

September 14, 2007

Dirk Kempthorne
Secretary, Department of the Interior
1849 C Street, N.W.
Washington DC 20240

H. Dale Hall
Director, Fish and Wildlife Service
1849 C Street, N.W.
Washington DC 20240

**Re: Public Comment Period and Extension of Decision Deadline on
Proposed Rule to List the Polar Bear Under the ESA**

Dear Secretary Kempthorne and Director Hall:

The undersigned organizations are writing to you regarding the proposed rule to list the polar bear as threatened throughout its range and specifically about the recent reports generated by the U.S. Geological Survey. All of the undersigned are concerned about the Fish and Wildlife Service's listing process for the polar bear and the impact of these reports on the decision-making. Most, if not all, have previously submitted comments on this rulemaking. For the reasons explained below, we request that the FWS:

- provide the public with at least a 60-day comment period on the extensive new scientific information contained in the nine USGS reports,
- itself take adequate time to review both the new information and public comment on it, and
- extend the one-year final listing deadline for up to six months pursuant to ESA Section 4(b)(6)(B)(i).

These new reports are extensive. They include a great deal of underlying data and references and employ new modeling methods and data. They mandate a full public comment period and an extension of the time period in which the FWS must make a final decision.

The nine reports in total comprise 470 pages of dense scientific data and analysis. The reports cite hundreds of secondary references and close to a hundred tables and figures. The reports directly rely on new data and methodologies. The USGS's press release on these reports explains that the team integrated the data "into a range of new and traditional models." The Executive Summary of the reports notes that the Secretary of the Interior asked the USGS "to generate new scientific data, models, and interpretations on polar bears and their sea ice habitats, to be available within the decision-making framework." These reports apparently were not peer-reviewed and were not generated as independent scientific analyses, but were instead specifically directed at informing the FWS on its decision on polar bear listing. These facts further support the need for full public review and comment.

The FWS indicates in its news release on these reports (September 7, 2007) that "[w]ith a final decision on the listing proposal expected in early 2008, the additional comment

period will necessarily be short.” But, as explained above, the public needs at least a full 60 days and the agency needs time to analyze critically both the reports and the public comment. The case law makes clear that the agency must give the public an adequate opportunity to review and comment on new information related to an ESA listing decision. For example, the Ninth Circuit has explained that “[t]he opportunity for public comment is particularly crucial when the accuracy of important material in the record is in question.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1403 (9th Cir. 1995). In that case, the FWS relied on a USGS report, prepared after the public comment period had ended, in making its decision to list a species. The Court ruled that the agency had not given the public any opportunity to review and comment on the new report. *Id.* at 1404. While in that case the agency did not provide any opportunity for public comment on the new report, its reasoning applies to not providing an adequate opportunity to comment based on a purported need to complete the decision-making process.

Fortunately, to address just this situation, the ESA gives the agency authority to take up to six additional months in which to make a decision:

If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A) (i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

16 U.S.C. § 1533(b)(6)(B)(i); *see also* 50 C.F.R. § 424.17(a). The Secretary apparently requested the USGS generate and analyze new information in response to questions about the “sufficiency and accuracy” of available data. New information has been generated and the Secretary will be soliciting additional data in the form of public comment and the FWS’s own analysis of the information generated by the USGS. The ESA provides an avenue for the FWS to take additional time in which to analyze both the new information and public comment before making its final decision.

In addition to the Secretary’s own concerns, governments such as Alaska and Canada, and many of the organizations listed below, raised questions and concerns about the scientific debate. Whether or not these new reports address those concerns is a question on which the public must have time to comment and the agency must have time to analyze. Without an extension, the public comment period and the agency’s consideration of new information will be truncated and inadequate.

In past situations, the agencies responsible for listing decisions have not hesitated to take this statutorily provided additional time. In a listing of a snail species, the FWS extended a public comment period and decision deadline by six months to consider “[n]ew information that questions the range, population status, and impact of present threats to the species.” 51 Fed. Reg. 47033 (Dec. 30, 1986). The National Marine Fisheries Service, FWS’s sister agency in listing decisions, extended a listing determination

Letter to Kempthorne/Hall

September 14, 2007

Page 3 of 3

deadline involving salmon species by six months to “solicit, collect, and analyze additional information that will enable NMFS to make the final listing determination based on the best available data.” 61 Fed. Reg. 52611 (Oct. 31, 1996).

For all of these reasons, the undersigned organizations request that the FWS provide at least 60 days for the public to review and comment on the nine new USGS reports. They further request that the FWS extend the period for consideration of the proposed rule by six months, as allowed by statute, to ensure full public comment and agency consideration of the available scientific information.

Signed:

The Boone & Crockett Club
The Campfire Club of America
Congressional Sportsmen’s Foundation
Conservation Force
National Rifle Association
National Shooting Sports Foundation
North American Bear Foundation
The Pope & Young Club
Ruffed Grouse Society
Safari Club International
U.S. Sportsmen’s Alliance