

BEFORE THE SECRETARY OF THE INTERIOR

PETITION PURSUANT TO THE PELLY AMENDMENT, 22 U.S.C. § 1978,

SEEKING CERTIFICATION OF CANADA FOR UNDERMINING THE

EFFECTIVENESS OF THE 1973 AGREEMENT ON THE CONSERVATION OF

POLAR BEARS



Photo by Brendan Cummings

Submitted by:

Center for Biological Diversity

January 23, 2012

January 23, 2012

Via Certified Mail and Email

Ken Salazar
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
Email: exsec@ios.doi.gov

Re: Petition for Certification of Canada pursuant to the Pelly Amendment for Taking in Violation of the Agreement on the Conservation of Polar Bears

Dear Secretary Salazar,

The Center for Biological Diversity (“the Center”) submits this petition requesting certification of Canada pursuant to the Pelly Amendment. 22 U.S.C. § 1978. Specifically, the Center seeks certification that Canada’s management of polar bears “diminishes the effectiveness” of the 1973 Agreement on the Conservation of Polar Bears because the level of harvest allowed in the Canadian Territory of Nunavut violates “sound conservation practices based on the best available scientific data.” *Id.* § 1978(a)(2). Further, the Center requests the Secretary recommend trade sanctions against Canada for these violations, as contemplated by the Pelly Amendment. *Id.* § 1978(a)(4).

INTRODUCTION

In recognition of their shared responsibility for the polar bear, the United States and Canada negotiated the Agreement on the Conservation of Polar Bears in 1973 (“Polar Bear Agreement”). This Agreement prohibits the take of polar bears, except for specific purposes like conservation or by “local” peoples and only “in accordance with sound conservation practices based on the *best available scientific data.*” Agreement on the Conservation of Polar Bears, Art. II (1973) (emphasis added).

While this Agreement initially halted the species’ decline several decades ago, the polar bear now faces an increasingly serious threat of extinction due to climate change impacts on its Arctic habitat. Ongoing hunting, toxic contamination, and habitat disturbance from oil and gas drilling and shipping have and will continue to exacerbate this decline. However, despite these serious, additive impacts, Canada allows substantial subsistence harvest, sport-hunting, and commercial trade in polar bears and polar bear parts. Continued harvest in several of the Canadian polar bear populations is unsustainable and may heighten the populations’ trend towards extinction.

Specifically, in October of 2011, the Canadian Territory of Nunavut *quadrupled* the number of bears that may be legally harvested this season from the declining Western Hudson Bay polar bear population. Scientists have already documented the impacts of climate change on this population, and it will likely be one of the first populations to face extinction. The Polar

Bear Specialist Group (PBSG), a group of polar bear experts formed to advise implementation of the Polar Bear Agreement, “strongly” opposed Nunavut’s increased harvest. The PBSG found the level of harvest is “not sustainable” and is not based on the “best available scientific data,” in contravention of the Agreement on the Conservation of Polar Bears.

Under the Pelly Amendment, the Secretary of Interior is authorized to certify to the President whenever he finds that foreign nationals “are engaging in . . . taking which diminishes the effectiveness of any international program” to protect endangered species. 22 U.S.C. § 1978(a)(2). By allowing polar bear hunting in contravention of “sound conservation practices” and contrary to “the best available scientific data,” Canada and its Territory of Nunavut are exacerbating the decline of the Western Hudson Bay polar bear population and thereby “diminish[ing] the effectiveness” of the Polar Bear Agreement. *Id.* Accordingly, the Center requests the Secretary certify Canada under the Pelly Amendment and recommend that the President prohibit importation of certain Canadian wildlife products until Canada reduces polar bear take to sustainable levels.

I. Legal Background

A. Agreement for the Conservation of Polar Bears

In 1973, in response to overharvest and population declines due to sport-hunting, the polar bear range states – the U.S., Canada, the Soviet Union/Russia, Norway, and Greenland/Denmark – reached an agreement to protect this iconic Arctic species.¹ The Agreement, which was both drafted and facilitated by the International Union for the Conservation of Nature’s Polar Bear Specialist Group (“PBSG”), was ratified by Canada in 1974 and by the U.S. in 1977.² While the Soviet Union initially proposed the countries ban all polar bear hunting, as it had done in 1956, the parties ultimately agreed to substantially restrict polar bear take and to encourage and cooperate on polar bear scientific research.³

The Agreement states that the “taking of polar bears shall be prohibited except as” provided in the Agreement. Art. I(1), (2) (defining “[t]aking” as “hunting, killing and capturing”). The Agreement then allows taking: (a) “for bona fide scientific purposes;” (b) “for conservation purposes;” (c) “to prevent serious disturbance of the management of other living resources;” (d) “by local people using traditional methods in the exercise of their traditional rights;” or (e) “wherever polar bears have or might have been subject to taking by traditional means by its nationals.” Art. III. However, such taking is *only* to be permitted “[s]ubject to the provisions of Article[] II” of the Agreement, which requires that each party “shall manage polar

¹ See T.S. Larsen and I. Stirling. 2009. The Agreement on the Conservation of Polar Bears – its History and Future. Norsk Polarinstitutt, at 7 (detailing the full history of the Agreement); *see also* 73 Fed. Reg. 28,212, 28,238 (May 15, 2008) (Final Polar Bear Listing Rule noting Agreement was passed because “populations were declining prior to 1973 due to severe overharvest”).

² Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918, 13 I.L.M. 13. The PBSG, whose membership now includes 24 polar bear experts from the various range states, has continued to provide expert advice on the implementation of the Agreement. *See* <http://pbsg.npolar.no/en/about.html>.

³ Larsen and Stirling 2009, at 7, 8.

bear populations in accordance with sound conservation practices based on the *best available scientific data.*” Art. II, III(I) (emphasis added). Accordingly, range countries may allow taking of polar bears, but only for specified purposes and only “in accordance with sound conservation practices based on the best available scientific data.” Finally, each range country “shall prohibit the exportation from . . . its territory of polar bears or any part or product thereof taken in violation of this Agreement.” Art. V.

B. The Pelly Amendment

Enacted in 1971 and amended in 1978, the Pelly Amendment to the Fishermen’s Protective Act of 1967 (“Pelly Amendment”) provides the U.S. leverage to promote other nations’ compliance with international agreements through trade restrictions. *See Am. Cetacean Soc’y v. Baldrige*, 768 F.2d 426, 428 (D.C. Cir. 1985) (describing Pelly’s passage, amendment, and legislative history), overruled by 478 U.S. 221 (1986). The Pelly Amendment requires that, when the “Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary . . . shall certify such fact to the President.” 22 U.S.C. § 1978(a)(2). Upon receiving such a certification, the President is authorized “to prohibit . . . the importation into the United States of any products from the offending country.” *Id.* § 1978(a)(4). The Pelly Amendment then makes importation in violation of that prohibition illegal. *Id.* § 1978(c).

Further, the Pelly Amendment defines “taking” as to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or to attempt to do any of the above. *Id.* § 1978(h)(5). The Pelly Amendment also defines an “international program for endangered or threatened species” as “any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to protect endangered or threatened species of animals.” *Id.* § 1978(h)(4). The Polar Bear Agreement is clearly an “international program for endangered or threatened species” covered by Pelly, as it protects the Endangered Species Act-listed polar bear.

The Secretary’s decision to certify a country’s “departure” from a treaty requirement may be based only on conservation concerns. *See Japan Whaling Ass’n*, 478 U.S. at 234 (suggesting the Secretary may *not* refuse to certify a treaty violation for a “reason not connected with the aims and conservation goals” of the treaty); *Greenpeace, U.S.A. v. Mosbacher*, 719 F. Supp. 21, 24 (D.D.C. 1989) (noting Supreme Court’s “dictum stating that a decision based on factors other than conservation constitutes an abuse of discretion”). Further, once a certification has been issued, and if the President takes action to prohibit importation from the country, the President may prohibit the import of *any* product from that country, not just importation of the particular wildlife species covered by the treaty. *See Florsheim Shoe Co. v. United States*, 19 C.I.T. 295, 297 (1995) (approving Pelly-based Presidential Proclamation prohibiting importation of all wildlife products from Taiwan, including elk skin shoes, even though the treaty violation involved endangered tigers and rhinos).

II. Factual Background

A. The Imperiled Polar Bear and Its Threats

The polar bear (*Ursus maritimus*) inhabits ice-covered waters of the circumpolar Arctic, spanning the land and seas of five countries: the United States, Canada, Russia, Greenland, and Norway. Of the world's 20,000 to 25,000 polar bears, approximately 15,500 bears inhabit Canada.⁴ The species occupies the country's width from its northern most points to the southern end of the Hudson Bay.

As the U.S. Fish and Wildlife Service ("FWS") recognized in listing the polar bear as "threatened" under the Endangered Species Act in 2008, the species faces a number of very serious threats. First and foremost, climate change has already impacted the species and will continue to cause the species to decline towards extinction if carbon emissions continue as anticipated. 73 Fed. Reg. 28,212 (May 15, 2008). The polar bear is highly adapted to and highly dependant upon sea ice for survival, including for hunting ice-dependant seals, mating and breeding, sometimes for maternity denning, and as a platform for long-distance movement.⁵ The rapid decline of Arctic sea ice from global warming has and will continue to degrade polar bear's Arctic habitat and drive the species towards extinction.⁶

Ongoing polar bear hunting exacerbates the already steep decline of polar bear populations.⁷ In fact, hunting is the most important variable after sea ice in determining whether polar bears will survive.⁸ Accordingly, in 2009, the PBSG adopted a resolution recommending that parties to the Polar Bear Agreement use a precautionary approach in setting harvest levels and account for "current and likely future impacts of global warming in all management" decisions.⁹

Yet substantial harvest, sport-hunting, and commercial trade of polar bears continues in Canada. Each year, around 500 polar bears are killed in the country, representing approximately 70% of the world's legal harvest.¹⁰ Canada is the only country that currently allows polar bear trophy hunting. While under Canadian Territorial quota systems, only Inuit hunters may receive

⁴ See 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 35. Available at: http://www.sararegistry.gc.ca/virtual_sara/files/cosewic/sr_polar_bear_0808_e.pdf (last visited Jan. 6, 2012).

⁵ S.C. Amstrup, 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 4.
⁶ *Id.*

⁷ 73 Fed. Reg. at 28,279 (FWS acknowledging harvest remains a "potential stressor, and could exacerbate the effects of habitat loss in the future"); see also CoP15 Prop. 3: U.S. Proposal for CITES Appendix 1 Uplisting for Polar Bears (Dec. 21, 2009), at 3 ("The decrease in polar bear habitat – sea ice – exacerbates all other potential threats to polar bear, including but not limited to, utilization and trade . . .").

⁸ Amstrup 2007, at 31.

⁹ See PBSG, Resolutions from the 15th meeting of the PBSG in Copenhagen, Denmark, 2009. Available at: <http://pbsg.npolar.no/en/meetings/resolutions/15.html>.

¹⁰ E. Peacock, A.E. Derocher, G.W. Thiemann, and I. Stirling. 2011. Conservation and management of Canada's polar bears (*Ursus maritimus*) in a changing Arctic. CAN. J. ZOOL. 89: 371-385, at 372.

“tags” to take polar bears, in some Territories those tags may be sold to non-aboriginal sport-hunters on Inuit-guided hunts.¹¹ As of 2009, 87% of all commercially-exported polar bear skins came from Canada, and the demand and price for polar bear furs is rising.¹² Recognizing the impacts of trade on the declining species, in 2009, the United States proposed to uplist the polar bear to Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), which would have banned the commercial polar bear trade.¹³

Further, the Canadian Territory of Nunavut has a history of unsustainable polar bear harvest. For example, in 2005, scientists estimated that 88 bears could be sustainably harvested annually from the Baffin Bay polar bear population, which inhabits both Canada and Greenland.¹⁴ Yet that year, Nunavut increased harvest from 64 to 105 bears per year, in part because it assumed a low harvest of the population in Greenland. However, when Greenland’s actual harvest became clear, scientists determined the Baffin Bay population was *declining* and harvest levels were unsustainable.¹⁵ Greenland responded by instituting a quota and reducing harvest, but in 2008, Nunavut refused to change its harvest levels. Nunavut believed the scientific data regarding the population’s decline was outdated and instead relied on Traditional Ecological Knowledge (“TEK”) of Inuit hunters that there were more bears in the region.¹⁶ However, scientists had already considered and rejected the claim that an increasing number of bears spotted by coastal village residents indicates an increase in population numbers; instead, both the Baffin Bay and Western Hudson Bay populations were known to be declining.¹⁷

Accordingly, recognizing the continued Baffin Bay harvest as unsustainable, the European Union then banned the import of Baffin Bay polar bear hides from Canada, and later,

¹¹ See N.J. Lunn, M. Branigan, L. Carpenter, J. Justus, D. Hedman, D. Larsen, S. Lefort, R. Maraj, M. E. Obbard, E. Peacock, and F. Pokiak. 2010. Polar Bear Management in Canada, 2005-2008, pp. 87-114 in M. E. Obbard, G. W. Thiemann, E. Peacock, and T. D. DeBruyn, editors. 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. vii + 235 pp. Available at: <http://pbsg.npolar.no/export/sites/pbsg/en/docs/PBSG15proc.pdf> (last visited Jan. 17, 2012); see also Peacock 2011, at 374 (describing Canada’s co-management and quota system).

¹² See CoP15 Prop. 3: U.S. Proposal for CITES Appendix 1 Uplisting for Polar Bears (Dec. 21, 2009), at 7 (citing UNEP-WCMC CITES trade database); T. Hopper, N.W.T. ups price paid for polar bear pelts to \$1,750 as demand for the fur rises, National Post (Jan. 3, 2012). Available at: <http://news.nationalpost.com/2012/01/03/n-w-t-ups-price-paid-for-polar-bear-pelts-to-1750-as-demand-for-the-fur-rises/> (last visited Jan. 4, 2012).

¹³ See generally, *id.*

¹⁴ Peacock 2011, at 374-75; see also Obbard 2010, at 35-37.

¹⁵ Peacock 2011, citing IUCN/SSC PBSG. 2006. Proceedings of the 14th Working Meeting of the IUCN/SSC Polar Bear Specialist Group, Seattle, Wash., USA, 20–24 June 2005. Edited by J. Aars, N.J. Lunn, and A.E. Derocher. International Union for Conservation of Nature/Species Survival Committee (IUCN/SSC) Polar Bear Specialist Group (PBSG), Gland, Switzerland, and Cambridge, UK.

¹⁶ Obbard 2010, at 36; Peacock 2011, at 375.

¹⁷ I. Stirling and C. L. Parkinson. 2006. Possible effects of climate warming on selected populations of polar bears (*Ursus maritimus*) in the Canadian Arctic. *Arctic* 59:261-275 (stating “[w]e suggest that the increase in numbers of sightings of polar bears in Foxe Basin and Davis Strait may also be influenced by factors related to earlier breakup of the sea ice”).

the federal government of Canada itself banned exports from the Baffin Bay population.¹⁸ Then, only after the United States had proposed to increase polar bear protections under CITES, which would have prohibited commercial trade of all polar bear parts, Nunavut agreed to reduce Baffin Bay polar bear harvest to pre-2005 levels in 2010.

B. The Declining Western Hudson Bay Population of Polar Bears

The Western Hudson Bay population of polar bears is the world's best studied population, the most viewed by tourists, and the first for which climate change impacts were documented.¹⁹ Inhabiting portions of the Territory of Nunavut and the Province of Manitoba, including the area around Churchill, scientists estimate the Western Hudson Bay population has declined to only about 700 animals, as of September 2010.²⁰ Unlike the more northern polar bear populations, the Western Hudson Bay ("WHB" or "WH") bears must survive for several months without sea ice. When the Hudson Bay sea ice breaks up in the summer, the bears "are cut off from their sea ice prey, and must rely on fat reserves for approximately 4 months" until the Bay freezes again in the late fall.²¹

The Western Hudson Bay population is currently "declining."²² A seminal 2007 study by Eric Regehr and others documented the results of two-decades of capture analysis by the Canadian Wildlife Service and found that the population had declined by 22% between 1984 and 2004, to just 935 animals.²³ The study found that, due to increasing air temperatures, spring sea ice break-up occurs 3 weeks earlier than it did 30 years ago, and survival for subadult and senescent-adult bears "decreased by 2-5% for each week earlier than average that the sea ice broke up."²⁴ Further, in addition to attributing the population's decline to "increased natural mortality associated with earlier sea ice breakup, . . . the continued harvest of approximately 40 polar bears per year . . . , which at some point ceased to be sustainable," contributed to the decline.²⁵ The Regehr 2007 study's population estimates were generally supported by

¹⁸ Peacock 2011, at 375.

¹⁹ 73 Fed. Reg. at 28,217; *see also* E.V. Regehr, N.J. Lunn, S.C. Amstrup, and I. Stirling. 2007. Effects of earlier sea ice breakup on survival and population size of polar bears in Western Hudson Bay. *J. Wildl. Manage.* 71(8): 2673-3683, attached as Ex. A.

²⁰ N.J. Lunn. 2011. Western Hudson Bay polar bear sub-population estimate. Unpublished report, Science and Technology Branch, Environment Canada, 9pp., at 3, attached as Ex. B.

²¹ Ex. A: Regehr 2007, at 2673 (also noting pregnant females must survive for up to 8 months without food because they remain in their dens until early spring).

²² 73 Fed. Reg. at 28,217; *see also* Obbard 2010, at 67; Lunn 2010, at 95.

²³ Ex. A: Regehr 2007, at 2679.

²⁴ *Id.* at 2677; *see also* Stirling and Parkinson 2006 (finding average weight of female Western Hudson Bay polar bears declined by about 65 kg between 1980 and 2004, and projecting cub production could cease in 20 to 30 years if climate trends continue); 73 Fed. Reg. at 28,267 (listing other studies showing correlation between earlier sea ice break-up and declining recruitment and body condition for polar bears in western Hudson Bay).

²⁵ Ex. A: Regehr 2007, at 2680; *see also* Obbard 2010, at 59 (PBSG noting "[o]nce the WH subpopulation began to decline, [existing polar bear] harvest was no longer sustainable but remained unchanged. Thus, its additive contribution to the reduction in total subpopulation size probably accelerated the decline between 1988 and 2004"); 73 Fed. Reg. at 28,238 (noting, based on Regehr 2007, "overharvest did not

subsequent research from the Government of Nunavut's own Department of Environment.²⁶

Unfortunately, since the 2007 study, declines in the Western Hudson Bay polar bear population have continued. A June 2011 population viability analysis found that “[d]espite recent reductions in the Total Allowable Harvest, . . . the population of WHB in the fall of 2010 *may have declined to less than 700 animals,*” from the 935 estimated in 2004.²⁷ The study also documented continued decline in the extent and timing of sea ice, fewer females accompanied by cubs-of-the-year, and declining litter production since 2005.²⁸ Further, in 2010, both the PBSG and the Canadian Polar Bear Technical Committee confirmed the population's estimated risk of future decline over the next ten years is “Very High.”²⁹

C. Harvest of Western Hudson Bay Polar Bears in Nunavut

Despite the declining status of the Western Hudson Bay polar bear population, harvest both for subsistence purposes and for sport-hunting has continued in Nunavut. Pursuant to the 1993 Nunavut Land Claims Act, polar bear harvest in Nunavut is managed by the Territorial Government of Nunavut, upon the advice and recommendation of the Nunavut Wildlife Management Board (“NWMB” or “Board”) – although harvest remains subject to Canada's international treaty obligations.³⁰ While Nunavut initially reduced Western Hudson Bay polar bear harvest after acknowledging steep population declines in 2007, as described below, Nunavut has now substantially increased allowable take, despite evidence of yet further population decline.

1. 2007 Harvest Reductions in Response to Population Declines

In 2005, the Government of Nunavut set the total allowable harvest (“TAH”) of Western Hudson Bay polar bears at 56 bears per year, based on an estimated population of 1400 bears.³¹

cause the population decline; however, as the population declined, harvest rates could have contributed to further depressing the population”).

²⁶ E. Peacock and M. Taylor. 2007. Polar Bears of western Hudson Bay: Survey extension investigation. NWMB Project # 2-07-19, at 2 (“The actual WH population numbers and annual survival rates could be slightly higher than those estimated by Regehr *et al.* (2007), but even if this is true, our results still support the population decline and significantly reduced population productivity reported for WH polar bears (Regehr *et al.* 2007).”), attached as Ex. C.

²⁷ See Ex. B: Lunn 2011, at 3 (emphasis added).

²⁸ *Id.* at 5-8.

²⁹ Available at: <http://pbsg.npolar.no/en/status/status-table.html#bottom> (updated March 2010); Obbard 2010, at 67; Lunn 2010, at 95 (showing likelihood of decline to be “100%”).

³⁰ See Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (“Nunavut Land Claims Agreement of 1993”) Art. 5.3.4 (requiring the Nunavut Wildlife Management Board and Nunavut's Minister of Environment “shall take account of . . . the terms of . . . international agreements pertaining to . . . wildlife” in setting harvest levels); see also Peacock 2011, at 374 (“Land-claim agreements are, however, subject to federal regulations and international treaties to which Canada is a signatory.”).

³¹ See Memorandum of Agreement for the Management of the “Western Hudson” Polar Bear Population (March 9, 2005), at 8; see Decision of the Nunavut Wildlife Management Board concerning the level of

However, in 2007, after being presented with much lower population estimates and evidence of climate change impacts, Nunavut reduced the total allowable harvest from 56 bears annually to 38 for the 2007-08 season, and then further to 8 bears annually for the following seasons.³² The Nunavut Wildlife Management Board explained that, based on the Canadian Wildlife Service's 20-year population survey documented in Regehr 2007, "[t]he best available scientific information" showed "that the maximum [Western Hudson Bay] polar bear population in recent years . . . [had been] reduced to 935 by 2004." It further noted that earlier spring ice break-up and later fall freeze-up "is having a detrimental effect on the hunting practices of WH polar bears." Accordingly, "[f]aced with both th[e] uncertainty [related to climate change impacts] and the risk of serious harm to the WH polar bear population," and adopting a "precautionary approach," the Board concluded harvest reductions were "necessary" to conserve the species.³³

2. Nunavut's 2011/2012 Proposal to Drastically Increase Harvest

Despite its previous findings and additional evidence of *further* population declines since 2007, in August of 2011, the Government of Nunavut proposed to drastically *increase* the total allowable harvest of Western Hudson Bay polar bears from 8 to 38 – a 475% increase.³⁴ To explain the increase, Nunavut asserted that the Western Hudson Bay polar bear population estimate is now "uncertain" due to "the difference in perspective between Traditional Ecological Knowledge and scientific knowledge." Specifically, "Inuit information suggests that the populations may not be declining as indicated by the scientific information" based on hunters' historic and current polar bears sightings.³⁵ Nunavut further claimed that the Regehr 2007 study upon which the earlier quota reductions were based had not fully sampled the population's northern range in Nunavut, citing a 2007 survey by Peacock and aerial surveys from 2010.³⁶ Nunavut submitted its proposal for review by the Nunavut Wildlife Management Board on August 18, 2011, and the Board requested public comment.

regional total allowable harvest for the Western Hudson Bay Polar Bear Population. June 20, 2007, at 1, attached as Ex. D (describing 2005 decision).

³² See Ex. D: Decision of the Nunavut Wildlife Management Board concerning the level of regional total allowable harvest for the Western Hudson Bay Polar Bear Population. June 20, 2007.

³³ *Id.* at 2, 3.

³⁴ See Request for a decision of the Nunavut Wildlife Management Board on the Total Allowable Harvest for the Western Hudson Bay Polar Bear Population. Aug. 18, 2011, attached as Ex. E. Specifically, Nunavut proposed a *total* TAH for the Western Hudson Bay population of 42, which allows the Province of Manitoba to take 4 "problem" bears, leaving 38 bears for Nunavut hunters. *Id.* at 3. However, Nunavut proposed only 21 bears actually be harvested this year to account for bears that were "over-harvest[ed]" in previous years, which Nunavut suggests was approximately 19 bears. *Id.* Nunavut provided no explanation for its numbers, which do not add up (21 bears allowed to be harvested + 19 bears overharvested in previous years = 40 bears, not the 38 set as the TAH). *Id.*

³⁵ *Id.* at 2, 3.

³⁶ *Id.* Nunavut's proposal actually cites "Peacock et al. 2008." However, this survey was completed in 2007 and reported in Peacock and Mitchell (2007), which is included by the Nunavut Wildlife Management Board as "Supporting Evidence" for Nunavut's proposal. See September 9th-October 10th 2011, Written Hearing to consider proposed modifications to the 2011/2012 level of Total Allowable Harvest for the Western Hudson Bay Subpopulation in the Nunavut Settlement Area, available at: <http://www.nwmb.com/english/meetings/sept2011.php> (last visited Jan. 17, 2012).

3. Scientific Opposition to Nunavut's Proposal

Both the PBSG and Environment Canada opposed Nunavut's proposed increased harvest and encouraged the Nunavut Wildlife Management Board to reject the increase. The PBSG "strongly oppose[d]" the Nunavut proposal because the harvest levels are "not sustainable" and are "*clearly contrary to what would be recommended on the basis of 'the best available scientific evidence,'*" as is required by the Agreement on the Conservation of Polar Bears.³⁷ The PBSG explained that "[b]ased on the results of over 25 years of intensive research, it has been demonstrated in the peer-reviewed scientific literature that the population of polar bears in western Hudson Bay has declined by over 20% between 1987 and 2004." Further, "the population appears to be declining, even with no harvest at all." Accordingly, "[b]y definition, it is not possible to have a sustainable harvest from a declining population."³⁸

The PBSG further contested Nunavut's claims that the science is "uncertain." The PBSG explained that, in response to Inuit Traditional Ecological Knowledge ("TEK") claims that the population had been underestimated because surveys failed to include bears in most northern part of the population's range, two additional surveys had been performed. These studies – the 2007 Peacock survey and the 2010 aerial survey referenced in Nunavut's proposal – "were designed using local TEK to identify possible concentrations of polar bears in Nunavut that might have been missed." Yet, "neither survey located concentrations of polar bears that might have been missed by earlier surveys."³⁹

Similarly, Environment Canada opposed the increase. Environment Canada explained that the rate Nunavut chose as the "maximum sustainable harvest" (4.5% of the population) is a rate intended for "healthy polar bear populations, and *should not be applied to any population that is showing evidence of declines in population size,*" like the Western Hudson Bay population.⁴⁰ Further, like the PBSG, the agency noted that recent studies had discredited the assumption that the population's northern areas contained unsampled and thus uncounted bears.⁴¹ Environment Canada also noted the June 2011 population viability analysis finding the population had declined to just 700 individuals. Accordingly, the agency concluded that "even a single-year increase in harvest could have a considerable negative impact on the population as a whole."⁴²

³⁷ See Letter from Dag Vongraven, Chair, IUCN/Polar Bear Specialist Group, to Nunavut Wildlife Management Board (Sept. 29, 2011), at 1, 2, attached as Ex. F (emphasis added).

³⁸ *Id.* at 1.

³⁹ *Id.* at 2.

⁴⁰ See Letter from Virginia Potter, Director General of the Canadian Wildlife Service, to Nunavut Wildlife Management Board (Oct. 7, 2011), at 1, attached as Ex. G.

⁴¹ *Id.* at 2 (noting "the two recent studies" cited by Nunavut to support their claim had "both . . . concluded that bears occurred at low densities in the . . . area, and that as such, they had been adequately accounted for in previous population estimates").

⁴² *Id.* at 1-2.

4. Nunavut's Approval of Increased Harvest

Despite Environment Canada's opposition and PBSG's opinion that Nunavut's "proposed increase is not sustainable and thus should be rejected," on October 18, 2011, the Nunavut Wildlife Management Board approved a total allowable harvest of 38 bears.⁴³ On October 26, the Government of Nunavut accepted the Board's decision and approved the increased harvest.⁴⁴ Neither the Nunavut Wildlife Management Board nor the Government of Nunavut addressed the PBSG's or Environment Canada's opposition in their approval letters.⁴⁵

III. Pursuant to Pelly, the Secretary Should Certify Canada's Management of Polar Bears in Violation of the Polar Bear Agreement.

Under the Pelly Amendment, when the Secretary "finds that nationals of a foreign country . . . are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary . . . shall certify such fact to the President." 22 U.S.C. § 1978(a)(2). The President may then act to "prohibit . . . the importation into the United States of any products from the offending country." *Id.* § 1978(a)(4).

Here, as described in detail above, Canadian "nationals" in Nunavut are engaging in "taking" of polar bears that "diminishes the effectiveness" of the 1973 Agreement on the Conservation of Polar Bears. The Agreement prohibits the take of polar bears, unless that take is "in accordance with sound conservation practices based on the best available scientific data." Art II, III(I). However, Canada has allowed Nunavut to drastically increase the "take" of declining Western Hudson Bay polar bears, in direct contravention of the "best available scientific data" that clearly demonstrates the harvest is unsustainable.

In addition to directly violating the terms of the Agreement, the continued harvest of threatened polar bears from this already steeply declining population will only hasten the population's extinction. Because Canada's action amplifies the already high likelihood that this population of polar bears – the most viewed polar bear population in the world – may be lost forever, it undoubtedly "diminishes the effectiveness" of a treaty negotiated to protect the species itself. 22 U.S.C. § 1978(a)(2). The Secretary has a duty to prompt Canada, and the Canadian Territory of Nunavut, to stop its history of unsustainable polar bear hunting to preserve any chance this species has for a future.

⁴³ See Letter from Mikidjuk Akavak, Chairperson of the Nunavut Wildlife Management Board, to Minister Daniel Shewchuk (Oct. 19, 2011) (NWMB informing Nunavut Minister of Environment that, at its Oct. 18, 2011 meeting, the NWMB "RESOLVED that the NWMB increase the regional total allowable harvest to 38" for the 2011-2012 season), attached as Ex. H.

⁴⁴ Letter from Minister Shewchuk, Nunavut Minister of Environment, to Mikidjuk Akavak (Oct. 26, 2011) (Minister of Environment informing NWMB of formal approval of TAH increase), attached as Ex. I.

⁴⁵ The NWMB stated that it had made its decision "after carefully considering all of the available evidence and arguments" submitted, but that it would later "provide full justifications and reasons for its decision." Oct. 19, 2011 Letter from Akavak to Minister Shewchuk. However, the Board has not yet issued that explanation.

Accordingly, the Center petitions the Secretary to certify that Canada's management of polar bears in the Western Hudson Bay "diminishes the effectiveness" of the 1973 Agreement on the Conservation of Polar Bears, pursuant to the Pelly Amendment. 22 U.S.C. § 1978(a)(2). The Center further requests the Secretary recommend the President prohibit importation of Canadian wildlife products into the United States until Canada or Nunavut reduces the harvest of Western Hudson Bay polar bears to sustainable levels. *Id.* § 1978(a)(4).

Please contact us if you have any questions, would like more information, or if there is anyway the Center can assist you in acting upon this Petition. As required by the Pelly Amendment, we expect the Secretary to act "promptly" in investigating this issue. *Id.* § 1978(a)(3)(B).

Sincerely,



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LIST OF EXHIBITS

- Ex. A:** E.V. Regehr, N.J. Lunn, S.C. Amstrup, and I. Stirling. 2007. Effects of earlier sea ice breakup on survival and population size of polar bears in Western Hudson Bay. *J. Wildl. Manage.* 71(8): 2673-3683.
- Ex. B:** N.J. Lunn. 2011. Western Hudson Bay polar bear sub-population estimate. Unpublished report, Science and Technology Branch, Environment Canada, 9pp.
- Ex. C:** E. Peacock and M. Taylor. 2007. Polar Bears of western Hudson Bay: Survey extension investigation. NWMB Project # 2-07-19.
- Ex. D:** Decision of the Nunavut Wildlife Management Board concerning the level of regional total allowable harvest for the Western Hudson Bay Polar Bear Population. June 20, 2007.
- Ex. E:** Government of Nunavut. Request for a decision of the Nunavut Wildlife Management Board on the Total Allowable Harvest for the Western Hudson Bay Polar Bear Population. Aug. 18, 2011.
- Ex. F:** Letter from Dag Vongraven, Chair, IUCN/Polar Bear Specialist Group to Nunavut Wildlife Management Board. Sept. 29, 2011.
- Ex. G:** Letter from Virginia Potter, Director General of the Canadian Wildlife Service to Nunavut Wildlife Management Board. Oct. 7, 2011.
- Ex. H:** Letter from Mikidjuk Akavak, Chairperson of the Nunavut Wildlife Management Board, to Minister Daniel Shewchuk. Oct. 19, 2011.
- Ex. I:** Letter from Minister Shewchuk, Nunavut Minister of Environment, to Mikidjuk Akavak. Oct. 26, 2011.