

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

16 December 2008

Mr. Timothy J. Van Norman
Chief, Branch of Permits
Division of Management Authority
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Arlington, VA 22203

Re: Permit Application Nos. PRT-189427, PRT-189249-189432,
and PRT-191814 (Applicants Dun, Halstead, Atcheson,
Wieczorek, Hansen, Hamel, and Neilson (submitted by
Conservation Force)

Dear Mr. Van Norman:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the applications and accompanying information provided by Conservation Force in support of its clients' requests to import polar bear trophies from Canada for purposes of enhancement of the species under section 104(c)(4) of the Marine Mammal Protection Act.

RECOMMENDATIONS

Consistent with its view concerning the scope of the enhancement permit provision of the Marine Mammal Protection Act, the Marine Mammal Commission recommends that the Fish and Wildlife Service adopt an interpretation that sport hunting does not constitute an enhancement activity under section 104(c)(4) of the Act and codify this interpretation by regulation. The Marine Mammal Commission further recommends that the Fish and Wildlife Service deny the requested authorizations to import polar bear trophies as being inconsistent with the statutory requirements for issuance of enhancement permits.

RATIONALE

The Service cannot issue an enhancement permit to authorize the activities in question—and the Commission cannot recommend issuance of such permits—unless the applicable statutory requirements have been met. As discussed in detail below, the Marine Mammal Commission believes that the current application fails to satisfy these criteria in certain important respects.

Scope of Enhancement Permit Authority under the Marine Mammal Protection Act

Since addition of the enhancement permitting authority to the Marine Mammal Protection Act in 1988, the Commission has written several letters to the Fish and Wildlife Service and the National Marine Fisheries Service concerning the scope of that provision. Most recently, the Commission sent the attached letter dated 7 March 2008 to the Fish and Wildlife Service commenting on a permit request from the Monterey Bay Aquarium. In that letter, the Commission

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noted its participation in the negotiations that led to development of the enhancement permit amendment and summarized the agreements reached by the parties to those negotiations. We will not repeat that history here but instead refer you to the 7 March letter.

A key issue discussed by those who drafted the enhancement permit amendment was whether the new authority could be used to authorize the importation of animals from sport hunts, as had been allowed under the more general enhancement permit authority of the Endangered Species Act. Those concerned about such a prospect were given specific assurances that sport hunts would not fit under the new Marine Mammal Protection Act authority. Unfortunately, this agreement is not explicitly documented in the statutory language that was enacted or in the accompanying legislative reports. There is, however, some direct and some circumstantial evidence that supports this view.

First we turn to the statutory language of the enhancement permitting provision. A primary requirement is that the taking or importation “is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock.” Although a well-regulated sport hunting program may provide funding sources for species conservation or might provide incentives for governments, local communities, and individuals to establish or support such programs, those potential benefits are usually generalized and do not equate directly and demonstrably to specific effects on the distribution or numbers of marine mammals. This level of specificity seems to be what is envisioned under the enhancement permitting authority. It would include, for example, captive breeding programs designed to augment wild populations, management programs (such as the National Marine Fisheries Service’s head start program for Hawaiian monk seals) that improve juvenile survival, and translocations and the establishment of experimental populations that are designed to increase a species’ range. It would not include such things as education programs that may increase public awareness of a species’ plight or generate support for generalized conservation efforts.

As for circumstantial support for this interpretation of congressional intent, we look to the context in which the enhancement permit provision was enacted. For example, it is noteworthy that the enhancement permit provision goes into considerable detail about the determinations that must be made and the requirements that must be met before captive maintenance of a depleted marine mammal can be authorized, yet the statute is silent about the findings that must be made to authorize lethal taking under the enhancement provision. In contrast, contemporaneous amendments enacted to the permit provisions applicable to scientific research (section 104(c)(3)) set forth specific requirements for authorizing lethal research. This incongruity is easily explained if one adopts the position that we know from first-hand involvement that the drafters of the 1988 Marine Mammal Protection Act amendments never envisioned that the authority would be used to authorize sport hunting or the importation of trophies from sport hunting in other countries.

Further support that sport hunting was not considered to be an activity covered by the enhancement permit authority comes from the 1994 amendments. If, as the applicants for these permits now contend, the sport hunting of polar bears in Canada constitutes an enhancement activity for purposes of the Marine Mammal Protection Act, there would not have been any need for

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the addition of a special provision concerning the importation of trophies from those hunts. The fact that Congress saw a need to establish a special exception for such imports strongly suggests that it did not believe that these imports could be authorized under the existing provision.¹

Based on our review of the legislative history of the Marine Mammal Protection Act's enhancement permit provision, the Commission believes that there is considerable support for the position that Congress never intended sport hunting to be considered an enhancement activity. We believe that this is a sufficient basis on which to deny the permits. The Marine Mammal Commission therefore recommends that the Fish and Wildlife Service adopt such an interpretation of the enhancement permitting authority and promulgate implementing regulations to codify this interpretation.

Application of the Statutory Criteria to these Applications

Even if the Service does not agree that there is sufficient evidence that Congress did not intend for sport hunting to be considered an enhancement activity under any circumstances, the Commission believes that applying the statutory criteria to the current applications leads to a similar result. That is, the applications fail to satisfy the statutory criteria and should be denied.

Section 104(c)(4) of the Marine Mammal Protection Act sets forth two basic requirements for the issuance of permits for enhancing the survival or recovery of a marine mammal species or stock. That provision requires that, before it can issue an enhancement permit, the Service, after consultation with the Marine Mammal Commission, determine that the proposed taking (1) is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock, and (2) is consistent with the conservation/recovery plan adopted for the species or stock.

There is nothing in the current applications that demonstrates that authorizing the requested imports will have any impact on the numbers or distribution of polar bears in the Gulf of Boothia (or, more generally, in Canada), let alone a significant positive one.² Arguments that the financial benefits that come to local communities or guides from sport hunting somehow reduce the overall number of bears removed by subsistence hunters, leading to larger populations, is, at best, speculative. In addition, under the Canadian management system, the quotas established for each management unit are designed to ensure that the harvest is sustainable, regardless of whether subsistence hunters or sport hunters take the bears. If the population is healthy, as the applicants claim, and the management program includes quotas that limit hunting to levels that sustain the population at a healthy level, then it is not apparent what enhancement benefit accrues to the polar

¹ Although a similar argument could be made about the Act's waiver provision, contemporaneous legislative materials, including the Safari Club International's January 1993 *Report on the Polar Bear Initiative*, recognize that seeking a waiver would be possible, but would be unpredictable and potentially costly. This uncertainty was cited as the basis for legislative action. In contrast, contemporaneous materials are silent concerning the enhancement authority or possible impediments to its use.

² If anything, it seems that the taking of the bears would have resulted in a short-term decrease in the number of bears in the population.

bear population from sport hunting or by allowing trophies to be imported into the United States. Are the applicants suggesting that Canada would not be managing polar bears responsibly but for the incentives provided by sport hunting? This would be contrary to Canada's obligations as a party to the Agreement on the Conservation of Polar Bears, and there is nothing in the record to support such a conclusion.

The Commission also believes that, for an activity to qualify for an enhancement permit, it should address one of the factors that is causing a decline in the population or otherwise compromising its persistence at an optimum sustainable level. Here, any conservation benefits that derive from Canada's sport hunting program or from allowing trophies to be imported into the United States do nothing to address the primary threat faced by the species, which is the projected loss of sea ice habitat. Thus, it is unclear how issuance of the requested permits will contribute to ensuring the survival or recovery of polar bears.

Any taking or importation authorized by an enhancement permit also must be consistent with any conservation or recovery plan for the species or stock or, if there is no such plan, with the Service's evaluation of actions that likely would be identified in such a plan. Currently, there is no conservation or recovery plan in place for polar bears, although the Service will need to develop a recovery plan under 4(f) of the Endangered Species Act unless it determines that such a plan will not promote the conservation of the species. Of the five factors to be considered in making listing determinations under the Endangered Species Act, the only factor identified by the Service to warrant the listing of polar bears as threatened was the present or threatened destruction, modification, or curtailment of the species' habitat or range and the secondary effects of habitat loss, such as reduced prey availability. Thus, it seems that a recovery plan would focus on actions needed to prevent or reduce habitat degradation or loss. Whether or not sport hunting is perpetuated should have little impact on the prospects for the recovery of polar bears. As such, it seems unlikely that this would be considered an action required to enhance the survival or recovery of the species in light of the factors that would be identified in a recovery plan. This being the case, the proposed importations would fail to satisfy the statutory criterion concerning consistency with a conservation or recovery plan.

For the foregoing reasons, the Marine Mammal Commission recommends that the Fish and Wildlife Service deny the requested authorizations to import polar bear trophies as being inconsistent with the statutory requirements for issuance of enhancement permits.

Gulf of Boothia Population

Although the Commission does not believe that enhancement permits can be issued to authorize the importation of trophies from any of the Canadian management units, we are particularly concerned about the prospect of using this provision to authorize imports from a population such as the Gulf of Boothia that had not been approved under the trophy import provision. There is even less basis for concluding that polar bears stocks are somehow enhanced by allowing sport hunting and trophy imports from populations that the Service has yet to approve under section 104(c)(5). It is through that process that the Service, in consultation with the

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Commission, and after public review and comment, determines whether the management program for that particular management unit is based on scientifically sound quotas that ensure the maintenance of the population at a sustainable level. Although Conservation Force had petitioned the Service to amend its regulations to authorize trophy imports from the Gulf of Boothia, the Service has yet to propose such an amendment. Until a management unit has been reviewed and approved by the Service, the Commission believes that it is premature for U.S. hunters to participate in sport hunts in those areas, and they should have no expectation that bears taken from these populations would eventually be allowed entry into the United States. We do not see how allowing imports from a population that the Service has yet to determine to be based on scientifically sound quotas and to be sustainable can be viewed as enhancing the survival or recovery of the population.

Please contact me if you or your staff has any questions concerning these comments and recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Attachment

Cc: Mr. P. Michael Payne