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*VIA Facsimile and EMAIL*

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**Re: Marine Mammals: Incidental Take of Polar Bears and Pacific Walrus During Specified Activities; Year-Round Oil and Gas Industry Exploration, Development, and Production Operations in the Beaufort Sea. (71 Fed. Reg. 14446)**

These comments on the U.S. Fish and Wildlife Service's ("FWS's") proposed regulations authorizing incidental take of polar bears and Pacific walrus related to year-round oil and gas industry exploration, development, and production operations in the Beaufort Sea (71 Fed. Reg. 14446, March 22, 2006) are submitted on behalf of the Center for Biological Diversity, Pacific Environment, and the Northern Alaska Environmental Center. We are concerned about the impact of oil and gas exploration, development and production activities on polar bears and Pacific walrus and on the communities dependant on these species. We therefore urge FWS not to issue any take authorization for these species related to oil and gas industry activities unless and until FWS can ensure that mitigation measures are in place that truly avoid adverse impacts to the species, and only after full and adequate public participation has occurred and environmental review of the cumulative impacts of such activities on these species and their habitats has been undertaken. Unfortunately, the proposed regulations do not meet these standards and therefore violate the Marine Mammal Protection Act, the National Environmental Policy Act, and other governing statutes and regulations.

#### **I. Marine Mammal Protection Act**

FWS's proposed authorization of take for all oil and gas related activities does not comply with the Marine Mammal Protection Act ("MMPA"). Congress enacted the MMPA in 1972 in response to widespread concern that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). The legislative history for the MMPA states that the purpose of the MMPA is to "prohibit the harassing, catching, and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States" without a

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permit. H. Rep. No. 92-707, reprinted in 1972 U.S.C.C.A.N. 4144. The primary mechanism by which the MMPA protects marine mammals is through the implementation of a “moratorium on the taking” of marine mammals. 16 U.S.C. § 1371(a). Under the MMPA, the term “take” is broadly defined to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” Id. §1362(13). “Harass” is further defined to include acts of “torment” or “annoyance” that have the “potential” to injure a marine mammal or marine mammal stock in the wild or have the potential to “disturb” them “by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” Id. § 1362(18); 50 C.F.R. § 216.3 (defining “Level A” and “Level B” harassment).

The MMPA provides several narrow exception to the moratorium on take. Relevant here, FWS may, upon request, promulgate regulations authorizing such take for a period up to five years provided certain conditions are met. To receive such take authorization, an activity (i) must be “specified” and limited to a “specified geographical region,” (ii) must result in the incidental take of only “small numbers of marine mammals of a species or population stock,” (iii) can have no more than a “negligible impact” on species and stocks, and (iv) will not have “an unmitigatable adverse impact on the availability of such species or stock for taking for subsistence uses” by Alaska Natives. Furthermore, in issuing an authorization, FWS (v) must provide for the monitoring and reporting of such takings and (vi) must prescribe methods and means of effecting the “least practicable adverse impact” on the species or stock and their habitat. 16 U.S.C. § 1371(a)(5)(A). As discussed more fully below, FWS has not demonstrated that the proposed regulations will meet any of these standards.

#### **A. Specified Activities and Specified Geographic Region**

An initial problem with FWS’s proposed regulations is that they do not adequately “specify” the activities to be covered by the take authorization. The MMPA allows take authorization only for explicitly “specified activities” within a specified geographic area. 16 U.S.C. § 1371(a)(5)(A). The proposed regulation does not do this. In essence, the proposed regulations would exempt any and all activities related to oil and gas exploration, development, and production in the defined “Beaufort Sea Region.” However, FWS does not explicitly define what these activities are in the proposed regulation. The actual proposed rule language is extremely broad:

Regulations in this subpart apply to the nonlethal incidental, but not intentional, take of small numbers of polar bear and Pacific walrus by you (U.S. citizens as defined in § 18.27(c)) while engaged in oil and gas exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska.

71 Fed. Reg. at 14465. This broad, overinclusive description of activities for which incidental take is authorized cannot meet any rational definition of “specified activities.” Moreover, the explanatory text provides little help in actually clarifying what activities will be exempted from the take prohibition. Instead, FWS simply lists examples of activities expected to occur and states that FWS “will evaluate these and any future activities to insure that they fall within the scope of activities analyzed in these regulations on a case-by-case basis through the LOA process.” 71 Fed. Reg. at 14448. However, FWS cannot rationally evaluate whether any given activity falls within the scope of covered activities unless such activities are explicitly defined. By proposing a rule that purportedly covers any and all activities

related to the oil and gas industry, FWS has violated the clear language of the MMPA that only “specified activities” be exempted from the take prohibition.<sup>1</sup>

## **B. Small Numbers and Negligible Impact**

Regulations authorizing incidental take of marine mammals from specified activities can only be promulgated if such take will be limited to “small numbers” and have a “negligible impact” on the species or stock. 16 U.S.C. § 1371(a)(5)(A); 50 C.F.R. § 18.27. These are separate and distinct statutory requirements. *Id.* As an initial matter, the proposed authorization is legally infirm as it explicitly relies on a regulatory definition of “small numbers” that is at odds with the statute and has been struck down by the courts. The FWS defines “small numbers” in such a way that conflates it with the “negligible impact” determination and impermissibly renders it meaningless:

*Small numbers* means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.

50 C.F.R. § 18.27(c). As a U.S. District Court concluded in overturning an identical regulatory definition of the National Marine Fisheries Service (“NMFS”), “[t]he plain language indicates that ‘small numbers’ is a separate requirement from ‘negligible impact.’ To treat them as identical would appear to render the reference to ‘small numbers’ mere surplusage.” Natural Resources Defense Council v. Evans, 232 F.Supp.2d 1003, 1025 (N.D.Cal. 2002); see also Natural Resources Defense Council v. Evans, 364 F. Supp. 2d 1083 (N.D.Cal. 2003). The court noted that by conflating the two terms, NMFS has “eliminated the ability of the two terms to act, as intended, as separate checks on the Secretary’s authority.” 232 F.Supp.2d at 1026. Congress clearly intended “small numbers” and “negligible impacts” to operate as two separate standards. *Id.* citing H.R. Rep. No. 97-228 (1981), reprinted in 1981 U.S.C.C.A.N. 1458, 1981 WL 21352 at \*1469. By relying on this unlawful standard in the proposed rulemaking, FWS is committing prejudicial error rendering the rule invalid.

Notwithstanding the unlawful regulation, nowhere in the rulemaking is it apparent that FWS has made a separate finding that only “small numbers” of Pacific walrus and polar bears will be affected by the proposed authorization. In fact, there is no apparent numerical estimate of the number of walrus and polar bears that will be taken during the five-year period in which the regulations will be in effect. The closest FWS comes to this is with regard to walrus, where, due to the apparent low population density in the area, FWS repeatedly asserts that “few” walrus will be impacted by any industrial activity that occurs. FWS however does not, and cannot, make this statement with regard to polar bears. The only place where FWS attempts a numerical estimate of the anticipated take of polar bears is with regard to oil spill modeling. However, as described below this estimate is likely an underestimate. No numerical estimates of polar bears “taken” to support a lawful “small numbers” finding are made with regard to any other of the authorized activities likely to impact the species. In

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<sup>1</sup> While FWS has arguably complied with the MMPA’s requirement that the authorization be within a “specified geographic area,” because the impacts from the authorized activities extend beyond the defined “specified geographic area,” and the cumulative impacts on the affected stocks of polar bear and walrus certainly extend beyond the defined area, FWS has improperly limited the geographic scope of its analysis in making its “small numbers” and “negligible impact” finding under the MMPA as well as in its NEPA analysis.

sum, FWS simply fails to make the “small numbers” findings required by the MMPA and therefore cannot lawfully issue the proposed take authorization.

Additionally, to the degree FWS claims to have made separate “small numbers” and “negligible impact” findings, these findings themselves are neither supported nor supportable. Among the flaws in FWS’s analysis are an underestimate of the number of polar bears likely to be exposed to seismic surveys, an underestimate of the number of polar bears likely to interact with humans, an underestimate of the number of polar bears likely to be exposed to an oil spill, a poorly supported conclusion that no lethal take will occur, and a complete lack of analysis of indirect impacts of oil and gas activities on the species.

These underestimates come from at least two sources. First, FWS assumes, despite significant evidence to the contrary, that the level of activities impacting polar bears will likely be “comparable” to those occurring during previous 5-year regulatory periods. 71 Fed. Reg. at 14462. Unfortunately, industrial activity in the area subject to the take authorization has increased dramatically and is projected to do so even more over the next five years. For example, in just the past two months there have been at least four separate activities proposed in the Beaufort Sea likely impacting polar bears and walrus. See e.g. 71 Fed. Reg. 9782 (Proposed NMFS IHA for on-ice seismic surveys in Harrison Bay); 71 Fed. Reg. 11681 (Proposed scientific seismic survey by National Science Foundation); 71 Fed. Reg. 11314 (NMFS 5-year harassment regulation for activities related to Northstar); [http://www.mms.gov/alaska/ref/pea\\_be.htm](http://www.mms.gov/alaska/ref/pea_be.htm) (MMS Programmatic Environmental Assessment related to OCS seismic surveys). Additionally, significant increases in onshore oil and gas development with attendant direct impacts on polar bears on land as well as indirectly through increased ship traffic are also occurring and projected to occur at greater rates than in the past. See e.g. 70 Fed. Reg. 47809 (NMFS IHA for barge traffic to NPR-A); 70 Fed. Reg. 47851 (Notices regarding new oil and gas development in the NPR-A). The cumulative effect of these activities will certainly mean greater impacts to polar bears and walrus than in the past from each category of industrial activity covered by the authorization (seismic surveys, oil spill risk, den disturbance, direct human/bear encounters, etc.). The heightened levels of oil and gas activity and attendant take likely to occur during the term of the take authorization renders any “small numbers” and “negligible impact” findings by FWS arbitrary and capricious.

Another factor causing FWS’s “small numbers” and “negligible impact” findings to be suspect is the fact that the Beaufort Sea area is undergoing rapid change as a result of global warming. The FWS is clearly aware of the significant impacts of global warming on the Arctic in general, and on Alaska and the polar bear specifically.<sup>2</sup> These impacts are occurring at such a rate that conditions over the 5-year term of the authorization are likely to be substantially different than over previous authorization periods. The retreat of the sea ice from the Beaufort Sea coast has had numerous impacts

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<sup>2</sup> On February 9, 2006 FWS made a finding that listing of the polar bear under the Endangered Species Act as a threatened species due to the impacts of global warming “may be warranted.” 70 Fed. Reg. 6745. The Petition seeking listing of the polar bear, all supporting documents, and comments received are already on file with FWS at the same office to which these comments are being sent. We hereby incorporate by reference the Petition and those items submitted by the Center for Biological Diversity supporting the Petition into this letter and formally request that all documents related to the ESA rulemaking be considered by FWS in this rulemaking as well, and also be included in this administrative record.

on polar bears that are relevant here. For example, a study by MMS documented large numbers of polar bears seen swimming far from shore:

During aerial surveys in early-September, 2004, an unusually large number of polar bears were seen swimming > 2 km offshore near Kaktovik. Subsequently, polar bear carcasses were seen floating offshore. Extrapolation of survey transect data suggests that on the order of 40 bears may have been swimming and that many of those probably drowned as a result of rough seas caused by high winds. We speculate that mortalities due to offshore swimming during late-ice (or mild ice) years may be a relatively important and unaccounted source of natural mortality given energetic demands placed on individual bears engaged in long-distance swimming. We suggest that drowning-related deaths of polar bears may increase in the future if the observed trend of regression of pack ice and/or longer open water periods continues.<sup>3</sup>

This significant change since the previous take authorizations is important in several respects. First, the fact that large numbers of polar bears likely drowned in the incident and more are likely to do so in the future renders any previous “negligible impact” conclusion suspect. Moreover, more polar bears in the water means more polar bears are likely to be exposed to the impacts of seismic surveys and oil spills. FWS’s calculations of the numbers likely impacted by seismic surveys assumes polar bears do not swim long distances. 71 Fed. Reg. 14454. This is no longer the case. Similarly, the oil spill risk assessments were also based on the assumption that few if any bears would be in the water to be exposed to a spill. Again, this is no longer the best available science. If FWS intends to issue any incidental take regulations for polar bears it must carry out its “small numbers” and “negligible impacts” analysis informed by the reality of the changed conditions in the Arctic as a result of global warming.

The impacts of global warming on the polar bear relevant to the proposed take authorization are not limited to more bears spending more time in the water with attendant risks. Additionally, there is a disturbing trend of polar bears congregating on land along the Beaufort Sea coast in late summer and fall awaiting the formation of sea ice. FWS documents this fact in the proposed rulemaking (71 Fed. Reg. 14450-51) but does not analyze the likely impacts of this changed circumstance on the numbers of bears likely to be impacted by oil and gas activities. The increased presence of bears on the coast has obviously resulted in greater risk of human/bear encounters and consequent higher levels of take, including greater probabilities of lethal take.<sup>4</sup> The failure to analyze this factor is a significant shortcoming of the rulemaking.<sup>5</sup>

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<sup>3</sup> The study is available at <http://www.mms.gov/alaska/ess/Poster%20Presentations/MarineMammalConference-Dec2005.pdf>

<sup>4</sup> The increased numbers of bears are also likely food stressed, and in Canada and Russia have been documented showing increased aggression towards humans. In such cases, the bears have almost always been killed. Articles documenting these impacts have been submitted to FWS related to the ESA listing process. See footnote 2, *supra*. Similar interactions in Alaska are likely and should be analyzed in the rulemaking.

<sup>5</sup> An additional form of take of polar bears and walrus occurring as a result of oil and gas activities is the impairment of their breeding, feeding and sheltering as a result of the loss of sea ice habitat due to anthropogenic climate change brought on by greenhouse gas emissions. The oil and gas activities covered by the authorization generate significant amounts of

Another significant deficiency of the rulemaking is its failure to analyze the indirect effects of oil and gas industry activities on polar bears and walrus. For example, the rulemaking concludes minimal impacts to polar bears from seismic surveys due to the fact that polar bears supposedly spend little time in the water. Even if this were true (see discussion above), there is no analysis of the known and likely impacts of such seismic surveys on the prey base of polar bears (ringed and bearded seals) or the ecosystem as a whole (the fish and invertebrates that seals prey on). Seismic surveys have known impacts to these species but are nowhere addressed in the rule.<sup>6</sup> Relatedly, (and also discussed in the NEPA section below), the proposed rulemaking completely ignores cumulative impacts to both the walrus and the polar bear in making its “negligible impact” findings.

In sum, the proposed rulemaking fails to comply with the MMPA’s requirements that take of marine mammals be limited to “small numbers” and have a “negligible impact.” Because of this, the take authorization cannot be lawful issued.

### **C. Impact on Subsistence Uses**

The MMPA also requires that any incidental take authorized will not have “an unmitigatable adverse impact on the availability of such species or stock for taking for subsistence uses” by Alaska Natives. 16 U.S.C. § 1371(a)(5)(A)(i). The proposed rule purports to make such a finding. For the reasons discussed above regarding the “small numbers” and “negligible impact” findings, FWS’s conclusions on this point are also arbitrary and capricious.

### **D. Monitoring and Measures to Ensure Least Practicable Impact**

The MMPA authorizes FWS to issue a small take authorization only if it can first find that it has required adequate monitoring of such taking and all methods and means of ensuring the least practicable impact have been adopted. 16 U.S.C. § 1371(a)(5)(A). Astonishingly, the proposed rule completely ignores this statutory requirement. The rulemaking includes a short section in which FWS states it will require a “monitoring plan” to be submitted with any LOA request. 71 Fed. Reg. 14463. No details of this monitoring plan requirement are described in the rulemaking. The actual proposed regulatory language also completely fails to describe the necessary monitoring requirements:

A site-specific plan to monitor the effects of the activity on the behavior of polar bear and Pacific walrus that may be present during the ongoing activities. Your monitoring program must document the effects to these marine mammals and estimate the actual level and type of take. The monitoring requirements will vary depending on the activity, the location, and the time of year.

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greenhouse gases which are and will continue to impact these species. This form of take is not mentioned, much less analyzed in the rulemaking.

<sup>6</sup> FWS acknowledges the impacts of seismic surveys on pinnipeds in its discussion of impacts to the walrus (71 Fed. Reg. 14453) but makes to attempt to address impacts to these species in the context of being polar bear prey.

71 Fed. Reg. 14466. In other words, the proposed regulations contain no standards for monitoring; FWS will simply make them up along the way. This is not legally sufficient.

While FWS at least acknowledges that some form of monitoring is required, the proposed rulemaking is completely silent on the requirement that the covered activities have the “least practicable adverse impact” on the marine mammal species. At best, FWS mentions certain measures such as Forward Looking Infrared imagery to detect polar bear dens that “may” be required. But nowhere does FWS analyze why these or other measures should not always be required, or why other more protective measures such as a prohibition on activities during the denning season are (or are not) “impractical.” Without requiring such additional mitigation measures, or at a minimum discussing why they are not practicable, FWS cannot lawfully issue the requested authorization.

## **II. The 1973 Agreement on the Conservation of Polar Bears**

Shortly after the enactment of the MMPA, the United States along with the other nations with jurisdiction over polar bear populations adopted the 1973 Agreement on the Conservation of Polar Bears. Like the MMPA, the Polar Bear Agreement emphasizes habitat protection. We believe that the authorization of disruptive oil and gas industrial activities in polar bear denning habitat violates the mandate of the Polar Bear Agreement to protect essential polar bear habitats. At a minimum, FWS must explain how the incidental take regulations will protect such habitats. The proposed rule entirely fails to do so and is therefore arbitrary and capricious.

## **III. National Environmental Policy Act**

The proposed regulations authorizing take of polar bears and walrus from oil and gas activities in and along the Beaufort Sea are being promulgated in violation of the spirit and letter of the National Environmental Policy Act (“NEPA”) and its implementing regulations. First off, FWS has failed to provide adequate notice of the proposed action as required by NEPA. We are unaware of FWS contacting any environmental organization about the proposed rulemaking or distributing the Environmental Assessment (“EA”) to any interested party. Neither the EA or the proposed rule are posted on FWS’s Alaska Region website. There simply has been inadequate opportunity for public involvement in this significant rulemaking.<sup>7</sup> To comply with NEPA, FWS must reopen the comment period, make the relevant documents available on its website, and contact organizations and individuals with a history of involvement or expressed interest in management of polar bears and walrus.

In addition to the inadequate public notice, FWS’s most significant violation of NEPA is its failure to prepare a full Environmental Impact Statement (“EIS”) for this rulemaking. Under NEPA:

an EIS must be prepared if “substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.” To trigger this

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<sup>7</sup> Additionally, the contact person listed in the Federal Register notice for further information has to date failed to respond to an email sent requesting a copy of the draft EA.

requirement “a plaintiff need not show that significant effects will in fact occur,” raising “substantial questions whether a project may have a significant effect is sufficient.”

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149-50 (9<sup>th</sup> Cir. 1998) (citations omitted) (emphasis in original).

Additionally, under the CEQ regulations, the effects of the take authorization are significant. The CEQ regulations list ten factors that must be considered in determining the significance of an action’s environmental effects. 40 C.F.R. § 1508.27. Several of these factors are present here. Among these are that the action is “highly controversial,” and it involves possible effects that are “highly uncertain or involve unique or unknown risks.” Either of these factors, standing alone, is sufficient to require preparation of an EIS. Ocean Advocates v. United States Army Corps of Engineers, 402 F.3d 846, 865 (9<sup>th</sup> Cir. 2005). In this instance, each of these factors require preparation of an EIS.

As discussed in the MMPA section above, FWS must also consider the cumulative effects of all the past, present and likely future activities and events affecting the polar bear and walrus in its NEPA analysis. Among these are global warming, pollutants building up in the Arctic and in the bodies of these species, activities in the Canadian and Russian portions of the species ranges, and all other relevant factors. FWS has utterly failed to do so here. Additionally, as discussed in the mitigation section above, FWS must analyze all reasonable alternatives to the proposed action. Issuing blanket take authorization for all oil and gas activities without considering alternatives such as seasonal prohibitions of disruptive activities in denning areas violates this requirement of NEPA as well.

In at least three cases the Ninth Circuit has overturned decisions not to prepare an EIS for a project that impacted marine mammals, including in cases such as this where one such impact is the disruptive effects of sound on the species. See National Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 727 (9<sup>th</sup> Cir. 2001). (“The acoustic environment appears to be very important to humpback whales.”); see also Jones v. Gordon, 792 F.2d 821 (9<sup>th</sup> Cir. 1986)(overturning on NEPA grounds MMPA take authorization of killer whales). Most recently, in Anderson v. Evans, 350 F.3d 815 (9<sup>th</sup> Cir. 2003) as amended by 371 F.3d 475 (9<sup>th</sup> Cir. 2004) the Ninth Circuit held that failure to analyze the local impacts on a marine mammal population was sufficient to overturn a decision not to prepare an EIS: “Even if the eastern Pacific gray whales overall or the smaller PCFA group of whales are not significantly impacted by the Makah Tribe’s whaling, the summer whale population in the local Washington area may be significantly affected. Such local effects are a basis for a finding that there will be a significant impact from the Tribe’s hunts. See 40 C.F.R. § 1508.27(a).” All of these cases are applicable to the instant situation. FWS must prepare a full EIS for the proposed take authorization.

#### **IV. Conclusion**

We look forward to FWS’s prompt response to these comments. Also, please immediately provide us via email ([bcummings@biologicaldiversity.org](mailto:bcummings@biologicaldiversity.org)) and U.S. mail with FWS’s final NEPA and MMPA documents as soon as they are available. Thank you for your consideration of these comments.

Sincerely,

/s/

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