Example 19. Assume the same facts as stated in *Example 18,* except that instead of making a deposit of $h into B, Y enters into a guarantee agreement with B. The guarantee agreement provides that if X defaults on the loan, Y will repay the balance due on the loan to B. B was unwilling to make the loan to X in the absence of Y's guarantee. X must use the proceeds from the loan to construct the new child care facility. At the same time, X and Y enter into a reimbursement agreement whereby X agrees to reimburse Y for any and all amounts paid to B under the guarantee agreement. The signed guarantee and reimbursement agreements together constitute a ''guarantee and reimbursement arrangement.'' Y's primary purpose in entering into the guarantee and reimbursement arrangement is to further Y's educational purposes. No significant purpose of the guarantee and reimbursement arrangement involves the production of income or the appreciation of property. The guarantee and reimbursement arrangement significantly furthers the accomplishment of Y's exempt activities and would not have been made but for such relationship between the guarantee and reimbursement arrangement and Y's exempt activities. Accordingly, the guarantee and reimbursement arrangement is a program-related investment.

(c) *Effective/applicability date.* Paragraph (b), *Examples 11* through *19* of this section will be effective on the date of publication of the Treasury decision adopting these examples as final regulations in the **Federal Register**. Taxpayers may rely on paragraph (b), *Examples 11* through *19* of this section before these proposed regulations are finalized.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–9468 Filed 4–18–12; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 08–150; RM–11390; DA 12–512]

Radio Broadcasting Services; Asbury and Maquoketa, IA, and Mineral Point, WI

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: The Audio Division dismisses the petition for rule making filed by KM Radio of Independence, LLC, proposing the allotment of Channel 238A at Mineral Point, Wisconsin, and the substitution of reserved Channel *254A for reserved vacant Channel *238A at Asbury, Iowa, 73 FR 50,297, and terminates the proceeding.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 08–150, adopted April 2, 2012, and released April 2, 2012. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, (800) 378–3160, or via the company's Web site, *www.bcpiweb.com.* The *Report and Order* is not subject to the Congressional Review Act, and therefore the Commission will not send a copy of it in a report to be sent to Congress and the Government Accountability Office, *see* U.S.C. 801(a)(1)(A).

Federal Communications Commission.

Nazifa Sawez,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 2012–9401 Filed 4–18–12; 8:45 am]

BILLING CODE 6712–01–P

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

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; availability of draft environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to amend the regulations at 50 CFR part 17, 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*). The Secretary has the discretion to prohibit by regulation with respect to the polar bear any act prohibited by section 9(a)(1) of the ESA.

DATES: We will consider comments we receive on or before June 18, 2012. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by June 4, 2012.

ADDRESSES:

Document availability: You can view this proposed rule and the associated draft environmental assessment on *http://www.regulations.gov* under Docket No. FWS–R7–ES–2012–0009.

Written comments: You may submit comments on the proposed rule and associated draft environmental assessment by one of the following methods:

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–R7–ES–2012–0009; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203; or
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R7–ES–2012–0009.

Please indicate to which document, the proposed rule or the draft environmental assessment, your comments apply. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the *Public Comments* section below for more information).

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 Proposed Rule

In response to litigation against the Service challenging our December 16, 2008 final 4(d) special rule for the polar bear, the District Court for the District of Columbia (Court) found that although the final 4(d) special rule for the polar bear was consistent with the ESA, the Service violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act by failing to conduct a NEPA analysis when it promulgated the final 4(d)

special rule. 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 in the process of promulgating a new final 4(d) special rule with appropriate NEPA analysis. Through the NEPA process, the Service will fully consider each of the alternatives.

What is the effect of this proposed rule?

Neither the 2008 listing of polar bear as a threatened species under the ESA nor the 2011 designation of critical habitat would be affected if this proposed rule is finalized. On the ground conservation management of the polar bear under both the May 15, 2008 interim 4(d) and the December 16, 2008 final 4(d), are substantively similar; this proposed 4(d) special rule would reinstate the regulatory parameters afforded the polar bear from December 16, 2008 until November 18, 2011. Therefore, management of the species, as well as requirements placed on individuals, local communities, and industry, within the range of the polar bear, would not change if this proposed 4(d) special rule is finalized.

The Basis for Our Action

Under section 4(d) of the ESA, the Secretary of the Interior has discretion to issue such regulations as he deems necessary and advisable to provide for the conservation of the 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, the Service has developed general prohibitions for threatened species in 50 CFR 17.31 and exceptions to those prohibitions in 50 CFR 17.32. The proposed 4(d) special rule in most instances adopts the existing conservation regulatory requirements under the Marine Mammal Protection Act of 1972, as amended (MMPA), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as the appropriate regulatory provisions for this threatened species. If an activity is not authorized or exempted under the MMPA or CITES, and that activity would result in an act otherwise prohibited under the general prohibitions of the ESA for threatened species, then the general prohibitions at 50 CFR 17.31 would apply. We would require a permit for such an activity as specified in our regulations. In addition, this proposed 4(d) special rule would provide that any incidental take of polar bears that results from activities that occur outside of the current range of the species is not a prohibited act under the ESA. This proposed 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 the current range of the polar bear. Further, nothing in this proposed 4(d) special rule affects the consultation requirements under section 7 of the ESA.

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Suitability of the proposed rule for the conservation, recovery, and management of the polar bear.

(2) Additional provisions the Service may wish to consider to conserve, recover, and manage the polar bear.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by email or fax, or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On May 15, 2008, the Service published a final rule listing the polar bear (*Ursus maritimus*) as a threatened species throughout its range under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (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 by regulation with respect to the polar bear certain acts prohibited in section 9(a)(1) of the ESA (73 FR 28306); this interim 4(d) special rule was later finalized 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 U.S. District Court for the District of Columbia (D.C. District Court). On June 30, 2011, the D.C. District Court upheld the Service's decision to list the polar bear as a threatened species under the ESA.

On October 17, 2011, the D.C. District Court found that although the final 4(d) special rule was consistent with the ESA, the Service violated the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) 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 the final 4(d) special rule vacated and set aside pending resolution of a timetable for NEPA review. On November 18, 2011, the Court resolved the schedule for NEPA review and vacated the December 16, 2008 final 4(d) special rule (*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 December 16, 2008 final 4(d) special rule for the polar bear (73 FR 76249), the Court further ordered that, in its place, the interim 4(d) special rule for the polar bear published on May 15, 2008 (73 FR 28306), shall remain in effect until superseded by the new final 4(d) special rule for the polar bear to be published in the **Federal Register**. On January 30, 2012, the Service published in the **Federal Register** (77 FR 4492) a document revising the Code of Federal Regulations to reflect the November 18, 2011 court order.

Current Service Process

The Service is conducting a NEPA analysis and has prepared a draft environmental assessment (EA) to address the determinations made by the Court. The NEPA analysis accomplishes three goals: (1) Determine if any action, or the absence of action, will have significant environmental impacts; (2) address any unresolved environmental issues; and (3) provide a basis for a decision on a proposal. The draft EA

and this proposed 4(d) special rule are being published concurrently; both are available for a 60-day period for public review and comment (see the **DATES** section, above).

The Service will analyze and respond to all substantive comments received on both the draft EA and proposed 4(d) special rule before issuing a final 4(d) special rule. Public participation is an important part of the NEPA process. Thus, while we now propose a particular version of the 4(d) special rule, we retain flexibility to select among the four alternatives analyzed in the EA when issuing the final 4(d) special rule.

Applicable Laws

In the United States, the polar bear is protected and managed under three laws: the ESA; the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*); and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES; 27 U.S.T. 1087). 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. The ESA is implemented through regulations found in the Code of Federal Regulations (CFR). When a species is listed as endangered, certain actions are prohibited under section 9 of the ESA, as specified in § 17.21 of title 50 of the CFR (50 CFR). These include, among others, 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 of the Interior (Secretary) was given the discretion to issue such regulations as he deems 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 § 17.32, permits may be issued to allow persons to engage in otherwise prohibited acts.

Alternately, for other threatened species, the Service develops specific prohibitions and exceptions that are tailored to the specific conservation needs of the species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into a special rule under section 4(d) of the ESA, but the 4(d) special rule will also include provisions that are tailored to the specific conservation needs of the threatened species and which may be more or less restrictive than the general provisions at 50 CFR 17.31.

The MMPA was enacted to protect and conserve marine mammal species, or population stocks of those species, so that they continue to be significant functioning elements in the ecosystem of which they are a part. Consistent with this objective, management should have a goal to maintain or return marine mammals to their optimum sustainable population. The MMPA provides a moratorium on importation and the issuance of permits for the 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.

Authorizations and exemptions from these prohibitions are available for certain specified purposes. Any marine mammal listed as endangered or threatened under the ESA automatically has depleted status under the MMPA, which adds further restrictions.

Signed in 1973, CITES protects species at risk from international trade and is implemented by more than 170 countries, including the United States. The 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. Under CITES, a species is listed at one of three levels of protection, each of which have 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 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 CITES documents cannot be issued until specific biological and legal findings have been made. The CITES does not itself 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 Proposed Special Rule Under Section 4(d) of the ESA 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 proposed 4(d) special rule, in most instances, 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, would be unaffected by a proposed 4(d) special rule.

Under this proposed 4(d) special rule, if an activity is authorized or exempted under the MMPA or CITES, we would not require any additional authorization under the ESA regulations for that activity. 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, the prohibitions of § 17.31 would apply, and permits would

be required under 50 CFR 17.32 of our ESA regulations. The proposed 4(d) special rule would further provide that any incidental take of polar bears resulting from activities that occur outside of the current range of the species would not be a prohibited act under the ESA.

Neither the proposed 4(d) special rule nor any of the identified alternatives would 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 draft EA analyzing options for a possible special rule under section 4(d) of the ESA for the polar bear, we considered four alternatives. These were:

Alternative 1. ''No Action''—No 4(d) Rule. Under the no action alternative, no 4(d) special rule would be promulgated for polar bear conservation under the ESA. Thus, all prohibitions and protections for threatened wildlife stipulated under 50 CFR 17.31 and 17.32, which incorporate in large part the provisions of § 17.21would apply to the polar bear due to its ''threatened'' ESA listing status.

Alternative 2. (Proposed Alternative)—Final 4(d) Special Rule published in the ***Federal Register*** *on December 16, 2008.* This 4(d) special rule, in most instances, adopts the existing conservation regulatory requirements under the MMPA and CITES as the appropriate regulatory provisions for the polar bear. Nonetheless, if an activity is not authorized or exempted under the MMPA or CITES and would result in an act that would be otherwise prohibited under the general prohibitions under the ESA 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 4(d) special rule provides that any incidental take of polar bears resulting from an activity that occurs *outside the current range of the polar bear* is not a prohibited act under the ESA. This 4(d) special rule does not affect any existing requirements under the MMPA, including incidental take restrictions, or CITES, regardless of whether the activity occurs inside or outside the range of the polar bear. Further, nothing in this 4(d) special rule affects the consultation requirements under section 7 of the ESA.

Alternative 3. Interim 4(d) Special Rule published in the ***Federal Register*** *on May 15, 2008.* This alternative is similar to this proposed 4(d) special rule, in that both versions of the 4(d) special rule adopt the existing conservation regulatory requirements under the MMPA and CITES as the appropriate regulatory provisions for the polar bear.

There is only one substantive difference between this proposed 4(d) special rule and the interim 4(d) special rule published on May 15, 2008. The interim 4(d) special rule provides that any incidental take of polar bears resulting from activities that occur *outside Alaska* is not a prohibited act under the ESA. Thus, the geographic range of incidental take exemption under the ESA differs between ''outside Alaska'' (the interim 4(d) special rule) and ''outside the current range of the polar bear'' (this proposed 4(d) special rule).

This interim 4(d) special rule has been in effect since the Court ruled to vacate the Service's final 4(d) special rule on November 18, 2011.

Alternative 4. Final 4(d) Special Rule, but without the provisions of paragraph 4. This alternative is similar to the proposed and interim 4(d) special rules, in that all three versions of the 4(d) special rule adopt the existing conservation regulatory requirements under the MMPA and CITES as the appropriate regulatory provisions for the polar bear.

However, unlike the proposed and interim 4(d) special rules, this alternative does not contain a provision to expressly exempt any geographic areas from the prohibitions in § 17.31 of the ESA implementing regulations regarding incidental taking of polar bears.

Necessary and Advisable Finding and Rational Basis Finding

Promulgation of Alternatives 1, 2, and 4, would revise, while Alternative 3 would uphold our January 30, 2012 final 4(d) special rule at 50 CFR 17.40 (q) by adopting, in most instances, the conservation provisions of the MMPA and CITES as the appropriate regulatory provisions for this threatened species. These MMPA and CITES provisions regulate incidental take, intentional take (including 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 (this proposed 4(d) special rule) and Alternative 3, would further provide that any incidental take of polar bears resulting from activities that occur outside a certain prescribed geographic area is 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.

In the following sections, we provide explanation of how the various provisions of the ESA, MMPA, and CITES interrelate and how the regulatory provisions of a 4(d) special rule are necessary and advisable to provide for the conservation of the polar bear. We also explain our discretionary decision to prohibit by regulation with respect to the polar bear certain acts prohibited in section 9(a)(1) of the ESA.

Definitions of Take

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.'' 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 identifiable wildlife: actual death or injury. As noted by Supreme Court

Justice O'Connor in her concurring opinion in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 708–14 (1995), application of the definition of ''harm'' requires actual, as opposed to hypothetical or speculative, death or injury to identifiable animals. Thus, the definition of ''harm'' under the ESA requires demonstrable effect (i.e., actual injury or death) on actual, individual members of the species.

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; Pub. L. 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(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 actual, individual 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 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 definition of ''take'' under the ESA 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 a marine mammal or not (i.e., is incidental). Incidental take refers to the take of a protected species that is incidental to, but not the purpose of, an otherwise lawful activity. Under Alternative 2 (this proposed 4(d) special rule), Alternative 3, and Alternative 4, incidental take provisions of the MMPA and its implementing regulations would be in effect. If a person or entity lacked authorization for MMPA incidental take, then ESA take prohibitions would also apply, except that the geographic scope of incidental take prohibitions under the ESA would be limited as detailed in paragraph 4 of the special rules constituting Alternatives 2 or 3. This arrangement is necessary and advisable to provide for the conservation of the species. The Secretary has the discretion to prohibit by regulation with respect to the polar bear any act prohibited under section 9(a)(1) of the ESA.

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.'' 50 CFR 402.02.

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 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. These ESA requirements are not altered by Alternatives 2, 3, and 4 regardless of the geographic area where the action occurs.

As a result of consultation, 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 may 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 and 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 authorization is in place, the Service will also issue a statement 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. Nothing in Alternatives 2, 3, and 4 would affect the issuance or contents of the biological opinions for polar bears or the issuance of an incidental take statement, although incidental take resulting from activities that occur outside of the geographic range specified in paragraph 4, as provided in Alternatives 2 and 3, would not be subject to the taking prohibition of the ESA.

The 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 grant incidental take authorization. This authorization would include terms and conditions deemed necessary or appropriate to insure minimization of take, as well as monitoring and reporting requirements. Incidental take restrictions both inside and outside the current range of the polar bear that would apply under Alternative 2 are described below.

Activities Within Current Range

Under Alternative 2 (this proposed 4(d) special rule), if incidental take has been authorized under section 101(a)(5) of the MMPA for take of a polar bear by commercial fisheries, or by the issuance of an incidental harassment authorization (IHA) or through incidental take regulations for all other activities, we would not require an additional incidental take permit under the ESA issued in accordance with 50 CFR 17.32(b) for non-Federal parties because we have determined that the MMPA restrictions are more protective or as protective as permits issued under 50 CFR 17.32(b). In addition, while an incidental take statement under section 7 of the ESA would be issued, any take would be covered through the MMPA authorization. However, any incidental take that does occur from activities within the current range of the polar bear 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. Further, the ESA's citizen suit provision would be unaffected by this proposed special rule anywhere within the current range of the species to address alleged unlawful incidental take. 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 could be challenged through this provision as that would be a violation of 50 CFR 17.31. The ESA citizen suit provision would also remain 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. Prohibitions on direct take and commercial activities are also applicable without regard to the location of the direct take or commercial activity.

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 incidental harassment authorization (IHA) under section 101(a)(5)(D) of the MMPA. The IHAs 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 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 effecting 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; and (2) for Federal actions, that the activity is not likely to jeopardize the continued existence of the species (50 CFR 17.32).

The length of the authorizations under the MMPA are limited to 1 year for IHAs, 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 re-initiation 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. Therefore, the incidental take standards under the MMPA, because of their stricter standards and mandatory periodic re-evaluation, 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, Alternatives 2, 3, and 4 would adopt the MMPA standards for authorizing Federal and non-Federal incidental take as necessary and advisable to provide for the conservation of the polar bear and would by regulation prohibit with respect to polar bears certain acts prohibited in section 9(a)(1) of the ESA. Without a 4(d) special rule, the MMPA standards would continue to apply, as nothing in a 4(d) special rule affects MMPA protections in any way, but an additional ESA process to authorize the incidental take would need to be undertaken as well.

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 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 throughout its range 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. Under any of the three considered alternatives of a proposed special rule, any incidental take that could not be authorized under section 101(a)(5) of the MMPA would remain subject to the ESA prohibitions of 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 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 and in compliance with all measures under that 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 regulations 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 they move 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 specific activity. For example, we may require trained marine mammal observers for offshore activities; pre-activity surveys (e.g., aerial surveys, infra-red 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.

The Service also issues intentional take authorizations under sections 101 (a)(4)(A), 109(h), and 112(c) of the MMPA, which can authorize citizens to take polar bears by harassment (nonlethal deterrence activities) for the protection of both human life and polar bears while conducting activities in polar bear habitat. The intent of the interaction plan and training activities is to allow for the early detection and appropriate response to polar bears that may be encountered during operations, which minimizes the potential for injury or lethal take of bears in defense of human life. The Service provides guidance and training regarding the appropriate harassment response necessary for polar bears. 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). Intentional take authorizations have been issued to the oil and gas industry, the mining industry, local North Slope communities, scientific researchers, and the military. These MMPA-specific authorizations have been successful at protecting both communities and polar bears for many years.

Activities Outside Identified Geographic Area

Alternative 2 (this proposed 4(d) special rule) and Alternative 3 include a separate provision (paragraph (4)) that addresses take under the ESA that is incidental to an otherwise lawful activity that occurs outside a particular geographic range. Under paragraph (4) of Alternative 2, incidental take of polar bears that results from activities that occur outside of the current range of the species would not be subject to the prohibitions found at 50 CFR 17.31. In contrast, paragraph (4) of Alternative 3 refers to the State of Alaska.

Under paragraph (4) of Alternative 2, any incidental take that results from activities within the current range of the polar bear would be 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 would not require additional ESA authorization.

Prohibiting incidental take of polar bears from activities that occur within the current range of the species, under 50 CFR 17.31, would contribute to conservation of the polar bear. The areas within the current range of the polar bear include land or water that is subject to the jurisdiction or sovereign rights of the United States (including portions of lands and inland waters of the United States, the territorial waters of the United States, and the United States' Exclusive Economic Zone or the limits of the continental shelf) and the high seas. Thus, Alternative 2 more adequately provides for the protection and conservation of the polar bear than does Alternative 3, because it more clearly includes all areas within the range of the polar bear that should be subject to the ESA, rather than just the ''State of Alaska,'' which is more limited geographically and is not biologically based.

Any incidental take of a polar bear caused by an activity that occurs outside of the geographic range specified in paragraph (4) of Alternative 2 would not be a prohibited act under the ESA. However, 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.

Any incidental take caused by an activity outside the geographic range specified in paragraph (4) of Alternative 2, 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.

Any individual, business, State government, or Federal entity subject to the jurisdiction of the United States that is likely to cause the incidental taking of a polar bear under the MMPA, 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 and will not have an unmitigable adverse impact on the availability of the species for subsistence use take. 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 Alternative 2 affects section 7 consultation requirements outside the geographic range specified in the special rule. Any Federal agency that intends to engage in an agency action within the United States, its territorial waters, or on the high seas that ''may affect'' polar bears, or their habitat, must comply with 50 CFR part 402, regardless of whether the agency action is to take place within the current range of the polar bear. This includes, but is not limited to, intra-Service consultation on any MMPA incidental take authorization proposed for activities located outside the geographic range specified in paragraph (4) of this proposed special rule. Paragraph (4) would 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 amount or extent 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, provided that the incidental taking has already been authorized under the MMPA, as required under section 7(b)(4) of the ESA. The Service would, 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.

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 subject to the 60-day notice requirement. 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 geographic range specified in paragraph (4) of Alternative 2 would be a violation of the MMPA, if the proposed rule is finalized, 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 unless other statutory bases for jurisdiction, such as the Administrative Procedure Act, are available. The Service finds the provisions of paragraph (4) to be consistent with the conservation of the polar bear because: (1) The potential for citizen suits alleging take resulting from activities outside of the range of the polar bear is significant; (2) the likelihood of such suits prevailing in establishing take of polar bears is remote, and (3) defending against such suits will divert available staff and funding away from productive polar bear conservation efforts.

Operation of the citizen suit provision remains unaffected for any restricted act other than incidental take, such as direct 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 would be unaffected by Alternative 2, when the activity causing incidental take is anywhere within the geographic range specified in paragraph (4). Any person or entity that is allegedly causing the incidental take of polar bears as a result of activities within the geographic range specified in paragraph (4) of Alternative 2 without appropriate MMPA authorization could 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 would also remain available for alleged failure to consult under section 7 of the ESA regardless of where the agency action occurs within the United States, its territorial waters, or on the high seas. Further, any incidental taking caused by an activity outside the geographic range specified in paragraph (4) of Alternative 2 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. Subchapter II), which allows challenges to final agency actions.

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

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) 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 taken in violation of the MMPA; and 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. 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. As a general matter, unauthorized import of a marine mammal is prohibited subject to penalties under Sections 101(a) and 105(a)(1) of the MMPA.

The MMPA then provides specific exceptions to these prohibitions under which certain acts are allowed 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 a 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 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 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. Furthermore, section 117 of the MMPA requires that stock assessments be conducted for each marine mammal stock which occurs in waters under U.S. jurisdiction. Each stock assessment will describe population estimates and trends, describe annual human-caused mortality of the stock by source, and describe the potential biological removal level for the stock which is derived using a recovery factor.

Further, all permits issued under the MMPA must be consistent with the purposes and policies of the Act, which includes maintaining or returning marine mammals to their optimum sustainable population. Also, now that 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 § 17.32 allows issuance of permits for zoological exhibition and educational purposes. As the MMPA does not contain a provision similar to a special rule under section 4(d) of the ESA, the more restrictive requirements of the MMPA apply (16 U.S.C. 1543).

Thus, the existing statutory provisions of the MMPA allow fewer types of activities than does 50 CFR 17.32 for threatened species, and the MMPA's standards are generally stricter for those activities that are allowed than 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. We also prohibit by regulation with respect to polar bears certain acts prohibited in section 9(a)(1) of the ESA. Therefore, under Alternative 2 (this proposed 4(d) special rule), Alternative 3, and Alternative 4, as long as an activity is authorized or exempted under the MMPA, and the appropriate requirements of the MMPA are met, then the activity would not require any additional authorization under the ESA. All authorizations issued under section 104 of the MMPA would continue to be subject to section 7 consultation requirements of the ESA.

CITES

In addition to the MMPA restrictions on import and export discussed above, 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 legally possessed 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 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 these activities would not be necessary and advisable to provide for the conservation of the species. The Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in Section 9(a)(1) of the ESA. Thus, under Alternative 2 (this proposed 4(d) special rule, Alternative 3, and Alternative 4), 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 would be required. All export authorizations issued by the Service under CITES will continue to be subject to the consultation requirements under section 7 of the ESA, regardless of whether a 4(d) special rule is in place for the polar bear.

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 states 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 any of the three considered versions of a special rule, where unforeseen

differences between these provisions may arise in the future, 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. 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 which is operating a conservation program under the terms of a cooperative agreement with the Service in accord with section 6 of the ESA, when acting in the course of official duty, to take those species of threatened wildlife which are covered by an approved cooperative agreement 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. Section 101(a)(4)(D) clarifies that this authority to deter marine mammals applies to depleted stocks, which would include the polar bear. Further, the Service incorporated subparagraph 101(a)(4)(B) of this section into its polar bear management when it finalized ''deterrence guidelines'' on October 6, 2010 (75 FR 61631), effective November 5, 2010. The deterrence guidelines set forth best practices for safely and nonlethally deterring polar bears from damaging private and public property and endangering the public. The nonlethal deterrence of a polar bear from fishing gear or other property is not a provision that is included under the ESA. The Service feels the voluntary deterrence guidelines would not result in injury to a polar bear or removal of the bear from the population 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. Thus, we find it necessary and advisable to continue to manage polar bears under this provision of the MMPA and, as such, an activity conducted pursuant to this provision under the MMPA would not require additional authorization under the ESA under Alternative 2 (this proposed 4(d) special rule), Alternative 3, and Alternative 4. The Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

Section 101(d) of the MMPA provides that it is not a violation of the MMPA for any person to take a marine mammal if 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. Therefore, by adopting this provision of the MMPA, Alternatives 2, 3, and 4 would provide 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 17.31 provide for similar activities; however, the ESA provision only applies to an employee or agent of the Service, any other Federal land management agency, NMFS, or a State conservation agency, who is designated by the agency for such purposes. The provisions under section 101(d) apply to any individual, including private individuals. While we do not believe private citizens should attempt to free a large polar bear from entanglement for obvious safety reasons, there may be certain rare instances when an abandoned young cub may need aid. Although the provisions under the MMPA are broader in this case, we find them necessary and advisable to provide for the conservation of the polar bear; therefore, an activity conducted pursuant to this provision of the MMPA would not require additional authorization under the ESA under Alternatives 2, 3, and 4. The Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

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 a person 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. Section 112(c) of the MMPA allows the Service to enter into cooperative agreements with other Federal or State agencies and public or private institutions 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 provided for under the ESA, has allowed the Service to work with private groups to retrieve carcasses, respond to injured animals, and 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. Additionally, the Service has provided authorization under section 101(a)(5)(A) of the MMPA to certain trained non-Federal, non-State cooperators to nonlethally take polar bears through harassment/hazing of individual animals. These incidental take authorizations have been a crucial component of reducing bear-human confrontations in both Alaska Native villages and the oil and gas development areas on the North Slope of Alaska. This provision has provided for the conservation of the polar bear by allowing nonlethal techniques to deter polar bears from property and away from people before situations escalate, thereby preventing unnecessary injury or death of a polar bear. Therefore, the adoption of these MMPA provisions is necessary and advisable to provide for the conservation of the polar bear. The Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

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 states that the prohibitions on import and export do not apply to any fish or wildlife which were held in captivity prior to the enactment of the ESA or to the date of publication of listing as long as the holding of such specimens and their subsequent import and export is non-commercial. Section 9(b)(1) also states that fish and wildlife which were held in captivity for non-commercial purposes prior to enactment of the ESA or to the date of publication of listing are also exempt from regulations the Secretary may issue to conserve those species under the authority of the ESA. 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 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.

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 re-exporting 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). Alternative 2 (this proposed 4(d) special rule) would not affect requirements under CITES; therefore, these specimens continue to require this pre-Convention certificate for any international trade. 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.

Alternatives 2, 3, and 4 would adopt 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 a special rule, polar bear specimens that were obtained prior to the date that the MMPA went into effect (December 21, 1972) would not be 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. There are very few live polar bears, either in a controlled environment within the United States or elsewhere, that would qualify as ''pre-Act'' under the MMPA. Therefore, the standard MMPA restrictions apply to virtually 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 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 under Alternatives 2, 3, and 4. The Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

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 by-products 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. 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 our 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 Alternative 2 (this proposed 4(d) special rule), Alternative 3, and Alternative 4, any exempt activities under the MMPA associated with handicrafts or clothing or cultural exchange using subsistence-taken polar bears would 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. Under Alternatives 2, 3, and 4, all such imports and exports involving polar bear parts and products would need to conform to what is currently allowed under the MMPA, comply with our import and export 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 Alternatives 2, 3, and 4 is cultural exchange between Alaska Natives and Native inhabitants of Russia, 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. While the ESA has similar language allowing the import of items, there is no comparable language that would allow Natives to travel to Canada, Russia, or Greenland with cultural

exchange items. Cultural exchange has been an important exemption for Alaska Natives under the MMPA, and any of the three special rules ensure that such exchanges would not be interrupted.

Alternatives 2, 3, and 4 would also adopt 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 would align 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 in Alternatives 2, 3, and 4 regarding creation, shipment, and sale of authentic native articles of handicrafts and clothing would 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 non-native permanent resident of an Alaskan native village.'' However, the exemption under section 101 of the MMPA is limited to only 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 nonnative 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 provisions of the MMPA may be less strict than the ESA provisions, we have determined that these provisions would be 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 population, hunting is regulated voluntarily and effectively through an agreement 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 two commissioners representing the United States represents the Native people of Alaska and, in particular, the Native people 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. The Bilateral Agreement establishes the U.S.-Russia Polar Bear Commission (Commission), which functions as the bilateral managing authority to make scientific determinations, establish take limits, and carry out other responsibilities important to the conservation and management of the polar bear. At a meeting of the Commission on June 7–10, 2010, in Anchorage, Alaska, the Commission determined that no more than 58 polar bears per year may be taken from the Alaska-Chukotka polar bear population, of which no more than 19 animals may be females. Further, the Commission determined that the two countries will work together to identify legal requirements and documents needed to implement the determined subsistence harvest limit, and that further discussion regarding implementation of harvest management plans would take place at the next Commission meeting in 2011. At the Commission meeting in July 2011, the Commission, based on recommendations from its Scientific Working Group, reaffirmed the total allowable harvest of 58 polar bears from the Alaska-Chukotka population and approved a recommendation that a multi-year quota system be introduced for an initial period of 5 years, consistent with the terms of the Bilateral Agreement. The next Commission meeting in June 2012 will include discussion of the seasonal aspects of annual take limits. This cooperative management regime for the subsistence harvest of polar bears is 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. Thus, we recognize the unique contributions Alaska Natives provide to the Service's understanding of polar bears, and their interest in ensuring that polar bear stocks are conserved and managed to achieve and maintain healthy populations.

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. Alternatives 2, 3, and 4 would provide for the conservation of polar bears, 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, in proposing a 4(d) special rule, 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. The Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

This aspect of a 4(d) special rule is limited to activities that are not already exempted under the ESA. The ESA itself provides a statutory exemption to Alaska Natives under section 10(e) of the ESA for the harvesting of polar bears from the wild as long as the taking is for primarily subsistence purposes. The ESA then specifies that polar bears taken under this provision can be used to create handicrafts and clothing and that these items can be sold in interstate commerce. Thus, any of the three considered alternatives of a proposed special rule would 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 statute. A special rule would address only activities relating to cultural exchange and limited types of travel, and to the creation and shipment of authentic native handicrafts and clothing that are currently allowed under section 101 of the MMPA that are not already clearly exempted under section 10(e) of the ESA.

In addition, in our final rule to list the polar bear as threatened (73 FR 28212; May 15, 2008), while we found that polar bear mortality from harvest and negative bear-human 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 bear-human 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, and are not affected by the provisions of Alternatives 2, 3, and 4.

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. Alternative 2 (this proposed 4(d) special rule) would provide that an exemption invoked as necessary for national defense under the MMPA would require no separate authorization 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.

Penalties

As discussed earlier, the MMPA provides substantial civil and criminal penalties for violations of the law. These penalties remain in place and would not be affected by Alternative 2 (this proposed 4(d) special rule), Alternative 3, and Alternative 4. Under Alternative 2, these penalties are not affected by whether a violation occurs inside or outside the geographic range specified in paragraph (4). Because CITES is implemented through the ESA, any trade of polar bears or polar bear parts or products contrary to CITES and possession of any polar bear specimen that was traded contrary to the requirements of CITES is a violation of the ESA and remains subject to its penalties.

Under Alternatives 2, 3, and 4, certain acts not related to CITES violations also remain subject to the penalties of the ESA. Under paragraph (2) of Alternatives 2, 3, and 4, any act prohibited under the MMPA that would also be prohibited under the ESA regulations at 50 CFR 17.31 and that has not been authorized or exempted under the MMPA would be a violation of the ESA as well as the MMPA. In addition, even if an act 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 Alternative 2, the ESA penalties would also remain applicable to any incidental take of polar bears that is caused by activities within the geographic area specified in paragraph (4), if that incidental take has not been authorized under the MMPA consistent with paragraph (2). Under Alternative 2, while ESA penalties would not apply to any incidental take caused by activities outside the geographic area specified in paragraph (4), 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 are available for any other violation. Criminal penalties and imprisonment for up to 1 year, or both, are also available 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.

As discussed earlier, even where MMPA penalties provide the sole deterrence against unlawful activities under Alternatives 2 and 3, these penalties are substantial. A civil penalty of up to $10,000 for each violation may be assessed against any person, which includes businesses, States, and Federal agencies 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 will, upon conviction, be fined 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. Conservation is defined in the ESA to mean ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.'' In *Webster* v. *Doe,* 486 U.S. 592 (1988), the U.S. Supreme Court noted that similar language ''fairly exudes deference'' to the agency when the court interpreted the authority to terminate an employee when the Director of the Central Intelligence Agency ''shall deem such termination necessary or advisable in the interests of the United States.'' 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, the regulations promulgated under section 4(d) of the ESA provide the Secretary with a wide latitude of discretion to select appropriate prohibitions and exemptions. In such cases, some of the prohibitions and authorizations of the ESA implementing regulations at 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into a special rule, but the special rule may also include 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 conservation of a species. For example, the Secretary may find that it is necessary and advisable 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,* and 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).

Alternative 2 (this proposed 4(d) special rule) provides the appropriate prohibitions, and exceptions to those prohibitions, to provide for the conservation of the species. 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 use 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, public display) 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 via a finding of ''negligible impact'' is more restrictive than the process under the ESA.

Where the provisions of the MMPA and CITES are comparable to, or even more strict than, the provisions under the ESA, we find that it provides for the conservation of the polar bear to continue to manage the species under the provisions of the MMPA and CITES. As such, these mechanisms have a demonstrated record as being appropriate management provisions. Further, it would not contribute to the conservation of the polar bear and would be inappropriate 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 or less restrictive than the MMPA or CITES requirements.

There are a few activities for which the prohibitions under the MMPA are less restrictive than the prohibitions for the same activities under the ESA, including use of pre-Act specimens, subsistence use, military readiness activities, and take for defense of property and welfare of the animal. Concerning use of pre-Act specimens and military readiness activities, the general ESA 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 or its conservation. 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 and welfare of the animal, the MMPA allows a greater breadth of activities than would be allowed under the general ESA regulations; 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 bear-human interactions, and providing immediate benefits for the welfare of individual animals.

Our 39-year history of implementation of the MMPA, 36-year history of implementation of CITES, and our analysis in the ESA final listing rule for the species, demonstrate that these laws provide appropriate regulatory protection to polar bears for activities that are 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 additional overlay of provisions in the general threatened species regulations at 50 CFR 17.31 and 17.32, or even the full application of the provisions in sections 9 and 10 of the ESA. Based on the current state of the science, nothing within our authority under the ESA, above and beyond what we would require under Alternative 2, would provide the means to resolve this threat.

Paragraphs 1 through 3 of Alternatives 2, 3, and 4 would adopt existing conservation regulatory requirements under the MMPA and CITES as the appropriate regulatory provisions for this threatened species. Because of these provisions, under any of the three considered alternatives of the proposed special rule, if an activity is authorized or exempted under the MMPA or CITES, no additional authorization would be required. But if an 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 50 CFR 17.31, the protections provided by the general threatened species regulations would 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. In addition, any action authorized, funded, or carried out by the Service that may affect polar bears, including the Service's issuance of any permit or authorization described above, and would require consultation under section 7 of the ESA to ensure that the action is not likely to jeopardize the continued existence of the species.

We find that a 4(d) special rule containing paragraphs 1 through 3, which are identical in Alternatives 2, 3, and 4, is necessary and advisable to provide for the conservation of the polar bear because the MMPA and CITES have proven effective in managing polar bears for more than 30 years. The comparable or stricter provisions of the MMPA and CITES, along with the application 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 and 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 sections 9 and 10 of 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. In any case, the Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

With regard to paragraph 4 of Alternatives 2, 3, and 4, 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 a valuable 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 valuable to have the overlay of ESA incidental take prohibitions in place for several reasons. In the event that a person or entity causing the incidental take of polar bears has not been authorized under the MMPA, or is out of compliance with the terms and conditions of their MMPA incidental take authorization, the overlay would 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 legal action based on 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 valuable for the conservation of the species. Again, the Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

However, we find that for activities outside the current range of the polar bear (including vast areas within the State of Alaska that do not coincide with the polar bear's range), overlay of the incidental take prohibitions under 50 CFR 17.31 is not necessary and advisable for polar bear management and conservation. The Service finds the provisions of paragraph (4) to be consistent with the conservation of the polar bear because: (1) The potential for citizen suits alleging take resulting from activities outside of the range of the polar bear is significant; (2) the likelihood of such suits prevailing in establishing take of polar bears is remote, and (3) defending against such suits will divert available staff and funding away from productive polar bear conservation efforts. Even though incidental take of polar bears from activities outside the current range of the species would not be prohibited under this proposed special rule, the consultation requirements under section 7 of the ESA would remain fully in effect. Any biological opinion associated with a consultation will identify any incidental take that is reasonably certain to occur. Any incidental take, identified through a biological opinion or otherwise, remains a violation of the MMPA unless appropriately authorized. In addition, the citizen suit provision under section 11 of the ESA would be

unaffected by Alternative 2 for challenges to Federal agencies that are alleged to be in violation of the consultation requirement under section 7 of the ESA. Further, the Service will pursue any violation under the MMPA for incidental take that has not been authorized, and all MMPA penalties would apply. 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 (including some areas within the State of Alaska) would be consistent with the conservation of the species. The Secretary has the discretion to prohibit by regulation with respect to polar bears any act prohibited in section 9(a)(1) of the ESA.

Nothing in Alternatives 2, 3, and 4 changes in any way the recovery planning provisions of section 4(f) and consultation requirements under section 7 of the ESA, including consideration of adverse modification to any critical habitat, or the ability of the Service to enter into domestic and international partnerships for the management and protection of the polar bear.

Required Determinations

Regulatory Planning and Review

Executive Order 12866 requires Federal agencies to submit proposed and final significant rules to the Office of Management and Budget (OMB) prior to publication in the **Federal Register**. The Executive Order defines a rule as significant if it meets one of the following four criteria:

(a) The rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(b) The rule will create inconsistencies with other Federal agencies' actions;

(c) The rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or

(d) The rule raises novel legal or policy issues.

If the rule meets criteria (a) above it is called an ''economically significant'' rule and additional requirements apply.

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 proposed 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 proposed special rule for the polar bear would, with limited exceptions, allow for maintenance of the status quo regarding activities that had previously been authorized or exempted under the MMPA. 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 proposed 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 proposed special rule for the polar bear would allow, with limited exceptions, for the maintenance of the status quo regarding activities that had previously been authorized or exempted under the MMPA, 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 proposed rule would not have significant takings implications. We have determined that the rule has no potential takings of private property implications as defined by this Executive Order because this proposed special rule would, with limited exceptions, maintain the status quo regarding activities currently allowed under the MMPA. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. This proposed rule would not have substantial direct effects on the State, on the relationship between the

Federal Government and the State, 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 proposed 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 proposed 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, and businesses, or organizations. We may not conduct or sponsor, and you are 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 a draft environmental assessment in conjunction with this proposed 4(d) special rule. Subsequent to closure of the comment period, we will decide whether this proposed rule constitutes 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 draft 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 the section **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.

For this proposed rule, on January 18, 2012, we contacted the 52 Alaska Native Tribes (ANTs) and Alaska Native Corporations (ANCs) which 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 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. The Service intends to meet this recommendation throughout the process of finalizing this proposed rule for the polar bear, and will continue to seek input from ANTs and ANCs. Any comments, recommendations, or suggestions received from ANTs and ANCs will be considered.

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 within this proposed 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.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to 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; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; 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 (q)(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), 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 § 17.31 of this part apply to any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within 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: April 13, 2012.

Eileen Sobeck,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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