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Public Comments Processing
Attn: Docket No. FWS-R7-ES-2012-0009
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

Re: Comments of the Alaska Oil and Gas Association on the Proposed Special 4(d) Rule for the Polar Bear and the Associated Draft Environmental Assessment

Dear Sir or Madam:

This letter provides the written comments of the Alaska Oil and Gas Association ("AOGA") in response to the U.S. Fish and Wildlife Service's ("Service's") public notice of both a proposed special rule for the polar bear under authority of Section 4(d) of the Endangered Species Act ("ESA"), and an associated draft environmental assessment ("DEA"). The Service's public notice appears at 77 Fed. Reg. 23,432-449 (April 19, 2012) and pertains to Docket No. FWS-R7-ES-2012-0009. AOGA appreciates the Service's consideration of its comments regarding the proposed rule and the DEA.

I. AOGA's Interests and Expertise

AOGA is a business trade association located in Anchorage, Alaska. AOGA's sixteen member companies account for the majority of oil and gas exploration, development, production, transportation, refining and marketing activities in Alaska. AOGA's members are the principal industry stakeholders that operate in Arctic Alaskan waters, the adjacent U.S. Outer Continental Shelf, and onshore areas of Alaska's North Slope, within the range of the polar bear. AOGA and its members are longstanding supporters of wildlife conservation, management and research in the Arctic. Moreover, AOGA has been the successful petitioner for a series of polar bear incidental take regulations issued by the Service over a period of decades for oil and gas operations occurring within the Beaufort and Chukchi Seas, and adjacent nearshore areas.

II. Comments on the Proposed Special Rule for the Polar Bear

AOGA very strongly supports the proposed action – promulgation of a final 4(d) rule for the polar bear identical to the 4(d) rule promulgated in December 2008. As extensively addressed in the *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, a 4(d) rule in the proposed form reasonably recognizes that pre-existing management under the Marine Mammal Protection Act ("MMPA") properly protects the polar bear in real world contexts where people need to safely live, subsist and work among polar bears, and where polar bears need to be able to safely move, hunt and den among people. Vast investment, operations, and management systems on the North Slope of Alaska have been built on the long-standing, judicially-sustained regulatory regime under the MMPA that the Service has repeatedly found to be "beneficial" to polar bears. Promulgation of the proposed final 4(d) rule has significant practical consequences for those people and those activities that are most directly affected by the presence of polar bears and the listing of polar bears under the ESA, but which are demonstrably not a threat to polar bear populations. Accordingly, for example, the proposed rule would allow continued use of nonlethal methods to deflect polar bears from humans and private property, thereby conserving polar bears by avoiding escalation of bear-human encounters into lethal situations. The proposed 4(d) rule also rationally limits application of the Section 9 take prohibitions of the ESA so that otherwise lawful activities occurring outside the range of the polar bear are not subject to the prohibitions found at 50 C.F.R. § 17.31.

The proposed action is both politically bipartisan and judicially sustained. This is the third time that the Service has concluded the proposed 4(d) rule is the proper course of action (*i.e.*, once under the Bush Administration, and now for a second time under the Obama Administration). Moreover, the 4(d) rule has been held lawful under the ESA and rational under the Administrative Procedure Act ("APA"):

> [T]he Court finds that the Service reasonably concluded that a complementary management regime encompassing the MMPA, CITES, and the ESA is necessary and advisable to provide for the conservation of the polar bear. The Service conducted an exhaustive analysis in which it determined that the MMPA is comparable to, or even stricter than, the take provisions of the ESA in most respects. Accordingly, the Court finds that the Service reasonably chose to minimize administrative redundancy after it determined that doing so would not sacrifice significant conservation benefits.
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> In sum, having carefully considered the parties' arguments and the full administrative record, the Court finds that the Service reasonably determined that the prohibitions and exceptions set forth in its Special Rule for the polar bear are "necessary and advisable to provide for the conservation of [the] species," in accordance with Section 4(d) of the ESA.

In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation, 818 F. Supp. 2d 214, 233-34 (D.D.C. 2011)(internal footnotes omitted).

In light of the extensive history and litigation pertaining to the limitation proposed by the Service for promulgation at 50 C.F.R. § 17.40(q)(4), we encourage the Service to elaborate in its final rule on its rationale, including explicit discussion of the (q)(4) limitation in the context of both greenhouse gas ("GHG") emissions and potential discharges of other contaminants outside the range of the polar bear. In the (q)(4) provision, the Service proposes that the take prohibitions of the ESA should not apply to otherwise lawful activities occurring in the United States outside the current range of the polar bear. This provision was sustained against legal challenges under the ESA and the APA on the basis of the following:

1. "[P]laintiffs contend, the Service has unlawfully eliminated a potential tool for addressing greenhouse gas emissions and, ultimately, Arctic sea ice loss. . . . The Service found no evidence to suggest that extending the ESA incidental take provisions outside the range of the polar bear would produce . . . conservation benefits." *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, 818 F. Supp. 2d at *13-*14.

2. "Plaintiffs have argued that the Special Rule for the polar bear is arbitrary and capricious and impermissibly overbroad because it exempts not only greenhouse gases but *all* activities outside the range of the polar bear from regulation under the ESA. The Service concluded, however, that where an unauthorized incidental take of a polar bear is identified and attributed to a particular source originating outside the species' range – whether it be pesticides, chemical contaminants, or any other pollutant – the incidental take provisions of the MMPA are sufficient to address that violation." *Id.* at *14 n.17.

3. "The Court finds that the Service reasonably chose to minimize administrative redundancy after it determined that doing so would not sacrifice significant conservation benefits." *Id.* at *14.[1]

The underlying basis for these judicial findings can be found in the Service's final rule, particularly in response to "Issue 15" at 73 Fed. Reg. 76249, 76265-66 (Dec. 16, 2008).[2] This

[1] "Nothing within our authority under section 4(d) of the ESA, above and beyond what we have required in this final special rule, would address the threat to polar bears from loss of sea-ice habitat." *Id.* at 77263.

[2] *See also id.* at 76266 ("We have specifically considered whether a Federal action that produces GHG emissions is a "may affect" action that requires section 7 consultation with regard to any and all species that may be impacted by climate change. . . . There is currently no way to determine how the emissions from a specific action both influence climate change and then subsequently affect specific listed species, including the polar bear. As we now understand them, the best scientific data currently available do not draw a causal connection between GHG emissions resulting from a specific Federal action and effects on listed species or critical habitat by climate change."). Similar, albeit less elaborate, information is provided in the current DEA at page 41.

information warrants restatement and reaffirmation based upon the best data currently available and based upon exercise of the Service's current judgment and expertise.[3]

Finally, AOGA also endorses the Service's enhanced explanation of its authority under Section 4(d) of the ESA. We agree that under Section 4(d), the Service may both (i) issue such regulations as it deems necessary and advisable to provide for the conservation of a listed species, and (ii) with respect to "threatened" species, prohibit by regulation all, some or none of the acts prohibited as to "endangered" species by Section 9(a)(1) of the ESA. Moreover, we concur in the Service's current findings that the proposed action in this instance is lawful and rational on both grounds.

III. Comments on the DEA

A. Issuance of EA and FONSI

The proposed action – reinstatement of the polar bear 4(d) rule – is not a major federal action that may significantly affect the human environment. For all the reasons detailed in the DEA and the proposed rule, the environmental consequences of the proposed action are beneficial with respect to both polar bear conservation and human activities. Accordingly, AOGA strongly supports the Service's issuance of a final EA and an associated finding of no significant impact ("FONSI").

B. Organization and Structure

For sound reasons, the organization and structure of the Service's DEA are different than is the case for either project-specific or large programmatic NEPA assessments. Given the differences, and given the high probability of litigation challenging the Service's NEPA analysis, we urge the Service to elaborate in the final EA on the reasons why the Service has taken this particular approach to NEPA assessment of the proposed polar bear 4(d) rule.

For example, a more typical NEPA document would provide an extensive discussion of the baseline environment (the "Affected Environment"), and an equally or more extensive discussion of probable environmental impacts, with both subject areas subdivided into resource categories, such as geology, soils, climate, air quality, oceanography and coastal processes, hydrology, water quality, upland vegetation, wetlands, birds, terrestrial mammals, marine mammals, fish, land ownership and land use, socioeconomics, recreation, visual aesthetics, noise, cultural resources, subsistence, human health, environmental justice and cumulative impacts. In the present instance, the proposed 4(d) rule has a relatively narrow application in that it only pertains to: (i) "take" of polar bears resulting from activities undertaken in compliance with a lawful MMPA

[3] As a related comment, the proposed rule states in two places that the proposed (q)(4) limitation is consistent with the conservation of the polar bear because (i) the potential for ESA citizen suits alleging take from activities outside the range is significant, (ii) the likelihood of such case prevailing is remote, and (iii) defending such unproductive suits would be a diversion of resources. *See* 77 Fed. Reg. at 23440, 23447. These are all sound reasons. We encourage the Service to at least briefly elaborate in the final rule on the facts and judgments that underlie these findings.

take authorization or exemption; and (ii) the consequences of otherwise lawful activities occurring outside the United States range of the polar bear that might arguably result in a "take" of polar bears. This narrow scope is not meaningfully assessed on a resource by resource basis in the more encyclopedic manner typical of NEPA documents, but rather is reasonably and adequately addressed in this instance under the broad categories identified in the DEA (i.e., physical, biological and socioeconomic resources). Nevertheless, it would lend clarity to the DEA if the Service provided an express statement of its reasoning in order to link the organization and analysis in the EA to how the Service has determined it is best to discuss the direct, indirect and cumulative impacts of the proposed action and alternatives as required by NEPA.

As a specific sub-example, NEPA documents are typically used by federal agencies to address the requirements of Executive Order 12898 by identifying whether there is a potential for the proposed action and alternatives to have disproportionately high and adverse impacts on low income or minority populations. While AOGA does not contend that environmental justice is a significant issue with respect to the proposed polar bear 4(d) rule, and while NEPA documents are to discuss impacts only in proportion to their significance,[4] it would nevertheless be prudent for the Service to at least briefly acknowledge its environmental justice obligation and to state why there would be no disproportionately high and adverse impact. Notably, the DEA addresses in some detail the importance of polar bears to Alaska Native subsistence and cultural activities; however, there is no express mention of environmental justice.

As another example, we know from litigation previously challenging the polar bear 4(d) rule adopted by the Service in 2008 that one of the principal arguments asserted against such a rule is that GHG emissions may be discouraged or limited if there is no 4(d) rule. Accordingly, so the argument goes, the adverse impacts of climate change may be lessened or mitigated if no 4(d) is adopted. Given this circumstance, it seems likely that opponents of any 4(d) rule may contend that the Service's EA does not adequately detail climate change as part of the baseline environment, and also does not adequately analyze the impacts of the 4(d) rule on climate change. This being the case, it would be useful for the Service to more clearly express as to climate change what the agency has considered and found, and why. *See, e.g.*, 73 Fed. Reg. at 76263 (2008 final 4(d) rule stating: "Nothing within our authority under section 4(d) of the ESA, above and beyond what we have required in this final special rule, would address the threat to polar bears from loss of sea-ice habitat.").[5]

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[4] *See* 77 Fed. Reg. 14473, (Mar. 12, 2012) (final NEPA guidance stating: "Agencies are encouraged to concentrate on relevant environmental analysis in their EAs and EISs, not to produce an encyclopedia of all applicable information. Environmental analysis should focus on significant issues, discussing insignificant issues only briefly. Impacts should be discussed in proportion to their significance, and if the impacts are not deemed significant there should be only enough discussion to show why more study is not warranted." (internal footnotes omitted)).

[5] Of course, nothing in NEPA requires the Service to restate information that already exists in detail in other documents. Instead, the Service may briefly summarize the topic and incorporate by reference the more detailed information from other materials. *See* 40 C.F.R. § 1502.21 (NEPA regulation encouraging incorporation by reference).

C. No Action Alternative

As a matter of form, we note that the Service has mischaracterized the "no 4(d) rule" alternative as the "no action" alternative for purposes of its NEPA assessment. Respectfully, if nothing else, this analytical mistake creates the potential for confusion.

The current state of the environment – the environmental baseline for the proposed action – is the existing so-called "interim" 4(d) rule. This baseline is misidentified in the DEA as Alternative 3.[6] As the Service is aware, the interim final 4(d) rule was originally promulgated by the Service on May 15, 2008, and was later superseded by a final 4(d) rule in December 2008. *See* 73 Fed. Reg. 28306 (May 15, 2008); 73 Fed. Reg. 76249 (Dec. 16, 2008). However, after determining that the Service had failed to comply with NEPA in promulgating the final 4(d) rule, Judge Sullivan vacated the final 4(d) rule and reinstated the interim final 4(d) rule. *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, 818 F. Supp. 2d at 239. The Service subsequently ratified and implemented the court's order by promulgating the interim 4(d) rule as a final regulation. 77 Fed. Reg. 4492 (Jan. 30, 2012). Unless and until the Service completes a lawful notice and comment rulemaking that revokes, amends or supersedes the existing 4(d) rule, it remains the operative legal and environmental status quo.[7]

If the Service were to in fact take "no action," the result would be retention of the existing 4(d) rule. The only way in which the Service may achieve a "no 4(d) rule" condition is to propose and then promulgate a final rule revoking the existing 4(d) rule. Legally and logically, because revocation of the existing rule would be an "action" by the Service, it is not the "no action" alternative. The Service has acknowledged this circumstance:

> Unlike most "no action" alternatives described in NEPA analyses, this "no action" alternative would constitute a change from the physical, biological and socioeconomic status quo for polar bear conservation in Alaska, because the interim 4(d) rule came into effect on the same day that the polar bear was listed under the ESA; therefore the full prohibitions for threatened wildlife provided under 50 CFR 17.31 and § 17.32 have never been applied to the polar bear. Thus, implementation of the "no action" alternative would actually cause a shift from the environmental and social baseline within the range of the polar bear"

DEA at 16. We appreciate that in labeling the "no 4(d) Rule" option the "no action" alternative, the Service was attempting to view the alternatives as if its NEPA analysis had been done before any 4(d) Rule was adopted. Respectfully, rather than helping to rationalize the Service's DEA, mislabeling of alternatives creates confusion.

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[6] *See* DEA at 18 (acknowledging that Alternative 3 "represents the environmental and socioeconomic baseline upon which to measure the effects of taking any action").

[7] Moreover, as the Service has correctly observed, a state of "no 4(d) rule" has *never* been the environmental status quo because promulgation of the interim final 4(d) rule occurred simultaneously with the listing of the polar bear under the ESA. *See* DEA at 16.

D. Cumulative Impacts

The "scope" of NEPA documents encompasses three types of environmental impacts – direct, indirect and cumulative. 40 C.F.R. § 1508.25(c). Although neither NEPA nor federal regulations explicitly require an EA or an EIS to include a discussion of cumulative impacts, courts have interpreted the inclusion of cumulative impacts in the regulatory definition of the scope of an EIS to require consideration of the cumulative impacts of a proposed action in both EISs and EAs. *See, e.g., Center for Environmental Law and Policy v. Bureau of Reclamation*, 655 F.3d 1000, 1007 (9th Cir. 2011) ("Consideration of cumulative impacts requires some quantified or detailed information that results in a useful analysis, even when the agency is preparing an EA and not an EIS.") (internal quotations omitted); *Kern v. Bureau of Land Management*, 284 F.3d 1062, 1076 (9th Cir. 2002) ("We have held that an EA may be deficient if it fails to include a cumulative impact analysis or to tier to an EIS that has conducted such an analysis."); *TOMAC v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006) ("NEPA's implementing regulations require an agency to evaluate "cumulative impacts" along with the direct and indirect impacts of a proposed action.").

We are confident that the Service has considered the full range of environmental impacts associated with the proposed action. Nevertheless, the DEA does not explicitly mention cumulative impacts. Given the requirement that an EA consider cumulative impacts, and given the certainty that this EA will be challenged, we strongly encourage the Service to be explicit in the final EA in stating why cumulative impacts are not a significant environmental issue with respect to the proposed polar bear 4(d) rule. Of course, there is no "one size fits all" or talismanic form of cumulative impacts analysis, particularly in the context of an EA. As mentioned earlier in this comment letter, the Service may tier to or incorporate by reference other cumulative impact assessments (*see* footnote 5 above) in order to avoid duplication. Moreover, if cumulative impacts are not a significant issue for this proposal, the Service need only address the issue in sufficient detail to explain why it has decided that more detailed consideration is not required (*see* footnote 4 above).

E. Non-Significance Findings

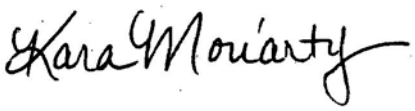
Table 2 on pages 66 and 67 of the DEA provides a summary of the Service's significance findings for each alternative and for each category of resource assessed for impacts. This type of table is typical in NEPA documents and is helpful in providing an easily accessible compilation of the agency's impact findings. AOGA concurs in the Service's decision to include such a table in its EA.

In Table 2, in most instances, the Service has characterized the magnitude of the impact on a given resource (i.e., no effect, negligible or moderate adverse impact, or beneficial). Given that the final EA will be relied upon by the Service to either issue a FONSI or to determine an EIS is required, we recommend that the Service review each separate box within the table and ensure the Service's impact assessment includes a magnitude rating. For example, the final assessment box in the lower right hand corner of page 67 of the DEA pertains to socioeconomic impacts under Alternative 4 (a 4(d) rule without the (q)(4) limitation). For this assessment category, the

rating given is “Mixed effect – some beneficial, some negative.” This assessment is arguably ambiguous. The Service should clarify whether the positive or negative effects are “significant” or something less, and should state what on balance the magnitude of the totality of effects is in this category. Similarly, in other instances in Table 2 where the magnitude of the impact is not clearly expressed, the Service should clarify its finding.

AOGA sincerely appreciates the Service’s review and consideration of its comments. We support and look forward to the Service’s issuance of a final 4(d) rule in the form proposed, and to a companion final EA and FONSI.

Sincerely,



Kara Moriarty
Executive Director

cc: The Honorable Sean Parnell, Governor, State of Alaska
The Honorable Lisa Murkowski, United States Senate
The Honorable Mark Begich, United States Senate
The Honorable Don Young, United States House of Representatives