

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb has a dark blue cap, and the bottom bulb has a light blue cap.

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Report RL34573

*Does the Endangered Species Act (ESA) Listing Provide
More Protection of the Polar Bear?*

Kristina Alexander, American Law Division

October 16, 2008

Abstract. On May 15, 2008, the Fish and Wildlife Service (FWS) listed the polar bear as a threatened species under the Endangered Species Act (ESA). Some have questioned the need to use the ESA to protect the bear, citing other treaties, statutes, and regulations that protect polar bears, primarily the Marine Mammal Protection Act (MMPA). This report discusses what additional protections are provided by the ESA listing that were not available before.

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CRS Report for Congress

Does the Endangered Species Act (ESA) Listing Provide More Protection of the Polar Bear?

Updated October 16, 2008

Kristina Alexander
Legislative Attorney
American Law Division

<http://wikileaks.org/wiki/CRS-RL34573>



Prepared for Members and
Committees of Congress

Does the Endangered Species Act (ESA) Listing Provide More Protection of the Polar Bear?

Summary

The polar bear has been protected under the Marine Mammal Protection Act (MMPA) since 1972, meaning that it is illegal to kill or harass the bear or to transport or trade its parts (with a few exceptions). The Endangered Species Act (ESA) also prohibits killing or harming listed species. Some ask: If it was already illegal to kill or harm the bear when the U.S. Fish and Wildlife Service placed the polar bear on the list of protected species on May 15, 2008, what protections were provided by the listing?

One example of increased protection is that being listed as a threatened species categorized the polar bear as a depleted species under the MMPA, meaning that polar bear trophies could no longer be imported from sport-hunts in Canada, under that MMPA exception. Approximately 80 bears a year are permitted for import under this program.

Perhaps the more significant protection offered by the ESA listing is habitat protection. The ESA has several provisions that function to protect not just the bear, but its habitat. While the MMPA has habitat protection as a purpose, it does not require any habitat conservation measures or punish habitat destruction. FWS has agreed to designate critical habitat by June 30, 2010, and so that environmental protection will be available then.

The citizen suit provision of the ESA could protect the bear, if litigants use its terms to challenge not just government actions but those by private parties. The ESA requires another system that might protect the bear — establishing a recovery plan — but the Fish and Wildlife Service has not completed the process. At a time a recovery plan is prepared, it would establish recovery goals and trigger congressional monitoring of the polar bear's progress.

Areas in which the ESA might have provided additional protections — such as for incidental takes or subsistence users — were eliminated by the Special Rules that accompanied the listing, which defined those protections as no more extensive than the MMPA. Had the polar bear been listed as an endangered species, rather than threatened, there would be no special rules, and arguably, the protection would have increased.

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Does the Endangered Species Act (ESA) Listing Provide More Protection of the Polar Bear?

On May 15, 2008, the Fish and Wildlife Service (FWS) listed the polar bear as a threatened species under the Endangered Species Act (ESA).¹ Some have questioned the need to use the ESA to protect the bear, citing other treaties, statutes, and regulations that protect polar bears, primarily the Marine Mammal Protection Act (MMPA).² This report discusses what additional protections are provided by the ESA listing that were not available before.

The Fish and Wildlife Service (FWS) considered existing regulatory protections before listing the polar bear. That is one of the five factors ESA requires when making a listing determination.³ FWS found that “potential threats to polar bears from direct take, disturbance by humans, and incidental or harassment take are, for the most part, adequately addressed through international agreements, national, State, Provincial or Territorial legislation, and other regulatory mechanisms.”⁴ However, the polar bear was listed because the bear’s primary habitat of sea ice was threatened with destruction due to global climate change. FWS found that the bear was likely to become endangered in the foreseeable future.

Protections

The ESA and the MMPA have similar provenances. Both appeared during the high tide of environmental legislation of the late 1960s and early 1970s. Both are written to protect species and their habitats. The Endangered Species Act has a broad purpose. It is intended to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species....”⁵

¹ 73 Fed. Reg. 28212 (May 15, 2008). P.L. 93-205; 16 U.S.C. §§ 1531-1544, as amended. For a detailed discussion of the polar bear listing process and related litigation, see CRS Report RL33941, *Polar Bears: Listing Under the Endangered Species Act*, by Eugene H. Buck, M. Lynne Corn, and Kristina Alexander.

² P.L. 92-522; 16 U.S.C. §§ 1361 *et seq.*, as amended.

³ ESA § 4(a)(1), 16 U.S.C. § 1533(a)(1).

⁴ 73 Fed. Reg. 28212, 28288 (May 15, 2008).

⁵ ESA § 2(b); 16 U.S.C. § 1531(b).

Similarly, the MMPA addresses both habitat and individual protection: “efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man’s actions.”⁶

Prohibitions

Both the MMPA and the ESA prohibit taking or transporting species protected under the acts.⁷ The ESA definition of *take* includes *harm*, which means killing or injuring wildlife including significant habitat disruption that impairs essential behavioral patterns.⁸ It also includes *harass*, meaning an action likely to injure by significantly disrupting normal behavioral patterns.⁹ Under the MMPA the term *take* includes “harass, hunt, capture, or kill, or attempt to do those activities.”¹⁰ *Harass* means acts that have “the potential to injure a marine mammal” (Level A harassment), or “has the potential to disturb a marine mammal ... by causing disruption of behavioral patterns” (Level B harassment). By being listed under both statutes, the bear enjoys the protections of both.

The ESA regulation has been interpreted to mean habitat disturbance by itself can function as a *take*, although courts have not uniformly agreed on this. The dispute centers on whether a species must be injured or killed before the statute has been violated. The Ninth Circuit has interpreted taking broadly as it applies to habitat modification, which includes Alaska, the bear’s U.S. habitat. The court has held that if an injury to wildlife occurs as a result of the habitat change, either in the past, present, or future, the definition’s injury requirement is satisfied.¹¹ This could be an advantage to polar bear protection, as the MMPA does not directly prohibit habitat destruction.

However, not all courts will find a take based on habitat destruction without an actual injury. For example, one district court said that an injury must occur before a prohibited taking may be found:

Although some of the comments specifically argued that habitat modification alone is a prohibited taking under section 9, in the opinion of the Service, Congress expressed no such intent.... In response to the broad misperception of the intent of the rule, an additional sentence has been added which is similar to the original definition’s language. This additional language makes it clear that

⁶ MMPA § 2(2), 16 U.S.C. § 1361(2).

⁷ ESA § 9, 16 U.S.C. § 1538(a)(1); MMPA § 101, 16 U.S.C. § 1371(a).

⁸ 50 C.F.R. § 17.3. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (upholding the regulation).

⁹ 50 C.F.R. § 17.3.

¹⁰ MMPA § 3(13), 16 U.S.C. § 1362(13).

¹¹ *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995); *see also* *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064 (9th Cir. 1996) (evidence of a threat of future harm to the threatened marbled murrelet supports a permanent injunction; evidence of past harm is not required), *cert. denied*, 117 S. Ct. 942 (1997).

habitat modification or degradation, standing alone, is not a taking pursuant to section 9.¹²

Special Rules

The ESA allows FWS to issue Special Rules for species listed as threatened where the agency deems it “necessary and advisable to provide for the conservation of such species.”¹³ They are known as Section 4(d) rules or Special Rules. Special Rules supplant the general regulations that apply to all threatened species, and can reduce those protections.¹⁴ The rules apply just to that one species. Special Rules were issued for the polar bear at the time of the listing.¹⁵ In essence, the polar bear Special Rules harmonize the requirements of the MMPA and the ESA, saying that compliance with the MMPA will be treated as compliance with the ESA. They are discussed in more detail later in this report.

Exceptions

Both statutes have exceptions to their prohibitions. Permits may be issued under either the ESA or the MMPA for taking a species for scientific purposes or to enhance the survival of the species.¹⁶ Both have provisions for incidental takes.¹⁷ Only the MMPA, however, provides permits to take marine mammals for public display, or for photography for educational or commercial purposes, and to import polar bear parts from bears sport-hunted in Canada.¹⁸ Some limits apply to those MMPA permits.

Sport-Hunted Polar Bears. Under Section 1371(a)(3)(B) of the MMPA, once a species is designated as depleted under the act, no permits may be issued for importing sport-hunt trophies. Being listed as a threatened species is one way a species is declared to be depleted. Accordingly, the ESA listing has eliminated the

¹² *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 11 F. Supp. 2d 529, 553 (D.N.J. 1998).

¹³ ESA § 4(d), 16 U.S.C. § 1533(d).

¹⁴ Several environmental groups have submitted comments to FWS stating that the Special Rules fail to “provide for the conservation of the species,” as is required by Section 4(d). *See* Letter from Center for Biological Diversity, NRDC, and Greenpeace, to FWS Public Comments Processing, “Comments on the Interim Final Section 4(d) Rule for the Polar Bear,” (July 14, 2008); Letter from Marine Mammal Commission to Lyle Laverty (July 14, 2008).

¹⁵ 73 Fed. Reg. 28305 (May 15, 2008). The rule was effective immediately as an “interim final rule” and public comments were accepted until July 14, 2008.

¹⁶ ESA § 10, 16 U.S.C. § 1539(a)(1)(A); MMPA § 101(a)(1), 16 U.S.C. § 1371(a)(1).

¹⁷ ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B); MMPA § 101(a)(2), 16 U.S.C. § 1371(a)(2)(for commercial fishing), and MMPA § 101(a)(5), 16 U.S.C. § 1371(a)(5)(for other activities).

¹⁸ MMPA § 101(a)(1), 16 U.S.C. § 1371(a)(1).

MMPA permit for importing polar bear trophies from Canada.¹⁹ Approximately 80 permits a year were issued under this program. That is one way in which the May 15 listing protected bears.

Subsistence Users. The two acts have different provisions regarding how Native Alaskans may take polar bears. It is not clear that the ESA listing provides additional protections for the polar bear. The FWS says that the MMPA rule is more restrictive and that it will treat compliance with that act as compliance with the ESA,²⁰ in essence neutralizing any additional protections the ESA may have provided. Both laws provide exemptions for Alaskan Natives to take species for subsistence purposes.²¹ The definition of subsistence users is more restrictive in the MMPA than the ESA. Both allow Indians, Aleuts, and Eskimos to kill polar bears for subsistence use. However, Section 10(e) of the ESA also allows non-native permanent residents of an Alaska native village to take for subsistence use.²² On the other hand, the ESA allows only subsistence use in its exception, while the MMPA also permits Alaskan natives to take polar bears for commercial sale of traditional handicrafts made of polar bear parts.²³

Incidental Takes in General. As stated above, both the ESA and the MMPA allow incidental takes of species protected under the acts.²⁴ There are differences between the two programs. Under the ESA, incidental takes are divided into two categories: Section 10 takes by citizens, which are authorized by incidental take permits; and Section 7 consultations for takes by federal agencies, which are authorized by incidental take statements.²⁵ The MMPA has two types of takes based on the severity of the action: incidental take authorizations (ITAs), also known as Letters of Authorization, for killing or injuring animals; and incidental harassment authorizations, for lesser takes.²⁶ All have statutory authorization, but the details are in the regulations.

¹⁹ Safari Club International has filed suit against FWS arguing that general prohibition regarding depleted species does not supersede the specific authorization for import permits. *See Safari Club International v. Kempthorne*, No. 1:08-cv-00881-EGS (D.D.C. filed May 23, 2008).

²⁰ 73 Fed. Reg. 28305, 28307 (May 15, 2008).

²¹ ESA § 10, 16 U.S.C. § 1539(e); MMPA § 101(b), 16 U.S.C. § 1371(b).

²² See 73 Fed. Reg. 28282, 28300 (May 15, 2008).

²³ MMPA § 101(b)(2), 16 U.S.C. § 1371(b)(2); 50 C.F.R. § 216.23.

²⁴ The terms are defined slightly differently by the regulations of each act. In the MMPA, *incidental, but not intentional, taking* is defined as “takings which are infrequent, unavoidable, or accidental.” 50 C.F.R. § 18.27(c). In the ESA *incidental taking* is defined as “any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 50 C.F.R. § 17.3 The ESA definition essentially leaves the definition of *incidental* to the dictionary, which, according to Webster’s New Collegiate Dictionary, means “occurring merely by chance or without intention; or being likely to ensue as a chance or minor consequence.”

²⁵ ESA § 10, 16 U.S.C. § 1539; ESA § 7, 16 U.S.C. § 1536.

²⁶ MMPA § 101, 16 U.S.C. § 1371.

Ordinarily, ESA incidental takes for threatened species are governed under regulations found at 50 C.F.R. § 17.22. An incidental take permit is issued. The rules require that applicants for such a permit include a description of the activity, the names and numbers of the species, and a habitat conservation plan (HCP). The HCP requires the applicant to describe the steps it will take to monitor, minimize, and mitigate any impacts to the threatened species; alternative actions and why they are not being used; and any other necessary and appropriate measures imposed by FWS.²⁷

Permission for an MMPA incidental take requires an applicant to submit data about the project and the impacted animals, and to suggest mitigation.²⁸ The agency is required to review the application using the best scientific evidence. The MMPA requires monitoring and reporting during the time the take is authorized.

Even though both statutes allow incidental takes, the steps to obtain those permits are different. Under the ESA, the incidental take permits are issued to an individual (which can be a corporation).²⁹ Under MMPA the incidental take authorizations are issued for an activity, instead. The language of the MMPA allows U.S. citizens to seek authorization for specified activities to allow the incidental take of “small numbers of marine mammals” for five-year periods, provided that the taking will have a negligible impact on such species and will not overdeplete animals available to subsistence users.³⁰ Similar permission may be provided for one-year periods for activities that incidentally *harass* small numbers of marine mammals.³¹ One difference in the incidental take permit under the ESA over the MMPA equivalent is that the ESA permit can be valid for decades, even 100 years. The MMPA authorization is valid for five-year periods, although it can be renewed. It is not clear if this difference protects the polar bear, however.

Special Rules for Polar Bears. The incidental take provisions of Section 17.22 ordinarily apply to threatened species, but the Section 4(d) rules for the polar bears alter this. In one section of the special rule, FWS establishes that the rules for taking polar bears will be the same under the ESA as they were under the MMPA. FWS stated: “if incidental take has been authorized under section 101(a)(5) of the MMPA, either by the issuance of an Incidental Harassment Authorization or through

²⁷ 50 C.F.R. § 17.32(b)(1)(iii)(C).

²⁸ 50 C.F.R. § 18.27(d).

²⁹ 50 C.F.R. § 17.22(b)(1). Person is defined in the ESA to include individuals, corporations, partnerships, and officers, employees, agents, departments, or instrumentalities of a federal, state, or local government. ESA § 3(13), 16 U.S.C. § 1532(13).

³⁰ MMPA § 101(a)(5)(A), 16 U.S.C. § 1371(a)(5)(A). *Citizens of the United States* is defined broadly to include corporations organized under U.S. law, and even federal, state, and local agencies. 50 C.F.R. § 18.27(c).

³¹ MMPA § 101(a)(5)(D), 16 U.S.C. § 1371(a)(5)(D).

incidental take regulations, we will not require an incidental take permit issued in accordance with 50 CFR 17.32(b).³²

FWS states that the standard under MMPA is more restrictive. It says that the definition of *negligible impact*, which is defined as “an impact that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species through effects on annual rates of recruitment or survival”³³ is “a more protective standard than 50 CFR 17.32’s requirement.”³⁴ Based on this representation by FWS, the ESA listing would not increase protections for the polar bear.

One advantage for applicants in having an MMPA incidental take authorization over the ESA equivalent, is that no HCP has to be negotiated and approved. The HCP application process can be involved — FWS recommends creating steering committees to develop the scope of the HCP and mitigation programs, and issued a handbook to guide applicants.³⁵ However, the HCP is one way in which the ESA protects habitat of listed species. An HCP is to provide for the restoration and protection of the listed species’ habitat.³⁶ No such plan is required by the MMPA, and no habitat protection or restoration is required, although applicants are required to discuss methods to make the least impact on the species and habitat. This difference appears to be an advantage to applicants, by saving substantial time in assembling a take application. It is not clear that it is to the polar bear’s advantage.

Section 7 Consultations

Based on the above, it seems that the protections under the two acts are nearly identical, and most differences in the prohibitions have been equalized. One area in which there is still a distinction between the acts is how federal agencies are authorized to take listed species. The ESA requires federal agencies taking actions that may harm a polar bear to consult with the FWS before committing significant resources toward that action.³⁷ This requirement is known as a Section 7 consultation.

The Section 7 consultation can be a time-consuming and litigious activity. A look at 51 cases since 2001 in which a court found FWS or NMFS did not comply with the ESA shows that 15 of those cases involved Section 7 consultations. It is a

³² 73 Fed. Reg. 28306, 28310 (May 15, 2008). Incidental take authorization is currently valid for oil and gas activities in the Beaufort Sea (and has been since 1993). The most recent ITA for Beaufort Sea was issued in 2006. 71 Fed. Reg. 43926 (August 2, 2006). An ITA for the Chukchi Sea is effective from June 11, 2008, to June 11, 2013. 73 Fed. Reg. 33212 (June 11, 2008).

³³ 50 C.F.R. § 18.27(c).

³⁴ 73 Fed. Reg. at 28311.

³⁵ FWS and NMFS, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (November 4, 1996), online at [<http://www.fws.gov/Endangered/pdfs/HCP/HCPBK3.PDF>].

³⁶ 50 C.F.R. § 17.3.

³⁷ ESA § 7, 16 U.S.C. § 1536.

primary reason given by the State of Alaska for its lawsuit against the FWS for listing the polar bear under the ESA.³⁸ Alaska fears that the oil and gas industry will forgo exploration and development in the state due to the extra requirements that the ESA imposes.³⁹

Under the ESA, federal agencies are required to consult with FWS or NMFS to ensure that federal actions are not likely to jeopardize the continued existence of a listed species or result in the adverse modification of habitat.⁴⁰ FWS indicated there was no interaction between a Section 7 consultation and the Section 4(d) rules: “requirements to authorize incidental take associated with a Federal action are set under section 7 of the ESA and would not be affected by this special rule.”⁴¹ Agencies are required to consult to see if their actions may jeopardize the continued existence of the polar bear.

The Special Rules address Section 7 consultations with regard to climate change. Some believed listing the polar bear under the ESA would allow challenges to actions that adversely affected climate change as takes against the polar bear.⁴² The theory was that projects that would increase greenhouse gas emissions, such as power plant authorizations, or automobile emission standards, would adversely affect the bear by contributing to habitat loss. FWS has treated this in the Section 4(d) rules, at 50 C.F.R. § 17.40(q)(4). That rule states that incidental takes apply only to activities within Alaska. Effects that occur “beyond the footprint of the action” would be considered 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.”⁴³ This applies to Section 7 consultations, and the incidental take permits discussed above.

As for existing MMPA incidental take authorizations for federal actions relating to the oil and gas industry, FWS has said that it believes the ITAs are harmonious with ESA consultation requirements and that no additional measure would be required:

to the extent that any Federal actions comport with the standards for MMPA incidental take authorization, we would fully anticipate 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 action(s) would augment protection and enhance agency management of the polar bear through the application of

³⁸ Governor Sarah Palin, *State to Sue Over Polar Bear Listing*, Press Release No. 08-076 (May 21, 2008).

³⁹ *Id.*

⁴⁰ ESA § 7, 16 U.S.C. § 1536(a)(2).

⁴¹ 73 Fed. Reg. at 28311 (May 15, 2008).

⁴² For details on this, see CRS Report RS22906, *Use of the Polar Bear Listing to Force Reduction of Greenhouse Gas Emissions: The Legal Arguments*, by Robert Meltz.

⁴³ 73 Fed. Reg. 28305, 28312 (May 15, 2008).

site-specific mitigation measures contained in authorization issued under the MMPA.⁴⁴

Similarly, FWS anticipates no additional administrative burden for federal actions related to commercial fisheries: “[we anticipate that] a consultation on commercial fishery activities in Alaska would result in a ‘no effect’ determination under section 7 of the ESA.”⁴⁵

Habitat and Critical Habitat

The polar bear was listed as a threatened species because the loss of its habitat made it likely to become endangered. Habitat protection, therefore, is significant to the bear. The United States committed by treaty to protect the habitat of the polar bear. In 1973, the United States, Canada, Denmark, Norway and the former Union of Soviet Socialist Republics entered an international agreement to protect polar bears.⁴⁶ The United States ratified the Agreement on the Conservation of Polar Bears in 1976. In addition to prohibiting the take of polar bears, the Agreement also requires actions to protect their habitat. Article II requires the Parties to:

- take appropriate action to protect the ecosystem of which polar bears are a part;
- give special attention to habitat components such as denning and feeding sites and migration patterns; and
- manage polar bear populations in accordance with sound conservation practices based on the best available scientific data.

In addition to the international obligation to protect polar bear habitat, the ESA prohibits habitat destruction that injures an animal, and requires incidental takes to develop plans to protect habitat. Additional habitat protections under the ESA apply at a time critical habitat is designated for a species. No critical habitat has been designated for the polar bear.

The ESA defines critical habitat as “the specific areas within the geographical area occupied by the species, at the time it is listed ... on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.”⁴⁷ It also includes areas *outside* the geographical area occupied by the species if those areas are deemed essential for the conservation of the species. There is no similar provision in the MMPA.

The ESA requires FWS to designate areas of critical habitat, and to make that designation based on the best scientific data available, after taking into consideration

⁴⁴ 73 Fed. Reg. 28305, 28311 (May 15, 2008).

⁴⁵ 73 Fed. Reg. 28305, 28312 (May 15, 2008).

⁴⁶ Agreement on the Conservation of Polar Bears, T.I.A.S. No. 8409, 27 U.S.T. 3918 (November 15, 1973).

⁴⁷ ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A).

the economic impact.⁴⁸ Critical habitat has not been designated for every species, however.⁴⁹ The advantage to a species of having critical habitat designated is that the Section 7 consultation for federal agencies requires them to ensure their actions do not destroy or adversely modify critical habitat in addition to not jeopardizing species.⁵⁰

Beginning with its 90-day finding for the polar bear in 2006, FWS has said that it would make its critical habitat designation separately from the listing.⁵¹ The Center for Biological Diversity sued FWS for not designating critical habitat at the time of listing.⁵² Pursuant to a settlement agreement, FWS agreed to make its final designation of critical habitat by June 30, 2010.⁵³

Recovery Plans

A recovery plan provides recovery goals for listed species, and is required by the ESA.⁵⁴ FWS is required to produce a plan with public input (which may include teams to prepare the plan) that identifies by specific, measurable criteria when a species has recovered, showing when it can be removed from listing. A recovery plan is intended to provide for the conservation and survival of listed species, giving priority to those species most likely to benefit from such a plan “particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.”⁵⁵ It would appear the polar bear would be such a priority.

A recovery plan is one of the areas under the ESA where expense is considered — a recovery plan must provide estimates of the time and money needed to achieve

⁴⁸ ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2).

⁴⁹ According to FWS, as of July 3, 2008, it has listed between 1927 and 1985 species (depending on which FWS website is used), and designated critical habitat for 508 of those species. (Compare FWS websites at [http://ecos.fws.gov/tess_public/CriticalHabitat.do?nmfs=1] with [http://ecos.fws.gov/tess_public/SpeciesReport.do] and [http://ecos.fws.gov/tess_public/SpeciesReport.do].) In some cases the agency can determine that the public designation of habitat could put the species in danger, but that is an exception to the rule of naming the area.

⁵⁰ ESA § 7, 16 U.S.C. § 1536(a)(2).

⁵¹ 71 Fed. Reg. 6745, 6746 (February 6, 2006) (“If we determine in our 12-month finding that listing the polar bear is warranted, we will address the designation of critical habitat in a subsequent proposed rule”).

⁵² Center for Biological Diversity v. Kempthorne, No. C 08-1339 CW (N.D. Cal. 2008).

⁵³ Center for Biological Diversity v. Kempthorne, No. C. 08-1339 CW (N.D. Cal. *stipulated partial settlement agreement filed* October 6, 2008).

⁵⁴ ESA § 4(f), 16 U.S.C. § 1533(f). Approximately two-thirds of the listed species have such plans. See [http://ecos.fws.gov/tess_public/Boxscore.do].

⁵⁵ ESA § 4(f)(1)(A), 16 U.S.C. § 1533(f)(1)(A).

the plan's goal.⁵⁶ FWS and NMFS are required to report to Congress every two years on recovery plans prepared and the status of the species in those plans. While the MMPA has a reporting requirement in conjunction with monitoring efforts under the ITAs, there is no similar requirement for identifying any success in protecting species.

In some instances a recovery plan is issued at the time of the listing. No plan for the polar bear has been issued. Upon completion of a plan, Congress would receive biennial updates on the polar bear's status.

Citizen Suits

The ESA has an enforcement provision that the MMPA does not. The ESA allows citizens to take action against other citizens to halt violations of the act.⁵⁷ The citizen suit provision could provide additional protection for the polar bear, if citizen enforcers use it. It allows "any person" to give 60 days' written notice of a violation to an alleged violator and the FWS. If the FWS or the United States has not begun an action to redress the violation or otherwise punish the violator by then, a civil suit may be filed to enjoin the violation. In practice, however, the citizen suit provision primarily is used against federal agencies and very rarely against anybody else. Additionally, the Special Rule's limitation of takings to actions within Alaska, combined with the geographical remoteness of polar bears, may inhibit this tool's use. Citizens may bring suit for violations of the MMPA only against a federal agency by using the Administrative Procedure Act (APA).

Difference If Listed As Endangered

There would be slightly different protections if the polar bear had been listed as an endangered species, rather than a threatened one. However, as it was already forbidden to kill, harm, or harass the bear under the MMPA, an endangered status would not improve that protection. Primarily, with an endangered listing, there would be no Special Rules. Without the Special Rules, there would be no homogenization of the incidental take permission. Incidental takes would require development of HCPs, focusing more attention on habitat restoration and protection. Takes of the polar bear would not be limited to actions in Alaska, and takings based on climate change could be more of a factor. Also, without the Special Rules, there would not be an exception allowing the killing of polar bears for commercial sale of handicrafts by subsistence users.

The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) provides additional trade protections for those species threatened with extinction, known as Appendix I species. The polar bear is listed as an Appendix II species, meaning that it does not have all of the protections available to an Appendix I species. A country cannot unilaterally place a species on those lists. However, the United States' listing the polar bear as being in danger of extinction

⁵⁶ ESA § 4(f)(1)(B)(iii), 16 U.S.C. § 1533(f)(1)(B)(iii).

⁵⁷ ESA § 11(g), 16 U.S.C. § 1540(g).

would likely be persuasive in changing the bear's status from Appendix II to Appendix I.

Conclusion

The polar bear was already protected under the MMPA before the FWS listed it as threatened under the ESA, but some additional protections inure to the polar bear's benefit. Being listed as a threatened species meant permits for importing sport-hunted polar bear parts from Canada were discontinued — a practice that permitted approximately 80 bears per year for import. The ESA protects the bear and its habitat, meaning that some protection may accrue if habitat destruction is prosecuted. The citizen suit provision is a tool that could be used to halt activities that are harming the bear, but it is seldom used to challenge anything but government actions. Otherwise, there appears to be little additional protection provided by the listing.

While there may have been some differences between the incidental take permissions under the ESA versus the MMPA (and FWS says the MMPA is stricter), those differences were ended by the Special Rules that declared compliance under the MMPA would be evidence of compliance with the ESA. The Special Rules also declared that the MMPA rules for subsistence users apply, ending any distinction that might have protected the polar bear had just the ESA been used. Finally, the Special Rules limited takes to actions occurring in Alaska, circumscribing the scope of citizen suits. Critical habitat designation and recovery plans are two areas in which the ESA provides protection, but the MMPA does not. However, as neither was prepared at the time of the listing, the potential for such additional protections remains unaddressed.