TESTIMONY OF HOWARD M. CRYSTAL
BEFORE THE HOUSE SUBCOMMITTEE ON
INSULAR AFFAIRS, OCEANS AND WILDLIFE OF THE
HOUSE COMMITTEE ON NATURAL RESOURCES

I appreciate the opportunity to testify on H.R. 1053, which proposes an amendment to the Marine Mammal Protection Act (MMPA) of 1972. I am a partner with the public-interest law firm Meyer Glitzenstein and Crystal, which has litigated cases on behalf of a wide range of national and grassroots conservation and animal protection organizations, including Sierra Club, Defenders of Wildlife (Defenders), Humane Society of the United States (HSUS), International Fund for Animal Welfare (IFAW), Ocean Conservancy, Center for Biological Diversity, and Save The Manatee Club. With regard to the conservation of the polar bear, we are representing IFAW, Defenders and HSUS in the Multi-District Litigation (MDL) currently pending before the federal district court for the District of Columbia. In that litigation the Safari Club International, Conservation Force, and others are asking the court to find that the Department of the Interior's Fish and Wildlife Service (FWS) may grant polar bear imports permits under the MMPA despite the agency's 2008 finding that the polar bear is a threatened species under the Endangered Species Act (ESA).

THE MARINE MAMMAL PROTECTION ACT AND ITS RELATIONSHIP TO THE ENDANGERED SPECIES ACT

Before providing some comments on the Amendment proposed by Congressman Young, it is important to put the amendment into some historical context. In enacting the MMPA in 1972, the House of Representatives explained:

> Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefitted from our interest; they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.

H.R. Rep. No. 92-707 (1971). Based on these findings, and declaring that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities," Congress passed the MMPA to ensure that these species "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." 16 U.S.C. § 1361(1) and (2).

To accomplish this objective, the MMPA imposes a moratorium on the taking and importation of marine mammals, id. § 1371; see also id. § 1372(b), and establishes a scheme under which these activities may be permitted by the agency. For the import of species such as the polar bear, the principal authority for the agency to issue such permits is a provision allowing imports "for purposes of scientific research, public display, or enhancing the survival or recovery of" the species. Id. § 1371(c).

In 1994, Congress amended the MMPA to permit the import of polar bear body parts taken in sport hunts in Canada where certain conditions are met, including the approval of hunting for certain polar bear populations. Pub. L. No. 103-238, § 5 (1994).

The MMPA also has always provided special protection for a species designated as "depleted" under the statute. 16 U.S.C. § 1362(1). Of particular relevance here, MMPA Section 102(b) provides that, irrespective of the polar bear import provision or any other permit authority, once a species is designated as "depleted" import permits may only be issued "for scientific research, or for enhancing the survival or recovery of a species or stock . . . ." Id. § 1372(b)(3).

The 1972 statute defined a "depleted" species, inter alia, as one that "has declined to a significant degree over a period of years," or "has otherwise declined and that if such decline continues . . . such species would be subject to the provisions of the" ESA. See Pub. L. No. 92-522, § 3(1). In 1981, that definition was expanded to include "any case in which . . . a species or population stock is listed as an endangered species or a threatened species under" the ESA. Pub. L. No. 97-58, § 1 (1981) (emphasis added). As the House Report on this amendment explained,

this change "recognized that species that are listed under the Endangered Species Act are, a fortiori, not at their Optimum Sustainable Population and, therefore, should be considered depleted." H.R. Rep. No. 97-228, at 16 (1981).

THE 2009 AMENDMENT

In May 2008 the FWS listed the polar bear as a threatened species under the ESA throughout its range. 73 Fed. Reg. 28,212 (May 15, 2008). In listing the species the Service explained that, prior to 1973, the polar bear was declining due to "severe overharvest" that occurred in light of "the economic or trophy value of their pelts." Id. at 28,238. While the subsequent cessation in large-scale hunting provided some protection to the species, the Service found that other threats have continued to cause population declines, including climate change-induced reductions in sea ice; reduced prey availability; and continued overharvest in certain areas. Id. at 28,255-28,292. In light of these threats, the Service concluded that the polar bear is likely to become an endangered species "within the foreseeable future," and consequently listed the species as threatened under the ESA. Id. at 28,238. Moreover, while the agency has the authority under certain circumstances to limit a species' protection to certain discrete portions of its range, the FWS determined that the species was threatened throughout its range, including the polar bear populations in Canada.

Pursuant to MMPA Section 3(1), by virtue of the ESA listing the polar bear became a "depleted" species under the MMPA. 16 U.S.C. § 1362(1). This, in turn, triggered MMPA Section 102(b)'s proscription on polar bear import permits, limiting them to those issued for scientific research or enhancement of survival purposes. Id. § 1372(b). Accordingly, because the species is threatened with extinction, the FWS may no longer allow trophy hunters to kill polar bears in Canada and import their body parts into the United States.

The proposed amendment would circumvent this existing regulatory scheme, authorizing the FWS to issue import permits for polar bears killed from previously approved populations in

Canada up until the date the species was listed under the ESA. The amendment should be rejected for both legal and policy reasons.

The amendment fundamentally undermines the critical relationship between the protections that species presently receive under the ESA and the MMPA. Under the MMPA, Congress recognized that a species may be "depleted" – thereby warranting a ban on imports – even before it becomes so imperiled that it requires listing under the ESA. Indeed, a species can be designated as depleted simply because it is below its "optimum sustainable population," 16 U.S.C. § 1362(1)(A) – which is the "number of animals that will result in the maximum productivity of the population or the species." Id. § 1362(9) (emphasis added).

Under this amendment, however, although the polar bear is now listed under the ESA, it will not be uniformly treated as depleted under the MMPA. Instead, the FWS will continue to allow certain recreational hunters to import their polar bear trophies into this country.

The fact that the amendment is limited to those polar bears killed before the species was listed does not change this fact. The ban on imports of imperiled species is a critical tool by which the United States can impact the treatment of those species in other countries. Certainly, hunters who wish to bring their trophies into this country will have significantly less incentive to participate in a sport hunt if that import is prohibited. The import ban also sends an important signal to our conservation partners in other countries, helping to generate efforts that might improve the species' status so that imports may once again be permitted.

Allowing continued imports of polar bears, by contrast, sends exactly the wrong signal. The polar bear has become a poster child for species' conservation in a world rapidly changing due to human impacts. To allow sport-hunters to bring polar bear body parts into this country after the expert agency has decided that the species is threatened with extinction broadcasts that

the protection of the species is not that important, and that the interests of sport-hunting take precedence over the interests of the long-term protection of the polar bear.

In this regard, it is also critical to recognize that nothing dramatic happened to the polar bear's on-the-ground condition in May 2008. The species was not imperiled the day after the listing, but in fine health the day before. Instead, as the Service recognized in listing the species, the polar bear faces ongoing and long-term threats to its existence. Therefore, from a conservation perspective there is no principled basis to distinguish between polar bears killed before the listing and those killed afterwards. In short, now that the species is listed imports of trophies should be prohibited, regardless of when the species was killed.

The fact that the listing became effective on the date it was published in the Federal Register, and not after a thirty day "grace period" as is often the case, also does not support allowing imports of sport-hunting trophies after the species was listed. As a federal district court judge explained when she rejected the sport-hunter's argument that a special exception should be made for hunters who had submitted import applications for bears killed prior to the listing, sport-hunters "assumed the risk that they would be unable to import their trophies" when they chose to engage in sport-hunting despite the fact that the species was under consideration for listing under the ESA. *Center for Biological Diversity v. Kempthorne*, No. 08-1339 (N.D. Cal. July 11, 2008). Moreover, most, if not all, of the hunters who submitted import applications before the listing could not have obtained an import permit within the grace period in any event, given the notice and comment process involved in obtaining such a permit.

It is also crucial to appreciate that this amendment is a stark departure from earlier amendments allowing these imports. While Congress has twice amended the statute to allow imports of polar bears killed years earlier, at neither time was the species listed under the ESA and depleted under the MMPA. Moreover, while hunters certainly knew the species was likely to be listed – therefore banning imports – this amendment would allow hunters who killed a

polar bear just weeks, or even days, before the listing to bring their trophies into this country. Congress should not support the perverse incentives created by such an approach. Indeed, particularly if Congress passes this amendment, hunters will assume that if they continue to hunt polar bears in Canada despite the ESA listing, provisions will be made to allow their importation in the future.

This brings me to the pending litigation. The ESA listing is presently being challenged in multiple lawsuits pending in federal court for the District of Columbia, including by sport-hunting groups. This litigation is yet another reason that the proposed amendment is both ill-conceived and ill-timed.

If Congress passes this amendment, and then the plaintiffs lose the pending litigation and the court upholds the listing, we could well be here again in a few years. At that time, sport-hunters might seek an amendment allowing the import of trophies for polar bears killed before the judicial opinion was issued. Their argument then, much like their argument now, would be that when they went on their hunts in 2009, the species' status was "uncertain" because of the litigation. Because they believed the listing should and would be set aside, they would argue, they should not be penalized by not allowing their trophies to be imported. Moreover, they would also argue, since the polar bears killed in 2009 are already dead, allowing their import would not impact the conservation of the species. The fact that passing the amendment today allows that argument in the future simply highlights why the amendment makes no sense now, just as it will make no sense then. In short, the only reasonable line to draw for imports is the one already drawn by the existing regulatory scheme: banning sport-hunted imports at the time the species is listed.

Finally, if the sport-hunting groups prevail in the current litigation, the amendment under consideration today would not be necessary. If the species were no longer listed as threatened, it would no longer be designated as depleted, and the original polar bear import provision would go back into effect, barring some other legislative development.

Alternatively, the sport-hunting groups are also arguing to the court that the polar bear import provision remains in effect despite the listing. If they prevail on this alternative argument, imports would once again be permitted on that basis. In light of these possibilities, it is at the very least premature for Congress to consider this amendment at this time.

CONCLUSION

Through the interplay between the ESA and the MMPA, Congress has already struck a balance between the conservation needs of marine species such as the polar bear and the other interests, including those of sport-hunters. We urge Congress not to upset that balance by permitting sport-hunters who have gone to Canada to kill polar bears to continue to import their body parts into this country, despite the fact that the FWS has determined that the species is threatened with extinction throughout its range, including Canada. Thank you for the opportunity to submit these comments.