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**VIA EMAIL:**

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Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

Re: Draft Environmental Impact Statement for Effects of Oil and Gas Activities in the Arctic Ocean (RIN 0648-XA885)

Dear Mr. Lecky:

This letter provides the written comments of the Alaska Oil and Gas Association (AOGA) regarding the December 2011 Draft Environmental Impact Statement for Effects of Oil and Gas Activities in the Arctic Ocean (the “DEIS”) prepared by the National Marine Fisheries Service (NMFS). Thank you for considering AOGA’s comments and including them in the administrative record.<sup>1</sup>

**I. INTRODUCTION**

Over a period of decades, AOGA and its members have worked cooperatively and successfully with NMFS to study marine mammal populations and behavior in the Arctic, and to closely

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<sup>1</sup> AOGA is a private non-profit trade association located in Anchorage, Alaska. AOGA’s sixteen member companies account for the majority of oil and gas exploration, development, production, transportation, refining, and marketing activities in Alaska. AOGA’s members are the principal industry stakeholders that operate in Arctic Alaskan waters and the adjacent waters of the Outer Continental Shelf (“OCS”). AOGA and its members are longstanding supporters of both responsible oil and gas leasing, exploration and development in Alaska, and wildlife conservation, management and research in the Arctic.

monitor oil and gas activities with the potential to affect marine mammals. Given this context, AOGA appreciates the effort reflected in the DEIS and understands the underlying desire of NMFS to engage in a thoughtful impact analysis. Notwithstanding our respect for NMFS and its statutory missions, candor dictates that we frankly comment that this DEIS is very poorly conceived and otherwise deeply flawed.

We would like to provide comments that help NMFS efficiently remedy the deficiencies in this DEIS. However, it is likely this DEIS is beyond repair, and should be abandoned. Because there is no purpose or need for NMFS to prepare an environmental impact statement analyzing oil and gas activities in the Arctic Ocean, there is no remedy for the most fundamental problems with the DEIS. Even if there were a need for NMFS to evaluate the effects of incidental harassment of marine mammals reasonably expected to occur as a result of oil and gas activities over the next five years, which there is not, NMFS would still need to engage in a new scoping process leading to development of new reasonable alternatives, followed by a new impact assessment of these different alternatives and, eventually, publication of a new draft DEIS. Regrettably, the time, effort and diversion of agency, industry and stakeholder resources required to undertake these tasks would be very substantial, while providing little, if anything, useful.

## **II. THERE IS NO PURPOSE OR NEED FOR THIS EIS**

The purpose, need and scope of this DEIS, and the associated environmental analysis, are misaligned with NMFS's underlying substantive authority (*i.e.*, the Marine Mammal Protection Act (MMPA)), conflicting and confusing, and duplicative of other NEPA analyses. These fundamental flaws cannot be remedied by merely editing the existing DEIS and responding to public comments.

1. This DEIS is an environmental impact analysis in search of a proposed action that does not exist.

The MMPA provides that certain U.S. citizens may petition for issuance of incidental take regulations (ITRs) for a five-year period to authorize the incidental take of small numbers of marine mammals while engaged in a specified activity within a given geographic area. NMFS may issue an ITR if it concludes that the projected incidental take will have a "negligible impact" on affected marine mammal species or stocks and will not have an unmitigable adverse impact on the taking of such species for subsistence uses. 16 U.S.C. § 1371(a)(5)(A). The purpose and need of this DEIS is described and structured as though NMFS intends to issue five-year ITRs for all oil and gas activities in the Arctic Ocean regarding all marine mammal species. However, there is no such pending proposal with NMFS for any ITRs for any oil and gas activity in the Arctic Ocean affecting any marine mammal stock or population.<sup>2</sup> Accordingly, were NMFS to complete this NEPA process, there would be no five-year ITR decision for it to make and no Record of Decision (ROD) to issue.

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<sup>2</sup> Nor, in the many decades of Arctic OCS oil and gas leasing, exploration and production, has any such petition ever been presented to NMFS.

To be sure, applications have in the past and will in the future be filed with NMFS seeking incidental harassment authorizations (IHAs) under the MMPA for certain marine mammal stocks. *See* 16 U.S.C. § 1371(a)(5)(D). In contrast to ITRs, IHAs are limited in scope to a specific project and operator, of limited duration (no more than one year, which means one open-water season for most Arctic activities), and may only authorize incidental take having the lowest level of effects (*i.e.*, harassment only, not serious injury or mortality). As addressed further below, the necessary NEPA analyses for issuance of IHAs either already exists or are certain to be prepared by the U.S. Department of Interior, Bureau of Ocean Energy Management (BOEM).

2. The scope of NEPA analysis for MMPA incidental take authorizations is limited to analysis of the impact of incidental take on the affected marine mammal stocks or populations within the jurisdiction of NMFS.

It is well-established in the Ninth Circuit, in the context of MMPA incidental take ITRs for oil and gas activities occurring in the Beaufort and Chukchi Seas, that ITRs only authorize incidental take, not the underlying activity. *See, e.g., Center for Biological Diversity v. Kempthorne*, 588 F.3d 701 (9th Cir. 2009). As the DEIS states, “NMFS does not authorize the exploration activities, but rather authorizes the take of marine mammals incidental to specified activities.” DEIS at 2-45. Accordingly, the scope of NEPA analysis directed to issuance of any form of MMPA incidental take authorization is necessarily limited to *the impacts of the anticipated take* on the affected marine mammal stocks, and there is no purpose or need for NMFS to broadly analyze the impacts of future oil and gas activities in general. Impacts on, for example, terrestrial mammals, birds, fish, land use, and air quality are irrelevant in this context because in issuing IHAs (or, were one proposed, an ITR), NMFS is only authorizing take of marine mammals. The scope of the current DEIS is vastly overbroad and does not address any specific incidental take authorization under the MMPA.

Moreover, some Arctic marine mammals – polar bears and Pacific walrus, in particular – are managed under the MMPA by the U.S. Fish & Wildlife Service (USFWS). USFWS has issued current ITRs for polar bears and walrus in the Beaufort and Chukchi Seas. *See* 76 Fed. Reg. 47,010 (Aug. 3, 2011) (current Beaufort Sea ITR); 73 Fed. Reg. 33,212 (June 11, 2008) (current Chukchi Sea ITR).<sup>3</sup> These ITRs were issued following a public comment process and accompanied by environmental assessments (EAs) prepared in compliance with NEPA.<sup>4</sup> Given USFWS authority over polar bears and walrus in the Arctic, and given the existence of current ITRs for these species, accompanied by NEPA analyses, there is no purpose or need for the scope of any NEPA analysis prepared by NMFS to address the impacts of incidental take of

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<sup>3</sup> AOGA has submitted a petition to USFWS to renew the Chukchi Sea ITR for polar bear and walrus for the period 2013-2018. USFWS, which is not a cooperating agency in preparation of the DEIS, will be preparing its own NEPA document for this ITR renewal.

<sup>4</sup> Copies of the ITR EAs are available at: <http://alaska.fws.gov/fisheries/mmm/itr.htm>. Both of these EAs have been judicially sustained in response to legal challenges to their adequacy.

polar bears and walrus by the oil and gas industry in the Arctic. Again, in this respect, the current DEIS is overbroad and misaligned in scope because it includes an analysis of the impacts of oil and gas activities on polar bears and walrus in the Arctic.

3. NEPA analysis for an authorization that must, by law, have no more than a *negligible impact*, can never require the preparation of an EIS, which is an analysis reserved for actions that may have *significant impacts*.

Under NEPA, an EIS must be prepared for major federal actions that may significantly affect the human environment. 42 U.S.C. § 4332(C). The term “significantly” is not susceptible to one all encompassing definition, but generally connotes “major” effects, in contrast to lesser impacts deemed to be “moderate,” “minor,” or “negligible.” See 40 C.F.R. § 1508.27. The DEIS adopts and follows this impact weighting nomenclature. See DEIS at 4-4. However, by law, MMPA authorizations (ITR or IHA) may only be issued if the anticipated incidental take is found to have no more than a negligible impact. 16 U.S.C. §§ 1371(a)(5)(A), (D); see DEIS at 1-3 (§ 1.1.1). Because there can never be a purpose or need to prepare an EIS to evaluate the impact of actions that must have no more than a negligible impact, there is no need now, nor can there ever be a need, for NMFS to prepare an EIS in order to issue an MMPA incidental take authorization. It is for this very reason, among others, that in the entire history of OCS oil and gas activity in the Arctic Ocean, no EIS has ever been prepared exclusively for issuance of an MMPA incidental take authorization. Accordingly, here again, NMFS’s decision to prepare an EIS reflects a serious disconnect between its authority under the MMPA and its NEPA analysis.

4. The DEIS is unnecessary because it duplicates existing and certain to be prepared future NEPA documents.

NEPA regulations emphasize the importance of avoiding duplicative impact analyzes. 40 C.F.R. § 1500.4. For this reason, agencies may “adopt” a NEPA analysis prepared by another agency, “tier” from a broader scale or earlier NEPA analysis, and “incorporate by reference” portions of other NEPA documents. *Id.*; 40 C.F.R. §§ 1502.20-.21, 1506.3.

With respect to the Chukchi Sea, which encompasses areas in which most OCS oil and gas exploration is expected to occur in the next five years, the judicially-sustained Lease Sale 193 final EIS (FEIS) and supplemental EIS (SEIS) already fully and expressly address seismic exploration and associated ancillary geological and geophysical (G&G) activities. Even if it were appropriate for NMFS to broadly analyze the impacts of these activities, there would be no purpose or need for NMFS to do so now because BOEM has already done it. Although there is no similar recent comprehensive EIS pertaining to seismic exploration in the Beaufort Sea, insofar as AOGA is aware, the potential for these and related G&G activities is relatively low. If and when such activities are proposed to BOEM, BOEM will necessarily undertake any necessary NEPA analysis, including assessment of potential marine mammal incidental take. NMFS may participate in such process as a “cooperating agency” and, in any event, should adopt BOEM’s analysis for its more limited purposes.

As for exploration drilling activities, BOEM has, in the case of Shell Exploration and Production Company’s (“Shell”) proposed Chukchi and Beaufort Sea exploration drilling programs, and

will, in the case of the two other anticipated Chukchi Sea exploration drilling programs by ConocoPhillips and Statoil, prepare project-specific NEPA analyses. Again, NMFS may elect to participate as a cooperating agency and, in any event, such analyses will be suitable for “adoption” by NMFS because marine mammal impacts have been (in the case of Shell), and will be (in the cases of ConocoPhillips and Statoil), addressed.<sup>5</sup>

5. BOEM’s involvement, and the purported analysis of ancillary lease activities in the DEIS, appears to be contrived.

Respectfully, although the DEIS states or implies at times that it was jointly prepared by NMFS and BOEM, it is not apparent that BOEM was an active participant in preparing the DEIS. To the contrary, it appears that BOEM’s involvement has been, at most, passive. Moreover, the suggested link for BOEM’s involvement – analysis of G&G and ancillary lease activities – appears to be similarly contrived. G&G and ancillary activities are, by definition, limited in scope, duration and impact. Such activities do not have the plausible potential to “significantly” affect the human environment so as to require an EIS. Insofar as AOGA is aware, there has never been a purpose or need for a separate EIS to address G&G and ancillary activities. Even if there were such a need, BOEM would be the appropriate lead agency. Indeed, as addressed immediately above, for the Chukchi Sea, BOEM has already completed exactly that analysis as a component of the Lease Sale 193 FEIS/SEIS.

### **III. NONE OF THE ALTERNATIVES ANALYZED ARE REASONABLE**

NEPA requires the lead agency to analyze the proposed action, and a reasonable range of alternative actions, including the no action alternative. *See* 40 C.F.R. § 1502.14. Identification and analysis of the proposed action and reasonable alternatives is considered “the heart” of any EIS process. *Id.* In this instance, there is no proposed action and, in Alternatives 2 and 3, the DEIS mis-identifies the range of reasonable oil and gas activity that may foreseeably occur in the next five years. In particular, the DEIS significantly over estimates the amount of seismic exploration than is reasonably foreseeable, while underestimating the amount of exploration drilling that may occur in 2014 or later. In addition, Alternatives 4 and 5 purport to analyze a range of additional mitigation measures that, in whole or in substantial part, far exceed the scope of NMFS’ authority, and are impracticable, unnecessary or speculative.

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<sup>5</sup> It is also relevant to note that it is uncommon for NEPA analyses pertaining to exploration drilling to require an EIS. Because of the limited duration of such activities, and the associated low level of impact within the project area, it has been adequate for purposes of NEPA to analyze OCS exploration drilling impacts through project-specific EAs (which, in the case of the Chukchi Sea, may be tiered to the Lease Sale 193 FEIS and SEIS). *See, e.g.,* Environmental Assessment – Shell Revised Chukchi Sea Exploration Plan (Dec. 2011).

1. There is no proposed action against which to measure alternatives.

NEPA does not provide federal agencies with the authority to engage in non-programmatic impact analyses in the absence of a proposed action. However, that is precisely what NMFS has done in this instance.

As discussed in Section II above, one of the reasons the DEIS lacks a purpose or need is that there is no pending proposed action. The DEIS is not a programmatic NEPA analysis. Instead, the DEIS is based on the concept of a proposal for a five-year ITR for incidental take of marine mammals during Arctic Ocean OCS oil and gas activities. However, there has never been, and there is not now, a petition pending with NMFS for a five-year ITR for Arctic Ocean oil and gas activities. Accordingly, if there were a proposed action underlying the DEIS, it would have to be for approval of one or more one-year IHAs authorizing incidental take by harassment of small numbers of marine mammals for a specific project or projects. However, the DEIS does not identify any pending IHAs, nor does the DEIS purport to analyze any project specific projections of incidental take by harassment. *See* DEIS at ES-4 (§1.4.2) (stating that “NMFS anticipates receipt of applications” and stating the need for NEPA analysis is “to assist NMFS . . . related to projected requests”), 1-9 (§1.3.2) (same).

If there were a proposed action pending with NMFS for issuance of one or more IHAs (which would, necessarily, be limited to 2012 activity), in order to identify a proposed action against which to compare a range of reasonable alternatives, NMFS would need to have identified the project activities and estimated the associated potential for incidental take. However, because the DEIS does not identify any pending project-specific IHAs, the DEIS also does not identify project specific activities proposed for 2012, or the related potential for incidental take of marine mammals.<sup>6</sup> *See* DEIS at 2-44 (§ 2.5.1) (emphasizing that “NMFS is required to make these [incidental take] decisions on an *application-specific basis*”) (emphasis added).

2. NMFS has no authority to limit OCS activity and may not propose to do so through an EIS alternative.

Under the MMPA, NMFS has the authority to grant or deny, or to reasonably condition, marine mammal incidental take authorizations. However, NMFS lacks any authority to establish closures, or presumptive caps or limits on OCS oil and gas activity in the Arctic Ocean.

The MMPA states that if NMFS finds that the specified activity itself, or the implementation of mitigation and monitoring measures, will have a negligible impact on the affected marine mammals species or stocks and will not have an unmitigable adverse impact on the availability of affected marine mammal

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<sup>6</sup> The only OCS oil and gas activities anticipated to occur in the Arctic Ocean in 2012 by AOGA’s members are exploration drilling programs by Shell in the Chukchi and Beaufort Seas. As previously mentioned, BOEM has already completed project-specific EAs in satisfaction of NEPA for these activities.

species or stocks for taking for subsistence uses, NMFS *shall issue* the requested ITA.

DEIS at § 2.5 (emphasis in original); *see also* 16 U.S.C. § 1371(a)(5)(A)(i) (Secretary “shall allow” incidental taking that meets applicable statutory standards).

Although NMFS does not approve or disapprove oil and gas activities in the OCS through MMPA incidental take authorizations, the defining and distinguishing characteristics of DEIS Alternatives 2 and 3 are different assumed levels of annual oil and gas activity (identified in the DEIS as Level 1 and Level 2 activity) occurring for a 5-year period. In defining alternatives by activity level, NMFS has confused the nature of the proposed action (incidental take, not oil and gas activity) and the agency’s need to define the proposed action (the anticipated frequency and intensity of incidental take, not the frequency of oil and gas activity), with the NEPA requirement that the impacts of the proposed action should be compared to a reasonable range of alternatives. Stated another way, even if Level 1 or Level 2 oil and gas activities were reasonable assumptions, which they are not, varying ranges of oil and gas activity are not alternatives to proposals for incidental take authorizations.<sup>7</sup>

3. The range of oil and gas activity analyzed in Alternatives 2 and 3 is both too much (for seismic exploration) and too little (for exploration drilling in the Chukchi Sea).

If there were a pending proposal for a five-year ITR for all marine mammals incidental take as a result of oil and gas activity in the Arctic Ocean (which there is not), then in describing the proposed action, NMFS would need to identify the range of activities anticipated to occur and assess the potential frequency and intensity of effects on marine mammals and subsistence. Insofar as Level 1 and Level 2 activity identified in Alternatives 2 and 3 of the DEIS are intended to reflect the expected range of oil and gas activity that will occur in Arctic Ocean OCS over the next five years, these levels are wrong. Both levels of activity overstate foreseeable 2D/3D seismic exploration and understate foreseeable exploration drilling. Because the assumed levels of oil and gas activity are wrong, the impact analysis premised on these assumptions is also flawed.

With respect to 2D and 3D seismic exploration, the DEIS assumes that for each of the next five years there will be either up to seven (Level 1) or, alternatively, up to eleven (Level 2) annual seismic surveys combined for the Chukchi and Beaufort Seas. This level of activity is not realistic. In the Chukchi Sea, major seismic programs were conducted and completed in prior years. Insofar as AOGA is aware, there are no 2D or 3D seismic surveys planned by the oil and gas industry in the Chukchi Sea for the next five years, and, even making a conservative assumption, no more than one seismic survey a year in the Chukchi Sea is realistic. Similarly, in the Beaufort Sea, insofar as AOGA is aware, there are no anticipated 2D or 3D seismic exploration programs in the next several years. Again, making a very conservative assumption, no more than one seismic survey a year in the Beaufort Sea is realistic for the next several years.

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<sup>7</sup> In this context, any attempt to identify additional feasible mitigation is a hopeless quagmire because there is no proposed action with associated proposed mitigation.

With respect to exploration drilling, the DEIS assumes that there may be as many as one exploration drilling program occurring in each of the Chukchi and Beaufort Seas annually (Level 1) or, alternatively, as many as two exploration drilling programs annually in each of the Chukchi and Beaufort Seas. This assumption assumes too few exploration drilling programs for 2014 and perhaps other later years in the Chukchi Sea. Initially, it is important to observe that the actual amount of oil and gas activity expected to occur is very different depending upon the year. For this reason, it is likely unreasonable to assume, as does the DEIS, that some maximum level of activity will occur every year. With respect to exploration drilling in the OCS, Shell is expected to engage in multi-well exploration drilling in the Chukchi Sea over a period of years beginning in 2012. While there will only be one exploration drilling program in the Chukchi Sea in 2012 and 2013, by 2014, it is likely that ConocoPhillips and Statoil will be conducting exploration drilling on their prospects in the Chukchi Sea. Accordingly, in 2014, and perhaps later years depending upon results, there may be as many as three exploration drilling programs occurring in the Chukchi Sea. In the Beaufort Sea, Shell also intends to engage in a multi-well exploration drilling program over a period of years beginning in 2012. However, it does not appear likely that there will be more than one exploration drilling program a year in the Beaufort Sea.

In sum, the range of oil and gas activity analyzed in the DEIS is wrong.<sup>8</sup> Depending upon the type of exploration activity and the year, the impact analysis in the DEIS assumes either too much or too little activity will occur. If it made sense for NMFS to proceed with this NEPA analysis (which it does not), the agency would need to re-scope the proposed action to develop a realistic range of anticipated activity that takes into account anticipated variations in exploration depending upon the year (instead of assuming maximum activity for all years). Based upon re-scoping, NMFS would then need to reconsider and establish new alternatives, complete a new impact analysis and then re-issue a revised DEIS for public comment.

4. Alternative 4 addresses unnecessary and unexplained time and area closures that are impracticable.

Although NMFS and USFWS have uniformly determined for decades that the anticipated impact of oil and gas activities on marine mammals in the Arctic are, and will be, negligible, and although the best available science demonstrates to a high degree of reliability that these judgments were correct, in Alternative 4, NMFS identifies a range of additional onerous regulatory measures that might be imposed as a condition of a future MMPA authorization. There are numerous statutory, regulatory, analytical and practicability problems with the additional mitigation addressed in Alternative 4.

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<sup>8</sup> The anticipated level of site clearance and shallow hazard survey programs is also wrong. For example, Level 1 activity assumes as many as three such programs in the Chukchi Sea, while Level 2 activity assumes as many as 5 such programs. By comparison, the ITR petition recently submitted by AOGA to USFWS for polar bear and walrus projects as many as seven (and as few as zero) shallow hazard surveys and as many as two (and as few as one) other G&G surveys annually in the Chukchi Sea over the next five years.

First, there is no statutory basis for imposing additional mitigation on activities that, as currently mitigated, do not result in more than temporary changes in behavior, without any known injury, mortality or other adverse consequence to any marine mammal species or stock. *See* DEIS at 2-44 (§ 2.5.1) (“The MMPA states that if NMFS finds that the specified activity itself, or with the implementation of mitigation and monitoring measures, will have a negligible impact on affected marine mammal species or stocks and will not have an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses, NMFS *shall issue* the requested ITA.”) (emphasis in original); *see* 16 U.S.C. § 1371(a)(5).

Second, because the purpose of analyzing a reasonable range of alternatives is to encourage thoughtful decision-making, only alternatives that present important and likely environmental advantages over the proposed action merit detailed consideration. Were this not the case, there could be a potentially infinite number of “alternatives” with equal or more impacts that might be addressed in an EIS to no environmental or decision-making benefit. In the present case, as demonstrated in Table 2.6 (pp. 2-51 to 2-54), there are no relevant environmental advantages anticipated to result from imposition of additional mitigation. In every impact category but one, the draft impact findings for Alternative 4 are identical to the draft impact findings for Alternative 3 (Level 2 activity with standard mitigation measures).<sup>9</sup> Given that the impacts with and without additional mitigation are the same, Alternative 4 neither advances thoughtful decision-making nor provides a rational justification under the MMPA for NMFS to impose any additional conditions beyond standard mitigation measures. Stated otherwise, there is no need to analyze additional mitigation because (i) the existing mitigation is demonstrably effective in ensuring a negligible impact, and (ii) analysis of the additional mitigation has not demonstrated any impact differential on any environmental resource, including most importantly, marine mammals and subsistence.

Third, Alternative 4 provides no useful analysis because the context is entirely abstract (*i.e.*, independent from a specific proposal). The need and effectiveness of any given mitigation measure, standard or otherwise, can only be assessed in the context of a specific activity proposed for a given location and time, under then-existing circumstances. *See* DEIS at 2-44 (§ 2.5.1) (“NMFS is required to make these [incidental take] decisions on an application-specific basis”). However, this DEIS is merely a theoretical analysis of potential measures undertaken in the absence of a specific activity, location, or time. Moreover, as NMFS has acknowledged, if these measures were ever potentially relevant, reanalysis in a project-specific NEPA document would be required. This circumstance renders the entire exercise of analyzing hypothetical additional mitigation pointless.

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<sup>9</sup> The only category with differently rated impacts between Alternatives 3 and 4 is “cultural resources.” Although authorization of marine mammal incidental take would have no impact on cultural resources, for Alternatives 2 and 3, impacts to cultural resources are rated as “negligible” rather than none. With imposition of additional mitigation measures, the impact is inexplicably *increased* to “minor.” *See* DEIS at Table 2.6 (p. 2-53).

Fourth, the identified time/area closures, and the use of a 120 dB and 160 dB buffer zones, have no sound scientific or other factual basis. In several instances, these unnecessary measures would render oil and gas exploration impracticable.

- According to the DEIS, the primary purpose of the identified time/area closures in Camden Bay, Barrow Canyon and the Western Beaufort Sea, the Shelf Break of the Beaufort Sea, Hanna Shoal, and Kasegaluk Lagoon/Ledyard Bay is protection of bowhead and beluga whales, and minimization of conflicts with subsistence hunting activities. However, the DEIS does not identify any data or other scientific information establishing that past, present, or reasonably anticipated oil and gas activity in these areas has had, or is likely in the future to have, either more than a negligible impact on marine mammals or any unmitigable adverse impact on the availability of marine mammals for subsistence activities. Accordingly, these time/area closures are “mitigation” in search of an adverse impact that, insofar as we are aware, does not exist.
- In addition, except to identify where no exploration drilling is anticipated because there are few or no leases, the DEIS does not provide any information about what levels of oil and gas activity are foreseeably expected to occur in the identified areas in the absence of time/area closures, or what the anticipated adverse impacts from such activities would be. Without this information, the time/area closure mitigation measures are arbitrary because there is an insufficient basis to evaluate and compare the effects with and without time/area closures except through speculation.
- It appears that the principal target of the time/area closures is mitigation of an anticipated large number of 2D/3D seismic surveys. However, as addressed above, few 2D/3D seismic surveys are anticipated in the next five years. The vast majority of these surveys has already been conducted – each with accompanying NMFS-issued MMPA IHAs that did not require preparation of an EIS. There is no scientific evidence that these seismic surveys, individually or collectively, resulted in more than a negligible impact. Again, these measures appear to be mitigation in search of a perceived problem that is not foreseeable.
- The time/area closure for Camden Bay is both arbitrary and impracticable. For the reasons explained above, the proposed Camden Bay time/area closure is arbitrary because there is no demonstrated need. To the contrary, BOEM has already completed its analysis of Shell’s exploration drilling program in Camden Bay and found the anticipated impacts to marine mammals and subsistence to be minimal and fully mitigated. Moreover, the proposed September 1 to October 15 closure effectively eliminates *over 54 percent* of the open water exploration drilling season in Camden Bay. Such a draconian impact – all without a demonstrated need – would likely render exploration

drilling in Camden Bay economically and logistically impracticable, thereby effectively imposing a full closure of the area under the guise of mitigation.<sup>10</sup>

- Similarly, restrictions intended to prevent sound levels above 120 dB or 160 dB are arbitrary and unwarranted. As AOGA has previously commented to NMFS in connection with prior draft NEPA analyses of potential seismic survey effects, the best scientific evidence does not support a need for imposition of restrictions at 120 dB or 160 dB levels. Perhaps the most compelling demonstration of this point comes from the sustained period of robust growth and recovery experienced by the Western Arctic stock of bowhead whales, while exposed to decades of seismic surveys and other activities without restrictions at the 120 dB or 160 dB levels. Moreover, as AOGA has also previously commented to NMFS, restrictions at these levels, especially at the 120 dB level, are impracticable to monitor because the resulting exclusion zones are enormous, and the Arctic Ocean is an extremely remote area that experiences frequent poor weather.

Finally, other additional mitigation measures identified by NMFS are speculative and arbitrary, and well beyond the authority of NMFS to impose under authority of the MMPA. In Section 2.4.10 of the DEIS, NMFS has identified other measures the agency is evaluating as possible future standard measures for all alternatives. For all the same reasons identified above, these measures are not needed and their effects are, at most, entirely speculative. However, it bears special mention that NMFS has no basis whatsoever in law or in fact to impose “reduced, limited or zero discharge” requirements on “any or all of the specific discharge streams” from a proposed OCS activity under authority of the MMPA. *Id.* At 2-41.

In sum, AOGA is a strong supporter of reasonable mitigation necessary to ensure that oil and gas activities have a negligible impact and that the availability of marine mammals for subsistence is not impaired. However, there is no need for any of the identified additional mitigation because existing mitigation measures are proven, based on an extensive record with many years of data, to be effective. *See* DEIS at 4-107 (occurrence of hearing impairment, injury, or mortality due to oil and gas exploration activities “is considered highly unlikely” using the standard mitigation measures).

5. Alternative 5 is entirely (and admittedly) speculative, and so useless for NEPA purposes.

Alternative 5 is defined as Level 2 oil and gas activity performed subject to both standard mitigation measures, and alternative seismic survey technologies. However, NMFS acknowledges in the DEIS that these technological alternatives “are in various stages of development and none are commercially available.” DEIS at 2-23 (§ 2.3.5). NMFS further acknowledges that it is uncertain when these technologies could become available, and the

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<sup>10</sup> Other suggested time/area closures would have similarly onerous consequences. Proposed time/area closures would arbitrarily bar exploration during *over 49 percent* of the open water season in some areas of the Chukchi Sea.

effects of their usage is largely unknown. *Id.* Indeed, the DEIS states that NMFS is unable to meaningfully analyze the effects of these uncertain technologies and, accordingly, additional NEPA analysis will be required:

Because the majority of these technologies have not yet been built and/or tested, it is difficult to fully analyze the level of impacts from these devices. Therefore, additional NEPA analyses (i.e., tiering) will likely be required if applications are received requesting to use these technologies during seismic surveys.

DEIS at 4-317 (§ 4.8).

No useful purpose is served by purporting to undertake a detailed impact analysis of seismic survey technologies that are too uncertain to know whether they may become commercially viable and, when and if they do become available, what impacts they may have on the incidence of marine mammal takes during seismic surveys. As NMFS has acknowledged, it is impossible to perform a detailed impact analysis for speculative technologies that have, at most, imagined, but untested, effectiveness. The futility of such an analysis is all the more evident where, as here, it is admitted that so little is now known that further NEPA analysis will be required regardless of this EIS.

#### **IV. KEY IMPACT FINDINGS IN THE DEIS ARE ARBITRARY AND ERRONEOUS**

The draft impact findings in the DEIS addressed to the effects of oil and gas activities on marine mammals conflict with applicable statutory standards, the best available science, and better-informed NEPA analyses.<sup>11</sup>

1. The draft impact findings would seriously undermine, if not prevent, NMFS from issuing any MMPA incidental take authorizations for the oil and gas industry, and conflict with judicially-confirmed findings by USFWS regarding polar bears and walrus.

The MMPA allows NMFS (and USFWS) to authorize incidental take of marine mammals if, and only if, the anticipated effects are expected to have a “negligible impact.” 16 U.S.C. § 1371(a)(5)(A) and (D). Although NMFS states that the primary purpose of the DEIS is to facilitate its issuance of MMPA incidental take authorizations, the DEIS proposes impact findings for marine mammal species that are greater than “negligible.” *See, e.g.*, DEIS at 4-111

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<sup>11</sup> Because the scope of this NEPA analysis should, at most, be limited to analyzing the impact of marine mammal take by harassment during oil and gas activities, AOGA is not commenting on aspects of the DEIS that address other unrelated resources. However, NMFS lacks any expertise pertaining to these resources and, as previously stated, NMFS lacks jurisdiction to analyze these activities on such a broad scale. Other NEPA documents, most notably BOEM’s Lease Sale 193 FEIS/SEIS, more thoroughly and capably analyze the broader range of impacts that may result from oil and gas activity in the Arctic Ocean OCS.

(§ 4.5.1.4.9.) (“the overall impact to bowhead whales is likely to be moderate” from Level 1 activity), 4-115 (“moderate” impact on beluga whales from Level 1 activity), 4-128 (§ 4.5.2.4.12.2) (“minor” impact to all species of ice seals from Level 1 activity); *compare* DEIS at 4-4 (defining “moderate” and “minor” to mean impacts greater than “negligible”). If these draft findings were retained by NMFS, the arguable legal effect of this NEPA analysis would be a presumptive determination that the agency is barred from issuing the very incidental take authorizations for which it purports to be conducting this impact analysis. In other words, the paradoxical consequence of NMFS assessing oil and gas activities so it can issue MMPA authorizations would be that NMFS could issue no MMPA authorizations.<sup>12</sup>

Apparently having grasped this problem late in the drafting process, the DEIS includes a one sentence footnote stating that the standard for “negligible” in the MMPA and NEPA are not the same. *See* DEIS at 4-4, n.1. However, no explanation, analysis or authority has been provided to support the seemingly illogical assertion that an environmental impact finding of greater than “negligible” is not in conflict with a “negligible impact” finding under the MMPA. One conclusory footnote does little to alter the inevitable confusion and significant legal risk created by arbitrary and erroneous draft impact findings that conflict with the applicable statutory standard for issuance of MMPA incidental take authorizations.

2. Oil and gas leasing, exploration, and development in the Arctic Ocean has had no known adverse impact on marine mammal species and stocks, and the reasonably anticipated impacts to marine mammals from OCS exploration activities occurring in the next five years are, at most, negligible.

The impacts of oil and gas activity on marine mammals in the Arctic has been a reasonable concern of the Native community, federal, state and local agencies, and the oil and gas industry for over 40 years. The primary reason for this concern and attention has been the importance of subsistence hunting to Native Alaskans in the Arctic. In addition, bowhead whales, long considered the most important and sensitive Arctic marine mammal, are listed as an endangered species under the ESA and a “strategic stock” under the MMPA. As a result of heightened attention, the Western Arctic Ocean stock (also known as the Bering-Chukchi-Beaufort (BCB) Seas stock) of bowhead whale is one of the most rigorously studied marine mammal stocks on Earth. Offshore oil and gas activities with the potential to affect bowhead whales in the Arctic Ocean have long been subject to a stringent set of mitigation and monitoring requirements.

Given this context, the bowhead whale serves as a prime example of the arbitrary and unsound draft impact findings in the DEIS. The Western Arctic Ocean stock of bowhead whales has been

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<sup>12</sup> The consequences of non-negligible impact findings would be compounded for ESA-listed species. The ESA bars issuance of incidental take authorizations for listed marine mammals unless accompanying by a contemporaneous “negligible impact” finding under the MMPA. *See* 16 U.S.C. § 1536(b)(4)(C). Accordingly, for bowhead whales (and for ringed and bearded seals should NMFS proceed with a final ESA-listing later this year), non-negligible impact findings in a final EIS could serve as an insurmountable legal bar to both ESA and MMPA incidental take authorizations.

exposed to the full range of oil and gas activity in the Alaskan OCS since the 1960s. Over the course of this lengthy period of time, with decades of continuous monitoring and study, no injuries or mortalities have been detected from oil and gas activity. Even though bowhead whales are actively hunted for subsistence purposes, the Western Arctic stock has steadily rebounded from depressed abundance caused by pre-20th century commercial whaling practices to the point where the stock is acknowledged to be at or quickly approaching the carrying capacity of its habitat, while continuing to grow at a robust annual rate. There is much about bowhead whales that remains unknown and unknowable. Nevertheless, all the available information indicates to a high degree of scientific reliability that routine oil and gas activity has no more than a negligible impact on the Western Arctic stock, that the stock has experienced robust growth for many decades while exposed to oil and gas activities, and that the stock is healthy, resilient to the adverse impacts of all environmental, subsistence, and anthropogenic effects (including climate change), and recovered to pre-whaling abundance without a detectable slowing in the rate of growth. Moreover, even the DEIS projects that the occurrence of hearing impairment, injury, or mortality due to oil and gas exploration activities “is considered highly unlikely.” DEIS at 4-107.

Notwithstanding the consistency and reliability of the above information, and notwithstanding an unbroken record of well-supported “negligible impact” determinations by NMFS made over a period of decades, the DEIS improbably concludes that “the overall impact to bowhead whales is likely to be “moderate.” DEIS at 4-111. Respectfully, the draft “moderate” impact finding is arbitrary and baseless. For the reasons expressed in the previous section, such a finding exposes OCS oil and gas activity to legal risk that is entirely unwarranted by the sum of over four decades of data and scientific opinion.<sup>13</sup>

## V. CONCLUSION

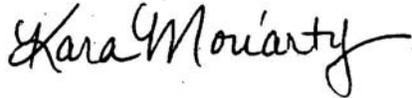
AOGA is a longstanding supporter of the MMPA regulatory process as an effective means of balancing and rationalizing responsible oil and gas development with conservation of marine mammals. We continue to support issuance of ITRs and IHAs under the MMPA because it has been demonstrably effective in the Arctic in protecting marine mammal species without unduly and unnecessarily burdening industry. Notwithstanding our support for the MMPA, we do not understand what NMFS intended when it prepared this DEIS, and we can find no justification for NMFS to proceed to finalize it. Instead, for the reasons explained above and in the additional

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<sup>13</sup> The other impact findings in the DEIS for marine mammals are similarly unwarranted. *Compare* DEIS at § 4.5.2.4.12 (concluding that impacts to ice seals are likely to be “minor”), *with* AOGA and API letter to Ms. Kaja Brix (NMFS) dated Feb. 13, 2012 at pp. 15-20 (detailing data and findings of NMFS and others that the totality of impacts to Arctic ribbon seals are “negligible”); *compare* DEIS at 4-139 (Level 1 activity impacts on polar bear likely to have “minor” impact), *with* 76 Fed. Reg. 47,010 (Aug. 3, 2011) (current Beaufort Sea ITR for polar bear with USFWS “negligible impact” finding), 73 Fed. Reg. 33,212 (June 11, 2008) (current Chukchi Sea ITR for polar bear with USFWS “negligible impact” finding).

submissions of AOGA's members, the American Petroleum Institute, and other members of Alaska's oil and gas industry, we recommend that NMFS abandon the DEIS.

Sincerely,

A handwritten signature in black ink that reads "Kara Moriarty". The signature is written in a cursive, flowing style.

Kara Moriarty  
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  
Dr. James Kendall, Bureau of Ocean Energy Management, Alaska Regional Director  
Geoffrey Haskett, U.S. Fish & Wildlife Service, Alaska Regional Director