

# **Exhibit J:**

Center for Biological Diversity Letter regarding SARA Violations and NAAEC  
Petition (Oct. 6, 2011) [Attachment omitted, but included as Ex. G]



October 6, 2011

***Via Registered Mail and Email***

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Dear Ministers Kent, Ashfield, and Moore, Dr. Leonard, and Ms. Caceres,

The Center for Biological Diversity (the Center) is writing to express our serious concern regarding Canada's long-standing failure to fully protect the polar bear under Canada's Species at Risk Act (SARA). The polar bear is an iconic and imperiled species in both the United States and Canada. Yet Canada has thus far failed to properly protect this shared international resource. Accordingly, we wish to inform you of our groups' intent to raise Canada's failures with the Commission for Environmental Cooperation (CEC), pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC).

The polar bear is gravely endangered from the threats of climate change, which is rapidly shrinking the species' sea ice habitat. To respond to this threat, the United States listed the polar bear as a "threatened" species under the U.S. Endangered Species Act (ESA) in 2008, extending many of the statute's substantive protections to the species.<sup>1</sup> Previously, the International Union for Conservation of Nature (IUCN) Polar Bear Specialist Group (PBSG) had recommended listing the polar bear as "vulnerable" in 2005, which is equivalent to a "threatened" listing under SARA, and it has been recognized as such ever since. Yet Canada has still failed to extend required legal protections to the polar bear, despite clear evidence demonstrating the species qualifies as "endangered" under SARA. We ask the Canadian government to end its extensive delay and immediately act to protect this declining, transboundary species.

### **A. The Polar Bear and Its Threats**

The polar bear (*Ursus maritimus*) inhabits ice-covered waters of the circumpolar Arctic. Roughly 60 percent of the world's polar bears inhabit Canada, from the Davis Strait to the Beaufort Sea and to the southern end of Hudson Bay.<sup>2</sup> The species is divided into 19 geographically, ecologically, and sometimes genetically distinct subpopulations, and 13 of these subpopulations occupy Canada.<sup>3</sup> Several of the 13 populations cross Canada's borders, including the Southern Beaufort Sea population that straddles both Alaska and the Yukon Territory.

The polar bear is highly adapted to and highly dependant upon sea ice for survival. The species' primary food source is ice-dependent seals, including ringed seals and bearded seals.<sup>4</sup> In addition to using sea ice as a platform for hunting these seals, polar bears depend on sea ice for mating and breeding, sometimes for maternity denning, and as a platform for long-distance movement.<sup>5</sup>

The current, worldwide population of polar bears is estimated to be 20,000 to 25,000, and approximately 15,000 of these bears inhabit Canada.<sup>6</sup> However, due to the rapid decline of

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<sup>1</sup> Although the Center believes the polar bear clearly qualifies as "endangered" under the ESA and challenged the U.S. "threatened" listing on this basis, the threatened listing currently in place provides important protections to the polar bear by generally banning the direct killing, pursuit, and import of polar bears, by mandating critical habitat designation, and by requiring consultation with agency experts before federal permits for oil and gas development and scientific study may be issued.

<sup>2</sup> COSEWIC. 2008. COSEWIC assessment and update status report on the polar bear *Ursus maritimus* in Canada. Committee on the Status of Endangered Wildlife in Canada, Ottawa, at vi, 35 (referred to herein as "COSEWIC Status Report (2008)").

<sup>3</sup> *Id.* at 8; IUCN/SSC Polar Bear Specialist Group. 2006. Polar bears: Proceedings of the 14<sup>th</sup> Working Meeting of the IUCN Polar Bear Specialist Group. Aars, J., A. Derocher, and N. J. Lunn (eds.), IUCN, Gland, Switzerland and Cambridge, U.K.

<sup>4</sup> Amstrup, S.C., B.G. Marcot, and D.C. Douglas. 2007. Forecasting the rangewide status of polar bears at selected times in the 21st Century. USGS Alaska Science Center, Anchorage, Administrative Report, at 3; COSEWIC Status Report (2008), at 14.

<sup>5</sup> Amstrup et al. (2007), at 4.

<sup>6</sup> COSEWIC Status Report (2008), at 35; Obbard, M.E., G.W. Thiemann, E. Peacock, and T.D. DeBruyn. 2010. Polar Bears: Proceedings of the 15th Working Meeting of the IUCN/SSC Polar Bear Specialist Group, Copenhagen, Denmark, 29 June–3 July 2009. Gland, Switzerland and Cambridge, UK: IUCN, at 31.

Arctic sea ice from global warming, currently at least seven of the 13 Canadian polar bear populations are likely declining.<sup>7</sup> Scientists estimate that if the Arctic continues its melting trend, the worldwide polar bear population will decline by two-thirds by 2050 and will be near extinction by the end of the century.<sup>8</sup>

In 2008, in response to a petition from the Center, the U.S. Fish & Wildlife Service listed the polar bear as a “threatened” species under the U.S. Endangered Species Act. 73 Fed. Reg. 28,212 (May 15, 2008). Based upon the “best scientific and commercial data available” at the time, the U.S. found the polar bear is “likely to become endangered throughout all of its range” within 45 years due primarily to loss of sea ice habitat from climate change. *Id.* at 28,293; 28,253-54. The U.S. also determined that “harvest is likely exacerbating the effects of habitat loss in several populations.” *Id.* at 28,280.

Similarly, based on a 2005 recommendation by the Polar Bear Specialist Group (PBSG), the IUCN listed the polar bear as “Vulnerable” due to a “suspected population reduction of >30% within three generations (45 years),” due primarily to climate change effects on polar bears.<sup>9</sup> An IUCN “vulnerable” listing “equates to . . . [a] Threatened” listing under SARA.<sup>10</sup> In 2008, Manitoba listed the polar bear as “threatened” under its Endangered Species Act, and in 2009, Ontario deemed the species “threatened.”

## **B. The Species at Risk Act**

The Species at Risk Act was proclaimed in 2003 in order to “prevent Canadian indigenous species, subspecies and distinct populations of wildlife from becoming extirpated [from Canada] or extinct” and “to provide for the recovery of endangered or threatened species.” C. 29, SARA Summary. The statute lists several hundred species as threatened, endangered, or of special concern, provides protections for listed species and their habitat, and sets out a process for adding species to the list. *See* C. 29, Schedule I.

### **1. Protections for SARA-Listed Species**

SARA extends varying degrees of protection depending on a species’ listing status, affording threatened and endangered species the highest protection. Specifically, SARA prohibits any person from “kill[ing], harm[ing], harass[ing], captur[ing] or tak[ing] an individual of a wildlife species” listed as threatened or endangered and from “damag[ing] or destroy[ing] the residence” of such an animal. ss. 32(1), 33. For most species, including most mammals, these

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<sup>7</sup> Obbard et al. (2010), at 62-67; Amstrup et al. (2007).

<sup>8</sup> *See* Amstrup et al. (2007), at 2; Amstrup, S.C., E.T. DeWeaver, D.C. Douglas, B.G. Marcot, G.M. Durner, C.M. Bitz, and D.A. Bailey. 2010. Greenhouse gas mitigation can reduce sea ice loss and increase polar bear persistence. *Nature* 468:955-960.

<sup>9</sup> Schliebe, S., Wiig, Ø., Derocher, A. & Lunn, N. 2008. *Ursus maritimus*. In: IUCN 2011. IUCN Red List of Threatened Species.

<sup>10</sup> COSEWIC Status Report (2008), at 52.

prohibitions apply only on federal lands, unless the Governor in Council specifically orders the prohibitions to apply in provincial or territorial lands.<sup>11</sup> ss. 34, 35.

Once a species has been listed as threatened or endangered, the Minister of the Environment, or other relevant minister, must prepare a recovery strategy for the species. s. 37(1). The strategy must identify population objectives and threats, describe a strategy for combating those threats, and “identif[y] . . . critical habitat” for the species. s. 41(1)(b)-(d). SARA then prohibits “destroy[ing] any part of the critical habitat” that is on federal land, in the Canadian Exclusive Economic Zone (EEZ), or on the continental shelf of Canada.<sup>12</sup> s. 58(1)(a). The Minister must publish the recovery strategy and critical habitat within one year of listing an endangered species and within two years of listing a threatened species. s. 42(1).

However, SARA affords virtually no substantive protections to species listed as “species of special concern.” The Minister “must prepare a management plan for the species and its habitat,” including “measures for the conservation of the species that the competent minister considers appropriate,” within three years of the species’ listing. s. 65, 68. However, SARA does not prohibit killing, harassing, or destroying the home of a species of special concern, nor does SARA require identification or protection of critical habitat.

## **2. SARA Listing Process and Deadlines**

SARA also provides a detailed procedure, including strict deadlines, for listing species. Specifically, SARA formally established the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) as an advisory committee composed of Minister-appointed scientific experts.<sup>13</sup> ss. 14, 16(1), (2). If COSEWIC considers a species to be “at risk,” COSEWIC must commission a “status report” for the species. ss. 15, 21(1). Within one year of receiving that status report, COSEWIC must formally “assess the status” of the species, identify its threats, and classify it as extinct, endangered, threatened, a species of special concern, or not at risk. ss. 23(1), 15(1)(a). Status reports and assessments must be made “on the basis of the best available information,” including scientific, community, and aboriginal traditional knowledge. s. 15(2). Once complete, COSEWIC must “provide the Minister and the Canadian Endangered Species Conservation Council,” which includes various ministers, “with a copy of the assessment,” and “include[ ]” a copy in the SARA public registry. s. 25(1).

Upon receiving COSEWIC’s assessment, the Minister “must, within 90 days,” and after “tak[ing] into account” COSEWIC’s assessment and consulting with “the competent minister[s],” “include in the public registry a report on how the Minister intends to respond to the assessment” and provide timelines for action. ss. 25(3); 27(2). Then, the Governor in Council (GIC) “may” “within nine months after receiving an assessment” and “on the recommendation of

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<sup>11</sup> However, the prohibitions apply to aquatic animals and migratory birds listed as threatened or endangered, regardless of where those animals are found. s. 34(1).

<sup>12</sup> Critical habitat on non-federal land, or outside the EEZ or continental shelf, may be protected by the Governor in Council, but only on recommendation of the provincial or territorial minister, or if the laws of the province or territory do “not effectively protect” the habitat. s. 61.

<sup>13</sup> While SARA formally established COSEWIC in 2003 as an SARA advisory committee, COSEWIC has operated since 1977.

the Minister,” accept COSEWIC’s assessment and add a species to the SARA list, reject the assessment, or refer the assessment back to COSEWIC for further consideration. s. 27(1), (1.1). However, if the GIC has not made such a determination “*within nine months after receiving an assessment . . . by COSEWIC, the Minister shall, by order, amend the List in accordance with COSEWIC’s assessment.*” s. 27(3) (emphasis added). Accordingly, SARA requires that, within nine months of when COSEWIC completes an assessment, the GIC *must act* or the species is automatically listed.

SARA’s legislative history confirms that Parliament intended strict compliance with the statutory deadlines. As numerous members expressed during debate, Parliament specifically adopted the “reverse onus” concept, in which species are automatically listed unless the government *timely* rejects COSEWIC’s recommendation, as a compromise to allow only prompt and limited political consideration into an otherwise purely scientific listing process:

House at report stage, Feb. 21, 2002 (1155) Ms. Karen Kraft Sloan (York North): “[A]s a compromise, the committee amended section 27 so that a species would become part of the legal list . . . within six months<sup>14</sup> of COSEWIC’s recommendation unless, during this period, cabinet determined that the species should be listed.”

House at report stage, Mar. 21, 2002 (1345) Mr. Larry Spencer (Regina, Lumsden, Lake Centre): “The Canadian Alliance worked hard to achieve several key changes to the bill. Most important of these was the reverse onus listing. It would give cabinet the final decisions about the listing of species but it would have to make them within a limited time. Listing decisions it did not make within the allowed time would default to the list compiled by the scientists.”

House at report stage, June 10, 2002 (1640) Mr. John McKay (Scarborough East): “When the committee on the status of endangered wildlife in Canada proposes a list there has to be a decision made within nine months.”

House at third reading, June 11, 2002 (1255) Hon. Charles Caccia (Davenport): “On the first change, a provision was made whereby once the scientific community proposes future additions to the list of endangered species, cabinet has nine months to reject them and must give reasons. If no action is taken by cabinet during the nine months, the list automatically becomes official. Thus the accountability of elected representatives is retained but within a limited period of time and the independent role of scientists is thus given greater significance.”

In sum, SARA clearly requires the Minister to list a species within nine months of when COSEWIC completes an assessment, unless the GIC rejects the listing during that time. s. 27(3).

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<sup>14</sup> The House Committee initially proposed a listing deadline of 60 days, but the Committee later extended the deadline to six months. At the report stage in the House, after a motion to delete the deadline entirely, the deadline was changed to nine months.

### 3. Endangered, Threatened, and Species of Special Concern

Lastly, SARA defines when a species is endangered, threatened, or a species of special concern. An “endangered” species is a species “facing imminent . . . extinction.” s. 2(1). A “threatened” species “is likely to become an endangered species if nothing is done to reverse the factors leading to its . . . extinction.” *Id.* A “species of special concern” is a species “that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats.” *Id.* Lastly, a “wildlife species” under SARA includes “a species, subspecies, variety or geographically or genetically distinct population.” *Id.*

Despite having authority to do so, the Minister has never issued regulations governing any part of SARA, including the listing provisions. However, COSEWIC has further defined when a species may be listed, “based on” IUCN listing criteria.<sup>15</sup> Specifically, under Indicator E, a species is “endangered” if “[q]uantitative analysis . . . show[s] the probability of extinction . . . is at least . . . 20% within . . . 5 generations,” and a species is “threatened” if extinction probability is at least “10% within 100 years.”<sup>16</sup> Alternatively, under Indicator A3, a species is endangered if “a reduction in total number of mature individuals, projected . . . to be met within the next . . . 3 generations” is at least 50%, “based on . . . a decline in . . . area of occupancy, extent of occurrence and/or quality of habitat” or other factors.<sup>17</sup> A species is threatened under Indicator A3 if the reduction is projected to be at least 30%.

Finally, COSEWIC acknowledges that wildlife may be listed in units smaller than the species level, including “designatable units.”<sup>18</sup> A population is “designatable” based on taxonomy, genetic evidence, range disjunction, or biogeographic distinctions.

#### C. Canada’s Extensive Delay in Listing the Polar Bear

##### 1. 2005 Listing Denial

COSEWIC has evaluated the polar bear’s status on numerous occasions. COSEWIC first designated the polar bear to be of “special concern” in 1991, then re-examined and confirmed that status in 1999, and then again in 2002.<sup>19</sup> The 2002 assessment was based on threats from potential overhunting, toxic contamination, and “possible long-term effects of climate change on polar bears [that] are unknown.”<sup>20</sup>

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<sup>15</sup> See COSEWIC Assessment Process and Criteria (Apr. 2010), at 8 (adopting longstanding COSEWIC practice since 2001).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 10, citing Indicators A3 and A1.

<sup>18</sup> COSEWIC, Guidelines for Recognizing Designatable Units Below the Species Level (2005). In 2009, COSEWIC issued new guidance, recommending a population be a designatable unit if the population is both “discrete” and evolutionarily “significant.” COSEWIC, Guidelines for Recognizing Designatable Units (2009).

<sup>19</sup> See COSEWIC Status Report (2008), at iii.

<sup>20</sup> COSEWIC. 2002. COSEWIC assessment and update status report on the polar bear *Ursus maritimus* in Canada. Committee on the Status of Endangered Wildlife in Canada. Ottawa. pp. 19-20.

On April 21, 2004, following the passage of SARA, the Minister issued a “Response Statement,” formally acknowledging COSEWIC’s 2002 polar bear assessment.<sup>21</sup> The Minister announced he would “immediately forward” the assessment to the GIC, initiate consultation with various territories, provinces, wildlife boards, and aboriginal peoples, and then make a recommendation as to listing. The GIC formally acknowledged receipt of the COSEWIC assessment the same day, triggering SARA’s nine-month deadline.<sup>22</sup> On January 12, 2005, the GIC declined to list the polar bear. The GIC believed COSEWIC’s assessment did not sufficiently incorporate aboriginal traditional knowledge, stating that the polar bear was “not being added . . . at this time in order to consult with the Nunavut Wildlife Management Board on [their] concerns . . . These consultations will be undertaken *on an urgent basis* and are expected to be completed *this spring*, at which time the Minister will reconsider this matter.”<sup>23</sup>

## 2. COSEWIC’s 2008 Status Report and Assessment

Despite the GIC’s statement that the polar bear’s status would be revisited “urgent[ly]” in spring 2005, the listing process stalled. In 2008, COSEWIC again re-examined the polar bears’ status, and again assessed the bear as a “species of special concern,” finding the species did not qualify as threatened or endangered.<sup>24</sup>

As discussed in detail below, in making this determination, COSEWIC *entirely discounted the critical impact climate change will have on the species*. COSEWIC found the “negative effects of continued global warming cannot be reliably assessed,” dismissing credible analyses demonstrating that *two-thirds of the Canadian polar bear population* will face a sufficient probability of extinction in just 45 years to qualify the species as “endangered” due to climate change.<sup>25</sup> As one polar expert recently noted, Canada gave “the most eager climate-sceptic among experienced polar bear scientists the task of assessing the status of polar bears for COSEWIC” and “[n]ot surprisingly, the assessment concluded” the species should not be listed as endangered.<sup>26</sup> Further, COSEWIC refused to identify “designatable units” (DUs) of polar bears, and instead evaluated the status of the Canadian polar bear population as a whole. COSEWIC dismissed without explanation a scientific paper identifying five polar bear DUs and finding that “the continued consideration of polar bears as a single biological unit is untenable.”<sup>27</sup>

Based on its status report and at its April 20-25, 2008 meeting, COSEWIC formally assessed the polar bear’s status under SARA section 15(1)(a), designating the polar bear as a

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<sup>21</sup> Minister’s Response Statement for Polar Bear (Apr. 21, 2004).

<sup>22</sup> *Canadian Gazette*, Part II, Vol. 138, No. 9 (May 5, 2005).

<sup>23</sup> *Canadian Gazette*, Part II, Vol. 139, No. 2 (Jan. 26, 2005), at 96 (emphasis added).

<sup>24</sup> COSEWIC Status Report (2008), at 59, iii.

<sup>25</sup> *Id.*; Amstrup et al. (2007); *see also* Amstrup et al. (2010).

<sup>26</sup> Vongraven, D. 2009. Guest editorial: the ballyhoo over polar bears. *Polar Research* 28: 323-326.

<sup>27</sup> COSEWIC Status Report, at 13 (2008); Thiemann, G.W., A.E. Derocher, and I. Stirling. 2008. Polar bear *Ursus maritimus* conservation in Canada: an ecological basis for identifying designatable units. *Oryx* 42:504-515.



species of special concern.<sup>28</sup> SARA required COSEWIC to “provide the Minister . . . with a copy of the assessment” and “include[ ]” a copy in the public registry. s. 25(1).

### 3. Minister’s Delayed Response

As noted above, once COSEWIC completes an assessment, a series of strict deadlines are triggered. Specifically, “[o]n receiving a copy of an assessment of the status of a wildlife species from COSEWIC . . . , the Minister must, *within 90 days*, include in the public registry a report on how the Minister intends to respond to the assessment.” s. 25(3). Accordingly, the Minister’s response on the polar bear was due in late July 2008.<sup>29</sup> However, the Minister did not issue a “Response Statement” until November 26, 2008 – seven months after COSEWIC assessed the polar bear.<sup>30</sup> In his response, the Minister indicated he would, after consulting with various parties, recommend the polar bear be listed as a species of special concern under SARA.

### 4. GIC’s Non-Response and Minister’s Failure to Order Listing

In addition to requiring the Minister to respond within 90 days, SARA separately requires that “within nine months after receiving an assessment . . . by COSEWIC,” the GIC “may review the assessment and may, on the recommendation of the Minister,” accept, reject, or refer the assessment back to COSEWIC. s. 27(1.1). Further, if the GIC “has not taken” action “within nine months after receiving” the COSEWIC assessment, “the Minister shall, by order, amend the List in accordance with COSEWIC’s assessment.” s. 27(3). **Accordingly, SARA required the polar bear to be *automatically* listed as a “species of special concern” by January of 2009**, nine months after COSEWIC assessed the polar bear.

However, the GIC did not act within nine months, and the Minister failed to issue a timely order listing the species, as required by section 27(3). Instead, the GIC claimed it did not “receive” COSEWIC’s assessment until February 3, 2011, *nearly 3 years after COSEWIC completed its assessment*, even though the assessment had been widely available in the SARA public registry and online and had been sent directly to several ministers who are part of the GIC.<sup>31</sup> On July 2, 2011, the GIC published its proposal to include the polar bear as a species of special concern under SARA.<sup>32</sup> As of the date of this letter, the GIC has not finalized this decision, and the polar bear remains unlisted under SARA.

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<sup>28</sup> See COSEWIC Press Release, Polar Bear and other Species at Risk Assessed by Independent Canadian Science Body (Apr. 25, 2008). Available at: [http://www.cosewic.gc.ca/eng/sct7/sct7\\_3\\_11\\_e.cfm](http://www.cosewic.gc.ca/eng/sct7/sct7_3_11_e.cfm).

<sup>29</sup> It is unclear what date the final COSEWIC assessment was “received” by the Minister. Under COSEWIC guidance, COSEWIC must finalize the assessment and post it on the SARA registry “soon after the [COSEWIC] Wildlife Species Assessment Meeting,” which concluded on April 25, 2008. See COSEWIC Assessment Process and Criteria, at 5. Nothing in SARA allows COSEWIC to arbitrarily withhold the assessment and only provide it in an “Annual Report” to the Minister. See COSEWIC Annual Report 2007-2008 (Aug. 28, 2008).

<sup>30</sup> See Response Statement - Polar Bear (Nov. 26, 2008). Available at:

[http://www.sararegistry.gc.ca/document/default\\_e.cfm?documentID=1676](http://www.sararegistry.gc.ca/document/default_e.cfm?documentID=1676).

<sup>31</sup> *Canada Gazette*, Part II, Vol. 145, No. 4. (Feb. 3, 2011) (noting a “decision was made to delay [GIC’s] receipt of this wildlife species [assessment] to allow for extended consultations with the Nunavut Wildlife Management Board and the Nunavut Government. The consultations are now complete.”).

<sup>32</sup> *Canada Gazette*, Part I, Vol. 145, No. 27 (July 2, 2011).

## D. Violations of Canada’s Species at Risk Act

Canada’s failure to list the polar bear as an endangered species violates both the procedural and substantive provisions of SARA. Had Canada fully complied with SARA, the polar bear would have been listed as endangered two and a half years ago, and the species would be protected by a recovery strategy and have identified critical habitat by now. s. 42(1).

### 1. Failure to Meet Statutory Deadlines for the Polar Bear Listing

As described in detail above, SARA contains a series of carefully crafted deadlines, intended to expedite the listing process and thus the actual protection of species. However, Canada has missed at least two key deadlines in listing the polar bear:

Statutory Deadline	SARA Section	Deadline for Polar Bear Listing	Canada’s Timing	Amount of Unlawful Delay
Minister’s Response due 90 days after receiving COSEWIC assessment	s. 25(3)	Due end of July 2008	Response issued Nov. 2008	4 months late
GIC’s finding due nine months after receiving COSEWIC assessment	s. 27(1.1)	Due end of Jan. 2009	Not yet issued	32 months late
Alternatively, Minister’s Order listing species if GIC fails to act within nine months of receiving COSEWIC assessment	s. 27(3)	Due end of Jan. 2009	Not yet issued	32 months late

In an apparent effort to relieve itself of SARA’s clear statutory deadlines for listing the polar bear and a myriad of other imperiled species, Canada has unlawfully interpreted SARA to allow an *unlimited* amount of time to list species.<sup>33</sup> Specifically, Canada believes that, after the Minister receives COSEWIC’s assessment, the Minister may constructively withhold the assessment from the GIC while the Minister conducts extended economic and political consultations, thus delaying when the GIC “receives” the assessment.<sup>34</sup> Accordingly, Canada believes the Minister may indeterminately delay species’ listing well beyond the nine month deadline set in the statute.

<sup>33</sup> See Submission to CEC under NAAEC by Sierra Club, et al. (Oct. 2006), at 5 (listing 45 other species whose listing has been severely delayed under Canada’s unlawful interpretation of SARA). Available at: [http://www.cec.org/Storage/83/7899\\_06-5-SUB\\_en.pdf](http://www.cec.org/Storage/83/7899_06-5-SUB_en.pdf).

<sup>34</sup> See Environment Canada, Consultation on Amending the List of Species under the Act: Terrestrial Species, at 5 (Dec. 2009) (explaining that some species will undergo “extended consultations” by the Minister, and listing may take several years after the assessment); see also Draft Species at Risk Act Policies (2009) (“Receipt of the assessments by the Governor in Council will generally occur within three months of posting the response statements. *Delivery by the Minister of the Environment and receipt by the Governor in Council may be delayed in certain circumstances.*”) (emphasis added).

Canada's interpretation clearly contravenes SARA's plain language and Parliament's intent, defeats the purpose of the carefully drawn deadlines, and frustrates the statute's purposes.<sup>35</sup> First, as described in detail above, the statutory language is clear, and the "reverse onus" deadline was crafted to allow for *time-limited* political considerations, triggering automatic listing if the deadline is missed. s. 27(3). Canada's unlawful interpretation violates the plain language of the statute and renders the carefully negotiated "reverse onus" requirement meaningless.

Further, pretending the GIC does not "receive" COSEWIC's assessment until formally provided by Minister is irrational, as COSEWIC's assessment is widely available almost immediately following assessment. SARA specifically requires COSEWIC, upon completion of an assessment, to publish a copy in the SARA public registry, which is widely accessible online. s. 25(1). COSEWIC also issued a press release in April 2008 informing the public it had completed its polar bear assessment.<sup>36</sup> Further, SARA requires COSEWIC to "provide . . . a copy" of each completed assessment to the "Canadian Endangered Species Conservation Council," which includes numerous ministers who are also members of the GIC, including the Minister of the Environment, the Minister of Fisheries and Oceans, and the Minister of Canadian Heritage. ss. 25(1), 2(1). Canada cannot deem the GIC ignorant of COSEWIC's assessments *for years* in order to avoid SARA's clear deadlines.

Additionally, Canada's unlawful delay in listing species defeats the purpose of several other statutory provisions. SARA requires the Minister to issue a recovery plan and identify critical habitat within one year of an endangered species' listing and two years of a threatened species' listing. s. 42(1). By unlawfully delaying listings, Canada renders these short deadlines meaningless, and denies even highly endangered species much needed protections. SARA also requires COSEWIC to base its assessment on the "best," most up-to-date science and information. s. 15(2). However, if the GIC delays its determination for multiple years after the assessment is completed, the science may be outdated upon listing, diluting the purpose behind this strong standard.<sup>37</sup> This is particularly true in the constantly advancing field of climate change. In sum, Canada's delay of listing the polar bear violates SARA, and Canada's unfounded interpretation of the statute contravenes SARA's plain language and purposes.

## **2. Failure to List the Polar Bear as Endangered**

In addition to Canada's unlawful and extensive delay in listing the polar bear, Canada has also violated SARA's substantive provisions. First, COSEWIC failed to apply best available

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<sup>35</sup> See also Sierra Club CEC Submission, at 4-6 (2006) (explaining Canada's unlawful interpretation of "receipt"). Oddly, the GIC's February 3, 2011 acknowledgement of receipt of COSEWIC's polar bear assessment notes that assessments are received by the Minister, then forwarded to the GIC, and *then* the Minister conducts required consultations. See *Canada Gazette*, Part II, Vol. 145, No. 4. (Feb. 3, 2011). Yet Canada clearly did not follow this procedure.

<sup>36</sup> See SARA Public Registry: [www.sararegistry.gc.ca](http://www.sararegistry.gc.ca); COSEWIC Press Release, *Polar Bear and other Species at Risk Assessed by Independent Canadian Science Body* (Apr. 25, 2008).

<sup>37</sup> See Ex. A: Center for Biological Diversity Comments on Proposed Order Amending Schedule 1 for Polar Bears (Aug. 1, 2011), at 5-6 (citing numerous studies issued since COSEWIC issued its assessment in 2008, further demonstrating the dire threat to polar bears).

information in assessing the polar bear's status. Second, COSEWIC wrongly assessed the polar bear as a "species of special concern," even though the polar bear qualifies as "endangered" and certainly at least "threatened" under COSEWIC's definitions.

**a. COSEWIC Failed to Use Best Available Information in its Polar Bear Status Report and Assessment.**

SARA requires COSEWIC to base its status reports and assessments on "the best available information," including scientific, community, and aboriginal traditional knowledge. s. 15(2). COSEWIC violated this requirement by issuing a polar bear status report and assessment that entirely ignored the serious impacts of climate change and by failing to identify "designatable units" of polar bears.

First, COSEWIC's status report and assessment found the Canadian polar bear population did not meet the criteria to be listed as threatened or endangered.<sup>38</sup> However, in making this conclusion, COSEWIC entirely discounted the future effects of climate change on the species and arbitrarily dismissed the "best available information" regarding these impacts. Specifically, COSEWIC assessed the polar bear's risk of extinction using a "RISKMAN" model that did not take future climate change and sea ice loss into account.<sup>39</sup> Further, for many populations, the model used pre-2000 demographic data that does even reflect existing impacts from sea ice decline over the past decade. Using this inadequate model, COSEWIC concluded that only four polar bear subpopulations, or roughly 28% of Canadian polar bears, "have a high risk of declining by 30% or more over the next 3 bear generations."<sup>40</sup>

In refusing to find the polar bear endangered or even threatened, COSEWIC dismissed key studies concluding that – after factoring in climate change impacts – seven Canadian polar bear populations, or approximately 68% of Canadian polar bears, will face over a 30% probability of extinction in 45 years – enough to qualify Canadian polar bears as "endangered."<sup>41</sup> Specifically, COSEWIC acknowledges, but incorrectly dismisses as "preliminary," the Amstrup et al. (2007) study estimating extinction probabilities in 45 years, 75 years, and 100 years under a middle-of-the-road A1B greenhouse gas emissions scenario.<sup>42</sup> The U.S. based its ESA "threatened" listing in part on the Amstrup et al. (2007) study, deeming it part of the "best scientific and commercial data available." 73 Fed. Reg. at 28,238. The study's robustness was later confirmed when *Nature*, one of the world's most elite scientific journals, published the

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<sup>38</sup> COSEWIC Status Report (2008) at 58-59.

<sup>39</sup> *Id.* at 37 (under RISKMAN model, "due to unknown effects of directional climate change on survival and recruitment, results should be used to interpret current and short-term likelihoods of decline only").

<sup>40</sup> *Id.* at 58-59.

<sup>41</sup> Amstrup et al. (2007).

<sup>42</sup> *Id.*; see also Exhibit A: Center Comments, at 10. Amstrup et al. (2007)'s projections are supported by Hunter et al. (2007), who used a populations dynamic model to similarly forecast that the Southern Beaufort Sea polar bear population had an extinction probability of ~45% to 75% in the next 50 years and ~75% to 95% by the end of the century. See Hunter, C. M., H. Caswell, M. C. Runge, E. V. Regehr, S. C. Amstrup, and I. Stirling. 2007. Polar bears in the Southern Beaufort Sea II: Demography and Population Growth in Relation to Sea Ice Conditions. USGS Science Strategy to Support U.S. Fish and Wildlife Service Polar Bear Listing Decision. U.S. Geological Survey, Reston, Virginia.

work as its cover story in 2010.<sup>43</sup> COSEWIC also failed to include or adequately address numerous other studies that were available in 2008 that forecast declines and document climate change threats to Canadian polar bear populations.<sup>44</sup>

Further, COSEWIC acknowledged that in 2006, the IUCN Polar Bear Specialist Group found the polar bear qualified as “Vulnerable,” a status that “equates to COSEWIC threatened status,” “in response to modelling of trends in sea ice extent, thickness, and timing of coverage . . . due to climate warming.”<sup>45</sup> The uplisting was “based on a suspected population reduction of >30% within three generations (45 years).”<sup>46</sup> Despite applying the very same standard as the IUCN, COSEWIC nonetheless dismissed these predictions and failed to explain how it reached a different conclusion than this international body of polar bear experts.

Second, COSEWIC ignored the best available information when it refused to identify “designatable units” (DUs) of polar bears. Had COSEWIC properly identified DUs, these units would have qualified for endangered listing under COSEWIC’s standards.<sup>47</sup> The Thiemann (2008) paper was developed specifically to address the “ecological basis for identifying designatable units” for the SARA polar bear listing.<sup>48</sup> The paper identified five DUs in Canada that are “genetically, geographically, and ecologically separable” and “capture[ ] broad patterns of polar bear biodiversity.” These experts concluded, “[c]onsidering the vast geographical distribution of the species and the spatially variable ecological impacts of climate change, *the continued consideration of polar bears as a single biological unit is untenable.*”<sup>49</sup> COSEWIC acknowledged but cursorily dismissed this analysis, stating only that “identified subpopulations cannot be considered Designatable Units as per COSEWIC guidelines,” providing no rationale.<sup>50</sup>

### **b. COSEWIC Wrongly Assessed the Polar Bear as a Species of Special Concern, Instead of Endangered.**

In addition to the extensive delay in listing the polar bear, COSEWIC also wrongly assessed the polar bear as a “species of special concern,” even though the polar bear qualifies as “endangered” under SARA and COSEWIC’s own standards. As described above, SARA defines a species as “endangered” if it “is facing imminent . . . extinction.” s. 2(1). A species is

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<sup>43</sup> Amstrup et al. (2010).

<sup>44</sup> See Hunter et al. (2007); see also Ex. A: Center Comments, citing Fischbach et al. (2007) (finding significant decrease in the proportion of polar bear maternal dens on pack ice between 1985 and 2005 in the Southern Beaufort Sea related to delays in autumn freeze-up, reductions in stable old ice, increases in open water, and reductions in snow cover on pack ice; Durner et al. (2006) (degradation of land denning habitats by coastal erosion of shorelines due to climate change); Monnett & Gleason (2006) (drowning and stress from increased open water swimming due to sea ice loss) and more.

<sup>45</sup> COSEWIC Status Report (2008), at 52, citing IUCN (2006).

<sup>46</sup> Schliebe et al. (2008) (concluding that due to sea ice decline, risk “makes it fair to suspect population reduction of >30%”).

<sup>47</sup> As discussed below, all Canadian polar bear populations qualify as endangered under COSEWIC Indicators E and A3 based on Amstrup et al. (2007), and thus population subsets designated as DUs would also qualify as endangered.

<sup>48</sup> Thiemann et al. (2008), at 511.

<sup>49</sup> *Id.* at 512 (emphasis added).

<sup>50</sup> COSEWIC Status Report (2008), at 13.

threatened if it “is likely to become an endangered species if nothing is done to reverse the factors leading to its . . . extinction.” *Id.* COSEWIC adopted criteria further defining the terms based on the IUCN Redlist criteria.<sup>51</sup>

As described above, the best available information required COSEWIC to designate and evaluate the statuses of the smaller polar bear DUs instead of one polar bear population. However, even when considered as a single biological unit, the polar bear qualifies as endangered. The polar bear clearly meets the definition of an endangered species under both Indicator E and Indicator A3 of the COSEWIC listing criteria.

### **1. Indicator E: Quantitative Analysis Shows Probability of Extinction Is 20% or Greater within Five Polar Bear Generations**

Under COSEWIC’s criteria, a species is endangered if “[q]uantitative analysis (population projections) show[s] the probability of extinction . . . is at least . . . 20% within . . . 5 generations,” which COSEWIC determined is 60 years for the polar bear.<sup>52, 53</sup> The Amstrup et al. (2007) study concluded that more than two-thirds of Canada’s polar bears (68% or 10,439 of Canada’s total population of 15,361 bears) have an extinction probability of at least 35% in just 45 years, well-exceeding the SARA endangered threshold of 20% in 60 years.<sup>54</sup> Further, *all* Canadian polar bear populations face a probability of extinction of at least 37% within 75 years.<sup>55</sup> Although the Amstrup et al. (2007) study did not expressly provide extinction probabilities at 60 years, based on the study’s projections for 45 years and 75 years, *all* Canadian polar bear populations will almost certainly exceed 20% probability of extinction within 60 years, again meeting the endangered threshold. Accordingly, the polar bear qualifies for SARA endangered status under COSEWIC’s criteria.

Further, it is likely Amstrup et al. (2007) *underestimates* the actual extinction risk to polar bears. The IPCC climate models used in Amstrup project slower melting trends for sea ice

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<sup>51</sup> COSEWIC Assessment Process and Criteria, at 8.

<sup>52</sup> *See id.* at 10. A species is “threatened” if extinction probability is at least “10% within 100 years.” *Id.* A quantitative analysis is defined as “[a]n estimate of the extinction probability of a taxon based on known life history, habitat requirements, threats and any specified management options. Population viability analysis (PVA) is one such technique. Quantitative analyses should make full use of all relevant available data. If there is limited information, available data can be used to provide an estimate of extinction risk (for instance, estimating the impact of stochastic events on habitat). In presenting quantitative analyses, the assumptions, the data used and the uncertainty in the data or quantitative model must be documented. (Source: adapted from IUCN 2001).” *Id.* at 18. While the underlying modeling of Amstrup et al. (2007, 2010) is not a PVA and does not include standard confidence intervals, there can be no question that the work meets the SARA definition of a “quantitative analysis” and must be considered in the SARA listing process.

<sup>53</sup> The COSEWIC status assessment used a generation time of 12 years, despite the uniform use of a 15-year generation time by the IUCN, PBSG, and U.S. Fish and Wildlife Service. While we believe that the use of a 12-year generation time was incorrect, the polar bear must be classified as endangered even under COSEWIC’s truncated 12-year generation time.

<sup>54</sup> Amstrup et al. (2007); *see also* Ex. A: Center Comments, at 10 (Table 2) (showing Amstrup et al. (2007)’s probabilities of extinction by ecoregion for Canadian polar bear populations).

<sup>55</sup> Amstrup et al. (2007).

than have actually been observed. For example, there was less ice in the Arctic in September 2007 than the mean IPCC model ensemble projected for 2050.<sup>56</sup> Second, Amstrup used the IPCC's mid-range A1B emissions scenario for its assumptions about future greenhouse gas emissions; however, actual carbon dioxide emissions have largely tracked the trajectory of the most fossil-fuel intensive emissions scenario, A1FI, since 2000.<sup>57</sup>

Lastly, COSEWIC misapplied the Indicator E criteria in making its determination. Specifically, in considering whether the polar bear met Indicator E, COSEWIC found it "unlikely that the Canadian population of polar bears will decline by 30% over the *next 36 years*," or three polar bear generations.<sup>58</sup> However, Indicator E requires an endangered listing if the "probability of extinction . . . is at least . . . 20% within . . . 5 *generations*," or 60 years for the polar bear.<sup>59</sup> COSEWIC clearly violated SARA and its own guidance by failing to list the polar bear as endangered.

## **2. Indicator A3: A 50% Reduction in the Total Number of Individuals Projected within Three Polar Bear Generations**

In addition to meeting Indicator E, the polar bear also qualifies as endangered under COSEWIC's Indicator A3. Specifically, under Indicator A3, a species is endangered if there is at least a 50% "reduction in total number of mature individuals, projected . . . within the next . . . 3 generations," or 36 years under COSEWIC's 12-year generation time for the polar bear.<sup>60</sup> A species is threatened under the same criteria if a 30% reduction is projected in three generations.

Amstrup et al. (2007) demonstrates that all of the Canadian bears in the Seasonal Ice Ecoregion (Southern Hudson Bay, Western Hudson Bay, Foxe Basin, Davis Strait, and Baffin Bay populations) and all the bears in the Divergent Ice Ecoregion (Southern Beaufort population) will likely (77 to 80% probability) be extinct by 2050, just over 36 years from now. This equates to a loss of 9,000 bears and a 60% reduction in Canada's 15,361-bear population. In addition, Amstrup et al. (2007) predicted that the remaining Canadian bear populations in the Convergent Ice and Archipelago Ecoregions will likely be smaller in 2050 than at present, meaning that the Canadian polar bear population in total is likely to be reduced by more than 60% over the next three generations. Thus, the Canadian polar bear population meets the A3 COSEWIC criteria for an endangered listing.

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<sup>56</sup> Stroeve, J., M.M. Holland, W. Meier, T. Scambos, and M. Serreze. 2007. Arctic sea ice decline: Faster than forecast. *Geophysical Research Letters* 34, L09501.

<sup>57</sup> Raupach, M.R., G. Marland, P. Ciais, C. Le Quéré, J.G. Canadell, G. Klepper, and C.B. Field. 2007. Global and regional drivers of accelerating CO<sub>2</sub> emissions. *Proceedings of the National Academy of Sciences of the United States of America* 104:10288-10293; Friedlingstein, P., R. A. Houghton, G. Marland, J. Hackler, T. A. Boden, T. J. Conway, J. G. Canadell, M. R. Raupach, P. Clais, and C. Le Quéré. 2010. Update on CO<sub>2</sub> emissions. *Nature Geoscience* 3:811-812; Global Carbon Project. 2010. Carbon Budget 2009, report available at <http://www.globalcarbonproject.org/index.htm>.

<sup>58</sup> COSEWIC Status Report (2008), at 59.

<sup>59</sup> See COSEWIC Assessment Process and Criteria, at 8.

<sup>60</sup> *Id.* citing Indicator A3, A1. Under Indicator A3, the reduction must be "based on . . . a decline in index of area of occupancy, extent of occurrence and/or quality of habitat," or other factors. *Id.* Amstrup et al. (2007)'s results were reached based on these factors.

In sum, the polar bear meets COSEWIC's and thus SARA's criteria for listing as an endangered species. COSEWIC's failure to assess the species as endangered, in addition to COSEWIC's failure to apply best available science or even the correct listing standard, violates SARA. ss. 15(1), (2); 21(1). The Minister, and likely the GIC, have and will compound this violation by making their recommendations and orders based on COSEWIC's invalid and unlawful assessment.

#### **E. NAAEC Article 14 Petition Process**

In 1994, when Canada, Mexico, and the United States established the North American Free Trade Agreement (NAFTA), the Parties also adopted the North American Agreement on Environmental Cooperation (NAAEC). Article 5(1) of the NAAEC provides that "each Party shall effectively enforce its environmental laws and regulations." The NAAEC established the Commission for Environmental Cooperation (CEC) to promote the effective enforcement of the Parties' domestic environmental laws. NAAEC Art. 8, 10.

Article 14 of the NAAEC allows any "non-governmental organization or person" to make submissions to the CEC Secretariat asserting "that a Party [to the NAAEC] is failing to effectively enforce its environmental law." Art. 14(1). If the CEC Secretariat finds the organization's submission to be sufficient, the Secretariat may provide the Party an opportunity to respond. Art. 14(2), (3). After considering the initial submission and the response, the Secretariat may develop a "factual record." Art. 15. The factual record objectively outlines the Party's obligations under the law, the history of the issue, and the relevant facts regarding the allegations of a Party's failure to enforce the law. Once completed, the CEC Council votes to finalize the factual record, and then it is made publicly available. Art. 15(2), (7).

As detailed above, the Center believes Canada is failing to effectively enforce SARA to protect the imperiled polar bear, as required by both Canadian law and the NAAEC. Through the actions and inactions of COSEWIC, the Minister, and the GIC, Canada has failed to meet clear statutory timelines for listing and has failed to list the polar bear as endangered as is required by SARA, and thus has failed to provide required substantive protections for the species. Accordingly, if Canada does not act immediately to list the polar bear as endangered, the Center will initiate the NAAEC process to prompt Canada's compliance with its own law. We implore Canada to take immediate action to protect this shared natural resource from its continued decline.

#### **Conclusion**

We look forward to your prompt response on this letter. Please contact Brendan Cummings at (760) 366-2232 x304 or [bcummings@biologicaldiversity.org](mailto:bcummings@biologicaldiversity.org) if you would discuss this issue, or any other issue, with us. Thank you for your time and consideration.



Sincerely,



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Enc: Exhibit A, August 1, 2011, letter from the Center for Biological Diversity on Proposed Order To List The Polar Bear Under SARA As A Species Of Special Concern, As Stated In Order Amending Schedule 1 To The Species At Risk Act; Published in *Canada Gazette*, Part I, Ottawa, Saturday, July 2, 2011