

**Call for Nominations and Comments  
Arctic National Wildlife Refuge  
Coastal Plain Oil and Gas Lease Sale**

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The following are comments in response to the Notice for Request for Nominations and Comments, Coastal Plain Oil and Gas Lease Sale, Arctic National Wildlife Refuge, Alaska (85 FR 73292, Document Number: 2020-25316). In addition, these comments address the Detailed Statement of Sale for Coastal Plain Alaska, Oil and Gas Lease Sale 2021 (85 FR 78865, Document Number: 2020-26788). This review is based on professional knowledge gained through years of experience as a natural resource planner.

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## Public Law 115-97 and the Coastal Plain Lease Sale

The BLM Federal Register Notice (85 FR 73292) states, *"Pursuant to 43 CFR § 3131.2, the BLM is issuing this call for nominations and comments on tracts within the Coastal Plain (CP) of the Arctic National Wildlife Refuge that may be offered for lease in the upcoming CP Oil and Gas Lease Sale. The BLM also requests comments on tracts which should receive special concern and analysis as well as the size of the tracts and, specifically, whether the sizes of any tracts should be reduced... Tract number 29 covers the*

*disputed Staines-Canning River area. It is currently under litigation with the State of Alaska. The BLM may elect to not offer this tract in the upcoming sale...."* The BLM could have just as accurately stated that the entire lease area is under litigation and the BLM may elect to not offer any tracts at this time.

Public Law 115-97 Section 20001 (b)(2)(A) states, *"The Secretary shall establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain... [and] (b)(3) the Secretary shall manage the oil and gas program on the Coastal Plain in a manner similar to the administration of lease sales under the Naval Petroleum Reserves Production Act of 1976 (42 U.S.C. 6501 et seq.)."*

The phrase, *"in a manner similar to the administration of lease sales"* is sufficiently vague to make this direction operationally meaningless. Actions that the BLM should have taken prior to a leasing decision include: (1) establishing rules and regulations that complement U.S. Fish and Wildlife Service regulations and policies for protecting environmental, fish and wildlife, and historical or scenic values and (2) provide clarifying direction on how any competitive leasing in the Arctic National Wildlife Refuge will deviate from but be similar to the competitive leasing process describe in regulations pertaining to the National Petroleum Reserves.

The Coastal Plain Alaska, Oil and Gas Lease Sale 2021, Detailed Statement of Sale on page 7 states, *"The BLM, not FWS, has jurisdiction to authorize and administer uses related to the oil and gas program. Lessee will be required to protect identified resource values and to operate in accordance with applicable stipulations and required operating procedures described in the CP ROD."* This description is incomplete failing to recognize that BLM actions must be consistent with protecting surface resource through several regulatory processes that are the responsibility of the U.S. Fish and Wildlife Service.

Section 20001 (c)(1) and (c)(2) guidance does not supplant the need to plan and provide for the integrated resource management of the Arctic National Wildlife Refuge Coastal Plain that is consistent with established Fish and Wildlife Service Comprehensive Conservation Planning processes. Coastal plain resource planning must recognize all the purposes of the Arctic Refuge and address an overlay of management regimes including ANILCA, National Wildlife Refuge Administration Act, Endangered Species Act, Wilderness Act, Wild & Scenic Rivers Act, Clean Water Act, international treaties, and related regulations and policies.

Section 20001 (c)(2) states, *"RIGHTS-OF-WAY. The Secretary shall issue any rights-of-way or easements across the Coastal Plain for the exploration, development, production, or transportation necessary to carry out this section."* This legislative direction that mandates development is counter to many existing laws and regulations that govern the protection of Arctic National Wildlife Refuge surface resources. In order to meet requirements to protect surface resources, lease tract surface development will need to be strategic and limited.

The Coastal Plain Alaska, Oil and Gas Lease Sale 2021, Detailed Statement of Sale on page 1 states, *"The BLM is required to manage the oil and gas program on the Coastal Plain 'in a manner similar to the administration of lease sales under the Naval Petroleum Reserves Production Act of 1976 (42 U.S.C. 6501 et. seq.) (including regulations).' Except as provided for in Section 20001 of Public Law 115-97, the*



*Coastal Plain Oil and Gas Leasing Program Record of Decision (ROD) signed by the Secretary of the Interior on August 17, 2020, in this Detailed Statement of Sale, or otherwise determined by the BLM to be inapplicable due to differences between the two NPR-A and Coastal Plain programs, the regulations in Title 43 of the Code of Federal Regulations (CFR) Part 3130 applicable to lease sales within the National Petroleum Reserve – Alaska (NPRA lease sales) shall apply to this lease sale within the Coastal Plain of the Arctic National Wildlife Refuge."*

The BLM should have recognized that the administration of a competitive oil and gas program (42 U.S.C. 6501 et seq. and regulations) does not prescribe resource allocation or planning processes that are effective for a National Wildlife Refuge. The BLM should not use the vague guidance in the Tax Act to assert arbitrary power to implement unilateral resource planning and leasing processes that were never designed for application on a globally-significant wildlife refuge.

Federal Register Documents 2020-25316 and 2020-26788 should be withdrawn, since the solicitation of tract nominations is premature and not ripe for a decision. Any oil and gas administrative processes within the Arctic National Wildlife Refuge must first be made to be consistent with the Refuge Administrative Act, ANILCA, and P.L. 115-97 as determined through future rulemaking. In addition, lease sale tract selections must follow Environmental Assessment or Environmental Impact Statement processes.

### **Arctic National Wildlife Refuge Purposes**

*The purposes of the ANILCA are described in part as, "SEC. 101. (a) In order to preserve for the benefit, use, education and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, and units described in the following titles are hereby established. (b) It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, Wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems, to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing fishing, and sport hunting, within large arctic and subarctic wildlands and on free-flowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems."*

*ANILCA directs in SEC. 304 that, "[e]ach refuge shall be administered by the Secretary, subject to valid existing rights, in accordance with the laws governing the administration of units of the National Wildlife Refuge System, and this act... The Secretary shall prepare, and from time to time, revise, a comprehensive conservation plan...for each refuge."*

The purposes of the Arctic National Wildlife Refuge, including the Coastal Plain, are defined by a Public Land Order, ANILCA, and other laws and regulations. The Arctic National Wildlife Range was established in 1960 by Public Land Order 2214 for the purpose of preserving unique wildlife, wilderness, and

recreational values. The purposes for which the Arctic National Wildlife Refuge is established and shall be managed include (ANILCA Section 303(2)(B)):

- (i) To conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, the Porcupine caribou herd (including participation in coordinated ecological studies and management of this herd and the Western Arctic caribou herd), polar bears, grizzly bears muskox, Dall sheep, wolves, wolverines, snow geese, peregrine falcons and other migratory birds and Arctic char and grayling;

[This purpose is consistent with the Refuge's original intent to be inclusive of all species, ANILCA Section 102(17) clarifies, "[t]he term 'fish and wildlife' means any member of the animal kingdom...." The Arctic Refuge is to provide for the natural interactions, dynamics, cycles, and processes within and between species in these areas.]

- (ii) To fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

[This purpose recognizes the role the Refuge plays in meeting several treaty obligations related to conservation of the fish, caribou, and polar bears that inhabit both Alaska and Canada, and the migratory birds shared by many nations.]

- (iii) To provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents;

[ANILCA Title VIII provides several provisions to ensure that, consistent with other Refuge purposes, rural residents have the continued opportunity to use Refuge lands and resources to meet their physical, economic, traditional, and other needs.]

- (iv) To ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge; and

[This purpose recognizes that the protection of water resources is central to conservation of fish and wildlife and their encompassing ecological systems and processes. This purpose establishes an explicit, but unquantified, Federal reserved water right for surface waters and groundwater in the Refuge for fish and wildlife populations and habitats.]

- (v) To provide for an oil and gas program on the Coastal Plain. (P.L. 115-97, ANILCA Amendment)  
[This additional purpose established by the Tax Act provides for an oil and gas leasing program, but does not override or diminish the need to provide for the surface resource purposes and the protection of those values.]

In applying section 4(d) of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd) with respect to each refuge, the Secretary may not permit any use, or grant easements for any purpose described in such section 4(d) unless such use ... or purpose is compatible with the purposes of the Refuge (ANILCA Section 304(b)). Furthermore, each comprehensive conservation plan (CCP) shall (iii) specify the uses within each such area which may be compatible with the major purposes of the refuge (ANILCA Section 304(g)(3)).

The Arctic Refuge CCP does not address the extent to which seismic surveys and oil and gas development can occur and still be compatible with the surface resource purposes. The existing CCP directs that the 1002 area be managed as a Minimal Management Area in the National Wildlife Refuge



System. As such, activities are directed at maintaining the existing conditions of areas that have high fish and wildlife values.

### **Refuge Administrative Act Requirement to Ensure Biological Diversity**

The Refuge Administration Act states that, *"The Secretary is authorized, under such regulations as he may prescribe, to -- (A) permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible" and that ". . . the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety."* The law also provides that, in administering the National Wildlife Refuge System, ". . . the Secretary is authorized to . . . *"Issue regulations to carry out this Act."*

A significant directive of the Refuge Administration Act is to ensure that the biological integrity, diversity, and environmental health of the National Wildlife Refuge System be maintained for present and future generations of Americans. Uses that may reasonably be anticipated to conflict with maintaining the ecological integrity of the System are contrary to fulfilling the National Wildlife Refuge System mission and are therefore not compatible. Fragmentation of the National Wildlife Refuge System's wildlife habitats is a direct threat to the integrity of the National Wildlife Refuge System, both today and in the decades ahead. Uses that reduce the quality or quantity or fragment habitats on a national wildlife refuge will not be compatible.

### **Natural Diversity and Water Resources Protection Requirements**

Purposes for the Alaskan refuges are to conserve fish and wildlife populations and habitats...to fulfill international treaty obligations with respect to fish and wildlife and their habitats...and to ensure water quality and quantity within refuges in a manner consistent with fish and wildlife conservation... The conservation of *"natural diversity,"* therefore, was not intended to mean only the number of species present on the landscape, but also the conservation of the natural interactions, dynamics, cycles, and processes within and between species in these areas.

The purposes of the Endangered Species Act (ESA) of 1973 (16 U.S.C. § 1531 et seq.) are to *"provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."* The ESA also established as a policy of Congress an affirmative responsibility that *"all federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of this Act."* Conserve is defined under the ESA to mean *"the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary."*

One of the specific purposes of the Arctic National Wildlife Refuge as established in ANILCA is to ensure *"water quality and necessary water quantity within the refuge"* to conserve fish, wildlife, and habitats. This purpose recognizes the protection of water resources is central to conservation of fish and wildlife and their encompassing ecological systems and processes. This purpose establishes an explicit, but

unquantified, Federal reserved water right for surface waters and groundwater in the Refuge for fish and wildlife populations and habitats.

### **Coastal Plain Oil and Gas Leasing Program Decision Concerns**

The Coastal Plain Oil and Gas Leasing Program Record of Decision of August 2020 approves programs that are inconsistent with many laws. In its FEIS, BLM rejected alternatives that would have caused less environmental harm to the Coastal Plain and elsewhere. Instead, BLM designated as its preferred alternative a Program making essentially the entire Plain available for leasing and seismic exploration. This alternative has the most acreage available for construction of oil and gas infrastructure. It includes the fewest protections for biological and ecological resources. It permits and, as described in the FEIS, exceeds the maximum surface infrastructure allowed by the Tax Act. The preferred alternative has the greatest projected impacts on wilderness values, recreation, permafrost and tundra, water quantity and quality, customary and traditional subsistence practices, natural diversity of wildlife, and climate change of all the alternatives considered in the FEIS.

The FEIS acknowledges that implementation of the Program would interfere with and detract from the Refuge's conservation purposes. For example, it concludes that the Program has the potential to harm recreation throughout the entire Coastal Plain and cause the displacement or decline of sensitive species such as polar bears. It also acknowledges that the Program, which would allow surface occupancy and seismic surveying right up to the wilderness boundary, would degrade the wilderness character of the Mollie Beattie Wilderness.

The Coastal Plain Oil and Gas Leasing Program FEIS analyzed a misleadingly narrow range of alternatives, none of which even attempts to minimize risk and harms to natural and related values in and beyond the Coastal Plain. No alternative limits leasing to the minimum acreage required by the Tax Act. None reduces roads, drill pads, and other surface infrastructure below the maximum permitted by the Tax Act. None limits ice roads, pipelines, and other connectors by restricting dispersal of processing facilities. None reduces impacts to wilderness values to the minimum feasible. None eliminates harmful seismic exploration or even substantively restricts where the seismic exploration it incorporates into the leasing program can occur.

The ROD establishes without site-specific analyses that, *"Essential pipelines and road crossings will be permitted through setback areas in accordance with Section 20001 (c)(2) of PL 115-97."* Section 20001 (c)(2) mandates that rights-of-way or easements across the Coastal Plain are to be issued with no mention of protecting surface resource values. The ROD's selected alternative will lead to the authorization of rights-of-way or easements as recognized in the notice of lease sale. The Coastal Plain Alaska, Oil and Gas Lease Sale 2021, Detailed Statement of Sale on pages 5 and 6 states, *"Surface Development and Access: Section 20001 (c)(2) of Public Law 115-97 states that the Secretary acting through the BLM 'shall issue any rights-of-way or easements across the Coastal Plain for the exploration, development, production, or transportation necessary to carry out this section.' BLM interprets the plain language of this provision as requiring that it authorize any such rights-of-way necessary to carry out the Coastal Plain oil and gas program established by Section 20001 of PL 115-97. This provision ensures that successful implementation of the mandated oil and gas program in this remote frontier region not be*



*frustrated by the unavailability of necessary access. Off-lease rights-of-way and easements necessary for development under a particular lease will be granted, as well as any right-of-way or easement necessary to carry out the oil and gas program across the Coastal Plain."* The BLM fails to recognize that an agency is required to fully evaluate site-specific impacts once it reaches the point of making *"a critical decision . . . to act on site development."*

The Detailed Statement of Sale should have been supported by a site-specific Environmental Assessment or Environmental Impact Statement with sufficient information to foster informed decision-making and informed public participation that addressed the requirements of Section 20001 (c)(2). Furthermore, it is disappointing to witness the BLM asserting subjective views, with no mention of globally significant surface values of the Coastal Plain, by stating, *"This provision ensures that successful implementation of the mandated oil and gas program in this remote frontier region not be frustrated by the unavailability of necessary access."* Coastal Plain Alaska, Oil and Gas Lease Sale 2021, Detailed Statement of Sale should be amended (or withdrawn) deleting this subjective and bias characterization of P.L. 115-97.

If oil and gas lease sales are to be offered on the refuge as directed by the Tax Act, then Alternative W2 that I presented in my comments on the DEIS is clearly more desirable and better meets the overall purposes of the Refuge than the alternatives presented in the FEIS. If horizontal drilling reach is a concern, as briefly mentioned in responses to DEIS comments, then the BLM could have developed and expanded the Alternative W2 drilling areas to make areas more accessible to development. Alternative W2 with surface occupancy extensions, if needed, could meet the requirements of the Tax Act, especially if the western 400,000 acres was made available for sale first, and if necessary, followed by other leasing opportunities to include areas to the east. Alternative W2 recognizes the direction in the Tax Act, but attempts to minimize effects on fish, wildlife, and water resources through limited surface occupancy and strategic developments that strive to protect the surface purposes of the Arctic National Wildlife Refuge. In addition, Alternative W2 is better able to comply with requirements to conduct and disclose site-specific analysis as related to Section 20001 (c)(2) than the excessive impacts that would be allowed under all the FEIS action alternatives. Alternative W2 is a reasonable alternative that should have been analyzed in detail because it provides for an oil and gas program on the Coastal Plain as required under the Tax Act, while reducing surface resource effects. Proposed Alternatives W1 or W2 would likely have been identified as the environmentally preferred alternative because it may not substantially degrade the surface resources of the Refuge through limiting surface occupancy, restricting development location, and providing for strategic phased developments.

In the FEIS, however, the BLM did not develop or study any alternative that would fulfill, to the extent consistent with Tax Act obligations, the conservation-oriented purposes for which the Refuge must be managed or minimize adverse effects to the environment. By failing to consider any alternative in the FEIS that would implement the Tax Act in a manner that minimizes the risk of damage to the natural values and related human activities associated with the Coastal Plain, BLM violated NEPA (42 U.S.C. § 4332).

Furthermore, if any lease is issued, the BLM will have failed to address the site-specific analysis requirements of NEPA. An agency reaches the threshold triggering site-specific review when it proposes

to make an irreversible and irretrievable commitment of resources. The BLM improperly made an irretrievable commitment of resources when the ROD was approved granting Section 20001 (c)(2) rights-of-way without site-specific analyses.

The Refuge Act mandates that each national wildlife refuge *"shall be managed to fulfill the mission of the [National Wildlife Refuge] System, as well as the specific purposes for which that refuge was established"* (16 U.S.C. § 668dd(a)(3)(A)). A refuge's purposes include *"purposes specified in or derived from the . . . public land order . . . establishing . . . a refuge"* (16 U.S.C. § 668 ee(10)). Similarly, ANILCA requires the national wildlife refuges it created to be managed in accordance with the laws governing the administration of the National Wildlife Refuge System and pursuant to all consistent provisions of previously applicable public land orders (ANILCA §§ 304(a), 305).

Public Land Order 2214 established management purposes for much of the Arctic Refuge—including all the Coastal Plain—as preserving the area's unique wildlife, wilderness, and recreational values.

ANILCA § 303(2)(B) added four detailed conservation purposes for which the Arctic Refuge *"shall be managed,"* which are maintenance of wildlife populations and habitats in their natural diversity, fulfillment of wildlife-related treaties, provision of continued opportunities for subsistence practices, and ensuring water quality and quantity.

The Tax Act added a purpose to ANILCA § 303(2)(B) *"to provide for an oil and gas program on the Coastal Plain,"* but did not otherwise alter that section or the Refuge Act, and left in force the Wilderness Act and other laws applicable to management of the Arctic Refuge.

The Leasing EIS ROD is based in part on an assertion that Congress *"mandated that the 1.56 million-acre Coastal Plain be managed for an oil and gas program"* just as it mandated that other portions of the Refuge be managed as Wilderness. In so doing, they misinterpreted the Tax Act as overriding other legal obligations, including those under the Refuge Act, ANILCA, Wild and Scenic Rivers Act, and the Wilderness Act, beyond the minimal extent required by the Tax Act.

In neither the FEIS nor the ROD did the BLM consider or analyze their actual legal obligations under the Refuge Act, ANILCA, Wild and Scenic Rivers Act, and the Wilderness Act or state how they would achieve those requirements. With respect to the Wilderness Act, they expressly found that operations under the Program would adversely affect wilderness characteristics of the Mollie Beattie Wilderness and considered measures to mitigate those impacts, but did not either adopt them or explain in the FEIS or the ROD how and why their decision not to adopt them or other measures to protect the wilderness character of the Mollie Beattie Wilderness will achieve the requirements of the Wilderness Act.

One of the specific purposes of the Arctic National Wildlife Refuge is to ensure *"water quality and necessary water quantity within the refuge"* to conserve fish, wildlife, and habitats. The Fish and Wildlife Service states, *"Water is the lifeblood of the Arctic National Wildlife Refuge. Ensuring water quality and quantity for fish and wildlife resources is one of the purposes of the Refuge. But water quantity is limited, especially on the coastal plain - technically a very dry area. Less than five inches of precipitation falls there each year. In addition, compared to areas west, where surface water is plentiful, the coastal plain has few lakes, and they are shallow and unevenly distributed. Most of the water available in summer*



*comes from spring snowmelt. It pools on the surface of the land, soaking the tundra. The water doesn't percolate through the soil, as it does in most places, due to permafrost, which underlies most of the area about a foot down."*

According to the Comprehensive Conservation Plan, this purpose *"establishes an explicit, but unquantified, Federal reserved water right for surface waters and groundwater in the Refuge for fish and wildlife populations and habitats. This purpose recognizes that the protection of water resources is central to conservation of fish and wildlife and their encompassing ecological systems and processes. This purpose establishes an explicit, but unquantified, Federal reserved water right for surface waters and groundwater in the Refuge for fish and wildlife populations and habitats"* (CCP 1.4.2.1 Arctic Refuge's Purposes at 1-21).

The Refuge Act provides, in part, that *"the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use"* (16 U.S.C. § 668dd(d)(3)(A)(i)).

A *"compatible use"* is a *"use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge"* (16 U.S.C. 668ee(1)). *"[S]ound professional judgment,"* in turn, *"means a finding, determination, or decision that is consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of this Act and other applicable laws"* (16 U.S.C. § 668ee(3)). A compatibility determination must be made in writing and provide adequate opportunity for public comment (16 U.S.C. § 668dd(d)(3)(B); 50 C.F.R. § 26.41).


















The Leasing ROD fails to include or reference a Fish and Wildlife Service compatibility determination that oil and gas lease sale area allocations, stipulations, and required operating procedures under the selected alternative will prevent actions and uses that would materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission and the Arctic Refuge purposes of conserving fish and wildlife populations and habitats, water quality and necessary water quantity within the refuge.

The Program opens to leasing far more of the Coastal Plain than Congress required, it maximizes the surface area disturbed by permanent development, it contains no provision limiting the location or extent of destructive activities such as seismic testing and ice road construction, it fails to limit the dispersal of drill pads and pipelines across the landscape, and it foregoes numerous lease and operating restrictions that would protect natural values. The FEIS acknowledges that the Program would interfere with or detract from the fulfillment of the Refuge's conservation-oriented purposes.

The Refuge was created, and by law must be managed, for several stringent conservation-oriented purposes, relating to the natural diversity of fish and wildlife and their habitats, preservation of wilderness qualities, unique recreational values, water quality and quantity, and traditional subsistence practices. These purposes remain in effect and binding, notwithstanding Congressional adoption through the Tax Act of a fifth purpose, related to oil and gas leasing in the Coastal Plain.

**Table 1** summarizes the compatibility and consistency of the FEIS alternatives with the purposes for which the Arctic Refuge was established.

**Table 1. Compatibility and Consistency of the FEIS Alternatives.**

Excellent  Good  Poor  Not Compatible 				
Arctic National Wildlife Refuge Purposes and Comprehensive Conservation Plan	FEIS Alternatives A and B and Proposed DEIS Alternatives W1 and W2 Compatibility Assessments			
	A	W1	W2	B
Protects Arctic National Wildlife Range purposes of preserving unique wildlife, wilderness and recreational values				
(i) Conserves fish and wildlife populations and habitats in their natural diversity (including polar bear Critical Habitat)				
(ii) Fulfills the international treaty obligations of the United States with respect to fish and wildlife and their habitats				
(iv) Ensures, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge				
(v) Provides for an oil and gas program on the Arctic Refuge Coastal Plain	No	Yes	Yes	Yes
Consistent with the Arctic National Wildlife Refuge Comprehensive Conservation Plan	Yes	No	No	No

### BLM Lease Sale Tract Comments

The agency tracts design reflects the false narrative that the Coastal Plain's dominant purpose is for industrial oil and gas development. Instead, the Tax Act only requires that the Secretary conduct not fewer than 2 lease sales within 4 and 7 years. The Notice for Request for Nominations and Comments failed to identify mitigating stipulations for each of the proposed tracts negating the possibility of making informed nominations for tracts to be included in any lease. The lack of stipulations also limits informed comments. The Tax Act did not direct that the Coastal Plain be developed into an industrial park at the expense of fish and wildlife natural diversity and water quantity and quality.

The Coastal Plain Alaska, Oil and Gas Lease Sale 2021, Detailed Statement of Sale offers the entire Coastal Plain for lease sales. Lease sale 1 could infringe on Lease sale 2. By offering more than 1.16-million acres for sale, the BLM is not in compliance with Section 20001(c)(1) of PL 115-97 which requires that each sale offered for lease be at least 400,000 acres in size.

Most if not all of the agency proposed tracts demonstrate an industrial oil and gas development bias that would lead to seismic and oil and gas development that would materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission and the Arctic Refuge purposes of (1) conserving fish and wildlife populations and habitats in their natural diversity, (2) ensuring to the maximum extent practicable and in a manner consistent with the purposes of conserving fish and



wildlife populations and habitats, water quality and necessary water quantity within the refuge, and (3) protecting other surface resource values.

Adopting the proposed leasing tracts would continue ongoing BLM Arctic National Wildlife Refuge actions that would lead to:

- Significant impacts on fish and wildlife natural diversity, including impacts on terrestrial mammals, disturbance from vehicle and aircraft noise, human presence, and habitat fragmentation and loss; as well as loss of permafrost, vegetation, and wetlands.
- Significant impacts on marine mammals, including human-polar bear interactions; and vehicle, aircraft and boat traffic and noise disturbance.
- Significant Impacts on water quality caused by seismic exploration, water extraction and construction of ice roads and pads, gravel mining, and wastewater discharges.
- Impacts on subsistence users, both from impacts on subsistence species and from displacement of resources from traditional harvest areas, and hunter avoidance of industrialized areas.
- Substantial greenhouse gas emissions from exploration and development.
- Potential impacts on cultural resources by lease development.
- Wilderness characteristics would no longer exist where surface occupancy is allowed.
- Eligible Wild and Scenic Rivers outstandingly remarkable values would be lost.

The following are specific comments on the BLM lease sale tracts:

BLM Tract Number	Comments
17, 27, 29, 30, and 31	<p><b>Canning River Delta</b> – Canning River delta tracts should only be leased with a No Surface Occupancy (NSO) stipulation. Particularly important for waterfowl is the Canning River Delta at the western end of the Coastal Plain. It is the largest river on the Coastal Plain and has the largest delta and wetlands in the entire Arctic Refuge. The largest thaw-lake plains in the Arctic Refuge and nearly all the largest deep lakes, are in this area.</p> <p>The Canning River forms the western boundary of the Refuge north of the Brooks Range. The Canning River starts in the Romanzof Mountains and flows in an arc to the south, west, and finally north through scenic, glaciated valleys near the Continental Divide. Within about 15 miles of the Beaufort Sea, the Canning becomes a three-mile-wide, heavily braided, shallow waterway. The river then creates a wide delta with multiple distributaries as it empties into the Beaufort Sea.</p> <p>The Canning River delta is of special concern due to the need to protect unique fish and wildlife habitat and populations and water quality. The Canning River has high species diversity relative to other waters on the North Slope. Shorebirds, including plovers, sandpipers, and phalaropes, concentrate around the Canning River delta between mid-July and August in preparation for their fall migration. High densities of nesting tundra swans and molting small geese, as well as the only known nesting sites of Sabine's gulls in the Refuge, are found on the Canning River delta. The Canning River delta has significant resource values, including habitat for threatened species; habitat for</p>

	<p>overwintering, spawning and smolting fish; wetlands dependent on water flow; historical and cultural values; and subsistence and general fishing values. Muskoxen have often concentrated along the Coastal Plain of the Canning River during the summer. Polar bear denning occurrences are high. The Central Arctic caribou herd's calving activity usually is concentrated in two areas, one of which is the lower Canning River delta.</p>
<p>7, 8, 22, 23, 24, 25, 28, 29, 30, and 31</p>	<p><b>Conserving the Polar Bear</b> – These tracts should only be leased with a NSO stipulation. A primary concern is conserving the polar bear by avoiding actions within the Arctic Refuge that may adversely affect the species. Coastal plain areas free of human disturbance for maternal den sites and unobstructed access between den sites and the coast are essential to conservation of the southern Beaufort Sea polar bear population. Preventing adverse modification of the Arctic Refuge's Coastal Plain, other North Slope Coastal Plain areas, barrier islands, river bank drainages, and coastal bluffs that occur at the interface of mainland and marine habitat is key to the species' survival and recovery because these habitats receive proportionally greater use for denning than other areas. Further, these terrestrial habitats are likely to become ever more important because the predicted, continued loss of arctic sea ice due to climate change is expected to result in an increase in the number of polar bears denning on land in northern Alaska. During recent years, the proportion of dens on land has already increased in relation to dens excavated out on sea ice. Polar bear use of terrestrial areas during the summer and early fall is also expected to increase as climate change causes the distance between the southern edge of the pack ice and coastal denning areas to increase during the summer.</p> <p>Degradation of polar bear habitat is inconsistent with a primary purpose of the refuge and the need to protect critical habitat. The direct and indirect impacts of the proposed action may adversely affect polar bears that utilize the Arctic Refuge and Beaufort Sea. Oil and gas development on the Arctic Refuge is incompatible with conserving fish and wildlife populations and habitats in their natural diversity, including protecting polar bear critical habitat.</p> <p>The purposes of the Endangered Species Act (ESA) of 1973 (16 U.S.C. § 1531 et seq.) are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." The ESA also established as a policy of Congress an affirmative responsibility that "all federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of this Act." Conserve is defined under the ESA to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary." Three-fourths of the refuge Coastal Plain is designated as critical habitat for polar bears, which are highly vulnerable to disturbance due to oil and gas activities.</p>
<p>Tracts 1 through 15 and 18 through 25</p>	<p><b>Porcupine Caribou Herd</b> – These tracts provide for important Porcupine Caribou herd habitat of which 700,000 acres should not be included in the first two lease sales. Protecting the Porcupine Caribou herd population and habitats is of utmost concern. In 1987, the U.S. and Canadian governments signed the <i>"Agreement between the Government of the United States of America and the Government of Canada on the Conservation of the Porcupine Caribou Herd."</i> This bilateral agreement recognizes that</p>



	<p>the Porcupine caribou herd regularly migrates across the international boundary between Canada and the United States and that the herd should be conserved according to ecological principles emphasizing the importance of conserving habitat, including calving, post-calving, migration, wintering, and insect relief habitat.</p>
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	<p>The main objectives of the agreement are to conserve the herd and its habitat through international cooperation and coordination so that the risk of irreversible damage or long-term adverse effects, including cumulative effects, as a result of use of caribou or their habitat is minimized, and to ensure opportunities for customary and traditional uses of the Porcupine caribou herd.</p>
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The BLM has made decisions about the size and timing of leases in the Arctic National Wildlife Refuge without developing a range of lease sale configurations and comparing the environmental impacts of these various lease sale alternatives, despite the availability of information that could inform the required analysis. This decision without taking a hard look at reasonable alternatives is arbitrary, capricious, and not in accordance with law and is in violation of NEPA, 42 U.S.C. § 4332(2)(C) and the Administrative Procedures Act, 5 U.S.C. §§ 702, 706.

### **Alternative to the BLM Proposed Lease Sale Tracts**

This section reviews an alternative tract configuration that draws upon the strategy presented in my comments on the Coastal Plain Oil and Gas Leasing Program DEIS. The following proposed alternative lease sale tract configuration, that was informed by proposed DEIS Alternative W2. These tract locations and a staged lease sale strategy may result in leasing that provides for the collective Arctic National Wildlife Refuge Coastal Plain purposes.

Governor Mike Dunleavy addressed the Arctic National Wildlife Refuge in an October 4, 2020 article in The Seattle Times stating, *"Oil development in Alaska is not what it used to be. Thanks to horizontal drilling, the newest field on the North Slope of Alaska accesses more than 50 square miles of subsurface resources from a single pad supported by a 165-acre facility. Unlike the rest of the nation, the methane produced from oil extraction in Alaska is not flared into the atmosphere but rather pumped back into the ground. These are just a couple examples of how we limit our environmental footprint, decrease greenhouse gases and, in short, do it right."*

Coastal plain oil and gas development and associated activities must use horizontal drilling to the extent feasible if all the purposes of the Arctic National Wildlife Refuge are to be realized. Coastal Plain Leasing Program proposed Alternative W2 was designed to strive to accomplish this outcome. Alternative W2 was presented in my comments on the Coastal Plain Oil and Gas Leasing Program DEIS and is a reasonable alternative that should have been developed and analyzed in the FEIS. A decision on oil and gas development must have a goal to minimize impacts and take a hard look at alternatives. Coastal plain development activities should be suspended until such time that the Tax Act is implemented consistent with all laws that govern the management of the Coastal Plain.

The following proposed tracts may ensure that any oil and gas program on the Coastal Plain would not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission and the Arctic Refuge purposes of (1) conserving fish and wildlife populations and habitats in their

natural diversity, (2) ensuring to the maximum extent practicable and in a manner consistent with the purposes of conserving fish and wildlife populations and habitats, water quality and necessary water quantity within the refuge, and (3) protecting other surface resource values. Table 2 includes acreage information about each recommended alternative lease sale tracts. These alternative tracts are depicted on the map in Figure 1. Some tracts such as 5, 6, 9, and 14 could be further divided.

**Table 2.** Alternative lease sale tracts which address the collective Coastal Plain purposes.

<u>Tract – Lease Sale 1</u>		<u>Tract – Lease Sale 2</u>	
1	43,000 acres	11	15,000 acres
2	56,000 acres	12	50,000 acres
3	56,000 acres	13	28,000 acres
4	38,000 acres	14	59,000 acres
5	43,000 acres	15	49,000 acres
6	47,000 acres	16	34,000 acres
7	48,000 acres	17	34,000 acres
8	20,000 acres	18	53,000 acres
9	53,000 acres	19	37,000 acres
10	17,000 acres	32	42,000 acres
29	24,000 acres		

The following are specific comments on each of the recommended alternative lease tracts:

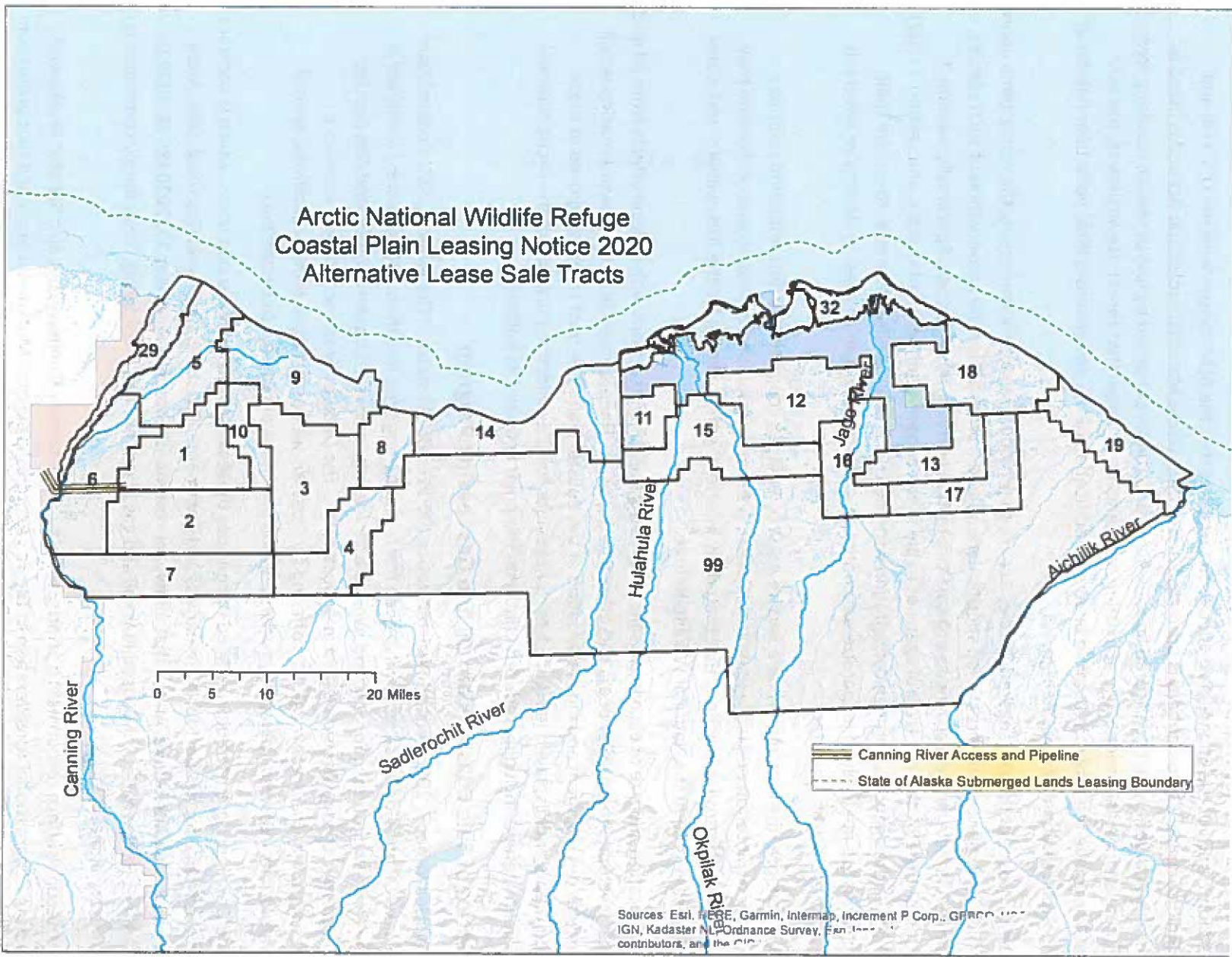
- **Canning River Delta – Tracts 5, 6, 9, and 29.** Leasing these tracts should require a NSO stipulation. A NSO stipulation would protect fish and wildlife natural diversity and water quality and quantity of this biological rich delta. A NSO stipulation would help conserve the polar bear.
- **Conserving the Polar Bear – Tracts 8, 9, 10, 14, 15, 18, and 19.** Leasing these tracts should require a NSO stipulation. A NSO stipulation would help conserve the polar bear and protect important coastal wetlands. Would contribute to protecting Porcupine Caribou Herd habitat.
- **Porcupine Caribou Herd and Protecting Natural Diversity – Tracts 4, 7, 16, 17, and Tract Area 99.** A NSO stipulation for tracts 4, 7, 16, and 17 would help protect fish and wildlife natural diversity and water quality and quantity. Not leasing area 99 in lease 1 and lease 2 would protect Porcupine Caribou herd habitat and many other species of fish and wildlife, conserves polar bear habitat, and maintains water quality and quantity.
- **Providing for a Coastal Plain Oil and Gas Program – Tracts 1, 2, 3, 11, 12, and 13.** Controlled surface use of these tracts would provide for the oil and gas purposes of the Tax Act. Horizontal drilling from these tracts and state lands could contribute to a Coastal Plain oil and gas program.

Lease sale 1 would include roughly 445,000 acres and lease sale 2 may include around 402,000 acres. To protect surface resources, the second lease sale would prioritize unleased areas from sale 1 for lease sale offerings to meet, and not to substantially exceed, the 400,000-acre Tax Act lease sale requirement.

This alternative tract layout is consistent with the direction to establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain. This alternative tract layout would substantially reduce surface resource impacts from what could be expected from implementation of the agency lease sale tract configuration.



Figure 1. Map of Alternative Lease Sale Tracts.





## **Lease Sale Tracts and the Duty to Consult with the Fish and Wildlife Service**

Section 7(a)(2) of the Endangered Species Act requires that the BLM consult with the U.S. Fish and Wildlife Service. The polar bear is protected under the Marine Mammal Protection Act and is listed as Threatened under the Endangered Species Act due to the threat posed by loss of sea-ice resulting from climate change and inadequacy of existing mechanisms to curtail that threat. Nevertheless, the BLM could manage the Program to avoid adverse modification of the designated critical polar bear habitat of the Arctic National Wildlife Refuge.

The purposes of the Endangered Species Act are to provide a means for conserving the ecosystems upon which endangered and threatened species depend and a program for the conservation of such species. The ESA directs all federal agencies to participate in conserving these species. Specifically, section 7 (a)(1) of the ESA charges federal agencies to aid in the conservation of listed species, and section 7 (a)(2) requires the agencies, through consultation with the U.S. Fish and Wildlife Service, to ensure their activities are not likely to jeopardize the continued existence of listed species, or destroy or adversely modify their critical habitat.

Furthermore, the Fish and Wildlife Service must complete a compatibility determination prior to a seismic exploration or a lease issuance decision. A seismic exploration or lease issuance decision may result in uncontrollable actions that materially interfere with providing for the fish, wildlife, and water purposes of the Arctic National Wildlife Refuge.

The location and size of each lease sale tract matters, leading to actions with varying effects from oil and gas development on polar bears and other listed species. The proposed BLM tract layout maximizes oil and gas development and industrialization of the Coastal Plain. The tract layout proposed in these comments and displayed in Figure 1 better provides for the collective purposes of the Arctic National Wildlife Refuge, including reduced effects on the polar bear and its habitat.

## **Notice of Sale Coastal Plain Oil and Gas Leasing Program**

The December 7, 2020 Federal Register Notice (85 FR 78865) states, *"The January 2021 Coastal Plain Alaska Oil and Gas Lease Sale will include tracts and acreage (no less than 400,000 acres) identified in the Detailed Statement of Sale and available for leasing under the Coastal Plain Oil and Gas Leasing Program Record of Decision issued in August 2020... The Detailed Statement of Sale includes a description of the areas the BLM is offering for lease, as well as the lease terms, conditions, special stipulations, required operating procedures, and directions about how to submit bids."*

The Detailed Statement of Sale failed to consider these comments on lease sale tracts, which is contrary to the Notice for Request for Nominations and Comments, Coastal Plain Oil and Gas Lease Sale, Arctic National Wildlife Refuge, Alaska that allows for comments through December 17, 2020 (85 FR 73292). Issuing a Notice of Sale of Coastal Plain oil and gas leases prior to considering these timely comments is arbitrary and capricious.

Protecting surface resources is a priority for not only Governor Dunleavy, but also Senator Murkowski. During Congressional consideration of the Tax Act, Alaska Senator Murkowski explained that protection



of the environment of the Coastal Plain would remain a statutory priority: She agreed that *"the environment and local wildlife will always be a concern, always be a priority. That is why we did not waive NEPA or any other environmental laws. That is why the consultation requirements with our Alaska Native people still apply. That is why surface development will cover up to, but no more, than 2,000 Federal acres."* 163 Cong. Rec. S7539-40 (daily ed. Nov. 30, 2017) (statement of Sen. Murkowski).

Contrary to the Governor's and Senator's priorities, oil and gas development as described in the Coastal Plain Oil and Gas Leasing Program EIS Alternative B (the selected alternative) would materially interfere with providing for the Arctic Refuge purposes of (1) conserving fish and wildlife populations and habitats in their natural diversity and (2) ensuring to the maximum extent practicable and in a manner consistent with the purposes of conserving fish and wildlife populations and habitats, water quality and necessary water quantity within the refuge. Alternative B allows for long-term oil and gas production activities that would result in significant short and long-term negative impacts to the surface resources of the Arctic National Wildlife Refuge Coastal Plain.

The 2020 Coastal Plain Oil and Gas Leasing Program EIS does not analyze the impacts of any proposal for when to offer which tracts of land for leasing, let alone alternative proposals that vary by location, amount, or timing. In addition, the BLM did not consider adequate alternatives in the 2020 EIS. NEPA requires consideration of a reasonable alternative authorization of multiple lease sales that employed criteria regarding how many and which tracts to offer. Comments on the Coastal Plain Oil and Gas Leasing Program DEIS for proposed alternative W2 offered a reasonable development scenario that should have been addressed in the programmatic FEIS, which would have informed the lease sale tracts.

The BLM erred by not providing clear guidance and definition regarding Section 20001(c)(3) of PL 115-97. The determination as to whether surface acreage must be authorized to be covered by *"production and support facilities"* should not have been left to *"future fact specific determinations,"* since this omission does not provide sufficient information to foster informed decision-making, public participation, and lease bids. Omission of this constraint will inflate lease bids.

The Coastal Plain Alaska, Oil and Gas Lease Sale 2021, Detailed Statement of Sale on page 6 states, *"Section 20001(c)(3) of Public Law 115-97 provides that BLM shall authorize up to 2,000 surface acres of Federal land on the Coastal Plain to be covered by production and support facilities (including airstrips and any area covered by gravel berms or piers for support of pipelines) during the term of the leases under the oil and gas program. This mandate, requiring the authorization of up to 2,000 surface acres of Federal land to be covered by production and support facilities during the term of the leases, will be carried out through leases that allow for regulation of facilities but may not preclude such infrastructure. If a lessee discovers oil or gas, it may seek approval to develop the resources by submitting an application for a permit to drill that includes a drilling plan and a surface use plan of operations. This statutory requirement functions as a directive to BLM that it must not deny or unreasonably limit development of production and support facilities on the Coastal Plain until 2,000 surface acres are covered by production and support facilities."*

The BLM appears to recognize that once a lease is approved, the agency has limited authority to limit surface development. However, the BLM has failed to recognize that Section 20001 part (c) guidance

requires proactive planning for strategic and limited surface development if surface resource values are to be protected. Alternative W2 as proposed in comments on the DEIS offers an approach for addressing all the purposes of the Arctic National Wildlife Refuge.

Furthermore, the BLM's Notice of Sale of Coastal Plain Oil and Gas Leases should have included a binding lease term describing that an Application for Permit to Drill shall not be approved if the development would result in production and support facilities that exceed 2,000 surface acres during the term of the Coastal Plain leases. Production and support facilities should have been clearly defined prior to any lease sale.

The BLM must manage lease sales to ensure that no more than 2,000 surface acres are developed as restricted by Section 20001 (c)(3). The BLM must avoid relying on sections 39 and 17(f) of the Mineral Leasing Act to allow one of two forms of federal lease suspensions for the purpose of not being in violation of the 2,000-acre development limit.

The BLM Alaska state office should withdraw the current Notice of Competitive Lease Sale (sale notice) until existing Coastal Plain Oil and Gas Leasing Program litigation is resolved. If the notice is reposted, the period for response should be for at least 45 days prior to the start of the lease sale. Requiring that bids be received by December 31, 2020 is not an adequate response period, nor does the January 6, 2021 date allow for adequate consideration of the bids and resolution of any concerns by the BLM and the U.S. Fish and Wildlife Service.

### **Lease Sale Tracts and the National Environmental Policy Act**

Federal Register Document Numbers 2020-25316 and 2020-26788 should be withdrawn. Oil and gas administrative processes within the Arctic National Wildlife Refuge must be informed by rulemaking that provides for the integration of the requirements of the Refuge Administrative Act, ANILCA, and P.L. 115-97. Such regulations are yet to be enacted.

If the BLM continues to pursue the proposed nomination process, then nominations should be resolicited as an integral part of an Environmental Assessment or Environmental Impact Statement analysis and decision process that approves tract size and locations. In addition, any future solicitation for nominations and comments must identify the stipulations associated with each of the proposed tracts.

The location and size of each lease tract matters even when lease stipulations are identical for any given area of land. Bias tract configurations would lead to actions that would benefit oil and gas development or provide for greater surface resource protection. The proposed BLM tract layout clearly is designed to maximize oil and gas development, while also maximizing adverse environmental impacts, without considering alternative scenarios. The alternative tract layout proposed in these comments and displayed in **Figure 1** would be superior in providing for the collective purposes of the Arctic National Wildlife Refuge.

The Coastal Plain Oil and Gas Programmatic Leasing Decision and FEIS did not address the site-specific analysis requirements resulting from the Tax Act direction that, "*Essential pipelines and road crossings*



*will be permitted through setback areas in accordance with Section 20001 (c)(2) of PL 115-97.* Section 20001 (c)(2) mandates that rights-of-way or easements across the Coastal Plain are to be issued with no mention of protecting surface resource values. The Lease Sale Tract proposed action was another opportunity for the BLM to address the site-specific requirements of NEPA for each of the offered lease sale areas. An agency is required to fully evaluate site-specific impacts once it reaches the point of making *"a critical decision . . . to act on site development."* An agency reaches the threshold triggering site-specific review when it proposes to make an irreversible and irretrievable commitment of resources.

The call for lease sale tract nominations and comments and Notice of Sale should have been supported by an Environmental Assessment or Environmental Impact Statement with sufficient information to foster informed decision-making and informed public participation. The lease sale tract decision is not in conformance with 42 U.S.C. § 4332(2)(C) and is therefore not in accordance with law under 5 U.S.C. § 706(2)(A) and not in observance of procedure required by law under 5 U.S.C. § 706(2)(D).

### **Council on Environmental Quality Regulations**

Revised CEQ NEPA regulations were effective on September 14, 2020 (85 FR 43304). The following paragraphs reviews the regulations.

The courts have given CEQ's regulations *"substantial deference"* when the regulations had a *"well-considered basis."* From 1978 through 2020, CEQ's regulations reinforced NEPA's salutary goals. In July 2020, however, CEQ promulgated a new rule (the 2020 Rule), 85 Fed. Reg. 43,304 (July 16, 2020), that attempts to reinterpret and revise the statute, and to eviscerate many of NEPA's well-established, judicially recognized protections. The 2020 Rule purports to bind every other federal agency.

Congress passed NEPA in 1969 *"to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of"* humankind.

The Act declares a *"continuing responsibility of the Federal Government to . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."* In recognition of that responsibility, the statute imposes on the federal government an obligation *"to create and maintain conditions under which man and nature can exist in productive harmony,"* and to *"assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings."*

Section 102 of NEPA requires each federal agency to prepare a *"detailed statement by the responsible official"* of the environmental impacts of any proposed major federal action significantly affecting the environment. This statement—commonly known as an environmental impact statement—must describe the environmental impacts of the proposed action.

NEPA commands that each environmental impact statement address, among other factors, *"any adverse environmental effects which cannot be avoided should the proposal be implemented,"* and *"the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity."*

NEPA further requires that, for *"any proposal which involves unresolved conflicts concerning alternative uses of available resources,"* federal agencies must *"study, develop, and describe appropriate alternatives to recommended courses of action."*

NEPA's requirement to prepare an environmental impact statement "*serves NEPA's 'action-forcing' purpose*" of "*ensur[ing]*" that federal decisionmakers "*will have available, and will carefully consider, detailed information concerning significant environmental impacts*" before approving new projects.

NEPA's environmental review process also "*gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' and, perhaps more significantly, provides a springboard for public comment.*"

Section 102 of NEPA requires each federal agency to "*develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking.*" Congress directed each federal agency to develop its NEPA procedures "*in consultation with*" CEQ.

CEQ issued its first regulations implementing NEPA in 1978. These 1978 regulations set out procedures and standards for preparation of environmental impact statements and related documents.

To help ensure that NEPA's broad mandate was realized, the 1978 regulations defined what impacts an environmental impact statement must assess; accommodated public involvement; and put limits on agency authority to delegate the preparation of environmental impact statements to private project proponents.

CEQ's 1978 regulations provided that an environmental impact statement was required where the agency reasonably anticipated "*a cumulatively significant impact on the environment.*"

CEQ's 1978 regulations defined "*cumulative impact*" to mean "*the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions,*" including "*individually minor but collectively significant actions taking place over a period of time.*"

On July 16, 2020, CEQ published its 2020 Rule in the Federal Register (See 85 Fed. Reg. at 43,304).

The 2020 Rule undermines NEPA's mandate, and conflicts with decades of judicial precedent interpreting the statute. The 2020 Rule limits the number and nature of projects subject to NEPA analyses. It eliminates the requirement that, when NEPA reviews are conducted, agency environmental documents consider the cumulative and indirect effects of the proposed projects. It raises barriers to public participation; allows private, self-interested project proponents to draft environmental documents for federal agencies; and attempts to constrain judicial oversight of NEPA compliance.

The 2020 Rule eliminates the definition of cumulative impact and the requirement to consider such impacts.

The 2020 Rule also eliminates all references to "*indirect*" effects and revises the definition of "*effects*" to include only effects that are "*reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives.*"

Under the 2020 Rule, "*a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA.*" The 2020 Rule states: "*Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or [that] would occur regardless of the proposed action.*"

CEQ states that "*analysis of cumulative effects . . . is not required under NEPA.*" CEQ also states that agency analyses "*should not go beyond the definition of effects.*" Thus, under the 2020 Rule, agencies



may not consider cumulative impacts when determining whether a project will have a significant environmental impact.

CEQ justifies its elimination of the requirement to consider cumulative impacts and indirect effects of a project by stating that *"the terms 'indirect' and 'cumulative' have been interpreted expansively resulting in excessive documentation about speculative effects and leading to frequent litigation."*

CEQ also justifies the change by noting that *"categorizing and determining the geographic and temporal scope of [cumulative] effects has been difficult and can divert agencies from focusing their time and resources on the most significant effects."*

These assertions—that assessing cumulative impacts and indirect effects has resulted in excessive documentation and diverted agency attention from *"more important"* environmental problems—are factually unsupported, unexplained, and legally insufficient to justify such a substantial change in CEQ's longstanding policy.

CEQ makes no effort to explain how, and cites no evidence to support its conclusion that, the 2020 Rule's elimination of *"cumulative impacts"* analyses, and its replacement of CEQ's long-standing regulatory definitions of *"effect"* and *"indirect effect"* with the phrase *"remote in time, geographically remote, or the product of a lengthy causal chain,"* will reduce litigation or agency confusion.

CEQ fails to explain how, or even to claim that, the 2020 Rule's elimination of *"cumulative impacts"* analyses, and its replacement of CEQ's long-standing regulatory definitions of *"effect"* and *"indirect effect"* with the phrase *"remote in time, geographically remote, or the product of a lengthy causal chain,"* will not cause agencies to overlook significant environmental impacts of a project. CEQ ignores a long record of environmental documents that have successfully described significant environmental impacts because cumulative and indirect effects were specifically considered in those documents. CEQ does not explain how failure to consider significant cumulative and indirect impacts is consistent with NEPA.

CEQ's elimination of the requirement to consider cumulative impacts and indirect effects is inconsistent with NEPA's statutory language—which requires a *"detailed statement"* of *"environmental impact[s],"* including *"any"* adverse effects of the project that cannot be avoided and the law's purpose. It is also inconsistent with decades of judicial precedent that interprets the statute to require agencies to consider the cumulative effects of an action. CEQ has no authority to overrule this precedent.

The 2020 Rule's elimination of the requirement to consider cumulative impacts and indirect effects is unsupported by record evidence, disregards factors relevant to CEQ's interpretation of NEPA, exceeds CEQ's statutory authority, and violates the standards of section 10 of the Administrative Procedure Act.

Courts may declare that the 2020 CEQ Rule is *"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations or short of statutory right,"* and *"without observance of procedure required by law,"* in violation of the standards of the Administrative Procedure Act, and NEPA, and vacate and set aside the 2020 Rule.

Courts should find that the 2020 CEQ Rule is *"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations or short of statutory right,"* and *"without observance of procedure required by law,"* in violation of the standards of the Administrative Procedure Act, and NEPA, and vacate and set aside the 2020 CEQ Rule.

