

### Discussion of Comments on the Proposed Rule

The proposed rule, which was published in the **Federal Register** (68 FR 44020) on July 25, 2003, included a request for public comments. The closing date for the comment period was August 25, 2003. We received seven comments. Two commenters indicated support for the rule but did not provide specific comments. One commenter provided new comments but also incorporated by reference their comments on the 2000 proposed rule (65 FR 16828). For those past comments, we refer the commenter to our previous responses (65 FR 16828). The following issues were raised by the commenters.

#### Specific Comments and Responses

*Comment:* Some commenters stated their opposition to any form of incidental killing of wildlife, indicating their opinion that the incidental take program was developed as a vehicle to grant permission to the oil and gas industry to kill polar bears and walrus.

*Response:* The authorization of incidental take of marine mammals is provided for under section 101(a)(5)(A) of the MMPA. Take is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." Intentional take is not authorized by these regulations. Incidental take is authorized only after the Service finds that any expected take will have no more than a negligible impact on the species. During the past nine years of incidental take regulations, there are no known instances where a polar bear or walrus was killed by Industry activities. When polar bears do encounter Industry activities, appropriate measures are taken to safeguard the lives of both humans and bears. Section 101(5)(B) authorizes the Secretary to withdraw or suspend the authorization if these regulations are not complied with, or if the take allowed under the regulations is having or may have a more than negligible impact on the species or stock of concern.

*Comment:* No number or percentage of a population is included as an upper limit on the number of polar bears or walrus that could be killed over a given period of time while ensuring a sustainable population.

*Response:* The assessment of effects does not attempt to describe the allowable maximum sustainable incidental take mortality that could occur. We evaluated the potential effect of the predicted take to determine if the impact of this level of take would be negligible. If an unanticipated mortality of polar bears occurs, we will evaluate

this level and the effect on polar bear population rates of recruitment and survival and, if warranted, reconsider or revise the negligible effect finding of this rule.

*Comment:* Polar bears may be more affected by an oil spill than an initial mortality survey may indicate.

*Response:* We agree that there may be secondary or latent effects on polar bears from an oil spill. These effects are additive to the potential direct effects discussed in the section on oil spills in the proposed rule. The final rule has been revised to reflect our analysis of such latent effects and the finding that the potential secondary or latent effects, along with potential direct effects, will have a negligible impact, considering the likelihood of these effects occurring.

*Comment:* The proposed rule is inconsistent with the incidental take provisions of the MMPA. (The commenter did not identify specific inconsistencies.)

*Response:* Incidental take is authorized under section 101(a)(5)(A) of the MMPA. While the MMPA placed a moratorium on the taking of any marine mammal, section 101(a) of the MMPA identifies exceptions to the moratorium. Section 101(a)(5)(A) of the MMPA provides for the incidental but not intentional take of small numbers of marine mammals, provided that the total take will have a negligible impact on the population and will not affect the availability of the species for subsistence users.

*Comment:* A more comprehensive analysis of incidences of harassment of polar bears is necessary prior to issuing these regulations.

*Response:* Polar bear/human interaction data (1994–2003) occurring during Industry activities was incorporated into the analysis of this rule. The level and effects of hazing during this period were not significant and resulted in a negligible impact finding. The general objective of hazing polar bears is to encourage the movement of bears transient to coastal habitats back onto the pack-ice environment. The type and degree of hazing depend on specific circumstances, and in many instances only passive forms of hazing are necessary, such as positioning of vehicles or noise to displace bears from areas occupied by people. Cracker shell shotgun fire or deterrent rounds may be used when concerns for human safety are more immediate. We will continue to evaluate the data to determine if trends exist regarding the location and timing of hazing events and, if necessary, we will refine how hazing is conducted in the future. The hazing of

polar bears reduces potential impacts to polar bears and thus reduces potential effects of industrial activities and helps to support a negligible impact finding.

In addition, any future improvements to monitoring and reporting requirements may be implemented as conditions to future LOAs as warranted.

*Comment:* No alternatives were analyzed, such as issuing regulations that cover a narrower geographical scope (e.g., only lands falling within existing leases).

*Response:* The current geographic scope of the regulations accurately addresses the areas of ongoing or expected Industry activities and provides the framework for our assessment of potential impacts. Narrowing the scope of the regulations or evaluating lesser alternatives of reduced scale or frequency would not allow us to adequately address potential cumulative impacts. The alternatives considered in our environmental assessment were to issue regulations or not to issue regulations covering the full geographic area in which similar and interrelated Industry activities occur.

*Comment:* The regulations should not include the State or Federal Outer Continental Shelf waters offshore of the Arctic National Wildlife Refuge.

*Response:* We acknowledge that the State and Federal Outer Continental Shelf waters offshore the Arctic National Wildlife Refuge are important movement, feeding, and denning habitats to polar bears. However, these regulations do not authorize the actual Industry activities in this or other areas. The geographic scope of the regulations was based on that area in which Industry has already been authorized to conduct exploration, development, and production activities; that area in which Industry applied for MMPA coverage; and that area which allows us to accurately assess Industry's effects on polar bears and walrus.

*Comment:* The Service has conflated the MMPA's requirement that the number of takings be small and that the number of takings has a negligible impact on a species or stock.

*Response:* We disagree with this comment and believe that our analysis has fully considered the MMPA requirement that the number of takes be small and that takings have a negligible impact on species or stock. Based on the monitoring information we have acquired to date, we conservatively estimate that the average number of polar bears and walrus that may modify their behavior as a result of the oil and gas industry is small. In most cases, takes are a behavioral change that will be temporary, minor behavioral