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JERSEY, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND THE
COMMONWEALTH OF MASSACHUSETTS**

November 6, 2020

By E-Mail

Ms. Sarah LaMarr
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Re: Marsh Creek East Seismic Exploration, DOI-BLM-AK-R000-2021-0001-EA
(Oct. 23, 2020): Comments Submitted by State Attorneys General

Dear Ms. LaMarr:

The undersigned Attorneys General submit these comments on the Bureau of Land Management's (BLM) Marsh Creek East Seismic Exploration Program Proposed Action and Plan of Operations (the Proposed Action). We strongly object to the Proposed Action. Before BLM subjects over 450,000 acres of the fragile Arctic National Wildlife Refuge's Coastal Plain (Coastal Plain) to seismic exploration activities that would significantly impact the environment (including essential habitat for polar bears, caribou, and migratory birds) and cultural and subsistence resources, BLM must complete a lawful and adequate environmental review and public comment period as required by the National Environmental Policy Act (NEPA), consider the purposes for which Congress created the Arctic Refuge, and otherwise comply with federal law.

BLM has failed to provide the public with any information about the environmental impacts of the Proposed Action and failed to explain how the Proposed Action will be compatible with and fulfill the Refuge purposes. Moreover, BLM has failed to account for or even mention that the project operator, SAExploration, is subject to a U.S. Securities and Exchange Commission (SEC) fraud enforcement action, raising significant doubt about its ability to perform in compliance with applicable laws. Despite these glaring deficiencies, BLM now attempts to rush through its unlawful action by limiting the comment period—on a subject of intense public interest—to 14 days.

If authorized, the Proposed Action would allow seismic testing across a third of the Coastal Plain and construction of hundreds of miles of snow access trails, multiple airstrips, and thousands of miles of receiver lines. The Proposed Action would also include mobile camp facilities that would

support 180 people, require thousands of gallons of water per day, and move every five to seven days as the testing activities progress. Food and other solid waste would be incinerated daily and up to 5,000 gallons of grey water per day could be discharged from the camp facilities. Together, the vehicles and camp facilities would require approximately 6,000 gallons of fuel per day.

Given the significant environmental impacts of this Proposed Action, NEPA requires a detailed environmental review with a robust public comment process. BLM cannot, as it appears to, rely on its deficient and fundamentally flawed environmental impact statement (Program EIS) for the Coastal Plain Oil and Gas Leasing Program (the Leasing Program) which is subject to multiple pending lawsuits, including one filed by the undersigned States. BLM must conduct an independent review to satisfy fully its NEPA obligations. In addition, the Department of the Interior, of which BLM is a part, has not complied with the statutory mandates of the National Refuge System Administration Act (Refuge Administration Act) and the Alaska National Interest Lands Conservation Act (ANILCA) to ensure authorized uses of the Refuge are compatible with and fulfill the purposes for which Congress created the Refuge—a fatal infirmity, particularly here where, on its face, the Proposed Action appears inconsistent with those purposes.

While BLM cannot proceed with the Proposed Action without the legally-required environmental review and consideration of the Refuge purposes, it is also egregious to proceed under these circumstances when the project operator is currently the subject of a SEC enforcement action.¹ The SEC alleges that SAExploration and former senior executives including its former Chief Executive Officer perpetrated a four-year accounting fraud scheme involving over \$100 million and exploitation of the State of Alaska’s oil and gas exploration tax credits.² These serious and unresolved allegations coupled with SAExploration’s Chapter 11 bankruptcy filing in August of this year undermine BLM’s representations or assumptions that the operator will conduct the proposed activities in compliance with applicable laws or has the resources to do so. These facts demonstrate why it is especially important that BLM not rush its review on an artificially expedited timetable.

A. The Proposed Action Requires Detailed Environmental Review Under NEPA.

All federal agencies, including BLM, must comply with NEPA “to the “fullest extent possible” and must prepare a detailed environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332. An EIS must discuss, among other things: the environmental impact of the proposed federal action, any adverse and unavoidable environmental effects, any alternatives to the proposed action, and any

¹ Although Kaktovik Iñupiat Corporation (KIC) is the project applicant, KIC intends to conduct operations through SAExploration. Kaktovik Iñupiat Corporation, Marsh Creek East Program Plan of Operations, Winter Seismic Survey, 4 (released Oct. 23, 2020).

² Complaint, *U.S. Sec. and Exch. Comm’n v. SAExploration Holdings, Inc.*, No. 1:20-cv-08423 (S.D.N.Y. filed Oct. 8, 2020).

irreversible and irretrievable commitment of resources involved in the proposed action. *Id.* § 4332(2)(C). Because the Proposed Action will significantly impact the quality of the environment, BLM must prepare an EIS before authorizing seismic activity in the Arctic National Wildlife Refuge.

As noted above, snow trails, airstrips, receiver lines, and camp facilities collectively will disrupt thousands of miles of the Coastal Plain. Large equipment including camp trailers, rubber tracked vehicles (e.g. Steigers), and fuel tanks will crisscross the Coastal Plain. Thousands of gallons of snow and ice will be removed from the tundra and lakes to supply camp facilities. Aircraft will take off and land repeatedly during the winter months and a helicopter will return during the summer when migratory birds are present to conduct hundreds of landings and take offs as it searches for lingering debris.

The Proposed Action area, which encompasses nearly half a million acres of the Coastal Plain, includes essential habitat for migratory birds, polar bears, caribou, and other wildlife. Yet, the Proposed Action does not adequately review potential impacts to polar bears and caribou and it fails entirely to mention the abundance and diversity of migratory birds that frequent the area, including species that migrate to the undersigned States such as the long-tailed ducks³ and snow geese.⁴ While the proposed seismic testing would occur during winter months, the proposed summer cleanup and inspection activities would occur in July and August when a high density of migratory birds are present. These activities would involve 450 to 600 helicopter landings and takeoffs in important migratory bird habitat. Yet, the Proposed Action does not contemplate mitigating impacts to migratory birds. Moreover, while a high density of migratory birds may not be present during winter seismic testing, BLM has not analyzed whether the expansive exploration activities will irreparably harm this important bird habitat. This omission is consequential because migratory bird protection is one of the purposes for which Congress created the Arctic Refuge.⁵

The Proposed Action would expose the Coastal Plain to seismic activity for only the second time. The first seismic exploration occurred in the winter of 1984–85 and left scars on the landscape still seen decades later.⁶ With new technology, seismic exploration now creates a denser grid, which

³ Bureau of Land Management, Environmental Impact Statement of the Coastal Plain Oil and Gas Leasing Program (Program EIS), at App. A, Map 3-24 (Sept. 2019).

⁴ *Id.* at App. A, Map 3-26.

⁵ ANILCA, Pub. L. No. 96-487 § 303(2)(B), 94 Stat. 2371, 2390 (1980).

⁶ Martha K. Reynolds et al., *Landscape Impacts of 3D-Seismic Surveys in the Arctic National Wildlife Refuge, Alaska*, ECOLOGICAL APPLICATIONS, 10.1002/eap.2143, 5-15 (Oct. 2020); Janet C. Jorgenson et al., *Long-Term Recovery Patterns of Arctic Tundra After Winter Seismic Exploration*, ECOLOGICAL APPLICATIONS, 205, 219–20 (2010), available at Publications, Agencies and Staff of the U.S. Department of Commerce, Paper 187, <https://digitalcommons.unl.edu/usdeptcommercepub/187>; see also U.S. FISH AND WILDLIFE SERV., ARCTIC SEISMIC TRAILS (last updated Feb. 27, 2014), <https://www.fws.gov/refuge/arctic/seismic.html>.

could increase disturbance to wildlife.⁷ The expansive grid of seismic tracks on nearly half a million acres of the Coastal Plain also will irreparably destroy the environmental baseline, making it impossible to accurately account for the current abundance of wildlife and intricacies of the ecosystem prior to seismic exploration and other oil and gas activities on the Coastal Plain. As the undersigned States noted in their complaint challenging the Coastal Plain Leasing Program EIS, that baseline information is particularly important for understanding impacts to migratory birds, many of which frequent the undersigned States.⁸

Despite this expansive impact to a third of the Arctic Refuge's Coastal Plain, BLM has not conducted a detailed environmental review in compliance with NEPA. As part of this review, BLM must develop a reasonable range of alternatives, including a no-action alternative and an alternative that minimizes development and prioritizes conservation of the Coastal Plain consistent with the purposes for which the Refuge was created.

In addition, BLM must conduct a thorough review of the direct, indirect, and cumulative impacts of each alternative. This analysis must include, but it is not limited to: the direct, indirect, and cumulative impacts from the construction and operation of hundreds of miles of snow access trails, air strips, receiver lines, and mobile camp facilities; the direct, indirect, and cumulative emissions associated with seismic exploration; the direct, indirect, and cumulative impacts of the Proposed Action and other seismic activity in the region on migratory birds; the direct, indirect, and cumulative impacts of snow removal, water withdrawal, and grey water discharge on migratory birds; the direct, indirect, and cumulative impacts of summer flight operations on migratory birds; the direct, indirect, and cumulative impacts of the Proposed Action's fuel spills; the direct, indirect, and cumulative impacts of the Proposed Action on all wildlife, including polar bears and caribou.⁹ BLM's environmental review also must gather appropriate baseline information about water levels and distribution and migratory bird populations, so that BLM can fully assess the potential impacts of the Proposed Action. BLM must not rely on stale data or conclusory assertions to support its analysis. BLM must also analyze the Proposed Action's direct, indirect, and cumulative impacts

⁷ Ryan R. Wilson & George M. Durner, *Seismic Survey Design and Effects on Maternal Polar Bear Dens*, THE JOURNAL OF WILDLIFE MANAGEMENT, 201, 202 (Nov. 2019).

⁸ Complaint for Declaratory and Injunctive Relief at 52-54, *Washington et al. v. Bernhardt*, No. 3:20-cv-00224 (D. Alaska filed Sept. 9, 2020), ECF No. 1.

⁹ The undersigned States understand that the revised regulations implementing NEPA no longer require analysis of indirect and cumulative impacts. However, it is the undersigned States' position that NEPA, itself, requires indirect and cumulative impact review. *See* Complaint for Declaratory and Injunctive Relief at 60-64, *California et al. v. CEQ*, No. 3:20-cv-06057 (N.D. Cal. filed Aug. 28, 2020), ECF No. 1.

to subsistence resources, public health, and environmental justice.¹⁰ BLM must also comply with the National Historic Preservation Act.¹¹

B. BLM Cannot Satisfy Its NEPA Obligations By Relying on the Legally Deficient Coastal Plain Oil and Gas Program EIS.¹²

Contrary to BLM's implication, the Proposed Action may not rely on BLM's unlawful Program EIS and Record of Decision to authorize the Proposed Action.

The undersigned States filed a lawsuit challenging the Program EIS and Record of Decision in August 2020, identifying several legal deficiencies under NEPA and other federal laws.¹³ Because the Program EIS and Record of Decision do not comply with NEPA and are otherwise unlawful, BLM may not rely on them to support the Proposed Action.¹⁴ In particular, the Program EIS: failed to consider a reasonable range of alternatives, including an alternative consistent with the purpose of the Refuge; failed to adequately analyze the greenhouse gas emissions associated with oil and gas development; and failed to adequately analyze the Leasing Program's impacts to migratory birds. These deficiencies include BLM's cursory analysis of impacts from seismic exploration. For instance, the Program EIS did not consider an alternative that, among other things, would have limited seismic activity on the Coastal Plain. In addition, while the EIS summarily concludes that seismic exploration during the winter would "have little effect on most birds," this assertion is unsupported by any scientific studies or expert analysis.¹⁵ Without adequate data and consideration of significant impacts, BLM did not make reasoned choices in the Program EIS about

¹⁰ Among other things, BLM should ensure that the Proposed Action complies with Executive Order, 12898, which directs federal agencies to identify and address the disproportionately high and adverse human health and environmental effects of their actions on minority and low-income populations. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

¹¹ See 54 U.S.C. § 306108.

¹² In addition, it is not clear that BLM has the statutory authority to authorize seismic testing in the Arctic Refuge.

¹³ Complaint for Declaratory and Injunctive Relief at 52-54, *Washington et al. v. Bernhardt*, No. 3:20-cv-00224 (D. Alaska filed Sept. 9, 2020), ECF No. 1.

¹⁴ See *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1074 (9th Cir. 2002) (an environmental assessment may not tier to a legally deficient EIS).

¹⁵ Program EIS at 3-119.

programmatic parameters and potential mitigation measures with respect to seismic exploration, among other activities.

Because the Program EIS violates NEPA, BLM cannot rely on that EIS to authorize the Proposed Action.¹⁶

C. BLM Should Clarify the Public Review Process for the Proposed Action.

Meaningful public participation on proposed federal actions is a cornerstone of the NEPA process. This truncated comment process is not a substitute for meaningful public input on BLM's review of the environmental impacts of the Proposed Action. In addition, at least one public report suggests that the terms of the Proposed Action are not current because federal agencies are working with KIC to amend the Proposed Action.¹⁷ Public comment on a half-baked plan is insufficient. BLM should clarify the process it plans to use during its review of the Proposed Action, including by indicating how and when it will provide opportunities for public review and input and by clarifying how BLM plans to review and consider that input in light of NEPA's statutory requirements,¹⁸ the newly revised NEPA regulations,¹⁹ and existing regulations.²⁰

D. The Proposed Action Must Not Conflict with the Arctic Refuge Purposes.

The Refuge Administration Act and ANILCA require that the Secretary of the Interior manage the Arctic Refuge consistent with the purposes for which Congress created the Refuge and that uses of the Refuge be compatible with and fulfill those purposes.²¹ Yet, the Proposed Action fails to even mention the Refuge purposes let alone provide any explanation of how the Proposed Action will be compatible with and fulfill those purposes. In ANILCA, Congress identified four purposes of the Arctic Refuge, including conserving fish and wildlife populations and their habitats, fulfilling international treaty obligations related to migratory birds and their habitats, providing opportunities for subsistence use, and ensuring adequate water quality and quantity within the Refuge.²² These four purposes built on the three original purposes of the Arctic Refuge to preserve

¹⁶ See *Kern*, 284 F.3d at 1074.

¹⁷ Sabrina Shankman, *Trump's Interior Department Pressures Employees to Approve Seismic Testing in ANWR*, Inside Climate News, Oct. 29, 2020, at <https://insideclimatenews.org/news/29102020/trump-arctic-national-wildlife-refuge-seismic-testing-oil-fish-and-wildlife-service>.

¹⁸ 42 U.S.C. §§ 4331–32; see also Complaint for Declaratory and Injunctive Relief at 63, *California et al. v. CEQ*, No. 3:20-cv-06057.

¹⁹ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act (Final Rule), 85 Fed. Reg. 43,304 (July 16, 2020) (to be codified at 40 C.F.R. pt. 1500).

²⁰ See 43 C.F.R. pt. 46.

²¹ National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd–68ee; ANILCA §§ 303(2)(B), 304(a)–(b), 94 Stat. at 2390, 2393; 50 C.F.R. § 25.12.

²² ANILCA § 303(2)(B), 94 Stat. at 2390.

“unique wildlife, wilderness, and recreational values.”²³ Although Congress added a Refuge purpose to provide for a limited oil and gas program on the Coastal Plain in a rider to the 2017 Tax Act,²⁴ these other purposes remain intact and BLM must act in a way that is compatible with and fulfills all of the purposes of the Arctic Refuge.²⁵ Before BLM can authorize the Proposed Action the Secretary must ensure that the Proposed Action will be compatible with and fulfill the Refuge purposes, including conservation and protection of migratory birds and their habitat.

E. Conclusion.

The Coastal Plain is a national treasure that supports a diversity of wildlife, including migratory birds that travel between the undersigned States and the Coastal Plain. For the above reasons, BLM must not authorize activities in the Coastal Plain without fully complying with federal laws and carefully considering the immediate and long-term impacts of seismic activity in one of the nation’s last remaining wild places.

Respectfully submitted,

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²³ Public Land Order 2214, at 1 (Dec. 6, 1960); ANILCA § 305, 94 Stat. at 2395 (stating that original purposes remain in effect in addition to the four purposes identified in ANILCA).

²⁴ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 tit. 2, § 20001, 131 Stat. 2054, 2235–37.

²⁵ 16 U.S.C. §§ 668dd(d)(3)(A)(i), 668ee(3).

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Nov. 6, 2020
Page | 8

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Page | 9

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Page | 10

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