



# United States Department of the Interior

OFFICE OF THE SOLICITOR

**MAY 23 2008**

M-37015

Memorandum

To: Director, U.S. Fish and Wildlife Service

From: Solicitor

Subject: Legal Implications Affecting the Importation of Sport-hunted Polar Bears from Canada Resulting from the Listing of the Polar Bear as a Threatened Species under the Endangered Species Act

## I. INTRODUCTION

Since 1994, the Marine Mammal Protection Act (MMPA) has authorized the Secretary of the Interior (Secretary) to issue permits that allow importation into the United States of polar bear parts taken in sport hunts in Canada, provided that specific requirements are met. Marine Mammal Protection Act of 1972 § 104(c)(5), 16 U.S.C. § 1374(c)(5) (2000). The Secretary has delegated this permitting authority to the Director of the U.S. Fish and Wildlife Service (Service or FWS). *See* 242 DM 1.

On January 9, 2007, the Service issued a proposed rule to list the polar bear as a threatened species throughout its range, including Canada and the United States, under the Endangered Species Act (ESA). Twelve-Month Petition Finding and Proposed Rule To List the Polar Bear (*Ursus maritimus*) as Threatened Throughout Its Range, 72 Fed. Reg. 1064 (Jan. 9, 2007). On May 14, 2008, the Secretary announced his decision to accept the recommendation to list the polar bear as a threatened species under the ESA. On May 15, 2008, the Service published the final rule listing the polar bear as threatened throughout its range. Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28212 (May 15, 2008) (to be codified at 50 C.F.R. § 17.11(h)).

You have requested my opinion on how listing the polar bear as a threatened species under the ESA affects the Service's ability to authorize importation of sport-hunted polar bears from Canada under the MMPA.

## II. ANALYSIS

### A. Authorizing Importation Under the MMPA of Sport-hunted Polar Bears Taken in Canada

In 1994, Congress amended the MMPA to authorize the Service to issue permits for the importation of polar bear parts (other than internal organs) taken in sport hunts in Canada by applicants who can show that they legally harvested the bear from an approved population. MMPA § 104(c)(5)(A). The Service must find that (1) Canada has a monitored and enforced sport-hunting program consistent with the purposes of the Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918, 13 I.L.M. 13; (2) Canada has a sport-hunting program based on scientifically sound quotas that ensure the maintenance of the affected polar bear stock<sup>1</sup> at a sustainable level; (3) the export from Canada and import into the United States are consistent with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and other international agreements; and (4) the export from Canada and import into the United States are not likely to contribute to illegal trade in bear parts. *Id.* § 104(c)(5)(A)(i) - (iv). The statute also calls for charging a fee for these permits, with the collected funds to be used for cooperative research and management programs for the conservation of polar bears in Alaska and Russia. *Id.* § 104(c)(5)(B).

In February 1997, the Service published regulations detailing its implementation of the new MMPA provision. *See* 50 C.F.R. § 18.30 (2007). The Service found that Canada's polar bears comprise 12 populations; six of these populations are currently approved as having monitored and enforced sport-hunting programs that meet the requirements of the MMPA.<sup>2</sup> Consistent with the statutory fee provision, the Service imposed a \$1,000 conservation fee for each importation, in addition to the standard permit processing fee, to be used for polar bear cooperative research and management programs. *Id.* § 18.30(g)(2).

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<sup>1</sup> "Stock" or "population stock" is defined in the MMPA to mean "a group of marine mammals of the same species or smaller taxa in a common spatial arrangement that interbreed when mature." MMPA § 3(11).

<sup>2</sup> Approved populations as of May 2008 include the Southern Beaufort Sea, Northern Beaufort Sea, Viscount Melville Sound, Western Hudson Bay, Lancaster Sound, and Norwegian Bay. 50 C.F.R. § 18.30(i)(1). Bears that were lawfully taken on or before May 31, 2000, from the M'Clintock Channel population may also be imported. *Id.*

## B. Depleted Species Under the MMPA

### 1. Definition of "Depleted"

The MMPA applies to species that qualify as "marine mammals," and the statutory definition of "marine mammal" specifically references polar bears. *See* MMPA § 3(6). Thus, the MMPA's standard provisions, including prohibitions, authorizations, and use by Alaska Natives, currently have applied to the polar bear since 1972. But the MMPA also provides the more protective status of "depleted" for marine mammal species or stocks that meet certain criteria. A species or stock is "depleted" if (1) the Service, in consultation with the Marine Mammal Commission, determines that the species or stock is below its optimum sustainable population;<sup>3</sup> (2) a State to which management authority for the species has been transferred determines that a species or stock is below its optimum sustainable population;<sup>4</sup> or (3) the species or stock is listed as an endangered species or threatened species under the ESA. *Id.* § 3(1). Therefore, with its listing as a threatened species under the ESA, the polar bear automatically obtained "depleted" status under the MMPA by operation of law. Once a marine mammal species or stock has depleted status, certain additional provisions apply, two of which are relevant to authorizing the importation of sport-hunted polar bears from Canada.

### 2. Section 101(a)(3)(B) of the MMPA

Section 101(a) of the MMPA established a moratorium on the taking and importation into the United States of marine mammals and marine mammal products unless one of the specified exceptions applies. These exceptions include, among other things, the issuance of permits for taking or importation for scientific research, public display, or enhancement of the survival or recovery of the species or stock; incidental take in the course of commercial fishing or other activities; and take to deter a marine mammal from damaging personal property or endangering personal safety. *See id.* § 101(a)(1), (2), (4), (5). The specified exceptions also include the issuance of permits under section 104 to authorize the importation of sport-hunted polar bear trophies from Canada, as described above. *See id.* § 101(a)(1). However, section 101(a)(3)(B) narrows the purposes for which permits and authorizations may be issued under the moratorium for depleted species. Section 101(a)(3)(B) provides:

*Except for scientific research purposes, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock as provided for in paragraph (1) of this subsection, or as provided for under paragraph (5) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary*

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<sup>3</sup> The Service has not made a finding that the polar bear is below its optimum sustainable population.

<sup>4</sup> No State has management authority for an FWS marine mammal species under section 109 of the MMPA.

*as depleted, and no importation may be made of any such mammal*<sup>5</sup> (emphasis added).

While section 101(a) provides that the Service may authorize importation for a variety of purposes for nondepleted marine mammals, the purposes for which importation can be authorized for marine mammals from depleted species or stocks is more limited. It is noteworthy that polar bear parts taken during sport hunts in Canada are not included in the list of purposes for which importation permits can be issued for marine mammals from depleted species or stocks under section 101(a)(3)(B).

### 3. Section 102(b) of the MMPA

Separate from the moratorium on taking and importation established under section 101(a), section 102 of the MMPA lists prohibited acts, as well as certain exceptions to the prohibitions. For example, subject to certain exceptions, it is unlawful under section 102 for any person subject to the jurisdiction of the United States to take any marine mammal on the high seas or in waters or on lands under the jurisdiction of the United States or for any person to use any port, harbor, or other place under the jurisdiction of the United States to take or import marine mammals or marine mammal products. *See id.* §§ 102(a)(1), (2). Section 102 is substantially aligned with the exceptions provided under the moratorium. The section begins by expressly exempting the authorizations available under sections 101 (the moratorium) and 104 (permitting provisions), among others, from the prohibitions. *See id.* § 102(a).

Section 102 also contains additional restrictions for certain specified activities, including an additional restriction on importation if the marine mammal is from a species or stock that has been designated as depleted. Section 102(b) provides:

*Except pursuant to a permit for scientific research, or for enhancing the survival or recovery of a species or stock . . . , it is unlawful to import into the United States any marine mammal if such mammal was –*

- (1) pregnant at the time of taking;
- (2) nursing at the time of taking, or less than eight months old, whichever occurs later;
- (3) *taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a*

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<sup>5</sup> “Marine mammal” is defined to include any live animal but also includes any part of a marine mammal, including “its raw, dressed, or dyed fur or skin.” *See id.* § 3(6).

*depleted species or stock; or*

- (4) taken in a manner deemed inhumane by the Secretary.

Notwithstanding the provisions of paragraphs (1) and (2), the Secretary may issue a permit for the importation of a marine mammal, if the Secretary determines that such importation is necessary for the protection or welfare of the animal (emphasis added).

While importation can be authorized in general under the MMPA for a variety of purposes, section 102(b) restricts importation to scientific research or enhancement of the survival or recovery of the species or stock if the marine mammal originates from a species or stock that has depleted status. Importation of polar bear parts taken during sport hunts in Canada is not included in the list of exceptions to section 102(b).

4. Application of sections 101(a)(3)(B) and 102(b) to the importation of sport-hunted polar bear trophies if polar bears acquire depleted status
  - a. Statutory scheme

A plain-language reading of both section 101(a)(3)(B) and section 102(b) demonstrates that Congress did not intend to allow the importation of sport-hunted polar bear trophies from Canada if polar bears acquired depleted status. While the section 101(a) moratorium and the section 102 prohibitions differ somewhat in the acts to which they apply, both broadly restrict specific, identified acts that negatively affect marine mammals: take and importation under the moratorium; take, importation of certain categories of marine mammals; and transport, purchase, sale, and possession of marine mammals taken in violation of the statute under section 102. Both sections then provide specific exceptions to the restrictions and allow otherwise prohibited acts to be authorized only if the proposed activity qualifies as one of the listed, approved purposes. Thus, section 101(a)(1) provides that permits may be issued under section 104 for certain specific purposes, including “for importation of polar bear parts . . . taken in sport hunts in Canada.” While section 102 does not specifically list the importation of polar bear parts taken during sport hunts in Canada, it references the exceptions provided under sections 101 and 104 of the MMPA, which allow the Service to issue permits for the importation of sport-hunted polar bear trophies from Canada. *See id.* § 102(a).

After establishing the moratorium and prohibitions and providing exceptions, both sections then place additional restrictions on the allowable uses of depleted marine mammals. Section 101(a)(3)(B) limits the issuance of permits for, and the importation of, depleted species under the moratorium to scientific research, photography for educational or commercial purposes, enhancement of the survival or recovery of a species or stock, or take incidental to conducting another activity. Section 102(b) prohibits importation into the United States of any marine mammal taken from a species or stock with depleted status unless the importation is for scientific

research or enhancement of the survival or recovery of a species or stock. In its approach to marine mammal conservation, Congress chose to construct a statute that consists of specific, enumerated prohibited acts, and then lists specific, enumerated exceptions under which certain types of activities are exempt or can be authorized, with specific additional restrictions for depleted species. Of the listed purposes for which importation can be authorized for depleted species under section 101(a) or section 102, neither section 101(a)(3)(B) nor section 102(b) includes polar bear parts taken during a sport hunt in Canada.

b. Depleted status determination and ESA listing

Theoretically someone might argue, however, that neither section 101(a)(3)(B) nor section 102(b)(3) apply to polar bears because they obtained their depleted status through the ESA listing process. As described in section 1 above, a species or stock acquires depleted status if it is listed as an endangered species or threatened species under the ESA. *See id.* § 3(1)(C). But a species or stock can also acquire depleted status if the Service or a State to which management authority for the species has been transferred determines that it is below its optimum sustainable population level. *See id.* § 3(1)(A), (B). Since 1988, section 115 of the MMPA has laid out the process for making depletion findings, whether at the agency's initiative or by public petition, which includes rule-making through notice in the *Federal Register* and an opportunity for public comment. *Id.* § 115(a).

Section 101(a)(3)(B) applies to species that have “been designated by the Secretary as depleted” and section 102(b) applies to species “which the Secretary has, by regulation published in the *Federal Register*, designated as a depleted species.” It could be argued, therefore, that these limitations apply only to species that have obtained their depleted status under the process described in sections 3(1)(A) and 115(a) of the MMPA – those determined by the Service through rule-making to be below their optimum sustainable population level – and not to species that are depleted due to their listing as threatened or endangered species under the ESA. Section 102(b) in particular refers to species “which *the Secretary has, by regulation published in the Federal Register*, designated as a depleted species or stock.” *Id.* § 102(b)(3) (emphasis added).

However, we have historically interpreted sections 101(a)(3)(B) and 102(b) as applying to all depleted species, regardless of how they received their depleted status. The Service has a number of marine mammal species that it manages as “depleted” species or stocks under the MMPA (manatees, southern sea otters, the southwest Alaska distinct population segment of northern sea otters), all of which obtained their depleted status through their listing under the ESA.<sup>6</sup> The Service has consistently applied the provisions in the MMPA for depleted species, including other provisions in sections 102 and 104, to all depleted species without regard to how the

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<sup>6</sup> The Service has never designated a species as depleted other than through an ESA listing action, although it has received at least one petition to do so in the 36-year history of the MMPA. That petition, to designate the Alaska stock of sea otters as depleted, was denied, and the Service ultimately listed one stock of northern sea otters in Alaska as threatened under the ESA.

species obtained its depleted status. This interpretation is reflected in the agency's regulations, which provide that, except for certain indicated purposes, it is unlawful to import into the United States any endangered or threatened marine mammal or any specimen taken from a depleted stock. *See* 50 C.F.R. § 18.12(c).<sup>7</sup> Thus, this regulatory provision, which interprets the section 102(b) prohibition, includes both species that acquired their depleted status through the ESA listing process and acquired their depleted status through the separate designation process.

Our interpretation is supported by the plain language of the MMPA. The ESA directs the Secretary of the Interior to determine whether any species qualifies as an endangered species or a threatened species under the statute. *See* Endangered Species Act of 1973 § 4(a)(1), 16 U.S.C. § 1533(a)(1) (2000). The ESA also requires that determinations of endangered and threatened status be through proposed and final rule-makings published in the *Federal Register*. *See id.* §§ 4(b)(5), (6). Marine mammals that are listed as endangered species or threatened species under the ESA therefore meet the requirements of having received their depleted designation by the Secretary and by regulation published in the *Federal Register*, as called for in sections 101(a)(3)(B) and 102(b) of the MMPA.

Our long-standing interpretation is also consistent with the legislative history of the MMPA. In 1971, the House of Representatives passed H.R. 10420 as the first step in what became the MMPA. The House bill introduced the concept of “depleted” status and defined depletion to mean “any case in which the number of individuals . . . has declined to a significant degree over a period of years and, if that decline were to continue, would result in that species or population stock being threatened with extinction.” H.R. REP. NO. 92-707, at 2. The House emphasized that its concept of “depleted” was intended to be broader than that of “endangered” under the Endangered Species Conservation Act of 1969. *Id.* at 22, *reprinted in* 1972 U.S.C.C.A.N. 4144. The House bill also included a prohibition nearly identical to the current section 102(b) prohibition. The primary difference was that the House prohibition specifically included not only marine mammals taken from a species or stock designated as depleted but also those “endangered.” *Id.* at 3. The House Report emphasized that this prohibition would make it illegal to import certain marine mammals, including those “taken from a species or stock which has been *designated by the appropriate Secretary as depleted or endangered.*” *Id.* at 23 (emphasis added).

In 1972, the Senate passed its marine mammal conservation bill, S. 2871, which contained both a moratorium and a set of prohibitions. The Senate bill also adopted the concept of “depletion” and defined the term in a manner similar to that in the House bill, but also included any case where

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<sup>7</sup> Section 18.12(c) lists exceptions provided under subpart C of part 18, section 18.31, and section 18.32. The regulations governing importation of polar bear trophies taken during sport hunts in Canada are found at subpart D of part 18, and therefore are not included in the list of allowable exceptions.

the number of animals “is at such a level that . . . such species or stock is threatened with extinction.” Marine Mammal Protection Act of 1972, S. 2871, 92d Cong. § 3(1) (1972). The Senate bill then went on to include language in the moratorium similar to that currently found in section 101(a)(3)(B), but explicitly included both endangered and depleted species: “Except for scientific purposes . . . during the moratorium no permit may be issued for the taking of any marine mammal which is classified as belonging to an endangered species pursuant to the Endangered Species Conservation Act of 1969 [citation omitted] or has been designated by the Secretary as depleted, and no importation may be made of any such mammal.” *Id.* § 101(a)(3)(B) (emphasis added). The Senate Report emphasized that during the moratorium, except for research purposes, permits should not be issued for “any marine mammal classified as an endangered species or as depleted.” S. REP. NO. 92-863, at 14.

The Senate bill also included prohibition language similar to that now found at section 102(b) and nearly identical to that found in the House bill, except the House bill prohibited importation of any species or stock “which the Secretary has, by regulation published in the Federal Register, designated as a depleted or endangered species or stock” while the Senate bill applied to a species or stock “which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock or which has been listed as an endangered species under the Endangered Species Conservation Act of 1969.” *See* H.R. REP. NO. 92-707, at 3; S. 2871 § 102(b)(3). Thus, both bills specifically included both endangered species and depleted species in their prohibition language. The Senate Report explained that the prohibition on importation would include animals “taken from a species or stock which has been designated by the Secretary as depleted or from a species which is listed as endangered.” S. REP. NO. 92-863, at 15 (emphasis added). Ultimately a committee of conference reconciled the two bills, adopting provisions consistent with the intent of both bills. *See* Pub. L. No. 92-522, 86 Stat. 1027.

In 1981, Congress amended the definition of “depleted” to its current form and amended sections 101(a)(3)(B) and 102(b) to strike the references to endangered or threatened species. *See* Pub. L. No. 97-58, 95 Stat. 979. The Committee Report provided no explanation for the amendments to sections 101(a)(3)(B) or 102(b). But they noted regarding the amendment to the definition of “depleted” that “species that are listed under the [ESA] are, a fortiori, not at their optimum sustainable population and, therefore, should be considered depleted.” H.R. REP. NO. 97-228, at 16, *reprinted in* 1981 U.S.C.C.A.N. 1458, 1466. Therefore, although it is not clear why the specific references to endangered species were deleted from sections 101(a)(3)(B) and 102(b) in 1981, the legislative history shows that the House and the Senate have consistently intended for the limiting language in both provisions to apply to species or stocks that acquire their depleted status both through the agency designation process and through listing as an endangered or threatened species under the ESA.

Therefore, I conclude that the plain language and the legislative history of the MMPA demonstrate that Congress did not intend to allow the continued importation of sport-hunted polar bear trophies from Canada under section 104(c)(5) regardless of whether polar bears acquired depleted status through a section 115 determination or listing as a threatened species



under the ESA.<sup>8</sup>

C. Authorizing Importation of Polar Bear Parts From Canada Under Other Provisions of the MMPA

Although I conclude that the limiting language of sections 101(a)(3)(B) and 102(b) means that threatened polar bear trophies sport hunted in Canada cannot be imported into the United States under section 104(c)(5), polar bear parts may continue to be imported under one of the exceptions listed in sections 101(a)(3)(B) and 102(b), provided that all legal standards are met. Both sections specify that their restrictions for depleted species do not apply to permits for scientific research or for enhancement of the survival or recovery of the species or stock.<sup>9</sup> MMPA §§ 101(a)(3)(B), 102(b). Nothing in the legislative history indicates that Congress' addition of section 104(c)(5) in 1994 was intended to be the exclusive means of authorizing the importation of polar bear parts from Canada that also qualify under a different provision.

Thus, polar bears and polar bear parts from Canada may continue to be imported into the United States regardless of depleted status if the stringent requirements for research or enhancement are met.<sup>10</sup> A permit to authorize importation for scientific research may be issued if the "taking is required to further a bona fide scientific purpose." *Id.* § 104(c)(3)(A); *see also id.* § 3(22) (definition of "bona fide research"), 50 C.F.R. § 18.31 (regulations for issuance of scientific research permits, including issuance criteria). Permits for enhancing the survival or recovery of a species or stock may be issued, after consultation with the Marine Mammal Commission and

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<sup>8</sup> Nothing in this opinion affects the importation of sport-hunted polar bear trophies under section 104(c)(5)(D) of the MMPA. That paragraph provides a grandfather clause for issuance of permits for polar bears that were legally harvested in Canada prior to February 18, 1997. It specifically states that "The Secretary shall issue such permits without regard to . . . sections [101] and [102] of this title." *See* MMPA § 104(c)(5)(D). The sections referenced in the sentence contain the additional restrictions on importation of depleted species: sections 101(a)(3)(B) and 102(b). Therefore Congress' direction to issue such permits "without regard to" these restrictions provides a narrow exception to the general restrictions on importation of depleted species and allows the Service to issue permits and allow the importation of sport-hunted trophies from polar bears that were hunted prior to February 18, 1997, provided that all other requirements are met.

<sup>9</sup> Importation of marine mammals for purposes of public display may also be authorized by the Service under section 104(c)(2) of the MMPA. However, because public display is not listed as one of the allowable purposes under either section 101(a)(3)(B) or section 102(b), these provisions also preclude the importation of polar bears for public display now that the species is listed as threatened under the ESA.

<sup>10</sup> Polar bears are also listed under Appendix II of CITES, and therefore all CITES requirements would also have to continue to be met prior to importation of polar bears or polar bear parts into the United States. Prior to export from Canada, the Canadian government must issue a CITES export permit finding that the polar bear was not obtained in contravention of any Canadian law for the protection of fauna and flora and that the export would not be detrimental to the survival of the species. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, art. IV(2), 27 U.S.T. 1087, 993 U.S.T.S. 243. Although no CITES import permit would be issued by the Service, a valid Canadian CITES export permit must be presented upon import. *Id.* art. IV(4).

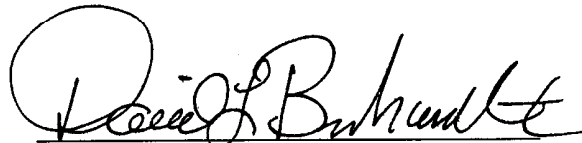


ESA § 17. Therefore, an ESA 4(d) rule plays no role in determining whether importation of sport-hunted polar bear trophies from Canada can be authorized under the MMPA and does not modify any of the requirements of the MMPA.

### III. CONCLUSION

I conclude that Congress did not intend to allow the importation of sport-hunted polar bear trophies from Canada under section 104(c)(5) of the MMPA if polar bears were listed as a threatened species or endangered species under the ESA. The Service may authorize the importation of polar bear parts from Canada under an MMPA scientific research permit or a permit for the enhancement of the survival or recovery of the species or stock if the importation meets all statutory and regulatory requirements.<sup>14</sup>

This opinion was prepared with the assistance of Holly Wheeler of the Branch of Fish and Wildlife, Division of Parks and Wildlife.



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<sup>14</sup> Nothing in the Executive Order on Facilitation of Hunting Heritage and Wildlife Conservation affects this conclusion. *See* Exec. Order No. 13443, 72 Fed. Reg. 46,537 (Aug. 20, 2007). This Executive Order addresses hunting opportunities on United States' public lands and calls for cooperation with State and tribal governments and other stakeholders. This legal opinion is limited to considering authorizing the importation of polar bears whose harvest and habitat management is regulated solely under Canadian law.