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VIA U.S. MAIL AND ELECTRONIC DELIVERY

Public Comments Processing
Attn: 1018-AV79
Division of Policy and Directives
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Suite 222
Arlington, VA 22203

Re: Comments on the United States Fish and Wildlife Service's Promulgation of a Special Rule for the Polar Bear, 73 Fed. Reg. 28,306 (May 15, 2008)

Dear Madam or Sir:

Defenders of Wildlife submits the following comments on the regulation promulgated by the United States Fish and Wildlife Service ("FWS" or "Service") pursuant to Section 4(d) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1533(d), prescribing the measures necessary to provide for the conservation of the polar bears, a species listed as threatened under the Act. *See* 73 Fed. Reg. 28,306 (May 15, 2008). Defenders believes that the FWS's interim final rule denies the polar bear and its habitat the legal protection necessary to ensure the conservation of the species, in violation of the letter and intent of the ESA. The Service should withdraw the interim final rule and propose a new rule, consistent with the requirements of the ESA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*

On May 15, 2008, after much delay, the FWS listed the polar bear as a threatened species under the ESA. 73 Fed. Reg. 28,212 (May 15, 2008). At the same time, the FWS issued an "interim final" rule pursuant to section 4(d) of the ESA, without prior notice or opportunity for public comment, which, with respect to activities in Alaska, declares that the "existing conservation regulatory requirements" of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), are sufficient to ensure the continued survival and recovery of the polar bear. 73 Fed. Reg. at 28,306. With respect to activities within the jurisdiction of the United States outside Alaska, the 4(d) rule, without explanation, withholds any protection for the polar bear from incidental take. 73 Fed. Reg. at 28,318.

Although the FWS issued the section 4(d) rule as an interim final rule, without considering public comment, the Service invited the public to comment on the final rule after

the fact, and Defenders accordingly submits the following comments. Defenders has separately given notice to the Service that it believes that the FWS's action promulgating the 4(d) rule violates the ESA and APA, and that it intends to challenge the Service's action in court. *See* letter from Robert G. Dreher, Vice President for Conservation Law, Defenders of Wildlife, to Dirk Kempthorne, Secretary, U.S. Department of the Interior and Dale Hall, Director, U.S. Fish and Wildlife Service (May 16, 2008).

What is most striking about the FWS's section 4(d) rule is that it effectively repudiates the Service's very action listing the polar bear as threatened under the ESA. As Defenders discusses below, section 4(d) imposes a mandate on the Secretary to adopt all measures necessary for the conservation – that is, the survival *and recovery* – of threatened species. Yet the Service here chose not to adopt *any* measure under the ESA for the conservation of the polar bear. Instead, it simply declared that existing protections under another statute, the MMPA, suffice for actions in Alaska, and that no protections are needed for the bear outside of Alaska. Essentially, the Service has announced that "business-as-usual" is enough for the bear. If that were true, of course, then the bear would hardly need listing today. To the extent that the Service has framed its rule in these terms to reassure development interests, particularly the oil, gas, and coal industries, that listing the bear will not affect their interests, the Service has abdicated its legal duties under the Act.

As we discuss below, the ESA in fact provides specific protections for species that go well beyond that afforded by the MMPA, particularly for species' habitat. Given that the overwhelming threat to the polar bear, as the Service itself acknowledges, is loss of its arctic ice habitat from global warming, the Service's refusal to afford the bear the best protection for its habitat available under the law is inexplicable, contrary to the Service's legal duties, and arbitrary and capricious.

The Endangered Species Act

The ESA establishes a comprehensive statutory program for the protection and conservation of imperiled species and their ecosystems, through a process that identifies and lists species that are "endangered" or "threatened" with extinction, protects the species' critical habitat, directs the development of plans to recover such species, prohibits federal agencies from taking actions that jeopardize the continued existence of protected species, and bars the "take" of endangered species except as authorized under the Act. As the Supreme Court has emphasized, the "plain intent of Congress in passing the statute was to halt and reverse the trend toward extinction, whatever the cost." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995) (citing *TVA v. Hill,* 437 U.S. 153, 184 (1978)).

A central component of the ESA's protections is the prohibition against the unpermitted "take" of an "endangered" animal. 16 U.S.C. § 1538(a)(1). The Act defines "take" to include engaging in or attempting to engage in conduct that will "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an individual of a listed species. 16 U.S.C. § 1532(19). The Service has further defined several elements of take. "Harm" is defined as "an act which actually kills or injures wildlife." 50 C.F.R. § 17.3. The Service's regulations note that "harm" may include "significant habitat modification or degradation

where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.* The FWS also defines the term "harass" as "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." *Id.*

The Act does not automatically provide the same level of protection for threatened species. Instead, pursuant to Section 4(d) of the ESA, the Secretary must establish regulations that are "necessary and advisable to provide for the conservation" of the species. 16 U.S.C. § 1533(d). Such regulations may extend the Act's prohibition against the "take" of endangered species to threatened species. *Id.* By definition "conservation" is "the use of all methods and procedures which are necessary to bring any endangered species or threatened species back to the point at which the measures provided are no longer necessary," 16 U.S.C. § 1532(3), and therefore any regulation promulgated pursuant to Section 4(d) must meet this standard. 16 U.S.C. § 1533(d). On this authority, the FWS has issued regulations broadly applying the Section 9 take prohibitions to threatened species, 50 C.F.R. § 17.31, unless the Service has promulgated a special rule pursuant to Section 4(d) for a particular threatened species. 50 C.F.R. § 17.31(c).

Background

The polar bear (*Ursus maritimus*), the largest of the world's bear species, is distributed among nineteen arctic subpopulations—two of which, the Chukchi and the Southern Beaufort Sea populations, totaling approximately 3500 individuals, are located within the United States. *See* Nature, Polar Bear Numbers Set to Fall, Vol. 453, p. 432-33 (May 22, 2008). The total polar bear population is thought to be between 20,000 and 25,000, but accurate population data for many areas is lacking and even those populations that are stable or increasing may become endangered in the foreseeable future due to the loss of arctic sea ice as a result of global warming. Indeed, as the Service acknowledges, the best available science relating to global warming and the polar bear indicates that the species faces extinction from the United States by mid-century. *See* 73 Fed. Reg. at 28,292.

The melting of the sea ice as a result of human caused global warming is directly and adversely impacting the polar bear. If the rate of melting observed in 2007 continues, the Arctic could be completely ice free in the summer by mid-century or earlier. 73 Fed. Reg. at 28,228. Melting sea ice shortens the time frame in which polar bears can hunt seals due to earlier ice break-up and later freeze-up dates, reduces availability of prey, increases distances bears need to swim because of melting ice, and increases bear-human conflicts as bears move into terrestrial and populated areas in search of food. 73 Fed. Reg. at 28,275-76; *see aslo* Ronald M. Nowak, *Walker's Carnivores of the World* 124 (2005). Given the polar bears' dependence upon sea ice for access to marine prey, and direct observations of adverse effects on polar bear populations associated with reduced sea ice (reduced body condition, reproduction, survival, and population size), the polar bear's survival is clearly imperiled by global warming. *See* 73 Fed. Reg. at 28,275 ("The ultimate net effect of these interrelated factors will be that polar bear populations will decline or continue to decline."); United States Geological Survey ("USGS"), Forecasting the Range-wide Status of Polar Bears at Selected Times in the 21st Century (2007). Recent studies by the USGS estimating maximum carrying capacity and population persistence based on predicted climate change impacts and sea ice declines predict

that polar bear populations within the United States "*will most likely be extirpated by mid century.*" *Id.* at 36 (emphasis added). Indeed, given that the actual loss of Arctic sea ice in recent years exceeds that predicted under climate models, it is possible that the Arctic may be free of ice by 2030, and that the polar bear may thus face extinction in the United States much sooner than mid-century. *See, e.g.*, National Snow and Ice Data Center (NSIDC). 2007a. Arctic Sea Ice News Fall 2007. http://www.nsidc.org/news/press/2007_seaiceminimum/20070810_index.html (last visited July 9, 2008). Based on this information, the Service concluded that polar bears should be listed pursuant to the ESA. As discussed below, however, by promulgating an inadequate section 4(d) rule, the Service has failed to provide the protection necessary for the conservation of polar bears.

Discussion

The FWS's 4(d) rule for the polar bear declares that the prohibition against "take" under the ESA will not apply to activities that are "conducted in a manner that is consistent with requirements" of the MMPA and CITES. 73 Fed. Reg. at 28,306 (codified at 50 C.F.R. § 17.40(q)(2)). The FWS justifies this approach because "for the most part, the MMPA . . . already provide more protective measures than" the ESA. 73 Fed. Reg. at 28,313. Thus, the FWS has "determined that requiring additional authorization to carry out activities that are already strictly regulated under the MMPA and CITES would not increase protection for polar bears." 73 Fed. Reg. at 28,315. For activities that cannot properly be permitted under the MMPA or CITES, and would result in an act that would be otherwise prohibited under the ESA's take prohibition, as applied to threatened species, 50 C.F.R. § 17.31, "the protections provided by the general threatened species regulations will apply ... and authorization under 50 C.F.R. § 17.32 would be required." 73 Fed. Reg. at 28,315. However, this application of the ESA take prohibition only applies to activities within Alaska, as the 4(d) Rule contains a blanket exemption from the ESA's take provision from all activities outside of Alaska. 73 Fed. Reg. at 28,318 (codified at 50 C.F.R. § 17.40(q)(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 any area subject to the jurisdiction of the United States except Alaska."). This latter provision received no analysis or justification in the preamble. For the reasons stated below, the 4(d) rule fails to carry out the mandate of the ESA.

A. Section 4(d) Requires the Service to Provide for the Conservation of the Polar Bear

Section 4(d) of the ESA establishes a legislative mandate for the FWS to ensure the conservation, that is, the survival and recovery, of threatened species. *See TVA v. Hill*, 437 U.S. 153, 172 (1978) ("By § 4 (d) Congress has authorized—indeed commanded—the Secretary to 'issue such regulations as he deems necessary and advisable to provide for the conservation of such species.'"). The development of measures for the conservation of threatened species under section 4(d) is essential to achieve the ESA's primary objective "not merely to forestall the extinction of species (*i.e.*, promote a species' survival), but to allow a species to recover to the point where it may be delisted." *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004); *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001) ("[T]he objective of the ESA is to enable listed species not merely to survive, but to recover from their endangered or threatened status."). To this end, section 4(d) states that for all "threatened" species the Secretary "*shall*

issue such regulations as he deems necessary and advisable *to provide for the conservation* of such species." 16 U.S.C. § 1533(d) (emphasis added). "Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined 'conserve' as meaning '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 chapter are no longer necessary.'" *Hill*, 473 U.S. at 180 (quoting 16 U.S.C. § 1532(3)) (emphasis added by Court). To properly fulfill the ESA's conservation mandate the Secretary must institute the measures necessary to secure a species' recovery, and section 4(d) accordingly provides the FWS with the "extensive power to develop regulations and programs for the preservation of endangered and threatened species." *Id.*; *accord, Sierra Club v. Clark*, 755 F.2d 608, 13 (8th Cir. 1985) ("To fail to use Congress' definition of ['conservation'] would be to refuse to give effect to a crucial part of the enacted statutory law.").

Section 4(d) does allow the Secretary discretion in crafting the appropriate protections for threatened species. Such flexibility enables the Service to develop regulations "tailored to the needs of the animal." 119 Cong. Rec. 25,669 (statement of floor sponsor Sen. Tunney), reprinted in Comm. on Environment and Public Works, Legislative History Of The Endangered Species Act Of 1973, As Amended In 1976, 1977, 1978, and 1980 at 151 (1982). That discretion, however, is "limited by the requirement that the regulations he is to issue must provide for the *conservation* of threatened species." *Sierra Club v. Clark*, 755 F.2d at 612-13 (emphasis in original). Recognizing that "[o]nce 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," H.R. Rep. No. 412, 93rd Cong., 1st Sess. 12 (1973), Congress was singularly clear that this authority is to be used to secure the conservation of threatened species:

> [S]uch options were to be exercised only in the promulgation of regulations that "would serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act" which were, *inter alia*, "to provide a means for protecting the ecosystems upon which we and other species depend" and "to provide a specific program for the protection of endangered [and threatened] species." H.R. Rep. No. 412, 93rd Cong., 1st Sess. 10, 11 (1973). The "almost infinite options," then, had to serve the purpose of protection and conservation of the threatened species.

Sierra Club, 755 F.2d at 616. Thus, any decision by the Secretary pursuant to 4(d)—including extending to, or withholding from, a threatened species the Act's prohibitions against take—must be based upon the benefit that will accrue to the recovery of the species from such action. *See Sierra Club v. Clark*, 755 F.2d at 612-613; *Fund for Animals, Inc. v. Turner*, 1991 U.S. Dist. LEXIS 13426 (D.D.C. Sept. 27, 1991).

B. *The FWS's Rule Ignores the Central Mandate of Section 4(d) by Failing to Provide for the Conservation of the Polar Bear*

The FWS's rule for the polar bear virtually ignores the central mandate of section 4(d) to provide the measures necessary and advisable for the conservation of the polar bear. The FWS makes no real attempt to evaluate what measures are needed to address the immediate and long-term threats to the bear's existence, or what further measures are needed for the

species to achieve recovery. Indeed, the rule conspicuously omits *any* positive measure to protect the polar bear. Rather, the FWS focuses on justifying its decision *not* to provide protections normally afforded threatened species as a matter of course under the FWS's regulations, *see* 50 C.F.R. § 17.31 (applying the take prohibition of section 9 of the Act to threatened species unless the Service specifically provides otherwise), relying instead on existing protections for the polar bear under the MMPA.

The Service's reliance on those existing protections, and its complete failure to assess additional measures that are necessary to protect and recover the polar bear, effectively endorses a "business-as-usual" approach rather than providing necessary and advisable measures for the polar bear's conservation. Yet listing under the ESA is a watershed moment that should focus immediate attention on the need for changes in conservation for a threatened species. "By definition, a 'threatened' species is one that is likely to become endangered in the foreseeable future barring significant changes in the conditions or practices that are threatening the long-term viability of that species. *A listing decision is intended to cause those significant changes.*" *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (emphasis added). The listing of the polar bear represents the Service's long-overdue recognition that the bear faces grave threats to its survival due to global warming; the Service cannot simply bury its head to the sand, ignoring the need for conservation measures to address the threats that have pushed the polar bear toward extinction.

To comply with section 4(d)'s mandate, the FWS should first have prescribed such regulations as are necessary to protect the polar bear from both immediate and long-term threats to its survival. It should also have identified and implemented measures needed to restore the polar bear's population to the point of recovery. Given the overwhelming threat to the polar bear's survival from global warming, fulfilling these mandates may well require adoption of all reasonably available conservation measures to assist the bear's resilience and to protect its shrinking habitat. Under these circumstances, if the Service chose to withhold available protective measures that might benefit the polar bear, it must demonstrate that such measures are unnecessary or inadvisable to protect and recover the species, either because they would be ineffectual, or because the survival and timely recovery of the species is reasonably assured by the other measures that the Service has adopted. The FWS has failed here on all counts.

As the Service acknowledges, the principal threat to the polar bear's continued survival and recovery is the loss and degradation of the species' habitat. In listing the species, the FWS determined that polar bears "are reliant on sea ice as a platform to hunt and feed on ice-seals, to seek mates and breed, to move to feeding sites and terrestrial maternity denning areas, and for long-distance movements." 73 Fed. Reg. at 28,292. The rapid loss of sea ice in the Arctic, which "is unequivocal and extensively documented in scientific literature" and "projected by the majority of state-of-the art climate models," thus threatens the polar bear throughout its range. *Id.* Moreover, human activities that will directly and adversely impact polar bear habitat are also increasing. For example, oil and gas activities in the polar bear's terrestrial and marine habitat are increasing as development continues throughout the U.S. Arctic. The FWS notes that while the "greatest concern for future oil and gas development is the effect of an oil spill or discharges in the marine environment," potential disturbance from associated activities with this development can result in direct or indirect effects on polar bear use of habitat. 73 Fed.

Reg. at 28,265. Such disturbances, which will increase as polar bears are forced off the melting ice onto land, will have direct, negative impacts on the polar bear. *Id.*

The Service's section 4(d) rule fails, however, to provide the polar bear with any meaningful protection for its habitat. By withholding the ESA's protection against take of a listed species, the FWS has deprived the polar bear of one of the Act's primary protections for a listed species' habitat. "Take" under the ESA includes "harm," 16 U.S.C. § 1532(19), which the Service defines by regulation to include "*significant habitat modification or degradation* [that] actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (emphasis added). Neither the MMPA nor CITES provide similar protections for the polar bear against habitat destruction. The habitat protection afforded the polar bear under the ESA is essential to the species' continued survival and recovery, since the loss of the bear's sea ice habitat will force it to rely increasingly on inland habitat, making it increasingly vulnerable to disturbance from human development activity and increasingly likely to come into conflict with local human communities, resulting in increased bear deaths. The FWS's rejection of the habitat protection afforded by the take prohibition under the ESA is compounded by its failure to timely designate and protect the polar bear's "critical habitat." 16 U.S.C. § 1533(b)(2).

Moreover, the 4(d) rule flatly rejects any attempt to protect the polar bear from the significant threats to the species continued survival and recovery from greenhouse gas emissions that are causing global warming. The primary basis for listing the polar bear as threatened is the melting the polar bears' sea ice habitat as a result of global warming; and yet the rule specifically exempts from potential take liability the vast majority of the domestic greenhouse gas emitters that are contributing to global warming. 73 Fed. Reg. at 28,318 (codified at 50 C.F.R. § 17.40(q)(4)) (the FWS has exempted all activities "within any area subject to the jurisdiction of the United States except Alaska."). The FWS does not offer any other measure to address the impacts of global warming on the polar bear, by, for example, establishing protected areas on land to compensate to the extent possible for the loss of sea ice habitat. While such measures would likely be inadequate to offset the catastrophic loss of sea ice habitat resulting from global warming, the Service does not even attempt to offer some alternative habitat protection.

The FWS rule also fails to ensure the polar bear is protected from other threats. While the primary threat to the polar bear is the melting of sea-ice habitat due to global warming, the bear faces a daunting suite of other threats. These include an increase in bear-human interactions as larger numbers of bears remain on land during the summer and as bears in poorer condition due to food deprivation come into human settlements to scavenge refuse; an increase in human disturbances associated with greater oil and gas exploration and development in many northern areas as the sea ice disappears; an increase in disturbance in the marine environment due to higher levels of shipping and marine traffic as the northern passage becomes navigable throughout the year; and an increase in exposure to contaminants due to increased rainfall and terrestrial run-off that drains into rivers and discharge into the arctic seas. As the FWS acknowledges, these threats "may become more significant threats in the future for polar bear populations experiencing declines related to nutritional stress brought on by sea ice and environmental changes," 73 Fed Reg. at 28,292, yet its 4(d) rule does nothing to insulate the polar bear from these threats. Such protections are necessary to ensure that the polar bear has the resiliency to recover from periodic disturbances and catastrophic

events, and to maintain sufficient genetic diversity to allow the bear to respond and adapt to future environmental changes.

Finally, the FWS's section 4(d) rule fails altogether to consider and adopt measures necessary and advisable for the recovery of the polar bear, as required in order to provide for the polar bear's "conservation." The FWS does not address the challenges involved in achieving recovery, identify potential measures that could help in achieving recovery, or offer any basis to believe that its adoption of the present rule will even contribute to recovery.

C. *The FWS Fails to Explain Why the Protections of the ESA are Not Necessary to Provide for the Conservation of the Polar Bear*

In the preamble to the rule, the FWS suggests that the protections provided for the species by the MMPA and CITES make the ESA's take protections superfluous. 73 Fed. Reg. at 28,313-15. The FWS fails to recognize critical differences in the protections afforded by the statutes and the international treaty, however, and does not explain how it can possibly benefit the conservation of the polar bear to deprive it of the protections that the ESA affords in addition to those already provided by the MMPA. Prior attempts by the FWS to rely on the existence of an alternative management scheme that provided protections similar, but not identical, to those afforded a species by the ESA have been roundly rejected as inconsistent with the intent and purpose of the Act. *Cf. Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1098 (D. Ariz. 2003) (holding that the "existence of other habitat protections does not relieve [FWS] from designating critical habitat"); *id.* at 1100 ("So long as they are useful, the more protections the better."); *see also Natural Resources Defense Council v. United States Department of the Interior,* 113 F.3d 1121, 1126 (9th Cir. 1997) ("Neither the [ESA] nor the implementing regulations sanctions nondesignation of habitat when designation would be merely *less* beneficial to the species than another type of protection.") (emphasis in original).

Here, as in those prior cases, the Service has wholly failed to demonstrate why the particular protections afforded by the ESA should not be added to any protections provided under other statutory schemes or treaties. Section 4(d) requires the Secretary to provide for the "conservation" of the polar bear, which includes the use of "*all* methods and procedures which are necessary to" the recovery of the polar bear. 16 U.S.C. § 1532(3) (emphasis added). Therefore, where the Service chooses *not* to afford a threatened species protections that are available under the Act, it must demonstrate why such measures are not necessary for the species' conservation. 16 U.S.C. § 1533(d); *see Sierra Club v. Clark*, 755 F.2d at 612. Its failure to do so here is arbitrary and capricious.

The FWS's decision to forego the take protections of the ESA in favor of the alternative management scheme of the MMPA fails to account for fundamental differences in those schemes, or to explain why the polar bear should not benefit from the protections of both statutes. The FWS relies on the fact that the MMPA, like the ESA, prohibits the "taking" of marine mammals. The scope of protection against take afforded by the two statutes is not identical, however; indeed, in at least one respect the MMPA may provides less protection for marine mammals than the ESA. Under the MMPA, the term "take" is focused on actions that "harass, hunt, capture or kill" any marine mammal. 16 U.S.C. § 1362 (13); 50 C.F.R. 18.3. The term "harass" includes acts of "pursuit, torment, or annoyance" that have the potential to "injure" or "disturb" a marine mammal or marine mammal stock "by causing disruption of

behavior patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding or sheltering." 16 U.S.C. § 1362(18). The MMPA's take prohibition does not include actions that "harm" protected species, however, in contrast to the ESA, and thus, unlike the ESA, does not clearly extend to actions that injure a species by modifying or degrading its habitat. *Compare* 50 C.F.R. § 17.3. Given that the primary threat to the polar bear is loss of habitat, the FWS's failure to recognize that the ESA would give greater protection to the bear's habitat than the MMPA is simply arbitrary.

The MMPA's regulation of "take" differs from that under the ESA in other respects, and the FWS does not adequately analyze those differences to ensure that the ESA's protections would not provide additional protections for the polar bear. For example, the FWS asserts that the MMPA provides greater protections for the polar bear than the ESA because the incidental take authorized under the MMPA must have no more than a "negligible impact" on the species. 73 Fed. Reg. at 28,311; 16 U.S.C. § 1371(a)(5)(A). However, the FWS fails to provide any meaningful analysis of how the "negligible impact" standard compares to the "jeopardy" threshold which must be passed before incidental take may be authorized under the ESA. 16 U.S.C. § 1536(a)(2), (b)(4).

For example, before incidental take may be authorized under the ESA, the FWS must, using "the best scientific and commercial data available," 16 U.S.C. § 1536(a)(2), provide its "biological opinion" on the impact the action will have on listed species and whether, as a result of those impacts, the action is likely to jeopardize the species. 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(g)(4). Through this process the FWS must (1) "review all relevant information," (2) "evaluate the current status of the listed species," (3) and "evaluate the effects of the action and cumulative effects on the listed species." 50 C.F.R. § 402.14(g). This comprehensive review of the species and the impact of the anticipated take, placed in the context of all other existing and foreseeable threats to the species, ensures the take will not negatively impact the species. The FWS fails to analyze adequately whether the MMPA provides equal or greater protections for the species—rendering the ESA's protections superfluous—and thus fails to meet its burden of demonstrating that the take protections of the ESA would not benefit conservation of the polar bear.

Another significant difference in the protection afforded marine mammals under the two statutes is the lack of citizen authority to enforce the provisions of the MMPA. The take prohibitions of the ESA and the elements of a take authorization under that Act, unlike those of the MMPA, are enforceable through the citizen suit provision of the Act, reflecting Congress's recognition that public vigilance is an important backstop to the limited resources of government agencies in ensuring that listed species receive the Act's protections. 16 U.S.C. § 1540(g); *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (the enforcement rights provided to private citizens under the ESA are "a means by which private parties *may enforce the substantive provisions of the ESA against regulated parties.*") (emphasis added). *Cf. Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 285 (1975) ("Significant public benefits are derived from citizen litigation to vindicate expressions of congressional or constitutional policy."). As the history of the listing for the polar bear itself demonstrates, citizen suits are a vital mechanism for ensuring the conservation of species in accordance with the Act.

D. *The Service Fails to Provide for the Conservation of the Polar with Respect to Activities which Occur Outside of Alaska*

To the very limited extent that the Service's 4(d) rule applies the ESA's take prohibition to the polar bear, it only applies to activities within Alaska that are not otherwise authorized under the MMPA. For activities outside of Alaska, the 4(d) Rule simply establishes a blanket exemption from the ESA's protections against incidental take. 73 Fed. Reg. at 28,318 (codified at 50 C.F.R. § 17.40(q)(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 any area subject to the jurisdiction of the United States except Alaska."). The Service failed to offer any rationale for dispensing with incidental take protections everywhere outside Alaska, and its action is plainly arbitrary.[1]

As a threshold matter, the FWS fails to define with precision the geographic scope of this exemption. If the Service means the rule's reference to "Alaska" to cover lands and waters subject to the state's jurisdiction, the rule effectively withholds incidental take protections from the polar bear in a significant portion of the species' habitat in federal waters outside the State's boundaries. Pursuant to the Submerged Lands Act, 43 U.S.C. § 1312, coastal states have jurisdiction over a region extending three nautical miles seaward from the baseline, the mean lower low water line along the coast. Presuming this standard is applied here, the 4(d) rule fails to provide the bear *any* protection under the Act for activities, such as oil and gas development, occurring in federal waters in the Arctic outside the three mile limit, despite the fact that such activities occur within the polar bear's range and unquestionably have direct and indirect on the bear and its habitat. The Service offers no basis for treating activities directly affecting the polar bear within Alaska differently from similar activities in federal waters offshore, and the distinction seems entirely arbitrary.

The Service also offers no explanation whatsoever for its decision to exclude incidental take protection for the polar bear from activities in United States' jurisdiction outside the Arctic. The FWS's preamble contains a brief analysis of the extent to which, in the Service's view, the duties of federal agencies to consult under Section 7 of the Act would be triggered by actions that involve emission of greenhouse gases that contribute to global warming. The Service asserts that "the best scientific data currently available does 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." 73 Fed. Reg. at 28,313. The FWS elsewhere makes clear, however, that the 4(d) rule does not alter or affect the duties of federal agencies to consult pursuant to Section 7 of the Act. 73 Fed. Reg. at 28,310 ("[T]his 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 any endangered or threatened species, including the polar bear."). The

[1] Agencies must provide a reasoned basis for rulemaking decisions. 5 U.S.C. § 553(c) (agency shall incorporate in rules it adopts a concise general statement of their basis and purpose). *See, e.g., PPL Wallingford Energy LLC v. Federal Energy Regulatory Comm'n*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (agency must "articulate a satisfactory explanation" of its decision). The Secretary's failure to provide a reasoned basis for adoption of this portion of the rule thus squarely violates the APA and Section 4(b)(4) of the ESA, 16 U.S.C. § 1533(b)(4).

Service does not attempt to connect its theoretical discussion of Section 7 consultation to the issue of the scope of incidental take protection that should be afforded the polar bear under the present rule.

To the extent the Service intended its views about the presumed difficulty of proving that greenhouse gas emissions caused harm to the polar bear to justify a complete exclusion from incidental take protection, the Service acted arbitrarily and prematurely. The issue of causation raised by the Service is ultimately a question of the sufficiency of the scientific evidence that can be presented linking a particular source to effects on the polar bear or its habitat; it cannot be predetermined without examination of the relevant evidence. Analysis of "take" under the ESA requires a specific factual investigation "must be addressed in the usual course of the law, through case-by-case resolution and adjudication." *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 708 (1995); *id.*, 515 U.S. at 713 (O'Connor, J. concurring) ("The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts" and such causation "is not a concept susceptible of precise definition."). Thus, the FWS's apparent determination that there is no causal connection between activities that occur outside of Alaska that may impact the bear is premature and inconsistent with the ESA.

E. To the Extent That the Service's Rule Seeks to Minimize Burdens on Development Interests at the Expense of the Polar Bear's Conservation, It is Fundamentally Arbitrary

As we have noted above, the text and intent of section 4(d) requires the Secretary to base any decision about measures to "provide for the conservation" of a threatened species exclusively on the potential benefit such measures may provide for the species' conservation. Rather than being based on the benefit of the polar bear, however, the FWS's adoption of the 4(d) rule appears to have been motivated largely by considerations of convenience for regulated parties, such as oil and gas development interests. The FWS asserts that adoption of this special rule would "provide appropriate protections for the species while eliminating unnecessary permitting burdens on the public," and argues that requiring take authorization under the ESA in addition to the requirements of the MMPA and CITES would "create an additional, unnecessary administrative burden on the public." 73 Fed. Reg. at 28,315. The convenience of parties who would otherwise be subject to the take prohibitions of the Act is not a permissible factor in the Secretary's promulgation of a 4(d) rule, however. The Secretary's formulation of protective regulations pursuant to 4(d) must be based exclusively on his determination that such action is "necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). To the extent that the Secretary has based a decision to curtail necessary protections from the polar bear for the convenience of regulated parties, his decision is fundamentally arbitrary and capricious and unlawful. *See Motor Vehicle Mfrs.Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider").

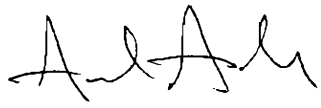
Conclusion

The section 4(d) rule adopted by the FWS for the polar bear fails to provide for the conservation of the polar bear, and arbitrarily withholds from the bear important protections afforded by the ESA's prohibition against take of protected species. Defenders urges the FWS

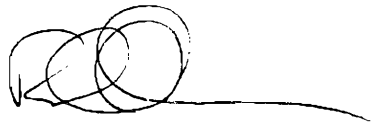
to rescind its illegal rule, and to promulgate in its place a rule that adopts appropriate measures to ensure the survival and recovery of the polar bear. Such measures must, at a minimum, include the full protection of the ESA against take of the polar bear.

If you have any questions about these comments, please contact Andrew Hawley, staff attorney, at 202.772.3224, or at ahawley@defenders.org.

Sincerely,



Andrew M. Hawley
Staff Attorney
Defenders of Wildlife



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