



MARINE MAMMAL COMMISSION

26 May 2010

Rosa Meehan, Ph.D.
Chief, Marine Mammals Management Office
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, AK 99503

Dear Dr. Meehan:

On 26 April 2010 the Fish and Wildlife Service published a proposed rule in the *Federal Register* (75 Fed. Reg. 21571) to establish guidelines for safely deterring polar bears from damaging private and public property or endangering personal safety. The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the proposed rule and offers the following recommendations and comments.

RECOMMENDATIONS

The Marine Mammal Commission recommends that, before adopting final deterrence guidelines for polar bears, the Fish and Wildlife Service—

- consider less formal ways of adopting and implementing measures unless it has a compelling reason for establishing such measures by regulation;
- consider expanding the proposed deterrence measures for polar bears that pose a threat to personal safety to allow the person at risk to adopt a stepped approach in which all non-lethal measures, including the use of crackershells and soft projectiles, would be available as alternatives to lethal taking;
- revise its proposed regulations to clarify who may take action to deter polar bears, under what circumstances, and the reasons for such taking;
- revise its preamble and proposed regulations to indicate that any person may deter polar bears, provided that they otherwise meet the criteria set forth in section 101(a)(4) and the implementing regulations;
- explain in the preamble the reason(s) why taking in accordance with the proposed rule would not require additional authorization under the Endangered Species Act;
- include the rationale or basis for all proposed deterrence measures, but do so in the preamble to the proposed rule rather than in the wording of the regulations themselves; and
- provide additional justification for its determination that the proposed sound threshold of acoustic deterrent devices will not adversely affect polar bears.

RATIONALE

Section 101(a)(4) of the Marine Mammal Protection Act authorizes certain categories of people (e.g., property owners and their agents and employees) to deter marine mammals from damaging private property or endangering personal safety, provided that the deterrence measures do not result in the death or serious injury of any marine mammal. That provision likewise authorizes

government employees to deter marine mammals from damaging public property, something ostensibly also authorized under section 109(h)(1) of the Act. Section 101(a)(4) generally directs the Fish and Wildlife Service to publish a list of guidelines for safely deterring marine mammals under its jurisdiction. In addition, the Service is required to recommend specific nonlethal measures that it can authorize for use in deterring marine mammals listed as endangered or threatened under the Endangered Species Act. Conversely, if the Service determines that certain forms of deterrence have a significant adverse impact on marine mammals, it may prohibit the use of such measures by regulation.

The Marine Mammal Commission supports the Fish and Wildlife Service's efforts to propose specific measures for safely deterring polar bears, as required by the second sentence of section 101(a)(4)(B) of the Marine Mammal Protection Act. The Commission notes, however, that the Service has yet to publish the general guidelines for deterring marine mammals called for under the first sentence of that paragraph. In the final rule the Service should explain why it has not done so or indicate what plans it has for issuing guidelines for deterring species other than polar bears.

Section 101(a)(4)(B) does not require rulemaking to develop guidelines or specific measures to deter marine mammals. In contrast, section 101(a)(4)(C) does require rulemaking, including public notice and comment, to prohibit the use of those types of deterrence that have a significant adverse effect on marine mammals. The proposed rule does not explain why the Service opted to use rulemaking to establish specific measures for the nonlethal deterrence of polar bears. The Marine Mammal Commission recommends that the Fish and Wildlife Service consider less formal ways of adopting and implementing measures unless it has a compelling reason for establishing such measures by regulation. A less formal approach would make it easier for the Service to make revisions should the need arise.

As noted earlier in this letter, the Commission generally supports the Service's decision to identify specific measures that can be used to deter polar bears from damaging property or endangering human safety and agrees with the general intent of the proposed guidance. However, those measures need to recognize that polar bears are top-level predators that occur not only in marine environments but in coastal and terrestrial areas. As such, polar bears are more likely than other marine mammal species to pose risks to human life and safety. Thus, the measures should focus not only on ensuring the safety of the bears that are subject to deterrence, but also should be designed to prevent a situation in which personal safety is threatened from escalating into a situation where lethal taking under section 101(c) of the Act is necessary. The Marine Mammal Commission therefore recommends that the Service consider expanding the proposed deterrence measures for polar bears that pose a threat to personal safety to allow the person at risk to adopt a stepped approach in which all non-lethal measures, including the use of crackershells and soft projectiles, would be available as alternatives to lethal taking. The Commission believes that the use of such measures would not expose polar bears to a high risk of death or serious injury and would be consistent with the requirements of section 101(a)(4). In addition, the Commission believes that the proposed regulatory language can be improved in ways that would increase clarity and facilitate more precise tracking of the applicable statutory provisions. Specific areas of concern are discussed below.

Section 101(a)(4)(A) of the Marine Mammal Protection Act includes four purposes for which deterrence measures can be taken, three of which are relevant to polar bears. (We are not aware of any instances of polar bears damaging fishing gear or catch.) In contrast, the proposed regulations merely indicate that polar bears can be deterred in the wild, but do not specify what they can be deterred from doing. Similarly, the proposed regulations do not identify who may engage in deterring polar bears in those different instances. For example, the statute is clear that only the property owner or an agent, bailee, or employee of that owner is authorized to deter a marine mammal from damaging private property, and only government employees are authorized to deter a marine mammal from damaging public property. To make the specific measures adopted for the deterrence of polar bears equally clear, the Marine Mammal Commission recommends that the Fish and Wildlife Service revise its proposed regulations to clarify who may take action to deter polar bears, under what circumstances, and the reasons for such taking.

The proposed rule suggests that only U.S. citizens would be allowed to deter polar bears under the regulations. While section 101(a)(5) of the Marine Mammal Protection Act, which governs incidental taking, is applicable only to “citizens of the United States,” section 101(a)(4) contains no similar limitation. To track the statutory provision accurately, the Marine Mammal Commission recommends that the Fish and Wildlife Service revise its preamble and proposed regulations to indicate that any person may deter polar bears, provided that they otherwise meet the criteria set forth in section 101(a)(4) and the implementing regulations.

Section 18.34(a) of the proposed rule indicates that those conducting activities that comply with the guidelines also would be in compliance with the Marine Mammal Protection Act and the Endangered Species Act. It should be noted, however, that the Endangered Species Act does not contain a provision parallel to section 101(a)(4) of the Marine Mammal Protection Act for authorizing deterrence measures. Only the special rule promulgated for polar bears (50 C.F.R. § 17.40(q)) allows an exception to the otherwise applicable taking prohibition of the Endangered Species Act. For that reason, if the polar bear were listed as endangered and the rule no longer in force, deterrence measures would no longer be in compliance with the Endangered Species Act, absent some additional taking authorization. The Marine Mammal Commission therefore recommends that the Fish and Wildlife Service explain in the preamble the reason(s) why taking in accordance with the proposed rule would not require additional authorization under the Endangered Species Act.

The proposed rule includes several specific requirements pertaining to the proposed passive deterrence measures. For example, fenced areas may not exceed five acres, skirting can be used only for buildings on pilings if the building is 10,000 square feet or larger, cages must be at least four feet by four feet by eight feet, cages in bear travel corridors should be placed within one-half mile of the coast, bars on cages must be no smaller than one inch wide and spaced no more than four inches apart, and lids on garbage containers must be constructed of heavy steel tubing or heavy expanded metal. For some measures the Service has provided no rationale or justification for the measures or values proposed. In other cases the Service provides extensive explanation, but it does so in the

Rosa Meehan, Ph.D.
26 May 2010
Page 4

proposed wording of the regulations where the explanations are extraneous. To address these concerns, the Marine Mammal Commission recommends that the Fish and Wildlife Service include the rationale or basis for all proposed deterrence measures, but do so in the preamble to the proposed rule rather than in the wording of the proposed regulations.

The proposed rule would allow the use of acoustic deterrence devices that generate sound pressure levels no greater than 150 dB. As the Service notes in the preamble to the proposed rule, “there are no data available to indicate minimum received sound levels required to cause damage...to polar bear hearing.” The Service then concludes that “the use of sound deterrent devices will not harm polar bears and, therefore, is allowable as long as the sound level [is] no greater than 150 dB SPL (the upper level that is painful to humans).” The basis for that conclusion is not apparent. The Marine Mammal Commission therefore recommends that the Fish and Wildlife Service provide additional justification for its determination that the proposed sound threshold of acoustic deterrent devices will not adversely affect polar bears.

I hope these comments and recommendations are helpful. Please contact me if you have questions.

Sincerely,

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

Timothy J. Ragen, Ph.D.
Executive Director