STATEMENT
OF
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BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
REGARDING THE
ENDANGERED SPECIES ACT AND PROPOSED LISTING OF THE POLAR BEAR AS A THREATENED SPECIES

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Madam Chairman: My name is William P Horn and I appreciate the opportunity to appear before the Committee to discuss the Endangered Species Act (ESA), polar bears, and the adverse wildlife conservation consequences that will arise if the healthy polar bear populations are listed as a threatened species. This testimony reflects my prior tenure as Assistant Secretary of the Interior for Fish, Wildlife and Parks in 1985-1988 (responsible for the ESA program) and experience serving on the Board of Environmental Sciences and Toxicology of the National Academy of Sciences. It is also on behalf of the United States Sportsmen's Alliance (USSA).

It would be a mistake to list the presently healthy and sustainable polar bear populations as a threatened species under the ESA. Such action will produce a variety of adverse consequences including (1) creating an ESA listing precedent that opens Pandora's Box in the form of other unwarranted listings that will diminish resources available for bona fide wildlife conservation and recovery efforts, (2) setting the stage for new rounds of litigation and judicial activism to turn the ESA into a regulatory monster of unprecedented proportions, and (3) harming existing successful polar bear conservation and management programs. Each of these specific topics will be discussed in turn below.

USSA is committed to effective scientific based wildlife management. Since the days of Teddy Roosevelt, the sporting community has worked with its federal and state partners to develop the successful North American Wildlife Conservation Model. It is similarly committed to conserving the polar bear, as well as other species, through the continuation of presently successful and effective conservation programs and ensuring that the ESA remains focused on offsetting the present and imminent impacts of discrete human activities that adversely threaten our fish and wildlife resources.

Adverse Listing Precedent – A decision to list a presently healthy species – exhibiting no present trajectory toward endangerment − based on large scale hemispheric models forecasting problems 50 years in the future is a radical departure from the language of the ESA. It pushes the decision horizon far into the genuinely unseeable future, is predicated on uncertain intervening events where it is difficult if not impossible to tie those events directly to specific on-the-ground situations, and will likely precipitate the subsequent listing of an array of otherwise healthy species which might also be forecast to face problems a half century or more from now. By stretching the ESA and encompassing under its umbrella an unknown number of such species, finite monetary and staff resources will be further divided and resources diminished and diverted from conservation and recovery of species facing bona fide imminent threats and where

FWS is actually capable of conserving such species. That is bad conservation strategy and bad policy.

The ESA specifies that an "endangered species" is one is "in danger of extinction" and a "threatened species" is one "likely to become endangered within the foreseeable future." 16. U.S.C. § 1532(20). For the past 35 years, in the ESA context, foreseeability has meant imminent adverse effects expected or predicted to occur within a few years. Foreseeability has also incorporated a present adverse population trajectory that is expected to continue or worsen absent some changes in conservation practices. In addition, the concept of "foreseeability" in our legal system has almost always included notions of proximity or imminence. The lawyers, including Members of Congress, who drafted and enacted the ESA in 1973, would have been fully cognizant of those established principles regarding "foreseeability" when that term was incorporated into the statute.

The proposed polar bear listing would obliterate these concepts of imminence and proximity. Indeed, FWS has acknowledged that the forecast problems for the polar bear are unlikely to arise until 45 to 50 years from now. In the meantime, and especially in the imminent, proximate and genuinely foreseeable future, polar bear populations are expected to remain healthy and sustainable. No present adverse population trajectory now exists. Rather, an uncertain forecast large scale intervening event (i.e., climate change) is predicted by some models to manifest itself in shrinking Arctic Sea ice and at some point in the future change the trajectory of polar bear populations. So the bears present a unique new policy and legal question: is "foreseeable" now extended to mean model forecasts 50 years hence which represent a fundamental change in a species present healthy population trajectory?

Obviously proponents of listing want to push "foreseeability" out an unprecedented degree with substantial consequences for other species. There is no doubt that listing the polar bear on the basis of forecast Arctic sea ice shrinkage a half century from now will necessitate the listing of other Arctic species similarly dependent on the present state of the Arctic ecology. Interest groups have already "connected the dots" and have filed listing petitions for other Arctic species such as walrus and ribbon seals. Last Thursday NOAA announced that it will consider listing four Bering Sea seal species as endangered or threatened based on forecast sea ice shrinkage. On a broader scale, climate change is predicted to usher in significant ecological changes in other areas of North America. Is each presently healthy species that may be adversely impacted by such ecological changes – 50 years or more from now – to be listed today under the ESA?

It was only 30 years ago that the dominant climate concern was the advent of another ice age. Action in the mid-1970's based on the accepted model predictions of that era would have had FWS listing temperate species which would be impacted by cooling temperatures, advancing glaciers, and attendant ecological changes. Even today it is recognized that "the envelope of uncertainty in climate projections has not narrowed appreciably over the last 30 years."[1] FWS acknowledges that the Arctic climate models are uncertain, natural variability causes uncertainties, and the resultant model forecasts are uncertain. These limitations prevent detailed

[1] Why is Climate Sensitivity So Unpredictable" 318 Science 629 (2007).

forecasts of climate models beyond about a decade. Furthermore, it is very difficult to extrapolate and accurately predict specific on-the-ground ecological and species impacts from broad scale climate models with a global or hemispheric focus. These factors persuade me that attempts to make species specific forecasts 50 years hence, especially when that represents a reversal of present species health or population growth, are not "foreseeable" as a matter of law or policy.

Once these established "foreseeability" sideboards are blown away by a polar bear listing, I anticipate a cascade of petitions to list a wide variety of species that could be impacted by climate change. Obviously, Arctic species might likely be at the top of this list but Antarctic species (e.g., penguins) probably qualify for listing under the looming polar bear precedent. These prospective listings will be based on predicted global or hemispheric changes in climate arising from increases in greenhouse gas emissions.

A New Regulatory Monster – Listing today's healthy polar bear populations as threatened will open the gate to new rounds of litigation and judicial activism that will likely turn the ESA into a regulatory monster of unprecedented proportions. The predicate of the listing is that greenhouse gas emissions are triggering melting of the Arctic Sea ice habitat upon which the polar bears depend. Yet ESA provides – and FWS possesses − no authority or expertise to regulate such emissions on a national, hemispheric, or global basis. Clearly, FWS cannot tell the governments of China or India to stop building new coal fired power plants. A polar bear listing will also trigger a sequence of events in which FWS is compelled to expand the scope of its regulatory activities into realms (e.g., air emissions) where it cannot be effective as a matter of fact or law. The agency will be pressed well beyond its expertise and resources to become the uberregulator of our nation's greenhouse gas emitting electrical and transportation systems. That will detract from focus on areas and species where FWS can be effective and conserve genuinely at-risk species.

It is a given that some interest group will advance the argument that actions which emit greenhouse gas emissions constitute a prohibited "taking" of the listed polar bear under section 9 of the ESA (16 U.S.C. § 1538). The same interests will insist that FWS be "consulted" under section 7 of the ESA (16 U.S.C. § 1536) regarding any federal agency action that will result in any increase of greenhouse gas emissions. If the historic trajectory of ESA and the courts continues, a variety of private citizen or state actions will likely be found to be illegal takings of listed polar bears.

These conclusions re "takings" are based on a series of ESA federal court cases in which federal courts have held states and local governments liable merely for allowing private parties to engage in activities which occasionally result in inadvertent unintentional taking of endangered or threatened species. To give just three examples, the federal courts have held a state fishing regulator liable for the acts of fishermen whose nets occasionally entangle protected whales.[2] They have held counties liable for not prohibiting driving on beaches, where private drivers

[2] Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1998).

occasionally disturb the nests of protected turtles.[3] And a State has been found culpable of "taking" when it allowed trapping and some trappers accidentally caught a few listed (i.e., protected) lynx.[4] Under these precedents, activists will have the upper hand in getting federal courts to hold state pollution control agencies, transportation officials and others liable for allowing the emission of gasses in their areas and liable for harming polar bears.

USSA is a party defendant in two cases in federal district court in which animal rights activists mounted this same theory to try to hold state wildlife regulators liable for not banning trapping. The theory of these cases is that, without a State trapping license, private trappers would not be trapping any animals and so would not occasionally accidentally catch a protected Canada lynx. The States of Maine and Minnesota are the primary defendants in those cases even though they don't engage in trapping and do engage in extensive voluntary efforts to help trappers avoid lynx and work closely with the FWS to conserve the lynx population.

Some no doubt will argue that the Supreme Court in the Sweet Home case decided that an entity (a person or a state) is guilty of a "take" only when its action is the "proximate cause" of harm or damage to the listed species. The whale, beach driving, and Minnesota lynx cases have all held that not prohibiting an activity at least in some circumstances amounts to proximately causing take by private parties engaged in the activity. Indeed, on Monday (March 30) the Minnesota court opined that the "proximate cause" aspect of Sweet Home is merely non-binding dicta. Under this line of reasoning, state environmental agencies and local building inspectors who do not prohibit greenhouse gas emissions may well found to be a similar proximate cause. Furthermore, since the polar bear listing blows apart traditional notions of foreseeability, I certainly would not advise any client to expect to be protected from citizens' suits on polar bear takings by traditional notions of proximate cause.

A polar bear listing based on the greenhouse gas predicate will also expand enormously the scope of FWS consultations. Any activity, or set of activities, that individually or cumulatively result in greenhouse gas emissions will likely be subject to section 7 consultation. Indeed, a California U.S. District Court has already directed FWS to incorporate climate change issues into its ESA consultations.[5] In dealing with either takings allegations or consultations for listed polar bears, FWS will also wrestle with extremely difficult causation issues or linkages between specific actions and Arctic climate change. When a new or expanded highway is to be built, what contribution, if any, to Arctic ice melting will be made by attendant increases in greenhouse gas emissions specifically attributable to the project? What kind of evaluation must FWS be able to conduct for a new domestic greenhouse gas emitting coal or gas electric power plant to be able to "consult" regarding its effects on the polar bear? Heretofore, the ESA has been focused on largely discrete activities that impact directly species habitats (e.g., water diversions, housing construction, logging). Those connections are direct and capable of being evaluated by fish and wildlife professionals. In contrast, for listed polar bears the connections will be highly attenuated between specific actions within the U.S. and Arctic climate leading to

[3] Loggerhead Turtle v. Volusia County, 896 F.Supp. 1170 (M.D. Fla. 1995), other aspects of case reviewed, 148 F.3d 1231 (11th Cir. 1998).

[4] Animal Protection Institute v. Holsten, 0:06-cv-3776, Order March 30, 2008.

[5] 506 F. Supp. 2d 322 (E.D. Cal. 2007).

sea ice shrinkage leading to impacts on polar bears. Wildlife professionals, no matter how intelligent or well trained, cannot make empirically sustainable connections for specific projects or activities.

For the ESA, that yields two alternative outcomes: (1) FWS can make no connections/linkages so that listing the polar bear will have no effects on domestic greenhouse emissions or (2) all such emissions, especially cumulatively, are connected to climate change so all emission-causing activities are subject to FWS review. In the first case, polar bear listing is a mere gesture with no real regulatory benefits contributing to conservation. In the second, FWS is forced to be the new uberregulator of domestic greenhouse gas emissions.

Of course, as previously noted, FWS has no expertise in the air emissions realm and it would require huge infusions of money and staff for it to acquire such expertise. That also begs the fundamental question: did Congress intend FWS to become THE greenhouse gas emission regulator via the ESA? Once the polar bear is listed, activists will no doubt pursue litigation to make this happen regardless of what Congress intended in 1973. We are convinced that pushing FWS into this regulatory realm, via listing the polar bear, does not serve wildlife conservation. Funds are barely available today to administer the National Wildlife Refuge system or run the migratory bird program. Forcing FWS into this expanded role will require the money to come from somewhere and we fear that the agency's traditional refuge, migratory bird and fisheries programs will be the first to suffer.

Listing Will Harm Existing Polar Bear Conservation – It is well established that polar bear populations are at or near record highs, have increased substantially since the 1960s, and sustain carefully managed subsistence and sport hunting programs. The latter programs, conducted primarily in Canada, generate important local income and ensure that Native communities are vested in polar bear conservation. The resultant partnership between these communities and Canadian wildlife officials has yielded effective scientific bear conservation and management resulting in improved sustainability of 11 of 12 polar bear populations in Canada.

Most the participants in these hunting programs are U.S. citizens who are now allowed to hunt in Canada and bring back the bear trophies pursuant to a special provision of the Marine Mammal Protection Act (MMPA). When enacted in 1972, the MMPA barred sport hunting of polar bears in the United States (i.e., Alaska) and also barred the import of trophies from Canada and elsewhere. It became evident in the 1980's that this ban on imports was hurting Canada's bear conservation and management. So Congress amended the MMPA in 1994 allowing trophy imports from Canada if the U.S. Fish and Wildlife Service (FWS) determined that "Canada has a sport hunting program based on scientifically sound quotas ensuring the maintenance of the affected population stock at a sustainable level." 16 U.S.C. § 1374(c)(5)(A). The hunting program is an integral element of bear conservation and management.

Listing all polar bears as threatened, as presently proposed, will terminate this effective program. The MMPA defines as "depleted" any species which is listed under the ESA. 16 U.S.C. § 1362(1)(C). It will therefore be illegal for FWS to make the "sustainable" finding for the polar bear if ,as a matter of law, ESA listing renders it a "depleted" species. Even if FWS

made such an effort, I am absolutely sure one of the radical animal rights groups will jump immediately into court to challenge that finding and succeed.

Crippling the most tangible polar bear conservation program will be the immediate consequence of an ESA listing. For this reason, Canadian and indigenous government wildlife officials strongly oppose the proposed listing. We note too that the Alaska Department of Fish and Game, which has its own polar bear programs and cooperates with Canada, similarly opposes the listing. Policy makers ought to listen to the recommendations of those on-the-ground wildlife professionals who deal with polar bear conservation on a daily basis.