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Fwd: 1018-0070

Tina Campbell <tina_campbell@fws.gov>
To: Madonna Baicum <madonna_baucum@fws.gov>

Mon, Mar 13, 2017 at 10:17 PM

Another comment.

Begin forwarded message:

From: "Luetkemeyer, Timothy" <tluetkemeyer18@law.du.edu>
Date: March 13, 2017 at 8:53:58 PM EDT
To: "tina_campbell@fws.gov" <tina_campbell@fws.gov>
Subject: 1018-0070

Please see the attached Comment on Proposed Information Collection; Incidental Take of Marine Mammals During Specified Oil and Gas Industry Activities.

Thank you.

Sincerely,

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2 attachments

 [noname.html](#)
1K

 [Comment on Proposed Information Collection; Incidental Take of Marine Mammals During Specified Oil and Gas Industry Activities.docx](#)
135K

Comment on Proposed Information Collection; Incidental Take of Marine Mammals During Specified Oil and Gas Industry Activities

This proposed information collection does not comply with the Marine Mammal Protection Act of 1972. The proposed method of information collection will, in itself, constitute an unlawful taking under the MMPA.

1. The proposed methods of information collection do not comply with the MMPA.

The Marine Mammal Protection Act of 1972 imposed a moratorium, or complete cessation, on the taking of marine mammals.¹ This moratorium is subject to exceptions, including the exception codified in 16 U.S.C. § 1371(a)(5)(A) (“the exception”), which the oil and gas industry relies on to exploit marine mammal habitat to drill for fossil fuels. The exception directs the Secretary of the Interior to allow citizens, upon request, “the incidental, **but not intentional**, taking by citizens” for specified activities.²

The Secretary of the Interior does not have the authority to allow the proposed information collection.³ The information collection at issue permits the intentional taking of polar bears. The Secretary, therefore, would be acting outside the scope of authority granted by the MMPA and the exception.

A. The proposed information collection allows for intentional takings.

No exception in the MMPA permits intentional takings. The term “take” means to harass, hunt, capture, or kill, or attempt to do the same.⁴ The term “harassment” includes any act of pursuit, which has the potential to disturb a marine mammal by causing disruption of behavioral patterns of sheltering and nursing.⁵

¹ 16 U.S.C. § 1371(a).

² 16 U.S.C. § 1371(a)(5)(A).

³ *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795, 802 (D.D.C. 1988) (“The Secretary has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by the Act.”).

⁴ 16 U.S.C. § 1362(13).

⁵ 16 U.S.C. § 1362(18)(A)(ii).

The proposed information collection would allow the oil and gas industry to use “any appropriate tool,” including “polar bear scent-trained dogs,” to locate polar bear dens.⁶ To be sure, polar bears use dens for shelter and nursing cubs.⁷ When their sheltering behavior is disrupted by a pack of howling, barking dogs, their behavior pattern is disrupted. The bears are, thus, subjected to harassment, which constitutes a taking.

This taking is intentional, not incidental. Incidental means a non-intentional or accidental act that results from, but is not the **purpose** of, carrying out an otherwise lawful action.⁸ In the pack of dogs hypothetical, the industry would have the **purpose** of pursuing polar bears with dogs, which is harassment. The taking would, therefore, not be incidental. It would be intentional.

B. The proposed information collection must impose much stricter standards on obtaining data.

Permitting the oil and gas industry to locate polar bear dens using “any appropriate tool” is much too broad, as the above example illustrates. In order to comply with the MMPA, the data must be collected in a manner that does not constitute an intentional taking. For example, Forward-Looking Infrared (“FLIR”) is a much more viable option. This is suggested in the proposed information collection. The proposal should narrow its language to include specific allowable techniques, to ensure that polar bears are not intentionally taken by the oil and gas industry.

⁶ See Proposed Information Collection, Incidental Take of Marine Mammals During Specified Oil and Gas Industry Activities.

⁷ See Charles J. Jonkel et al., *Further Notes on Polar Bear Denning Habits*, available at http://www.bearbiology.com/fileadmin/tpl/Downloads/URSUS/Vol_2/Jonkel_Kolenosky_et_al.pdf.

⁸ *Pacific Ranger, LLC v. Pritzker*, 2016 WL 5676276, at *3 (D.D.C. Sep. 30, 2016).

2. Proposed Terms and Conditions to be issued in LOAs

If LOAs are issued, mandatory polar bear disturbance mitigation requirements should be imposed. In implementing the MMPA, Congress found that “certain species and population stocks of marine mammals are … in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. 1361(1). Indeed, no marine mammal may be in more danger than the polar bear.⁹ Climate Change is the primary threat to polar bear survival and habitat, as oceans warm and acidify, and sea ice mass decreases. It has been determined to a high level of scientific certainty that anthropogenic emissions of greenhouse gases are causing this loss of habitat.¹⁰ The oil and gas industry is responsible for a majority of these emissions.

This proposed information collection allows the same companies who have already pushed polar bears to the brink of extinction due to habitat destruction, to directly and personally drive polar bears from the comfort of their dens with invasive groups of dogs and imaging technology. In essence, the lack of regulation of information collection techniques, and lack of oversight mechanism, permits the oil and gas industry to throw salt in the wounds of the already-decimated polar bear population.

In light of these policy considerations, the industry should be required to restore 2 units of polar bear habitat for every location discovered, since by definition, the discovery of such location is a disturbance, and taking, in itself.

⁹ https://www.washingtonpost.com/news/energy-environment/wp/2017/01/09/without-action-on-climate-change-say-goodbye-to-polar-bears/?utm_term=.7240d3a7e7d7

¹⁰ See IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151, available at https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SyR_Full_WCover.pdf.