DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R7-ES-2008-0027]

[MO-9221050083 – B2]

RIN 1018–AV79

Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the Fish and Wildlife Service (Service), amend the regulations at 50

CFR part 17, which implement the Endangered Species Act, as amended (ESA), to create a final special rule under authority of section 4(d) of the ESA that provides measures that are necessary and advisable to provide for the conservation of the polar bear (Ursus maritimus). The special rule, in most instances, adopts the existing conservation regulatory requirements under the Marine Mammal Protection Act of 1972, as amended (MMPA), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as the appropriate regulatory provisions for this threatened species. Nonetheless, if an activity is not authorized or exempted under the MMPA or CITES and would result in an act that would be otherwise prohibited under the general prohibitions under the ESA for threatened species (50 CFR 17.31), then the prohibitions at 50 CFR 17.31 apply, and we would require authorization under 50 CFR 17.32. In addition, this special rule provides that any incidental take of polar bears that results from activities that occur outside of the current range of the species is not a prohibited act under the ESA. This special rule does not affect any existing requirements under the MMPA, including incidental take restrictions, or CITES, regardless of whether the activity occurs inside or outside the current range of the polar bear. Further, nothing in this special rule affects the consultation requirements under section 7 of the ESA.

DATES: This final rule becomes effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: This final rule is available on the Internet at http://www.regulations.gov

and http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A0IJ. Supporting documentation we used in preparing this final rule will be available for public inspection, by appointment, during normal business hours, at the Marine Mammal Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503.

FOR FURTHER INFORMATION CONTACT: Geoffrey Haskett, Regional Director, Region 7, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503 telephone 907-786-3309. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

On May 15, 2008, we published the final rule to list the polar bear as a threatened species (73 FR 28212) under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). Additional information regarding previous Federal actions for the polar bear can be found in the combined 12-month petition finding and proposed listing rule (72 FR 1064; January 9, 2007) or by consulting the species' regulatory profile found at: http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A0IJ.

Concurrent with the listing rule, we issued an interim final special rule (73 FR 28306; May 15, 2008). In the interim final rule, we opened a 60-day public comment period for all interested parties to submit comments that might contribute to the development of the final determination on the special rule. The interim rule with applicable modifications is finalized with the publication of this final special rule.

Background

Applicable Laws

In the United States, the polar bear is protected and managed under three laws: the ESA, the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 et seq.), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES; 27 U.S.T. 1087). A brief description of these laws, as they apply to polar bear conservation, is provided below.

The purposes of the ESA are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in the ESA. The ESA is implemented through regulations found in the Code of Federal Regulations (CFR). When a species is listed as endangered, certain

actions are prohibited under section 9 of the ESA, as specified in § 17.21 of title 50 of the Code of Federal Regulations (50 CFR). These include, among others, take within the United States, within the territorial seas of the United States, or upon the high seas; import; export; and shipment in interstate or foreign commerce in the course of a commercial activity. Additionally, the consultation process under section 7 of the ESA requires that Federal agencies ensure actions they authorize, fund, permit, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species.

The ESA does not specify particular prohibitions and exemptions to those prohibitions for threatened species. Instead, under section 4(d) of the ESA, the Secretary of the Interior (Secretary) was given the discretion to specify the prohibitions and any exceptions to those prohibitions that are appropriate for the species, provided that those prohibitions and exceptions are necessary and advisable to provide for the conservation of the species. Exercising this discretion, the Service has developed general prohibitions (50 CFR 17.31) and exceptions to those prohibitions (50 CFR 17.32) under the ESA (i.e., provisions) that apply to most threatened species. Under § 17.32, permits may be issued to allow persons to engage in otherwise prohibited acts.

Alternately, for other threatened species we develop specific prohibitions and exceptions that are tailored to the specific conservation needs of the species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into the special rule under section 4(d) of the

ESA, but the special rule will also include provisions that are tailored to the specific conservation needs of the threatened species and which may be more or less restrictive than the general provisions at 50 CFR 17.31.

The MMPA was enacted to protect and conserve marine mammal species or population stocks of those species so that they continue to be significant functioning elements in the ecosystem of which they are a part. Consistent with this objective, management should have a goal to maintain or return marine mammals to their optimum sustainable population. The MMPA provides a moratorium on the taking and importation of marine mammals and their products, unless exempted or authorized under the MMPA. Prohibitions also restrict:

- Take of marine mammals on the high seas;
- Take of any marine mammal in waters or on lands under the jurisdiction of the United States;
- Use of any port, harbor, or other place under the jurisdiction of the United States to take or import a marine mammal;
- Possession of any marine mammal or product taken in violation of the MMPA;
- Transport, purchase, sale, export, or offer to purchase, sell, or export any marine mammal or product taken in violation of the MMPA or for any purpose other than public display, scientific research, or enhancing the survival of the species or stock; and
- Import of certain categories of animals.

Authorizations and exemptions from these prohibitions are available for certain specified purposes. Any marine mammal listed as threatened or endangered under the ESA automatically has depleted status under the MMPA, which adds further restrictions.

Signed in 1973, CITES protects species at risk from international trade and is implemented by more than 170 countries, including the United States. The CITES regulates commercial and noncommercial international trade in selected animals and plants, including parts and items made from the species, through a system of permits. Under CITES, a species is listed at one of three levels of protection, each of which have different document requirements. Appendix I species are threatened with extinction and are or may be affected by trade; CITES directs its most stringent controls at activities involving these species. Appendix II species are not necessarily threatened with extinction now, but may become so if not regulated. Appendix III species are listed by a range country to obtain international cooperation in regulating and monitoring international trade. Polar bears were listed in Appendix II of CITES on July 7, 1975. Trade in CITES species is prohibited unless exempted or accompanied by the required CITES documents, and CITES documents cannot be issued until specific conservation and legal findings have been made. The CITES does not itself regulate take or domestic trade of polar bears; however, it contributes to the conservation of the species by monitoring international trade in polar bears and polar bear parts or products.

Provisions of the Special Rule Under Section 4(d) of the ESA for the Polar Bear

We assessed the conservation needs of the polar bear in light of the extensive protections already provided to the species under the MMPA and CITES. This final special rule, in most instances, synchronizes the management of the polar bear under the ESA with management provisions under the MMPA and CITES. A special rule under section 4(d) of the ESA can only specify ESA prohibitions and available authorizations for this species. All other applicable provisions of the ESA and other statutes such as the MMPA and CITES are unaffected by this special rule.

Under this final special rule, if an activity is authorized or exempted under the MMPA or CITES, we will not require any additional authorization under the ESA regulations associated with that activity. However, if the activity is not authorized or exempted under the MMPA or CITES and the activity would result in an act that would be otherwise prohibited under the ESA regulations at 50 CFR 17.31, the prohibitions of § 17.31 apply, and permits would be required under 50 CFR 17.32 of our ESA regulations. The special rule further provides that any incidental take of polar bears that results from activities that occur outside of the current range of the species is not a prohibited act under the ESA.

Finally, the special rule does not remove or alter in any way the consultation requirements under section 7 of the ESA.

Necessary and Advisable Finding

This rulemaking revises our May 15, 2008, special rule at 50 CFR 17.40 that, in most instances, adopts the conservation provisions of the MMPA and CITES as the appropriate regulatory provisions for this threatened species. These MMPA and CITES provisions regulate incidental take, non-incidental take (including take for self-defense or welfare of the animal), import, export, transport, purchase and sale or offer for sale or purchase, pre-Act specimens, and subsistence handicraft trade and cultural exchanges. The special rule further provides that any incidental take of polar bears that results from activities that occur outside of the current range of the species is not a prohibited act under the ESA. Finally, we have also clarified the operation of the consultation process under section 7 of the ESA and how it will continue to contribute to the conservation of the polar bears.

In the following sections, we provide explanation of how the various provisions of the ESA, MMPA, and CITES interrelate and how the regulatory provisions of this special rule are deemed necessary and advisable to provide for the conservation of the polar bear.

Definitions of Take

Take of protected species is prohibited under both the ESA and MMPA; however,

the definition of "take" differs somewhat between the two Acts. Take is defined in the ESA as meaning to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct. The MMPA defines take as meaning to harass, hunt, capture, or kill, or to attempt to harass, hunt, capture, or kill any marine mammal. A number of terms appear in both definitions; however, the terms harm, pursue, shoot, wound, trap, and collect are included in the ESA definition but not in the MMPA definition. Nonetheless, the ESA prohibitions on pursue, shoot, wound, trap, and collect are covered within the scope of the MMPA definition. A person who pursues, shoots, wounds, traps, or collects an animal, or attempts to do any of these acts, has harassed (which includes injury), hunted, captured, or killed – or attempted to harass, hunt, capture, or kill – the animal in violation of the MMPA.

The term "harm" is also included in the ESA definition, but is less obviously related to take under the MMPA definition. Under our ESA regulations, harm is defined at 50 CFR 17.3 as "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." While the term harm in the take definition addresses negative effects through habitat modifications, it requires evidence that the habitat modification or degradation will result in specific effects on identifiable wildlife: actual death or injury. As noted by Supreme Court Justice O'Connor in her concurrence in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995), application of the definition requires actual, as opposed to hypothetical or

speculative, death or injury to identifiable animals. Thus, the definition of harm under the ESA requires demonstrable effect (i.e., actual injury or death) on actual, individual members of the species.

The term "harass" is also defined in the MMPA and our ESA regulations. Under our ESA regulations, harass refers to an "intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." With the exception of the activities mentioned below, harassment under the MMPA means any act of pursuit, torment, or annoyance that "has the potential to injure a marine mammal or marine mammal stock in the wild" (Level A harassment), or "has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering" (Level B harassment).

Section 319 of the National Defense Authorization Act for Fiscal Year 2004 (NDAA; Pub. L. 108-136) revised the definition of harassment under section 3(18) of the MMPA as it applies to military readiness or scientific research conducted by or on behalf of the Federal Government. Section 319 defined harassment for these purposes as "(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral

patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered."

In most cases, the definitions of "harassment" under the MMPA encompass more activities than the same term under the Service's ESA regulations. While the statutory definition of harassment under the MMPA that applies to all activities other than military readiness and scientific research conducted by or on behalf of the Federal Government includes any act of pursuit, torment, or annoyance that has the "potential to injure" or the "potential to disturb" marine mammals in the wild by causing disruption of key behavioral patterns, the Service's ESA definition of harassment applies only to an act or omission that creates the "likelihood of injury" by annoying the wildlife to such an extent as to significantly disrupt key behavioral patterns. Even the more narrow definition of harassment for military readiness activities or research by or on behalf of the Federal Government includes an act that injures or has "the significant potential to injure" or an act that disturbs or is "likely to disturb," compared to the "likelihood of injury" standard under the ESA. The potential to injure or disturb is a stricter standard than the likelihood of injury. The one area where the ESA definition is broader than the MMPA definition is that the ESA definition includes acts or omissions whereas the MMPA definition includes only acts. However, we cannot foresee circumstances under which the management of polar bears would differ due to this difference in the two definitions.

In addition, although the ESA includes "harm" in the definition of take and the MMPA does not, the differing definitions of take do not result in a difference in management of polar bears. As discussed earlier, application of the harm definition requires evidence of demonstrable injury or death to actual, individual polar bears. The breadth of the MMPA harassment definition requires only potential injury or potential disturbance, or, in the case of military readiness activities, likely disturbance causing disruption of key behavioral patterns. Thus, the evidence required for harm under the ESA would provide the evidence to show potential injury or potential or likely disturbance that causes disruption of key behavioral patterns under the MMPA.

In summary, the definitions of take under the MMPA and ESA differ in terminology; however, they are similar in application. We find the definitions of take under the Acts to be comparable and where they differ, due to the breadth of the MMPA's definitions of harassment, the MMPA definitions of take are, overall, more protective. Therefore managing polar bears under the MMPA definition provides for the conservation of polar bears. Where a person or entity does not have authorization for an activity that causes take under the MMPA, or is not in compliance with their MMPA take authorization, the definition of take under the ESA will be applied.

Incidental Take

The take restrictions under the MMPA and those typically provided for threatened

species under the ESA through our regulations at 50 CFR 17.31 or a special rule under section 4(d) of the ESA also apply to incidental take. Take restrictions under both Acts have the same geographic scope. Incidental take refers to the take of a protected species that is incidental to, but not the purpose of, an otherwise lawful activity. This special rule under section 4(d) of the ESA aligns the ESA incidental take provisions for polar bears with the incidental take provisions of the MMPA and its implementing regulations as those necessary and advisable to provide for the conservation of the species.

Section 7(a)(2) of the ESA requires Federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. Regulations that implement section 7(a)(2) of the ESA (50 CFR part 402) define "jeopardize the continued existence of" as to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with the Service, subject to the exceptions set out in 50 CFR 402.14(b) and the provisions of 402.03. It is through the consultation process under section 7 of the ESA that incidental take is identified and Federal agencies receive authorization for incidental take. The section 7 consultation

requirements also apply to the Service and require that we consult with ourselves to ensure actions we authorize, fund, or carry out are not likely to result in jeopardy to the species. This type of consultation, known as intra-Service consultation, would, for example, be applied to the Service's issuance of authorizations under the MMPA and ESA. Further, regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). 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 action being authorized, funded, or carried out is not likely to jeopardize the continued existence of the polar bear. Further, in the event critical habitat is designated for the polar bear in the future, nothing in this special rule affects the prohibition against destruction or adverse modification of any critical habitat through a Federal action, and Federal agencies would be required to consider the destruction or adverse modification standard in the consultation process under section 7 of the ESA.

As a result of consultation, we document compliance with the requirements of section 7(a)(2) of the ESA through our issuance of a concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat, or

issuance of a biological opinion for Federal actions that may adversely affect listed species or critical habitat. In those cases where the Service determines an action that is likely to adversely affect polar bears will not likely result in jeopardy but is anticipated to result in incidental take, the biological opinion will describe the amount and nature of incidental take that is reasonably certain to occur. Under section 7(b)(4) of the ESA, an incidental take statement for a marine mammal such as the polar bear cannot be issued until the applicant has received incidental take authorization under the MMPA. If such authorization is in place, the Service will also issue a statement that specifies the amount or extent of such take; any reasonable and prudent measures considered appropriate to minimize such effects; terms and conditions to implement the measures necessary to minimize effects; and procedures for handling any animals actually taken. Nothing in this special rule affects the issuance or contents of the biological opinions for polar bears or the issuance of an incidental take statement, although incidental take resulting from activities that occur outside of the current range of the polar bear is not subject to the taking prohibition of the ESA.

The regulations at 50 CFR 17.32(b) provide a mechanism for non-Federal parties to obtain authorization for the incidental take of threatened wildlife. This process requires that an applicant specify effects to the species and steps to minimize and mitigate such effects. If the Service determines that the mitigation measures will minimize effects of any potential incidental take, and that take will not appreciably reduce the likelihood of survival and recovery of the species, we may grant incidental take authorization. This

authorization would include terms and conditions deemed necessary or appropriate to insure minimization of take, as well as monitoring and reporting requirements. Incidental take restrictions both inside and outside the current range of the polar bear under this special rule are described below.

Activities Within Current Range

Under this special rule, if incidental take has been authorized under section 101(a)(5) of the MMPA for take of a polar bear by commercial fisheries, or by the issuance of an Incidental Harassment Authorization (IHA) or through incidental take regulations for all other activities, we will not require an additional incidental take permit under the ESA issued in accordance with 50 CFR 17.32(b) for non-Federal parties since we have determined that the MMPA restrictions are more protective or as protective as permits issued under 50 CFR 17.32(b). In addition, while an incidental take statement under section 7 of the ESA will be issued, any take will be covered through the MMPA authorization. However, any incidental take that does occur from activities within the current range of the polar bear that has not been authorized under the MMPA, or is not in compliance with the MMPA authorization, remains prohibited under 50 CFR 17.31 and subject to full penalties under both the ESA and MMPA. Further, the ESA's citizen suit provision is unaffected by this special rule anywhere within the current range of the species. Any person or entity that is allegedly causing the incidental take of polar bears as a result of activities within the range of the species without appropriate MMPA

authorization can be challenged through this provision as that would be a violation of 50 CFR 17.31. The ESA citizen suit provision also remains available for alleged failure to consult under section 7 of the ESA regardless of whether the agency action occurs inside or outside the current range of the polar bear.

Sections 101(a)(5)(A) and (D) of the MMPA give the Service the authority to allow the incidental, but not intentional, taking of small numbers of marine mammals, in response to requests by U.S. citizens (as defined in 50 CFR 18.27(c)) engaged in a specified activity (other than commercial fishing) in a specified geographic region. Incidental take cannot be authorized under the MMPA unless the Service finds that the total of such taking will have no more than a negligible impact on the species or stock.

If any take that is likely to occur will be limited to nonlethal harassment of the species, the Service may issue an Incidental Harassment Authorization (IHA) under section 101(a)(5)(D) of the MMPA. The IHAs cannot be issued for a period longer than 1 year. If the taking may result in more than harassment, regulations under section 101(a)(5)(A) of the MMPA must be issued, which may be in place for no longer than 5 years. Once regulations making the required findings are in place, we issue Letters of Authorization (LOAs) that authorize the incidental take for specific projects that fall under the provisions covered in the regulations. The LOAs expire after 1 year and contain activity-specific monitoring and mitigation measures that ensure that any take remains at the negligible level. In either case, the IHA or the regulations must set forth:

(1) permissible methods of taking; (2) means of effecting the least practicable adverse impact on the species and their habitat and on the availability of the species for subsistence uses; and (3) requirements for monitoring and reporting.

While a determination of negligible impact is made at the time the regulations are issued based on the best information available, each request for an LOA is also evaluated to ensure it is consistent with this determination. The evaluation consists of the type and scope of the individual project and an analysis of all current species information, including the required monitoring reports from previously issued LOAs, and considers the effects of the individual project when added to all current LOAs in the geographic area. Through these means, the type and level of take of polar bears is continuously evaluated throughout the life of the regulations in order to ensure that any take remains at the level of negligible impact.

Incidental take of threatened or endangered marine mammals, such as the polar bear, that results from commercial fishery operations is regulated separately under the MMPA through sections 101(a)(5)(E) and 118. Section 101(a)(5)(E) requires that for marine mammals from a species or stock designated as depleted because of its listing as an endangered or threatened species under the ESA, a finding must be made that any incidental mortality or serious injury from commercial fisheries will have a negligible impact on such species or stock. In essence, section 101(a)(5)(E) applies the same "negligible impact" standard to the authorization of incidental take due to commercial

fishery activities that is applied to incidental take from other activities. In addition, an ESA recovery plan must be developed, unless otherwise excepted, and all requirements of MMPA section 118 must be met. These authorizations may be in place for no longer than 3 years, when new findings must be made.

Negligible impact under the MMPA, as defined at 50 CFR 18.27(c), is an impact that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. This is a more protective standard than standards for issuing incidental take under the ESA, which are: (1) for non-Federal actions, that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and, (2) for Federal actions, that the activity is not likely to jeopardize the continued existence of the species. In addition, the authorizations under the MMPA are limited to 3 years for commercial fisheries authorizations, 1 year for IHAs, and 5 years for incidental take regulations, thus ensuring that activities that are likely to cause incidental take of polar bears are periodically reviewed and mitigation measures that ensure that take remains at the negligible level can be updated. Incidental take permits and statements under the ESA have no such statutory time limits. Incidental take statements remain in effect for the life of the Federal action, unless reinitiation of consultation is triggered. Incidental take permits for non-Federal activities can be for various durations (see 50 CFR 17.32(b)(4)), with some permits valid for up to 50 years. Therefore, the incidental take standards under the MMPA because of their stricter standards and mandatory periodic re-evaluation, provide a greater level of

protection for the polar bear than adoption of the standards under the ESA at 50 CFR 17.31 and 17.32. As such, this special rule adopts the MMPA standards for authorizing Federal and non-Federal incidental take as necessary and advisable to provide for the conservation of the polar bear.

As stated above, when the Service issues authorizations for otherwise prohibited incidental take under the MMPA, we must determine that those activities will result in no more than a negligible impact on the species or stock. The distinction of conducting the analysis at the species or stock level may be an important one in some cases. Under the ESA, the "jeopardy" standard, for Federal incidental take, and "appreciably reduce the likelihood of survival and recovery" standard, for non-Federal take, are always applied to the listed entity (i.e., the listed species, subspecies, or distinct population segment). The Service is not given the discretion under the ESA to assess "jeopardy" and "appreciably reduce the likelihood of survival and recovery" at a smaller scale (e.g., stock) unless the listed entity is in fact smaller than the entire species or subspecies (e.g., a discrete population segment). Therefore, because avoiding greater than negligible impact to a stock is tighter than avoiding greater than negligible impact to an entire species, the MMPA may be much more protective than the ESA for activities that occur only within one stock of a listed species. In the case of the polar bear, it is listed as a threatened species throughout its range under the ESA, while multiple stocks are recognized under the MMPA. Therefore, a variety of activities that may impact polar bears will be assessed at a finer scale under the MMPA than they would have been otherwise under the

ESA.

In addition, during the process of authorizing any MMPA incidental take under section 101(a)(5), we must conduct an intra-Service consultation under section 7(a)(2) of the ESA to ensure that providing an MMPA incidental take authorization to an applicant is an act that is not likely to jeopardize the continued existence of the polar bear. Since the standard for approval under MMPA section 101(a)(5) is no more than "negligible impact" to the affected marine mammal species or stock, we believe that any MMPA-compliant authorization or regulation would meet the ESA section 7(a)(2) standards of avoiding jeopardy to the species. Under this special rule, any incidental take that could not be authorized under section 101(a)(5) of the MMPA would remain subject to the prohibitions of 50 CFR 17.31.

To the extent that any Federal actions are found to comport with the standards for MMPA incidental take authorization, we fully anticipate that 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 actions would augment protection and enhance agency management of the polar bear through the application of site-specific mitigation measures contained in an authorization issued under the MMPA. Therefore, we do not anticipate, in light of the ESA jeopardy standard and the maximum duration of these MMPA authorizations that there could be a conservation basis for requiring any entity holding incidental take

authorization under the MMPA and in compliance with all measures under that authorization (e.g., mitigation) to implement further measures under the ESA section 7 process, as long as the action does not go beyond the scope and duration of the MMPA take authorization.

For example, affiliates of the oil and gas industry have requested, and we have issued regulations since 1991 for, incidental take authorization for activities in occupied polar bear habitat. This includes regulations issued for incidental take in the Beaufort Sea from 1993 to the present, and regulations issued for incidental take in the Chukchi Sea for the period 1991–1996 and, more recently, regulations for similar activities and potential incidental take in the Chukchi Sea for the period 2008-2013. A detailed history of our past regulations for the Beaufort Sea region can be found in the final regulations published on November 28, 2003 (68 FR 66744), August 2, 2006 (71 FR 43926). and June 11, 2008 (73 FR 33212).

The mitigation measures that we have required for all oil and gas projects include a site-specific plan of operation and a site-specific polar bear interaction plan. Site-specific plans outline the steps the applicant will take to minimize effects on polar bears, such as garbage disposal and snow management procedures to reduce the attraction of polar bears, an outlined chain-of-command for responding to any polar bear sighting, and polar bear awareness training for employees. The training program is designed to educate field personnel about the dangers of bear encounters and to implement safety procedures

in the event of a bear sighting. Most often, the appropriate response involves merely monitoring the animal's activities until they move out of the area. However, personnel may be instructed to leave an area where bears are seen. When necessary, and under specific authorization separate from the incidental take authorization, bears can be displaced by using forms of deterrents, such as vehicles, vehicle horns, vehicle sirens, vehicle lights, spot lights, or, if necessary, pyrotechnics (e.g., cracker shells). The intent of the interaction plan and training activities is to allow for the early detection and appropriate response to polar bears that may be encountered during operations, which eliminates the potential for injury or lethal take of bears in defense of human life. By requiring such steps be taken, we ensure that any impacts to polar bears will be minimized and will remain negligible.

Additional mitigation measures are also required on a case-by-case basis depending on the location, timing, and specific activity. For example, we may require trained marine mammal observers for offshore activities; pre-activity surveys (e.g., aerial surveys, infra-red thermal aerial surveys, or polar bear scent-trained dogs) to determine the presence or absence of dens or denning activity; measures to protect pregnant polar bears during denning activities (den selection, birthing, and maturation of cubs), including incorporation of a 1-mile (1.6-kilometer) buffer surrounding known dens; and enhanced monitoring or flight restrictions. These mitigation measures are implemented to limit human–bear interactions and disturbances to bears and have ensured that industry effects on polar bears have remained at the negligible level.

Data provided by the required monitoring and reporting programs in the Beaufort Sea and in the Chukchi Sea show that mitigation measures successfully minimized effects on polar bears. For example, since 1991, when the incidental take regulations became effective in the Chukchi and Beaufort Seas, there has been no known instance of a polar bear being killed or of personnel being injured by a bear as a result of oil and gas industry activities in the areas covered by the incidental take regulations.

Activities Outside Current Range

This special rule includes a separate provision (paragraph (4)) that addresses take under the ESA that is incidental to an otherwise lawful activity that occurs outside the current range of the polar bear. Under paragraph (4), incidental take of polar bears that results from activities that occur outside of the current range of the species is not subject to the prohibitions found at 50 CFR 17.31. This provision has been modified from the version of paragraph (4) that appeared in the interim final rule to more precisely delineate where the ESA prohibition against incidental take is necessary and advisable to provide for the conservation of the polar bear.

Under paragraph (4), any incidental take that results from activities within the current range of the polar bear remains subject to the prohibitions found at 50 CFR 17.31, although, as explained in the previous section, any such incidental take that has already

been authorized under the MMPA will not require additional ESA authorization.

Any incidental take of a polar bear caused by an activity that occurs outside of the current range of the species, however, would not be a prohibited act under the ESA, regardless of whether a causal connection has been made between the conduct of the activity and effects on the species. But nothing in paragraph (4) modifies the prohibitions against taking, including incidental taking, under the MMPA, which continue to apply regardless of where the activity occurs. If it is shown that a particular activity conducted outside the current range of the species is reasonably likely to cause the incidental taking of a polar bear, whether lethal or nonlethal, any incidental take that occurs is a violation of the MMPA unless authorization for the take under the MMPA has been issued by the Service.

Any incidental take caused by an activity outside the current range of the polar bear and covered by the MMPA would be a violation of that law and subject to the full array of the statute's civil and criminal penalties unless it was authorized. Any person, which includes businesses, States, and Federal agencies as well as individuals, who violates the MMPA's takings prohibition or any regulation may be assessed a civil penalty of up to $10,000 for each violation. A person or entity that knowingly violates the MMPA's takings prohibition or any regulation will, upon conviction, be fined for each violation, imprisoned for up to 1 year, or both. Please refer to the "Penalties" discussion below for additional discussion of the penalties under the ESA and the

MMPA.

Any individual, business, State government, or Federal agency subject to the jurisdiction of the United States that is likely to cause the incidental taking of a polar bear under the MMPA, regardless of the location of their activity, must therefore seek incidental take authorization under the MMPA or risk such civil or criminal penalties. As explained earlier, while the Service will work with any person or entity that seeks incidental take authorization, such authorization can only be granted if any take that is likely to occur will have no more than a negligible impact on the species. If the negligible impact standard cannot be met, the person or entity will have to modify their activities to meet the standard, modify their activities to avoid the taking altogether, or risk civil or criminal penalties.

In addition, nothing in paragraph (4) of this final rule affects section 7 consultation requirements outside the current range of the polar bear. Any Federal agency that intends to engage in an agency action that "may affect" polar bears must comply with 50 CFR part 402, regardless of the location of the agency action. This includes, but is not limited to, intra-Service consultation on any MMPA incidental take authorization proposed for activities located outside the current range. Paragraph (4) does not affect in any way the standards for issuing a biological opinion at the end of that consultation or the contents of the biological opinion, including an assessment of the nature and amount of take that is likely to occur. An incidental take statement would also be issued under

any opinion where the Service finds that the agency action and the incidental taking are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of any polar bear critical habitat that may be designated, provided that the incidental taking has already been authorized under the MMPA, as required under section 7(b)(4) of the ESA. The Service will, however, inform the Federal agency and any applicants in the biological opinion and any incidental take statement that the take identified in the biological opinion and the statement is not a prohibited act under the ESA, although any incidental take that actually occurs and that has not been authorized under the MMPA would remain a violation of the MMPA.

One difference between the MMPA and the ESA is the applicability of the ESA citizen suit provision. Under section 11 of the ESA, any person may commence a civil suit against a person, business entity, State government, or Federal agency that is allegedly in violation of the ESA. Such lawsuits have been brought by private citizens and citizen groups where it is alleged that a person or entity is taking a listed species in violation of the ESA. The MMPA does not have a similar provision. So while any unauthorized incidental take caused by an activity outside the current range of the polar bear would be a violation of the MMPA, legal action against the person or entity causing the take could only be brought by the United States and not by a private citizen or citizen group. However, operation of the citizen suit provision remains unaffected for any restricted act other than incidental take, such as non-incidental take, import, export, sale, and transport, regardless of whether the activity occurs outside the current range of the

polar bear. Further, the ESA's citizen suit provision is unaffected by this special rule when the activity causing incidental take is anywhere within the current range of the species. Any person or entity that is allegedly causing the incidental take of polar bears as a result of activities within the range of the species without appropriate MMPA authorization can be challenged through the citizen suit provision as that would be a violation of the ESA implementing regulations at 50 CFR 17.31. The ESA citizen suit provision also remains available for alleged failure to consult under section 7 of the ESA regardless of whether the agency action occurs inside or outside the current range of the polar bear. Further, any incidental taking caused by an activity outside the current range of the polar bear that is connected, either directly or in certain instances indirectly, to an action by a Federal agency could be pursued under the Administrative Procedure Act of 1946 (5 U.S.C. 706), which allows challenges to final agency actions.

Import, Export, Non-Incidental Take, Transport, Purchase, and Sale or Offer for Sale or Purchase

When setting restrictions for threatened species, the Service has generally adopted prohibitions on their import; export; take; transport in interstate or foreign commerce in the course of a commercial activity; sale or offer for sale in interstate or foreign commerce; and possession, sale, delivery, carrying, transportation, or shipping of unlawfully taken species, either through a special rule or through the provisions of 50 CFR 17.31. For the polar bear, these same activities are already strictly regulated under

the MMPA. Section 101 of the MMPA provides a moratorium on the taking and importation of marine mammals and their products. Section 102 of the MMPA further prohibits activities unless exempted or authorized under subsequent sections.

Prohibitions in section 102(a) include take of any marine mammal on the high seas; take of any marine mammal in waters or on lands under the jurisdiction of the United States; use of any port, harbor, or other place under the jurisdiction of the United States to take or import a marine mammal; possession of any marine mammal or product taken in violation of the MMPA; and transport, purchase, sale, export, or offer to purchase, sell, or export any marine mammal or product taken in violation of the MMPA or for any purpose other than public display, scientific research, or enhancing the survival of the species or stock. Under sections 102(b) and (c) of the MMPA, it is unlawful to import a pregnant or nursing marine mammal; an individual taken from a depleted species or population stock; an individual taken in a manner deemed inhumane; any marine mammal taken in violation of the MMPA or in violation of the law of another country; or any marine mammal product if it was made from any marine mammal taken in violation of the MMPA or in violation of the law of another country, or if it was illegal to sell in the country of origin.

The MMPA then provides specific exceptions to these prohibitions under which certain acts are allowed only if all statutory requirements are met. Under section 104 of the MMPA, these otherwise prohibited activities may be authorized for purposes of

public display (section 104(c)(2)), scientific research (section 104(c)(3)), enhancing the survival or recovery of a species (section 104(c)(4)), or photography (where there is level B harassment only; section 104(c)(6)). In addition, section 104(c)(8) specifically addresses the possession, sale, purchase, transport, export, or offer for sale of the progeny of any marine mammal taken or imported under section 104, and section 104(c)(9) sets strict standards for the export of any marine mammal from the United States. In all of these sections of the MMPA, strict criteria have been established to ensure that the impact of an authorized activity, if a permit were to be issued, would successfully meet Congress's finding in the MMPA that species "should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part."

Under the general threatened species regulations at 50 CFR 17.31 and 17.32, authorizations are available for a wider range of activities than under the MMPA, including permits for any special purpose consistent with the ESA. In addition, for those activities that are available under both the MMPA and the general threatened species regulations, the MMPA issuance criteria are often more strict. For example, in order to issue a permit under the general threatened species regulations at 50 CFR 17.32, the Service must consider, among other things:

(1) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;

(2) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife;

(3) Whether the permit would in any way directly or indirectly conflict with any known program intended to enhance the survival probabilities of the population; and

(4) Whether the activities would be likely to reduce the threat of extinction facing the species of wildlife.

These are all "considerations" during the process of evaluating an application, but none set a standard that requires denial of the permit under any particular set of facts. However, in order to obtain an enhancement permit under the MMPA, the Service must find that any taking or importation: (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 any conservation plan or ESA recovery plan for the species or stock or, if no conservation or ESA recovery plan is in place, with the Service's evaluation of actions required to enhance the survival or recovery of the species or stock in light of factors that would be addressed in a conservation plan or ESA recovery plan. In order to issue a scientific research permit under the MMPA, in addition to meeting the requirements that the taking is required to further a bona fide scientific purpose, any lethal taking cannot be authorized unless a nonlethal method of conducting the research is not feasible. In addition, for depleted species such as the polar bear, permits shall not be issued for any lethal taking unless the results of the research will directly benefit the species, or fulfill a critically important research need.

Further, all permits issued under the MMPA must be consistent with the purposes and policies of the Act, which includes maintaining or returning marine mammals to their optimum sustainable population. Also, now that polar bears have depleted status under the MMPA, no MMPA permit may be issued for taking or importation for the purpose of public display, whereas § 17.32 allows issuance of permits for zoological exhibition and educational purposes. As the MMPA does not contain a provision similar to a special rule under section 4(d) of the ESA, the more restrictive requirements of the MMPA apply.

Thus, the existing statutory provisions of the MMPA allow fewer types of activities than does 50 CFR 17.32 for threatened species, and the MMPA's standards are generally stricter for those activities that are allowed than standards for comparable activities under 50 CFR 17.32. Because, for polar bears, an applicant must obtain authorization under the MMPA to engage in an act that would otherwise be prohibited, and because both the allowable types of activities and standards for those activities are generally stricter under the MMPA than the general standards under 50 CFR 17.32, we find that the MMPA provisions are necessary and advisable to provide for the conservation of the species and adopt these provisions as appropriate conservation protections under the ESA. Therefore, under this special rule, as long as an activity is authorized or exempted under the MMPA, and the appropriate requirements of the MMPA are met, then the activity does not require any additional authorization under the

ESA. All authorizations issued under section 104 of the MMPA will continue to be subject to section 7 consultation requirements of the ESA.

CITES

In addition to the MMPA restrictions on import and export discussed above, CITES provisions that apply to the polar bear also ensure that import into or export from the United States is carefully regulated. Under CITES and the U.S. regulations that implement CITES at 50 CFR part 23, the United States is required to regulate and monitor the trade in legally possessed CITES specimens over an international border. Thus, for example, CITES would apply to tourists driving from Alaska through Canada with polar bear handicrafts to a destination elsewhere in the United States. As an Appendix II species, the export of any polar bear, either live or dead, and any polar bear parts or products requires an export permit supported by a finding that the specimen was legally acquired under international and domestic laws. Prior to issuance of the permit, the exporting country must also find that export will not be detrimental to the survival of the species. A valid export document issued by the exporting country must be presented to the officials of the importing country before the polar bear specimen will be cleared for importation.

Some limited exceptions to this permit requirement exist. For example, consistent with CITES, the United States provides an exemption from the permitting requirements

for personal and household effects made of dead specimens. Personal and household effects must be personally owned for noncommercial purposes, and the quantity must be necessary or appropriate for the nature of the trip or stay or for household use. Not all CITES countries have adopted this exemption, so persons who may cross an international border with a polar bear specimen should check with the Service and the country of transit or destination in advance as to applicable requirements. Because for polar bears any person importing or exporting any live or dead animal, part, or product into or from the United States must comply with the strict provisions of CITES as well as the strict import and export provisions under the MMPA, we find that additional authorizations under the ESA to engage in these activities would not be necessary and advisable to provide for the conservation of the species. Thus, under this rule, if an import or export activity is authorized or exempted under the MMPA and the appropriate requirements under CITES have been met, no additional authorization under the ESA is required. All export authorizations issued by the Service under CITES will continue to be subject to the consultation requirements under section 7 of the ESA.

Take for Self-Defense or Welfare of the Animal

Both the MMPA and the ESA prohibit take of protected species. However, both statutes provide exceptions when the take is either exempted or can be authorized for self-defense or welfare of the animal.

In the interest of public safety, both the MMPA and the ESA include provisions to allow for take, including lethal take, when this take is necessary for self-defense or to protect another person. Section 101(c) of the MMPA states that it shall not be a violation to take a marine mammal if such taking is imminently necessary for self-defense or to save the life of another person who is in immediate danger. Any such incident must be reported to the Service within 48 hours of occurrence. Section 11(a)(3) of the ESA similarly provides that no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an otherwise prohibited act based on a good faith belief that he or she was protecting himself or herself, a member of his or her family, or any other individual from bodily harm. Section 11(b)(3) of the ESA provides that it shall be a defense to prosecution if the defendant committed an offense based on a good faith belief that he or she was protecting himself or herself, a member of his or her family, or any other individual from bodily harm. The ESA regulations in 50 CFR 17.21(c)(2), which reiterate that any person may take listed wildlife in defense of life, clarify this exemption. Reporting of the incident is required under 50 CFR 17.21(c)(4). Thus, the self-defense provisions of the ESA and MMPA are comparable. However, under this special rule, where unforeseen differences between these provisions may arise in the future, any activity that is authorized or exempted under the MMPA does not require additional authorization under the ESA.

Concerning take for defense of property and for the welfare of the animal, the provisions in the ESA and MMPA are not clearly comparable. The provisions provided

under the ESA regulations at 50 CFR 17.21(c)(3) authorize any employee or agent of the Service, any other Federal land management agency, the National Marine Fisheries Service (NMFS), or a State conservation agency, who is designated by the agency for such purposes, to take listed wildlife when acting in the course of official duties if the action is necessary to: (i) aid a sick, injured, or orphaned specimen; (ii) dispose of a dead specimen; (iii) salvage a dead specimen for scientific study; or (iv) remove a specimen that may constitute a threat to human safety, provided that the taking is humane or, if lethal take or injury is necessary, that there is no other reasonable possibility to eliminate the threat. Further, the ESA regulations at 50 CFR 17.31(b) allow any employee or agent of the Service, of NMFS, or of a State conservation agency which is operating a conservation program under the terms of a Cooperative Agreement with the Service in accord with section 6 of the ESA, when acting in the course of official duty, to take those species of threatened wildlife which are covered by an approved cooperative agreement to carry out conservation programs.

Provisions for similar activities are found under sections 101(a), 101(d), and 109(h) of the MMPA. Section 101(a)(4)(A) of the MMPA provides that a marine mammal may be deterred from damaging fishing gear or catch (by the owner or an agent or employee of the owner of that gear or catch), other private property (by the owner or an agent or employee of the owner of that property), and, if done by a government employee, public property so long as the deterrence measures do not result in death or serious injury of the marine mammal. This section also allows for any person to deter a marine

mammal from endangering personal safety. Section 101(a)(4)(D) clarifies that this authority to deter marine mammals applies to depleted stocks, which would include the polar bear. The nonlethal deterrence of a polar bear from fishing gear or other property is not a provision that is included under the ESA; however, this provision would not result in injury to the bear or removal of the bear from the population and could, instead, prevent serious injury or death to the bear by preventing escalation of an incident to the point where the bear is killed in self-defense. Therefore, we find it necessary and advisable to continue to manage polar bears under this provision of the MMPA and, as such, an activity conducted pursuant to this provision under the MMPA does not require additional authorization under the ESA.

Section 101(d) of the MMPA provides that it is not a violation of the MMPA for any person to take a marine mammal if the taking is necessary to avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris, and care is taken to prevent further injury and ensure safe release. The incident must be reported to the Service within 48 hours of occurrence. If entangled, the safe release of a polar bear from fishing gear or other debris could prevent further injury or death of the animal. Therefore, by adopting this provision of the MMPA, this special rule provides for the conservation of polar bears in the event of entanglement with fishing gear or other debris and could prevent further injury or death of the bear. The provisions under the ESA at 50 CFR 17.31 provide for similar activities; however, the ESA provision only applies to an employee or agent of the Service, any other Federal land management

agency, NMFS, or a State conservation agency, who is designated by the agency for such purposes. The provisions under section 101(d) apply to any individual, including private individuals. Although the provisions under the MMPA are broader in this case, we find them necessary and advisable to provide for the conservation of the polar bear; therefore, an activity conducted pursuant to this provision of the MMPA does not require additional authorization under the ESA.

Further, section 109(h) of the MMPA allows the humane taking of a marine mammal by specific categories of people (i.e., Federal, State, or local government officials or employees or a person designated under section 112(c) of the MMPA) in the course of their official duties provided that one of three criteria is met—the taking is for: (1) the protection or welfare of the mammal; (2) the protection of the public health and welfare; or (3) the nonlethal removal of nuisance animals. The MMPA regulations at 50 CFR 18.22 provide the specific requirements of the exception. Section 112(c) of the MMPA allows the Service to enter into cooperative agreements with other Federal or State agencies and public or private institutions or other persons to carry out the purposes of section 109(h) of the MMPA. The ability to designate non-Federal, non-State "cooperators," as allowed under sections 112(c) and 109(h) of the MMPA but not provided for under the ESA, has allowed the Service to work with private groups to retrieve carcasses, respond to injured animals, and provide care and maintenance for stranded or orphaned animals. This has provided benefits by drawing on the expertise and allowing the use of facilities of non-Federal and non-State scientists, aquaria,

veterinarians, and other private entities. Additionally, the ability for non-Federal, non-State cooperators to haze polar bears from oil and gas facilities in Alaska has provided for the conservation of the polar bear by allowing nonlethal techniques to deter them from property and away from people before situations escalate, thereby preventing unnecessary injury to, or lethal take of, polar bears. Therefore, the adoption of these MMPA provisions is necessary and advisable to provide for the conservation of the polar bear.

Pre-Act Specimens

The ESA, MMPA, and CITES all have provisions for the regulation of specimens, both live and dead, that were acquired or removed from the wild prior to application of the law or the listing of the species, but the laws treat these specimens somewhat differently. Section 9(b)(1) of the ESA provides an exemption for threatened species held in a controlled environment as of the date of publication of their listing provided that the holding and any subsequent holding or use is not in the course of a commercial activity. Additionally, section 10(h) of the ESA provides an exemption for certain antique articles. Polar bears held in captivity prior to the listing of the polar bear as a threatened species under the ESA and not used or subsequently held or used in the course of a commercial activity, and all items containing polar bear parts that qualify as antiques under the ESA, would qualify for these exemptions.

Section 102(e) of the MMPA contains a pre-MMPA exemption that provides that none of the restrictions shall apply to any marine mammal or marine mammal product composed from an animal taken prior to December 21, 1972. In addition, Article VII(2) of CITES provides a pre-Convention exception that exempts a pre-Convention specimen from standard permitting requirements in Articles III, IV, and V of CITES when the exporting or re-exporting country is satisfied that the specimen was acquired before the provisions of CITES applied to it and issues a CITES document to that effect (see 50 CFR 23.45). The special rule does not affect requirements under CITES, therefore, these specimens continue to require this pre-Convention documentation for any international movement. Pre-Convention certificates required by CITES and pre-MMPA affidavits and supporting documentation required under the Service's regulations at 50 CFR 18.14 ensure that trade in pre-MMPA and pre-Convention specimens meet the requirements of the exemptions.

This rule adopts the pre-Act provisions of the MMPA and CITES. The MMPA has been in force since 1972 and CITES since 1975. In that time, there has never been a conservation problem identified regarding pre-Act polar bear specimens. While under this special rule, polar bear specimens that were obtained prior to the date that the MMPA went into effect (December 21, 1972) are not subject to the same restrictions as other threatened species under the general regulations at §§ 17.31 and 17.32, the number of specimens and the nature of the activities to which these restrictions would apply is limited. There are very few live polar bears, either in a controlled environment within the

United States or elsewhere, that would qualify as "pre-Act" under the MMPA. Therefore, the standard MMPA restrictions apply to virtually all live polar bears. Of the dead specimens that would qualify as "pre-Act" under the MMPA, very few of these specimens would likely be subject to activities due to the age and probable poor physical quality of these specimens. Furthermore, under CITES these specimens would continue to require documentation for any international movement, which would verify that the specimen was acquired before CITES went into effect in 1975 for polar bears. While the general ESA regulations would provide some additional restrictions, such activities have not been identified as a threat in any way to the polar bear. Thus, CITES and the MMPA provide appropriate protections that are necessary and advisable to provide for the conservation of the polar bear in this regard, and additional restrictions under the ESA are not necessary.

Subsistence, Handicraft Trade, and Cultural Exchanges

Section 10(e) of the ESA provides an exemption for Alaska Natives for the taking and importation of listed species if such taking is primarily for subsistence purposes. Nonedible by-products of species taken in accordance with the exemption, when made into authentic native articles of handicraft and clothing, may be transported, exchanged, or sold in interstate commerce. The ESA defines authentic native articles of handicraft and clothing as items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional

native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices (section 10(e)(3)(ii)). That definition also provides that traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. Further details on what qualifies as authentic native articles of handicrafts and clothing are provided at 50 CFR 17.3. This exemption is similar to one in section 101(b) of the MMPA, which provides an exemption from the moratorium on take for subsistence harvest and the creation and sale of authentic native articles of handicrafts or clothing by Alaska Natives. The definition of authentic native articles of handicrafts and clothing in the MMPA is identical to the ESA definition, and our MMPA definition in our regulations at 50 CFR 18.3 is identical to the ESA definition at 50 CFR 17.3. Both statutes require that the taking may not be accomplished in a wasteful manner.

Under this special rule, any exempt activities under the MMPA associated with handicrafts or clothing or cultural exchange using subsistence-taken polar bears will not require additional authorization under the ESA, including the limited, noncommercial import and export of authentic native articles of handicrafts and clothing that are created from polar bears taken by Alaska Natives. Under this special rule, all such imports and exports involving polar bear parts and products will need to conform to what is currently allowed under the MMPA, comply with our import and export regulations found at 50 CFR parts 14 and 23, and be noncommercial in nature. The ESA regulations at 50 CFR 14.4 define commercial as related to the offering for sale or resale, purchase, trade, barter,

or the actual or intended transfer in the pursuit of gain or profit, of any item of wildlife and includes the use of any wildlife article as an exhibit for the purpose of soliciting sales, without regard to the quantity or weight.

Another activity covered by the special rule is cultural exchange between Alaska Natives and Native inhabitants of Russia, Canada, and Greenland with whom Alaska Natives share a common heritage. The MMPA allows the import and export of marine mammal parts and products that are components of a cultural exchange, which is defined under the MMPA as the sharing or exchange of ideas, information, gifts, clothing, or handicrafts. Cultural exchange has been an important exemption for Alaska Natives under the MMPA, and this special rule ensures that such exchanges will not be interrupted.

This special rule also adopts the registered agent and tannery process from the current MMPA regulations. In order to assist Alaska Natives in the creation of authentic native articles of handicrafts and clothing, the Service's MMPA implementing regulations at 50 CFR 18.23(b) and (d) allow persons who are not Alaska Natives to register as an agent or tannery. Once registered, agents are authorized to receive or acquire marine mammal parts or products from Alaskan Natives or other registered agents. They are also authorized to transfer (not sell) hides to registered tanners for further processing. A registered tannery may receive untanned hides from Alaska Natives or registered agents for tanning and return. The tanned skins may then be made into

authentic articles of clothing or handicrafts. Registered agents and tanneries must maintain strict inventory control and accounting methods for any marine mammal part, including skins; they provide accountings of such activities and inventories to the Service. These restrictions and requirements for agents and tanners allow the Service to monitor the processing of such items while ensuring that Alaska Natives can exercise their rights under the exemption. Adopting the registered agent and tannery process aligns ESA provisions relating to the creation of handicrafts and clothing by Alaska Natives with the current process under the MMPA and allows Alaska Natives to engage in the subsistence practices provided under the ESA's section 10(e) exemptions.

Nonetheless, the provisions in this special rule regarding creation, shipment, and sale of authentic native articles of handicrafts and clothing apply only to items to which the subsistence harvest exemption applies under the MMPA. The exemption in section 10(e)(1) of the ESA applies to "any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska" but also applies to "any non-native permanent resident of an Alaskan native village." However, the exemption under section 101 of the MMPA is limited to only an "Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean." Because the MMPA is more restrictive, only a person who qualifies under the MMPA Alaska Native exemption may legally take polar bears for subsistence purposes, as a take by nonnative permanent residents of Alaska native villages under the broader ESA exemption is not allowed under the MMPA. Therefore, all persons, including those who qualify under the Alaska Native

exemption of the ESA, should consult the MMPA and our regulations at 50 CFR part 18 before engaging in any activity that may result in a prohibited act to ensure that their activities will be consistent with both laws.

Although a few of these provisions of the MMPA may be less strict than the ESA provisions, these provisions are the appropriate regulatory mechanisms for the conservation of the polar bear. Both the ESA and the MMPA recognize the intrinsic role that marine mammals have played and continue to play in the subsistence, cultural, and economic lives of Alaska Natives. The Service, in turn, recognizes the important role that Alaska Natives play in the conservation of marine mammals. Amendments to the MMPA in 1994 acknowledged this role by authorizing the Service to enter into cooperative agreements with Alaska Natives for the conservation and co-management of subsistence use of marine mammals (section 119 of the MMPA). Through these cooperative agreements, the Service has worked with Alaska Native organizations to better understand the status and trends of polar bear throughout Alaska. For example, Alaska Natives collect and contribute biological specimens from subsistence-harvested animals for biological analysis. Analysis of these samples allows us to monitor the health and status of polar bear stocks.

Further, as discussed in our proposed and final rules to list the polar bear as a threatened species (72 FR 1064; January 9, 2007, and 73 FR 28212; May 15, 2008), the Service cooperates with the Alaska Nanuuq Commission, an Alaska Native organization

that represents interests of Alaska Native villages whose members engage in the subsistence hunting of polar bears, to address polar bear subsistence harvest issues. In addition, for the Southern Beaufort Sea population, hunting is regulated voluntarily and effectively through an agreement between the Inuvialuit of Canada and the Inupiat of Alaska (implemented by the North Slope Borough) as well as being monitored by the Service's marking, tagging, and reporting program. In addition, in the Chukchi Sea, the Service will be working with Alaska Natives through the recently implemented Agreement between the United States of America and the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population (Bilateral Agreement), under which one of two commissioners representing the United States will represent the Native people of Alaska and, in particular, the Native people for whom polar bears are an integral part of their culture. Thus, we recognize the unique contributions Alaska Natives provide to the Service's understanding of polar bears, and their interest in ensuring that polar bear stocks are conserved and managed to achieve and maintain healthy populations.

The Service recognizes the significant conservation benefits that Alaska Natives have already made to polar bears through the measures that they have voluntarily taken to self-regulate harvest that is otherwise exempt under the MMPA and the ESA and through their support of measures for regulation of harvest. This contribution has provided significant benefit to polar bears throughout Alaska, and will continue by maintaining and encouraging the involvement of the Alaska Native community in the conservation of the

species. This special rule provides for the conservation of polar bears, while at the same time accommodating the subsistence, cultural, and economic interests of Alaska Natives, which are interests recognized by both the ESA and MMPA. Therefore, the Service finds that aligning provisions under the ESA relating to the creation, shipment, and sale of authentic native handicrafts and clothing by Alaska Natives with what is already allowed under the MMPA contributes to a regulation that is necessary and advisable to provide for the conservation of polar bears.

This aspect of the special rule is limited to activities that are not already exempted under the ESA. The ESA itself provides a statutory exemption to Alaska Natives under section 10(e) of the ESA for the harvesting of polar bears from the wild as long as the taking is for primarily subsistence purposes. The ESA then specifies that polar bears taken under this provision can be used to create handicrafts and clothing and that these items can be sold in interstate commerce. Thus, this rule does not regulate the taking or importation of polar bears or the sale in interstate commerce of authentic native articles of handicrafts and clothing by qualifying Alaska Natives; these have already been exempted by statute. This special rule addresses only activities relating to cultural exchange and limited types of travel, and to the creation and shipment of authentic native handicrafts and clothing that are currently allowed under section 101 of the MMPA that are not already clearly exempted under section 10(e) of the ESA.

In addition, in our final rule to list the polar bear as threatened (73 FR 28212; May

15, 2008), while we found that polar bear mortality from harvest and negative bear–human interactions may be approaching unsustainable levels for some populations, especially those experiencing nutritional stress or declining population numbers as a consequence of habitat change, subsistence take by Alaska Natives does not currently threaten the polar bear throughout all or any significant portion of its range. Range-wide, continued harvest and increased mortality from bear–human encounters or other reasons are likely to become more significant threats in the future. The Polar Bear Specialist Group (Aars et al. 2006, p. 57), through resolution, urged that a precautionary approach be instituted when setting harvest limits in a warming Arctic environment, and continued efforts are necessary to ensure that harvest or other forms of removal do not exceed sustainable levels. However, the Service has found that standards for subsistence harvest in the United States under the MMPA and the voluntary measures taken by Alaska Natives to manage subsistence harvest in the United States have been effective, and that, range-wide, the lawful subsistence harvest of polar bears and the associated creation, sale, and shipment of authentic handicrafts and clothing currently do not threaten the polar bear throughout all or a significant portion of its range and are not affected by the provisions of this special rule.

National Defense Activities

Section 319 of the NDAA amended section 101 of the MMPA to provide a mechanism for the Department of Defense (DOD) to exempt actions or a category of

actions necessary for national defense from requirements of the MMPA provided that DOD has conferred, for polar bears, with the Service. Such an exemption may be issued for no more than 2 years. This special rule provides that an exemption invoked as necessary for national defense under the MMPA will require no separate authorization under the ESA. The MMPA exemption requires DOD to confer with the Service, the exemptions are of limited duration and scope (only those actions "necessary for national defense"), and no actions by the DOD have been identified as a threat to the polar bear throughout all or any significant portion of its range.

Penalties

As discussed earlier, the MMPA provides substantial civil and criminal penalties for violations of the law. These penalties, regardless of whether a violation occurs inside or outside the current range of the species, remain in place and are not affected by this rule. Because CITES is implemented through the ESA, any trade of polar bears or polar bear parts or products contrary to CITES and possession of any polar bear specimen that was traded contrary to the requirements of CITES is a violation of the ESA and remains subject to its penalties.

Under this special rule, however, certain acts not related to CITES violations also remain subject to the penalties of the ESA. Under paragraph (2) of this special rule, any act prohibited under the MMPA that would also be prohibited under the ESA regulations

at 50 CFR 17.31 and that has not been authorized or exempted under the MMPA would be a violation of the ESA as well as the MMPA. In addition, even if an act is authorized or exempt under the MMPA, failure to comply with all applicable terms and conditions of the statute, the MMPA implementing regulations, or an MMPA permit or authorization issued by the Service would likewise constitute a violation of the ESA. Under paragraph (4) of this rule, the ESA penalties also remain applicable to any incidental take of polar bears that is caused by activities within the current range of the species, if that incidental take has not been authorized under the MMPA consistent with paragraph (2) of this rule. While ESA penalties would not apply to any incidental take caused by activities outside the current range, as explained above, all MMPA penalties remain in place in these areas. A civil penalty of $12,000 to $25,000 is available for a knowing violation (or any violation by a person engaged in business as an importer or exporter) of certain provisions of the ESA, the regulations, or permits, while civil penalties of up to $500 are available for any other violation. Criminal penalties and imprisonment for up to one year, or both, are also available for certain violations of the ESA. In addition, all fish and wildlife taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of the ESA or any ESA regulation or permit or certificate issued under the ESA are subject to forfeiture to the United States. There are also provisions for the forfeiture of vessels, vehicles, and other equipment used in committing unlawful acts under the ESA upon conviction of a criminal violation.

As discussed earlier, even where MMPA penalties provide the sole deterrence against unlawful activities under this rule, these penalties are substantial. A civil penalty of up to $10,000 for each violation may be assessed against any person, which includes businesses, States, and Federal agencies as well as private individuals, who violates the MMPA or any MMPA permit, authorization, or regulation. Any person or entity that knowingly violates any provision of the statute or any MMPA permit, authorization, or regulation will, upon conviction, be fined for each violation, be imprisoned for up to 1 year, or both. The MMPA also provides for the seizure and forfeiture of the cargo (or monetary value of the cargo) from any vessel that is employed in the unlawful taking of a polar bear, and additional penalties of up to $25,000 can be assessed against a vessel causing the unlawful taking of a polar bear. Finally, any polar bear or polar bear parts and products themselves can be seized and forfeited upon assessment of a civil penalty or a criminal conviction.

While there are differences between the penalty amounts in the ESA and the MMPA, the penalty amounts are comparable or stricter under the MMPA. The Alternative Fines Act (18 U.S.C. 3571) has removed the differences between the ESA and the MMPA for criminal penalties. Under this Act, unless a Federal statute has been exempted, any individual found guilty of a Class A misdemeanor may be fined up to $100,000. Any organization found guilty of a Class A misdemeanor may be fined up to $200,000. The criminal provisions of the ESA and the MMPA are both Class A misdemeanors and neither the ESA nor the MMPA are exempted from the Alternative

Fines Act. Therefore, the maximum penalty amounts for a criminal violation under both statutes is the same: $100,000 for an individual and $200,000 for an organization.

While the maximum civil penalty amounts under the ESA are for the most part higher than the maximum civil penalty amounts under the MMPA, other elements in the penalty provisions mean that, on its face, the MMPA provides greater deterrence. Other than for a commercial importer or exporter of wildlife or plants, the highest civil penalty amounts under the ESA require a showing that the person "knowingly" violated the law. The penalty for other than a knowing violation is limited to $500. The MMPA civil penalty provision does not contain this requirement. Under section 105(a) of the MMPA, any person "who violates" any provision of the MMPA or any permit or regulation issued there under, with one exception for commercial fisheries, may be assessed a civil penalty of up to $10,000 for each violation.

Determination

Section 4(d) of the ESA states that the "Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation" of species listed as threatened. Conservation is defined in the ESA to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." In Webster v. Doe, 486 U.S. 592 (1988), the U.S. Supreme Court

noted that similar language "fairly exudes deference" to the agency when the court interpreted the authority to terminate an employee when the Director of the Central Intelligence Agency "shall deem such termination necessary or advisable in the interests of the United States".

Thus, the regulations promulgated under section 4(d) of the ESA provide the Secretary the discretion to determine what prohibitions, exemptions, or authorizations are necessary and advisable for a species, as long as the regulation provides for the conservation of that species. In such cases, some of the prohibitions and authorizations of the ESA implementing regulations at 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into the special rule, but the special rule may also include provisions tailored to the specific conservation needs of the listed species, which may be more or less restrictive than the general provisions. Section 4(d) specifies that "[t]he Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) . . . with respect to endangered species."

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, the Secretary may find that it is necessary and advisable not to include a taking prohibition, or to include a limited taking prohibition. See Alsea Valley Alliance v. Lautenbacher, 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); Washington Environmental Council v. National Marine Fisheries Service, and 2002 U.S. Dist. Lexis 5432 (W.D.

Wash. 2002). In addition, as affirmed in State of Louisiana v. Verity, 853 F.2d 322 (5th Cir. 1988), the rule need not address all the threats to the species. As noted by Congress when the ESA was initially enacted, "once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species," as long as the measures will "serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973)."

This special rule provides the appropriate prohibitions, and exceptions to those prohibitions, to provide for the conservation of the species. Many provisions provided under the MMPA and CITES are comparable to or stricter than similar provisions under the ESA, including the definitions of take, penalties for violations, and use of marine mammals. As an example, concerning the definitions of harm under the ESA and harassment under the MMPA, while the terminology of the definitions is not identical, we cannot foresee circumstances under which the management for polar bears under the two definitions would differ. In addition, the existing statutory exceptions that allow use of marine mammals under the MMPA (e.g., research, public display) allow fewer types of activities than does the ESA regulation at 50 CFR 17.32 for threatened species, and the MMPA's standards are generally stricter for those activities that are allowed than those standards for comparable activities under the ESA regulations at 50 CFR 17.32.

Provisions for take for self-defense are comparable under the ESA and MMPA and clearly provided for under both statutes. Finally, due to the enactment of the Alternative Penalties Act and the provisions therein, the criminal penalties provided under the ESA and MMPA are equivalent.

Additionally, the process for authorization of incidental take under the MMPA is more restrictive than the process under the ESA. The standard for issuing incidental take under the MMPA is "negligible impact." Negligible impact under the MMPA, as defined at 50 CFR 18.27(c), is an impact that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. This is a more protective standard than standards for issuing incidental take under the ESA, which are, for non-Federal actions, that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild and, for Federal actions, that the activity is not likely to jeopardize the continued existence of the species. A proposed Federal action being independently evaluated under the MMPA and the ESA would have more than a negligible impact before, and in some cases well before, a jeopardy determination would be made.

Where the provisions of the MMPA and CITES are comparable to, or even more strict than, the provisions under the ESA, we find that it provides for the conservation of the polar bear to continue to manage the species under the provisions of the MMPA and CITES. As such, these mechanisms have a demonstrated record as being appropriate

management provisions. Further, it would not contribute to the conservation of the polar bear and would be inappropriate for the Service to require people to obtain an ESA authorization (including paying application fees) for activities authorized under the MMPA or CITES where protective measures for polar bears under the ESA authorization would be equivalent or less restrictive than the MMPA or CITES requirements.

There are a few activities for which the prohibitions under the MMPA are less restrictive than the prohibitions for the same activities under the ESA, including use of pre-Act specimens, subsistence use, military readiness activities, and take for defense of property and welfare of the animal. Concerning use of pre-Act specimens and military readiness activities, the general ESA regulations would provide some additional restrictions beyond those provided by the MMPA; however, such activities have not been identified as a threat in any way to the polar bear or its conservation. Therefore, the additional restrictions under the ESA would not contribute to the conservation of the species. Concerning subsistence use and take for defense of property and welfare of the animal, the MMPA allows a greater breadth of activities than would be allowed under the general ESA regulations; however, these additional activities clearly provide for the conservation of the polar bear by fostering cooperative relationships with Alaska Natives who participate with us in conservation programs for the benefit of the species, limiting lethal bear-human interactions, and providing immediate benefits for the welfare of individual animals.

We find that for activities within the current range of the polar bear, overlay of the incidental take prohibitions under 50 CFR 17.31 is an important component of polar bear management because of the timing and proximity of potential take of polar bears. Within the range of the polar bear there are currently ongoing lawful activities that result in the incidental take of the species such as those associated with oil and gas exploration and development. Any incidental take from these activities is currently authorized under the MMPA. However, we recognize that there may be future development or activities that may cause incidental take of the species. Because of this, we find that it is important to have the overlay of ESA incidental take prohibitions in place for several reasons. In the event that a person or entity was causing the incidental take of polar bears that has not been authorized under the MMPA, or they are not in compliance with the terms and conditions of their MMPA incidental take authorization, the overlay will provide that the person or entity is in violation of the ESA as well as the MMPA. In such circumstances, the person can alter his or her activities to eliminate the possibility of incidental take, seek or come into compliance with their MMPA authorization, or be subject to the penalties of the ESA as well as the MMPA. In this situation, the citizen suit provision of section 11 of the ESA would allow any citizen or citizen group to pursue an incidental take that has not been authorized under the MMPA. As such, we have determined that the overlay of the ESA incidental take prohibitions at 50 CFR17.31 in the current range of the polar bear is important for the conservation of the species.

However, we find that for activities outside the current range of the polar bear,

overlay of the incidental take prohibitions under 50 CFR 17.31 is not necessary for polar bear management and conservation. Even though incidental take of polar bears from activities outside the current range of the species is not prohibited under this special rule, the consultation requirements under section 7 of the ESA remain fully in effect. Any biological opinion associated with a consultation will identify any incidental take that is reasonably certain to occur. Any incidental take identified through a biological opinion or otherwise remains a violation of the MMPA unless appropriately authorized. In addition, the citizen suit provision under section 11 of the ESA is unaffected by this rule for challenges to Federal agencies that are alleged to be in violation of the consultation requirement under section 7 of the ESA. Further, the Service will pursue any violation under the MMPA for incidental take that has not been authorized, and all MMPA penalties would apply. As such, we have determined that not having the additional overlay of incidental take prohibitions under 50 CFR 17.31 resulting from activities outside the current range of the polar bear does not impede the conservation of the species.

Our 36-year history of implementation of the MMPA, 33-year history of implementation of CITES, and our analysis in the ESA final listing rule for the species, which shows that none of the activities currently regulated under the MMPA and CITES are factors that threaten the polar bear throughout all or a significant portion of its range, demonstrate that these laws provide appropriate regulatory protection to polar bears for activities that are regulated under these laws. In addition, the threat that has been

identified in the final ESA listing rule – loss of habitat and related effects – would not be alleviated by the additional overlay of provisions in the general threatened species regulations at 50 CFR 17.31 and 17.32, or even the full application of the provisions in section 9 and 10 of the ESA. Nothing within our authority under section 4(d) of the ESA, above and beyond what we have already required in this final special rule, would provide the means to resolve this threat.

Therefore, this special rule under section 4(d) of the ESA adopts existing conservation regulatory requirements under the MMPA and CITES as the appropriate regulatory provisions for this threatened species. Under this rule, if an activity is authorized or exempted under the MMPA or CITES, no additional authorization will be required. But if an activity is not authorized or exempted under the MMPA or CITES and the activity would result in an act that would be otherwise prohibited under 50 CFR 17.31, the protections provided by the general threatened species regulations will apply. In such circumstances, the prohibitions of 50 CFR 17.31 would be in effect, and authorization under 50 CFR 17.32 would be required. In addition, any action authorized, funded, or carried out by the Service that may affect polar bears, including the Service's issuance of any permit or authorization described above, will require consultation under section 7 of the ESA to ensure that the action is not likely to jeopardize the continued existence of the species. Section 7 is a powerful tool in the conservation of listed species as it allows the Service to have a role in both the project-by-project planning and the larger development of regulations, guidelines, and restrictions that other Federal agencies

may implement. The application of provisions in 50 CFR 17.31 provides an additional overlay of protection for the species. ESA civil and criminal penalties will continue to apply to any situation where a person has not obtained MMPA or CITES authorizations or has obtained their authorizations or is operating under an MMPA or CITES exemption or authorization but has failed to comply with all terms and conditions of the authorization or exemption.

We find that this final special rule is necessary and advisable to provide for the conservation of the polar bear because the MMPA and CITES have proven effective in managing polar bears for more than 30 years. The comparable or stricter provisions of the MMPA and CITES, along with the application of the ESA regulations at 50 CFR 17.31 and 17.32 for any activity that has not been authorized or exempted under the MMPA and CITES or for which a person or entity is not in compliance with the terms and conditions of any MMPA or CITES authorization or exemption, address those negative effects on polar bears that can foreseeably be addressed under sections 9 and 10 of the ESA. It would not contribute to the conservation of the polar bear to require an unnecessary overlay of redundant authorization processes that would otherwise be required under the general ESA threatened species regulations at 50 CFR 17.31 and 17.32.

Nothing in this special rule changes in any way the recovery planning provisions of section 4(f) and consultation requirements under section 7 of the ESA, including

consideration of adverse modification to any critical habitat that may be designated in the future, or the ability of the Service to enter into domestic and international partnerships for the management and protection of the polar bear.

Summary of Changes From the Interim Final Rule

In preparing the final special rule for the polar bear, we reviewed and considered comments from the public on the May 15, 2008, interim final special rule (73 FR 28306). As a result of comments received, we made the following changes to the interim rule:

(1) Removed discussion of section 4(a)(3) of the ESA from the preamble to the special rule. This section discussed exemptions available to the Department of Defense in the ESA's critical habitat designation process that are not relevant to this rule-making.

(2) Revised paragraph (2) to more clearly define which activities are subject to the prohibitions under the ESA regulations at 50 CFR 17.31.

(3) Revised paragraph (4) to clarify that incidental take from activities located outside the current range of the polar bear is not prohibited, rather than incidental take from activities located outside the State of Alaska.

(4) Reorganized the preamble language and inserted clarifying language to address substantive comments.

Summary of Comments and Recommendations

In our May 15, 2008, interim final rule to amend the 50 CFR part 17 regulations of the ESA to create a special rule under section 4(d) of the ESA for the polar bear, we opened a 60-day public comment period for all interested parties to submit comments that might contribute to the development of a final determination on the 4(d) rule. The public comment period closed on July 14, 2008.

In response to the public comment period, we received approximately 29,700 comments on our interim final 4(d) rule. To accurately review and incorporate the publicly provided information in our final rule, we worked with the eRulemaking Research Group, an academic research team at the University of Pittsburgh that has developed the Rule-Writer's Workbench analytical software. The Rule-Writer's Workbench enhanced our ability to review and consider the large numbers of comments, including large numbers of similar comments, on our interim final rule, allowing us to identify similar comments as well as unique ideas, data, recommendations, or suggestions on the interim final rule.

All substantive information provided during the public comment period has been

considered and either incorporated directly into this final rule or consolidated into key issues in this section.

1. *Issue*: Several commenters expressed concerns about the appropriate listing status of the polar bear, causes of global climate change, the designation of critical habitat, and the development of a recovery plan.

Response: These issues are outside the scope and authority of this special rule. Please see the final listing rule (73 FR 2821; May 15, 2008) for discussion of these topics.

2. *Issue*: Several commenters indicate that the interim final special rule lacks justification for and does not meet the "necessary and advisable to provide for the conservation" of the species standard required in a special rule because it does not address the threats of loss of sea-ice habitat due to climate change or the potential for oil spills. Further, a new proposed rule should be published for additional public comments that includes provisions specific to these threats. Other commenters supportive of the special rule assert that the Secretary has the authority to issue such a rule and that the interim final special rule meets the appropriate standards. These commenters suggest that the Secretary has broad discretion through rulemaking to allow or not allow "take" of threatened species, without a conservation constraint.

Response: Section 4(d) of the ESA states that the "Secretary shall issue such

regulations as he deems necessary and advisable to provide for the conservation" of species listed as threatened. For the reasons provided in the preamble, we find that this rule meets this standard. For example, all trade in polar bears or their parts and products made from polar bears will continue to be analyzed under CITES to ensure that the trade is not detrimental to the survival of the species. All activities that may cause incidental take of polar bears will continue to be reviewed and analyzed under the MMPA to ensure that they would not cause more than a "negligible impact" at the species or stock level before being authorized. This includes analysis of the potential for oil spills that may cause the taking of polar bears. Please see the "Necessary and Advisable Finding" section above for additional explanation of why this rule meets the legal standard.

Nothing within our authority under section 4(d) of the ESA, above and beyond what we have required in this final special rule, would address the threat to polar bears from loss of sea ice habitat. Therefore, there is no need for additional rulemaking. In addition, nothing in this special rule, the MMPA, or CITES precludes us from developing and implementing a recovery plan or entering into a treaty or conservation agreement that addresses the specific threats to the polar bear as outlined in the listing rule (73 FR 28212).

3. *Issue*: Several commenters expressed concern that, by adopting the MMPA regulations to manage the polar bear, the interim final special rule is not protective enough. These concerns include that the MMPA has different "take" provisions than the

ESA, including a lack of means to protect habitat and to consider cumulative impact, and as such, the final special rule should include any elements of taking defined under the ESA that are not covered under the MMPA. Other commenters stated that the MMPA and CITES are sufficient and appropriate standards for the conservation and management of the species since there is well-documented evidence that the oil and gas industry in Alaska, as regulated and monitored under the MMPA, does not injure or otherwise have more than a negligible effect on polar bears.

Response: We disagree that the polar bear will not be adequately protected by the adoption of the MMPA and CITES regulations under this special rule. The preamble explains how, for polar bears, the definition of take under the MMPA is comparable to or stricter than the definition of take under the ESA.

While the direct protections of the MMPA apply to the animals themselves, as explained in the "Applicable Laws" section above, the MMPA includes consideration of habitat and ecosystem protection. The terms "conservation" and "management" in the MMPA are specifically defined to include habitat acquisition and improvement. Protection of essential habitats, including rookeries, mating grounds, and areas of similar significance is addressed in incidental take authorizations issued under section 101(a)(5) of the MMPA. Cumulative effects are also part of the MMPA incidental take evaluation, as explained in our final rule for Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals (September 29, 1989; 54 FR 40338); "In determining

[cumulative] impact, the Service must evaluate the "total taking" expected from the specified activity in a specific geographic area. The estimate of total taking involves the accumulation of impacts from all anticipated activities that are expected to be covered by the specific regulations. In other words, the applicant's anticipated taking from its own activities is only one part of the story; the total taking expected from all persons conducting the activities to be covered by the regulations must be determined." In addition, cumulative effects to the species and its habitat are evaluated during the intra-Service ESA section 7 consultation required for the issuance of incidental take authorizations under section 101(a)(5).

4. *Issue:* One commenter noted that the MMPA provides no citizen suit provision and therefore argued that enforcement of the protections provided under the special rule is left entirely to the discretion of the agency. This commenter also stated that the Service has failed to pursue past incidental take violations.

Response: We agree that the MMPA contains no citizen suit provision. However, as explained in the preamble, under this special rule the ESA citizen suit provision will continue to allow a citizen or citizen group to bring a lawsuit against any individual, business or organization, State or local government, or Federal agency that is alleged to be in violation of this rule or other applicable provisions of the ESA. Thus, for example, the provision is available for any Federal action that may affect polar bears where the Federal agency has failed to satisfy the consultation requirements under section

7 of the ESA, regardless of whether the Federal action is located inside or outside the current range of the species. Although the citizen suit provision does not apply to allegations of ESA incidental take outside the current range of the species as that is not a prohibited act under this rule, the ESA citizen suit provision will otherwise continue to allow any citizen or citizen group to pursue a lawsuit alleging that an activity has resulted or will result in a prohibited act under 50 CFR 17.31 and the person conducting the activity has failed to obtain the necessary MMPA or CITES authorization, is not in compliance with their MMPA or CITES authorization or exemption, or, if the activity is not covered under the MMPA or CITES, has failed to obtain the proper authorization under 50 CFR 17.32. Otherwise, for any violations of this rule and any violations of the MMPA or CITES, the Service will use the full range of its legal authorities to pursue violations of the law. The commenter has not identified any examples where take has occurred, including nonlethal harassment, where the take was not authorized under the MMPA with appropriate protections for the species in place or the take was a violation of the MMPA that was not pursued as a violation of law by the Service.

5. *Issue:* The Service's previous attempts to rely upon alternative management regimes that provide similar but not identical protections to species have been rejected by the courts.

Response: While Congress laid out the prohibitions, authorizations, and exemptions that are appropriate for endangered species, it expressly did not do so for

threatened species. Instead it left to the discretion of the agency to determine what measures would be necessary and advisable to provide for the conservation of the species. There is no indication that Congress intended that management regimes for threatened species be identical to management regimes for endangered species. In fact, by stating that regulations for a threatened species "may" prohibit any act prohibited for endangered species under section 9 of the ESA, Congress made clear that it may not be appropriate to include section 9 prohibitions for some threatened species. As discussed in the preamble of this rule, the case law supports the discretion of the agency to develop regulations appropriate for the conservation needs of the species, while neither of the cases cited by the commenter is relevant to the development of a special rule under section 4(d) of the ESA. Both cases cited by the commenter challenged critical habitat determinations by the Service, which are covered by different standards than the development of threatened species regulations under section 4(d).

6. *Issue:* Concerning activities that are prohibited by the ESA, several commenters suggested that the Service should remove the possible ambiguity between the wording in the special rule itself exempting actions "consistent with" the MMPA and CITES, and the language in the preamble exempting actions "authorized or exempted by" the MMPA and CITES.

Response: Although there is no change in meaning from the interim final rule, we accept this suggestion and have changed paragraph (2) in the regulatory language to

clarify that actions "authorized or exempted" under the MMPA and CITES do not require additional ESA authorization. We have further revised paragraph (2) to clarify that an authorization or exemption is needed under the MMPA or CITES, or both, to qualify for the exception, such that if both statutes are relevant to any particular activity, both statutes must be complied with.

7. *Issue:* One commenter stated that the use of the term "depleted" with reference to polar bears is inappropriate because the term does not accurately describe the facts with regard to polar bears.

Response: The term "depleted" is not used in this rulemaking in the dictionary sense. Section 3 of the MMPA defines "depleted" as: (1) a species or population stock that is below its optimum sustainable population as determined by the Secretary in consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals; (2) a species or population stock that is below its optimum sustainable population as determined by a State to which authority for the conservation and management of that species has been transferred under section 1379 of the MMPA; or, (3) a species or population stock that is listed as endangered or threatened under the Endangered Species Act of 1973, as amended. Thus, when the polar bear was listed as a threatened species under the ESA on May 15, 2008, it obtained depleted status as a matter of law under the MMPA.

8. *Issue*: The rule should clarify that a waiver of the MMPA moratorium on taking and importing polar bears under sections 101(a)(3)(A) and 103 is no longer available since the polar bear is now considered a depleted species under the MMPA.

Response: Section 101(a)(3)(A) authorizes the Service, in consultation with the Marine Mammal Commission, to waive the MMPA moratorium on taking and importation of marine mammals so as to allow taking or importing of any marine mammal or marine mammal product as long as a determination to do so is made based on the best scientific evidence and takes into consideration the distribution, abundance, breeding habits, and time and lines of migratory movements and is compatible with the MMPA. In making such a determination, the Service must be assured that the taking is in accord with sound principles of resource protection and conservation. We agree that the waiver of the moratorium is no longer available for polar bears as the species now has depleted status under the MMPA. See Committee for Humane Legislation v. Richardson, 414 F.Supp. 297 (D.DC. 1976).

9. *Issue*: The preamble to the final rule should provide clarification about importation of polar bears for commercial and educational photography.

Response: Under section 104(c)(6) of the MMPA, a permit may be issued for commercial and educational photography of marine mammals in the wild provided the taking is limited to Level B harassment. Although section 104(a) allows permits to be

issued for taking or importation, section 104(c)(6) clearly limits photography permits to taking in the wild; thus importation of polar bears for photography is not allowed. In the interim special rule, we mistakenly included photography in the list of activities under section 101(a)(3)(B) of the MMPA that qualify as exceptions to the prohibition on import for species with depleted status. Section 101(a)(3)(B), when read in conjunction with section 104(c)(6), allows us to issue a permit only for Level B harassment take for photography of polar bears for educational or commercial purposes, and not for importation. We have removed the language in the preamble that was confusing.

10. *Issue*: The discussion of public display permits needs to be clarified to specify that such permits are no longer allowed for polar bears since they are now considered a depleted species under the MMPA.

Response: With the listing of the polar bear under the ESA and the concurrent designation of polar bears as a depleted species under the MMPA, new permits for the take and import of polar bears for public display under section 104(c)(2) of the MMPA are no longer available.

Before being listed as threatened under the ESA, a polar bear that was permitted for the purpose of public display (or its progeny) could be transferred, transported, exported, or re-imported without additional MMPA authorization, provided the receiving institution met the specific housing and display criteria or comparable standards (if an

export was involved). Now that the species is listed under the ESA, only polar bears or their progeny that qualified as public display animals prior to May 15, 2008, can continue to be displayed and transferred within the United States consistent with the MMPA requirements for notification outlined in section 104(c)(2)(E). Further, such animals, or their progeny, can be exported provided they meet the requirements for comparable standards under section 104(c)(9) of the MMPA and all requirements under CITES. However, any animals that have been exported cannot be re-imported for the purpose of public display, and no permit may be issued for the taking or importation of a polar bear for purposes of public display. A waiver of the MMPA's moratorium on taking or importing polar bears under section 101(a)(3)(A) and 103 of the Act is not available now that the species has depleted status under the MMPA. As specified in section 17 of the ESA, nothing in a special rule under section 4(d) of the ESA can override these more restrictive measures of the MMPA.

11. *Issue*: The summary of requirements for obtaining an enhancement of survival permit is discussed under the MMPA but a discussion is not included under the ESA for comparison.

Response: We have added a description of the issuance criteria for ESA enhancement permits under the general threatened species regulation found in 50 CFR 17.32 to the "Import, Export, Non-Incidental Take, Transport, Purchase, and Sale or Offer for Sale or Purchase" section above.

12. *Issue:* Authorizations for scientific research and enhancement of survival permits issued under the MMPA should be subject to review under the ESA.

Response: As discussed in the "Import, Export, Non-Incidental Take, Transport, Purchase, and Sale or Offer for Sale or Purchase" section above, the standards for issuing scientific research and enhancement permits are stricter under the MMPA than those under the general threatened species regulations under the ESA. Thus, we believe that the MMPA criteria are the appropriate provisions for the conservation of the polar bear. In addition, as mentioned above, we must conduct an intra-Service section 7 consultation for any activity that we authorize, fund, or carry out that may affect a listed species. The issuance of an MMPA scientific research or enhancement of survival permit is a Federal action that would require a section 7 consultation under the ESA.

13. *Issue*: The interim final special rule failed to discuss section 101(a)(4)(B) of the MMPA in which the Service is directed to recommend specific measures that can be used to nonlethally deter a listed marine mammal.

Response: Section 101(a)(4)(B) of the MMPA provides a mechanism for the Service to publish specific measures that may be used to nonlethally deter marine mammals that are listed as endangered or threatened under the ESA. The Service has committed to develop such measures for polar bear deterrence in consultation with

appropriate experts. These measures will be published in the Federal Register for public review and comment prior to finalization.

14. *Issue*: The Service should clarify discussion in the preamble of the interim final special rule to explain that, for listed marine mammals, ESA incidental take is authorized under section 7(b)(4) instead of a section 10(a)(1)(B) permit.

Response: Absent this special rule, incidental take under the ESA is authorized under section 7(b)(4) and (o)(2) of the ESA through the consultation process for Federal activities, through a section 10(a)(1)(B) permit for non-Federal activities for endangered species, and, if applicable, through a 50 CFR 17.32 permit for non-Federal activities for threatened species. Under this special rule, incidental take authorized under the MMPA does not require additional authorization under the ESA regardless of whether the activity is Federal or non-Federal. However, the section 7 consultation requirements continue to apply to any Federal activity that may affect a listed species. Please see the "Incidental Take" section above for additional discussion of incidental take authorizations.

15. *Issue:* The Secretary was correct to conclude that there is no causal link between greenhouse gas (GHG) emissions and take of specific polar bears. Service regulations, policies, and handbooks should be revised to further emphasize this conclusion.

Response: For listed species, section 7(a)(2) of the ESA requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species. If a Federal action may affect a listed species, the responsible Federal action agency must enter into consultation with us subject to the provisions of 50 CFR 402.14(b) and 402.03. In addition, as a Federal agency, the Service must conduct an intra-Service section 7 consultation for any action it authorizes, funds, or carries out that may affect polar bears. This requirement does not change with the adoption of this special rule.

Nonetheless, the determination of whether consultation is triggered is based on the discrete effects of the proposed agency action. This is not to say that other factors affecting listed species are ignored. Initially, however, a Federal agency evaluates whether consultation is necessary by analyzing what will happen to listed species "with and without" the proposed action. This analysis considers the direct effects and indirect effects of the action under consultation (including the direct and indirect effects that are caused by interrelated and interdependent activities) to determine if the proposed action "may affect" listed species. For indirect effects, our regulations at 50 CFR 402.02 require that they both be "caused by the action under consultation" and "reasonably certain to occur." That is, the consultation requirement is triggered only if there is a causal connection between the proposed action and a discernible effect to the species or critical habitat that is reasonably certain to occur. One must be able to "connect the dots" between an effect of proposed action and an impact to the species and there must be a

reasonable certainty that the effect will occur. Direct effects are the immediate effects of the action and are not dependent on the occurrence of any additional intervening actions for the impacts to species or critical habitat to occur.

While there is no case law directly on point, in Arizona Cattlegrowers' Association v. U.S. Fish and Wildlife Service, 273 F.3d 1229 (9th Cir. 2001), the 9th Circuit ruled that in preparing incidental take statements for section 7 consultations the Service must demonstrate the connection between the action under consultation and the actual resulting take of the listed species, which is one form of effect. In that case, the court reviewed grazing allotments and found several incidental take statements to be arbitrary and capricious because the Service did not connect the action under consultation (grazing) with an effect on (take of) specific individuals of the listed species. The court held that the Service had to demonstrate a causal link between the action under consultation (issuance of grazing permits with cattle actually grazing in certain areas) and the effect (take of listed fish in streams), which had to be reasonably certain to occur. The court noted that "speculation" with regard to take "is not a sufficient rational connection to survive judicial review."

We have specifically considered whether a Federal action that produces GHG emissions is a "may affect" action that requires section 7 consultation with regard to any and all species that may be impacted by climate change. As described above, the regulatory analysis of indirect effects of the proposed action requires the determination

that a causal linkage exists between the proposed action, the effect in question (climate change), and listed species. There must be a traceable connection from one to the next, and the effect must be "reasonably certain to occur." This causation linkage narrows section 7 consultation requirements to listed species in the "action area" rather than to all listed species. Without the requirement of a causal connection between the action under consultation and effects to species, literally every agency action that contributes greenhouse gases to the atmosphere would arguably result in consultation with respect to every listed species that may be affected by climate change. This would render the regulatory concept of "action area" meaningless.

There is currently no way to determine how the emissions from a specific action both influence climate change and then subsequently affect specific listed species, including polar bears. As we now understand them, the best scientific data currently available do not draw a causal connection between GHG emissions resulting from a specific Federal action and effects on listed species or critical habitat by climate change.

Since the development of the interim final special rule for the polar bear, additional guidance has been issued concerning consultation requirements in relation to GHG emissions. A policy memorandum titled "Expectations for Consultations on Actions that Would Emit Greenhouse Gases" was issued by the Director of the Service on May 14, 2008. This memorandum speaks to the issues discussed above and establishes a framework for consultation on GHG emissions. The memorandum clarifies that, while

direct impacts from oil and gas development operations would undergo consultation, the future indirect impacts of individual GHG emitters cannot be shown to result in "take" based on the best available science at this time and that "the Service does not anticipate that the mere fact that a Federal agency authorizes a project that is likely to emit GHG will require the initiation of section 7 consultation."

Furthermore, on August 15, 2008, the Service and NMFS proposed to amend regulations governing interagency consultation under section 7 of the ESA (73 FR 47868). The Service and NMFS proposed these changes to clarify several definitions, to clarify when the section 7 regulations are applicable and the correct standards for effects analysis, and to establish timeframes for the informal consultation process. We have not yet taken final action on this proposed rule.

Finally, on October 3, 2008, the Department of the Interior's Solicitor issued a legal memorandum on the applicability of consultation requirements to proposed actions involving the emission of GHGs. That memorandum noted that the causal link cannot currently be made between emissions from a proposed action and specific effects on a listed species. Therefore, the Solicitor concluded that, given the current state of science, a proposed action that will involve the emission of GHGs cannot pass the "may affect" test for those GHGs as they relate to climate change, and is not subject to consultation on those effects under the ESA and its implementation regulations.

16. *Issue:* Paragraph (4) of the interim final special rule should be revised to explicitly exempt GHG emissions from section 9 "take" prohibitions and section 7 consultations.

Response: As discussed in the response to issue 15, since the publication of the interim final special rule, the Director has issued a policy memorandum, the Department of the Interior's Solicitor has issued a legal memorandum, and the Service and NMFS have published proposed revisions to the general section 7 regulations under the ESA that address these issues more thoroughly.

17. *Issue*: Several commenters expressed concern or confusion about paragraph (4) of the interim final special rule, noting a lack of rationale for this paragraph in the preamble to the interim final special rule.

Response: We apologize for the confusion and lack of explicit rationale for paragraph (4) in the interim final special rule. Discussion of the operation of paragraph (4) in contributing to the conservation of the polar bear is found in the "Necessary and Advisable Finding" section above.

18. *Issue:* Several commenters noted that the use of the term "Alaska" in paragraph (4) was vague, inappropriate, or did not accurately reflect the range of the polar bear.

Response: This provision has been modified from the version of paragraph (4) that appeared in the interim final special rule to more precisely delineate where the ESA prohibition against incidental take is necessary and advisable to provide for the conservation of the polar bear. Under paragraph (4), incidental take of polar bears that results from activities that occur outside of the current range of the species is not subject to the prohibitions found at 50 CFR 17.31. The areas within the current range of the polar bear where ESA incidental take prohibitions at 50 CFR 17.31 apply include land or water that is subject to the jurisdiction or sovereign rights of the United States (including portions of lands and inland waters of the United States, the territorial waters of the United States, and the United States' Exclusive Economic Zone or the limits of the continental shelf) and the high seas.

19. *Issue:* The special rule should be revised to require that a polar bear used to create authentic native articles of handicrafts or clothing must be taken primarily for subsistence purposes, as defined in the Service's ESA regulations at 50 CFR 17.3.

Response: A polar bear that is lawfully taken by an Alaska Native under the exemption in section 101(b) of the MMPA meets the exemption requirements under section 10(e) of the ESA, and therefore no further taking authorization is needed under the ESA. Section 101(b) of the MMPA provides that, to qualify for this statutory exemption, the taking must be for subsistence purposes or for purposes of creating and

selling authentic native articles of handicrafts and clothing. The ESA articulates the requisite purpose of the taking somewhat differently by stating that it must be "primarily" for subsistence purposes and expressly including the creation and sale of authentic native articles of handicrafts and clothing within the scope of the statutory exemption. In the regulations implementing both the MMPA and the ESA, the Service has clarified that subsistence includes not only use for food but also for clothing, shelter, heating, transportation, and other uses necessary to maintain the life of the taker of the animal or those who depend upon the taker to provide them with such subsistence. Thus, the taking of a polar bear to create authentic native articles of handicrafts and clothing that are, for example, used directly or bartered or sold to provide income for one of the above specific purposes, including a use "necessary to maintain the life of the taker," qualifies as a taking for primarily subsistence purposes under section 10(e) of the ESA. Any such taking that meets the requirements of the subsistence provision is exempt under the ESA and requires no authorization.

20. *Issue:* Hunting of polar bears should not be allowed.

Response: Since 1972, only the subsistence hunting of polar bears by Alaska Natives has been allowed in the United States. Congress included specific exemptions for take by Alaska Natives under both the MMPA and the ESA. Harvesting of polar bears is an important cultural and economic activity for Native peoples throughout much of the Arctic. A management agreement is in place between the Inupiat of Alaska and the

Inuvialuit of Canada which serves to help ensure that Beaufort Sea polar bear harvests remain at sustainable levels. The Bering-Chukchi polar bear stock is shared with Russia and implementation of the U.S.-Russia Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear population provides a framework for cooperatively managing subsistence harvest of this population. The final listing rule found that subsistence harvest in Alaska was not a threat to the species throughout all or a significant portion of its range. The Service will continue to work with the Alaska Native community to comanage subsistence-related issues.

Neither the ESA nor the MMPA restrict take in areas subject to the territorial jurisdiction of foreign countries. It is within the sovereign rights of other countries to establish the appropriate laws and regulations that govern take of polar bears in their countries.

21. *Issue:* The income from trophy hunts to native communities is a very important aspect of Nunavut economy. Since the special rule recognizes this activity is not a primary threat to the species, the final special rule should permit import of trophies. At a minimum, the Service should allow import of trophies that were actually taken before the polar bear became a threatened species on May 15, 2008.

Response: We recognize that polar bear sport trophy hunt incomes are a vital part of the economy of the native communities in the Northwest Territories and Nunavut, and

that Canada's management system of harvest quotas is based on maintaining polar bear populations at sustainable levels. Native communities may choose to use their annual harvest quota tags to guide sport hunts. As described more fully in the interim final special rule (73 FR 28306; May 15, 2008), Congress amended the MMPA in 1994 to allow hunters to import their trophies into the United States provided certain criteria were met, including that the polar bears had been taken in a legal manner from sustainably managed populations.

Under section 3(1)(C) of the MMPA, marine mammals such as the polar bear are considered "depleted" species once they are listed as threatened or endangered species under the ESA; therefore, the polar bear was automatically considered a depleted species when it was listed as threatened under the ESA on May 15, 2008. The MMPA (sections 101(a)(3)(B) and 102(b)) sets restrictions on what activities are allowed for species that are depleted. For a depleted species, under section 101(a)(3)(B) of the MMPA only imports for purposes of scientific research or for the enhancement and survival of the species can be authorized or allowed. Importation of polar bear parts taken in sport hunts in Canada is not one of the exceptions to the restrictions on depleted species. However, section 104(c)(5)(D) of the MMPA continues to allow for the import of sport-hunted polar bear trophies that were legally taken in Canada prior to February 18, 1997.

Therefore, as of the effective date of the final listing of the polar bear under the ESA on May 15, 2008, importation of a sport-hunted polar bear trophy taken in Canada

after February 18, 1997, is prohibited under the terms of the MMPA, even if the polar bear was taken in a hunt prior to May 15, 2008. A waiver of the MMPA's moratorium on importing polar bears under section 101(a)(3)(A) and 103 is not available because the species has depleted status. Section 17 of the ESA states that, unless expressly provided for, no provision in the ESA takes precedence over any more restrictive conflicting provision in the MMPA. Thus, nothing in a special rule under section 4(d) of the ESA can override the more restrictive provisions of the MMPA. A congressional amendment to the MMPA would be needed in order to allow the import of sport-hunted trophies taken in Canada after February 18, 1997.

22. *Issue:* The special rule should provide specific exemptions for the ongoing activities of the North Slope Borough and the native communities.

Response: Under the special rule, if an activity is authorized or exempted under the MMPA or CITES, it does not require additional authorization under the ESA. Therefore, the ongoing activities of the North Slope Borough and native communities that are authorized or exempt under the MMPA or CITES do not require additional authorization under the ESA. Such activities would include existing authorizations under incidental take regulations, LOAs, IHAs, and exemptions concerning subsistence use of handicrafts, cultural exchange, and defense of life and property.

23. *Issue:* The Service should include a severability clause in the final rule.

Response: We recognize that severability clauses are frequently used in legislation but have decided that such a clause would not be useful in the current rule. The rule is organized in a manner that reflects the connection among the different paragraphs while also indicating the distinctiveness of the different provisions. We would expect a court to take the discreteness of the various provisions into consideration during any judicial review of the rule.

24. *Issue:* The Service should invoke "Chevron" deference for the final rule.

Response: The Service agrees that the agency should receive deference during any judicial review of the rule regarding the conservation measures that are appropriate for the polar bear under the ESA. For threatened species, Congress left it to the Secretary's discretion to determine what measures are "necessary and advisable to provide for the conservation of [the] species." We would expect a court to be particularly deferential given that development of appropriate conservation measures for threatened species is a technical matter. Nonetheless, the Service believes that it is unnecessary to specifically invoke such deference as part of the rulemaking process.

25. *Issue*: The interim final rule violated the APA because the public was not given the opportunity to comment on a proposed rule before the interim final rule went into effect.

Response: We disagree. Under section 553(b)(3)(B) of the APA, Federal agencies have the authority to issue interim final rules when "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." We issued the interim final rule to ensure that the maximum regulatory protections would be in place for the polar bear from the time the species was listed as threatened until such time as we could promulgate a final special rule. We solicited public comment on the interim rule, and this final rule reflects the consideration of those comments and the appropriate modifications to the preamble and regulations section that resulted from those comments.

26. *Issue*: Some commenters stated that the interim final rule violated the National Environmental Policy Act (NEPA) because we failed to prepare an environmental impact statement. They assert that the special rule is substantially similar to an incidental take statement and permit for which courts have held that NEPA review is mandatory. Citing previous court decisions, other commenters stated that analysis under NEPA is not required for section 4(d) rules.

Response: This rule is exempt from NEPA procedures. In 1983, upon recommendation of the Council on Environmental Quality, the Service determined that NEPA documents need not be prepared in connection with regulations adopted pursuant

to section 4(d) rules. A 4(d) rule provides the appropriate and necessary prohibitions and authorizations for a species that has been determined to be threatened under section 4(a) of the ESA. The NEPA procedures would confuse matters by overlaying its own matrix upon the section 4 decision-making process. The opportunity for public comment, one of the goals of NEPA, is also already provided through the rulemaking procedures. Although this rule is exempt from NEPA, any consultations conducted on activities covered by this 4(d) rule, as well as issuance of IHAs or LOAs, would be subject to the appropriate level of NEPA review.

Required Determinations

Regulatory Planning and Review

Executive Order 12866 requires Federal agencies to submit proposed and final significant rules to the Office of Management and Budget (OMB) prior to publication in the FR. The Executive Order defines a rule as significant if it meets one of the following four criteria:

(a) the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(b) the rule will create inconsistencies with other Federal agencies' actions;

(c) the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients;. or

(d) the rule raises novel legal or policy issues.

If the rule meets criteria (a) above it is called an "economically significant" rule and additional requirements apply. It has been determined that this rule is "significant" but not "economically significant." It was submitted to OMB for review prior to promulgation.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

Based on the information that is available to us at this time, we are certifying that this special rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities include small organizations, including any independent nonprofit organization that is not dominant in its field, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. The SBA defines small businesses categorically and has provided standards for determining what constitutes a small business at 13 CFR 121.201 (also found at http://www.sba.gov/size/), which the RFA requires all Federal agencies to follow. To determine if potential economic impacts to these small entities would be significant, we considered the types of activities that might trigger regulatory impacts. However, this special rule for the polar bear will, with limited exceptions, allow for maintenance of the status quo regarding activities that had previously been authorized or exempted under the MMPA. Therefore, we anticipate no significant economic impact on a substantial number of small entities from this rule. Therefore, a Regulatory Flexibility Analysis is not required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.),

we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or [T]ribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

(b) Because this special rule for the polar bear allows, with limited exceptions, for the maintenance of the status quo regarding activities that had previously been authorized or exempted under the MMPA, we do not believe that this rule will significantly or uniquely affect small governments. Therefore, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. We have determined that the rule has no potential takings of private property implications as defined by this Executive Order because this special rule will, with limited exceptions, maintain the status quo regarding activities currently allowed under the MMPA. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. This rule will not have substantial direct effects on the State, on the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This special rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 et seq. The rule does not impose new record keeping or reporting requirements on State or local governments, individuals, and businesses, or organizations. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

This rule is exempt from NEPA procedures. In 1983, upon recommendation of the Council on Environmental Quality, the Service determined that NEPA documents need not be prepared in connection with regulations adopted pursuant to section 4(a) of the ESA. The Service subsequently expanded this determination to section 4(d) rules. A

section 4(d) rule provides the appropriate and necessary prohibitions and authorizations for a species that has been determined to be threatened under section 4(a) of the ESA. NEPA procedures would confuse matters by overlaying its own matrix upon the section 4 decision-making process. The opportunity for public comment—one of the goals of NEPA—is also already provided through section 4 rulemaking procedures. This determination was upheld in Center for Biological Diversity v. U.S. Fish and Wildlife Service, No. 04–04324 (N.D. Cal. 2005).

Government-to-Government Relationship With Tribes

The Service, in accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175 and the Department of the Interior's manual at 512 DM 2, and Secretarial Order 3225, acknowledges our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. During the public comment period following our proposal to list the polar bear as threatened (72 FR 1064), Alaska Native tribes and tribally authorized organizations were among those that provided comments on the listing action. In addition, public hearings were held at Anchorage (March 1, 2007) and Barrow (March 7, 2007), Alaska. For the Barrow public hearing, we established teleconferencing capabilities to provide an opportunity to receive testimony from outlying communities. The communities of Kaktovik, Gambell, Kotzebue, Shishmaref, and Point Lay, Alaska, participated in this

public hearing via teleconference.

Energy Supply, Distribution or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. For reasons discussed within this rule, we believe that the rule does not have any effect on energy supplies, distribution, and use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17 – [AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.40 by revising paragraph (q) to read as follows:

§ 17.40 Special rules—mammals.

* * * * *

(q) Polar bear (Ursus maritimus).

(1) Except as noted in paragraphs (q)(2) and (q)(4) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 of this part apply to the polar bear.

(2) None of the prohibitions in § 17.31 of this part apply to any activity that is authorized or exempted under the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 et seq., the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), or both, provided that the person carrying out the activity has

complied with all terms and conditions that apply to that activity under the provisions of the MMPA and CITES and their implementing regulations.

(3) All applicable provisions of 50 CFR parts 14, 18, and 23 must be met.

(4) None of the prohibitions in § 17.31 of this part apply to any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within the United States, except for any incidental taking caused by activities in areas subject to the jurisdiction or sovereign rights of the United States within the current range of the polar bear.

Dated: December 10, 2008

/s/ Lyle Laverty

Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55-P