

Final Special Rule Under Section 4(d) of the ESA for the Polar Bear Questions and Answers

What are the three federal laws under which the polar bear is protected and managed?

When the polar bear was listed as a threatened species under the Endangered Species Act (ESA) on May 15, 2008 the Act became the third law providing protection and management for polar bears. Polar bears have been protected under the Marine Mammal Protection Act (MMPA) since its adoption in 1972 and under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as an Appendix II species since 1975.

Why was a special rule under section 4(d) of the Endangered Species Act done for the polar bear?

In some circumstance, the standard regulatory provisions under the ESA for a threatened species may not be the necessary and appropriate provisions for the conservation of that species. In those situations, the Secretary has the discretion under section 4(d) of the ESA to determine in a special rule those measures and prohibitions that are necessary and advisable for the conservation of that particular species. Because the polar bear was determined to be a threatened species under the ESA on May 15, 2008, the Secretary exercised his discretion under section 4(d) of the ESA to determine in a special rule those measures and prohibitions necessary and advisable for the conservation the polar bear.

What does the Special Rule do and when will it become effective?

For the polar bear, the special rule: (a) in most instances, adopts the conservation regulatory requirements of the MMPA and CITES for the polar bear as the appropriate regulatory provisions for the polar bear; (b) provides that incidental take of polar bears resulting from activities outside the bear's current range is not prohibited under the ESA; (c) clarifies that the Special Rule does not alter the Section 7 consultation requirements of the ESA; and (d) applies the standard ESA protections for threatened species when and activity is not covered by an MMPA or CITES authorization or exemption.

The Special Rule will take effect 30 days after publication in the *Federal Register*

Does the special rule affect the regulatory provisions of the MMPA and CITES?

This special rule does not affect any existing regulatory requirements under the MMPA, including incidental take restrictions, or CITES, regardless of whether the activity occurs inside or outside the current range of the polar bear.

What public involvement occurred prior to publication of this Special Rule?

The special rule was announced and made available as interim final special rule on May 15, 2008, concurrent with the announcement of the decision to list the polar bear as threatened under the ESA. The announcement opened a 60-day public comment period to all interested parties to submit comments that might contribute to the development of the final rule. As a result of the comments received, we made appropriate revision to the rule that further responded to the comments in the rule.

Does the Special Rule alter in any way the recovery planning provisions or the section 7 consultation provisions under the Endangered Species Act?

Nothing in this special rule changes the recovery planning provisions and consultation requirements under section 7 of the ESA, including adverse modification to any critical habitat that may be designated in the future.

Does the Special Rule change who qualifies to legally take polar bears for subsistence purposes?

Under section 10(e) of the ESA, there is an exemption for the subsistence harvest of species listed as threatened or endangered under the Act. This exception includes any Indian, Aleut, or Eskimo who is an Alaska Native as well as non-native permanent residents of an Alaskan native village. However, under section 101(b) of the MMPA the exemption for subsistence harvest is more narrowly provided to only an Indian, Aleut, or Eskimo who meets the requirements of being an Alaska native and who resides in a coastal village of Alaska.

How does the Special Rule address “take” of polar bear under the MMPA and the ESA?

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

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

How does this Special Rule address incidental take of polar bears?

Incidental take refers to the take of a protected species that is incidental to, but not the purpose of, an otherwise lawful activity. This special rule under section 4(d) of the ESA aligns the ESA incidental take provisions for polar bears with the incidental take provisions of the MMPA and its implementing regulations as those necessary and advisable to provide for the conservation of the species. The MMPA provisions have been in place for an extended period of time and have been found to be successful in regulating incidental take at the negligible impact standard of the MMPA. Persons holding incidental take authorizations issued under the MMPA will not be required to obtain an additional incidental take permit under the ESA.

The MMPA incidental take provisions were selected because they are the most stringent, requiring a finding of negligible impact to a stock of polar bears. 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.

The special rule also addresses take under the ESA that is incidental to an otherwise lawful activity that occurs outside the current range of the polar bear. Incidental take of polar bears that results from activities that occur outside of the current range of the species is not subject to the prohibitions found at 50 CFR 17.31. As a result of the rule, any incidental take of a polar bear caused by an activity that occurs outside of the current range of the species would not be a prohibited act under the ESA, regardless of whether a causal connection has been made between the conduct of the activity and effects on the species. However, the prohibitions against take, including incidental take, under the MMPA, will continue to apply regardless of where the activity occurs, as well as the consultations provisions under section 7 of the ESA.

Does this special rule ban importation of "sport-hunted" polar bear trophies?

The 4(d) rule does not change the status of polar bear trophy importation, which was banned when the listing occurred in May 15, 2008. Listing the polar bear as a threatened species under ESA automatically designated the bear as a depleted species under MMPA.

As a result, importation of sport hunted polar bear trophies was prohibited by MMPA when the ESA listing occurred, and remains unchanged by the special 4(d) rule.

How will the special rule affect existing activities?

The special rule does not affect the continued subsistence harvest or the production and sale of polar bear handicrafts by Alaska Natives. Those activities are already exempted under the ESA and the MMPA. The 4(d) rule will allow the continued noncommercial export of Native handicrafts made from polar bear parts and cultural exchange that would otherwise require a permit as a result of the polar bear listing under the ESA.

Onshore and offshore oil and gas exploration, development, and production activities in Alaska have been effectively governed for decades by the more stringent MMPA provisions. Under the 4(d) rule, the Department of the Interior will continue to primarily rely on the more stringent provisions of the MMPA to control that activity. However, the overlay of provisions of the ESA, such as the consultation requirements of section 7 of the ESA will still apply.

Section 7 of the ESA requires federal agencies to ensure that the activities they authorize, fund or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a federal action may affect a listed species or its critical habitat, the permitting or action agency must enter into consultation with the Service. This requirement remains unchanged with the special rule.

Can people still take a polar bear in defense of life, to protect another person's life, or for the welfare of individual animals?

Both the MMPA and the ESA provide comparable prohibitions against 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. Under this special rule, any activity that is authorized or exempted under the MMPA does not require additional authorization under the ESA.

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

In contrast, 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 (not just certain persons as described in the ESA) to deter a marine mammal from endangering personal safety.

Since the deterrent provisions under the MMPA do not allow injury to the bear or killing the bear and could, instead, prevent serious injury or death to the bear by preventing escalation of an incident to the point where the bear is killed in self-defense, the Service has adopted the MMPA provisions as the appropriate conservation provisions for the species under the ESA.

How will pre-Act polar bear specimens be managed or controlled under the special rule?

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.

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

This special rule does not affect requirements under CITES, therefore, qualifying polar bear specimens or parts continue to require pre-Convention documentation for any international movement.

The ESA provides an exemption for threatened species held in a controlled environment as of the date of publication and for certain antique articles. Polar bears held in captivity prior to the listing of the polar bear as a threatened species under the ESA and not used or subsequently held or used in the course of a commercial activity, and all items containing polar bear parts that qualify as antiques under the ESA, would qualify for these exemptions.

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.

Does the special rule change the citizen suit provisions of the ESA?

The ESA's citizen suit provision is unaffected by this special rule when the activity causing take is anywhere within the current range of the species. Any person or entity that is allegedly causing the incidental take of polar bears as a result of activities within the range of the species without appropriate MMPA authorization can be challenged through the citizen suit provision as that would be a violation of the ESA. 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. The citizen suit provision of the ESA also still applies to other activities such as non-incidental take, import, export, sale, and transport.

The MMPA does not have a citizen suit provision such as that found in Section 11 of the ESA. So while any unauthorized take caused by an activity outside the current range of the polar bear would be a violation of the MMPA, legal action against the person or entity causing the take could only be brought by the United States and not by a private citizen or citizen group. However, 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 as a challenge to a final agency action. Further, the Service will pursue any violation under the MMPA for incidental take that has not been authorized, and all MMPA penalties would apply.