



# MARINE MAMMAL COMMISSION

9 January 2017

Mr. Greg Siekaniec, Director  
Alaska Region  
U.S. Fish and Wildlife Service  
1011 East Tudor Road  
Anchorage, Alaska 99503

Dear Mr. Siekaniec:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Fish and Wildlife Service's (FWS) 8 November 2016 advance notice of proposed rulemaking (81 Fed. Reg. 78560). FWS is soliciting comments on the development of a regulatory program and local management structures to enable it to meet its responsibilities under the United States-Russia Polar Bear Agreement (the Agreement) and Title V of the Marine Mammal Protection Act (MMPA). Specifically, FWS is seeking comments on the following five general matters:

- The appropriate activities and functions to be carried out by a co-management partner;
- candidate organizations or entities to serve in the capacity of a co-management partner;
- recommendations for improving the process for obtaining the input and engagement of Alaskan Natives in polar bear conservation and management;
- recommendations for improving the exchange of information between the Federal Government and Alaskan Natives on polar bear conservation and management; and
- methods and measures for effective implementation of polar bear harvest management, consistent with the obligations of the U.S.-Russia Agreement.

In soliciting this information, the FWS has posed the following eight questions related to the establishment and maintenance of a cooperative agreement with an Alaska Native organization (ANO) for polar bear conservation and management and the promulgation of regulations to monitor and manage the harvest of polar bears from the Alaska-Chukotka population:

- 1. Should the Service enter into a cooperative agreement with a new ANO for polar bear conservation and management?
- 2. What functions and roles should a polar bear co-management entity perform?
- 3. How should a polar bear co-management entity be formed?
- 4. Are there existing organizations or entities that are capable of and interested in serving in the role of the polar bear co-management entity?
- 5. What methods are most effective for the exchange of information between the Federal Government and Alaskan Natives?
- 6. Should harvest regulations for polar bears in the Alaska-Chukotka population be promulgated only at the Federal level or issued by the polar bear co-management entity and then adopted in Federal regulations?

- 7. What is the appropriate timing for reporting of harvested bears?
- 8. What is the most effective method for reporting of harvested bears in a timely manner?

The Commission offers the following comments and recommendations on these issues.

#### Formation of a Polar Bear ANO

Until mid-2016, the Alaska Nanuuq Commission (ANC) had been the ANO representing Alaska subsistence hunting communities and Alaska Native subsistence hunters in matters relating to polar bears. The ANC, chartered in 1995, was integral in negotiating the Agreement and had played a key role in working with the FWS, Native hunters in Russia, and others to implement the Agreement ever since. Throughout this process, it has the expectation of those involved that U.S. positions put forward in the U.S.-Russia Polar Bear Commission would be developed jointly by government and Alaska Native representatives and that implementation would likewise be accomplished jointly. The provisions of Title V of the MMPA are premised on following such an approach. The Commission continues to believe that successful implementation of the Agreement and effective conservation and management of polar bears in Alaska are best accomplished using a cooperative approach, with the FWS and an ANO sharing responsibilities. With the demise of the ANC, the Commission considers it imperative that a new ANO be identified as a successor to the ANC and that a cooperative agreement between the FWS and that ANO be completed as soon as possible.

The Commission is not in a position to suggest whether an existing entity might serve as an appropriate polar bear ANO or how a new one should be formed. The ANO serves as the representative of Native Alaska subsistence communities and hunters, and it is up to them to decide how they want to be represented and by whom. The Commission's only concern is that the selected entity be capable of carrying out the tasks ahead by having the necessary community support, authorities, resources, and motivation to be an effective co-management partner and representative of Alaska Native interests. The Commission is aware that FWS has issued a contract with the Indigenous People's Council for Marine Mammals (IPCoMM) to coordinate the formation of a successor polar bear ANO and that a meeting will be held early in 2017 to begin the process of forming a new ANO. The Commission regards this as a positive step, as it does the unity with which Native communities are approaching this effort.

Section 501 of the MMPA includes a definition of the term "Alaska Nanuuq Commission," which provides for the possibility that a successor entity would fill the role played by the ANC at the time Title V was enacted. That definition states that the ANC is the entity that "represents all villages in the State of Alaska that engage in the annual subsistence taking of polar bears from the Alaska-Chukotka [polar bear] population...." It is not entirely clear whether that provision is intended to be descriptive of whom Congress thought the ANC represented or aspirational as to whom it thought the ANC should represent. In fact, the ANC was formed through resolutions from 15 Native villages and comprised commissioners from each of those villages. While this delegation of authority and representation included the lion's share of polar bear hunters, it did not include all villages that hunt polar bears from the Alaska-Chukotka polar bear population. It may be that some inhabitants in those other villages hunt polar bears infrequently and fall outside the statutory definition in that those communities do not hunt polar bears on an annual basis. Nevertheless, the Commission believes that the new ANO needs to represent the interests of all hunters and

subsistence users who may be affected by the requirements established under the Agreement, the U.S.-Russia Polar Bear Commission, Title V of the MMPA, the FWS, and/or its co-management partner. These smaller villages and their inhabitants will be subject to the annual taking limits and other requirements established under the Agreement and therefore somehow need to be accounted for. This is an issue that requires closer scrutiny by both the FWS and those forming the new ANO. While these other villages may engage in hunting polar bears so infrequently that they need not have a representative on the new ANO, the bears that are taken in these villages need to be accounted for under whatever monitoring, reporting, and allocation mechanisms are developed.

Although the advance notice of proposed rulemaking and our comments are focused on the Alaska-Chukotka polar bear population, it is worth noting our belief that the new ANO, as was the case with the ANC, should represent Alaska Natives with respect to all polar bear matters.

### Role of the ANO

The discussion on page 78563 of the *Federal Register* notice lists some of the expected functions of the new ANO. These include involving subsistence users in polar bear conservation and management, providing for effective communication, collecting and exchanging traditional ecological knowledge, developing a regional harvest management system, and developing a polar bear co-management structure. Clearly, all of these functions are important and have many sub-elements that the new ANO and the FWS will need to address. In doing so, an appropriate starting place is to look at the activities that were undertaken by the ANC and determine where those activities were successful or fell short. The Commission also recommends that the FWS and the new ANO look closely at the successful co-management arrangement for bowhead whales between the National Oceanic and Atmospheric Administration (NOAA) and the Alaska Eskimo Whaling Commission. It is one of the few models available for how cooperative management, allocation, and enforcement might be structured under U.S. legal authorities.

One of the clear messages from the listening sessions convened by the Commission in Alaska last year and from the June 2016 Polar Bear Summit held in Nome was that communication among the FWS, the ANC, Native villages, and hunters had not been very effective. This is a crucial area where all involved parties should focus their attention. Here, the history with the ANC is particularly illustrative.

The ANC had the necessary delegations of authority to represent the 15 major polar bear hunting villages. The ANC leadership participated as equal partners with the federal government in negotiating the Agreement, developing and implementing legislation, establishing take limits, and designing mechanisms to meet U.S. responsibilities under the Agreement. As such, they were well informed about all of these activities. The cooperative agreements between the FWS and the ANC included a commitment for the ANC to hold an annual meeting of Commissioners from the 15 member villages, at which these developments presumably were discussed. As explained in the *Federal Register* notice, those Commissioners were appointed by their respective tribal governments to serve on the ANC board. As noted by the FWS, the cooperative agreements also included—

a requirement for coordination between the ANC Chairman and the ANC Commissioners to ensure: (1) That all Commissioners were fully informed of the taking limitation that will be implemented for the ACPBP [Alaska-Chukotka polar bear population] ; (2) that community concerns about conservation, management,

and subsistence use of polar bears were shared with the ANC executive leadership with copies to the Service; and (3) that Commissioners attended local tribal government meetings, including those with the ANC leadership and Service employees, to present information on the polar bear harvest and other information about polar bear management and conservation and provide relevant reports from these meetings to the ANC executive leadership with copies to the Service.

On paper, the system established by the FWS and ANC looked exemplary. The ANC leadership was informed of, and in fact participated in, every key action taken to develop and implement the agreement. The ANC held annual meetings with village representatives to inform them of these activities and to hear community concerns. The Commissioners were expected to attend tribal meetings to share information about polar bear management and conservation and gather community input to share with the ANC leadership.

Yet, from what we heard at our Alaska listening sessions, something went seriously awry. Many hunters said that they had only recently heard about the adoption of harvest limits (or not heard about them at all) and many had been misinformed about the details (e.g., where they would apply). The Commission hopes that this experience will provide a cautionary lesson for all involved. The FWS should engage in more outreach on its own and in tandem with the new ANO to ensure that key messages are reaching the affected communities and hunters. The new ANO should place high priority on developing a communication strategy that will ensure that it is keeping those it represents fully informed of actions concerning polar bear management and conservation and is receiving the necessary input from those constituencies. Village governments and affected hunters should also play an active role in seeking out information concerning polar bears. If they have not heard from the FWS or the ANO representatives in a while, they should ask for an update. The design of the communication system under the ANC does not appear to be fundamentally flawed, but everyone involved at every level needs to be more vigilant in meeting his or her responsibilities.

Issues related to the development of regional harvest management structures and co-management structures are largely regulatory matters and are discussed below.

### Funding of the ANO

To be an effective co-management partner, the ANO needs adequate funding to carry out its duties. For several years, we have heard that ANOs generally are underfunded. We do not have sufficient knowledge of past funding levels for the ANC, how that money was spent, or what additional resources will be needed for the new ANO to assume the anticipated management duties to be able to provide informed recommendations for funding specific to the new ANO. However, co-management is a shared undertaking and the funding responsibility should not fall on a single partner. One concern that we have heard from IPCoMM members and at our listening sessions is that the funding partner under section 119 cooperative agreements (i.e., FWS or NMFS) has too much influence on how those agreements are structured and on what tasks are given priority. One way around this is for the tribal or regional governments/corporations that are forming the new ANO to assume some of the funding responsibility. In particular, inasmuch as the ANO would be acting as a representative of the villages, the Commission recommends that the tribal governments and FWS approach the Bureau of Indian Affairs about grants or other funding possibilities to help support ANO activities. In addition, we encourage the new ANO and/or the represented villages to pursue funding opportunities with private foundations or organizations interested in Alaska Native

issues, sustainable use of subsistence resources, or polar bear conservation. The Commission also notes that the MMPA includes separate funding authorizations to support ANO activities generally (section 119(d)) and to implement U.S. obligations under the Agreement (section 509). Both of these authorizations should be pursued in FWS budget requests to ensure adequate funding for polar bear co-management in Alaska.

### Regulatory Issues

The first sentence of the summary provided in the advance notice of proposed rulemaking indicates that FWS “is authorized to issue regulations” to facilitate implementation of U.S. harvest management obligations under the Agreement. In fact, section 503(d)(1) *directs* the FWS to “promulgate such regulations as are necessary to carry out this title and the Agreement.” The Commission believes that such regulations are necessary and recommends that FWS, in cooperation with the new ANO and other stakeholders, initiate the envisioned rulemaking. While that rulemaking should be mainly focused on implementing the annual taking limit, the Commission recommends that FWS also incorporate the prohibitions set forth in section 502(a) of the MMPA and provide clear, accessible guidance on hunting practices that would be in violation of the Agreement (e.g., the taking of cubs, females with cubs, or denning bears; the use of aircraft or large motorized vessels or vehicles; or the use of poison, traps or snares).

Those regulations should focus on meeting the key obligations of the United States under the Agreement; foremost among them is complying with the adopted annual taking limit. The Agreement is silent as to how each party chooses to meet this obligation, so there is considerable flexibility in the regulatory approach that FWS could adopt. The option described on page 78562 of the *Federal Register* notice anticipates that the ANO’s authority to implement and enforce the annual taking limit will come from delegations from the tribal governments. This is one of the alternatives countenanced in Title V of the MMPA. Once the ANO had adopted the necessary ordinances or regulations, the FWS presumably would adopt those limitations using its rulemaking authority under section 503(d)(2) of the MMPA.

However, a second alternative for empowering the ANO to implement and enforce the taking limit exists under section 504 of the MMPA. Under this provision, the ANO’s management authority would flow from the FWS. The Director of the FWS may share federal management authority under Title V with the ANO if three conditions are met: (1) the ANO must enter into a cooperative agreement with FWS under section 119 of the MMPA, (2) it must meaningfully monitor compliance with Title V and the Agreement by Alaska Natives, and (3) it must administer the co-management program for polar bears in accordance with Title V and the Agreement. This alternative more closely aligns with that taken by NOAA in delegating management and enforcement authority to the Alaska Eskimo Whaling Commission for bowhead whales.

The structure of the regulations depends in part on which of these alternatives is selected, which in turn depends on the preference of the new ANO and the willingness of the governments of all tribal villages within the area covered by the Agreement to delegate enforcement authority to the new ANO. Because this is a crucial decision point, the Commission recommends that FWS discuss this issue with IPCoMM to ensure that it is addressed at the planned ANO organizational meeting to gauge the interest among the villages in delegating enforcement authority. If the new ANO cannot get the necessary authority from all of the affected villages, the FWS will need to decide whether it is willing to delegate its management authority to the new ANO under section 504.

If so, the FWS should identify the structures and resources that the ANO will need to develop in order for the agency to make the findings required under section 504(b).

Two of the questions posed by the FWS in the advance notice of proposed rulemaking pertain to reporting harvested bears. This will be a key feature of the regulations regardless of what regulatory approach is followed. However, how reports are made and how timely they need to be depends on how the allowable harvests are allocated.

If no allocation is made and the allowable harvests are available on a first-come basis, then a more rigorous reporting system would be needed to ensure that neither the total harvest limit nor the limit on taking female bears is exceeded. Near real-time reporting and sex determinations would be necessary, particularly as the harvest limits were being approached. There also would need to be a mechanism to close the hunting season and get the word out to hunters that the season is closed once one of the taking limits has been reached. The Commission advises against hunting without any allocation amongst the villages or hunters. Aside from the difficulties associated with monitoring and suspending such a hunt, it could work to the disadvantage of hunters who reside in areas where bears appear later in the year.

If managers opted for an allocation system that authorized the harvest of a bear by individual hunters (e.g., through the issuance of tags or licenses), there would be a lesser need for enhanced monitoring and reporting over that already required under the FWS's marking and tagging regulations. If, for instance, tags were issued to individual hunters and only those with tags were allowed to harvest a bear, there would be little risk that the overall harvest limit would be exceeded. There would, however, still be a need to monitor the female portion of the harvest closely to ensure that the one-third limit on taking females is not exceeded. Again, the Commission sees some problems with this approach, given that polar bear hunting in Alaska is largely opportunistic.

Another alternative is to allocate the total allowable harvest among the hunting villages. This, too, has its advantages and disadvantages. Each community would be guaranteed a share of the harvest and could adopt its own system of apportioning that share to its members, tailored to the timing and nature of its traditional hunting practices. At least with respect to the overall taking limit, reporting could be done locally, with no need for a statewide reporting system. Nevertheless, there would still be a need to report the taking of female bears on a statewide and near real-time basis. It also would complicate the reporting system by requiring the ANO and/or the villages to be responsible for multiple monitoring efforts. Another potential difficulty is how best to provide for hunting opportunities and account for taking in small communities that harvest bears infrequently and that may not be represented on the board of the ANO. Given the need to monitor the take of female bears and the difficulty in allocating that portion of the harvest ahead of time, it probably makes most sense to design a population-wide reporting system.

Whether to adopt an allocation scheme and how it should be structured are largely questions to be resolved by Alaska Natives. The Commission therefore recommends that the FWS defer to the wishes of the affected Native communities concerning allocation of allowable takes, provided that their preferred system does not undermine the ability of the United States to meet its obligations under the Agreement or inordinately complicate the FWS's or ANO's ability to monitor the harvest in a timely manner.

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It is apparent to the Commission that the current marking and tagging program, with its 30-day reporting requirement, likely will be insufficient, by itself, to enable the United States to meet its obligations under the Agreement. We are particularly concerned about the need to track the taking of female bears. Given the wide availability of cellular phone service and email or social media in most hunting communities, these mechanisms offer the best promise of providing near real-time reporting. Perhaps it makes the most sense to retain the existing marking and tagging requirements but require prompt reporting to the village government, the ANO, and/or the FWS when a bear has been taken, along with the sex of the bear. Hunters are probably best situated to provide informed views on how quickly reports can be filed, but as a preliminary thought, a 24-hour or 48-hour requirement would probably not be unreasonable in most cases. It is worth noting, though, that the adoption of a five-year, flexible harvest system by the U.S.-Russia Polar Bear Commission affords some flexibility in that slight overages in one year can be compensated for in the next.

While we could comment further on other possible components of a prospective rule, until a new ANO is formed and at least preliminary determinations are made about what authority the ANO will be operating under and how takes will be allocated, it does not seem like doing so would be fruitful at this juncture. However, the Commission and its staff remain available and willing to assist the FWS and Alaska Native representatives as they develop a proposed rule.

#### Timing and Next Steps

The *Federal Register* notice concludes with a discussion of a possible implementation schedule. This was expanded upon by the FWS in a presentation given at the 2016 U.S.-Russia Polar Bear Commission meeting. The Commission agrees with the FWS's assessment that, as a matter of law, the harvest limits adopted under the Agreement are in effect. Nevertheless, we are equally cognizant that the structures needed to implement those limits effectively are currently lacking and will best be provided through a co-management approach. While the FWS could seek to regulate the harvest on its own, we think that this would be a mistake, and should be viewed only as a last-resort option. At the same time, we are concerned that, over the past five years, the combined harvest of polar bears from the Alaska-Chukotka population in Russia and the United States may have exceeded the sustainable level established by the Commission, a situation that should not be allowed to continue. Thus, pending resolution of several questions regarding implementation of the Agreement by the United States and the development of implementing regulations, the Commission encourages the FWS and Alaska Native hunters to make a concerted effort to abide by the U.S. share of harvest limits, as they seem to have done over the past two years.

Thank you for the opportunity to comment on these important issues. The Commission remains available to assist the FWS in any way it can to achieve successful implementation of U.S. obligations under the Agreement and Title V of the MMPA.

Sincerely,



Rebecca J. Lent, Ph.D.  
Executive Director