



VIA EMAIL AND EXPRESS, CERTIFIED MAIL

December 18, 2025

Doug Burgum
Secretary of the Interior
1849 C Street NW, Mail Stop 7328
Washington, DC 20240
exsec_exsec@ios.doi.gov

Bill Groffy
Principal Deputy Director
Bureau of Land Management
1849 C Street NW, Room 5665
Washington, DC 20240
wgroffy@blm.gov

Kevin Pendergast
Alaska State Director
Bureau of Land Management
222 W 7th Avenue, #13
Anchorage, AK 99513
blm_ak_state_director@blm.gov

RE: 60-Day Notice of Intent to Sue Regarding Violations of the Endangered Species Act Related to Oil and Gas Leasing Program in the Coastal Plain of the Arctic National Wildlife Refuge

Dear Sirs,

This letter serves as a 60-day notice on behalf of the Natural Resources Defense Council, Center for Biological Diversity, and Friends of the Earth of their intent to sue the Bureau of Land Management (Bureau) and Secretary of the Interior Doug Burgum for violating the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, by failing to ensure that the oil and gas leasing program approved by the Bureau in October 2025 is not likely to jeopardize the continued existence of polar bears or result in the destruction or adverse modification of their critical habitat. The government acknowledges that the program is likely to disturb threatened polar bears, scare them away from their dens, and result in the death of cubs. Nevertheless, it concludes—based on faulty analysis—that the program’s effect on the bears will be negligible. This letter is provided pursuant to the 60-day notice requirement of the ESA’s citizen-suit provision, 16 U.S.C. § 1540(g).

ALASKA 325 FOURTH STREET JUNEAU, AK 99801

T: 907.586.2751 F: 907.463.5891 AKOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

I. Legal Framework

Under Section 7 of the ESA, before taking any action that may affect a listed species, “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . .” 16 U.S.C. § 1536(a)(2). To comply with section 7’s substantive mandate, federal agencies must consult with the relevant wildlife agency whenever an agency action may affect a listed species. *Id.*; 50 C.F.R. § 402.14(a). The Secretary has delegated to the Fish and Wildlife Service (Service) the authority to provide ESA consultation to agencies taking actions that may affect the polar bear. Both the action agency (here the Bureau) and the consulting agency (here the Service), must use “the best scientific and commercial data available” to fulfill their Section 7 duties. 16 U.S.C. § 1536(a)(2). At the conclusion of the consultation, the consulting agency issues a biological opinion detailing how the action is expected to affect the listed species and its habitat.

The biological opinion includes a determination from the consulting agency on whether a proposed action is “[l]ikely to jeopardize” or “[n]ot likely to jeopardize . . . the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(h). If the consulting agency concludes that a proposed action will jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, the biological opinion must include “reasonable and prudent alternatives” to avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2).

ESA regulations define “[j]eopardize the continued existence of” as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. A jeopardy analysis requires the agency to consider the aggregate effect of past and ongoing human activities that affect the current status of the species and its habitat (“environmental baseline”); all consequences of the proposed action to listed species or critical habitat, including those that occur later in time (“effects of the action”); and the effects of future state and private activities that are reasonably certain to occur (“cumulative effects”). *Id.* §§ 402.14(g), 402.02. An agency must consider all of these factors in context of the current status of the species and its habitat. *Id.* § 402.14(g).

Section 9 of the ESA prohibits the “take” of any endangered species without special exemption. 16 U.S.C. § 1538. “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

If, during consultation, the consulting agency concludes that an action is reasonably certain to take listed members of the population but will not jeopardize the continued existence of the species, the biological opinion must include an incidental take statement that specifies the impact of the action, generally by setting a numeric limit on take and identifying “reasonable and prudent measures” that will minimize the impact of that take, among other requirements. 16 U.S.C. § 1536(b)(4)(C). The take of a listed species in compliance with the terms of a valid

incidental take statement is not prohibited under section 9 of the ESA. *Id.* § 1536(o)(2); 50 C.F.R. § 402.14(i)(6).

II. Background

On October 23, 2025, the Bureau released a Record of Decision (ROD) adopting an oil and gas leasing program (Program) that authorizes leasing across the entire Coastal Plain of the Arctic National Wildlife Refuge, including in areas designated as critical habitat for Southern Beaufort Sea polar bears, listed as threatened under the ESA. This ROD purports to rely on both the 2019 final environmental impact statement (FEIS) and 2024 supplemental environmental impact statement (SEIS) prepared for the two previous Programs. *See* Bureau of Land Management, U.S. Department of the Interior, DOI-BLM-AK-0000-2025-0003-EIS, *Coastal Plain Oil and Gas Leasing Program Record of Decision 4* (Oct. 2025) (2025 ROD).

Onshore denning habitat is becoming increasingly important for polar bears as climate change reduces the availability of sea ice habitat and forces bears to den on land. *See* Bureau of Land Management, U.S. Department of the Interior, DOI-BLM-AK-0000-2018-0002-EIS, *Coastal Plain Oil and Gas Leasing Program Final Environmental Impact Statement* 3-167 to 3-168, 3-170 (2019). Both the SEIS and FEIS acknowledge that the Program could result in the direct loss or alteration of denning habitat. *Id.* at 3-180; Bureau of Land Management, U.S. Department of the Interior, DOI-BLM-AK-0000-2021-0006-EIS, *Coastal Plain Oil and Gas Leasing Program Supplemental Environmental Impact Statement* 3-163 (2024). Seismic activities, in particular, could result in “disturbance of maternal females during the winter denning period, which could result in premature den abandonment and loss of cubs.” FEIS at 3-183 to 3-184, 3-187; *see also* SEIS at 3-163 to 3-164. Seismic vehicles could also crush mother bears and their cubs in their dens as they move across the plain. *See* SEIS at 3-173. The FEIS further acknowledges that “[a]ny injury or mortality from oil and gas development-related human/bear conflicts would pose a problem because of the declining status of the SBS population.” FEIS at 3-192; *see also* SEIS at 3-173 (“Existing rates of human-caused removals already exceed the SBS stock’s calculated potential biological removal (PBR) level . . . any additional mortality of SBS polar bears could further inhibit SBS polar bears from reaching their optimum sustainable population level.”).

The Bureau consulted with the Service, and the Service issued a biological opinion for the Program on September 23, 2025. In the biological opinion, the Service concluded—based on a series of faulty assumptions—that the Program is not likely to result in jeopardy to polar bears or appreciably diminish the value of their critical habitat. *See* Northern Alaska Fish and Wildlife Field Office, U.S. Fish and Wildlife Service, *Programmatic Biological Opinion for the Coastal Plain Oil and Gas Leasing Program in the Arctic National Wildlife Refuge* 225-31, 234-37 (Sept. 2025) (BiOp). The Service did not include an incidental take statement with the biological opinion.

III. The 2025 Biological Opinion

The action at issue here is the action adopted in the Bureau's 2025 ROD for the Program: "a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain." 2025 ROD at 6. In adopting the 2025 ROD, the Bureau violated the ESA because it relied on a legally insufficient biological opinion. The biological opinion the Bureau relied on: (1) fails to include an incidental take statement; (2) fails to analyze the effects of the entire program using the best available science and data; (3) incorporates an erroneous understanding of the allowed scope of development under the Program; and (4) arbitrarily and unlawfully relies on ineffective and nonbinding mitigation measures to conclude that polar bears will not face jeopardy as a result of the Program. These flaws are discussed in more detail below.

A. No incidental take statement

Despite indicating that the Program would likely result in substantial take of polar bears, including mortality of cubs, *see, e.g.*, BiOP at 167-68, the biological opinion does not include an incidental take statement for the Program. While Service regulations sometimes allow the agency to skip an incidental take statement for a programmatic consultation, it could not do so where—as here—the take at issue is "reasonably certain to occur." 50 C.F.R. § 402.14(g)(7).

B. Improper jeopardy analysis

A biological opinion must include an assessment of cumulative effects on the species' survival over the timeline considered. *See* 50 C.F.R. § 402.14(g)(4), (h). In that assessment, the question "is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts." *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Recl.*, 426 F.3d 1082, 1093 (9th Cir. 2005). The biological opinion did not seriously grapple with the Service's conclusions elsewhere that polar bear populations are expected to decline precipitously during the 85-year period the biological opinion covers. *See, e.g.*, 2025 BiOp at 154-55 ("The [Southern Beaufort] subpopulation is part of the Polar Basin Divergent Ecoregion which is expected have a 75 percent reduction in the numbers of bears by the end of the century."). Instead, the biological opinion found no jeopardy based on arbitrary conclusions (a) about the number of projected takes compared to the global population; (b) that only cubs would be killed; (c) that females who lose cubs can have more cubs the next season; and (d) that regulated subsistence hunting is a larger source of polar bear deaths. 2025 BiOp at 230-31. This approach failed to consider at least one central factor in the jeopardy analysis: the broader cumulative decline of polar bears to which the program would contribute. And it improperly focused on the (alleged) small annual number of takes attributable to the Program, violating the ESA's requirement that "where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm." *Turtle Island Restoration Network v. U.S. Dep't of Com.*, 878 F.3d 725, 737 (9th Cir. 2017) (cleaned up). It also failed to adequately consider the relative importance of Unit 2 habitat, particularly the maternal denning habitat that will be affected by development; maternal denning habitat on the Coastal Plain is

limited to 18,400 acres. *See* BiOp at 147. The Service also ignored projects that will cause cumulative impacts to the polar bears' broader habitat. *See, e.g., id.* at 70.

C. Arbitrary analysis of development allowed under the Program

In the 2025 ROD, the Bureau changed its interpretation of an aspect of the Program that was an important consideration in the biological opinion's no jeopardy or adverse modification conclusion. Congress has limited surface development for production and support facilities on the Coastal Plain to 2,000 acres. Pub. L. No. 115-97, § 20001(c)(3). The biological opinion presents the limit as a hard cap on surface development, repeatedly stating that surface disturbance will be limited to 2,000 acres. *See* BiOp at 14-15; *see also id.* at xiii, xiv, 3-4, 9, 135, 136, 150, 184. The biological opinion then concludes that the limit provides meaningful protection to polar bears and their habitat because "permanent alteration of 2,000 acres (8 km²) of Terrestrial Denning Habitat would represent a very small subset of available Terrestrial Denning Habitat" thus "overall effects to the [physical and biological features] of Terrestrial Denning Habitat would be insignificant." *Id.* at 175.

In the 2025 ROD, however, the Bureau indicated that it has changed its interpretation of the 2,000-acre limit on surface development in a way that could substantially increase the area of cumulative surface development permitted under the Program. *See* 2025 ROD at 8-10. The biological opinion's analysis is arbitrary because it does not reflect this important change in the Bureau's interpretation.

D. Arbitrary and unlawful reliance on mitigation measures

The biological opinion's reliance on several mitigation measures for its no-jeopardy finding was arbitrary and unlawful. Mitigation relied upon in a biological opinion must be "clear, definite" and "under agency control or otherwise reasonably certain to occur." *Nat'l Wildlife Fed. v. NMFS*, 524 F.3d 917, 936 & n.17 (9th Cir. 2008); *see also Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020). The biological opinion itself acknowledges that it "cannot rely on . . . uncertain, nonbinding mitigation measure[s]." BiOp at 160; *see also id.* at 172. A non-exhaustive list of some of the uncertain, nonbinding, and/or ineffective mitigation measures that the biological opinion relies upon is provided below.

The biological opinion relies on Required Operating Procedure (ROP) 11 to conclude that polar bear denning habitat suitability will not be affected by seismic surveys. 2025 BiOp at 136 ("As described above, no long-term effects on denning habitat suitability would be expected to occur from seismic survey and exploratory drilling activities because ROP 11 is expected to protect streambanks, minimize soil compaction, and the breakage, abrasion, compaction, or displacement of vegetation."); *see also id.* at 129. But robust scientific evidence shows that ROP 11 will not provide adequate protection because snow cover in the Coastal Plain is highly variable and it is very unlikely that operators can guarantee sufficient snow cover. *See, e.g.,* Glen E. Liston, ANWR 1002 SnowModel Snow Depth Study, 2010-2020 (Dec. 12, 2020) (submitted as Exhibit A to Dkt. No. 43-11 in *Nat'l Audubon Soc'y v. Bernhardt*, No. 20-cv-205-SLG (D. Alaska Dec. 15, 2020)). The biological opinion fails to grapple with this evidence and simply assumes ROP 11 will be fully effective.

The biological opinion also relies on ROP 10 to ensure a 41% rate of pre-seismic detection for polar bear dens. BiOp at 142. The biological opinion acknowledges that “ROP 10 does not specify the type of survey required nor does it specify the level of effort required.” *Id.* at 149. ROP 10 merely requires that operators “make efforts to locate occupied polar bear dens within and near areas of operation, utilizing appropriate tools, such as infrared imagery and/or polar bear scent-trained dogs.” 2025 ROD at A-14. Yet the biological opinion assumes that operators will utilize AIR surveys. BiOp at 146, 149. The biological opinion also assumes, despite ROP 10’s “uncertainty in the timing of the surveys,” that the surveys will take place before seismic activities start. *Id.* at 140. And the biological opinion assumes these surveys will have a highly effective detection rate of 41%. *See, e.g., id.* at 142. The biological opinion fails to grapple with the various conditions that can affect such surveys and the fact that most industry surveys are likely to happen in suboptimal conditions. For example, underlying research found the surveys that “most closely resembled den surveys flown for oil and gas industry” resulted in detection probabilities of 15% and 24%. Woodruff et al., *Evaluating the efficacy of aerial infrared surveys to detect artificial polar bear dens*, 46(3) WILDLIFE SOC’Y BULLETIN (2022).

The biological opinion also assumes that authorized officers will only issue waivers, exceptions, and modifications to lease stipulations and ROPs after giving 30 days of public notice, and that they will issue written decisions explaining the underlying rationale. BiOp at 32. While this was required under the 2024 ROD, *see* Bureau of Land Management, U.S. Department of the Interior, *Coastal Plain Oil and Gas Leasing Program Record of Decision A-1* (Dec. 2024), it is not mandated by the 2025 ROD, *see generally* 2025 ROD at App’x A. Stipulations and ROPs lay out the requirements for protection of the Coastal Plain species, lands and waters, and the biological opinion relies on these terms and conditions to reach its no jeopardy conclusion. It notes, for example, that stipulations and ROPs “help ensure that maternal polar bears retain access to terrestrial den sites and access between den sites and the coast” and relies on such terms to make conclusions about disturbance. *See* BiOp at 176. The biological opinion arbitrarily assumes that the integrity of the stipulations and ROPs will be protected by at least a minimal public transparency process, when that process is no longer required.

Finally, the biological opinion recognizes that current mitigation measures may be inadequate, but does not propose binding measures to avoid adverse effects to polar bears and their habitat. *See, e.g.,* BiOp at 149 (acknowledging that the mitigation measure aimed at detecting polar dens “does not specify the type of survey required nor does it specify the level of effort required,” yet assuming that a certain type of survey will be used). The biological opinion’s reliance on inadequate mitigation measures renders its no jeopardy conclusion arbitrary and unlawful.

IV. The Bureau’s violations of Section 7 of the ESA

For all the reasons explained in Part III above, the biological opinion does not meet the requirements of the ESA. The Bureau cannot rely on a legally deficient biological opinion to meet its obligations under the ESA. This is particularly true in this context, where the Bureau’s opportunity to remove areas from leasing, or otherwise condition the leases that may be issued, is

now, before the first lease sale under the new Program. In issuing and implementing the 2025 ROD that relies on a legally insufficient biological opinion, the Bureau is violating the ESA.

The Natural Resources Defense Council, Center for Biological Diversity, and Friends of the Earth intend to sue the Bureau and Secretary Burgum for these violations at the conclusion of the 60-day notice period, if the Bureau and the Secretary do not withdraw the 2025 ROD for the Program and reinitiate consultation by that time.

Sincerely,

Erik Grafe
Hannah Payne Foster
EARTHJUSTICE
310 K Street, Suite 508
Anchorage, AK 99501

Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801

Jared E. Knicley
Garett R. Rose
NATURAL RESOURCES DEFENSE COUNCIL
1152 15th Street NW, Suite 300
Washington, DC 20005

*Counsel for Natural Resources Defense
Council, Center for Biological Diversity,
and Friends of the Earth*

Cc: Nicole Hayes, Associate State Director
Alaska State Office, BLM
blm_ak_state_director@blm.gov

Paul Turcke
Mark Brown
Department of Justice
paul.turcke@usdoj.gov
mark.brown@usdoj.gov