



Alaska Oil and Gas Association
121 W. Fireweed Lane, Suite 207
Anchorage, AK 99503-2035
Phone: (907) 272-1481
www.aoga.org

February 8, 2013

VIA Federal eRulemaking Portal
(<http://www.regulations.gov>)

Public Comments Processing
Attn: Docket No. FWS-R7-ES-2012-0043
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

**Re: Alaska Oil and Gas Association's Comments on Proposed Rule and Draft
Environmental Assessment for Chukchi Sea Incidental Take Regulations**

To Whom It May Concern:

This letter provides the written comments of the Alaska Oil and Gas Association ("AOGA") regarding the U.S. Fish and Wildlife Service's ("Service") proposed Marine Mammal Protection Act ("MMPA") regulation authorizing the incidental take of small numbers of polar bears and Pacific walrus during oil and gas activities in the Chukchi Sea and on the adjacent shoreline in Alaska for a five-year period from 2013 to 2018. *See* 78 Fed. Reg. 1942 (Jan. 9, 2013) ("Proposed Rule"). These comments also address the Service's draft Environmental Assessment for the Proposed Rule, dated October 17, 2012 ("Draft EA"). Our comments on the Proposed Rule and Draft EA are discussed in Sections I and II below, respectively. As the applicant for the Proposed Rule, AOGA appreciates the Service's time and attention to our comments.

I. COMMENTS ON PROPOSED RULE

The Proposed Rule is supported both by the current record and an extensive history of the Service's issuance of incidental take regulations in the Beaufort and Chukchi Seas. The Service's experience and well-documented findings demonstrate that these regulations are very effective in minimizing, monitoring, and documenting incidental harassment associated with routine oil and gas activities. In Alaska and in the adjacent Outer Continental Shelf, the MMPA

has provided a stable and successful regulatory framework that conserves marine mammals and protects subsistence hunting of marine mammals, without imposing unnecessary and burdensome restrictions.

We commend the Service for preparing a proposal that is generally well-organized, clearly written, and consistent with applicable law. In particular, the Service's "small numbers" and "negligible impact" determinations are supported by thorough evaluations of the best available data and faithful to the requirements set forth in Section 101(a)(5) of the MMPA as well as recent decisions by the Ninth Circuit Court of Appeals. *See Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012); *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009). We appreciate the Service's hard work, attention to detail, and timely preparation of the Proposed Rule. However, in some instances, the Proposed Rule is not consistent with the scope of the petition or with the scope of mitigation measures that are currently, and historically have been, required. In other instances, there are specific areas in which the Proposal Rule can be improved. The following comments address these concerns.

1. Geographic Region. The geographic region identified in the Proposed Rule does not include the full area set forth in AOGA's Petition for Incidental Take Regulations for Oil and Gas Activities in the Chukchi Sea and Adjacent Lands in 2013-2018 (January 2012) ("Petition"). Specifically, the Proposed Rule does not include the onshore area that is located southwest of the NPR-A boundary extending to Point Hope, and the Proposed Rule contains no explanation for this deviation from the Petition. *See* Petition, Figure 1.1-1; *compare* 78 Fed. Reg. at 1984 (Proposed Rule, Figure 1). The area omitted by the Service was expressly included in AOGA's Petition because operators may conduct onshore surveys in this area and seek related incidental take authorizations for those activities. Therefore, we request that the geographic region covered by the final rule include all of the areas requested in the Petition.

2. Barrow Gas Fields. The Proposed Rule appears to include within its coverage incidental take related to onshore activities at the Barrow Gas Fields, such as the construction of ice roads, helicopter or ground transportation, and maintenance of the existing gas fields. These activities were not included in the scope of the Petition, and we respectfully request that the final rule authorize only the incidental take associated with the activities specifically described in the Petition. Should the Service decide to include incidental take related to the Barrow Gas Fields in the final rule, it should provide a reasoned explanation for doing so.

3. Seasonal Mitigation. The Proposed Rule suggests that "seasonal mitigation procedures," including seasonal exclusions, will be required near coastal haul-outs and, specifically, near the Hanna Shoal area. AOGA respectfully requests that the Service reconsider these seasonal mitigation procedures because they may result in unnecessary and burdensome exclusions from areas located near leases purchased by AOGA members. Although some walrus foraging at Hanna Shoal and the surrounding shelf areas may occur after the full melt of sea ice, the combination of the reduced presence of the walrus in these areas after full melt and the

reduced susceptibility of walruses to disturbance eliminates any need for exclusions during periods when minimal sea ice is present. Because most industry activities occur during periods when only minimal sea ice is present, area closures are unnecessary. Moreover, the Service has already proposed measures to exclude vessels and aircraft from areas within 800 meters (0.5 mile) of walruses and polar bears on ice or in water, and aircraft from areas within 1,500 feet vertical of walruses and polar bears. The Service recognizes that these measures, if implemented, will be effective in minimizing incidental take. These spacing restrictions, which have proven effective and for which no data or information to the contrary exists, render seasonal exclusions unnecessary and unduly burdensome.

4. Walrus Incidental Take. In the section titled “Evaluation of Anticipated Effects on Walruses,” the Proposed Rule states that “most of the anticipated takes would be limited to minor behavioral modifications” 78 Fed. Reg. at 1960. AOGA’s Petition requests authorization only for incidental takes that are limited to minor behavioral modifications and short-term changes in behavior (i.e., Level B harassment). Moreover, the best available data and information demonstrate that all (not “most”) of the anticipated walrus takes will be limited to minor behavioral modifications and short-term changes in behavior. Accordingly, the Proposed Rule should be corrected to accurately reflect the Petition and the supporting record.

5. Polar Bear Critical Habitat. The Proposed Rule should be updated to reflect recent legal developments regarding polar bear critical habitat. *See* 78 Fed. Reg. at 1954 (discussion regarding polar bear critical habitat). In January 2013, the federal district court for the District of Alaska issued an order vacating and remanding the final rule designating critical habitat for the polar bear. *See Alaska Oil and Gas Association, et al. v. Salazar, et al.*, Case No. 3:11-cv-0025-RRB (D. Alaska, Jan. 11, 2013). The Proposed Rule should be modified to speak to “habitat,” but not to “critical habitat” since the rule designating polar bear critical habitat has been vacated by the Alaska district court.

6. Ice Seal ESA Listing. The Proposed Rule states that ringed and bearded seals are important polar bear prey. However, the Proposed Rule does not explain that certain ringed and bearded seal subspecies have recently been listed as “threatened” under the Endangered Species Act (“ESA”). The final rule should reflect this change in status.

7. Mitigation and Monitoring. The Proposed Rule includes a number of new mitigation and monitoring provisions that are either not included in current (or previous) incidental take regulations for the Chukchi or Beaufort Seas or not proposed in AOGA’s Petition. These proposed changes are not identified or explained in the Proposed Rule. Given the well-documented history showing that oil and gas activities in the Arctic result in no more than temporary changes in behavior, without any known injury, mortality, or other detectable adverse impacts to marine mammal stocks, and that mitigation measures previously and currently applied are fully effective, there is no apparent basis for the Service’s unexplained

inclusion of new or modified mitigation measures in the Proposed Rule or its deviation from the measures proposed in the Petition. Our concerns are set forth as follows:

- The Proposed Rule includes a requirement that any vessel may not approach within one mile of walrus groups observed on land. 50 C.F.R. § 18.118(a)(2)(ii) (as proposed). In contrast, existing regulations provide that vessels shall not approach within one-half mile of walrus groups observed on land. 50 C.F.R. § 18.118(a)(1)(ii). We are aware of no past experiences, information, or data, or any operational changes, that provide a reasonable basis for this proposed change or that otherwise suggest that existing regulations are not effective. Accordingly, we request that the Service continue to implement the one-half mile requirement, as stated in current regulations.
- The Proposed Rule provides that transit of operational and support vessels through the specified geographic region is not authorized prior to July 1 or later than November 30. *See* 50 C.F.R. §§ 18.118(a)(2)(iv) (as proposed). However, AOGA's Petition requested a less rigid approach to account for the fact that the open water season can vary substantially from year-to-year:

“The ITRs requested in this Petition are for the period from June 11, 2013, to June 11, 2018. Within that time period, oil and gas exploration activities could occur during any month of the year, depending on the type of activity. Most offshore activities such as exploration drilling, seismic surveys, and shallow hazards surveys, are expected to occur only during the open-water season (June–November). Onshore activities may occur during winter (e.g., geotechnical studies), spring (e.g., hydrological studies), or summer-fall (e.g., various fish and wildlife surveys). Anticipated types of activities are described in Section 2 and additional information about the dates and duration over which the activities may occur is provided there. Because of the large number of variables influencing exploration activity, it is not possible to predict the exact dates and locations of the operations that will take place from 2013 to 2018. The specific dates and durations of the individual operations and their geographic locations will be set forth in detail when requests for LOAs are submitted by Industry applicants to USFWS.”

Petition at 35. Accordingly, we request that the Service eliminate the “July 1 to November 30” requirement and, instead, authorize activities, and associated time

periods, as they are requested on a case-by-case basis through letter of authorization applications.

- The Proposed Rule imposes a 3,000-foot height restriction on helicopters within one mile of walrus groups observed on land. 50 C.F.R. § 18.118(a)(3)(iii) (as proposed). This restriction is new, but this is not explained in the Proposed Rule. We are aware of no past experiences, information, or data, or any operational changes, that provide a reasonable basis for this proposed change or that otherwise suggest that the current measures are not effective. Additionally, with respect to height restrictions, AOGA supports and incorporates Shell’s separately requested exemption for unmanned aerial systems.
- The Proposed Rule provides that no more than two simultaneous seismic operations and three offshore exploratory drilling operations will be authorized at the same time. 50 C.F.R. § 18.118(a)(4)(ii) (as proposed). In contrast, existing regulations do not address exploratory drilling and establish a limit of no more than four simultaneous seismic operations in the Chukchi Sea. Again, this change is not explained in the Proposed Rule. As acknowledged by the Service in the Proposed Rule, the Service’s authority under Section 101(a)(5) of the MMPA extends only to the regulation of incidental take, not the underlying, and otherwise federally permitted, activities. The proposed restrictions on exploratory drilling and seismic operations are beyond the Service’s authority under Section 101(a)(5) because they purport to regulate activities, not take. Accordingly, we request that the Service remove these measures from the final rule. Should the Service include activity restrictions in the final rule (to which we object), it should increase the limit on simultaneous offshore drilling operations to at least four, consistent with the information provided in AOGA’s Petition.¹ See Petition, Table 2.3.1-1 (at least four drilling rigs anticipated in some years).
- The Proposed Rule contains new “monitoring” provisions that substantially expand current requirements:

“These monitoring and research efforts must employ rigorous study designs (e.g., before-after, control-impact [BACI]) and sampling protocols (e.g., ground-truthed remote sensing) in

¹ For the reasons stated in Shell’s separate comments on the Proposed Rule, we also object to the Service’s proposed requirement that certain vessels maintain a minimum spacing of 15 miles between active seismic source vessels and exploratory drilling operations.

order to provide useful information. Information needs in the Chukchi Sea include, but are not limited to:

- (i) Distribution, abundance, movements, and habitat use patterns of walruses and polar bears in offshore environments;
- (ii) Patterns of subsistence hunting activities by the Native Villages of Kivalina, Point Hope, Point Lay, Wainwright, and Barrow for walruses and polar bears;
- (iii) Immediate and longer term (when possible) behavioral and other responses of walruses and polar bears to seismic airguns, drilling operations, vessel traffic, and fixed wing aircraft and helicopters;
- (iv) Contaminant levels in walruses, polar bears, and their prey;
- (v) Cumulative effects of multiple simultaneous operations on walruses and polar bears; and
- (vi) Oil spill risk assessment for the marine and shoreline environment of walruses, polar bears, their prey, and important habitat areas (e.g., coastal haulouts and den sites)."

50 C.F.R. § 18.118(b)(3) (as proposed). Respectfully, these study and sampling protocols amount to a requirement to implement an extensive research program that exceeds the scope of the Service's authority under MMPA Section 101(a)(5). These new requirements are particularly inappropriate given the wealth of data and information demonstrating that previous and current mitigation and monitoring efforts have been fully effective, resulting in "beneficial" consequences for marine mammal stocks. Moreover, these proposed measures will require industry to engage in a level of research that is substantially more intrusive, and consequently more harassing to marine mammals, than currently required monitoring activities. AOGA objects to the Service's proposed imposition of these new requirements and requests that the Service implement monitoring provisions that are consistent with past and current regulations, with AOGA's Petition, and with the well-documented and extensive record.

II. COMMENTS ON DRAFT EA

AOGA supports the Service's decision that the NEPA process for the Proposed Rule is appropriately addressed through issuance of an EA and finding of no significant impact ("FONSI"). The Proposed Rule is another in a long series of similar regulations dating back to 1991. Accordingly, the Service has a vast body of data regarding, and decades of experience with, the anticipated environmental effects of the unintentional take of polar bears and Pacific walrus during routine oil and gas activities. In prior regulations and in related legal challenges (none of which were successful), the scope of the proposed action was narrow: non-lethal incidental take of small numbers of polar bears and Pacific walrus having no more than a

negligible impact on the affected marine mammal stocks during a five-year period. It is inherent in the proposed action – which by law may have no more than a “negligible impact” – that there are no reasonably anticipated “significant” environmental impacts. Stated otherwise, if the proposed regulation meets the statutory “negligible impact” standard to which it is held under the MMPA, then it must follow that the proposed action will have no “significant” impact. *See, e.g., Kempthorne*, 588 F.3d 701.

Because there is a high probability of a legal challenge based upon, among other things, NEPA, we have several recommendations to clarify and amplify the text in the Draft EA. Our specific comments on the Draft EA are detailed as follows:

1. On page 6, the Draft EA references a definition for “small numbers” that has been invalidated by the Ninth Circuit Court of Appeals and that is not relied upon by the Service in the Proposed Rule. *See Salazar*, 695 F.3d at 903-04. This inadvertent reference should be eliminated and, instead, the Draft EA should recite the definition that is applied in the Proposed Rule.

2. As explained above, by definition, the Proposed Rule does not and cannot have effects that are “significant” because it only authorizes incidental take that has a negligible impact and no unmitigable impact on subsistence. The final EA should emphasize this point because it provides additional convincing support for the Service’s FONSI in this instance. In a similar vein, the reasons stated in the Draft EA’s conclusion section are precisely those that support the Service’s FONSI. The conclusion concurs in the findings contained in the Proposed Rule; however, it would be clearer and more appropriate if the conclusion in the EA tracked the function of the EA under NEPA instead of the function of the Proposed Rule under the MMPA. In other words, assuming the Service determines to proceed with the Proposed Rule and with an EA, the conclusion of the EA should be a FONSI.

3. On page 7, in the first paragraph of the introduction, the Draft EA states that the action being considered under NEPA is whether issuance of the incidental take regulations “is, or is not, a major federal action” and suggests that a positive finding would require an EIS. This is an incorrect statement of the law. As addressed above, the purpose of the NEPA analysis is to determine whether the proposed action may significantly affect the human environment. If not, then the Service must issue a FONSI and, if so, the Service must prepare an EIS. The question whether the Service must issue a FONSI or prepare an EIS does not depend on whether the proposed action is a “major Federal action.” As addressed above, and as detailed in the Proposed Rule, the proposed action will not significantly affect the human environment and, therefore, a FONSI is appropriate.

4. At the top of page 15, the Draft EA states that the proposed regulations “will not allow intentional taking” of polar bears or walrus. However, the proposed regulations do not prohibit intentional take, and, in fact, intentional take of polar bears and walrus is authorized

by the Service under separate provisions of the MMPA. Accordingly, the Draft EA should state that the proposed regulations “will not authorize” intentional take.

5. The section addressing polar bear critical habitat (pages 91-93 of the Draft EA) needs to be revised consistent with the Alaska district court’s order vacating and remanding the rule designating critical habitat for the polar bear.

6. In previous incidental take regulations and associated EAs, the Service has emphasized that the regulations have beneficial effects because they require a series of avoidance, minimization, and mitigation measures that would not otherwise be implemented, and because the regulations ensure stringent reporting and monitoring. These findings are no less relevant to the currently proposed regulations, which contain the same (and in some instances, more stringent) comprehensive mitigation and monitoring requirements as previous regulations. We urge the Service to restate its past findings regarding the overall “beneficial” effects of issuing MMPA incidental take regulations in this context. *See, e.g.*, 73 Fed. Reg. at 28,265-66 (May 15, 2008) (“mitigative regulations that have been instituted, and will be modified as necessary, have proven to be highly successful in providing for polar bear conservation in Alaska”); 73 Fed. Reg. at 28,314 (May 15, 2008) (incidental take regulations “under the MMPA have often proven to be beneficial to the conservation of marine mammals such as the polar bear”).

7. On page 133, the Draft EA incorrectly states that “we find that most of the anticipated takes will be limited to disturbances affecting a relatively small number of animals....” This statement is not consistent with the Proposed Rule or the record. As set forth in AOGA’s Petition, in the wealth of supporting documents and information, and in the Service’s Proposed Rule, all (not “most”) of the anticipated takes, taken collectively, will affect only a small number of polar bears and walruses. This statement in the Draft EA should be corrected to accurately reflect the Service’s findings and analyses contained in the Proposed Rule.

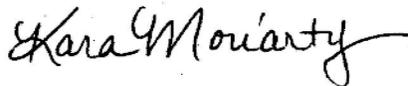
8. There are some areas in the Draft EA in which the inclusion (or incorporation by reference) of certain detailed analyses contained in the Proposed Rule may be beneficial. For example, the Proposed Rule provides a breakdown of the specific levels and types of activities that are considered by the Service in determining the authorized levels of incidental take. *See* 78 Fed. Reg. at 1944-47. In addition, the Proposed Rule provides a well-documented and thorough explanation of the reasons why the authorized incidental take will affect only “small numbers” of polar bears and walruses and have only a “negligible impact” on these species. *See id.* at 1969-80; *see also, e.g., Kempthorne*, 588 F.3d at 706 (“[P]ast regulation yielded much information about the industry’s interactions with polar bears and walrus.”). Although the underlying record undoubtedly supports the Service’s conclusions, as stated in the Proposed Rule, given the potential for litigation, we recommend elaborating upon and providing references to at least some of the supporting information in the Draft EA.

9. It is well-documented that the avoidance, minimization, and mitigation measures included in previous incidental take regulations for the Chukchi and Beaufort Seas, and as set forth in the Proposed Rule, have been highly effective. There are decades of data showing that these measures work and that Arctic species have not been adversely impacted by oil and gas activities in any detectable way. The Draft EA should more comprehensively document the effectiveness of the monitoring and mitigation measures.

10. Section V.B.4 of the Draft EA discusses “cumulative effects.” Initially, although the terms “cumulative impacts” and “cumulative effects” may be used interchangeably in NEPA documents, the correct NEPA term is “cumulative impact.” 40 C.F.R. § 1508.7 (NEPA regulations defining “cumulative impact”). This terminology distinction is important in the present context involving an ESA-listed species because the term “cumulative effects” is a defined term for purposes of the ESA, but has a very different meaning than “cumulative impacts” under NEPA. *See* 50 C.F.R. § 402.02 (defining “cumulative effects” for purposes of the ESA). As the Service is well aware, cumulative impacts analysis under NEPA is frequently a source of litigation. Although EAs are intended to be concise (*see* 40 C.F.R. § 1508.9 (defining an EA as “a concise public document”)), given the probability of litigation and given that the Service has conducted a thorough cumulative impacts analysis in the Proposed Rule, we recommend that the Service provide additional discussion in the Draft EA by incorporating by reference and summarizing the extensive cumulative impacts analysis included in the Proposed Rule. *See* 78 Fed. Reg. at 1969-73.

We appreciate the Service’s consideration of our comments. Please do not hesitate to contact me if you have any questions about our comments or would like to discuss them in more detail.

Sincerely,



Kara Moriarty
Executive Director
Alaska Oil and Gas Association

cc: Craig Perham, U.S. Fish and Wildlife Service, Alaska Region