



# MARINE MAMMAL COMMISSION

3 August 2012

Mr. Dan Ashe, Director  
U.S. Fish and Wildlife Service  
Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Dear Mr. Ashe:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Fish and Wildlife Service's 19 April 2012 proposed rule (77 Fed. Reg. 23432) that would re-instate the special rule for the polar bear issued under section 4(d) of the Endangered Species Act on 16 December 2008. The District Court for the District of Columbia invalidated that rule on 17 October 2011, thereby reinstating the interim final rule issued on 15 May 2008. The Commission concurs with the Service that re-instating the vacated rule is preferable to leaving the interim rule in place. However, the Commission does not believe that the proposed rule goes far enough in providing for the conservation of polar bears. Specifically, by exempting activities outside of the current range of the polar bear from the incidental taking provisions of the Endangered Species Act, the Service fails to address the primary threat to polar bears that prompted the species listing as threatened—the ongoing and predicted continuing loss of the species' sea ice habitat as a result of climate disruption associated with greenhouse gas emissions.

## RECOMMENDATIONS

The Marine Mammal Commission reiterates the recommendation that the Fish and Wildlife Service include in the special rule provisions that are tailored specifically to the conservation needs of polar bears and the threats that they face, primarily the ongoing and projected continuing loss of sea ice. The Commission further recommends that the Service adopt the “no action alternative” identified in the draft environmental assessment, which would make all of the Act's prohibitions applicable in accordance with 50 C.F.R. § 17.31(a). Absent adoption of that alternative, the Commission recommends that the Service adopt alternative 4, which would omit the geographic limitation on the applicability of the incidental take prohibition.

## RATIONALE

The Commission originally commented on the interim 4(d) rule in the enclosed 14 July 2008 letter. Although the Service subsequently amended that rule, the new rule, which the Service proposes to reinstate, suffers from the same basic flaws. That being the case, several of the points and recommendations included in our earlier letter remain pertinent. Therefore, we ask that our earlier letter be incorporated by reference as a comment on the current proposed rule.

Section 4(d) of the Endangered Species Act directs the Fish and Wildlife Service to issue such regulations as it deems necessary and advisable to provide for the conservation of any species listed as threatened. The Service listed the polar bear as threatened on 15 May 2008. Rather than apply all of the prohibitions applicable to endangered species under section 9(a)(1) of the Act, as is permissible under section 4(d), the Service opted to issue a special rule selecting less extensive

protection. Specifically, the special rule relied largely on the provisions of the Marine Mammal Protection Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to provide the necessary level of protection. As pointed out in the Commission's previous comments, those provisions alone have not prevented the polar bear from becoming a threatened species and, by themselves, will not reduce the threats to polar bears to a point where the protection provided by the Endangered Species Act is no longer warranted. The polar bear currently is listed on CITES Appendix II. However, the Service is in the process of deciding whether to propose for consideration at the next Conference of Parties that the species be placed on Appendix I. Although a change in listing status would place additional restrictions on international trade in polar bears and polar bear parts, trade restrictions—whether based on an Appendix II or an Appendix I listing—will have no effect on the loss of sea ice, which is the primary threat to polar bear populations throughout the Arctic. Clearly, additional tools are necessary and advisable to promote the recovery and conservation of the polar bear.

Primary among the points raised previously by the Commission is the pressing need for the Service to address specifically the loss of sea ice. Therefore, the Marine Mammal Commission reiterates the recommendation that the special rule include provisions that are tailored specifically to the conservation needs of polar bears and the ecological threats that they face, including ongoing and projected loss of sea ice. One way that this could be accomplished is to include in the final rule the full suite of prohibitions set forth under section 9(a)(1) of the Act. The Commission further recommends that the Service adopt the “no action alternative” identified in the draft environmental assessment, which would make all of those prohibitions applicable in accordance with 50 C.F.R. § 17.31(a). Absent adoption of that alternative, the Commission recommends that the Service adopt alternative 4, which would omit the geographic limitation on the applicability of the incidental take prohibition.

As recognized in the proposed rule, one potential benefit of omitting that limitation would be subjecting activities outside of the polar bear's current range that may result in incidental taking to additional scrutiny under the Endangered Species Act's citizen suit provision, a tool not available under the Marine Mammal Protection Act. The Service discounts such challenges as having only a remote likelihood of success, but the Commission disagrees with that assessment. This provision may be a potent mechanism to help curb major sources of greenhouse emissions, which are having and will continue to have adverse effects on polar bears and their habitat if we do not act. Indeed, those emissions are having and will continue to have profound effects on ecosystems worldwide, albeit exacerbated in the Arctic (and Antarctic) by polar amplification. We do not believe that the Service should pre-judge how a reviewing court might view such challenges or use the prospect of lawsuits by outside parties as a basis to exclude those areas within the United States where most greenhouse gas emissions occur from coverage under the rule.

Although the polar bear has become a symbol of the climate change issue, action to protect its habitat will have much broader benefits, both in the Arctic and elsewhere. Other species being considered for listing as endangered or threatened (e.g., ice seals and the walrus), which depend on similar habitats and face similar threats, would also be conserved. Decisive action also is needed to preserve the traditional culture of Natives in Alaska and elsewhere who depend on these marine mammal species and the access to resources that a stable environment provides. The Fish and

Mr. Dan Ashe  
3 August 2012  
Page 3

Wildlife Service has a long history of leadership in conservation of our natural resources. The question before the agency now is whether it will provide that leadership again.

In passing the Endangered Species Act, Congress recognized that “economic growth and development untempered by adequate concern and conservation” had resulted in the extinction of several species. The basic purposes of the Act—“to provide a means whereby the ecosystems upon which [listed] species depend may be conserved” and “to provide a program for the conservation of [listed] species”—reflect that concern. So too does the directive that each agency (but particularly the Fish and Wildlife Service and the National Marine Fisheries Service) use its authorities to conserve listed species and to further the purposes of the Act. A 4(d) rule that does not address the primary threat to a listed species—in this case greenhouse gas emissions that are driving climate change and the loss of sea ice habitat—fails to satisfy the basic goals and mandates of the Act. The Marine Mammal Commission urges you to take the actions required to give meaning to the purposes and policies of the Endangered Species Act and that will bring the polar bear to the point at which the measures provided by the Act are no longer necessary.

I hope these recommendations and comments are helpful. Please let me know if you have questions. We look forward to working with you on these important issues and would be pleased to help in any way we can.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a prominent initial 'T'.

Timothy J. Ragen, Ph.D.  
Executive Director

Enclosure

Cc Michael J. Bean, Esq.  
Mr. Gary Frazer