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AOGA Comments on Proposed Revisions to Endangered Species Act: Listing / Removing Species and Designating Critical Habitat

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To Whom It May Concern:

These comments are made on behalf of the members of the Alaska Oil and Gas Association ("AOGA"), who account for a majority of the oil and gas production and related operations in Alaska.

Alaska is notable for the vast scope of the state, its predominately unspoiled nature, its thousands of miles of coastlines and marine areas, and not least for the presence of many wild species and habitat. These include a number of species designated for protection under the ESA.

AOGA member oil and gas activities have successfully coexisted with ESA species for many years on both the North Slope and in Cook Inlet. This is in part due to extraordinary wildlife mitigation measures implemented by industry in cooperation with federal and State agencies, local governments and community stakeholders. Examples include wildlife interaction plans for polar bears, design measures to protect caribou movement, and mitigation measures to avoid interference with whales and marine mammals. AOGA members are proud of their longstanding and effective efforts to protect Alaska wildlife and ESA species.

At the same time, Alaska has also been the site of recent designations of new species and critical habitat across vast reaches of the Beaufort Sea based upon the threat of actual or projected climate conditions. While industry activities in Alaska have not been the cause of these

perceived risks to ESA species, the resulting expansion of federal jurisdiction in the Arctic is of real consequence to the ability of AOGA members to plan, permit and operate. In addition to the costs and delays of the consultation process, there is ongoing uncertainty due to litigation over all aspects of the ESA. Clarity in the ESA regulations for designation of species and habitat, and consistency with the text of the ESA itself, are important to reducing this uncertainty and to assuring that the ESA is in fact protecting species from actual threats as intended.

AOGA supports the Resource Agencies' proposed revisions to the regulations for designation of ESA species and habitat in 50 CFR § 424 et seq. AOGA appreciates the efforts of the Agencies to improve this important component of the ESA. In response to the Agencies' solicitation of feedback on their proposed revisions AOGA respectfully offers the following comments and suggestions for consideration.

Section 424.11-- Factors for Listing, Delisting, or Reclassifying Species
AOGA agrees that deletion of the phrase "without reference to possible economic or other impacts of such determination" is appropriate so that the regulation conforms more closely with the statutory language. This already requires determinations to be made "solely on the basis of the best scientific and commercial data available." The proposed revision would also eliminate an unnecessary barrier to discussion of economic and other impacts which may be of interest or importance to stakeholders and the public.

New Section 424.11 (d)—"foreseeable future"
AOGA agrees that use of the statutory term "foreseeable future" for listing of a species as threatened should be clarified. This concept has become very important to the listing of threatened species in the Alaska Arctic.

For example, in listing of bearded and ringed seals as "threatened," NMFS relied upon unprecedentedly long projections of the effects of climate change over the course of 50 to 100 years. This raised questions not only about the scientific reliability of climate models over a very long term but also about the extent to which the biological reaction of the presently healthy species to projected conditions could be foreseen. It also raised questions about the utility of such designations if effective conservation measures are not available under the Act. Other species in Alaska may present similar situations.

The proposed regulatory language would allow the Resource Agencies to consider a mix of factors depending on the situation to "describe the foreseeable future on a case by case basis… taking into account considerations such as the species life-history characteristics, threat-projection time frames, and environmental variability." This need not be done "in terms of a specific period of time," but "the Services may instead explain the extent to which they can reasonably determine that both future threats and the species' responses to those threats are probable."

In applying the various factors that the Services have articulated that must be considered on a case by case basis, it is always important to give clear effect to the statutory language. This is particularly the case with respect to the ESA, given the escalating litigation challenges brought under the ESA and the unanticipated interpretations often given to regulatory language by the

courts over the years. The result has been an expansion of the scope of the ESA and the complexity of its process that arguably reach far beyond what was contemplated when the statute was enacted and amended decades ago.

In this case, "threatened species" under the ESA means "any species which is likely to become an endangered species in the foreseeable future throughout all or a significant part of its range." ESA Sec. 3 (6) (definition of endangered species.) This is a terse formulation. The key threshold that must be met for listing of a species as threatened is "likely." "Foreseeable future" is neither qualified in any way nor is it a separate factor. The danger of extinction must occur in the future that is discernible to be "likely." AOGA respectfully suggests that the proposed regulations should rely to the greatest extent practicable on this statutory standard.

AOGA does not take issue with the proposed case by case approach, with the need for the Services to address the listed factors proposed for consideration, or with the need to explain their findings. These are properly factors which the Services must address to implement the statute. This approach also appears to be informed by a 2009 DOI Office of the Solicitor Opinion[1] on the meaning of "foreseeable future." However, as stated in that Opinion:

> Although the Secretary has the responsibility to make the ultimate judgments on issues relating to biology, the expertise and discretion used in making those judgments are subject to the strictures of the law. The law requires that the future likely status of a threatened species actually be foreseeable by the Secretary, based on the data available.

Id. at 10. AOGA respectfully submits that both scientific basis to foresee a threat to a species, and to predict the effect on the species, must be considered in assessing whether a species may be threatened in the foreseeable future.

Specifically, AOGA suggests that, where the conclusion is that a species should be listed, the regulation should state that the Services must not just explain, but must specifically find "that both future threats and the species' responses to those threats are probable." *See* Solicitor's Opinion at 10 ("In evaluating the foreseeable future, the Secretary must look not only at the foreseeability of threats, but also at the foreseeability of the impact on the threats to the species.") This is necessary because, absent such a conclusion for both factors, the statutory standard of "likely" cannot be met.

The factors proposed for consideration by the Services are also qualified by a general admonition that "[t]he term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable." AOGA respectfully suggests the terms "potentially" and "reasonably" should be omitted. While the stated conclusion of this is correct, the inclusion of the qualifying terms "potentially" and "reasonably" could be misread, diluting the statutory standard of "likely." ("Reasonably" could be misconstrued to suggest a reasonable basis

[1] Department of the Interior, Office of the Solicitor, M-37021, January 16, 2009.

standard, not the affirmative finding of "likely" required by the ESA; similarly, the foreseeable future of danger of extinction under the ESA must be likely, not potential.)

Factors Considered in Delisting Species

AOGA fully supports revisions to 424.11(d), to be redesignated now as (e), to apply the same standard to delisting a species as required for listing. AOGA further agrees that this approach is consistent with the statute, indeed arguably required, because the statute makes no distinction in its definitions for listing and delisting. Deletion of the examples given for delisting, in particular "recovery," avoids confusion or improper conflation of recovery plans with the statutory standards. Goals in recovery plans may be in part impracticable or aspirational in nature.[2] Most importantly, recovery plans cannot override statutory criteria for whether listing or continued listing is required.

Section 424.12—Criteria for Designating Critical Habitat

Not Prudent Determinations

AOGA supports clarification of the circumstances under which designation of critical habitat may not be prudent. AOGA agrees that the present standards, especially 424. (a)(1)(ii) with respect to whether designation "would not be beneficial," have been susceptible to unanticipated interpretations by the courts. In addition, as the Services note, the current regulation is not based upon statutory language.

AOGA concurs with the approach set forth in proposed 424.12(a)(ii) that designation of habitat may not be prudent where "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7 (a)(2) of the Act." This is in the first instance a common-sense recognition that some threats to habitat, such as diminished sea ice, cannot be prevented through consultation measures. If the actual threat to habitat cannot be addressed, it makes little sense to greatly expand federal jurisdiction, and create a significant public and private regulatory burden, solely to impose further federal management upon activities which are not such a threat.

This revision is also consistent with the statutory language that a designation of critical habitat must be of specific areas "which may require special management considerations or protection." ESA Section 5(A)(i). This neglected statutory requirement can be fairly read to limit designations of critical habitat where no such protection can be afforded due to the nature of the threat. In Alaska, recent designations of habitat have reached unprecedented scope, while identifying no conservation benefit to the species. This cannot be the intent and should not be the effect of the ESA.

AOGA does respectfully suggest one revision to this proposal: a substitution of "principally" for "solely." The reason is not to change the intended effect, but to avoid a possible misreading by the courts that the Services must show that no other threats of any kind to the habitat exist. This

[2] For example, the USF&WS Polar Bear Conservation Management Plan (USF&WS 2016) calls for global action to combat Artic warming and address diminishing sea ice as a primary component of the recovery plan. Id. at 6. Without any intended criticism of this approach, it cannot in itself control whether a species meets the statutory standards for listing or delisting.

would avoid the familiar conundrum of a standard potentially calling for proof of a negative. Moreover, other threats may be insignificant or in no way sufficient in themselves to require the designation.

AOGA also supports clarification that designation of critical habitat may not be prudent for species primarily occurring outside U.S jurisdiction where the areas in the U.S provide negligible conservation value.

Designating Unoccupied Areas

In 2016, the Services revised the standard for designation of areas for critical habitat by deleting the express requirement that areas that are occupied must first be seen as "inadequate to ensure conservation." The present proposal restores this requirement, thereby avoiding confusion over designation of such areas. This also gives better effect to the statutory standard, which requires a determination that "specific areas outside the geographical area occupied by the species at the time it is listed … are essential for the conservation of the species." ESA Section 5(A)(ii).

AOGA does not take substantive issue with further designation of unoccupied areas where necessary for "efficient conservation of the species" or that unoccupied areas should be subject to a determination that there is a "reasonable likelihood that the areas will contribute to the conservation of the species." AOGA respectfully suggests however that the Services may wish to consider whether these situations need to be listed, or may be more properly subsumed by the statutory requirement that the designation be "essential." If that standard is met, these are no more than examples, and perhaps this could be stated; if not, they should not be designated.

Conclusion

In conclusion, AOGA appreciates the opportunity to submit the foregoing comments and respectfully supports the Resource Agencies' proposed revisions to the regulations for designation of ESA species and habitat in 50 CFR § 424 et seq. AOGA further appreciates the hard work and effort of the Agencies to improve this important component of the ESA.

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