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Ms. Mary Colligan
Chief, Marine Mammals Management
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, Alaska 99503

Re: Comments of the Alaska Oil and Gas Association and American Petroleum Institute on the Draft Polar Bear Conservation Management Plan (FWS-R7-ES-2014-0060)

Dear Ms. Colligan:

This letter provides the comments of the Alaska Oil and Gas Association (“AOGA”) and the American Petroleum Institute (“API”) (together the “Associations”) on the U.S. Fish and Wildlife Service’s (“FWS”) Draft Polar Bear Conservation Management Plan (“Draft Plan”). *See* 80 Fed. Reg. 38,458 (July 6, 2015). The Associations, on their own or through their members, participated in the polar bear recovery and conservation planning process as active members of the Recovery Team. As such, the Associations have a unique perspective on the Draft Plan’s recovery criteria, identification of threats and proposed management measures. The Associations appreciate FWS’s consideration of these comments.

AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefits of all Alaskans. AOGA represents fourteen companies that are exploring, developing, producing, refining or marketing oil and gas on the North Slope, in the Cook Inlet and in the offshore areas of Alaska. AOGA and its members are longstanding supporters of wildlife conservation, management and research across the areas in which its members operate. AOGA’s members include the principal industry stakeholders that operate in the Alaskan Arctic within the range of the polar bear and our members have significant experience implementing conservation measures to protect polar bears, and have been doing so since before polar bears were listed as threatened under the

Endangered Species Act (“ESA”). These measures include decades of direct, on-the-ground experience in protecting the safety of both bears and humans through implementation of FWS incidental take regulations and “letters of authorization” under the Marine Mammal Protection Act (“MMPA”). AOGA and its members have worked closely with FWS in Alaska to ensure the ongoing success of these efforts and look forward to continuing in this cooperative relationship.

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry, including those operating in the Alaskan Arctic within the range of the polar bear. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

Summary of Comments

As a preliminary matter, the Associations sincerely appreciate the Draft Plan’s repeated acknowledgments that oil and gas exploration, development and associated activities are not a threat to polar bear populations now, and are expected to have “negligible effects” on polar bear population numbers in the future. Draft Plan at 7, 11. The Draft Plan and its appendices appropriately recognize that the oil and gas industry is highly regulated, and that existing regulatory regimes, combined with industry-led plans and practices, have protected and will continue to protect polar bears and the marine ecosystem upon which they depend. *See id.* at 46 (acknowledging the success of existing regulatory process and industry practices in preventing any major impacts to polar bears over nearly 40 years of operations on the North Slope).

The Associations also commend FWS for including as a fundamental goal the need to achieve polar bear conservation while minimizing restrictions to other activities in the range of the polar bear, including economic development. Draft Plan at 13, 15 (fundamental goal 6). Oil and gas operators and polar bears have safely cohabitated on Alaska’s North Slope for four decades. These highly regulated activities promote U.S. economic growth and national security and should be allowed to continue without new restrictions where, as here, they are already conducted in a manner that protects the environment and local cultural values.

Unfortunately, although the Draft Plan properly recognizes the important role of economic development in the Arctic and acknowledges the negligible effects to polar bears from oil and gas activities, the Draft Plan suffers from two serious flaws:

- First, the Draft Plan identifies a total of thirteen criteria (fundamental, demographic and threat-based) and performance metrics, virtually none of which are within the control or influence of the FWS or its U.S. partners, yet all of which must be met before polar bears will be considered “recovered.” FWS acknowledges that nothing short of a successful global movement to

reverse climate change's projected effects on sea ice will accomplish this objective, yet FWS admits that there are no known regulatory mechanisms at the international level to effectively address such effects. Additionally, FWS acknowledges that it has no authority over, and can do little if anything to achieve, global action that has the potential to affect Arctic temperatures. Instead, the Draft Plan focuses on the goal of "maintaining viability" of polar bear populations "in most regions of the Arctic." But achievement of that goal, too, is almost entirely outside the control of FWS and its U.S. partners since only a portion of two of the nineteen FWS-recognized subpopulations occur in the U.S. The Draft Plan's conclusion that global climate change reversal is the only effective action to recover polar bears, and its simultaneous finding that the U.S. cannot achieve that goal, demonstrates why the anticipated effects of global climate change cannot and should not be regulated through federal ESA listings. FWS should issue a conservation plan pursuant to the MMPA and the final plan should memorialize MMPA conservation planning efforts; however, FWS should decline to issue a recovery plan pursuant to the ESA or include "recovery" goals, criteria and actions in the final plan because there are simply no measurable, achievable actions that can be included in the plan to address global climate change—the sole primary threat identified to polar bear recovery. *See* 16 U.S.C. § 1533(f)(1) (under ESA, Secretary shall develop and implement recovery plans "unless he finds that such a plan will not promote the conservation of the species.").

- Second, notwithstanding the Draft Plan's findings that oil and gas activities are not threats to polar bear populations, will have negligible effects on future polar bear population numbers, and have resulted in no significant spills over nearly 40 years of oil and gas exploration and development on Alaska's North Slope,¹ the Draft Plan nevertheless speculates, without supporting science, that such activities "may" become threats to polar bear recovery in the future and thus warrant identification of recovery actions aimed at managing these "potential" future concerns. Rather than proposing new management actions directed at activities with no known population-level impacts in order to "preclude" them from having an effect that FWS has already determined they will not have, which would be arbitrary and capricious, the Associations urge FWS to focus its efforts on the oil and gas

¹ In particular, the Draft Plan repeatedly concludes that oil and gas activities are not presently threats and do not warrant recovery criteria. Draft Plan at 7 ("Potential future management concerns posed by oil and gas activities, contamination from spills, and increased Arctic shipping are acknowledged but, because these factors have not been identified as threats, no recovery criteria are associated with them."); *id.* at 30 ("A number of other factors, including shipping, oil and gas development, and oil spills, were evaluated in the 2008 listing rule for polar bears but were not found to be threats; thus, they do not require threats-based recovery criteria. Further, because the potential for these factors to become threats in the future is distant or low enough (Atwood et al. 2015), they do not warrant development of specific criteria to indicate when they might become a threat."); *id.* at 11 ("trans-Arctic shipping, oil and gas exploration, and point source pollution will have negligible effects [on future polar bear population outcomes].").

industry's continued implementation of management programs that have successfully protected polar bears in operating areas on the North Slope.

Based on the foregoing, and as discussed in detail below, the Associations request that FWS revise the Draft Plan so that it is focused exclusively on MMPA conservation management actions that U.S. stakeholders can continue to implement under the MMPA, in consultation with FWS, to protect polar bears. The Associations request that FWS issue the final plan under the MMPA, but not under the ESA, and that FWS remove ESA "recovery" goals, criteria and actions, which are not measurable or achievable and do not promote conservation of the species. Alternatively, the Associations request that FWS revise the Draft Plan to remove all recovery criteria and actions related to oil and gas exploration and development activities, consistent with the comments below and FWS's own findings regarding the negligible effects of those activities.

Detailed Comments

A. The Draft Recovery Criteria Are Not Measurable or Achievable, and FWS Should Issue an MMPA Conservation Plan but Not an ESA Recovery Plan.

The Associations have serious concerns about the ability of the FWS and its U.S. partners to meet the recovery criteria as defined in the Draft Plan. The Draft Plan identifies no fewer than thirteen criteria for conservation, recovery and delisting under both the ESA and the MMPA, none of which are within the control or influence of the FWS or its U.S. partners or stakeholders with the sole exception of reducing human-caused removals in portions of two subpopulations that occur in the U.S. *See* Draft Plan at 16-17.

The Draft Plan would require a 95 percent likelihood of the species' persistence over 100 years worldwide and a 90 percent likelihood of the species' persistence over 100 years in each recovery unit. Draft Plan at 7. In addition, projected sea-ice losses will only cease to be considered a threat, and thus recovery achieved, when: "the average duration of the ice-free period in each recovery unit (i) is expected not to exceed 4 months over the next 100 years based on model projections, or (ii) is expected to stabilize at longer than 4 months and there is evidence that polar bears can meet the demographic criteria under that longer ice-free period." *Id.* at 7. The Draft Plan identifies nine additional fundamental, demographic and threat-based criteria as well as performance metrics like those noted above, all of which must be met before polar bears are considered "recovered."

The proposed criteria, which in essence require worldwide resolution of climate change issues, illustrate the irrationality of attempting to regulate the anticipated effects of global climate change through federal ESA listings. The Draft Plan is replete with acknowledgement that polar bear recovery is "unlikely" absent aggressive global action to reverse effects of climate change on sea ice habitat. *See* Draft Plan at 6 ("Short of action that effectively addresses the primary cause of diminishing sea ice, it is unlikely that polar bears will be recovered."); *id.*

(addressing Arctic warming “will require global action.”); *id.* (“The single most important step for polar bear conservation is decisive action to address Arctic warming ... which is driven primarily by increasing atmospheric concentrations of greenhouse gases.”); *id.* at 5 (recovery “turns on our collective willingness to address the factors contributing to climate change”); *id.* at 11 (“It cannot be overstated that the single most important action for the recovery of polar bears is to significantly reduce the present levels of global greenhouse gas emissions...”); *id.* (“prompt and aggressive” reductions in greenhouse emissions needed); *id.* at 27 (“The primary threat to polar bears is loss of its sea-ice habitat, driven by global climate change.”). FWS concludes that significant effects of sea-ice changes on polar bears “will very likely continue for several decades or longer” absent global action to reduce greenhouse gas emissions to “suitable levels.” *Id.* at 11; *see id.* (“Polar Bears will likely be extirpated from much of their present-day range if emissions continue to rise at current rates throughout the 21st century.”).

However, only a portion of two of the nineteen FWS-recognized polar bear subpopulations occur in the U.S. Draft Plan at 9. FWS acknowledges that it has no authority over, and can do little if anything to achieve, global action on climate change that has the potential to affect Arctic temperatures. *See id.* at 6 (focus of Draft Plan “is on wildlife management actions within the United States”); *id.* at 10 (plan’s purpose is to provide framework for conservation “by partners within the United States.”); *id.* at 12 (“USFWS lacks the authority to regulate greenhouse gas emissions”); *see also* Solicitor’s Opinion M-37017, “Guidance on the Applicability of the Endangered Species Act’s Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases” (Oct. 3, 2008)(FWS does not have authority to regulate global climate change when consulting on alleged impacts of specific emissions under section 7 of the ESA). Even the interim goal of “maintaining viability” of polar bear populations “in most regions of the Arctic” (Draft Plan at 11) is mostly outside the control of FWS and its U.S. partners. Moreover, even if U.S. entities could influence international action, the Draft Plan acknowledges that there are no known regulatory mechanisms at the international level to effectively address potential climate change effects to sea ice. *Id.* at 27 (*citing* 73 Fed. Reg. 28,212, 28,288 (May 15, 2008)).

FWS asserts that nothing short of global climate change reversal can ensure that a currently healthy species will “recover,” and yet nothing done in the U.S. can ensure—or even substantially advance—that goal. Given the lack of control or influence over the primary threat identified to polar bear subpopulations, including the two subpopulations located partially in the U.S., FWS rightly acknowledges that achieving the fundamental goal of securing the long-term persistence of U.S. populations (if, in fact, those populations decline) is solely “aspirational.” Draft Plan at 14. FWS admits that the Draft Plan cannot, in fact, accomplish its aim, hoping instead that “governments, industries, and citizens throughout the world aspire to accomplish” the aforementioned aggressive reductions in greenhouse gases. Draft Plan at 11. Even if these goals are somehow achieved, we will not know it because

monitoring is focused only on the two U.S. subpopulations due to the “logistical challenges associated with monitoring outside the United States.” *Id.* at 47.

The ESA requires that recovery plans include site-specific management actions and objective, measurable criteria which, if met, would result in the species being removed from the ESA’s protection. *See* 16 U.S.C. § 1533(f)(B)(i), (ii). Because the goals and criteria articulated by the Draft Plan are neither measurable² nor, as FWS’s own statements reveal, achievable, and because, even if implemented, they *would not result in the removal of polar bears from the ESA’s protection*, they fail to meet the ESA’s recovery planning criteria. FWS should issue a conservation plan pursuant to the MMPA and the final plan should memorialize MMPA conservation planning efforts; however, FWS should decline to issue a recovery plan pursuant to the ESA where, as here, it is unable to articulate measurable, achievable actions that will “promote the conservation of the species” by addressing global climate change—the sole primary threat identified to polar bear populations. *See id.* § 1533(f)(1) (Secretary shall develop and implement recovery plans “unless he finds that such a plan will not promote the conservation of the species.”).³

B. Oil and Gas Activities Do Not Threaten Polar Bears, Have Negligible Effects on the Species, and Require No Additional Management Actions.

Lacking the ability to initiate meaningful global action on climate change, FWS turns its focus in the Draft Plan to activities that “are not currently threats to polar bear subpopulations...” but which it speculates “may” become threats in the future, such as oil and gas activities and contamination from spills. Draft Plan at 12; *id.* at 6, 7 (citing oil and gas activities and spills as “potential management concerns”); *id.* at 27 (citing “potential” threats that are not currently a threat to recovery but “could” become threats in the future). While the potential for these activities to become threats is deemed “distant or low enough” that FWS does not believe specific criteria are warranted to indicate when or if one might become a threat (*id.* at 30), the Draft Plan nevertheless dedicates significant space to describing these “potential” threats (*see, e.g., id.* at 30, 43, 46), including describing “hypothesized ways” in which those activities could affect polar bear populations in the future. *Id.* at 30 (acknowledging that there is “limited information” to predict how polar bears may respond to

² Even the Draft Plan’s demographic recovery criteria are expressed in terms of percentages rather than numbers. FWS asserts this is because recovery could be achieved at different levels (Draft Plan at 32), but in fact it seems readily apparent that FWS could not express recovery in terms of numbers because, if it did so, the recovery plan would likely expose the fact that the global population is currently meeting any numerical definition of a recovered population. Figures in the Draft Plan illustrating potential future scenarios all demonstrate that current populations exceed both (1) the “mean net productivity level” (*i.e.*, the level at which births and survival of juveniles, less adult deaths, is greatest), and (2) the stable ecosystem threshold. *Id.* at 33.

³ The ESA also requires the Secretary to give recovery planning priority to species that are most likely to benefit from such plans, and in particular those species that are or may be in conflict with construction, development or other economic activity. 16 U.S.C. § 1533(f)(1)(A). Here, the Draft Plan admits it cannot articulate actions to benefit polar bears by moving them towards recovery, and acknowledges that polar bears are not in conflict with economic activities in the Arctic. *See* Section B., below.

possible increases in oil and gas activities). The Draft Plan goes on to propose recovery actions to address these potential concerns (*see id.* at 46) in order to “preclude these [activities] from threatening the persistence or recovery of polar bears while the global community works to address and limit atmospheric levels of greenhouse gases...” *Id.* at 6, 7.

As the Draft Plan acknowledges in several places, there is no evidence that these activities currently have any adverse impact on polar bear population numbers. *Id.* at 7 (“these factors have not been identified as threats”). In fact, the Draft Plan is explicit that oil and gas exploration “*will have negligible effects*” on future polar bear population numbers. *Id.* at 11 (emphasis added). FWS also believes that these activities are not interfering with polar bears’ access to habitat now. *Id.* at 29 (“Currently, we believe that access to usable terrestrial habitats is not compromised for polar bears....”). FWS acknowledges that human activities in the Arctic are well managed and that industry implements “successful mitigation efforts” limiting disturbance to denning bears.⁴ *Id.* at 30.

FWS is right to focus on the oil and gas industry’s successful polar bear conservation and protection efforts. For decades, oil and gas operators have implemented successful operational management programs in consultation with FWS, including polar bear interaction plans, scientific research and critical operations monitoring programs, and oil spill prevention and response planning, which have successfully protected polar bears in operating areas on the North Slope. In addition, oil and gas operators incorporate both design and operational features to minimize potential impacts to the environment and polar bear populations under MMPA “letters of authorization” and as a matter of best practice. For example, companies may conduct employee training; hire qualified observers or allow FWS to place observers on site to monitor, record and report any interactions with polar bears; conduct aerial surveys pursuant to FWS protocol to identify potential den sites before commencing winter work which may encounter a den; work with FWS to develop and implement measures to minimize potential impacts from activities, including modifying air traffic patterns, restricting activities in den buffer areas (typically a one-mile exclusion zone), and conducting monitoring; and providing sometimes daily reports to FWS regarding bear activity.

Moreover, the oil and gas industry is already highly regulated under a myriad of federal and state requirements aimed at the protection of polar bears and other marine mammals, water quality, noise control, and oil spill prevention and response planning applicable to oil and gas operations. These regulations include, but are not limited to:

⁴ Given that existing management measures are successfully protecting denning habitat, the Draft Plan’s identification of \$866,000 in annual recovery actions to “protect denning habitat” is irrational and contrary to law because such measures are not objectively necessary to remove the species from the ESA’s protection. *See* 16 U.S.C. § 1533(f)(B).

- Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.* (*e.g.*, Incidental Take Regulations, Letters of Authorization, and Incidental Harassment Authorizations);⁵
- National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (detailed environmental review before any major Federal action);
- Endangered Species Act, 16 U.S.C. § 1536(a)(2) (requiring federal agencies to consult with FWS prior to taking actions that “may affect” polar bears, and allowing imposition of terms and conditions to minimize incidental take);
- Oil Pollution Act of 1990, 33 U.S.C. § 2701 (*e.g.*, Spill Prevention, Control, and Countermeasure Plans, and Vessel and Facility Response Plans);
- Clean Water Act, 33 U.S.C. § 1251, *et seq.* (*e.g.*, the Alaska Pollutant Discharge Elimination System permit program and the federal section 404 permitting and wetland mitigation program);
- Clean Air Act, 42 U.S.C. § 7401, *et seq.* (National Ambient Air Quality Standards and Prevention of Significant Deterioration Permitting);
- Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, *et seq.* (Essential Fish Habitat designations and protections);
- Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1331, *et seq.* (lease-related environmental conditions, monitoring and mitigation measures for protection of biological resources and fisheries);
- Annex V of MARPOL, U.S. Coast Guard regulations, 33 C.F.R. § 151.73 (disposal of garbage and domestic wastes from fixed or floating platforms); and
- Alaska Oil and Hazardous Substance Pollution Control, AS 46.04 (Oil Discharge Prevention and Contingency Plan).

As the Draft Plan acknowledges, these “[c]urrent regulatory processes ... and industry-led plans and practices have contributed to the absence of any major mishaps affecting polar bears in 30 years of oil and gas operations on the North Slope.” Draft Plan at 46. As a result of these robust measures, the “[d]ocumented direct impacts on polar bears by the oil and gas industry during the past 30 years are minimal.” *Id.*, Appendix A at 11.⁶ FWS has consistently made similar findings over recent years. *See, e.g.*, 73 Fed. Reg. 28,212, 28,289 (May 15, 2008) (“the actual history of oil and gas activities in the Beaufort and Chukchi Seas demonstrate that operations have been done safely and with a negligible effect on wildlife and the environment.”); 71 Fed. Reg. 43,926, 43,945 (Aug. 2, 2006) (“We evaluated the sum

⁵ FWS and the courts have found that the MMPA is even more stringent and protective than the ESA where polar bears are concerned. *See, e.g., In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d 214 (D.D.C. 2011) (upholding FWS’s special rule exempting MMPA-authorized activities from ESA “take” prohibition because FWS properly found that MMPA has “comparable or stricter” regulatory provisions than ESA).

⁶ For the same reasons, FWS’s comment that “there are multiple types of direct, lethal removals of polar bears, including ... authorized incidental take ... and polar bears killed as direct result of human activity (*e.g. oil spills*)” is a misstatement. Draft Plan at 29 (emphasis added). Incidental take authorizations do not authorize “lethal removals” of bears and there is no cited instance of polar bear mortality in Alaska from oil spills. These references should be removed from the final plan, which must rely on the best available science.

total of both subtle and acute impacts likely to occur from industrial activity and, using this information, we determined that all direct and indirect effects, including cumulative effects, of industrial activities would not adversely affect the [polar bear] species through effects on rates of recruitment or survival. Based on past monitoring reports, the level of interaction between Industry and polar bears ... has been minimal.”); 73 Fed. Reg. at 33,247-48 (“We have concluded that incidental takes will be limited to temporary and transitory modifications of animal behavior that will not have any negative impacts on population levels, *regardless of changes in the environment.*”) (emphasis added).

It is arbitrary and capricious for FWS to now speculate, in contradiction of its prior and contemporaneous statements on the issue, that activities with no known population-level impacts may have different or more serious impacts in the future absent a scientific basis to make such an assertion. It is, likewise, arbitrary and capricious and not reasonably related to a legitimate governmental purpose to propose actions to “preclude” such activities from “threatening” polar bears when there is admittedly no evidence, scientific or otherwise, that they are having or will have such population-level impacts. *See Bennett v. Spear*, 520 U.S. 154, 176 (1997) (ESA best science requirement’s “obvious purpose ... is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise”).

Finally, Draft Plan’s focus on oil and gas management actions is contrary to its own fundamental goal number 6, which recognizes the compatibility of industry and polar bears in the Arctic and makes it a goal to achieve polar bear conservation while minimizing restrictions to economic development. Draft Plan at 6, 13. The Draft Plan acknowledges the need for “compatible economic activity” in the Arctic and posits that trade-offs between economic development and conservation must be considered as such activities are undertaken. *Id.* at 31. But by FWS’s own admission, such activities are currently having a negligible effects and are being successfully mitigated. Any speculation that future industrial activities may have different effects or may be insufficiently mitigated is inconsistent with the best available science and not rationally related to the governmental purpose in preparing a recovery plan for polar bears.

Conclusion

The Draft Plan’s conclusion that nothing short of global climate change reversal will recover polar bears, and its simultaneous finding that nothing can be done in the U.S. to advance that goal, demonstrates the irrationality of attempting to regulate global climate change concerns through federal ESA listings. FWS should issue a conservation plan pursuant to the MMPA and the final plan should memorialize MMPA conservation planning efforts; however, FWS should decline to issue a recovery plan for polar bears under the ESA because doing so will not address the primary threat identified to polar bears—global climate change—and will therefore not “promote the conservation of the species.” 16 U.S.C. §§ 1533(f)(1). If FWS decides to include recovery goals, criteria and actions in the final plan

notwithstanding that it will not promote the recovery of polar bears, the plan should be revised consistent with FWS's own findings that oil and gas activities have had and will continue to have only negligible effects on polar bear population numbers. Specifically, FWS should remove recovery criteria and actions related to further restricting oil and gas exploration and development activities, which are already highly regulated and have been successfully managed under the MMPA to protect polar bears and the marine environment, and should instead focus on the industry's continued implementation of conservation actions under the MMPA in cooperation with FWS.

The Associations and our members appreciate your consideration of these comments. The Associations look forward to continuing to work productively with FWS and other key stakeholders as part of the plan's Implementation Team and its working groups. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



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