Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In subpart D, add § 180.1318 to read as follows:

§ 180.1318 3-decen-2-one; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of the biochemical pesticide, 3-decen-2-one, in or on potatoes when applied as a potato sprout inhibitor and used in accordance with label directions and good agricultural practices.

[FR Doc. 2013–03758 Filed 2–19–13; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R7–ES–2012–0009; 4500030113]

RIN 1018–AY40

Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear Under Section 4(d) of the Endangered Species Act

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; availability of environmental assessment and Finding of No Significant Impact.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), amends it regulations which implement the Endangered Species Act of 1973, as amended (ESA), to create a 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*), while also including appropriate prohibitions from section 9(a)(1) of the ESA.

DATES: This rule becomes effective on March 22, 2013.

ADDRESSES: *Document Availability:* The final rule, final environmental assessment, and finding of no significant impact are available for viewing on *http://www.regulations.gov* under Docket No. FWS–R7–ES–2012–0009. Supporting documentation we used in preparing this final rule is 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: Charles Hamilton, Marine Mammals Management Office, U.S. Fish and Wildlife Service, Region 7, 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:

Executive Summary

Why We Need To Publish a Final Rule

The Service was challenged via litigation on our December 16, 2008, final special rule under section 4(d) of the ESA (hereafter referred to as 4(d) special rule) (16 U.S.C. 1531 *et al*), for the polar bear. The District Court for the District of Columbia (Court) found that, although the final 4(d) special rule published December 16, 2008 (73 FR 76249) for the polar bear was consistent with the ESA, the Service violated the National Environmental Policy Act (42 U.S.C. 4321 et seq.) (NEPA) and the Administrative Procedure Act (5 U.S.C. 500 et seq.) by failing to conduct a NEPA analysis when it promulgated the final rule. On November 18, 2011, the Court vacated the final 4(d) special rule and ordered that the May 15, 2008, interim 4(d) special rule take effect until superseded by a new final 4(d) special rule. The Service is therefore promulgating a new final 4(d) special rule with appropriate NEPA analysis. Through the NEPA process, the Service fully considered a suite of alternatives for the special rule.

What is the effect of this rule?

The 2008 listing of the polar bear as a threatened species under the ESA is not affected by this final rule. In addition, nothing in this rule affects requirements applicable to polar bears under any other law such as the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 et seq.). On-the-ground conservation management of the polar bear under both the May 15, 2008, interim 4(d) special rule and the December 16, 2008, final 4(d) special rule, were substantively similar; this final 4(d) special rule reinstates the regulatory parameters afforded the polar bear under the December 16, 2008 rule, which was in place until November 18, 2011. Because this rule adopts a regulatory scheme that has governed polar bear management for over 30 years, the requirements placed on individuals, local communities, and industry are not substantively changed.

The Basis for Our Action

Under section 4(d) of the ESA, the Secretary of the Interior (Secretary) has discretion to issue such regulations as he deems necessary and advisable to provide for the conservation of threatened species. The Secretary also has the discretion to prohibit by regulation with respect to a threatened species any act prohibited by section 9(a)(1) of the ESA.

Exercising this discretion, which has been delegated to the Service by the Secretary, the Service has developed general prohibitions that are appropriate for most threatened species in 50 CFR 17.31 and exceptions to those prohibitions in 50 CFR 17.32. But for the polar bear, the Service has determined that a 4(d) special rule is appropriate. This 4(d) special rule adopts the existing conservation regulatory requirements under the MMPA and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES; 27 U.S.T. 1087) as the primary regulatory provisions for the polar bear. If an activity is authorized or exempted under the MMPA or CITES, no additional authorization under the ESA regulations is required, although consultation under section 7 of the ESA will also still be required if there is a Federal nexus. But if the activity is not authorized or exempted under the MMPA or CITES, and that activity would result in an act otherwise prohibited under the general ESA regulatory prohibitions for threatened species, then the general prohibitions at 50 CFR 17.31 would apply, and we would require a permit for the activity as specified in our ESA regulations.

Under this rule, incidental take caused by activities within the United States but outside the current polar bear range would not be subject to the takings prohibition under 50 CFR 17.31 as it is for most threatened species, but would remain subject to the taking prohibition in the MMPA and, if there is a Federal nexus, to the consultation requirement of section 7 of the ESA.

Previous Federal Actions

On May 15, 2008, the Service published a final rule listing the polar bear (*Ursus maritimus*) as a threatened species under the ESA (73 FR 28212). At the same time, the Service also published an interim special rule for the polar bear under authority of section 4(d) of the ESA that provided measures necessary and advisable for the conservation of the polar bear and prohibited certain acts covered in section 9(a)(1) of the ESA (73 FR 28306);

this interim 4(d) special rule was slightly modified in response to public comment when the Service published a final 4(d) special rule for the polar bear on December 16, 2008 (73 FR 76249). Lawsuits challenging both the May 15, 2008, listing of the polar bear and the December 16, 2008, final 4(d) special rule for the polar bear were filed in various Federal district courts. These lawsuits were consolidated before the Court. On June 30, 2011, the Court upheld the Service's decision to list the polar bear as a threatened species under the ESA.

On October 17, 2011, the Court upheld all of the provisions of the 4(d) special rule under the applicable standards of the ESA but found the Service violated NEPA and the Administrative Procedure Act (5 U.S.C. Subchapter II) by failing to conduct a NEPA analysis for its December 16, 2008, final 4(d) special rule for the polar bear. The Court ordered that the final 4(d) special rule would be vacated upon resolution of a timetable for NEPA review. On November 18, 2011, the Court approved the schedule for NEPA review and vacated the December 16, 2008, final 4(d) special rule (*In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation: This Document Relates to Ctr. for Biological Diversity, et al.* v. *Salazar, et al.,* No. 08–2113; *Defenders of Wildlife* v. *U.S. Dep't of the Interior, et al.,* No. 09–153, Misc. No. 08–764 (EGS) MDL Docket No. 1993). In vacating and remanding to the Service the final 4(d) special rule, the Court ordered that, in its place, the interim 4(d) special rule for the polar bear published on May 15, 2008 (73 FR 28306), remain in effect until superseded by the new final 4(d) special rule for the polar bear to be delivered to the **Federal Register** by December 6, 2012, later amended by the Court to February 6, 2013. On January 30, 2012, the Service published a final rule in the **Federal Register** (77 FR 4492) revising the Code of Federal Regulations to reflect the November 18, 2011, court order. On April 19, 2012, the Service published a proposed 4(d) special rule and announced the availability of the draft environmental assessment under NEPA, as well as announcing a 60-day public comment period on the proposed rule and draft environmental assessment (77 FR 23432). On the date specified above in **DATES**, this final rule becomes effective and supersedes the interim 4(d) special rule.

Service Process

The Service conducted a NEPA analysis and prepared an environmental assessment (EA) to address the determinations made by the Court. The NEPA analysis accomplished three goals. These were to (1) determine if the proposed action, or alternatives to the proposed action, would have significant environmental impacts; (2) address any unresolved environmental issues; and (3) provide a basis for a decision on promulgation of a final 4(d) special rule under the ESA for the polar bear.

We received 25 submissions during the public comment period, including literature references. The Service considered all comments and submissions received on both the draft EA and proposed 4(d) special rule before issuing this final 4(d) special rule. Our response to public comments on the April 19, 2012, proposed rule are discussed below (see Summary of and Responses to Comments and Recommendations); our response to public comments on the draft EA is provided in the EA finalized on February 5, 2013. A copy of the final EA may be obtained from *http://www.regulations.gov* at Docket No. FWS–R7–ES–2012–0009 or by contacting the U.S. Fish and Wildlife Service (see **ADDRESSES**).

Applicable Laws

In the United States, the polar bear is protected and managed under three laws: the ESA; the MMPA; and CITES. 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. When a species is listed as endangered, certain actions are prohibited under section 9 of the ESA, as specified in 50 CFR 17.21. These include, among others, prohibitions on 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 exceptions to those prohibitions for threatened species. Instead, under section 4(d) of the ESA, the Secretary, as well as the Secretary of Commerce depending on the species, was given the discretion to issue such regulations as deemed necessary and advisable to provide for the conservation of such species. The Secretary also has the discretion to prohibit by regulation with respect to any threatened species any act prohibited under section 9(a)(1) of the ESA. 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 that apply to most threatened species. Under 50 CFR 17.32, permits may be issued to allow persons to engage in otherwise prohibited acts for certain purposes.

Under section 4(d) of the ESA, the Secretary, who has delegated this authority to the Service, may also develop specific prohibitions and exceptions tailored to the particular conservation needs of a threatened species. In such cases, the Service issues a special rule that may include some of the prohibitions and authorizations set out in 50 CFR 17.31 and 17.32 but which also may be more or less restrictive than the general provisions at 50 CFR 17.31 and 17.32.

The MMPA was enacted to protect and conserve marine mammal species and population stocks, so that they continue to be significant functioning elements in their ecosystems. Consistent with this objective, the Service works to maintain or return marine mammals to their optimum sustainable population. The MMPA provides a moratorium on importation and taking 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 types of animals.

Authorizations and exemptions from these prohibitions are available for certain specified purposes. Any marine

mammal listed as an endangered or threatened species under the ESA automatically has depleted status under the MMPA, which triggers further restrictions.

Signed in 1973, CITES protects species at risk from international trade; it is implemented by 177 countries, including the United States. CITES regulates commercial and noncommercial international trade in selected animals and plants, including parts and products made from the species, through a system of permits and certificates. Under CITES, a species is listed at one of three levels of protection, each of which has 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 international trade is 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 for species listed on Appendix I or II, CITES documents cannot be issued until specific biological and legal findings have been made. CITES itself does not regulate take or domestic trade of polar bears; however, it contributes to the conservation of the species by regulating international trade in polar bears and polar bear parts or products.

Provisions of the Special Rule 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 4(d) special rule synchronizes the management of the polar bear under the ESA with management provisions under the MMPA and CITES. Because 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 4(d) special rule.

Under this 4(d) special rule, if an activity is authorized or exempted under the MMPA or CITES (including incidental take), no additional authorization under 50 CFR 17.32 for that activity will be required. 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, those prohibitions would apply, and permits to authorize any take or other prohibited act 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 within the United States but outside of the current range of the species is not a prohibited act under the ESA. The special rule does not remove or alter in any way the consultation requirements under section 7 of the ESA.

Alternative Special Rules Considered in the Course of This Rulemaking

In our EA analyzing options under section 4(d) of the ESA for the polar bear, we considered four alternatives. These were:

Alternative 1: ''No Action''—No 4(d) special rule. Under the no action alternative, no 4(d) special rule would be promulgated for the polar bear under the ESA. Instead, the general regulations for most threatened wildlife found at 50 CFR 17.31 and 17.32 would apply to the polar bear.

Alternative 2: 4(d) special rule with MMPA and CITES as the primary regulatory framework and with ESA incidental take prohibitions limited to polar bear range (December 16, 2008, final rule and April 19, 2012, proposed rule). This 4(d) special rule would adopt the existing conservation regulatory requirements under the MMPA and CITES as the appropriate regulatory provisions for the polar bear. Nonetheless, if an activity was not authorized or exempted under the MMPA or CITES and would result in an act that would be otherwise prohibited under the general prohibitions for threatened species (50 CFR 17.31), then the prohibitions at 50 CFR 17.31 would apply, and we would require authorization under 50 CFR 17.32.

In addition, this alternative would provide that any incidental take of polar bears resulting from an activity that occurred within the United States but outside the current range of the polar bear was not a prohibited act under the ESA. This alternative would not affect any existing requirements under the MMPA, including incidental take restrictions, or CITES, regardless of whether the activity occurred inside or outside the range of the polar bear. Further, nothing in this alternative would affect the consultation requirements under section 7 of the ESA.

Alternative 3: 4(d) special rule with MMPA and CITES as the primary regulatory framework and with ESA incidental take prohibitions limited to Alaska (May 15, 2008, interim rule). This alternative is similar to Alternative 2 above, in that both versions of the 4(d) special rule would adopt the existing conservation regulatory requirements under the MMPA and CITES as the appropriate regulatory provisions for the polar bear, with 50 CFR 17.31 applicable for any act not authorized or exempted under the MMPA or CITES.

This alternative would provide that any incidental take of polar bears resulting from activities that occurred within the United States but outside Alaska was not a prohibited act under the ESA. Thus, the geographic range of incidental take exemptions under the ESA differs between ''outside Alaska'' (Alternative 3) and ''outside the current range of the polar bear'' (Alternative 2). As with Alternative 2, this 4(d) special rule would not affect any existing requirements under the MMPA, including incidental take restrictions, or CITES, regardless of whether the activity occurs inside or outside Alaska. Further, nothing in this 4(d) special rule would affect the consultation requirements under section 7 of the ESA. This interim 4(d) special rule has been in effect since the Court vacated the Service's final 4(d) special rule on November 18, 2011.

Alternative 4: 4(d) special rule with MMPA and CITES as the primary regulatory framework and without a geographic exemption to ESA incidental take prohibitions. This alternative is similar to Alternatives 2 and 3, in that all three versions of the 4(d) special rule would adopt the existing conservation regulatory requirements under the MMPA and CITES as the primary regulatory provisions for the polar bear, with 50 CFR 17.31 applicable for any act not authorized or exempted under the MMPA or CITES.

However, unlike Alternatives 2 and 3, this alternative does not contain a provision to exempt any geographic areas from the prohibitions in 50 CFR 17.31 regarding incidental taking of polar bears.

For reasons discussed below, this final rule adopts Alternative 2.

Comparison of Alternatives

As we explained in our April 19, 2012, proposed rule (77 FR 23432), promulgation of Alternatives 2 or 4, would implement with revisions, while Alternative 3 would continue, our January 30, 2012, final 4(d) special rule at 50 CFR 17.40(q) by adopting the conservation provisions of the MMPA

and CITES as the primary regulatory provisions for this threatened species. These MMPA and CITES provisions regulate incidental take, other types of take including deterrence take (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.

Two of the alternatives, Alternative 2 and Alternative 3, would further provide that any incidental take of polar bears resulting from activities that occurred outside a certain prescribed geographic area was not a prohibited act under the ESA, although those activities would remain subject to the incidental take provisions in the MMPA and the consultation requirements under section 7 of the ESA. Alternative 4 contains no such provision. It leaves in place the ESA prohibition on incidental take regardless of where the activity causing the take occurs.

Alternative 1 would adopt for the polar bear the general regulations for most threatened wildlife found at 50 CFR 17.31 and 17.32. Standard provisions regarding take, including provisions that regulate incidental take, import, export, transport, sale or offer for sale, pre-Act specimens, and subsistence use, would all apply.

Necessary and Advisable Finding and Rational Basis Finding

Similar to the general regulatory requirements for threatened species found at 50 CFR 17.31 and 17.32 and the provisions for endangered species found in sections 9 and 10 of the ESA, the MMPA and CITES generally regulate incidental take, nonincidental take (including take for self-defense or welfare of the animal), import, export, possession of a specimen taken in violation of the law, transport, purchase or sale and offer for purchase or sale, pre-Act specimens, and subsistence use. In the following sections, we provide an explanation of how the various provisions of the ESA, MMPA, and CITES interrelate and how the regulatory provisions of this 4(d) special rule are necessary and advisable to provide for the conservation of the polar bear and include appropriate restrictions from section 9(a)(1) of the ESA.

Definitions of Take

Both the ESA and MMPA prohibit take of protected species over the same geographic area. Nonetheless, 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'' (16 U.S.C. 1532(19)). The MMPA defines ''take'' as meaning to ''harass, hunt, capture, or kill, or to attempt to harass, hunt, capture, or kill any marine mammal'' (16 U.S.C. 1362(13)). 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 within the scope of the MMPA ''take'' definition. As further discussed below, 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 of ''take,'' but is less obviously related to ''take'' under the MMPA definition. Under our ESA regulations, ''harm'' is defined at 50 CFR 17.3 as ''an act which actually kills or injures wildlife. Such act 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.'' While the term ''harm'' in the ESA ''take'' definition encompasses negative effects through habitat modifications, it requires evidence that the habitat modification or degradation will result in specific effects on wildlife: Actual death or injury.

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'' (50 CFR 17.3). 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) (16 U.S.C. 1362(18)(A)).

Section 319 of the National Defense Authorization Act for Fiscal Year 2004 (NDAA; Public Law 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'' (16 U.S.C. 1362(18)(B)).

In most cases, the definitions of ''harassment'' under the MMPA encompass more activities than does the term ''harass'' under the Service's ESA regulations. For example, 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 ''harass'' 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. Furthermore, 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,'' which is a stricter standard than the ''likelihood of injury'' standard under the ESA definition of ''harass.'' The one area where the ESA definition of ''harass'' is broader than the MMPA definition of ''harassment'' is that the ESA definition of ''harass'' includes acts or omissions whereas the MMPA definition of ''harassment'' 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 ''take'' definition includes ''harm'' and the MMPA ''take'' definition does not, this difference should not result in a difference in management of polar

bears. As discussed earlier, application of the ESA ''harm'' definition requires evidence of demonstrable injury or death to 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 to establish ''harm'' under the ESA would provide the evidence of potential injury or potential or likely disturbance that causes disruption of key behavioral patterns needed to establish ''harassment'' 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, we find that, due to the breadth of the MMPA's definition of ''harassment,'' the MMPA's definition of ''take'' is, overall, more protective. Therefore, we find that managing take of polar bears under the MMPA adequately 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 prohibitions of 50 CFR 17.31 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, apply regardless of whether the action causing take is purposefully directed at the animal or not (i.e., the take is incidental). Incidental take under the ESA refers to the take of a protected species that is incidental to, but not the purpose of, an otherwise lawful activity; under the MMPA, incidental takings are ''infrequent, unavoidable, or accidental'' but not necessarily unexpected. 50 CFR 18.27(c). Under this final 4(d) special rule, as with any other prohibited act, if incidental take within the United States or the United States' territorial sea or on the high seas is authorized or exempted under the MMPA, no additional authorization under 50 CFR 17.32 is required. However, if the incidental take is not authorized or exempted under the MMPA, the take prohibition of 50 CFR 17.31 would apply unless the activity causing the take occurred within the United States but outside the current polar bear range.

Most activities causing incidental take to polar bears have a Federal nexus; in those cases, the ESA section 7 consultation requirements apply regardless of where the activity likely to cause the incidental take is located. 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 (known as the ''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, if necessary, Federal agencies receive authorization for incidental take. The section 7 consultation requirements also apply to the Service and require that we consult internally to ensure actions we authorize, fund, or carry out are not likely to result in jeopardy to the species or adverse modification to its critical habitat. 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, e.g., a Service-issued scientific research permit. The final 4(d) special rule does not affect the ESA section 7 requirement that a Federal agency 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 or result in destruction or adverse modification of critical habitat if designated.

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 are likely to 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 or extent of incidental take that is reasonably certain to occur. Under section 7(b)(4) of the ESA, incidental take of a marine mammal such as the polar bear cannot be authorized under the ESA until the applicant has received incidental take authorization under the MMPA. If such MMPA authorization is in place, the Service will also issue a statement under the ESA 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. This final rule does not change the process related to the issuance or contents of the biological opinions for polar bears or the issuance of an incidental take statement.

Some incidental take is caused by activities that do not have a Federal nexus. The general threatened species 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 permit incidental take under the ESA. This authorization would include terms and conditions deemed necessary or appropriate to insure minimization of take, as well as monitoring and reporting requirements.

Under this final 4(d) special rule, if incidental take has been authorized under section 101(a)(5) of the MMPA for take by commercial fisheries, by the issuance of an incidental harassment authorization (IHA), or through incidental take regulations for all other activities, no additional ESA incidental take authorization is needed because the MMPA restrictions are more protective or as protective as standard ESA requirements. Separate from the provisions of this rule, however, ESA section 7 consultation will still be required for activities where there is a Federal nexus. In those cases, although take is enumerated in the incidental take statement, it is authorized through the MMPA. Where there is no Federal nexus, we will not require an additional incidental take permit under the ESA (50 CFR 17.32(b)), because we have determined that the MMPA restrictions are more protective than or as protective as permits issued under 50 CFR

17.32(b). Any incidental take that has not been authorized under the MMPA, or is not in compliance with the MMPA authorization, would remain prohibited under 50 CFR 17.31 and subject to full penalties under both the ESA and MMPA, so long as the activity causing the take occurred within polar bear range. Any incidental take that has not been authorized under the MMPA, or is not in compliance with the MMPA authorization, would remain prohibited under the MMPA and subject to its penalties, regardless of where the activity causing the take is located. 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, and that such taking will not have an unmitigable adverse impact on the availability of the species or stock for take for subsistence uses of Alaska Natives.

If any take that is likely to occur will be limited to nonlethal harassment of the species, the Service may issue an IHA under section 101(a)(5)(D) of the MMPA. An IHA 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 typically 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 affecting 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 the negligible impact 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 to ensure that any take remains at the level of negligible impact.

Negligible impact under the MMPA, as defined at 50 CFR 18.27(c), is ''an impact resulting from the specified activity 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 authorizing 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 (50 CFR 17.32); and (2) for Federal actions, that the activity is not likely to jeopardize the continued existence of the species (ESA section 7).

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. Currently there is minimal overlap between polar bears and commercial fishing and, to date, there are no reports of polar bears having been taken by commercial fisheries, but it is conceivable that, with the prospect of fisheries opening in the Arctic, there will be increased overlap. 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.

The length of the authorizations under the MMPA are limited to 1 year for IHAs, 3 years for commercial fishing authorizations, and 5 years for incidental take regulations, thus ensuring that activities likely to cause incidental take of polar bears are periodically reviewed and mitigation measures updated, if necessary, to ensure that take remains at a negligible level. Incidental take permits and statements under the ESA have no such statutory time limits. Incidental take statements under the ESA remain in effect for the life of the Federal action, unless reinitiation of consultation is triggered. Incidental take permits under the ESA 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.

Because of their stricter standards and mandatory periodic reevaluation even in the absence of a reinitiation trigger, the incidental take standards under the MMPA 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 final special rule adopts as the primary regulatory scheme the MMPA standards for authorizing Federal and non-Federal incidental take as necessary and advisable to provide for the conservation of the polar bear, while retaining the ESA prohibition on incidental take for any taking by activities within polar bear range that has not been authorized under the MMPA or for situations where the person or entity is not in compliance with their MMPA incidental take authorization.

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, and that such taking will not have an unmitigable adverse impact on the availability of the species or stock for subsistence use take. 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 the ''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 distinct population segment). Therefore, because avoiding greater than negligible impact to a stock is even 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, the species is listed as threatened in its entirety 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, nor adversely modify critical habitat. As 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 ordinarily meet the ESA section 7(a)(2) standards of avoiding jeopardy to the species or adverse modification to critical habitat designated for the species. Under this final 4(d) special rule, any incidental take that could not be authorized under section 101(a)(5) of the MMPA will remain subject to the ESA threatened species regulations at 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 Service 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 at this time, in light of the ESA jeopardy standard, the MMPA negligible-impact 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 for which ESA consultation has been conducted and in compliance with all measures under that MMPA authorization (e.g., mitigation) to implement further measures under the ESA, 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 and Chukchi Sea regions can be found in the final rules published on August 3, 2011 (76 FR 47010), and June 11, 2008 (73 FR 33212), respectively.

The mitigation measures that we have required for all oil and gas exploration and development 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 it moves out of the area. However, personnel may be instructed to leave an area where bears are seen.

Additional mitigation measures are also required on a case-by-case basis, depending on the location, timing, and type of specific activity. For example, we may require trained marine mammal observers for offshore activities; preactivity surveys (e.g., aerial surveys, infrared 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 (USFWS unpublished data).

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 within the United States but outside the current range of the polar bear. Under paragraph (4), incidental take of polar bears that results from activities that occur within the United States but outside of the current range of the species is not subject to the prohibitions found at 50 CFR 17.31.

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 within the United States but outside of the current range of the species, however, would not be a prohibited act under the ESA. 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, 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. There is, therefore, no conservation effect on polar bears from paragraph (4).

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. But inability of a citizen group or private citizen to bring a separate action under the ESA does not have a conservation effect on the species when that same take is readily enforceable by the government under the MMPA. In addition, 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 current 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.

Paragraph (4) of the 2008 4(d) rule applied only to the incidental take of polar bears resulting from activities within the United States but outside the species' current range. The preamble to the rule was clear that this did not affect the obligation in the section 7 process to identify the impacts on polar bears, if any, of such activities outside the species' range. Any incidental take lawsuit brought under the citizen suit provisions of the ESA would need to scale a high burden of scientific proof.

Moreover, such proof would undoubtedly lead to a finding of a take under the MMPA. Thus, as the district court specifically upheld, the Service has concluded that a redundant overlay of ESA permitting procedures and penalties for activities outside the range of the polar bear is unnecessary. This is true regardless of whether a causal connection can be shown today or at some time in the future. Accordingly, the proposed rule's discussion of causation is not repeated at length in this preamble to the final rule.

Import, Export, Direct Take, Transport, Purchase, and Sale or Offer for Sale or Purchase

General MMPA Restrictions

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) of the MMPA 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 from an animal taken in violation of the MMPA; and transport, purchase, sale, export, or offer to purchase, sell, or export any marine

mammal or product from an animal 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 generally 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, but 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 the 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 such 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 sets 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 MMPA 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 will 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 the species to its optimum sustainable population. Also, because 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 our regulations at 50 CFR 17.32 allow issuance of permits for zoological exhibition and educational purposes. As the MMPA does not contain a provision similar to section 4(d) of the ESA, the restrictive statutory requirements of the MMPA apply with no discretion for the Service to alter those requirements.

Additionally, for threatened species like the polar bear which are listed on Appendix II of CITES, the ESA provides broader allowances for noncommercial imports that are not available under the MMPA. For example, under the ESA legally taken polar bear sport-hunted trophies could be imported into the United States. However, because of the stricter provisions of the MMPA, no such imports may occur.

Thus, the existing statutory provisions of the MMPA allow fewer types of activities than does 50 CFR 17.32 for threatened species. In addition, the MMPA's standards are generally stricter for those activities that are allowed than are the 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, while also including appropriate restrictions from section 9(a)(1) of the ESA. Therefore, under this final 4(d) 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 will not require any additional authorization under 50 CFR 17.32.

General CITES Restrictions

In addition to the MMPA restrictions on import and export discussed above, the 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 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 of the 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 import or export would not be necessary or appropriate. Thus, under this final 4(d) special 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. But if the import or export is not authorized or exempted under the MMPA and CITES and would be otherwise prohibited under 50 CFR 17.31, then the prohibitions at 50 CFR 17.31 apply. All import and export authorizations issued by the Service under the MMPA and CITES 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 provides 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 criminal 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 final 4(d) special rule, where unforeseen differences between these provisions may arise in the future, any activity that is 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 that is operating a conservation program under the terms of an ESA section 6 cooperative agreement with the Service to take threatened species 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, again so long as the measures do not result in death or serious injury to the animal. Section 101(a)(4)(D) clarifies that this authority to deter marine mammals applies to depleted stocks, which would include the polar bear. Further, under the authority of section 101(a)(4)(B), the Service finalized ''deterrence guidelines'' on October 6, 2010 (75 FR 61631), which became effective on November 5, 2010. The deterrence guidelines (50 CFR 18.34) set forth best practices for safely and nonlethally deterring polar bears from damaging private or public property and endangering the public.

The nonlethal deterrence of a polar bear to prevent damage to fishing gear or other property is not a provision that is included under the ESA. But the voluntary deterrence guidelines and the exemptions for taking under the MMPA will not result in death or serious injury to a polar bear or removal of the bear from the population and could, instead, prevent escalation of an incident to the point where the bear is seriously injured or killed in self-defense.

Section 101(d) of the MMPA provides an exemption for any person who takes a marine mammal when 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 from drowning. While we do not believe private citizens should attempt to free a large polar bear entangled in fishing gear or debris for obvious safety reasons, there may be certain instances when an abandoned young cub may need aid. Therefore, by adopting this provision of the MMPA, this final 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 17.21(c)(3) (incorporated into the general threatened species regulations

through 17.31(a)) provide for similar activities; however, the ESA provision allows taking only by an employee or agent of the Service, another Federal land management agency, NMFS, or a State conservation agency, who is designated by the agency for such purposes. Most of the provisions under both sections 101(a)(4) and 101(d) of the MMPA apply to any individual, including private individuals, thus preventing incidents that could lead to death or serious injury of a bear or allowing aid when no appropriate governmental official is present. Therefore, although the provisions under the MMPA are broader in this case, we find them appropriate for the conservation of the polar bear, and, under this final rule, an activity conducted pursuant to these provisions of the MMPA would not require additional authorization under 50 CFR 17.31 or 17.32.

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 persons 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 for government officials and employees. Section 112(c) of the MMPA allows the Service to enter into cooperative agreements with other Federal or State agencies and public or private entities 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 expressly provided for under the ESA, has allowed the Service to work with private groups to retrieve carcasses, respond to injured animals, and to provide care and maintenance for stranded or orphaned animals. This has provided benefits by drawing on the expertise of, and allowing the use of, facilities of non-Federal and non-State scientists, aquaria, veterinarians, and other private entities.

The Service also issues take authorizations for hazing of polar bears to non-Federal, non-State entities under sections 109(h) and 112(c) of the MMPA, which allow people to take polar bears by harassment (nonlethal, noninjurious deterrence activities) for the protection of both human life and polar bears while conducting activities in polar bear habitat. Prior to issuance of these take authorizations, the Service reviews interaction plans and training activities required for oil and gas industry and polar bear patrol programs in Alaskan Native villages under section 112(c) agreements. By working with these cooperators, the Service provides guidance and training regarding the appropriate harassment response so that individuals who may be tasked with hazing polar bears: (1) Understand the level of deterrence that is appropriate to the particular situation; (2) are knowledgeable of bear behaviors; and (3) are familiar with hazing techniques, so that the risk to both humans and bears is minimized. This training ensures that the lowest level of harassment necessary to safely deter polar bears away from human environs is used. This authority allows for the early detection and appropriate response to polar bears that may be encountered and minimizes the potential for injury or lethal take of bears in defense of human life. Deterrent strategies may include use of tools such as vehicles, vehicle horns, vehicle sirens, vehicle lights, spot lights, or, if necessary, pyrotechnics (e.g., cracker shells).

These take authorizations have been issued to the oil and gas industry, the mining industry, local North Slope communities, scientific researchers, and the military. Over the past 10 years (2002–2011) Service trainers have conducted over 160 training events in Alaska Native communities and for industry personnel. Our analysis of oil and gas industry human-bear interactions, show that of the more than 1,500 encounters reported to the Service in that time, 390 required active deterrence actions taken by trained personnel to deter polar bears away from local communities or industry worksites; of these, only 1 incident has resulted in a bear fatality. In that incident, the responsible party was charged with violating the MMPA because it did not conduct the deterrence activity in a manner consistent with its authorization and was assessed a fine of $10,000.00.

These take provisions have been a crucial component of reducing human-bear confrontations in both Alaska Native villages and the oil and gas development areas on the North Slope of Alaska. The provisions have provided for the conservation of the polar bear by allowing nonlethal, noninjurious techniques to deter polar bears from property and away from people before situations escalate, thereby preventing unnecessary injury or death of a polar bear. These provisions also contribute to conservation of the species by allowing people to respond to injured or entangled animals and provide care and maintenance for stranded or orphaned polar bears. Therefore, under this rule, deterrence and assistance activities that are authorized or exempted under the MMPA do not require any additional authorization under 50 CFR 17.31 or 17.32. However, if a person conducting any of these activities is not authorized or exempted under the MMPA (or acts outside the scope of their authorization or exemption), the take prohibition of 50 CFR 17.31 still applies.

Further, reduction of human-bear conflict is becoming even more important with increasing numbers of polar bears using coastal habitat during the fall open water season. (See 73 FR 28212). In anticipation of increased human-bear interactions in Western Alaska, an area typically not utilized by polar bears when sea ice is available, the Service has initiated polar bear conservation efforts, including deterrence training and establishment of polar bear patrols, in partnership with the Alaska Nanuuq Commission and the North Slope Borough, in the Alaska Native Villages of Wales, Kivalina, Shishmaref, Little Diomede, Nome/King Island, Brevig Mission, Kotzebue, Gambell, and Savoonga.

Finally, the Service, in partnership with the Alaska Native community and our colleagues in the Russian Federation, is also working across the Bering/Chukchi Seas to ensure that all management options are realized to minimize human-polar bear interactions that might otherwise escalate into lethal take situations. Under the auspices of the ''*Agreement between the United States and the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population,''* the United States and the Russian Federation are required to manage and conserve polar bears based on reliable science and to meet the needs of Native peoples. The United States and the Russian Federation have both recognized that the removal of a polar bear, whether it is taken for subsistence purposes, incidentally, or because it poses a threat to human safety, should be considered a reduction to the overall population, and therefore, both countries are working across the region to reduce potential takes from human-bear interactions. The flexibility provided by the MMPA to deter curious or hungry bears before they become a threat to human life is key to this management and conservation effort.

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 that threatened wildlife that were held in captivity or in a controlled environment prior to enactment of the ESA or the date of publication of ESA listing are exempt from regulations that the Service may issue for that species under the authority of the ESA (which would include any rule under section 4(d) of the ESA), provided that the wildlife's 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 held 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 reexporting 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). This final 4(d) special rule does not affect requirements under CITES; therefore, these specimens continue to require this pre-Convention certificate for any import or export. 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 final 4(d) special rule adopts the pre-Act and pre-Convention provisions of the MMPA and CITES. The MMPA has been in force since 1972, and polar bears have been listed in Appendix II of CITES since 1975. In that time, there has never been a conservation problem identified regarding pre-Act or pre-Convention polar bear specimens. Polar bear specimens that were obtained prior to the date that the MMPA went into effect (December 21, 1972) will not be subject to the same restrictions as other threatened species under the general regulations at 50 CFR 17.31 and 17.32, but the number of specimens and the nature of the activities to which these restrictions would apply is limited. To our knowledge, there are no live polar bears, held in captivity within the United States or elsewhere, that would qualify as ''pre-Act'' under the MMPA. Therefore, the standard MMPA restrictions apply to 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 otherwise prohibited 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 trade, 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 byproducts 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. These exemptions remain in place and are not affected by this final 4(d) special rule. Specifically, this final 4(d) special 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 the ESA. This final 4(d) 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 currently allowed under section 101(b) of the MMPA that are not already clearly exempted under section 10(e) of the ESA.

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 the 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 final 4(d) 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 or Native people of Canada, Greenland, and the Russian Federation. All such imports and exports involving polar bear parts and products need to conform to what is currently allowed under the MMPA, comply with our import/export and CITES 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 this final 4(d) special rule is cultural exchange between Alaska Natives and Native inhabitants of the Russian Federation, 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. There is no comparable language in the ESA that would allow Alaska Natives to travel to Canada, Russia, or Greenland with cultural exchange items, or native people from Canada, Russia, or Greenland to bring items for cultural exchange into the United States. Cultural exchange has been an important exemption for Alaska Natives under the MMPA, and this final 4(d) special rule ensures that such exchanges would not be interrupted.

This final 4(d) 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 of this final 4(d) 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 nonnative permanent resident of an Alaskan native village.'' However, the exemption under section 101(b) of the MMPA is limited to 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 non-native 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 MMPA provisions related to subsistence use and cultural exchange may be less strict than comparable ESA provisions, we have determined that 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 bears throughout Alaska. For example, Alaska Natives collect and contribute biological specimens from subsistence-harvested animals for biological analysis. Analysis of these samples allows the Service 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 polar bear population, subsistence hunting is regulated voluntarily and effectively through the *''Inuvialuit-Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea''* 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 the Chukchi Sea, the Service is 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 the two U.S. commissioners represents the Native people of Alaska for whom polar bears are an integral part of their culture. The Bilateral Agreement allows for unified, on-the-ground conservation programs for the shared population of polar bears, including binding sustainable harvest limits. These cooperative management regimes for the subsistence harvest of polar bears are key to both providing for the long-term viability of the population as well as addressing the social, cultural, and subsistence interests of Alaska Natives and the native people of Chukotka and Canada.

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 final 4(d) special rule provides for the conservation of polar bears and includes appropriate prohibitions from section 9(a)(1) of the ESA, 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.

In our final rule to list the polar bear as a threatened species (73 FR 28212; May 15, 2008), while we found that polar bear mortality from harvest and negative human–bear 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. Rangewide, continued harvest and increased mortality from human–bear 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 that 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, rangewide, 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.

National Defense Activities

Section 319 of the National Defense Appropriations Act of 2004 (Pub. L. 108–136, November 24, 2003) 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. The ESA contains no similar exemption. This final 4(d) special rule provides that an exemption invoked as necessary for national defense under the MMPA requires no separate authorization under the ESA. Although this provision would allow some activities that would otherwise have to be authorized 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. In the 9 years since this provision was enacted, the DOD has not approached the Service with a proposal to invoke the exemption.

Penalties

The MMPA provides substantial civil and criminal penalties for violations of the law. These penalties remain in place and are not affected by this final 4(d) special rule. Because CITES is implemented through the ESA, any import or export of polar bears or polar bear parts or products contrary to CITES and possession of any polar bear specimen that was imported or exported contrary to the requirements of CITES is a violation of the ESA and remains subject to its penalties.

Under this final 4(d) special rule, certain acts not related to CITES violations also remain subject to the penalties of the ESA. Under paragraph (1) in combination with paragraph (2) of this final 4(d) special rule, any act prohibited under the MMPA that would also be prohibited under the ESA regulations at 50 CFR 17.31 where the activity has not been authorized or exempted under the MMPA, would be a violation of the ESA as well as the MMPA. In addition, any act prohibited under the ESA regulations at 50 CFR 17.31, where the act is not also prohibited under the MMPA or CITES and therefore where the activity has not been authorized or exempted under the MMPA or CITES, would be a violation of the ESA unless authorized under 50 CFR 17.32. Also, even if an activity 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 may be assessed for any other violation. Criminal penalties and imprisonment for up to 1 year, or both, are also assessed 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.

Under the MMPA, penalties against unlawful activities are also substantial. A civil penalty of up to $10,000 for each violation may be assessed against any person, which includes businesses, States, Federal agencies, and other entities 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 may, upon conviction, be fined up to $20,000 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 thereunder, 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. In *Webster* v. *Doe,* 486 U.S. 592 (1988), the U.S. Supreme Court noted that similar ''necessary or advisable'' language ''fairly exudes deference'' to the agency. Conservation is defined in the ESA to mean ''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 [the ESA] are no longer necessary.'' Additionally, section 4(d) states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1).''

Thus, regulations promulgated under section 4(d) of the ESA provide the Secretary with wide latitude of discretion to select appropriate provisions, including prohibitions and exemptions, for threatened species. In such cases, some of the ESA prohibitions and authorizations from section 9(a)(1) of the ESA and from 50 CFR 17.31 and 17.32 may be appropriate for the species and be incorporated into a 4(d) special rule, but the 4(d) special rule may also include other provisions tailored to the specific conservation needs of the listed species, which may be more or less restrictive than the general provisions.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the species. For example, the Secretary may find that it is appropriate 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,* 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 final 4(d) special rule includes appropriate provisions such that the rule is necessary and advisable to provide for the conservation of the species, while also including appropriate prohibitions from section 9(a)(1) of the ESA. 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 allowed uses 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, enhancement) 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.

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. Additionally, under section 101(a)(5)(A) and (D) of the MMPA, incidental take may only be authorized for ''small numbers'' of marine mammals. Overall, 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 the polar bear continues to be appropriately managed under the provisions of the MMPA and CITES. As such, these mechanisms have a demonstrated record as being appropriate management provisions. Further, the Service has concluded that, in this instance, 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 to or less restrictive than the MMPA or CITES requirements, it would not contribute to the conservation of the polar bear and would be inappropriate.

There are a few activities for which the provisions under the MMPA are less restrictive than provisions for similar activities under the ESA, including use of pre-Act specimens, subsistence use, military readiness activities, and take for defense of property or welfare of the animal. Concerning use of pre-Act specimens and military readiness activities, the general ESA threatened species 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. 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 or welfare of the animal, the MMPA allows a greater breadth of activities than would be allowed under the general ESA threatened species regulations, and in the case of take for defense of life or property or the welfare of the animal, use by a broader range of persons; 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 or injurious 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 CFR 17.31 in the current range of the polar bear is appropriate for 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 by the ESA under this special rule, the consultation requirements under section 7 of the ESA remain fully in effect. As part of the consultation process, any incidental take (as long as a causal connection could be established) will have already been identified in a section 7 incidental take statement and authorized under the MMPA (since under section 7(b)(4)(C) no incidental take statement can be issued for an endangered or threatened marine mammal until the person has obtained their MMPA incidental take authorization). Any incidental take not authorized would be a violation of the MMPA, which the Federal Government would pursue as a violation of the law and all MMPA penalties would apply. In addition, the citizen suit provision under section 11 of the ESA would remain fully operational for challenges that a Federal agency had failed to consult with the Service or to challenge the adequacy of any consultation. 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 have a conservation effect on the species.

Our 37-plus-year history of implementing the MMPA and CITES, and our comparative analysis of these laws with the applicable provisions of the ESA, demonstrate that the MMPA and CITES provide effective regulatory protection to polar bears for activities that are and can reasonably be 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 full application of ESA provisions in the general threatened species regulations at 50 CFR 17.31 and 17.32.

This final 4(d) special rule adopts existing conservation regulatory requirements under the MMPA and CITES as the primary regulatory provisions for this threatened species. If an activity is authorized or exempted under the MMPA or CITES, no additional authorization is required under 50 CFR 17.31 or 17.32. But if an activity is not authorized or exempted under the MMPA or CITES, or a person or entity is not in compliance with all terms and conditions of the authorization or exemption, and the activity would result in an act that would be otherwise prohibited under 50 CFR 17.31, the provisions of the general ESA threatened species regulations 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, unless the activity involves incidental take caused by an activity located within the United States but outside the current range of the polar bear. The application of provisions at 50 CFR 17.31 and 17.32 provides an additional overlay for the species. ESA civil and criminal penalties will continue to apply to any applicable situation where a person (i) has not obtained MMPA or CITES authorizations, (ii) is conducting their activities under an MMPA or CITES authorization or exemption but has failed to comply with all terms and conditions of the authorization or exemption, or (iii) was required to obtain a permit under 50 CFR 17.32 and failed to do so.

In addition, nothing in this final 4(d) special rule affects in any way other provisions of the ESA such as the recovery planning provisions of section 4(f) and consultation requirements under section 7, including consideration of adverse effects posed to any critical habitat. It also does not affect the ability of the Service to enter into domestic and international partnerships for the management and protection of the polar bear.

We find that this 4(d) 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 certain impacts on polar bears for more than 30 years, and as discussed in our response to comments below, provide the flexibility we need to respond to human-bear conflict, which is likely to increase with decreasing summer sea ice. This final 4(d) special rule also adopts appropriate prohibitions from section 9(a)(1) of the ESA. The comparable or stricter provisions of the MMPA and CITES, along with the overlay 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 or 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 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. Additionally, the Secretary has the discretion to decide whether to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

Summary of Changes From the Proposed 4(d) Special Rule

In preparing this final special rule for the polar bear, we reviewed and considered comments and information from the public on our proposed special rule published in the **Federal Register** on April 19, 2012 (77 FR 23432), as well as comments we received in response to our special rule making for the polar bear in 2008, and the Court determinations regarding that 2008

special rule. We also considered the analysis in our Environmental Assessment. Based on those considerations we are finalizing this special rule for the polar bear as proposed on April 19, 2012.

In this final rule, we have clarified that there is no conservation effect, either positive or negative, from the inclusion of paragraph (4) in section 17.40(q). See response to comment 7.

Summary of and Responses to Comments and Recommendations

During the public comment period, we requested written comments from the public on the proposed rule as well as the draft EA. Specifically we requested comment on the: (1) Suitability of the proposed rule for the conservation, recovery, and management of the polar bear; and (2) additional provisions the Service may wish to consider to conserve, recover, and manage the polar bear.

The comment period on the proposed 4(d) special rule for the polar bear opened on April 19, 2012 (76 FR 23432), and closed on June 18, 2012. During that time, we received 25 submissions from the public; these included comments on the proposed rule as well as a number of publications and other documents submitted in support of those comments. The Marine Mammal Commission submitted its comments on August 3, 2012.

In addition to the Marine Mammal Commission, the Service received comments from the State of Alaska, the Arctic Slope Regional Corporation, trade and environmental organizations, and the general public. We reviewed all comments received for substantive issues, new information, and recommendations regarding the 4(d) special rule and the EA. The comments on the proposed special rule, aggregated by subject matter, summarized and addressed below, are incorporated into the final rule as appropriate. Where commenters incorporated by reference their comments on the May 2008 interim rule, we refer them to our responses provided on those comments in the December 2008 final rule. The Service has summarized and responded to comments pertaining to the draft EA in our final EA.

Response to Comments

1. *Comment:* Commenters disagreed on the appropriate standard for issuance of the 4(d) special rule. Some argued that the 4(d) special rule must provide measures that are ''necessary and advisable for conservation of the species,'' while others asserted that the Secretary has broad discretion to issue a rule under section 4(d) of the ESA and did not need to meet the ''necessary and advisable'' standard.

Response: This issue was addressed by the District Court in its Memorandum Opinion issued on October 17, 2011 (*In Re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation. This Document Relates to: Ctr. for Biological Diversity, et al.* v. *Salazar, et al.,* No. 08–2113; *Defenders of Wildlife* v. *U.S. Dep't of the Interior, et al.,* No. 09–153, 818 F. Supp. 2d 214 (D.D.C. 2011)). There, the court noted Circuit Court precedent that the Secretary was afforded broad discretion under the ESA ''to apply any or all of the [Section 9] prohibitions to threatened species without obliging it to support such actions with findings of necessity'' (quoting *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt,* 1 F.3d 1, 8 (D.C. Cir. 1993), modified on other grounds on reh'g, 17 F.3d 1463 (D.C. Cir. 1994), rev'd on other grounds, 515 U.S. 687 (1995)). Despite having that discretion, the court found that the Service had ''premised its Special Rule on a finding that the rule is necessary and advisable to provide for the conservation of the polar bear.'' (818 F. Supp. 2d at 228–229). As a result, the Court reviewed the 4(d) special rule pursuant to the ''necessary and advisable'' standard, and found that it met that standard. We agree that the first two sentences of section 4(d) of the ESA provide separate authorities for regulations for threatened species. As such the Service finds that provisions in this 4(d) special rule are necessary and advisable to provide for the conservation of the polar bear and has also included appropriate prohibitions from section 9(a)(1) of the ESA. In other words, the final special rule for polar bears meets both rule-making standards under section 4(d).

2. *Comment:* The Service fails to establish that the proposed rule provides a conservation benefit to the polar bear; it instead relies on reasons that are unrelated to polar bear conservation.

Response: We disagree. A primary component of the Service's efforts to conserve the polar bear is to minimize death and injuries to polar bears caused by human-bear conflict. The flexibility provided by the MMPA to deter curious or hungry bears before they become a threat to human life or property is key to this conservation effort. In the preamble to this final rule, we have added information that even more strongly demonstrates the importance of such deterrence measures to polar bear conservation. See the section of the preamble on the Necessary and Advisable Finding and Rational Basis Finding for a complete explanation of how this and other provisions of the rule are necessary and advisable to provide for the conservation of the polar bear, while also including appropriate prohibitions from section 9(a)(1) of the statute.

3. *Comment:* Because the proposed rule does not address the primary threat to a listed species, in this case greenhouse gas (GHG) emissions that are driving climate change and the loss of sea ice habitat, the rule (particularly paragraph 4) fails to meet the ''necessary and advisable'' standard.

Response: We disagree. While we recognize the primary threat to the continued existence of the polar bear is loss of sea ice habitat due to climate change, we find that promulgation of this rule is ''necessary and advisable'' for the conservation of the polar bear, while also including appropriate prohibitions from section 9(a)(1) of the statute. Further, the District Court of the District of Columbia has reviewed an identical 4(d) special rule. In the case *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation: Ctr. for Biological Diversity, et al.* v. *Salazar, et al.,* No. 08–2113; *Defenders of Wildlife* v. *U.S. Dep't of the Interior, et al.,* No. 09–153, Misc. No. 08–764, MDL Docket No. 1993, the Court held that the Service's explanation for the rule met the ''necessary and advisable'' standard, essentially rejecting the same argument raised in the comment.

4. *Comment:* The rule's exemption from ESA section 9 take prohibitions for all activities authorized under the MMPA is unlawful because the MMPA is less protective than the ESA.

Response: We disagree. While we recognize there are slight differences between the statutory language of the MMPA and ESA, as discussed in the preamble, we find the definitions of ''take'' under the ESA and the MMPA to be comparable and, where they differ, we find that, due to the breadth of the MMPA's definition of ''harassment,'' the MMPA's definition of ''take'' is, overall, more protective. Thus, we have determined that applying the provisions on take of a polar bear as defined under the MMPA is appropriate for the species.

Further, and as also discussed in this final rule, for any activity which is not authorized or exempted under the MMPA or that has not been conducted in compliance with all terms and conditions that apply to an MMPA authorization or exemption for the activity and that would result in a taking that would be otherwise prohibited under the ESA regulations at

50 CFR 17.31, the prohibitions of 50 CFR 17.31 would apply, and permits are required under 50 CFR 17.32 of our ESA regulations. Thus, in the absence of MMPA compliance or the appropriate threatened species permit, a person would be in violation of the ESA prohibitions.

Ultimately, while Congress laid out the prohibitions and authorizations that are appropriate for endangered species, it expressly did not do so for threatened species. Instead it left it to the discretion of the agency to determine what measures would be necessary and advisable for the conservation of the species and which section 9(a)(1) prohibitions should be applied. There is no indication that Congress intended that prohibitions for threatened species be identical to prohibitions 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. Finally, as discussed above, the District Court for the District of Columbia specifically considered whether a rule identical to this final rule met the regulatory standards of the ESA and held that it did.

5. *Comment:* In practice, the MMPA is not more protective than the ESA because the Service has not implemented the MMPA to protect habitat.

Response: We disagree. While the prohibitions of the MMPA, like the ESA, apply to activities affecting the animals themselves, the MMPA also 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. Specifically, the Service must consider potential impacts to the polar bear's habitat prior to issuing incidental take authorizations under section 101(a)(5)(A) of the MMPA. In its incidental take regulations for the Beaufort and Chukchi Seas, for example, the Service has required industry to maintain a 1-mile buffer to minimize disturbance to the bear; that buffer also protects access to and use of important denning habitat.

In addition, because nothing in the 4(d) special rule affects section 7 consultation standards, 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) of the MMPA. Further, as explained in the preamble, this final rule does not change the requirement that all Federal agencies consult with the Service to ensure that any Federal action is not likely to result in the destruction or adverse modification of designated critical habitat. That consultation process for critical habitat supplements the existing habitat protections of the MMPA.

6. *Comment:* Because of the process by which MMPA direct and incidental take is authorized, there is no administrative burden to also require that same take to be authorized under the ESA.

Response: We disagree. As discussed above, much of the Service's efforts to conserve and manage the polar bear are currently focused on the reduction of human-bear conflict. The Service works with Federal agencies, State authorities, local governments, private researchers, industry, and private citizens, under both the general exemptions as well as authorizations contained in the MMPA to ensure that actions to deter polar bears may be conducted responsive to the varying conditions encountered. Without this 4(d) special rule, private individuals, industry, Alaska Native Organizations, and local communities would all need to obtain permits from the Service under the provisions of 50 CFR 17.32 for all activities that were reasonably likely to result in the prohibited taking of a polar bear under the ESA. Allowing these entities to react appropriately without having to obtain an additional permit under the ESA is a cornerstone of our conservation and management program for the species in Alaska.

While permitting requirements under 50 CFR 17.32 contribute to conservation of threatened species generally, in the case of the polar bear we have determined that relief from ESA permitting requirements is appropriate for polar bear conservation in remote areas of Alaska. The MMPA provisions that afford individuals the ability to haze potentially problem animals away from villages or remote camps come with both flexibility and responsibility. It is this combination that contributes to conserving polar bears in Alaska.

Under certain MMPA exemptions, individuals have the flexibility to determine when and what action is needed for a bear that is endangering personal safety or property without obtaining advance authorization from the Service. An individual's response may include taking appropriate action to deter a bear as a situation necessitates; in doing so, he or she must ensure that the deterrence action does not seriously injure or kill the animal. (An individual is authorized to kill a bear—under both the MMPA and the ESA—only when the action is imminently necessary in self-defense or to save the life of another person.) Areas in Alaska occupied by polar bears are also utilized by Alaska Natives for subsistence hunting and fishing activities. If ESA permitting requirements also applied, an Alaska Native subsistence user, for example, would need to obtain a permit to legally haze bears. In order to obtain such a permit, the hunter would have to first consider all possible hazing actions they might take, then complete a permit application and submit it for review to the Service's permitting office. Rather than requiring this impractical and potentially dangerous system for both people and bears, this rule relies on the protective, but flexible, authority provided by the MMPA.

7. *Comment:* The Service fails to rationally support its exemption of non-GHG pollutants emitted outside polar bear range, despite evidence that those pollutants clearly harm the polar bear.

Response: For the reasons explained in the preamble, neither the ESA prohibition on incidental take—nor the absence of such prohibition—conveys a conservation benefit from either GHG emissions or non-GHG pollutants. Sufficient science to demonstrate a causal connection between a particular facility and ESA incidental take of one or more bears, would also prove an MMPA incidental take violation because the burden of proof for an ESA incidental take violation is the same as that for an MMPA incidental take violation. And, if there was a Federal nexus, the ESA incidental take would trigger the section 7 consultation process. Therefore, as discussed earlier, any ESA incidental take prohibition would be simply additive to the existing MMPA incidental take prohibition, authorization process, and penalties (which are stricter than those under the ESA and would be pursued by the Federal government via appropriate enforcement actions). Therefore, because incidental take of polar bears is already fully prohibited under another statute with effective penalties, there is no conservation effect on the species from not prohibiting incidental take under the ESA in some geographic areas. Rather, the difference boils down to who has the ability to bring lawsuits for alleged incidental take violations, with the ESA citizen's suit provision being available for incidental take

allegedly caused by U.S. activities inside the current range of the polar bear but not available for incidental take allegedly caused by U.S. activities outside the current range of the polar bear.

The Director of the Service has therefore made a reasonable policy decision that, where it is not a conservation issue for the species, the potential burden of baseless incidental takings lawsuits to industry and others most likely to be subject to such lawsuits under the citizen suit provision argues in favor of paragraph (4) as an appropriate provision of the rule. Any benefit of allowing citizen suits for ESA incidental take violations outside polar bear range is outweighed by these considerations.

For a complete explanation of how paragraph (4) and other provisions of the rule are necessary and advisable to provide for the conservation of the polar bear, while also including appropriate prohibitions from section 9(a)(1) of the statute, see Necessary and Advisable Finding and Rational Basis Finding.

8. *Comment:* On the topic of citizen suits, some commenters agreed, while others disagreed, with the Service's statements regarding the likelihood of suits being filed, the potential for success, and the potential drain on Service resources. One commenter also challenged paragraph (4) of the proposed rule as a violation of the separation of powers doctrine.

Response: In the proposed rule, the Service found that paragraph (4), which limited the ESA prohibition on incidental take to activities within the range of the polar bear, was advantageous because: (1) The potential for citizen suits alleging take resulting from activities outside of the range of the polar bear [was] significant; (2) the likelihood of such suits prevailing in establishing take of polar bears [was] remote; and (3) defending against such suits [would] divert available staff and funding away from productive polar bear conservation efforts. Many of the commenters addressed these statements in their submissions.

With regard to the potential volume of citizen suits, the Service now concludes that it overestimated the number of suits that are likely to be initiated in the absence of paragraph (4) of the regulation. The standard for triggering ESA section 7 consultation is a relatively low bar, namely that a federal action ''may affect'' a listed species. That standard has been applied both within and outside polar bear range since the species was listed in 2008, yet no suits have been filed alleging a violation of section 7.

The Service has not changed its position on the likelihood of success. Although GHG emissions have been linked to the threat of sea ice loss (a primary trigger for the Service's listing of the polar bear), the burden of proof for an ESA incidental takings case is high and any ESA incidental takings lawsuit that might otherwise have been brought under the citizen suit provision would need to meet that burden.

Related to the issue of likelihood of success of ESA citizen suits, one commenter asserted that the proposed rule adopted new standards or misstates existing standards under the ESA. This commenter posited that population, not individual, level impacts are sufficient to establish harm, and that rather than considering whether emissions from a single facility cause take, the appropriate standard was whether the facility's emissions contribute to take. With these broader legal standards in mind, the commenter concluded that the current state of the science would allow a plaintiff to show a causal connection between GHG emissions and harm to polar bears. The Service has not changed its position on any legal standard, including under the definition of ESA ''harm.'' Changes have been made to the preamble to clarify this point. For the Service's position on the meaning of harm, see the 1981 final rule defining that term (46 FR 54748). Further, in the absence of judicial confirmation of these novel legal arguments, the Service stands by its position that the burden of proof is high. Also suggesting that the likelihood of success is low was the observation by one commenter that all the tort suits that have been brought against GHG emitters had been dismissed.

Because it is not a conservation issue for the species, the potential burden of baseless incidental takings lawsuits (even if likely to be relatively infrequent) to industry and others most likely to be subject to such lawsuits under the citizen suit provision, supports paragraph (4) as an appropriate provision of the rule. Any benefit of allowing citizen suits for ESA incidental take violations outside polar bear range is outweighed by these considerations.

Finally, including this provision is not a violation of the separation of powers doctrine. As we have explained, in section 4(d) of the ESA, Congress specifically left it to the discretion of the Service (as delegated by the Secretary) to develop threatened species rules that are necessary and advisable to provide for the conservation of the species, and to include—or not include—prohibitions from section 9(a)(1) of the ESA as appropriate. There is no legal requirement to include all, or any particular, prohibitions from section 9(a)(1) of the ESA. The ability to bring a citizen suit against parties other than the Service flows from showing that a person or entity has violated a provision of the ESA or any regulation issued thereunder. Thus, the ability to bring such citizen suits for threatened species flows largely from those prohibitions that the Service has decided to include within a 4(d) special rule, not an independent right to sue under the ESA. And the decision on which provisions should be included within a special rule under section 4(d) of the ESA is driven by the conservation needs of the species and appropriate section 9(a)(1) prohibitions, not the interests in certain groups in bringing lawsuits.

9. *Comment:* The Service should reaffirm its previous determinations that a causal link—one that would trigger ESA section 7, ESA section 9, or MMPA consequences—cannot be established between GHG emissions from a particular source and a specific effect on polar bears or their habitat.

Response: The same causation standard applies to take prohibitions under the MMPA and the ESA as well as identifying take under ESA section 7. Therefore consideration of the ESA section 7 process applies to these other statutory provisions as well. 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. The prohibitions on take that appear in 50 CFR 17.31 and MMPA section 102 similarly require a causal link be established between an action and the consequence of a take; a discussion of section 7 consultation is illustrative on this point.

For ESA section 7, the determination of whether consultation is triggered is narrow; that is, the focus of the effects analysis is on the discrete effect of the proposed agency action. This is not to say that other factors affecting listed species are ignored. 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 direct effects and indirect effects, 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 those effects beyond the direct effects of the action, 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.

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 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.''

In this case a federal agency would have to specifically consider whether a Federal action that produces GHG emissions is a ''may affect'' action that requires consultation under section 7 of the ESA 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 (i.e., ''but for causation'') from one to the next and the effect must be ''reasonably certain to occur.'' This causation linkage narrows ESA 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 GHG emissions to the atmosphere would arguably result in consultation with respect to every listed species that may be affected by climate change.

The Service acknowledges that climate science is an active area of current research, and our understanding of the causes, timing and scope of environmental impacts related to climate change is rapidly evolving. In the process of evaluating alternatives for the environmental assessment, we determined that an exhaustive analysis of all the current scientific literature regarding climate change and sea ice habitat would not change the analysis fundamental to our decision about the 4(d) special rule. Rather than turn on whether future scientific information might be capable of establishing a causal linkage between specific emissions and incidental take of particular polar bears, our analysis focuses on the regulatory consequences of either scenario—whether causal linkage is established or not in the future. In either case, we found that the MMPA provides sufficient regulatory and enforcement protection.

10. *Comment:* The Service should continue the well-founded and consistent legal and policy determination that the ESA cannot and should not be used to regulate GHG emissions.

Response: As with many other species listed because of threats to habitat, the ESA by itself does not provide authority to the Service to regulate the underlying causes of that habitat loss. Instead, where there is a Federal nexus, the ESA requires that a Federal agency consult with the Service when the best available science indicates that an action ''may affect'' a species or its critical habitat.

The Service recognizes that the biggest long-term threat to polar bears is the loss of sea ice habitat from climate change. While GHG emissions are clearly contributing to that climate change, comprehensive authority to regulate those emissions is not found in the ESA. The challenge posed by climate change and its ultimate solution is much broader. Rising to that challenge, Federal and State governments, industry, and nonprofit organizations are exploring ways to collectively reduce GHG emissions as we continue to meet our nation's energy needs.

The Service is working in other arenas to address the effects of climate change on polar bears. For example, the Service's recently released ''Rising to the Urgent Challenge: Strategic Plan for Responding to Accelerating Climate Change'' (*http://www.fws.gov/home/climatechange/pdf/CCStrategicPlan.pdf*) acknowledges that no single organization or agency can address an environmental challenge of such global proportions without allying itself with others in partnerships across the nation and around the world. Specifically, this Strategic Plan Service commits the Service to (1) lay out our vision for accomplishing our mission to ''work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people'' in the face of accelerating climate change; and (2) provide direction for our own organization and its employees, defining our role within the context of the Department of the Interior and the larger conservation community.

11. *Comment:* The Service should alter paragraph (4) of the regulation so that the exemption applies to all activities regardless of whether they occur outside or within polar bear range.

Response: The Service disagrees. Because there are other legal avenues that prohibit incidental take from activities undertaken outside or within polar bear range, the authority to bring a citizen suit alleging a violation of the ESA prohibition on incidental take is not a conservation issue for the species. Instead, other considerations come into play and the Director has weighed those factors in adopting the language of paragraph 4.

For activities outside polar bear range but within the United States, the Director has made a reasonable policy decision that the potential burden of baseless incidental takings lawsuits to industry and others under the citizen suit provision outweighs the tangential litigation benefit of allowing citizen suits for ESA incidental take violations under section 9.

For activities within polar bear range, the balance tips towards including ESA incidental take coverage. Within the species' range, there is a greater likelihood that a plaintiff will be able to establish a causal link between sources of incidental take other than GHG emissions and incidental take of bears because of proximity. For example, incidental take caused by noise, lights, visual disturbance, and emissions of toxins like mercury can all occur within polar bear range and could have a more direct causal linkage. While it is possible that similar effects could occur from an activity located outside the species' range and then spread or transmit to an area within the species' range, this is less likely and becomes increasingly unlikely the farther the activity is located from the species' range.

As with incidental take caused by activities outside the range, any ESA

incidental take proven to be caused by an activity within the species' range would be a violation of the MMPA takings prohibition. Therefore, this aspect of the rule likewise does not have a conservation effect on the species. But here the Director of the Service has made the policy decision that, even though there is no conservation benefit, an ESA incidental take prohibition should be included in the rule. In reaching this decision, the Director considered the potential burden to industry and others most likely to be subject to citizen suits but found that because such lawsuits are less likely to be baseless (for the reasons noted above), the balance tipped in favor of maintaining the citizen's suit provision within polar bear range.

12. *Comment:* The Service should reaffirm its prior assertion that GHG emissions from oil and gas development activities within the range of the polar bear should not result in ''indirect impacts'' that would require consultation under ESA section 7.

Response: We explain the Service's position on GHG emissions in our response to Comment 9 and reiterate in Comment response 11 the reasons for the geographic boundary in paragraph (4).

13. *Comment:* The Service failed to consider how the geographic exemption in paragraph (4) of the regulation might impact potential polar bear conservation associated with GHG emitters who choose to pursue regulatory options under the ESA section 10 permit program.

Response: Incidental take of polar bears has been prohibited since passage of the MMPA in 1972; neither the ESA listing nor publication of the 4(d) special rule changed that. Entities who are concerned that their activities might incidentally take a polar bear have several options, including seeking authorization for incidental take under the MMPA via incidental take regulations or an incidental harassment authorization. Under the terms of this final rule, if they receive incidental take authorization under the MMPA, and conduct their activities consistent with the conditions of that authorization, they would not need additional authorization under section 10 of the ESA. The reverse is not necessarily true. Regardless of paragraph (4), an entity who obtained an ESA section 10 permit for activities that caused incidental take would still need authorization under the MMPA. Alternatively, an entity may adjust their activities to avoid the incidental taking of polar bears. All of these avenues would contribute to polar bear conservation.

14. *Comment:* The Service should include information to make clear the polar bear population is not in decline.

Response: Issues related to the current status of polar bear populations are outside the scope of this 4(d) special rule. Please see the final listing rule (73 FR 28212; May 15, 2008) for discussion of these topics. As noted in that rule, the polar bear species is likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

As required by section 4(c)(2) of the ESA, the Service anticipates initiating a 5-year status review of the polar bear in 2013. The 5-year review assesses: (1) Whether new information suggests that the species is increasing, declining, or stable; (2) whether existing threats are increasing, unchanged, reduced, or eliminated; (3) if there are any new threats; and (4) if any new information or analysis calls into question any of the conclusions in the original listing determination as to the species' classification.

The 5-year review provides a recommendation, with supporting information, on whether a species' classification should be changed; it does not change the species' classification. A species' classification cannot be changed until a rulemaking process is completed, including a public review and comment period.

15. *Comment:* One commenter raised concerns regarding a possible up-listing of the polar bear from CITES Appendix II to CITES Appendix I.

Response: Consideration of this issue is beyond the scope of this final rule but the comment was forwarded to Service Headquarters, which is considering this comment as it deliberates potential recommendations to bring to the next meeting of the Conference of the Parties to CITES.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA), in the Office of Management and Budget, will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

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 final 4(d) 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 final 4(d) special rule for the polar bear would allow for maintenance of the regulatory status quo

regarding activities that had previously been authorized or exempted under the MMPA or CITES. 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 final 4(d) special rule would 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 final 4(d) special rule for the polar bear would allow for the maintenance of the regulatory status quo regarding activities that had previously been authorized or exempted under the MMPA or CITES, we do not believe that this rule would significantly or uniquely affect small governments. Therefore, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this final rule would not have significant takings implications. We have determined that this final rule has no potential takings of private property implications as defined by this Executive Order because this 4(d) special rule would, with limited exceptions, maintain the regulatory status quo regarding activities currently allowed under the MMPA or CITES. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this final rule does not have significant Federalism effects. A federalism summary impact statement is not required. This final rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, 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 final 4(d) special 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 final 4(d) 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 recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

We have prepared an environmental assessment in conjunction with this final 4(d) special rule. Subsequent to closure of the comment period, we determined that this final 4(d) special rule does not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the NEPA of 1969. For a copy of the environmental assessment, go to *http://www.regulations.gov* and search for Docket No. FWS–R7–ES–2012–0009 or contact the individual identified above in **FOR FURTHER INFORMATION CONTACT.**

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3225 of January 19, 2001 [Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206)], Department of the Interior Memorandum of January 18, 2001 (Alaska Government-to-Government Policy), Department of the Interior Secretarial Order 3317 of December 1, 2011 (Tribal Consultation and Policy), and the Native American Policy of the U.S. Fish and Wildlife Service, June 28, 1994, we acknowledge our responsibilities to work directly with Alaska Natives in developing programs for healthy ecosystems, to seek their full and meaningful participation in evaluating and addressing conservation concerns for listed species, to remain sensitive to Alaska native culture, and to make information available to Tribes.

On January 18, 2012, we contacted the 52 Alaska Native Tribes (ANTs) and Alaska Native Corporations (ANCs) that are, or may be, affected by the listing of the polar bear as well as the development of any special rule under section 4(d) of the ESA. Our January 18, 2012, correspondence explained the nature of the Federal Court's remand and the Service's intent to consult with affected ANTs and ANCs. Our correspondence further informed the ANTs and ANCs that we intended to hold two initial consultation opportunities: One on January 30, 2012, and one on February 6, 2012, during which we would answer any questions about our intention to propose a 4(d) special rule for the polar bear, as well as take any comments, suggestions, or recommendations participants may wish to offer. Subsequently, during the week of January 23, 2012, we contacted ANTs and ANCs by telephone to further inform them of the upcoming opportunities for consultation.

During the consultation opportunities held on January 30, 2012, and February 6, 2012, the Service received one recommendation from ANTs and ANCs regarding the development of a

proposed 4(d) special rule for the polar bear; that recommendation urged the Service to continue to provide information on the development of any proposed rule to the affected public. Consistent with this request from the Alaska Native community, on May 2, 2012, the Service again wrote to Alaska Native tribal governments and Corporations informing them of the publication of the proposed rule and draft EA and further seeking their input as the Service considered its options in finalizing this rule. The Service received one comment from an Alaska Native Corporation in response to this further request. On June 18, 2012, the Arctic Slope Regional Corporation wrote to the Service expressing their support for the proposed special rule. In their correspondence, the Arctic Slope Regional Corporation noted their belief that: (1) The [proposed] Special Rule reflects the appropriate finding that the extensive conservation provisions in the MMPA and CITES are the necessary and advisable measures for the conservation of the polar bear; (2) the current management provisions and protections will adequately protect both the polar bear and the continued ability of Alaska Natives to maintain their current lifestyle and cultural heritage; and (3) cultural exchange activities involving import and export of marine mammals parts and products, including from the polar bear, are a critically important component of Alaska Natives' lifestyle and cultural heritage, and preserving the ability of Alaska Natives to continue to participate in these activities ''uninterrupted''—as envisioned in the proposed 4(d) special rule—is both necessary and appropriate.

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 in the responses to comments for this final 4(d) special rule, we believe that the rule would not have any effect on energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this rule is available on the Internet at *http://www.regulations.gov* or upon request from the Service's Marine Mammals Management Office (see **ADDRESSES**).

Authors

The primary authors of this document are staff from the Service's Alaska Region (see **ADDRESSES**).

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; 1531–1544; and 4201–4245, 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 (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) (27 U.S.T. 1087), 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 § 17.31of 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: February 5, 2013.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–03136 Filed 2–19–13; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 120306154–2241–02]

RIN 0648–XC506

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries; General Category Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS closes the General category fishery for large medium and giant Atlantic bluefin tuna (BFT) until the General category reopens on June 1, 2013. This action is being taken to prevent overharvest of the General category January BFT subquota.

DATES: Effective 11:30 p.m., local time, February 15, through May 31, 2013.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin or Brad McHale, 978–281–9260.

SUPPLEMENTARY INFORMATION: Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, consistent with the allocations established in the 2006 Consolidated Atlantic Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP) (71 FR 58058, October 2, 2006) and subsequent rulemaking.

NMFS is required, under § 635.28(a)(1), to file a closure notice with the Office of the Federal Register for publication when a BFT quota is reached or is projected to be reached. On and after the effective date and time of such notification, for the remainder of the fishing year or for a specified period as indicated in the notification, retaining, possessing, or landing BFT under that quota category is prohibited until the opening of the subsequent quota period or until such date as specified in the notice.