

September 24, 2007

By facsimile, hand delivery and e-mail (Polar_Bear_Finding@fws.gov)

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**Re: Formal Request to Extend the Public Comment Period and Decision
Deadline on Proposed Rule to List the Polar Bear Under the ESA**

Dear Secretary Kempthorne and Director Hall:

The undersigned organizations are writing again 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 (we wrote on September 14, 2007). On September 20, 2007, the FWS published a Federal Register notice opening a comment period on these nine reports, giving the public only 15 days, until October 5, 2007, to review, analyze, and comment on these new Reports. 72 Fed. Reg. 53749 (Sept. 20, 2007). All of the undersigned are concerned about the impact of these Reports on the Fish and Wildlife Service's listing process for the polar bear. For the reasons explained below, we formally request that the FWS:

- withdraw the current notice giving the public only 15 days to comment on the extensive new scientific information contained in the nine USGS Reports,
- provide the public with at least a 60-day comment period on these Reports,
- itself take adequate time to review both the new information and public comment on it, and
- if necessary, extend the one-year final listing deadline for up to six months pursuant to ESA Section 4(b)(6)(B)(i).

The Nine New USGS Reports

The nine reports in total comprise 470 pages of dense scientific data and analysis. The sixteen named scientists who authored the reports and dozens of other scientists worked for over six months to prepare these reports. 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 decisionmaking framework."

Although there is no evidence or documentation of a peer review in the Reports themselves, we understand one was done. The results of the peer review have not been made public. These documents should also be made public for comment, as was done with peer review of the status review prepared for the proposed rule. The Reports 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 has requested “public comments on these reports and a review of the extent to which they add to the knowledge base for making the final decision.” 72 Fed. Reg. at 53750. The nature of these nine Reports dictates that meaningful and complete scientific review of and comment on these Reports cannot be done by October 5, 2007. For example, these Reports:

- utilize and interpret complex climate and sea ice models,
- make projections about possible impacts to polar bear habitat,
- make conclusions about the polar bear’s reaction to any changes, and
- use complex models and other analysis to synthesize the data into specific and grand conclusions about the possible future of the polar bear in 45, 75, and 100-year time horizons.

Sixteen named scientists, coming from diverse disciplines, were involved in this effort. Merely finding experts qualified to analyze all aspects of these nine reports and doing so within 15 days is a daunting prospect (extremely challenging for the undersigned organizations; impossible for ordinary citizens). By limiting the public comment period (and its own review), the FWS is ensuring both that (1) it will not have the best available scientific information and (2) substantial disagreement regarding the listing factors will remain when it makes its final decision.

Uncertainty in the Reports Support an Extended Public Comment Period

In addition, the nine reports themselves indicate that there is continuing uncertainty and disagreement about the sufficiency of the available data relevant to the listing determination. One of the nine reports is devoted entirely to describing the great uncertainty inherent in the analyses undertaken and conclusions made in the other reports. This report discusses the “kinds of uncertainty inherent in climate models, particularly those uncertainties that directly affect the reliability of their projection of future Arctic sea ice conditions.” “Uncertainty in Climate Model Projections of Arctic Sea Ice Decline: An Evaluation Relevant to Polar Bears,” Page 1. It also acknowledges that other reports predicting impacts to polar bear habitat and populations over the next 50-100 years rely on the climate and sea ice models projections. *Id.*

Other reports also highlight this uncertainty and the need for more data. For example, in the report on population status in Southern Hudson Bay, the authors dismiss the demonstrable impact on the population as due to their “limited sample size and few years

of intensive sampling.” The Southern Beaufort Sea report admits that the short duration of their study undermines their conclusions and concludes that “continued monitoring will be necessary to increase our confidence in the relationships between declining sea ice and polar bear vital rates.” At the very least, the public should have an adequate opportunity to comment on whether there continues to exist disagreement about the sufficiency and accuracy of the available data. Your own listing agency also needs time to make this determination. In short, serious questions persist about whether you need to solicit additional data, providing another reason to consider invoking your authority to extend the listing determination deadline.

The ESA Authorizes Additional Time to Analyze New Information

The Federal Register Notice explains that “[t]he comment period is being limited to 15 days because of the statutory deadline, which requires a final listing determination within one year of publication of the proposed rule, unless an extension of up to six months is granted due to substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination.” 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, at the same time it was shortening many deadlines in the listing process in 1982, Congress appropriately gave 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 Notice recognizes this authority but fails to discuss it. In fact, this provision is applicable. 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 organizations such as the undersigned, 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 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).

Request for Extension

For all of these reasons, the undersigned organizations formally 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, if necessary, the FWS extend the period for consideration of the proposed rule by up to six months, as allowed by statute, to ensure full public comment and agency consideration of the available scientific information.

The undersigned ask that you respond to this formal request as soon as possible so that they, and the general public, will know whether they have additional time to review the nine Reports and prepare comments, or whether they must do what they can in the 15 days given. Please respond by facsimile to Safari Club International, 202-543-1205, which will distribute the response to the other signatories.

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Signed:

The Boone & Crockett Club

The Campfire Club of America

Congressional Sportsmen's Foundation

Conservation Force

Dallas Safari Club

National Rifle Association

National Shooting Sports Foundation

North American Bear Foundation

The Pope & Young Club

Quality Deer Management Association

Ruffed Grouse Society

Safari Club International

U.S. Sportsmen's Alliance

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