

May 7, 2009

Honorable Ken Salazar
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Dear Secretary Salazar:

We are writing to encourage you to utilize your authority pursuant to section 429 of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2009 (part of the Omnibus Appropriations Act, Pub. L. 111-008), to revoke the special rule for the polar bear, published December 16, 2008 at 73 Fed. Reg. 76249. The undersigned are professors of natural resources and environmental law at law schools around the country who are concerned that the overly broad language of the polar bear rule removes effective protections for this increasingly imperiled species.

The special rule, which was promulgated under Section 4(d) of the Endangered Species Act (ESA), includes a blanket exemption from the take prohibitions of Section 9 of the ESA for all activities occurring outside the current range of the species. 73 Fed. Reg. 76249, 76254-55. The rule also exempts from Section 9 all activities, regardless of where they occur, as long as the activity is “authorized or exempted” under the Marine Mammal Protection Act (MMPA). 50 C.F.R. § 17.40(q)(2).

We have three primary concerns with these exemptions. First, the exemption for all activities outside the current range of the species is overly broad, exempting whole classes of activities that harm polar bears. For example, the majority of contaminants, ranging from petroleum hydrocarbons, persistent organic pollutants, and heavy metals that negatively impact polar bears come from outside the current range of the species. 73 Fed. Reg. 28212, 28290. Second, exemption of all greenhouse emissions outside of the current range of the polar bear from potential regulation under Section 9 undermines the survival and recovery of the polar bear because such emissions are the primary threat to the continued existence of the polar bear. Finally, the take provisions of the MMPA provide less protection for the polar bear because unlike the ESA, the MMPA’s definition of “take” does not include the term “harm.” Compare 16 U.S.C. § 1532(19) with 16 U.S.C. § 1362(13). Under the ESA, the “harm” prohibition has been interpreted to include habitat modification, which significantly impairs “essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R § 17.3. In eliminating the “harm” prohibition for polar bears, the special rule potentially undermines effective protections for the polar bear’s habitat from both direct and indirect impacts.

Although we recognize that protection of the polar bear presents challenges to the U.S. Fish and Wildlife Service, we cannot support a special rule that exempts nearly all of the primary threats to the species and firmly believe that the special rule is not consistent with the conservation of the species and is contrary to law. We urge you to make use of your authority under the Appropriations Act to formally repeal the rule.

One final note, given that Congress authorized the Secretary to withdraw the special rule because it eliminates vital ESA protections for the polar bear, withdrawal of that rule should not be interpreted as reinstating the interim rule which is even more problematic. Nothing in Section 429 or the APA prevents the Department of the Interior from rescinding both the final and interim polar bear rules promulgated by the Bush administration. Plainly, Congress intended that exercise of this authority would reinstate the full protections of the ESA for the polar bear.

Sincerely,

[Institutions are provided for identification purposes only.]

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