Alaska Oil and Gas Association

AOGA

121 W. Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907)272-1481 Fax: (907)279-8114
Email: crockett@aoga.org
Marilyn Crockett, Executive Director

December 8, 2010

VIA FEDERAL EXPRESS

Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Rowan W. Gould
Acting Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

Re: Sixty-Day Notice of Intent to Sue Relating to Critical Habitat Designation for the Polar Bear, 75 Fed. Reg. 76,086 (December 7, 2010)

Gentlemen:

This letter is provided by the Alaska Oil and Gas Association ("AOGA")[1] to notify you of AOGA's intent to sue the United States Fish and Wildlife Service ("Service") for its failure to satisfy and comply with statutory requirements of the Endangered Species Act ("ESA") in designating critical habitat for the polar bear. AOGA provides this 60-day notice letter pursuant to Section 11(g) of ESA, 16 U.S.C. § 1540(g), to the extent it may be applicable.

I. AOGA'S INTEREST

AOGA is a private, non-profit trade association located in Anchorage, Alaska. The companies on whose collective behalf AOGA submits this notice account for the vast majority of oil and gas exploration, development, production, transportation, refining and marketing activities in Alaska. AOGA, and the interests it represents, are the principal industry stakeholders that operate within the range of, and that incidentally interact with, polar bears in Alaska and in the adjacent U.S. Outer Continental Shelf ("OCS"). AOGA, and the interests it represents, are also longstanding supporters of polar bear conservation, management and research in Alaska and western Canada.

AOGA has been an active stakeholder in the all of the processes taking place under Section 4 of the ESA regarding the polar bear, including the listing decision, the issuance of a 4(d) interim and final rule, and the designation of critical habitat. AOGA has intervened in pending federal district court litigation to defend the Service's listing of the polar bear species as "threatened" under the ESA and to

[1] This notice is submitted on the collective behalf of AOGA and its members.

defend the Service's issuance of the final polar bear 4(d) rule. In addition, AOGA has previously submitted two sets of written comments, dated December 23, 2009 and July 6, 2010, regarding the Service's proposal to designate polar bear critical habitat. Several of the individual companies represented by AOGA in this notice also submitted separate written comments regarding the proposed designation of polar bear critical habitat.

II. SUMMARY OF ESA VIOLATIONS

1. The Service's designation of polar bear critical habitat is arbitrary and capricious, and violates ESA Section 3(5)(A), 16 U.S.C. § 1532(5)(A), and ESA Section 4(a)(3), 16 U.S.C. § 1533(a)(3), because the Service improperly defined the physical and biological features "essential to the conservation of the species," and because the Service then improperly designated vast areas that lack the physical and biological features "essential to the conservation of the species."

2. The Service's designation of polar bear critical habitat is arbitrary and capricious, and violates ESA Section 3(5)(A), 16 U.S.C. § 1532(5)(A), and ESA Section 4(a)(3), 16 U.S.C. § 1533(a)(3), because it designates areas that the Service has admitted do not currently, or in the foreseeable future, require special management measures.

3. The Service's designation of polar bear critical habitat is arbitrary and capricious, and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2), because the Service's designation of critical habitat, assessment of economic impact, and decision not to exclude certain areas from the critical habitat designation are neither based on nor consistent with the best scientific data available.

4. The Service's designation of polar bear critical habitat is arbitrary and capricious, and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2), because the Service did not reasonably assess, and therefore did not take into consideration, the actual economic impact and other relevant impacts of designating the identified areas as critical habitat.

5. The Service's designation of polar bear critical habitat is arbitrary, capricious and an abuse of discretion, and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2), because the Service failed to lawfully balance the conservation benefits and the economic effects to exclude areas where the benefits of exclusion outweigh the benefits of specifying such areas as part of the critical habitat.

III. THE SERVICE HAS VIOLATED THE ESA

A. The Critical Habitat Designation Violates ESA Sections 3(5)(A) and 4(a)(3) By Including Lands That Do Not Possess Physical or Biological Features Essential to the Conservation of the Species

The ESA defines critical habitat as "specific areas within the geographical area occupied by the species. . . on which are found those physical or biological features (I) essential to the conservation of the species *and* (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i) (emphasis supplied). The features that satisfy the Act's requirements are called Primary Constituent Elements ("PCEs"). 50 C.F.R. § 424.12(b)(5).

Notably, PCEs must be "found" on occupied land before that land can be eligible for critical habitat designation. 16 U.S.C. § 1532(5)(A)(i). In other words, it is a statutory prerequisite to designation that an area actually contain PCEs. *See e.g., The Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior*, 344 F. Supp. 2d. 108, 122 (D.D.C. 2004) ("the Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation"). These PCEs must be actually present at the time of designation; lands cannot be designated on the expectation that the PCEs will be present at some time in the future. *Id.* at 122-23 (Service's "hope" that "PCEs will likely be found in the future, is simply beyond the pale of the statute").

The final critical habitat designation includes an incomprehensibly vast area larger than any of 48 states, including huge areas that do not contain any biological or physical attributes essential to conservation of the polar bear species. For example:

- The designation of nearly 180,000 square miles identified as critical sea ice habitat is defined to include areas that have so little sea ice during certain seasons of the year that these areas are, functionally, ice free open water, and other areas that have such limited summer ice concentrations that they serve as, at most, marginal habitat rather than critical habitat.

- The designation of 5,657 square miles of the North Slope coastal plain as terrestrial denning critical habitat for the polar bear encompasses an area over 99 percent of which is not suitable for polar bear denning.

- The designation of terrestrial denning critical habitat and barrier island critical habitat includes areas in close proximity to pre-existing industrial activity, humans, and regular human activity that are unsuitable for denning or other sensitive polar bear behaviors.

- The designation of barrier island critical habitat, including a one-mile "no disturbance zone" includes barrier islands, barrier island habitat and surrounding areas that lack suitable topography or other habitat features necessary to essential polar bear behaviors. Moreover, the ESA does not authorize the Service to enact regulatory measures or protections, such as the "no disturbance zone" designated around barrier island habitat.

For the above reasons, and as discussed in greater detail in, for example, AOGA's comment letters provided to the Service, the Service has violated the ESA in designating areas that do not possess physical or biological features essential to the conservation of the species.

B. The Critical Habitat Designation Violates ESA Sections 3(5)(A) and 4(a)(3) By Including Lands That Do Not Require Special Management Measures

To qualify as critical habitat, lands must not only be occupied by the species at the time it is listed, but must also contain those physical and biological features (I) essential to the conservation of the species and *(II) which may require special management considerations or protections*. 16 U.S.C.

§1532(5)(A)(i) (emphasis supplied). If the lands contain PCEs but do not require special management considerations or protections, they cannot be designated as critical habitat. *Id.*

AOGA's previous comment letters explained in significant detail why most, if not all, of the habitat then proposed for critical habitat designation, and now formally designated as critical habitat, requires no special management considerations or protections, and therefore does not meet the required criteria for critical habitat designation. Initially, the Service has fundamentally failed to explain *why* special management considerations or protections may be required. The Service can designate critical habitat only if it first makes a finding that the listed species habitat "may require" special management considerations or protections. *See Cape Hatteras Access Preservation Alliance v. U.S.F.W.S.*, 344 F. Supp. 2d 108, 124 (D.D.C. 2004) (Service cannot designate critical habitat without making "mandatory" finding that special management may be required). Here, there is no sufficient basis for such a finding. *See Cape Hatteras*, 344 F. Supp. 2d at 124 (special management finding cannot be satisfied by a "conclusory statement").

In addition, as previously explained by AOGA, the Service cannot reasonably make the required special management finding because the Marine Mammal Protection Act ("MMPA") already adequately manages polar bear habitat. There is a long and well documented history showing that interaction between polar bears and the oil and gas industry in Alaska is minimal and that to date all oil and gas activity in Alaska has had no more than a "negligible impact" on the polar bear or its habitat. The MMPA achieves this result through regularly promulgated incidental take regulations that provide required mitigation measures applicable to oil and gas activities in polar bear habitat. Indeed, the Service itself has repeatedly concluded that these MMPA regulations "have ensured that industry effects on the polar bear have remained at the negligible level" and provide a greater level of protection to the polar bear than the ESA. *See* 74 Fed. Reg. 56,058, 56,072 (Oct. 29, 2009). Under these circumstances, no special management considerations or protections are required.

Moreover, in light of the Service's conclusion that the designation will provide no conservation benefit, the Service cannot reasonably justify any finding that polar bear habitat may require special management considerations or protections. "Special management considerations or protection" means "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." 50 C.F.R. § 424.02. The obvious intent of this regulation is to provide for habitat designation only where doing so will trigger some "methods or procedures" that will be "useful" in conserving the polar bear. As the Service has determined, however, existing management under the MMPA already adequately protects the polar bear and polar bear habitat, and the designation will result in *no additional protections*. Under these circumstances, where designation will trigger no conservation measures whatsoever, the Service cannot reasonably conclude that special management considerations or protections may be required.

The legislative history surrounding Congress' decision to amend the ESA in 1978 to limit critical habitat designations to areas that "may require special management considerations or protections" is instructive in this regard. Prior to 1978, the ESA had no express definition of critical habitat and the Service began broadly designating occupied areas as critical habitat. This practice created growing concerns that the Service was designating critical habitat "as far as the eye can see and the mind can

conceive."[2] In response to these concerns, Congress created the current definition of critical habitat which limits critical habitat designations to "specific areas" that contain "the physical or biological features . . . essential to the conservation of the species" *and that* "may require special management considerations or protections." 16 U.S.C. § 1532(5)(A). This narrower definition was designed to push back against overbroad designations where those designations were simply not useful or helpful for the conservation of threatened or endangered species. In the absence of any identifiable conservation or economic benefit, the proposed designation of an area larger than California for the polar bear critical habitat directly contravenes Congressional intent.

Nor can the Service satisfy its statutory obligations by relying on speculative future concerns. Although the word "may" indicates that the need for special management "need not be immediate, it is mandatory that the specific area designated have features which, in the future, may require special consideration or protection." *Cape Hatteras*, 344 F. Supp. 2d 108,124-25 (internal quotation marks omitted). That determination, like every part of a critical habitat decision, must be based on the best scientific and commercial data available. If the data show – as they do here – that there is no current or reasonably identifiable future unmet need with regard to polar bear habitat management, the Service cannot satisfy its statutory obligations and therefore should not designate critical habitat. Stated otherwise, if the Service cannot now foresee a benefit from critical habitat designation, then it cannot reasonably conclude that special management protections "may" be required in the future. Any other result would turn the ESA's special management requirement into a meaningless exercise.

C. The Service Has Violated ESA Section 4(b)(2) Because Its Polar Bear Critical Habitat Designation Is Contrary To The Best Scientific Data Available

One of the signature elements of the ESA is the mandate of Congress that decisions of the Service to list a species, and to designate critical habitat, must be made "on the basis of the best scientific data available." 16 U.S.C. § 1533(b)(2). As determined by the U.S. Supreme Court, an important purpose of this best science mandate "(if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-177 (1997).

The Service has violated the best science mandate of the ESA in numerous respects, including the following:

- As addressed in Section III.A above, the Service has over designated vast areas as critical habitat. The best scientific data available demonstrate that only a very small and readily identifiable fraction of these areas contain polar bear PCEs.

- As addressed in Section III.B above, the Service has designated as critical habitat vast areas that the best scientific data available demonstrate will not now require, and will not require in the foreseeable future, special management measures.

[2] *See* Legislative History of the Endangered Species Act at 823 (reprinting House Consideration and Passage of H.R. 14104, with amendments, Oct. 14, 1978).

- As addressed in Section III.D below, the Service has failed to assess the economic impact of its designation, and to assess other relevant factors, based upon the best available scientific data.

- As addressed in Section III.E below, the Service has failed to exclude areas from critical habitat designation based upon the best available scientific data.

See, e.g., AOGA's December 23, 2009 and July 6, 2010 letters.

D. The Service Has Violated ESA Section 4(b)(2) By Relying Upon An Inaccurate and Insufficient Economic Impact Assessment

In contrast to listing decisions under Section 4(a) of the ESA, critical habitat designations by the Service may only be made after taking into account economic impacts:

> The Secretary shall designate critical habitat . . . under subsection (a)(3) of this section on the basis of the best scientific data available *and after taking into consideration the economic impact*, the impact on national security, and any other relevant impact, *of specifying any particular area as critical habitat.*

16 U.S.C. § 1533(b)(2) (emphasis added). In the present instance, although the Service has purported to engage in an economic analysis, that analysis is so deeply flawed, inaccurate and incomplete that it effectively renders the requirement of an economic impact analysis a useless exercise contrary to the intent of Congress.

First, the Service has used an unlawful three-step process to assure itself of a finding that the critical habitat designation will impose no more than *de minimis* economic impacts. In step one, the Service initially lists the polar bear and then later and separately designates critical habitat contrary to the mandates of the ESA. In step two, the Service identifies the listing decision and all associated regulatory consequences as part of the "baseline" from which economic impacts of critical habitat are assessed. Finally, in step three, the Service assumes that all the economic costs associated with ESA regulation are derived from the listing decision, thereby concluding that the economic impact of designating critical habitat is, at most, the incremental costs of a marginally more complicated Section 7 consultation process. Through this "baseline approach" the Service has, time and time again, as here, rendered the economic impact requirement in Section 4(b)(2) of the ESA a meaningless exercise. *See New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service,* 248 F.3d 1277 (10th Cir. 2001) (invalidating Service's "baseline approach" to the economic analysis of critical habitat designations).

Second, even accepting the Service's unlawful baseline approach, the economic analysis here is an exercise in studied denial of the facts in the record. As detailed in the comments of AOGA, and others, including ConocoPhillips Alaska, the State of Alaska, the Arctic Slope Regional Corporation and the American Petroleum Institute, the Service's economic assessment grossly underestimates the additional costs of conducting Section 7 consultations and fails to account at all for other costs, including among others, litigation, project delay, project slippage, deferred production or closure, uncertainty and risk. Conservatively, the Service's economic analysis underestimates reasonably identifiable and certain economic impacts attributable to the Service's designation of polar bear critical habitat of between tens of millions and billions of dollars.

E. The Service Also Violated ESA Section 4(b)(2) By Failing to Lawfully Determine Whether on Balance the Benefits of Including Certain Areas are Outweighed by the Benefits of Excluding These Areas

Even assuming, *arguendo*, that the Service properly determined that areas larger than the State of California meet the statutory definition of "critical habitat" found at 16 U.S.C. § 1532(5)(A)(i), the final rule is invalid because the Service failed to determine whether the benefits associated with their inclusion are outweighed by the benefits derived from their exclusion as required by 16 U.S.C. § 1533(b)(2). Because the Service failed to consider an important aspect of the problem and failed to discharge a statutory condition precedent to critical habitat designation, the final rule is invalid as a matter of law. *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (Secretary must balance the costs of designation against its benefits; while the Secretary possesses discretion as to the substance of the ultimate outcome, "that does not confer discretion to ignore the required procedures of decisionmaking").

The Service expressly requested public comment on whether it should use its authority under Section 4(b)(2) to exclude certain areas from designation. In response, AOGA's comment letters, and the separate comment letters of AOGA's members and others, provide concrete and detailed information identifying existing oil and gas leases and facilities, planned developments, exploration areas and potential future developments, and leasing plan areas that should be excluded, and the associated reasons that, in balancing the benefits of exclusion with the benefits of inclusion, these areas should be excluded. Yet, nowhere in the final rule does the Service actually make a finding that the benefits of including these lands outweigh the benefits of excluding them from designation as critical habitat as required by Section 4(b)(2). In light of the provisions of Section 4(b)(2), the Service's own request for public comment on this very issue, the detailed and geographically specific exclusion requests, and the associated detailed rationale, including the Service's admission that there are no anticipated or foreseeable conservation benefits from the designation of polar bear critical habitat, the Service's failure to engage in a balancing analysis and to rationally explain its conclusion is arbitrary, capricious, an abuse of discretion and a violation of the ESA. Indeed, had the Service lawfully conducted the comparison required by Section 4(b)(2) based on the record established in this rulemaking, it could only have concluded that exclusion of these lands is warranted.

IV. CONCLUSION

Your attention to and consideration of this notice pursuant to 16 U.S.C. § 15(b) is appreciated. If you have any questions regarding this notice, please do not hesitate to contact the undersigned.

Sincerely,

Marilyn Crockett

Marilyn Crockett
Executive Director
Alaska Oil and Gas Association

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