

previous authorization from the Secretary of DNER. At the present time, the DNER has not designated critical habitat for the species under Regulation 6766. Therefore, the level of protection to the species' habitat is uncertain.

Based on the information provided in the petition and available in our files, we conclude that the petitioner has presented substantial information to indicate that existing regulatory mechanisms may be inadequate to protect the habitat of the harlequin butterfly.

#### *E. Other Natural or Manmade Factors Affecting the Species' Continued Existence*

##### Information Provided in the Petition

The petitioner asserts that the species is vulnerable to extinction due to low population numbers, restricted distribution (only one small colony), and monophagous habits, coupled with habitat alteration or loss. The petitioner also asserts that the species' habitat is threatened by fires associated with an illegal garbage dump on road PR-4485.

Carrión-Cabrera (2003, p. 60) conducted a species' survey of the harlequin butterfly, and observed only 235 individuals in 16 months of surveys (2 sample days per month), with a maximum of 50 individuals in a sample day (mean = 9 individuals per sample day). The petitioner asserts that with a low population and limited geographical area, coupled with habitat loss and pressure for development, the species may not be able to reach the minimum population mass to sustain a population in the wild and, therefore, is extremely vulnerable to extinction (Biaggi-Caballero 2009, p. 6).

##### Evaluation of Information Provided in the Petition and Available in Service Files

Information in our files also suggests that the range of the harlequin butterfly is restricted to 10 small patches of habitat in the municipality of Quebradillas (Monzón-Carmona 2007, pp. 83-84). Small population size and range, compounded by threats to its habitat as discussed under Factor A, could threaten this species. In addition, we have no information in our files regarding the petitioner's claim that the species' habitat is threatened by fires associated with an illegal garbage dump on road PR-4485. Based on the information presented in the petition and available in our files, we find that the petition presents substantial information indicating that other natural or manmade factors in combination with other probable threats to the

species habitat may pose a significant risk of extinction for the harlequin butterfly.

#### **Finding**

On the basis of our evaluation of the information presented under section 4(b)(3)(A) of the Act, we have determined that the petition presents substantial scientific or commercial information indicating that listing the harlequin butterfly throughout its entire range may be warranted. This finding is based on information provided under Factor A (present or threatened destruction, modification, or curtailment of the species' habitat or range), Factor D (the inadequacy of existing regulatory mechanisms), and Factor E (other natural or manmade factors affecting the species' continued existence). Because we have found that the petition presents substantial information indicating the harlequin butterfly may be at risk of extinction now or in the foreseeable future and therefore listing under the Act may be warranted, we are initiating a status review to determine whether listing the harlequin butterfly under the Act is warranted.

The "substantial information" standard for a 90-day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90-day finding does not constitute a status review under the Act. In a 12-month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90-day finding. Because the Act's standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not mean that the 12-month finding will result in a warranted finding.

The petitioner requested that we designate critical habitat for this species. If we determine in our 12-month finding that listing the harlequin butterfly is warranted, we will address the designation of critical habitat at the time of the proposed rulemaking. The proposed rulemaking may be published concurrently with the 12-month finding or at a later date.

#### **References Cited**

A complete list of references cited is available on the Internet at <http://www.regulations.gov> and upon request from the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### **Authors**

The primary authors of this notice are the staff members of the Caribbean Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### **Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 13, 2010

#### **Rowan W. Gould**

*Acting Director, U.S. Fish and Wildlife Service*

[FR Doc. 2010-9533 Filed 4-23-10; 8:45 am]

**BILLING CODE 4310-55-S**

## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 18**

[Docket No. FWS-R7-FHC-2010-0002; 71490-1351-0000-L5-FY10]

**RIN 1018-AW94**

#### **Marine Mammal Protection Act; Deterrence Guidelines**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; availability of draft environmental assessment; request for comments.

**SUMMARY:** These proposed guidelines set forth best practices that we, the Fish and Wildlife Service, find are appropriate for safely and nonlethally deterring polar bears from damaging private and public property and endangering the public. We would not require anyone to implement these guidelines, nor would anyone be liable if they did not implement them. If the guidelines are finalized, anyone deciding to implement them could do so without our authorization or supervision. We are proposing these guidelines to reduce occurrences of bear-human interactions with only minor, short-term behavioral effects on polar bears. As discussed in the background section of this proposed rule, we authorize other, more aggressive deterrence activities through separate provisions of the Marine Mammal Protection Act. We seek public comment on these proposed guidelines.

**DATES:** We will consider comments on the proposed guidelines or draft environmental assessment received on or before May 26, 2010.

**ADDRESSES:** You may submit comments on the proposed guidelines and associated environmental assessment by one of the following methods:

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No.

FWS-R7-FHC-2010-0002; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203; Attention: Polar Bear Deterrence Guidelines; or

• *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS-R7-FHC-2010-0002. Please indicate to which document, the proposed guidelines or the 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 S. Hamilton, Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503, telephone 907-786-3800 or 1-800-362-5148. 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:**

**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 guidelines for safely deterring the polar bear.

(2) Additional guidelines that the public could follow to safely deter a polar bear.

You may submit your comments and materials concerning this proposed rule by one of the methods 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**).

**Background**

The Marine Mammal Protection Act of 1972, as amended, requires the Secretary of the Interior, through the U.S. Fish and Wildlife Service (Service), to publish a list of guidelines for use in safely deterring marine mammals and, for marine mammal species listed as threatened or endangered under the Endangered Species Act of 1973, to recommend specific measures that may be safely used to nonlethally deter these animals.

The deterrence provisions of the 1994 amendments to the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) provide an exception to otherwise prohibited acts, allowing the use of measures that may deter a marine mammal from, among other things, damaging private property or endangering personal safety [16 U.S.C. 1371(a)(4)(A)(ii) and (iii), respectively]. These acts of deterrence must not result in the death or serious injury of a marine mammal. Section 1371(a)(4)(B) directs the Service to recommend specific measures that the public may use to safely, nonlethally deter marine mammals, including those listed as endangered or threatened under the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 *et seq.*). Section 1371(a)(4)(C) of the MMPA provides for the prohibition of certain forms of deterrence if the Service determines, using the best scientific information available, and subsequent to public comment, that the deterrence measure has a significant adverse effect on marine mammals.

These proposed deterrence guidelines have been developed under the authority of 16 U.S.C. Section 1371(a)(4)(B), as described above. The proposed guidelines are based on information gained over the past twenty years through our programs for incidental take authorizations and our Alaska cooperative agreements (discussed further in this notice). Through this experience, we have learned what kinds of actions work to deter polar bears in ways that are safe for bears and humans.

We have incorporated these proven deterrence actions in the proposed guidelines to provide the public with measures that can deter polar bears safely and nonlethally. If properly implemented, these measures will not have a significant adverse impact to polar bears. We are not proposing any

specific prohibitions under section 1371(a)(4)(C) at this time.

On May 15, 2008, the Service issued two rules regarding the polar bear: A final rule to list the polar bear as a threatened species (73 FR 82212) and an interim special rule under section 4(d) of the ESA (16 U.S.C. 1533(d)), which provided that activities authorized or exempted under the MMPA may not be considered as violations under the ESA or its implementing regulations (73 FR 28306). We finalized the interim rule on December 16, 2008 (73 FR 76249). Thus, if we issue these guidelines, citizens conducting activities that comply with these guidelines would need no additional authorizations under the ESA, nor would we consider their activities a violation under the take prohibitions of either the MMPA or the ESA.

The polar bear can be a large, dangerous predator with the capacity to injure and even kill a human. In proposing these guidelines, we are mindful of the inherent risks associated with deterring a large carnivore such as the polar bear and Congress's intent that the public be able to safely deter a polar bear while not resulting in the death or serious injury to the animal. Therefore, for example, these guidelines do not include the use of nonlethal projectiles discharged from a firearm, *e.g.*, crackershells, bean bags, or rubber bullets, which may be effective in moving a bear. This is because we have determined that such use is inconsistent with the language prohibiting serious injury or death of the animals.

These guidelines also do not include more aggressive hazing activities designed to stop bear activity patterns or to move an individual bear from areas of human populations or work environs. While the ability to move a polar bear away from a community, home, or industry site is intrinsic to both sound management of the species and human safety, some more aggressive hazing activities are inherently risky to both the person conducting the activity and the bear. Since such more aggressive hazing activities may result in injury to bears, and may present safety concerns for humans, they go beyond the scope of the provision of the MMPA that authorizes these proposed deterrence guidelines. We manage more aggressive hazing activities through other appropriate provisions of the MMPA.

Currently, the Service authorizes nonlethal incidental or intentional take of polar bears through Letters of Authorization issued under 16 U.S.C. 1371(a)(5)(A) for incidental take, or 1379(h) and 1382(c) for intentional take. Based on years of data obtained through

the monitoring and reporting requirements of these programs, their highly effective protocols for working with and training authorized individuals in bear deterrence have proven to reduce the possibility of bear-human interactions escalating into potentially lethal encounters. Although the Service developed these proposed deterrence guidelines based on the information gained through the above-referenced programs for incidental and intentional take, the Service does not intend these proposed guidelines, if issued, to replace or supersede those protocols or programs. Instead, consistent with the MMPA, the proposed guidelines list measures that any citizen could undertake to minimize potential interactions with polar bears but are not likely to cause a polar bear's death or serious injury. Actions the public elects to take that are consistent with these proposed deterrence guidelines would not be a violation of the MMPA, nor would the public need specific additional authorization from the Service to take these actions.

The Service encourages individuals living, travelling, or working in areas that polar bears may frequent to become aware of the practices in these guidelines to reduce the likelihood of bear-human interactions. Polar bears are generally found in the marine environment and along the coastline. Polar bears can be found far inland; however, most recorded polar bear-human interactions have occurred within 5 miles or less of the coastlines of the Chukchi and Beaufort seas.

We also encourage citizens, especially citizens within 5 miles of the coastline and within the range of the polar bear, to develop practices that may help prevent a bear-human interaction. These practices include: (1) Developing and attending polar bear awareness training; and (2) attending outreach events hosted by local communities or by the Service that provide information to reduce bear-human interactions.

For example, by attending an outreach event, citizens can share information on developing and implementing *detection systems*, which allow for early observation of polar bears in the vicinity of human settlement. Detection systems could include any of the following: bear monitors (*i.e.*, individuals trained to watch for and alert others to the presence of bears); trip-wire fences; closed-circuit TV; and electronic alarm systems. Furthermore, constant vigilance for polar bears by all personnel working at a work site augments a detection system web and can significantly reduce the occurrence of a bear-human interaction.

In addition, *operational management plans* for communities or private companies operating in polar bear habitat can be used to establish a formalized structure to incorporate passive and preventive deterrence measures. These could include measures for:

- *Attractants management*—Establishing protocols and procedures to limit attractants to wild animals within property boundaries by storing garbage, human waste, food, and other products in areas not accessible to bears;
- *Garbage management*—Establishing protocols and procedures for how communities or sites will control and dispose of garbage to limit its attraction to bears as a food source (*e.g.*, the use of incinerators);
- *Snow management*—Establishing protocols and procedures to remove snow around buildings and work areas to increase visibility, such as planning the placement of snow berms; and
- *Lighting systems management*—Establishing protocols and procedures to install appropriate lighting in areas where it is essential to detect bears that may be in the vicinity.

The Service recognizes our dual responsibilities to provide for the conservation of the polar bear, while at the same time work with local stakeholders that may be negatively affected by the presence of a large, curious, and at times hungry predator in their vicinity. In the past, we have worked with local communities to identify actions that may ameliorate the potential impacts of the presence of polar bears in local communities and will continue to do so by working with Alaska coastal communities on the implementation of these guidelines. Further, Federal, State, and local government officials have the authority to take marine mammals if doing so is for the protection or welfare of the animals or for the protection of the public health and welfare. Regulations governing such takings, which take into account the special training and experience levels of such officials, are in place at 50 CFR 18.22.

#### Proposed Guidelines

These proposed guidelines for safely deterring polar bears in the wild are acceptable deterrence actions that any citizen can use without obtaining specific authorization from the Service. Since these guidelines are voluntary in nature, no citizen is required to implement them. If the proposed guidelines are finalized, actions taken to properly implement the guidelines would not be subject to the take prohibitions of the MMPA or ESA. The

proposed guidelines, developed using the best available information, incorporate caution and restraint in their use.

The Service believes that adhering to these guidelines, if they are finalized, would minimize the possibility of polar bear-human interactions that could lead to a polar bear being killed in the interest of public safety. Furthermore, these guidelines give direction to ensure that deterrence actions do not result in the serious injury or death of a marine mammal.

We are proposing two levels of deterrence guidelines that a citizen could follow in order to nonlethally deter a problem polar bear: passive and preventive. Each type of measure includes a suite of appropriate actions that the public may use.

Passive deterrence measures are those that prevent polar bears from gaining access to property or people. The proper use of these passive deterrence devices provides for human safety and does not increase the risk of serious injury or death of a polar bear. Such measures include rigid fencing and other fixed barriers such as gates and fence skirting to limit a bear's access, bear exclusion cages to provide a protective shelter for people in areas frequented by bears, and bear-proof garbage containers to exclude polar bear access and limit food-conditioning and habituation to humans.

Preventive deterrence measures are those that can dissuade a polar bear from initiating an interaction with property or people. The proper use of these preventive deterrence devices provides for safe human use and does not increase the risk of serious injury or death of a polar bear. Such measures include the use of acoustic devices to create an auditory disturbance causing polar bears to move away from the area and vehicles or boats to deter or block an approaching polar bear.

Acoustic deterrence is limited to devices that create no more than a reasonable level of noise, *e.g.*, vehicle engines, or an air horn, where such auditory stimuli could startle a bear and disrupt its approach to property or people. Recent research on responses of captive polar bears to auditory stimuli has shown that polar bears are able to detect sounds down to 125 Hertz (Hz) (Bowles *et al.* 2008) and high-frequency sounds up to 22.5 kHz (Nachtigall *et al.* 2007).

Polar bears possess an acute hearing ability with a wider frequency range than humans, which is less than 20 kHz. Data indicate that polar bears hear very well within the frequency range of 11.2 to 22.5 kHz (Nachtigall *et al.* 2007).

Sounds (“roars”) with frequency content between 100 and 600 Hz and broadcast directionally at over 120 dB SPL (sound pressure level) appeared to have the most success in deterring bears (Wooldridge 1978, Wooldridge and Belton 1980). However, there are no data available to indicate minimum received sound levels required to cause damage (e.g., a temporary threshold shift [TTS]) to polar bear hearing.

While these upper limits are unknown, the Service believes that the use of sound deterrent devices will not harm polar bears and, therefore, is allowable as long as the sound level of the directed acoustic device used to deter bears has a sound strength of no greater than 150 dB SPL (the upper level that is painful to humans) (American Speech-Language-Hearing Association 2009). The use of commercially available air horns falls below this upper limit, is reasonable, and may be effective in deterring bears while causing no lasting or permanent harm to individual animals.

#### MMPA Consultation

Section 101(a)(4) of the MMPA (16 U.S.C. 1371(a)(4)) requires the Service to consult with appropriate experts on the development of safe and nonlethal deterrence provisions. The Service has compiled a list of individuals we believe have experience and knowledge of interactions with polar bears and/or the use of deterrence devices. We have sent these individuals a copy of these proposed guidelines and asked them to submit comments. The list of experts is available upon request; contact the individual identified above in **FOR FURTHER INFORMATION CONTACT**.

#### Required Determinations

##### *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 readily 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), and the Native American Policy of the U.S. Fish and Wildlife Service,

June 28, 1994, we readily 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 these proposed guidelines we will consult with the Alaska Nanuq Commission (Commission). The Commission, established in 1994, is a Tribally Authorized Organization created to represent the interests of subsistence users and Alaska Native polar bear hunters when working with the Federal Government on the conservation of polar bears in Alaska. Additionally, we do not anticipate that the proposed guidelines, if finalized, will have an effect on Tribal activities especially as they may pertain to Tribal subsistence activities. We have reached this determination because: (1) Under our incidental or intentional take programs, as discussed above, activities that whole communities are taking are being developed in partnership with the Service and under separate and relevant authorities; and (2) the taking for subsistence or handicraft purposes is exempted from these guidelines and, therefore, not impacted by these guidelines. The guidelines, if finalized, are designed to provide citizens with means to safely deter polar bears.

##### *Intra-Service Consultation Under Section 7 of the ESA*

On May 15, 2008, the Service listed the polar bear as a threatened species under the ESA (73 FR 28212). Section 7(a)(1) and (2) of the ESA (16 U.S.C. 1536(a)(1) and (2)) direct the Service to review its programs and to utilize such programs in the furtherance of the purposes of the ESA and to ensure that a proposed action is not likely to jeopardize the continued existence of an ESA-listed species. Consistent with these statutory requirements, the Service’s Marine Mammal Management office has initiated consultation over these proposed guidelines with the Service’s Fairbanks’ Ecological Services Field Office. Subsequent to the closure of this request for comment, and our consideration of any comments received, either from the public, or our experts, we will complete any necessary ESA section 7(a)(2) consultation prior to finalizing any guidelines.

##### *National Environmental Policy Act (NEPA) Considerations*

We have prepared a draft environmental assessment in

conjunction with these draft guidelines. Subsequent to closure of the comment period, we will decide whether the guidelines constitute 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–FHC–2010–0002 or contact the individual identified above in the section **FOR FURTHER INFORMATION CONTACT**.

##### *Regulatory Planning and Review*

The Office of Management and Budget (OMB) has determined that this rule is significant and will conduct a review under Executive Order 12866. OMB bases its determination upon the following four criteria:

(a) Whether 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) Whether the rule will create inconsistencies with other agencies’ actions.

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

(d) Whether the rule raises novel legal or policy issues.

##### *Small Business Regulatory Enforcement Fairness Act*

We have determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule is also not likely to result in a major increase in costs or prices for consumers, individual industries, or government agencies or have significant adverse effects on competition, employment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Expenses will be related to, but not necessarily limited to, the purchase of bear-proof garbage containers, fencing material, and air horns. Compliance with this rule is voluntary in nature, and any costs associated with implementing a guideline should be offset by reductions in potential bear-human interactions and safety.

##### *Regulatory Flexibility Act*

We have determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Compliance

with this rule is voluntary in nature, and any costs associated with implementing a guideline should be offset by reductions in potential bear-human interactions and safety. Therefore, a Regulatory Flexibility Analysis is not required.

#### *Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. Compliance with this rule is voluntary in nature, and any costs associated with implementing a guideline should be offset by reductions in potential bear-human interactions and safety. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

#### *Takings Implications*

This rule does not have takings implications under Executive Order 12630 because it authorizes the nonlethal take of polar bears by citizens and thereby exempts them from civil and criminal liability as long as they operate in compliance with the guidelines. Therefore, a takings implications assessment is not required.

#### *Federalism Effects*

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132. The MMPA gives the Service the authority and responsibility to protect polar bears and specifically allows for citizens to undertake activities to deter polar bears.

#### *Civil Justice Reform*

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

#### *Paperwork Reduction Act*

This rule does not contain information collection requirements, and a submission under the Paperwork Reduction Act (PRA) is not required.

#### *Information Quality Act*

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

#### *Effects on the Energy Supply*

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

#### *Clarity of this Regulation*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

#### **References**

We include a list of the references cited in this proposed rule:

- American Speech-Language-Hearing Association. 2009. Noise and Hearing Loss. <http://www.asha.org/public/hearing/disorders/noise.htm> downloaded from the Internet on 12–08–09.
- Bowles, A. E., M. A. Owen, S. L. Denes, S. K. Graves, and J. L. Keating. 2008. Preliminary Results of a Behavioral Audiometric Study of the Polar Bear. *J. Acoust. Soc. Am.* 123, 3509.
- Nachtigall, P. E., A. Y. Supin, M. Amundin, B. Roken, T. Moller, T. A. Monney, K. A. Taylor, and M. Yuen. 2007. Polar bear *Ursus maritimus* hearing measured with auditory evoked potentials. *J. Exp. Biol.* (210), 1116–1122.
- Wooldridge, D. R. and P. Belton. 1980. Natural and synthesized aggressive sounds as polar bear repellents. pp. 85–92 In: C.J. Martinka and K.L. McArthur (eds.) Bears—their biology and management. Bear Biol. Assoc. Conf. on Bear Res. and Manage. 10–13 Feb. 1980. Madison, WI.
- Wooldridge, D. R. 1978. Deterrent and detection systems: Churchill, Manitoba.

Unpubl. rept to NWT Govt. by Wooldridge biological consulting, Burnaby, British Columbia. 40pp. In: J. Truett (ed.) Guidelines for Oil and Gas Operations in Polar Bear Habitats. 1993. OCS Study MMS 93–0008. LGL Ecol. Res. Assoc., Inc., Bryan, TX.

#### **List of Subjects in 50 CFR Part 18**

Administrative practice and procedure, Alaska, Imports, Indians, Marine mammals, Oil and gas exploration, Reporting and recordkeeping requirements, Transportation.

#### **Proposed Regulation Promulgation**

For the reasons set forth in the preamble, the Service proposes to amend part 18, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below.

#### **PART 18—MARINE MAMMALS**

1. The authority citation for part 18 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

#### **Subpart D—Special Exceptions**

2. Add § 18.34 to subpart D to read as follows:

#### **§ 18.34 Guidelines for use in safely deterring polar bears.**

(a) These guidelines are intended for use in safely deterring polar bears in the wild. They provide acceptable types of deterrence actions that any citizen can use and not cause the serious injury or death of a marine mammal. Citizens conducting activities that comply with the guidelines in this subpart do not need any authorizations under the ESA or MMPA. Furthermore, we would not consider their actions to violate the take prohibitions of either the MMPA or this part.

(b) There are two levels of deterrence guidelines that a citizen could follow in order to nonlethally deter a polar bear. Each type of measure includes a suite of appropriate actions that the public may use.

(1) *Passive deterrence measures.* Passive deterrence measures are those that prevent polar bears from gaining access to property or people. These measures provide for human safety and do not increase the risk of serious injury or death of a polar bear. They include:

(i) *Rigid fencing.* Rigid fencing and other fixed barriers such as gates and fence skirting can be used around buildings or areas to limit bears from accessing community or industrial sites and buildings. Fencing areas 5 acres (~2 ha) and smaller can be used to limit human-bear interactions. Industry standard chain-link fencing material can

be used. Chain-link fencing can be placed around buildings on pilings (10,000 square feet or larger) as fence skirting to limit access underneath the buildings.

(ii) *Bear exclusion cages.* Bear exclusion cages provide a protective shelter for people in areas frequented by bears. Cages erected at building entry and exit points exclude polar bears from the immediate area and allow safe entry and exit for persons gaining access to or leaving a building should a polar bear be in the vicinity. Additionally, they provide an opportunity for people exiting a building to conduct a visual scan upon exit; such a scan is especially important in areas where buildings are constructed above ground level due to permafrost because bears may be resting underneath. These cages can be used at homes or industrial facilities to deter bears. Cages can be used in remote areas of unknown bear use and bear travel corridors, *e.g.*, within 0.5 mile from coastline, to deter bears from facilities. Cages must be no smaller than 4 ft (width) by 4 ft (length) by 8 ft (height). Bars must be no smaller than 1 inch wide. Distance between bars must be no wider than 4 inches on center. The ceiling of the cage must be enclosed.

(iii) *Bear-proof garbage containers.* Bear-proof garbage containers exclude bears from accessing garbage as a food source and limit polar bears from becoming food-conditioned or

habituated to people and facilities, which further reduces the potential for bear-human interactions. Commercially designed residential bear-proof containers (32–130 gallons) can be used. Two- to 6-cubic yard containers can be specifically designed by commercial vendors as bear-proof containers or have industry-standard lid locks to prohibit bear entry, depending on the need and location. Larger garbage containers, such as dumpsters or “roll-offs” (20 to 40 cubic yards), can limit bear-human interactions when the containers have bear-proof lids. Lids must be constructed of heavy steel tubing or similarly constructed with heavy expanded metal.

(2) *Preventive deterrence measures.* Preventive deterrence measures are those that can dissuade a polar bear from initiating an interaction with property or people. These measures provide for safe human use and do not increase the risk of serious injury or death of a polar bear. These are:

(i) *Acoustic devices.* Acoustic deterrent devices may be used to create an auditory disturbance causing polar bears to move away from the affected area. The reasonable use of loud noises, *e.g.*, vehicle engines, or an air horn, where such auditory stimuli could startle a bear and disrupt its approach to property or people, is authorized. This authorization is limited to deterrent devices with a sound strength

of no greater than 150 dB SPL. The use of commercially available air horns, which create sounds that fall below this upper limit, is acceptable.

(ii) *Vehicle or boat deterrence.* Patrolling the periphery of a compound or encampment in an enclosed vehicle, or similarly patrolling an area in a small boat, and deterring, but not chasing, polar bears with engine noise, or by blocking their approach without making a physical contact with the animal, is an acceptable preventive deterrence.

(c) The deterrence guidelines are passive or preventive in nature. Any action to deter polar bears that goes beyond these specific measures could result in a taking and, unless otherwise exempted under the MMPA, would require authorization. Prior to conducting activities beyond those specifically described in these guidelines, citizens should contact the Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 East Tudor Rd., MS-341, Anchorage, AK 99503, telephone (907) 786–3800, for further guidance.

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**Tom Strickland,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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