

Comments Submitted by the Attorneys General of the State of Washington, the Commonwealth of Massachusetts, and the States of Illinois, New Jersey, Vermont, Michigan, Connecticut, Delaware, Oregon, Rhode Island, New York, Maine, New Mexico, Minnesota and Maryland on the Draft Supplemental Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, 88 Fed. Reg. 62104 (Sept. 8, 2023)

**COMMENTS OF THE ATTORNEYS GENERAL OF THE STATE OF WASHINGTON,
THE COMMONWEALTH OF MASSACHUSETTS, AND THE STATES OF ILLINOIS,
NEW JERSEY, VERMONT, MICHIGAN, CONNECTICUT, DELAWARE, OREGON,
RHODE ISLAND, NEW YORK, MAINE, NEW MEXICO, MINNESOTA AND
MARYLAND.**

November 7, 2023

Via Email and Electronic Filing

ATTN: Coastal Plain Draft Supplemental EIS

Ms. Serena Sweet, Project Lead

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<https://eplanning.blm.gov/eplanning-ui/project/102555/510>

RE: Draft Supplemental Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, 88 Fed. Reg. 62104 (Sept. 8, 2023): Comments Submitted by State Attorneys General

Dear Ms. Sweet:

The undersigned Attorneys General (States) submit these comments on the Draft Supplemental Environmental Impact Statement (DSEIS), pursuant to the National Environmental Policy Act (NEPA), §§ 4321-4347, for the proposed Arctic National Wildlife Refuge (Arctic Refuge) Coastal Plain Oil and Gas Leasing Program, 88 Fed Reg. 62,104 (Sept. 8, 2023).

In the comments that follow, the States recognize and appreciate that the 2023 DSEIS provides a more thorough analysis of the significant environmental impacts of the proposed Leasing Program than the 2019 Final Environmental Impact Statement (FEIS) and 2020 Record of Decision (ROD). The States note with approval the designation of the U.S. Fish and Wildlife Service (USFWS) as a co-lead agency because it manages the Arctic Refuge and its lands and waters to help ensure protection and survival of its unparalleled ecosystem, and has the expertise to evaluate impacts to wildlife and habitat.

Although the DSEIS presents an alternative (alternative D) that would cause fewer local and global environmental impacts than other action alternatives, the DSEIS also demonstrates that *any* action alternative and leasing program with oil and gas development and production would have unacceptable environmental impacts. The States therefore continue to urge BLM and USFWS (the Agencies) to adopt the no-action alternative. If the Agencies feel compelled to

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adopt one of the action alternatives, the States urge them to select alternative D, the least impactful alternative.

I. SUMMARY OF COMMENTS

The 2023 DSEIS presents a more complete and informative analysis of the Lease Program's impacts on both the local environment and the global climate than did the 2019 FEIS and 2020 ROD. Addition of the Fish and Wildlife Service as a Co-Lead Agency provides much-needed expertise on wildlife and habitat. This more complete analysis further demonstrates that under any alternative presented, oil and gas production from the Arctic Refuge would have unacceptable effects on the Earth's climate.

Alternative D would offer a smaller portion of the Arctic Refuge Coastal Plain for leasing, and includes some additional protections for the local environment. However, any oil and gas development, even at alternative D's more modest scale, would have major and unacceptable impacts both on this pristine Arctic landscape and on the global climate.

Combustion of the oil and gas that would be produced from the Lease Program under any action alternative described would significantly increase greenhouse gas (GHG) emissions, worsen the impacts of climate change, both globally and in our States, and set back state and national efforts to address the climate crisis. Development of a wholly new fossil fuel source is untenable, as even the world's currently known oil and gas reserves cannot be combusted without exceeding global GHG emission targets.

Although the DSEIS presents a more complete analysis of how the Lease Program might affect migratory birds than the 2019 FEIS, significant data gaps as to how bird populations would be impacted remain. This uncertainty strongly counsels towards protecting migratory birds by adopting the no-action alternative. Any significant impacts on migratory birds would be felt not only in the Arctic Refuge, but in the states to which they annually migrate. At a minimum, the Agencies should select alternative D to ensure the greatest protections for migratory birds should the Agencies deem it necessary to select an action alternative.

Given the local and global impacts that would be produced by any action alternative and the lack of information regarding how this critical environment for migratory birds would be affected, selection of the no-action alternative (alternative A) is the only prudent course of action.

II. BACKGROUND

The Lease Program Would, for the First Time, Authorize Oil and Gas Development in an Unspoiled and Fragile Area of the Arctic.

The Arctic National Wildlife Refuge (Arctic Refuge) is often referred to as "America's Serengeti," and the Refuge's 1.56 million acre Coastal Plain is the most biologically productive

part of the Arctic Refuge for wildlife and the center of wildlife activity.¹ Species that are particularly reliant on the Coastal Plain’s unique ecosystem include caribou, polar bears, and millions of birds that migrate to and from six continents and to or through all 48 lower states, including the undersigned States.² The migratory birds that depend on the Coastal Plain are ecologically and economically important nationwide, and in particular to our States. This Arctic and Coastal Plain ecosystem is particularly vulnerable to environmental stressors, including climate change, which has caused thinning sea ice and thawing of permafrost in the region.

The National Wildlife Refuge System Administration Act (Refuge Act)³ and Section 1002 of the Alaska National Interest Lands Conservation Act (ANILCA)⁴ govern administration of the Arctic Refuge, including the Coastal Plain. Under ANILCA, the Secretary must administer the Arctic Refuge “in accordance with the laws governing the administration of units of the National Wildlife Refuge system, and this act.”⁵ ANILCA identifies four conservation purposes for the Arctic Refuge: 1) conservation of wildlife and their habitat (including migratory birds); 2) fulfillment of international treaty obligations with respect to wildlife and their habitats; 3) protection of water quality and quantity; and 4) opportunity for continued subsistence uses by local residents.⁶ The Refuge Act also requires that the Secretary manage each refuge “to fulfill the mission”⁷ of the National Wildlife Refuge System, “as well as the specific purposes for which that refuge was established.”⁸

The Lease Program analyzed in the 2023 DSEIS would, for the first time, open the unspoiled Coastal Plain to oil and gas leasing, exploration, and development, resulting in severe,

¹ Laura B. Comay et al., Cong. Research Serv., RL33872, Arctic National Wildlife Refuge (ANWR): An Overview at 4, 18 (Jan. 9, 2018) (quoting U.S. Dept. of the Interior, Fish and Wildlife Serv., Geological Survey, and Bureau of Land Mgmt., Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment, Report and Recommendation to the Congress of the United States and Final Legislative Environmental Impact Statement, 1987 [commonly referred to as the 1002 Report]).

² The States hereby incorporate the description of the Coastal Plain and its wildlife from their Comment Letter on the SEIS Scoping Process. Comments Submitted by State Attorneys General for the State of Washington, the Commonwealth of Massachusetts, and the States of Connecticut, Delaware, Illinois, Maine, Minnesota, New Jersey, New York, Oregon, and Vermont on the Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, 86 Fed. Reg. 147 (Aug. 4, 2021)(“States’ Scoping Comments”).

³ 16 U.S.C. § 668dd.

⁴ 16 U.S.C. § 3142 (ANILCA).

⁵ *Id.* at § 304(a).

⁶ *Id.* at § 302(i)(B).

⁷ The “mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2).

⁸ 16 U.S.C. § 668dd(a)(3)(A).

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long-lasting environmental harm to the Coastal Plain’s unique and sensitive Arctic ecosystem and contributing to global climate change, even as the climate crisis deepens. The Lease Program’s impacts on climate change and migratory birds are of vital interest to the States. Although these comments on the 2023 DEIS focus on the impacts to climate change and migratory birds, oil and gas exploration and development in the Coastal Plain would have many other lasting, far-reaching, and devastating environmental and social impacts. Due to its harsh climate, environmental impacts in the Arctic Refuge tend to be long-lived. These include impacts to indigenous communities that rely on the Coastal Plain for subsistence and to wildlife including caribou and polar bears (listed in 2008 as threatened under the federal Endangered Species Act (ESA), in part due to habitat loss from climate change).

The Climate Change Crisis is Harming the States Now.

The existential threat posed by climate change—and the urgent need for action—has been underscored in reporting by the Intergovernmental Panel on Climate Change (IPCC), an international scientific body of the United Nations. The 2021 IPCC report⁹ warned that recent warming of the Earth’s climate system has resulted in widespread and rapid changes to the atmosphere and oceans, which in turn have increased the frequency and intensity of extreme heat events, marine heatwaves, heavy precipitation events, droughts, and more severe hurricanes, typhoons, and cyclones.¹⁰

Our States are now experiencing unprecedented environmental, public safety, health, and economic damages resulting from the worsening climate crisis, including devastating impacts of extreme weather events, sea level rise, storm surge and coastal flooding, drought and wildfires, ocean acidification, and inland flooding.¹¹ The general contours of how climate change affects our States was described in the Comment Letter on the SEIS Scoping Process, incorporated here by reference.¹²

⁹ See Masson-Delmotte V. et al., IPCC, Summary for Policymakers, In: *Climate Change 2021: The Physical Science Basis, Intergovernmental Panel on Climate Change* (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf.

¹⁰ *Id.* at 19.

¹¹ See Crimmins, A. et al., eds., *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment*, U.S. Global Change Research Program (2016), <https://health2016.globalchange.gov/>.

¹² States’ Scoping Comments, *supra* note 2.

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As climate change worsens, the effects on the States continue to increase. Temperatures continue to rise¹³, sea levels rise and coastal flooding increases¹⁴, and the likelihood of extreme weather and severe droughts continues to rise. Last September, more than 61 million people in the United States “were under active extreme heat advisories, watches, and warnings.”¹⁵ During that heatwave, temperatures in Merced and Sacramento, California reached 116°F, the highest temperature recorded in those cities since record keeping began.¹⁶ Meanwhile, hurricanes of historic force swept across the southern and eastern United States—testing energy system resilience and producing record-breaking rainfall and fatal flash floods.¹⁷ NOAA reports that between January and July of 2023, the U.S. experienced 15 severe weather and climate disaster events, costing over \$1 billion each.¹⁸ This included the devastating floods experienced by Vermont in July 2023. And these climate impacts are projected to worsen.¹⁹ As average surface temperatures rise and the intensity and frequency of these types of extreme weather events increases,²⁰ our States face direct and compounding challenges to protect the health and welfare of our residents, our economies, and our natural resources.

¹³ According to the World Meteorological Organization, the last eight years were the eight warmest years on record. See: World Meteorological Organization, *Past eight years confirmed to be the eight warmest on record* (Jan. 12, 2023), <https://public.wmo.int/en/media/press-release/past-eight-years-confirmed-be-eight-warmest-record>.

¹⁴ For example, in Massachusetts, where 53% of all residents live in coastal communities, sea level is projected to rise by 0.6 to 1.1 feet by 2030 (above 2000 levels). And some projections estimate a 2.3 to 4.2 feet sea level rise by 2070. See Massachusetts Department of Public Health, *Climate Hazard Assessment Profile: Sea Level Rise* (May, 2022), <https://www.mass.gov/doc/climate-hazard-assessment-profile-sea-level-rise/download>.

¹⁵ NASA Earth Observatory, *A Long-Lasting Western Heatwave* (September 6, 2022), <https://earthobservatory.nasa.gov/images/150318/a-long-lasting-western-heatwave>.

¹⁶ *Id.*

¹⁷ See, e.g., National Oceanic and Atmospheric Administration, *National Hurricane Center Tropical Cyclone Report – Hurricane Ian* (September 2022), https://www.nhc.noaa.gov/data/tcr/AL092022_Ian.pdf; Jesse McKinley et al., *Flooding From Ida Kills Dozens of People in Four States*, N.Y. TIMES (Sept. 2, 2021, updated Sept. 15, 2021), <https://www.nytimes.com/live/2021/09/02/nyregion/nyc-storm>.

¹⁸ NOAA, *July 2023 brought record-high temperatures, devastating floods across the U.S.* (Aug. 8, 2023), <https://www.noaa.gov/stories/july-2023-brought-record-high-temperatures-devastating-floods-across-us>.

¹⁹ See IPCC, 2023: Summary for Policymakers. In: *Climate Change 2023: Synthesis Report*. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)], IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001 (“IPCC 2023”).

²⁰ *Id.* at 13-14.

Addressing Climate Change Demands Reductions in Fossil Fuel Use.

Preventing the worst effects of climate change requires we limit the total amount of GHGs emitted into the atmosphere, and that the rate of GHG emission substantially decrease. The Paris Climate Agreement recognizes the need to hold long-term global average temperatures to “well below 2 °C above pre-industrial levels” and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.²¹ While this would represent a profound change relative to the pre-industrial climate, the 1.5 °C limit would avoid some of the very worst projected climate change effects. Achieving this ambitious goal will require “nothing less than a complete transformation of how we produce, transport, and consume energy.”²² Reaching the goal of net-zero global emissions by 2050 will require reducing fossil fuels’ share of the total energy supply from 80 percent in 2020 to just over 20 percent in 2050.²³

In response to the global climate crisis, the United States, as well as our States individually, have committed to ambitious GHG reduction targets. The United States recently prepared and submitted its Nationally Determined Contribution (NDC) under Article 4 of the Paris Climate Agreement.²⁴ The NDC commits the United States to net reductions in GHG emissions of 50-52 percent below 2005 levels by 2030.²⁵ Many of our States have adopted aggressive mandates and policies that will require even deeper reductions in GHG emissions.²⁶

²¹ U.N., Paris Agreement, Art. 2, U.N. Doc. FCC/CP/2015/L.9 (Dec. 12, 2015) (“Paris Agreement”).

²² International Energy Agency, *Net Zero by 2050: A Roadmap for the Energy Sector*, 13 (2021), https://iea.blob.core.windows.net/assets/beceb956-0dcf-4d73-89fe-1310e3046d68/NetZeroBy2050-ARoadmapfortheGlobalEnergySector_CORR.pdf.

²³ *Id.* at. 57.

²⁴ U.N., *Nationally Determined Contributions Registry*, Climate Change (2021), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%2021%202021%20Final.pdf> (“NDC”).

²⁵ *Id.*

²⁶ **Washington:** Climate Commitment Act, ch. 316, 2021 Wash. Sess. Laws 2606 (codified as amended in scattered sections of Wash. Rev. Code tits. 43, 70A).; ²⁶ **See Delaware:** S.B 33, 151st Gen. Assem., 83 Del. Laws ch. 3 (2021) (codified at 26 *Del. C.* § 354, et seq.); **Maine:** 38 M.R.S. § 576-A (setting forth Maine’s greenhouse gas reductions of 45% below 1990 gross annual greenhouse gas levels by 2030 and 80% by 2050); **Maryland:** Effective June 1, 2022, Maryland law requires the State to reduce greenhouse gas emissions 60 percent below 2006 levels by 2031, and to achieve net-zero greenhouse gas emissions by 2045. Climate Solutions Now Act of 2022, 2022 Md. Laws, ch. 38, §§ 3-4; **Massachusetts:** Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, 2021 Mass. Acts. ch. 8, sec. 8, *see also* the Massachusetts Clean Energy and Climate Plan for 2025 and 2030 (June, 30, 2022), at 62 (requiring that by 2050, Massachusetts limit emission to achieve at least net zero greenhouse gas emissions statewide and economywide, and in no event higher than a level 85% below 1990 emissions baseline), <https://www.mass.gov/doc/clean-energy-and-climate-plan-for-2025-and-2030/download>; **Michigan:** Executive Directive No. 2020-10 (Mich. 2020); **New Jersey:** Global Warming Response Act, N.J.S.A. 26:2C-38. (finding “it is in the public interest . . . to limit the level of Statewide greenhouse gas emissions, and greenhouse gas emissions from electricity generated outside the State but consumed in the State . . . to 80 percent below the 2006 level by the

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Development of additional oil and gas resources is at cross-purposes with such policies, and threatens their success.

The 2023 DSEIS Was Issued to More Completely Assess the Environmental Impacts of a Leasing Program in the Arctic Refuge

In 2017, Congress included a provision in the Tax Cuts and Jobs Act of 2017, PL 115-97 (2017 Tax Act) which amended ANILCA to include “to provide for an oil and gas program on the Coastal Plain” to the existing conservation purposes for the Arctic Refuge.²⁷ In 2019, BLM issued its Final Environmental Impact Statement (FEIS) for the Lease Program, followed by a 2020 Record of Decision (ROD). BLM then held a lease sale on January 6, 2021, which resulted in thirteen bids on only eleven tracts.^{28, 29} No major oil or gas company bid. On January 19, 2021, BLM issued nine leases on nine tracts, totaling only 437,804 acres out of the 1,089,053 acres initially made available for leasing.³⁰

On January 20, 2021, President Biden issued Executive Order 13990, directing the Secretary of the Interior to pause and review the Coastal Plain Leasing Program.³¹ On June 1, 2021, BLM issued an order suspending all nine leases issued on January 19, 2021.³² Finally, on

year 2050.”); **New York:** N.Y. L. 2019, ch. 106, § 2; N.Y. PSL § 66-p (Climate Leadership and Community Protection Act mandates economy-wide greenhouse gas emissions reductions of 40 percent by 2030 and 85 percent by 2050 from 1990 levels); **Oregon:** ORS 469A.410 (requiring major electric utilities to eliminate GHG emissions by 2040); Oregon Administrative Rules chapter 340, division 271 (requiring reductions in greenhouse gas emissions from fossil fuels used in transportation, residential, commercial and industrial settings); **Vermont:** 10 V.S.A. § 578 (requiring reduction of Vermont’s greenhouse gas emissions of 26% from 2005 levels by 2025, 40% from 1990 levels by 2030, and 80% from 1990 levels by 2050).

²⁷ 2017 Tax Act § 20001(b)(2)(B)(v).

²⁸ See BLM, *2021 Coastal Plain Lease Sale Bid Recap* (Jan. 6, 2021) (“BLM 2021 Recap”), https://www.blm.gov/sites/blm.gov/files/docs/2021-01/BLM-Alaska_2021-Coastal-Plain-Sale-Bid-Recap_20210106.pdf.

²⁹ The bids averaged only \$26.00 per acre. *Id.* In contrast, from 1999 through 2018, lease sales in the NPR-A averaged \$47.20 per acre (bids totaling \$283,631,268 on 6,009,551). See BLM, *BLM Offers 3.98 Million Acres For Oil and Gas Lease Sale Within the NPR-A*, BLM press release (Nov. 5, 2019), <https://www.blm.gov/press-release/blm-offers-398-million-acres-oil-and-gas-lease-sale-within-npr> (summarizing Historical BLM Alaska NPR-A Oil & Gas Lease Sale Data). See also BLM, *Alaska Oil and Gas Lease Sales*, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/alaska>.

³⁰ See BLM, *2021 Coastal Plain Lease Report* (Jan. 19, 2021), https://www.blm.gov/sites/blm.gov/files/docs/2021-01/AK_CoastalPlain_OilandGas_LeaseReport_January%202021_508.pdf; See also BLM 2021 Recap.

³¹ Exec. Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037–7043, § 4(a) (Jan. 25, 2021).

³² Laura Daniel-Davis, Decision, Suspension of Operations and Production (June 1, 2021), <https://www.aidea.org/Portals/0/PressReleases/DOI%20to%20AIDEA%20-%20CP%20Lease%20Suspension%20-%206%201%2021.pdf>. BLM identified multiple “potential legal defect[s]” in the Lease Program’s Final EIS,

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September 6, 2023, the Secretary issued a memo cancelling the remaining leases in the Coastal Plain.³³

On August 4, 2021, BLM published a Notice of Intent to Prepare a Supplemental EIS for the Lease Program,³⁴ to more comprehensively analyze the Lease Program's environmental impacts pursuant to the National Environmental Policy Act (NEPA). Among the potential new alternatives to be considered in the SEIS were those that would "[d]esignate certain areas of the Coastal Plain as open or closed to leasing; permit less than 2,000 acres of surface development throughout the Coastal Plain; prohibit surface infrastructure in sensitive areas; and otherwise avoid or mitigate impacts from oil and gas activities."³⁵ The Supplemental EIS was to also consider impacts from GHG emissions from any Leasing Program, and correct potential legal deficiencies in the FEIS's climate impact analysis.³⁶ The DSEIS, the subject of these Comments, was issued on September 8, 2023. A major (and welcome) change was the addition of the USFWS as a co-lead agency.

III. THE STATES STRONGLY URGE BLM TO ADOPT THE NO-ACTION ALTERNATIVE OR, AT A MINIMUM, ALTERNATIVE D

The 2023 DSEIS clearly demonstrates that the only alternative consistent with the critical need and our efforts to combat climate change is the no-action alternative, alternative A. The States strongly urge that the Agencies adopt alternative A. If the Agencies decide to select an action alternative, the States strongly urge that the most protective alternative possible be adopted.

Inclusion of reasonable alternatives is the heart of NEPA review, and an agency must "discuss each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits."³⁷ The analysis must include the no-action alternative, and must discuss the reasons for eliminating any alternatives that were rejected for detailed

including "the EIS's treatment of foreign greenhouse gas [] emissions and compliance with section 810 of the Alaska National Interest Lands Conservation Act."

³³ Exhibit 1 to Defendants' Response in Opposition to Plaintiffs' and Intervenor-Plaintiff's Motion to Alter or Amend, *Alaska Indust Dev & Export Auth. V. Biden et al.*, No. 3:21-cv-00245 (D. Alaska. Sept. 19, 2023) ECF. 79-1 ("Cancellation Memo").

³⁴ 86 Fed. Reg. 41,989-90 (Aug. 4, 2021).

³⁵ *Id.*

³⁶ *Id.*

³⁷ 40 C.F.R. § 1502.14(b)

study.³⁸ An EIS must “inform[] decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts”³⁹ The 2019 FEIS unlawfully limited the scope of alternatives considered in several respects.

The States’ 2021 Scoping Comment letter noted that none of the action alternatives evaluated in the 2019 FEIS would sufficiently avoid, minimize, and mitigate environmental harms to assure compatibility with ANILCA and the Refuge Act.⁴⁰ The States therefore asked that BLM develop a new, minimally impactful action alternative, supported by robust and sound legal and technical analysis, and only select it as the preferred alternative if fully compatible with the Arctic Refuge’s conservation purposes. The 2023 DSEIS presents a more thorough analysis and a more meaningful range of action alternatives than the prior NEPA analysis. This analysis demonstrates, however, that any Lease Program would have unacceptable impacts on the Coastal Plain and the global climate. Even the least impactful alternative (alternative D), is incompatible with the United States’ commitment to reduce GHG emissions, and the States’ critical efforts to address climate change.

A. No-Action Alternative (alternative A)

The 2019 FEIS failed to meaningfully consider a no-action alternative. Although the States recognize that Congress has directed BLM to develop a Coastal Plain Leasing Program, that directive does not relieve BLM of its obligation to fairly consider the no-action alternative. NEPA requires that the environmental impact statement include the no-action alternative.⁴¹ Thus, the NEPA review process serves the important purpose of informing Congress, as well as BLM and the public, of the true environmental consequences of oil and gas development in the Coastal Plain. Failure to consider the no-action alternative meant that the impacts of any leasing program relative to baseline conditions was obscured. In their Comment letters submitted in response to both the 2018 DEIS and the 2021 Scoping period, the States urged BLM to carefully consider and adopt the no-action alternative.⁴² Due to the enormous consequences of leasing and

³⁸ 40 C.F.R. § 1502.14(a), (c); *See also Border Power Plant Working Grp. v. Dep’t of Energy*, 260 F. Supp. 2d 997, 1030 (S.D. Cal. 2003) (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir.1992) (an “agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action”)).

³⁹ *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004) (quoting former 40 CFR 1502.1; the current regulation is in substance identical (“inform decision makers and the public of reasonable alternatives which would avoid or minimize adverse impacts”)).

⁴⁰ States’ Scoping Comments.

⁴¹ 40 C.F.R. § 1502.14(c).

⁴² Comments Submitted by State Attorneys General of the States of Washington, Delaware, Oregon, Maine, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, Rhode Island, Vermont, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the District of Columbia on the Draft Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, 83 Fed. Reg. 67337 (Dec. 28,

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development in the Arctic Refuge, the States continue to urge the Agencies to adopt the no-action alternative.

B. Alternative B

Alternative B is similar to the previous alternative B presented in the 2019 FEIS, and would offer almost the entire Coastal Plain, including areas critical for caribou⁴³ and migratory birds⁴⁴, for leasing.⁴⁵ Alternative B would allow the largest area (2000 acres) of surface occupancy of any action alternative.⁴⁶ This alternative would also open the entire Coastal Plain (even areas not actually leased) to seismic exploration, which increases the likelihood of future oil and gas activity in other parts of the Coastal Plain.⁴⁷

By offering almost the entire Coastal Plain for leasing with only minimal protections for sensitive habitat areas, as well as providing for the entire area to be explored, alternative B unlawfully elevates oil and gas development over the other purposes of the Refuge. This is not consistent with the Refuge Act or ANILCA. Alternative B would also lead to the highest GHG emissions and therefore the greatest climate impacts of any alternative. Because this alternative would have unacceptable environmental impacts, and does not fully address and correct the legal deficiencies identified by the States and the Secretary,⁴⁸ the States urge the Agencies to reject it and adopt the no-action alternative.

C. Alternative C

Alternative C in the 2023 DSEIS is very similar to alternative D1 from the 2019 FEIS, with some additional protections. It represents improvements in some respects but would still have unacceptable impacts on the Arctic Refuge and global climate. Relative to alternative B, a smaller part of the Coastal Plain would be offered for lease.⁴⁹ Approximately a third of the

2018), at 11; States' Scoping Comments at 9.

⁴³ Alternative B would provide some timing restrictions on activities in the Porcupine Caribou primary calving habitat area in the South/southeast parts of the Arctic Refuge, but would not bar exploration and development activities, including permanent roads, in this area. *See* Lease Stipulation 7.

⁴⁴ For example, under alternative B, much of the area heavily used by snow geese would be open to leasing subject only to "standard terms and conditions." *See* BLM, *Coastal Plain Oil and Gas Leasing Program Supplemental EIS*, Draft, Vol. 2: Appendix A (Aug. 2023) ("2023 DSEIS App. A"), at Map 3-28.

⁴⁵ *See* BLM, *Coastal Plain Oil and Gas Leasing Program Supplemental EIS*, Draft, Vol. 1: Chapters 1 through 4, References, Glossary (Aug. 2023) ("2023 DSEIS"), at 2-4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ States' Scoping Comments; Cancellation Memo.

⁴⁹ *Id.*; *See also* 2023 DSEIS App. A at Map 2-3.

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Program Area, including much of the Porcupine Caribou Herd calving habitat, would be excluded from leasing.⁵⁰ Despite this, large parts of the Coastal Plain, including areas important for wildlife, would be opened for leasing subject only to standard lease conditions. Like the other action alternatives, the GHG emissions resulting from alternative C would be inconsistent with meeting our goals of combatting climate change.

By opening large areas of the Coastal Plain for leasing without protective conditions, alternative C would also unlawfully elevate oil and gas production over the other purposes of the Arctic Refuge. This is inconsistent with the Refuge Act and ANILCA. Because alternative C fails to address and correct the legal deficiencies in the 2019 FEIS, the Agencies should reject it. Rather than alternative C, or the other action alternatives, the States strongly urge the Agencies to adopt the no-action alternative.

D. Alternative D

Alternative D is the most protective action alternative analyzed, but would still generate unacceptable climate impacts. This new alternative, based on Alternative D2⁵¹ in the 2019 FEIS and including additional protections, “incorporates more protective lease stipulations and Required Operating Procedures (ROPs) than any alternative previously analyzed, has the most acres with NSO stipulations, and stresses protection of the four conservation-orientated statutory purposes of the Arctic Refuge.”⁵² According to the Agencies, this Alternative “addresses the NEPA deficiency identified by the Secretary in SO 3401 regarding the failure of the [2019 FEIS] to adequately analyze a reasonable range of alternatives.”⁵³

In contrast to alternatives B and C, BLM developed alternative D collaboratively with joint lead agency specialists, with input from cooperating agencies, and considering traditional ecological knowledge from Tribal governments.⁵⁴ Numerous provisions in alternative D require that Native people or “traditional knowledge specialists” be consulted in making management decisions.⁵⁵

⁵⁰ See 2023 DSEIS App. A at Map 2-3.

⁵¹ In its comment letter on the 2018 DEIS, the USFWS noted that it preferred alternative D2 because it met all the purposes of the Arctic Refuge and best preserved the wilderness characteristics provided for in ANILCA. Memo from Gregory Siekaniec, Regional Director – Alaska Region, USFWS to Nicole Hays, BLM, Project Manager Coastal Plain Oil and Gas Leasing Program EIS (Mar 13, 2019), at 2.

⁵² 2023 DEIS at 2-4.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Numerous Lease Stipulations and ROPs applicable to alternative D require consultation or input from Native or “local traditional knowledge experts,” or consideration of “local traditional knowledge.” See, e.g., Lease Stipulation

Alternative D would offer the smallest number of acres for leasing of the alternatives presented. The Agencies state that this Alternative “stresses protection of the four conservation-orientated statutory purposes of the Arctic Refuge.”⁵⁶ In particular, alternative D would protect much of the Coastal Plain from surface occupancy⁵⁷ and would apply appropriate lease stipulations and ROPs to most of the Program Area, in order to protect the various habitats and natural resources found in different parts of the Coastal Plain.⁵⁸

Notably, Porcupine Caribou Herd calving habitat, and much of the area most heavily used by snow geese,⁵⁹ would be excluded from leasing. Preventing impacts to these areas altogether represents a higher level of protection than the timing restrictions included in alternatives B and C. Seismic exploration would be limited to the part of the Program Area actually offered for leasing, reducing the likelihood that the Leasing Program would generate interest in opening up more of the Coastal Plain in the future.⁶⁰ Alternative D also includes Lease Stipulations and ROPs that would protect riparian habitat through greater setbacks from shorelines, restrictions on water withdrawals, and a prohibition on exploratory drilling in rivers and streams supporting fish populations. Additionally, ROP 24, as applied to alternative D, would protect a larger number of river floodplains from gravel mining.⁶¹

Despite the somewhat lower *local* environmental impacts of alternative D, the DSEIS’ analysis shows that adopting this alternative (as with the other action alternatives) would lead to significant increases in *global* GHG emissions and would undermine efforts to address climate

9 (protection of coastal areas); ROP 4 (polar bear and grizzly bear interaction plans); ROP 7 (avoiding contamination of subsistence foods); ROP 9 (protection of natural hydrologic regimes); ROP 10 (protection of grizzly bear, polar bear, or seal denning locations); ROP 14 (effect of seismic surveys on fish); ROP 18 (impacts of roads on subsistence uses); ROP 22 (hydrologic impacts on natural drainage patterns and fish passage); ROP 23 (disruption of caribou movement and subsistence use); ROP 28 (assessment of wildlife habitat before infrastructure development); ROP 34 (effects of low-flying aircraft); ROP 42 (vehicle-caused disturbance to wildlife movements).

⁵⁶ 2023 DSEIS at 2-4.

⁵⁷ The Agencies note that they “took into account the use of horizontal extended reach drilling, which can extend up to 6 or more miles from the surface drilling location” in designating areas to be protected by NSO stipulations. *See* 2023 DEIS at ES-4.

⁵⁸ More protective Lease Stipulations and ROPs included in alternative D include protecting ice-rich soils from thermal effects of infrastructure (Stipulation 12), increased protections for polar bears (Stipulation 5), increased setbacks from lakes, streams, and springs (Stipulations 1-3), a requirement for a Master Development Plan that minimizes redundant infrastructure and other impacts of multiple operators in the Program Area (Stipulation 13), and ensuring that monitoring and research is in place to develop a Caribou Adaptive Management Plan (ROP 23.1).

⁵⁹ *See* 2023 DSEIS App. A at Map 3-28.

⁶⁰ 2023 DSEIS at 2-4.

⁶¹ 2023 DSEIS at 2-57.

change. Accordingly, the States strongly urge adoption of the no-action alternative. At a minimum, the Agencies should adopt alternative D. If alternative D is selected, the Agencies should include in their ROD a clear explanation of the consequences to the global climate that would flow from the Leasing Program.

IV. THE 2023 DSEIS CORRECTLY INTERPRETS THE 2017 TAX ACT'S SURFACE OCCUPANCY LIMITS

In the 2017 Tax Act, Congress specified that the Secretary “shall authorize up to 2000 surface acres” of occupancy of land by production and support facilities during the term of the leases authorized pursuant to the Leasing Program.⁶² The statutory language (“up to,” rather than “exactly” or “at least”) indicates that the 2000 acre limit is a *maximum*, not a minimum or a requirement that occupancy of any particular acreage be allowed. The 2019 FEIS, on the other hand, eliminated from detailed analysis any alternative that allowed *less* than 2000 acres of surface occupancy.⁶³ The Deputy Secretary identified this legal deficiency and cited it as one ground for cancelling the leases issued following the January 2021 lease sale.⁶⁴

The 2023 DSEIS correctly applies the 2000-acre limit as a maximum, and includes two alternatives that would limit surface occupancy to less than 2000 acres. The DSEIS also properly clarifies that the 2000-acre limitation includes facilities such as gravel pads for production, processing, or lodging facilities, gravel airstrips or roads, and gravel berms or piers that support pipelines, which the 2020 ROD unlawfully excluded from inclusion as “production and support facilities” for purposes of the 2017 Tax Act.⁶⁵ The DSEIS also correctly includes roads authorized by a right of way (ROW) grant towards the 2000-acre limit.⁶⁶ The States agree that these facilities are properly included within the 2000-acre limit under the plain language of the 2017 Tax Act. The States remain concerned over the exclusion of ephemeral facilities from the 2000-acre limit. For example, ice roads, which would not count toward the limit in BLM’s calculation, can have lasting effects on local hydrology.⁶⁷ Minimizing use of such ephemeral structures would minimize these impacts.

⁶² Section 20001(c)(1)(B)(3) of Public Law (PL) 115-97.

⁶³ BLM, Coastal Plain Oil and Gas Leasing Program, FEIS, Vol. I: Executive Summary, Chapters 103, References, and Glossary (Sept. 2019) (“2019 FEIS”), at 2-44.

⁶⁴ Memo from Deputy Secretary Tommy Beaudreau to Alaska Industrial Development and Export Authority, dated September 6, 2023, at 4.

⁶⁵ 2023 DSEIS at 1-9.

⁶⁶ *Id.*

⁶⁷ *See* 2023 DSEIS at 3-98 (“[i]ce roads and pads may alter natural drainage patterns, obstruct flow, affect channel stability or alignment, and lead to erosion and sedimentation” (internal citation omitted)).

The DSEIS also confirms that the occupancy limit is a cumulative total including all lands occupied at any time during the Leasing Program, both on-lease and off-lease. That is, “[o]nce 2,000 acres of disturbance are reached, no additional disturbance would be allowed, regardless of reclamation of previous disturbed areas.”⁶⁸ This interpretation tracks the plain language of the 2017 Tax Act and ensures that any impacts to occupied lands do not exceed the 2000-acre limit set by Congress.

V. THE 2023 DSEIS DEMONSTRATES THAT ANY LEASING PROGRAM WOULD LEAD TO UNACCEPTABLE CLIMATE EFFECTS

The States appreciate and applaud the improved analysis of the Lease Program’s climate impacts in the Agencies’ 2023 DEIS, including analyzing the amount of oil that would be produced from the Refuge under each alternative and how that increased supply would affect global GHG emissions. That analysis, however, demonstrates that oil and gas production in the Refuge under any action alternative would lead to significant increases in GHG emissions, exacerbate climate change, impose billions of dollars of costs on society, and frustrate our ability to meet national and international commitments for GHG reduction.

A. Any Oil Produced Pursuant to a Lease Program Would Increase Overall GHG Emissions

Economic studies and “basic supply and demand principles” show that increases in United States oil and gas production resulting from projects such as the Lease Program will result in decreased oil prices and an increase in oil consumption.⁶⁹ Because the market for oil is global, increased oil production in the United States is expected to drive the global price down, therefore stimulating global demand.⁷⁰

Recent precedent confirms that NEPA requires agencies to consider the effect on global pricing and consumption when assessing GHG emissions. The Ninth Circuit Court of Appeals recently held in *Center For Biological Diversity v. Bernhardt* that federal agencies such as BLM must assess a project’s indirect impacts on global emissions resulting from foreign consumption

⁶⁸ 2023 DSEIS at 1-9.

⁶⁹ Erickson & Lazarus (2016), *How would phasing out U.S. federal leases for fossil fuel extraction affect CO₂ emissions and 2C goals?* Stockholm Environmental Institute, Working Paper No. 2016-02, <https://mediamanager.sei.org/documents/Publications/Climate/SEI-WP-2016-02-US-fossilfuel-leases.pdf>; Erickson & Lazarus (2014), *Impact of the Keystone XL Pipeline on Global Oil Markets and Greenhouse Gas Emissions*, 4 *Nature Climate Change* 778, 780. *See also* *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 736 (9th Cir. 2020) (“Understanding why foreign oil consumption is critical to BOEM’s alternatives analysis requires some basic economics principles. If oil is produced from Liberty, the total supply of oil in the world will rise. Increasing global supply will reduce prices. Once prices drop, foreign consumers will buy and consume more oil . . .”).

⁷⁰ Erickson & Lazarus (2016); *See also* Erickson & Lazarus (2014) at 780.

of oil as a “reasonably foreseeable” indirect effect of drilling.⁷¹ In this analogous case involving an offshore drilling and production facility along the coast of Alaska in the Beaufort Sea, the Court relied on economic analysis showing that the Program’s increase in domestic oil supply would result in lower prices and increased global oil consumption in the short-term.⁷²

Even a small increase in supply on the global market could lead to increased net oil consumption. For example, a study of the possible impact of additional oil production that the Keystone XL pipeline would enable concluded that every barrel of new oil produced would lead to consumption of an additional 0.6 barrels due to the impact on global oil pricing.⁷³ Conversely, if the oil and gas resources (such as those in Coastal Plain) were left undeveloped, global oil and gas consumption (and the associated GHG emissions) would decrease.⁷⁴ These economic studies thus demonstrate that only the no-action alternative is compatible with United States and international efforts to address climate change.

B. The 2023 DSEIS Analyzes the Lease Program’s Effect on Climate Change

The 2023 DSEIS analyzes how the Lease Program would affect global GHG emissions, and demonstrates that any oil and gas production from the Refuge would have unacceptable effects. BLM estimated the quantity and type of energy sources that would be displaced by oil produced from the Arctic Refuge using the BLM Energy Substitution (EnergySub) model.⁷⁵ BLM also modelled how the increased oil supply caused by production from the Program Area would change global prices and foreign oil consumption. The resulting analysis shows that any action alternative would significantly increase global GHG emissions, but that alternative D would have less than half the impact of either alternative B or C.

The DSEIS models GHG emissions for the period of 2023-2053, due to limitations of the EnergySub model.⁷⁶ Over that 30-year period, the Lease Program would result in a total net

⁷¹ *Ctr. for Biological Diversity*, 982 F.3d at 738. *See also Sovereign Inūpiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739 (D. Alaska 2021), WL 3667986, at *12 (holding that BLM’s exclusion of foreign emissions in its alternatives analysis in the Willow EIS was arbitrary and capricious).

⁷² *Ctr. for Biological Diversity*, 982 F.3d at 738–39.

⁷³ Erickson & Lazarus (2014) at 779. These authors based their calculations on increased supply of 830,000 barrels/day from the Keystone pipeline, which is similar in magnitude to the amount of oil (21 to 143 million barrels annually, or 57,000 to 397,000 barrels/day) likely to be produced from the Lease Program.

⁷⁴ *See* Erickson & Lazarus (2016) (“In total, we find that by ceasing to issue new and renewed leases for fossil fuel extraction from federal lands and waters, the DOI could reduce net CO2 emissions . . . by 2030.”).

⁷⁵ *See* BLM, *Coastal Plain Oil and Gas Leasing Program Supplemental EIS*, Draft, Vol. 3: Appendixes B-R (Aug. 2023)(“2023 DSEIS App. B-R”), at Appendix R.

⁷⁶ It should be noted that these figures may be artificially low for two reasons. First, the MarketSub analysis covered the 30-year period from 2023-2053, but oil and gas production would be expected to continue for decades after 2053. The DSEIS predicted that production would continue at some level to 2091, 2085, and 2073 under alternatives B, C, or D, and the *total* lifetime gross GHGe emissions estimated for the Lease Program are 909 MMT, 679 MMT,

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increase in GHG emissions of 92.56 – 235.80 million metric tons (“MMT”), depending on the alternative chosen.⁷⁷ To put these figures in context, the increased 2023-2053 emissions are equal to 1.55 – 3.9% of the total US CO₂e emissions in 2020.⁷⁸ The increased production from the Lease Program would also have significant effects on international demand for oil.

Approximately half of the projected increase in emissions represents increased foreign demand for oil due to the Lease Program’s effect on global oil prices.

Alternative	A	B	C	D
Gross CO ₂ e (direct and indirect effects) for lifetime of Lease Program	0	909 MMT	679 MMT	223 MMT
Gross CO ₂ e (direct and indirect effects) for period 2023-2053	0	+ 587.41 MMT	+552.55	+226.36 MMT
CO ₂ e not emitted from displaced energy sources 2023-2053	0	(348.54 MMT)	(332.07 MMT)	(133.80 MMT)
CO ₂ e from increased foreign consumption, 2023-2053	0	+122.66 MMT	+115.24 MMT	+46.40
Net global CO₂e change 2023-2053	0	+235.80 MMT	+220.48 MMT	+92.56 MMT

The increased emissions that would result from the Lease Program are unacceptable because major GHG *reductions*, not increases, are required in order to avoid the worst effects of climate change. The remaining global carbon budget (that is, the total of all CO₂e that can be emitted going forward) to remain within 1.5 °C of warming is 500 billion metric tons (“GT”).⁷⁹ The increased emissions projected as a result of the Lease Program (92.6 – 235.8 MMT)

and 223 MMT for alternatives B, C, and D respectively. *See* DSEIS at 3-10 to 3-14. Second, the Reasonably Foreseeable Development Scenario used in developing the DSEIS does not account for sale of gas produced from the Coastal Plain, which is estimated to contain up to 7 trillion cubic feet of gas. The DSEIS assumes that gas produced would (at least initially) be re-injected into the ground rather than sold for combustion. *See* DSEIS App. B-R at B-21. If this were eventually developed and combusted, a large increase in GHG production from the Leasing Program would result.

⁷⁷ 2023 DSEIS at 3-10 to 3-14; *Id.* at Table 3-4.

⁷⁸ Total U.S. emissions in 2020 were 5,981.4 MMT. 2023 DSEIS at 3-7.

⁷⁹ IPCC 2023 at 20.

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represent between .019% and .047% of this total. New oil production from the Arctic Refuge under any alternative thus is simply incompatible with efforts to limit climate change.

C. The DSEIS Applies the Social Cost of Greenhouse Gases (SC-GHG) Methodology to the GHG Impacts of the Lease Program

SC-GHG is a method developed to help understand the overall cost to society of the climate impacts caused by additional GHG emissions.⁸⁰ Executive Order 13990, issued by President Biden, emphasized how important it is for federal agencies to “capture the full costs of greenhouse gas emissions as accurately as possible, including by taking global damages into account” and established an Interagency Working Group on the Social Cost of Greenhouse Gases (the “IWG”).⁸¹ The IWG produces SC-GHG estimates based on complex models describing how GHG emissions affect global temperatures, sea level rise, and other biophysical processes; how these changes affect society through, for example, agriculture, health, or other effects; and monetary estimates of the market and nonmarket values of these effects.

SC-GHGs associated with the Lease Program were determined using the IWG’s 2021 Interim Estimates.⁸² The 2023 DSEIS presents estimates for each alternative reduced to net present value, generated using three different annual discount rates and a range of simulations.⁸³ Commensurate with being the alternative with the highest GHG emissions, alternative B would have the highest social costs associated with those emissions. Depending on the discount rate used, costs of the GHGs produced (expressed in 2020 dollars) range from \$2.331 billion to \$15.121 billion. Even alternative D, which is predicted to generate the lowest total GHG emissions, would incur a social cost of \$1.00 billion to \$6.194 billion.⁸⁴

These cost predictions are likely to be underestimates. The IWG generated its Interim Estimates of the SC-GHGs using a consumption discount rate of 3%, and now recognizes that based on recent research, a lower discount rate is likely correct.⁸⁵ This would increase the net

⁸⁰ Interagency Working Group on Social Cost of Greenhouse Gases, U.S. Government, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide: Interim Estimates under Executive Order 13990* (Feb. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf (“IWG 2021”), at 2.

⁸¹ Exec. Order 13990 at § 5.

⁸² IWG 2021.

⁸³ 2023 DSEIS App. B-R at F-4.

⁸⁴ The 95th percentile values generated in the simulations used produced even higher values: \$29.983 billion for alternative B and \$12.368 billion for alternative D.

⁸⁵ IWG 2021 at 19-21.

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present value of GHG emissions. Moreover, the Interim Estimates do not include cost estimates for some key impacts of climate change, including damages caused by more frequent and intense wildfires⁸⁶ and damage to culturally and historically significant resources⁸⁷ (e.g. the Statue of Liberty, or the cultural value of tribal “First Foods.”)

Accurate presentation of these projected costs is critical to understanding the true impacts of the Lease Program, and the unacceptable costs to society of oil and gas production in the Coastal Plan. The States urge the Agencies to avoid this economic harm to society by adopting the no-action alternative. If that is not feasible, the States strongly urge adoption of alternative D, the least environmentally and economically harmful alternative.

D. There is Simply No Need or Reason to Develop Additional Fossil Fuel Resources Through a Lease Program

According to the 2023 IPCC report, the best estimate of the remaining carbon budget (that is, the total amount of additional CO₂e that could be emitted) to limit global warming to 1.5 °C was 500 GT as of 2020.⁸⁸ As of 2020, global emissions were approximately 60 GT/annually.⁸⁹ Unfortunately, estimates of future CO₂ emissions from existing fossil fuel infrastructure without additional abatement⁹⁰ *already* exceed the remaining 500 GT carbon budget. Any actions, such as increases in fossil fuel supply, that significantly increase GHG emissions are incompatible with limiting climate change to a level that avoids massive consequences to people and the environment. For this reason, too, the States ask the Agencies to select the no-action alternative.

VI. SIGNIFICANT UNCERTAINTY REMAINS REGARDING HOW THE LEASE PROGRAM WOULD AFFECT MIGRATORY BIRDS.

The Coastal Plain provides important habitat for a large number of migratory bird species. The DSEIS presents a more complete analysis of how a Lease Program might affect migratory birds than the previous NEPA analysis, and demonstrates that there would be significant risks including loss of habitat, oil spills, increased predation, and disturbance by human activity. However, significant data gaps as to potential effects on bird populations remain.

⁸⁶ See Peter Howard, *Flammable Planet: Wildfires and the Social Cost of Carbon* (2014), <https://costofcarbon.org/files/Flammable Planet Wildfires and Social Cost of Carbon.pdf>.

⁸⁷ See National Academy of Sciences, *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017), at 152.

⁸⁸ See IPCC 2023 at 19.

⁸⁹ *Id.* at 22.

⁹⁰ *Id.* at 20. Abatement here refers to human interventions that reduce the amount of greenhouse gases that are released from fossil fuel infrastructure to the atmosphere

This uncertainty regarding how a Lease Program would impact migratory birds strongly counsels towards selecting a no-action alternative, or at a minimum selecting the alternative that will have the least impact on birds and habitat.

A. The Coastal Plain Area Provides Important Migratory Bird Habitat

Millions of migratory birds representing at least 157 species visit and utilize the Arctic habitat in the Coastal Plain, adjacent marine waters, and northern foothills of the Arctic Refuge each year, including nesting essential to propagation of many species.⁹¹ Birds migrate from the Arctic Refuge to or through all 48 contiguous states and to six continents.⁹² Numerous species that are ESA-listed, or listed as “sensitive,” “threatened,” or “birds of conservation concern” by BLM, USFWS, and the International Union for Conservation of Nature use the Coastal Plain.⁹³ The States previously submitted detailed information about the Arctic Refuge and the Coastal Plain in particular as bird habitat in their Scoping Comments, incorporated here by reference.⁹⁴

Some evidence suggests that the essentially undisturbed habitat in the Arctic Refuge Coastal Plain may compensate for degraded migratory bird habitat or disturbances in other North Slope areas, much of which has previously been opened for oil and gas development.⁹⁵ For example, nesting success for ground-nesting birds, including black brant, has been found to be “unusually low” in oil fields, possibly due to increased predation.⁹⁶ Modeling suggests that black brant populations may not be sustainable at such low success rates, and that the oilfield populations may represent “sink” populations that are sustained by in-migration from nearby areas.⁹⁷ The National Research Council (NRC) report predicted that “as industrial activity spreads into new areas, the amount of sink habitat [where a population is sustained by in-migration from other areas rather than by sustainable reproduction rates] will increase.”⁹⁸

⁹¹ 2019 FEIS at 3-106; BLM, Coastal Plain Oil and Gas Leasing Program, FEIS, Vol. II: Appendices A-R (Sept. 2019) (“2019 FEIS App. A-R”), at Table J-13; Arctic National Wildlife Refuge Revised Comprehensive Conservation Plan and FEIS, US Fish and Wildlife Service 2015 (“USFWS 2015”), at 4-80.

⁹² States’ Scoping Comments at 43; 2023 DSEIS at 3-150.

⁹³ 2019 FEIS App. A-R at Table J-13.

⁹⁴ States’ Scoping Comments at 42-63.

⁹⁵ National Research Council (2003), *Cumulative Environmental Effects of Oil and Gas Activities on Alaska's North Slope*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/10639> (“NRC 2003”), at 120.

⁹⁶ NRC 2003 at 120.

⁹⁷ *Id.* at 121.

⁹⁸ *Id.* at 123.

By compensating for the sink habitat in other parts of the North Slope, the Arctic Refuge may play a critical role in maintaining populations of these birds and the Leasing Program's effect on their populations might be greater than expected based simply on the degree of habitat disruption predicted. NRC further noted that sink habitat effects cannot be determined through population counts alone, underscoring the need to more fully understand population dynamics on the North Slope.⁹⁹

If the Program Area is in fact acting to compensate for degraded habitat or disturbances in other North Slope areas, any impacts on migratory birds from a Lease Program could have outsized impacts on their populations. This emphasizes the importance of further study of how Program-related activities would affect birds, as well as demonstrating that any Lease Program alternative is likely to have significant environmental impacts.

B. Existing Information Regarding Migratory Bird Distribution Remains Inadequate

While the 2023 DSEIS includes new information from several more recent studies of migratory bird distribution and/or abundance,^{100,101} significant uncertainty remains about how and where birds use the Coastal Plain and how they would be affected by leasing. Because of this uncertainty, it is difficult to assess how the Lease Program would impact migratory bird populations. The DSEIS notes that “detailed distribution and abundance data for the program area are lacking for many species.”¹⁰² A 2018 report by the USFWS stated that “[t]he Canning River Delta on the western edge of the Refuge Coastal Plain is the only site within the 1002 Area for which contemporary, fine spatial scale breeding bird data are available.”¹⁰³ The same report stated that “[c]onservation of birds in association with exploration, development, and production of oil and gas resources in the 1002 Area of the Coastal Plain of the Refuge” would require information regarding abundance and distribution of birds and their patterns of seasonal

⁹⁹ *Id.*

¹⁰⁰ See Goudie, et al. (2020), *Common Eider (Somateria mollissima)*, version 1.0., In *Birds of the World* (S. M. Billerman, Editor), Cornell Lab of Ornithology, <https://doi.org/10.2173/bow.comeid.01>; McGuire, R. L. (2023), *Patterns in avian reproduction in the Prudhoe Bay Oilfield, Alaska, 2003–2019*, *Journal of Avian Biology*: e03075, <https://doi.org/10.1111/jav.03075>; McGuire, et al. (2019), *Population trends of king and common eiders from spring migration counts at Point Barrow, Alaska between 1994 and 2016*, *Polar Biology* 42: 2065-2074; Rizzolo, D.J. et al. (2022), *Population Status and Habitat Use of Red-throated Loons in the Western Arctic National Wildlife Refuge: Data to Mitigate the Potential Impacts of Resource Development*; Uher-Koch, B.D., et al. (2021), *Red-throated loon (Gavia stellata) use of nearshore marine habitats—Results from a 2019 pilot study in northern Alaska*, Ecosystems Mission Area, Alaska Science Center, <https://pubs.usgs.gov/of/2021/1029/ofr20211029.pdf>.

¹⁰¹ 2023 DSEIS at 3-156; *Id.* at 3-157; *Id.* at 3-180.

¹⁰² 2023 DSEIS at 3-150.

¹⁰³ USFWS and BLM, *Rapid Response Resource Assessments and Select References for the 1002 Area of the Arctic National Wildlife Refuge in anticipation of an Oil and Gas Exploration, Leasing and Development Program per the Tax Act of 2017 Title II Sec 2001* (Feb. 16, 2018) (Rapid Response Resource Assessments).

movement, and identification of important areas for feeding, nesting, and molting. USFWS also reported that data was needed on impacts of development and disturbance to birds relative to the pre-development baseline.¹⁰⁴

C. The DSEIS Provides a Clearer Discussion of Habitat Impacts and Includes Some Greater Provisions for Protection of Birds in the Action Alternatives Discussed

1. Analysis of impacts to habitat

While much of this analysis is carried over from the previous NEPA analysis, it is now organized by stages of exploration and development. This organization is helpful in understanding the potential for impacts at future stages of development and the cumulative impacts of exploration, construction, and production. Further, the DSEIS provides much more detailed impacts of the construction phase of project development, including effects of gravel mining and placement, withdrawals of fresh and marine water, and attraction of predators to areas near infrastructure.¹⁰⁵ The DSEIS includes new data from a recent study on survival of birds near petroleum infrastructure, which may be predator-related.¹⁰⁶

Surface occupancy by roads, drilling pads and other infrastructure would impact migratory birds by disrupting their habitat. The DSEIS analyzes the number of acres that would be affected by development under each alternative, as well as describing Lease Stipulations and ROPs designed to protect habitat and mitigate impacts. While the FEIS described many of these, there are some additions. Notably, Lease Stipulation 13 would require, under alternative D, that a Master Development Plan address minimizing the footprint of infrastructure and joint use of surface infrastructure where two or more parties are developing in the Program Area.

Additionally, withdrawals from rivers and lakes in the Program Area would supply fresh water for use during the Program. Water withdrawals are “likely to affect large numbers of waterbirds” and the effects would persist throughout the Program lifetime.¹⁰⁷ Alternative D in the 2023 DSEIS includes ROPs providing somewhat better protection for surface water supplies, which should reduce the effect of withdrawals on birds. ROP 9 also requires use of traditional local knowledge in monitoring and modeling water use.¹⁰⁸

¹⁰⁴ *Id.*

¹⁰⁵ 2023 DSEIS at 3-172 to 3-173; *Id.* at 3-169 to 3-170; *Id.* at 3-180.

¹⁰⁶ McGuire, R. L. (2023), *Patterns in avian reproduction in the Prudhoe Bay Oilfield, Alaska, 2003–2019*, Journal of Avian Biology: e03075, <https://doi.org/10.1111/jav.03075>.

¹⁰⁷ 2023 DSEIS at 3-168.

¹⁰⁸ 2023 DSEIS at 2-36 to 2-39.

2. The DSEIS more accurately addresses the likelihood of oil spills and the threat posed to migratory birds

As demonstrated by the 1989 Exxon Valdez disaster, oil spills pose a grave risk to the environment and to wildlife.¹⁰⁹ Containment or cleanup of spilled oil is particularly difficult in the Arctic environment. Unfortunately, in the case of drilling in the Program Area, the question is not “if” spills will occur, but “when,” and how much oil would be released. Based on historical spill rates in the National Petroleum Reserve-Alaska and the estimated amount of oil to be produced under the Program, the 2019 FEIS estimated that there would be 281-1870 “small” spills (averaging 2.8 barrels) and up to six large spills (averaging 7374 barrels) over the lifetime of the Project.¹¹⁰ While those numbers were of concern, the DSEIS now includes more information about the risks of spills during the exploration and construction phases of development, and projects a significantly higher number of oil spills overall. Over the projected 70-year life of the Lease Program, the DSEIS’ analysis anticipates from 1760 to 17604 “small” spills (defined as less than 2100 gallons) and between 26 and 257 “large” spills (more than 2100 gallons).¹¹¹ There is also a more complete discussion of the possibility of large or very large spills, and how they could potentially harm large numbers of birds, leading to population-level effects.¹¹² The added discussion of how barge traffic increases the risk of a spill in marine areas (chiefly along the marine transport route) and the potential for significant harm to Steller’s and spectacled eiders is helpful in evaluating risks to these species.¹¹³

The DSEIS also discusses increased setbacks from water bodies, which would decrease the possibility that oil spills would reach riparian habitats.¹¹⁴ Alternative D protects the largest number of rivers and streams, and provides the greatest setback distances; it is therefore the most protective for these habitats.¹¹⁵ The DSEIS includes a more thorough discussion of how migratory birds might be affected by spills, including the mechanisms by which birds can be

¹⁰⁹ See *Spill: The Wreck of the Exxon Valdez*, Final Report, Alaska Oil Spill Commission (1990); Exxon Valdez Oil Spill Restoration Plan, 2014 Update: Injured Resources and Services, Exxon Valdez Oil Spill Trustee Council (2014).

¹¹⁰ 2019 FEIS at 3-49.

¹¹¹ 2023 DSEIS at 3-170 to 3-171; *Id.* at 3-111.

¹¹² 2023 DSEIS at 3-171 (noting that six spills greater than 100,000 barrels have previously occurred on the North Slope).

¹¹³ 2023 DSEIS at 3-171.

¹¹⁴ 2023 DSEIS at 3-169 (Lease Stipulation 1).

¹¹⁵ 2023 DSEIS at 2-2 to 2-8 (Lease Stipulation 1).

harmful (i.e. hypothermia or inability to feed due to feather oiling, reproductive effects, and long-term toxicity), and explains that even very small quantities of oil can be harmful to birds.¹¹⁶

3. The 2023 DSEIS presents a somewhat more thorough analysis of population-level effects on migratory birds than the 2019 FEIS

The 2019 FEIS incompletely addressed the Lease Program’s direct effects on migratory birds due to habitat alterations as well as the indirect climate effects due to combustion of the oil and gas that would be produced. Oil spills, habitat destruction, disturbance by human presence, and aircraft noise and emissions of lead all have the potential to reduce migratory bird populations. The 2019 FEIS concluded that there would not be population-level effects on migratory birds, although it relied on a cursory analysis.¹¹⁷ In many cases, BLM responded to comments regarding impacts on birds simply by stating “no bird species is anticipated to face population level impacts,” without citation to any further analysis.¹¹⁸

The 2023 DSEIS provides somewhat more in-depth analysis on this point and attempts to estimate the number of birds that would be affected by each alternative under the Lease Program.¹¹⁹ The DSEIS estimates that a relatively small number of birds would be affected, and that the impacts of the Lease Program were “not anticipated to reduce populations or regional abundance” of migratory birds. The one exception noted was for snow geese, which might be displaced from their staging habitat in Alaska by air traffic or other disturbance.¹²⁰ This conclusion, however, should be viewed in the context of the incomplete information available on use of the Arctic Refuge by migratory birds generally. The DSEIS also notes that migratory birds using the Arctic Refuge face numerous other challenges such as habitat loss in other areas or exposure to chemicals.¹²¹

D. Uncertainty About the Effects on Migratory Birds Counsels for a No-Action Alternative

Overall, while the DSEIS does contain additional analysis of impacts to migratory birds, there is still a lack of information regarding use of the Coastal Plain by many species, making

¹¹⁶ 2023 DSEIS at 3-170.

¹¹⁷ 2019 FEIS at 3-134 (“Impacts of the proposed action on birds are not anticipated to reduce population or regional abundance and density.”).

¹¹⁸ See BLM, Coastal Plain Oil and Gas Leasing Program, FEIS, Vol. 3: Appendix S (Sept. 2019) (“2019 FEIS App. S”), at S-448; 2019 FEIS App. S at S-449; 2019 FEIS App. S at S-451; 2019 FEIS App. S at S-457. In one case, this statement is directly coupled with the admission that “detailed data on many species do not exist.” 2019 FEIS App. S at S-451.

¹¹⁹ 2023 DSEIS at 3-183 to 3-190. See also 2023 DSEIS App. B-R at Table J-16, Table J-18, Table J-20.

¹²⁰ 2023 DSEIS at 3-190.

¹²¹ 2023 DSEIS at 3-191 to 3-192.

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firm predictions about impacts impossible. For this reason, too, the States urge selection of a no-action alternative, or if that is not possible, the least impactful alternative.

VII. CONCLUSION

For all of the reasons given above, the States urge the Agencies to protect the Arctic Refuge and our climate by adopting the no-action alternative, or at a minimum, alternative D.

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