

# Committee on Resources

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## Witness Testimony

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**Statement of John E. Reynolds, III, Ph.D., Chairman  
Marine Mammal Commission**

Before the House Subcommittee on Fisheries, Wildlife and Oceans

House Resources Committee

Regarding House Joint Resolution 59 to Disapprove a Rule

Affecting Polar Bear Trophies from Canada

April 30, 1997

Thank you for inviting the Marine Mammal Commission to testify on House Joint Resolution 59, which would disapprove the rule published by the Fish and Wildlife Service on 18 February 1997 to authorize the import of polar bear trophies from Canada. I am accompanied by Michael L. Gosliner, General Counsel to the Commission, and Robert J. Hofman, Ph.D., the Commission's Scientific Program Director.

As we understand it from your letter, the purpose of this hearing is to consider the Resolution and to obtain comments from witnesses concerning: 1) whether the final rule reflects the legislative intent of Congress, 2) Canada's program for the conservation and management of polar bears, and 3) sport hunts conducted in Canada.

### The 1994 Amendments

The Commission first became involved in this issue in 1993, when Congressman Studds requested our views on the advisability of amending the Marine Mammal Protection Act to permit the importation of legally harvested polar bear trophies from Canada. Mr. Studds specifically asked for the Commission's views on three points -- whether the Canadian polar bear population was relatively healthy, whether permitting trophy imports potentially would result in pressure on the Canadian government to allow more bears to be killed, and whether the Canadian hunt conflicted in any way with the 1973 Agreement on the Conservation of Polar Bears.

The Commission responded that it was not clear that an amendment was needed and noted the existence of the Marine Mammal Protection Act's waiver provision, which allows the Secretary of the Interior (or Commerce) to authorize the taking and importing of marine mammals, provided certain showings are made. The Commission indicated its belief that the waiver process provided the best way to examine whether the Canadian program met the requirements of the Act and was consistent with the requirements of the Agreement on the Conservation of Polar Bears. The Commission advised that amendment should be considered only after a waiver had been sought or specific problems or impediments with the process identified. Further views of the Commission were not sought as the trophy import amendment was drafted and considered.

The Commission's suggestion that amendment should not be considered before either a waiver had been sought or specific impediments to securing a waiver identified was not made to oppose the sport hunting of polar bears, to oppose imports of legally taken trophies from Canada, or to find fault with the Canadian program. Rather, it was to recognize that the Marine Mammal Protection Act already included a mechanism whereby importations of sport hunted trophies could be allowed. The Commission believed that that process should be given a chance to work as the original drafters of the Act intended and should be bypassed only if it did not work.

The Marine Mammal Protection Act Amendments of 1994, which included section 104(c)(5), were signed into law on 30 April 1994. Section 104(c)(5) authorizes the Secretary of the Interior to issue a permit for the importation of a polar bear trophy taken legally by the applicant in a sport hunt in Canada, provided four findings are made. Before issuing any such permit, the Secretary, in consultation with the Marine Mammal Commission and after providing notice and opportunity for public comment, must find that:

(i) Canada has a monitored and enforced sport hunting program consistent with the purposes of the Agreement on the

## Conservation of Polar Bears;

- (ii) Canada has a sport hunting program based on scientifically sound quotas ensuring the maintenance of the affected population stock at a sustainable level;
- (iii) the export and subsequent import are consistent with the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora and other international agreements and conventions; and
- (iv) the export and subsequent import are not likely to contribute to illegal trade in bear parts.

The statute places responsibility for making these findings on the Department of the Interior and ascribes a consultative role to the Commission. Additionally, the Service, before issuing a permit under this provision, must determine that each bear to be imported was legally harvested in Canada by the applicant.

## Consultations

In making its findings, the Service began consultations with the Commission during the summer of 1994. In October 1994, the Commission commented on a draft Federal Register notice regarding the development of regulations to govern polar bear imports from Canada and provided the Fish and Wildlife Service with an outline of the questions it believed the Service would need to address to make the statutorily mandated findings.

Canada provided the Service extensive information on its polar bear program in December 1994. A copy of Canada's submission was forwarded to the Commission in late January 1995. The material was reviewed by the Commission and members of the Committee of Scientific Advisors in preparation for commenting on a draft of the proposed rule being prepared by the Service. The Service provided a draft of its proposed rule to the Commission for comment at the end of March 1995. The Commission completed its review within a week. Extensive comments on the draft were provided to the Service during a 10 April 1995 telephone discussion.

After making revisions, the Service published its proposed rule on 17 July 1995. The comment period on the proposal was originally scheduled to close on 31 August. However, after receiving requests from two non-governmental organizations to extend the comment period, the Service informed the Commission that it intended to do so. The comment period was ultimately reopened until 6 November 1995. The Commission, in consultation with its Committee of Scientific Advisors, completed its review and forwarded comments to the Service on 9 November.

## The Commission's Comments on the Proposed Rule

I would be pleased to submit a copy of the Commission's comments for inclusion in the record. For purposes of my testimony, I will confine myself to a few key points.

The Commission provided detailed comments on each of the findings required under the 1994 amendments. We did so to meet our responsibility to see that the Marine Mammal Protection Act is faithfully implemented as enacted. The Marine Mammal Protection Act clearly provides for authorizing the hunting of polar bears and other marine mammals and the importation of trophies in certain circumstances. Our statutory responsibility is to see that all applicable conditions are met before such taking or importation is allowed. On all but a few issues, the Commission concurred with the findings initially proposed by the Fish and Wildlife Service. In many instances, however, we believed that additional explanation was needed to justify a proposed finding. We believe that, as a result of the Commission's carefully considered comments on the proposed rule, the final rule more accurately reflects the statutory criteria.

As noted above, the 1994 amendments specify four findings that must be made by the Fish and Wildlife Service before imports of polar bear trophies can be permitted. The first is that Canada's sport hunting program be consistent with the purposes of the Agreement on the Conservation of Polar Bears. To make such a finding, the Service must determine that one of the exceptions in Article III of the Agreement allows for the taking of polar bears by non-nationals in sport hunts. The Commission is fully aware of the declaration made by Canada in 1976 at the time it ratified the Agreement. The declaration stated Canada's view that the exceptions in Article III.1, subparagraphs (d) and (e) permitted "a token sports hunt based on scientifically sound settlement quotas as an exercise of the traditional rights of the local people."

Nevertheless, the 1994 amendments to the Marine Mammal Protection Act clearly placed the responsibility for making the determination of treaty consistency with the Fish and Wildlife Service. That is, while Canada's interpretation of the treaty provisions is certainly important, it is not dispositive of the issue for purposes of section 104(c)(5).

The Commission's position on this issue has been a consistent one. In its 1993 letter to Mr. Studds, the Commission advised that the bases for Canada's conclusions were by no means clear. The Commission pointed out that Article III.1.(d) appeared on its face to be limited to local people exercising traditional rights. The situation with respect to the exception in Article III.1.(e) was less clear. The Commission noted the possible problems with making such a finding of consistency, including a statement made by the Fish and Wildlife Service in support of Senate ratification of the Agreement in 1975 that took the position that the Article III.1.(e) exception applied only to nationals of the country in which bears are taken. Despite this caution from the Commission, the 1994 amendments included a requirement that the Canadian program be found consistent with the purposes of the Agreement before trophy imports could be permitted.

The Commission, in commenting on the Fish and Wildlife Service's proposed rule, provided a comprehensive discussion of the consistency of the Canadian program with each applicable element of the Agreement on the Conservation of Polar Bears. Our analysis was based in large part on a Commission contract report prepared prior to consideration of the 1994 amendments and in a context wholly unrelated to the question of polar bear imports from Canada. That report examined the possible inconsistencies between U.S. law and the provisions of the Agreement. Among other things, the report provided the basis for the Commission's recommendation to the Service that the best interpretation of the exception under Article III.1.(e) would allow a party to the Agreement to allow any person, including a non-national, to take a polar bear, as long as the take occurs in an area where the nationals of that country have engaged in or might have engaged in taking by traditional means.

The second required finding is that Canada's sport hunting program be based on "scientifically sound quotas ensuring the maintenance of the affected population stock at a sustainable level." The Service suggested in its proposed rule that this, as well as the other findings, were not applicable to those trophies taken by U.S. hunters in Canada prior to enactment of the 1994 amendments. The Commission did not see how the Service could have arrived at such a conclusion based on a plain reading of the statute. Section 104(c)(5)(A) clearly indicates that the four required findings are to be made before any import permit is issued. In addition, the legislative report on the amendments explained that "all conditions outlined by this amendment concerning importation of polar bear trophies taken prior to the adoption of this amendment have to be met." Given the plain meaning of the statutory provision and the statement of legislative intent, the Commission believed that the Service was courting adverse and costly litigation if it permitted the importation of pre-amendment trophies without making the specified findings.

The Commission also commented on the timing of the finding of scientific soundness as it relates to pre-amendment trophies. The Commission noted that the nature of the required finding suggested that historical data be used. That is, a quota would be considered scientifically sound if it ensured the maintenance of the affected population at a sustainable level at the time a bear was taken. While the Commission realized that an examination of historical data would be a bit more involved, we did not believe that it would be overly burdensome, if as the Safari Club International's Renewable Wildlife Resources Committee has contended, Canada has had "forty plus years of sustainable harvest involving a healthy population...."

As a plausible alternative interpretation of the statutory provision, the Commission suggested that the findings be based upon present day quotas and management practices for each population. This interpretation was ultimately adopted by the Service in its final rule.

The other key question that the Service needed to resolve was whether the findings of scientific soundness should be made for individual polar bear management units in Canada, for a single Canadian population, or for some other division of the populations that occur in Canada. The Commission's comments generally supported the use of management units as being conservative, but recommended that the Service provide additional justification in the final rule to link the management units to the Marine Mammal Protection Act's definition of "population stock." The Service found merit in the Commission's advice and explained the basis for equating management units with populations in the final rule.

## The Final Rule

The Service published its final rule on 18 February 1997, making affirmative findings for 5 of the 12 management units used by Canada when the rule was proposed. The Commission believes that the final rule is a considerable improvement over the original proposal and, in general, supports the Service's conclusions. The rule noted, but did not rely on, data that became available after the extended comment period ended. In the Commission's view, it would have been difficult for the Service, based on the record before it at that time, to sustain affirmative findings for any of the other seven management units. Also, we find no fault with the Service's assessment that, rather than revising the proposed findings to reflect more recent data, which would have required additional notice and comment, it made sense to conclude the initial rulemaking and then consider revisions.

We are well aware that some groups believe that the rule did not go far enough to allow imports of pre-amendment trophies or polar bears taken in other management units. With respect to pre-amendment bears, we recognize that these bears are already dead and, as such, whether or not they are allowed into the United States will have no bearing on the status of the populations. Nevertheless, the Fish and Wildlife Service is bound to implement the law as enacted, regardless of what expectations there may have been. The plain language of the statute is controlling and that language clearly requires the specified findings be applicable to all trophies, including those taken prior to enactment of the 1994 amendments.

## Prospective Actions

With final rules now in effect, we are in a position to consider where to go from here. Essentially, there are three available options: 1) amend the rule based on revised interpretations of the statutory requirements; 2) amend the Marine Mammal Protection Act to establish different requirements; or 3) work within the existing regulatory framework to consider additional data as they are developed.

The first option is fraught with difficulty. It would require overturning the Service's initial determinations which we believe are consistent with the statutory language. Moreover, a reviewing court is likely to examine carefully whether the Service has developed a new record sufficient to overcome its initial determinations.

The second option, statutory amendment, is the most direct way to change the status quo. If Congress does not believe that the 1994 amendments, as implemented by the Service, achieved the desired result, it can revise or eliminate some or all of the statutory requirements. For example, if Congress believes that all trophies currently in storage in Canada should be allowed to be imported into the United States, it could amend the Act to accomplish this by requiring that an applicant, to qualify for a permit, merely demonstrate that the bear was legally taken in Canada before a certain date.

The third option, working within the existing regulatory framework, is the one recommended by the Commission. We believe that the four criteria adopted by Congress in 1994 are appropriate and that appropriate findings relative to each should be required before imports from a particular management unit are allowed. We note that this option is not a static one. Rather, we expect the Service will consider new information as it becomes available and propose revisions to the regulations as warranted.

As noted above, the final rule was not based on population and management data regarding Canada's polar bear program that have become available since the close of the comment period. Additional population data are now available and Canada has revised its delineation of the 12 management units since that time. Based on more recent movement data, what formerly had been considered three management units, the Queen Elizabeth Islands, Parry Channel, and Baffin Bay, have been reorganized into a smaller Queen Elizabeth Islands management unit, a revised Baffin Bay management unit, and new Kane Basin, Lancaster Sound, and Norwegian Bay management units. The boundary between the Baffin Bay and Davis Strait management units has also been revised somewhat.

Shortly after publication of the final rule, the Commission requested that the Service provide it the most recent information on the status of Canadian polar bear populations and on changes to Canada's management program. To assist in its review of this information, the Commission contracted with J. Ward Testa, Ph.D., a population biologist and biometrician, to evaluate the new data and information. Dr. Testa was asked to evaluate: 1) whether Canada's polar

bear conservation program is based upon sound principles of resource management; 2) whether the procedure being used by Canadian scientists to estimate sustainable polar bear harvests is conceptually sound and reflects current knowledge about polar bears; 3) whether the judgments concerning the number, discreteness, and status of putative polar bear populations in Canada are based upon the best available data and appropriate analyses; and 4) the likelihood that the data and procedures being used to assess population status and manage harvests will allow polar bear populations in Canada to grow or be maintained at current levels.

Dr. Testa, after having considered comments from the Commission and outside reviewers on a draft report, submitted a final report on 21 April 1997. A copy is attached. The report concluded that the Canadian polar bear program is consistent with generally accepted principles of sound resource management. It also concluded that the methods and models used by Canada to set polar bear quotas to be conceptually sound. The report agreed that available data supported Canada's realignment of the Queen Elizabeth Islands, Parry Channel, and Baffin Bay management units.

Using the criteria adopted by the Fish and Wildlife Service in the final rule, the report examined whether polar bears from any other management units might now qualify for import permits under the Marine Mammal Protection Act. It concluded that two of the revised management units, Lancaster Sound and Norwegian Bay, no longer shared harvests with Greenland or with other Canadian provinces, have good histories of quota compliance, and have population estimates that are as reliable as those for other management units for which the Service made affirmative findings. Based upon the analyses in the report and our independent review of recent data, the Commission, in consultation with its Committee of Scientific Advisors, has recommended that the Service, if it concurs with our analysis, initiate a rulemaking to make affirmative findings for these two management units.

As for the remaining six management units for which findings have not been made, the Commission believes there are problems that Canada needs to resolve. Before an affirmative finding can be made for the Gulf of Boothia management unit, a better population estimate is needed. The remaining management units, Foxe Basin, Southern Hudson Bay, Davis Strait, Baffin Bay, and Kane Basin, all include areas outside of the Northwest Territories. Consistent with the criteria established by the Service in the final rule, the Commission believes that harvest agreements need to be concluded between the Northwest Territories and the entities with which the various populations are shared (Greenland, Ontario, Quebec, Labrador, and Newfoundland) before a finding of sustainability can be made.

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