued on May 5, 2010, reducing the proposed area from 519,403 km² to 484,764 km².⁷⁴ A draft economic analysis of how much the critical habitat designation is expected to cost was also issued in 2010.⁷⁵ According to that analysis, the polar bear habitat designation would have little financial impact on energy development, primarily because the MMPA already imposes restrictions related to the species, and so those costs are already part of the process. However, because the listing adds a Section 7 consultation requirement, the cost is estimated at \$53,900 per year.

⁶⁶ 75 Fed. Reg. 24545 (May 5, 2010) (proposing critical habitat (and revising earlier proposal) based on revised scope of U.S. territorial waters); 74 Fed. Reg. 56058 (October 29, 2009) (initial proposal of critical habitat).

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 September 21, 2010, it has listed between 1,958 species and 2,028 species, depending on which FWS website is used, and designated critical habitat for 597 of those species. See FWS websites at http://ecos.fws.gov/tess_public/CriticalHabitat.do?nmfs=1 (showing critical habitat data); http://ecos.fws.gov/tess_public/pub/boxScore.jsp (showing 1,958 listed species); http://ecos.fws.gov/tess_public/pub/listedPlants.jsp (showing 798 listed plants) and http://ecos.fws.gov/tess_public/pub/listedAnimals.jsp (showing 1,230 listed animals). 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 *Center for Biological Diversity v. Kempthorne*, No. C 08-1339 CW (N.D. Cal. 2008).

⁷² 74 Fed. Reg. 56057 (October 29, 2009).

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

⁷⁴ 75 Fed. Reg. 24545 (May 5, 2010).

⁷⁵ Draft Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States (March 15, 2010), available at http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/polar_bear_dea.pdf.

Recovery Plans

A recovery plan provides recovery goals for listed species and is required by the ESA.⁷⁶ 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.”⁷⁷ 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.⁷⁸ 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 Rule. Without the Special Rule, 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 Rule, there would be no special standard for military readiness activities. Without the Special Rule, citizen suits would not be limited in scope beyond what was provided by the ESA. Also, without the Special Rule, there would not be an exception allowing the killing of polar bears for commercial sale of handicrafts by subsistence users.

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

⁷⁶ 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.

⁷⁷ ESA § 4(f)(1)(A), 16 U.S.C. § 1533(f)(1)(A).

⁷⁸ 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.

Congressional Action

Several pieces of legislation have been introduced in the 111th Congress to alter the effects of the polar bear listing. One bill would eliminate the listing altogether (H.R. 5379), effectively reinstating the sport-hunt program and nullifying the Special Rule. Other bills, H.R. 1055 and S. 1395, would revise the MMPA to allow continued import of polar bears, regardless of their status. S. 1395 would further modify the act to allow imports even when they would have a significant impact on the Canadian population of bears and regardless of whether they were otherwise consistent with the MMPA. H.R. 1054 would create an exception in the MMPA to allow import of those bears killed prior to the May 2008 listing.

Conclusion

The polar bear was already protected under the MMPA before 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. Critical habitat designation and recovery plans are two areas in which the ESA provides protection, but the MMPA does not. However, as the critical habitat designation is still in the draft phase, and no recovery plan is prepared, the potential for such additional protections remains unaddressed.

Some of the protections the ESA may have added were obviated by the creation of the Special Rule. For example, the Special Rule ends 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 Rule allows categories of military activities to be exempted, rather than an action-by-action review as required under the ESA. The Special Rule limits takes to activities occurring in Alaska, and allows 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 Rule. The Special Rule also declares 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 allowed the Secretary of the Interior to “withdraw or reissue” the Special Rule without having to undergo the rulemaking procedures required by the APA.⁷⁹ But the Secretary did not act within the May 2009 deadline, and so the Special Rule

⁷⁹ P.L. 111-8, Tit. IV, § 429(a)(2).

remains in place. If the polar bear's threatened status is changed, the Special Rule will no longer apply.

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