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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

SOVEREIGN IÑUPIAT FOR A
LIVING ARCTIC, *et al.*,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT,
et al.,

Defendants,

and

CONOCOPHILLIPS ALASKA,
INC., *et al.*,

Intervenor-Defendants.

Case No. 3:23-cv-00058-SLG

**BRIEF OF AMICUS CURIAE PATAGONIA, INC. IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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LIST OF SHORT NAMES AND ACRONYMS

BiOp	Biological Opinion
BLM	Bureau of Land Management
ConocoPhillips	ConocoPhillips Alaska, Inc.
CEQ	Council on Environmental Quality
GHG	Greenhouse Gas
Greater Willow	Greater Willow 1 and 2
NEPA	National Environmental Policy Act
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement
Willow	Willow Master Development Plan

INTRODUCTION

The Bureau of Land Management (BLM) violated NEPA by ignoring the Willow Master Development Plan's (Willow or Willow Project) calamitous climate impacts. Specifically, despite both BLM and ConocoPhillips acknowledging the Willow Project is likely to expand beyond the current permits, the SEIS never addresses the anticipated downstream emissions – and the resulting climate impacts – from that larger development.

Willow would be one of the largest oil extraction projects proposed on U.S. federal lands and would result in more than 239 million metric tons of carbon emissions¹ added to earth's atmosphere over the next thirty years.² Despite the unprecedented scale of the project, and the urgency at which scientists agree we must act on climate change, BLM's environmental analysis violated NEPA by ignoring emissions from the reasonably foreseeable expansion of the project, and dramatically understating Willow's indirect and cumulative climate impacts.

The impacts of climate change are no longer remote or far off. Indeed, the Council on Environmental Quality (CEQ) published interim guidance in January acknowledging “[t]he United States faces a profound climate crisis and there is little time left to avoid a dangerous – potentially catastrophic – climate trajectory.” In *just the last two months*, the

¹ AR824901.

² Timothy Puko, *What is Willow? How an Alaska oil project could affect the environment*, (April 22, 2023) THE WASHINGTON POST, <https://www.washingtonpost.com/climate-environment/2023/03/17/willow-project-alaska-oil-drilling-explained>.

four hottest days in history occurred in *one week* in July, wildfires in Canada have blanketed the northeast and Midwest in toxic smoke, floods have devastated the northeast, record ocean temperatures have been recorded in the North Atlantic and Pacific Oceans, and an oppressive heatwave sits on top much of the United States. The effects of climate change just this summer – even before a single barrel of oil is pulled out of the Willow Project and the resulting carbon emitted into our atmosphere – are immediate, widespread, and profound.

It is against this backdrop that BLM approved the Willow Project, which is just the first phase of what ConocoPhillips has referred to as “the next great Alaskan hub” for oil and gas drilling.³ Willow is expected to produce 576 million barrels of petroleum over the next 30 years.⁴ Shortly after Willow, ConocoPhillips expects to also develop two wells just west of Willow, Greater Willow 1 and 2, which are expected to produce an additional 75 million barrels.⁵ In total, ConocoPhillips plans to “leverage the Willow infrastructure” to explore and extract “up to 3 billion [barrels of oil equivalent]” resources nearby.⁶ In light of well-established science about policy choices needed to mitigate the worst impacts of climate change, and what we are seeing before our very eyes this summer, Willow is incompatible with the emission reductions required to meet

³ *Edited Transcript: ConocoPhillips 2021 Market Update* (June 30, 2021) 9, <https://static.conocophillips.com/files/resources/2021-jun-30-cop-n-139276042438-transcript.pdf> [hereinafter ConocoPhillips Market Update].

⁴ AR824901.

⁵ AR821124.

⁶ ConocoPhillips Market Update, *supra* note 3, at 10.

national and international climate goals and limit warming to 1.5 degrees Celsius.

Research is also increasingly recognizing the negative impact that the climate crisis has on economic activity, and the Willow Project serves the short-term interests of one corporation over the long-term interests of virtually every other business in the world. As one example, amicus Patagonia is a member of the outdoor recreation industry, which is an \$800 billion industry supporting tens of millions of jobs. The outdoor recreation industry is impacted by climate change as people lose available days to go outside and accessible habitat and species to enjoy – whether because of extreme heat, toxic air from wildfires, floods, or rising ocean temperatures. BLM’s analysis put the interests of oil and gas extraction above a broad swath of interests, including economic interests, in combatting climate change.

“Federal leadership that is informed by sound analysis is crucial to addressing the climate crisis.”⁷ Here, BLM failed to perform its duties under NEPA by failing to disclose to the public and decision makers the full scope of Willow’s indirect and cumulative greenhouse gas emissions and climate impacts. For the reasons described herein, as well as those in Plaintiffs’ briefs, the Court should grant Plaintiffs’ motion for summary judgment, and vacate BLM’s ROD and all related authorizations.

INTEREST OF AMICUS CURIAE

Amicus curiae Patagonia plays a leading role in the outdoor recreation economy. Patagonia was founded in 1973 and has a 50-year history of environmental advocacy. It

⁷ 88 Fed. Reg. 1197 (Jan. 9, 2023).

is now a California benefit corporation, with its purpose of being in business to save our home planet enshrined in its articles of incorporation. Last year, Patagonia's owners gave the company away, transferring 100% of the voting stock to the Patagonia Purpose Trust, created to protect the company's values, and 100% of the nonvoting stock to the Holdfast Collective, a nonprofit dedicated to fighting the environmental crisis and defending nature. The funding for Holdfast Collective will come from Patagonia: Each year, the money the company makes after reinvesting in the business will be distributed as a dividend to help fight the climate crisis. Patagonia is headquartered in Ventura, California, with worldwide operations, and has 34 stores throughout the United States and employs thousands of people all over the country.

Patagonia is in business to support its customers' passion to explore, recreate in, and preserve the great outdoors. As climate change destroys natural resources, erodes coast lines, exacerbates air pollution, and wreaks havoc on our water, Patagonia's customers are prevented from engaging in the many outdoor activities—hiking, camping, climbing, skiing, running, cycling, boating, hunting, and fishing—that they love. Put simply, soaring temperatures, extreme weather events, reduced winter snowpack, smoke-filled skies from wildfires, degraded rivers and lakes and diminished wildlife populations will reduce access to outdoor recreation opportunities, which in turn impacts demand for the goods and services the outdoor recreation industry provides. Patagonia, therefore, has a direct economic interest in how BLM responds to the climate crisis through NEPA.

ARGUMENT

I. Climate Change is Already Causing Devastating Impacts.

BLM's failure to analyze the full climate impacts of the Willow Project is indefensible when considered against the daily evidence that climate change is *right now* wreaking havoc on our planet, its inhabitants, and our economy before a single barrel of oil from this massive project has contributed to the problem. The first week of July brought the *four hottest days in recorded history* and the first two weeks of July were the warmest ever recorded,⁸ and perhaps the hottest the earth has been in 125,000 years.⁹ For the last month, millions of Americans from Florida to California have been enduring extreme heat, with Phoenix experiencing *21 consecutive days* over 110 degrees.¹⁰ Heat waves are becoming more frequent, more severe, and deadlier. In 2022, record heat claimed the lives of an astonishing 425 people in Phoenix's Maricopa County.¹¹ Recent floods from unprecedented rainfall claimed thousands of homes and businesses in

⁸ Elana Shao, *Here's Where Global Heat Records Stand So Far in July*, THE NEW YORK TIMES (July 19, 2023), <https://www.nytimes.com/2023/07/19/climate/global-heat-records-july.html>.

⁹ Sarah Kaplan, *Floods, fires and deadly heat are the alarm bells of a planet on the brink*, THE WASHINGTON POST (July 13, 2023), <https://www.washingtonpost.com/climate-environment/2023/07/12/climate-change-flooding-heat-wave-continue>.

¹⁰ Nidhi Sharma, *Heat continues to blast much of the U.S. as another Phoenix record falls*, NBC NEWS (July 20, 2023), <https://www.nbcnews.com/science/environment/heat-continues-blast-much-us-another-phoenix-record-falls-rcna95368>.

¹¹ Liliana Salgado, *Heatwaves: world reels from wildfires, floods as US and China discuss climate crisis*, REUTERS (July 17, 2023), <https://www.reuters.com/world/global-temperatures-near-record-highs-us-china-meet-climate-2023-07-17>.

Vermont and, tragically, the lives of two children in Oklahoma City.¹² In June, smoke from wildfires in Canada blanketed the Northeast and Midwest, resulting in some of the worst air quality in the world in Chicago, Milwaukee and Detroit.¹³

The devastating impacts of climate change extend from the land to the sea, where, since April, marine heatwaves have spread throughout the Atlantic and Pacific Oceans, threatening marine ecosystems and the coastal communities that rely on them.¹⁴ In Florida, coastal waters have climbed into the mid-90s, not only threatening coastal reefs but depriving beach-goers of much needed respite from the oppressive Florida heat.¹⁵ And just this week, researchers predicted that circulation of the Atlantic Ocean could

¹² Nouran Salahieh & Lauren Mascarenhas, *Catastrophic flooding swamped Vermont's capital as intense storms forced evacuations and closures in Northeast*, CNN (July 12, 2023), <https://www.cnn.com/2023/07/11/us/northeast-storms-flooding-excessive-rainfall-tuesday/index.html>.

¹³ Caitlin O'Kane, *Chicago has the worst air quality in the world due to Canadian wildfire smoke*, CBS NEWS (June 27, 2023), <https://www.cbsnews.com/news/chicago-worst-air-quality-canadian-wildfire-smoke-june-27-2023>.

¹⁴ National Oceanic and Atmospheric Administration, *The ongoing marine heat waves in U.S. waters, explained* (July 14, 2023), <https://www.noaa.gov/news/ongoing-marine-heat-waves-in-us-waters-explained>; National Oceanic and Atmospheric Administration, *Global ocean roiled by marine heatwaves, with more on the way* (June 28, 2023), <https://research.noaa.gov/2023/06/28/global-ocean-roiled-by-marine-heatwaves-with-more-on-the-way>.

¹⁵ Seth Borenstein & Mike Schneider, *Florida in hot water as ocean temperatures rise along with the humidity*, AP NEWS (July 10, 2023), <https://apnews.com/article/florida-ocean-heat-climate-coral-record-bfc3010460eb077fc14d53a6f768931d>.

collapse as early as 2025 due to climate change,¹⁶ causing far-reaching effects on weather and sea-level rise in North America, Northern Europe, Africa, and Asia.¹⁷

Of course, the recent climate disasters are not contained to our nation's borders. Record monsoon rains have poured down in India, killing more than 100 people in the first two weeks of July.¹⁸ Recent floods and landslides in Japan have taken the lives of at least six people.¹⁹ In the midst of a heatwave in Europe (where the heat killed as many as 61,000 people last year²⁰), wildfires have scorched Greece, causing thousands to flee their homes.²¹ In China, temperatures in July in Beijing set a new record for consecutive

¹⁶ Peter Ditlevsen & Susanne Ditlevsen, *Warning of a forthcoming collapse of the Atlantic meridional overturning circulation*, 14 NATURE COMMUNICATIONS, 2 (July 25, 2023), <https://www.nature.com/articles/s41467-023-39810-w.pdf>.

¹⁷ Raymond Zhong, *Warming Could Push the Atlantic Past a 'Tipping Point' This Century*, THE NEW YORK TIMES (July 25, 2023), <https://www.nytimes.com/2023/07/25/climate/atlantic-ocean-tipping-point.html>.

¹⁸ Ashok Sharma & Rishi Lekhi, *Record monsoon rains have killed more than 100 people in northern India over two weeks*, AP NEWS (July 13, 2022) <https://apnews.com/article/india-monsoon-floods-deaths-8185e8e5b05fe9de76efc609928ec360>.

¹⁹ Justin McCurry, *'Heaviest rain ever' causes deadly floods and landslides in Japan*, THE GUARDIAN (July 11, 2023) <https://www.theguardian.com/world/2023/jul/11/heaviest-rain-ever-causes-deadly-floods-and-landslides-in-japan>.

²⁰ Salgado, *supra* note 11.

²¹ Niki Kitsantonis, *Residents flee Greek seaside villages as the dry, hot days leave them vulnerable to wildfires*, THE NEW YORK TIMES (July 18, 2023) <https://www.nytimes.com/2023/07/18/world/europe/greece-fires-residents.html>.

days over 95 degrees.²² In South Korea, heavy rains and flooding took the lives of at least 36 people.²³

This cascade of recent devastation has no end in sight and represents the real-life consequences of the dire warnings from climate experts.

II. Outdoor Recreation Is a Vital Part of the Nation’s Economy and Faces Increasing Threats From Climate Change.

A. Outdoor recreation plays a critical role in the economic health of the United States.

Each year Americans spend hundreds of billions of dollars exploring the outdoors in myriad ways—hiking, backpacking, camping, mountaineering, rock climbing, hunting, fishing, canoeing, kayaking, rafting, sailing, running, horseback riding, cycling, downhill skiing, cross-country skiing, snowboarding, snorkeling, scuba diving, and surfing, to name a few. These activities generate \$862 billion in consumer spending²⁴ through spending on outdoor recreation products (such as gear, apparel, footwear, equipment, services and vehicle purchases) and on trips and travel (airfare, fuel, lodging, groceries, lift tickets, guides, and lessons).²⁵ In 2021, outdoor recreation contributed \$454 billion

²² Crispian Balmer & Ryan Woo, *Europe battles heat and fires; sweltering temperatures scorch China, US*, REUTERS (July 19, 2023) <https://www.reuters.com/world/record-heat-wave-grips-china-flood-toll-rises-south-korea-2023-07-19>.

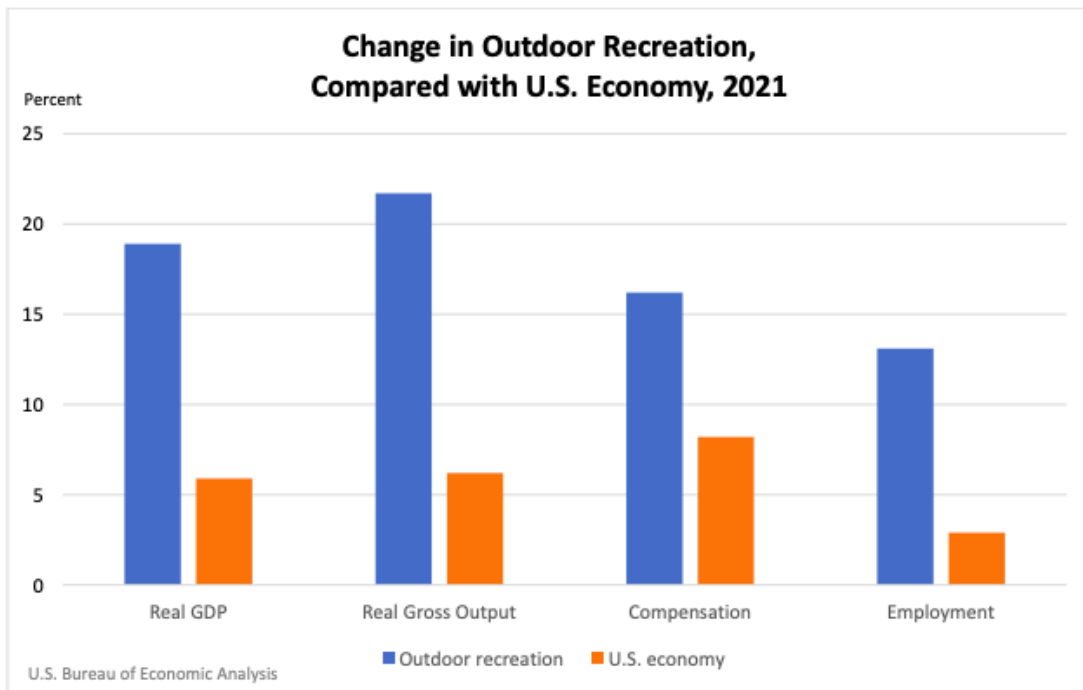
²³ *Id.*

²⁴ Outdoor Industry Association, *State of the Outdoor Market Fall 2022* (2022), 1, <https://outdoorindustry.org/wp-content/uploads/2022/12/OIA-State-of-the-Outdoor-Market-Report-Fall-2022.pdf>.

²⁵ Outdoor Industry Association, *The Outdoor Recreation Economy* (2017), 5, https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf.

(1.9%) to the nation’s GDP, which is more than motor vehicle manufacturing, oil/gas/coal, and air transportation *combined*.²⁶ During the COVID-19 pandemic in 2020-2021, outdoor recreation’s contribution to GDP increased by 20.8% and employment increased by 13.1%,²⁷ vastly outpacing the U.S. economy as a whole.

Figure 1: Change in Outdoor Recreation Compared with U.S. Economy, 2021. ²⁸



In over half of U.S. states, the outdoor economy contributes an even larger share of state GDP ranging from 4.8% to 2%.²⁹

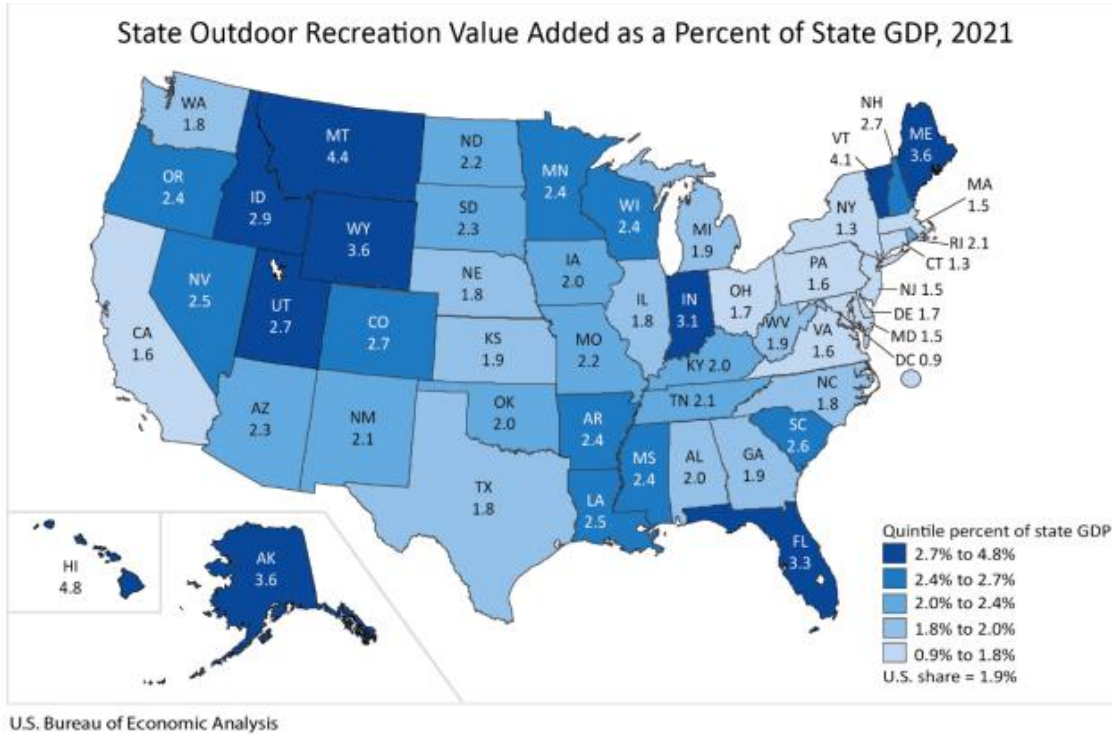
²⁶ Headwater Economics, *The Outdoor Recreation Economy by State* (Updated March 2023), <https://headwaterseconomics.org/economic-development/trends-performance/outdoor-recreation-economy-by-state>.

²⁷ *Id.*

²⁸ Bureau of Economic Analysis, *Outdoor Recreation Satellite Account, U.S. and States, 2021* (November 2022), 2, https://www.bea.gov/system/files/2019-09/orsa0919_1.pdf.

²⁹ *Id.* at 1.

Figure 2: State Outdoor Recreation Value Added as Percent of State GDP, 2021³⁰



In tandem with its impressive economic output, the outdoor recreation industry is also responsible for providing 4.5 million U.S. jobs in 2021.³¹ And these jobs expand well beyond traditional recreation jobs such as guiding, outfitting, lodging, and park service. The outdoor recreation industry employs product developers, small and large retailers and other professionals creating jobs for highly skilled workers in diverse fields such as technology, product design, manufacturing, sustainability, and global commerce.³² Tellingly, there are more American jobs in the hunting and fishing industry alone than the entire oil and gas extraction industry.³³

³⁰ *Id.*

³¹ Outdoor Industry Association, *supra* note 24, at 1.

³² Outdoor Industry Association, *supra* note 25, at 6.

³³ *Id.* at 7.

In sum, the outdoor recreation economy plays a vital role in the economic and physical health of the United States. The interests of amicus Patagonia and others similarly situated in the outdoor recreation economy are often overlooked in discussions of climate change broadly and oil and gas extraction specifically. These interests (and their undeniable economic and social benefits) cannot continue to thrive unless climate change is taken seriously and government agencies, such as BLM, ensure that the climate impacts of their decisions are properly disclosed, and where possible, mitigated.

B. Climate change directly threatens the outdoor recreation economy.

Climate change has caused significant economic losses across the globe, reducing the GDP per capita for the wealthiest regions by 1.5% and for low-income regions by 6.7% and is responsible for upwards of \$16 trillion in annual global losses.³⁴ NOAA estimates that the cost of climate and weather disasters in the United States in 2022 was at least \$165 billion.³⁵ The European Environment Agency estimated that, between 1980 and 2000 (prior to any of the climate impacts of the last two decades), heat waves alone in Europe cost up to \$71 billion.³⁶

³⁴ Christopher W. Callahan & Justin S. Mankin, *Globally unequal effect of extreme heat on economic growth*, 8 SCIENCE ADVANCE 1, 5 (2022), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9616493/pdf/sciadv.add3726.pdf>.

³⁵ Adam B. Smith, *2022 U.S. billion-dollar weather and climate disasters in historical context*, CLIMATE.GOV (Jan. 10, 2023), <https://www.climate.gov/news-features/blogs/2022-us-billion-dollar-weather-and-climate-disasters-historical-context>.

³⁶ Helen Nugent, *Here's how heat waves can impact economies, as well as people and wildlife*, WORLD ECONOMIC FORUM (JULY 19, 2022), <https://www.weforum.org/agenda/2022/07/heat-waves-economy-climate-crisis>.

For the outdoor recreation economy specifically, the U.S. Global Change Research Program (USGCRP)—a federal program mandated by Congress to coordinate climate-change research across 13 member agencies—warned in its most recent National Climate Assessment,

Climate change poses risks to seasonal and outdoor economies in communities across the United States, including impacts on economies centered around coral reef-based recreation, winter recreation, and inland water-based recreation.

Projected increases in wildfire smoke events are expected to impair outdoor recreational activities and visibility in wilderness areas. Declines in snow and ice cover caused by warmer winter temperatures are expected to negatively impact the winter recreation industry in the Northwest, Northern Great Plains, and the Northeast. Some fish, birds, and mammals are expected to shift where they live as a result of climate change, with implications for hunting, fishing, and other wildlife-related activities.³⁷

Those effects will be felt not only by recreationists but by “the people who make their living supporting these economies, including rural, coastal, and Indigenous communities,” and by the companies, like amicus Patagonia, who are key players in the outdoor recreation industry.³⁸

These losses to the outdoor recreation economy are not distant, theoretical losses but rather are happening *now*. For example, warmer oceans are killing the world’s coral reefs, including those off of the Florida Keys and the Hawaiian islands, which will cost

³⁷ USGCRP, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* (rev. Mar. 2021), 31-32 [hereinafter *Fourth National Climate Assessment*], https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf.

³⁸ *Id.*

the United States up to \$140 billion in economic benefits by 2100.³⁹ Rising sea levels are eroding California's coasts, where sea level rise and storm surge could completely erode two-thirds of southern California beaches by 2100.⁴⁰ Decreased snowfall and increased temperatures are melting glaciers, like those in Glacier National Park, which may have no glaciers left by the end of the century⁴¹ thereby threatening the estimated \$484 million in economic benefits and over 5,200 jobs supported by the park.⁴² During the 2018 Camp Fire—the deadliest and most destructive wildfire in California history, the San Francisco Bay Area recorded its worst air quality ever, prompting health officials to warn the area's 7 million residents to stay indoors and avoid outdoor recreational activities.⁴³ In 2017, Hurricane Maria's high winds, heavy rains, and massive storm surge caused months of closures at many of Puerto Rico's 34 nature reserves, 20 state forests, and 5 wildlife refuges.⁴⁴ In Alaska specifically, the only road in and out of Denali National Park has been closed all summer (as it was last summer) due to massive landslides from permafrost thaw.⁴⁵

³⁹ *Fourth National Climate Assessment*, *supra* note 37, at 279.

⁴⁰ *Id.* at 1118.

⁴¹ *Id.* at 1501.

⁴² *See Tourism to Glacier National Park Adds \$484 Million in Local Economic Benefits*, NAT'L PARK SERVICE (June 4, 2019), <https://www.nps.gov/glac/learn/news/19-28.htm>.

⁴³ Ted Goldberg, *Camp Fire Caused Nearly 2 Straight Weeks of Bay Area's Worst Air Quality on Record*, KQED NEWS (Dec. 19, 2018), <https://www.kqed.org/news/11712211/the-camp-fire-caused-nearly-two-straight-weeks-of-the-bay-areas-worst-air-quality-on-record>.

⁴⁴ *Puerto Rico Reopens 12 Nature Reserves, Refuges After Maria*, ASSOCIATED PRESS (Jan. 18, 2018), <https://apnews.com/7c57028e0e7c4915baa76a79fdc79106>.

⁴⁵ Yereth Rosen, *Worsening thaw-spurred landslide curtails access to Alaska's Denali park*, REUTERS (April 26, 2022),

The effect of climate change on seasonal activities is especially stark.

Unsurprisingly, declines in snow and ice cover caused by warmer winter temperatures are expected to negatively impact the winter recreation industry across the country.⁴⁶ Warmer winters and changing precipitation patterns will fundamentally change winter sports and activities—like downhill skiing, snowboarding, cross-country skiing, snowmobiling, ice skating, hockey, and mountaineering—an industry that accounted for \$5.6 billion in economic activity in 2016.⁴⁷ By 2050, the average ski season will be cut in half (in many places reduced to a few weeks), and the quality of those remaining days will be far worse, with losses of more than \$2 billion annually for downhill skiing alone by 2090.⁴⁸

The summer recreation industry is also poised for substantial losses. During the ever increasing heat waves, millions of people are urged to stay indoors and to avoid outdoor recreation.⁴⁹ Raging wildfires result in similar instructions to stay indoors to avoid smoke⁵⁰ and have caused closures to multiple national parks and all of California's national forests in recent years.⁵¹ Florida's recent spike in ocean temperature has warmed

<https://www.reuters.com/business/environment/worsening-thaw-spurred-landslide-curtails-access-alaskas-denali-park-2022-04-26>.

⁴⁶ *Fourth National Climate Assessment*, *supra* note 37, at 31.

⁴⁷ Bureau of Economic Analysis, *supra* note 28, at 4.

⁴⁸ Cameron Wobus, et al., *Projected Climate Change Impacts on Skiing and Snowmobiling: A Case Study of the United States*, 45 GLOBAL ENVTL. CHANGE 1, 1, 12 (2017), http://geode.colorado.edu/~small/docs/wobus_etal.pdf.

⁴⁹ *Over 100m Americans urged to stay indoors over extreme heat and humidity*, THE GUARDIAN, (Jun. 14, 2022), <https://www.theguardian.com/us-news/2022/jun/14/extreme-heat-humidity-100m-americans-stay-indoors>

⁵⁰ Goldberg, *supra* note 43.

⁵¹ *Sequoia and Yosemite National Parks Closed Due to California Wildfires*, NBC LOS ANGELES (Sept. 18, 2020), <https://www.nbclosangeles.com/news/local/sequoia-and->

the waters such that beach goes “really can’t cool off” and the water “just leaves [you] wet”.⁵² Exacerbating these impacts, warmer and shorter winters will lead to an increase in disease and pest out-breaks, including Lyme disease, West Nile, chikungunya, dengue, and Zika.⁵³ To avoid these harmful diseases, at-risk populations, such as children, pregnant people, and older people, may be under even greater pressure to forego outdoor recreation activities.

The economic, physical, and social impacts to outdoor recreation from climate change can only be addressed if the impacts are taken seriously and the climate change impacts from massive projects like Willow are properly disclosed, addressed, and, to the extent possible, mitigated. Although NEPA is only one tool available to address climate change, it is imperative that it be scrupulously followed to ensure that the multi-front struggle against climate change can be successful as a whole.

III. BLM Failed to Take a Hard Look at Willow’s Indirect and Cumulative Greenhouse Gas and Climate Impacts.

NEPA requires agencies to consider the reasonably foreseeable direct and indirect, effects of their proposed actions.⁵⁴ “Indirect effects” are those that are caused by the action, but are later in time or farther removed in distance from the action, and include

yosemite-national-parks-closed-due-to-california-wildfires/2430387; Mary Forgione & Christopher Reynolds, *Highway 1, 30 state parks and 18 national forests in California now closed: What you need to know*, LOS ANGELES TIMES (Sept. 11, 2020), <https://www.latimes.com/travel/story/2020-09-09/california-national-forests-close-fire-risk>.

⁵² Borenstein & Schneider, *supra* note 15.

⁵³ *Fourth National Climate Assessment*, *supra* note 37, at 545.

⁵⁴ 42 U.S.C. § 4332(2)(C)(i); 40 C.F.R. §§ 1502.14, 1502.16, 1508.7, 1508.8.

growth-inducing impacts and other effects resulting from changes in patter of land use.⁵⁵

“An EIS that does not adequately consider the indirect effects of a proposed action violates NEPA.”⁵⁶ For fossil fuel extraction projects, indirect impacts include the downstream emissions from consumption of the oil or gas that will be produced.⁵⁷

In addition to evaluating the direct and indirect effects of a proposed action, NEPA also requires agencies to: (1) assess the direct and indirect effects of reasonably foreseeable past, present, and reasonably foreseeable actions with impacts that may interact with the proposed action, and then (2) assess the incremental effects that will result when those effects are added to the effects of the proposed project.⁵⁸ This cumulative impacts analysis is especially relevant to the assessment of GHG emissions since climate effects are inherently cumulative in nature.⁵⁹

In its previous decision, the Court invalidated the 2020 EIS because it relied on a model that failed to analyze the effects of Willow’s downstream greenhouse gas emissions that would result from the ultimate consumption of the oil produced.⁶⁰ In the SEIS, BLM addressed this error, and the climate model for Willow and the alternatives includes downstream GHG emissions for the proposed project. However, the SEIS again

⁵⁵ 40 C.F.R. § 1508.8(b).

⁵⁶ *Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 737 (9th Cir. 2020)

⁵⁷ *Id.* at 737-38 (citing *Sierra Club v. Federal Energy Regulatory Comm’n*, 867 F.3d 1357 (D.C. Cir. 2017)); *see also* 88 Fed. Reg. 1197, 1204 (Jan. 9, 2023).

⁵⁸ 40 C.F.R. § 1502(g)(3).

⁵⁹ 88 Fed. Reg. 1197, 1206 (Jan. 9, 2023).

⁶⁰ *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 767 (D. Alaska 2021).

violates NEPA because BLM failed to assess the downstream emissions from reasonably foreseeable future projects, rendering the cumulative analysis of GHG emissions and climate impacts incomplete.

Willow is just the first piece of what ConocoPhillips has referred to as the “next great Alaska hub” for oil and gas drilling.⁶¹ Willow’s infrastructure will facilitate ConocoPhillips’ planned expansion that includes two drill sites directly west of Willow – Greater Willow 1 and Greater Willow 2 (collectively, “Greater Willow”).⁶² Greater Willow is expected to produce approximately 75 million barrels of petroleum.⁶³

The SEIS acknowledges that Greater Willow is a reasonably foreseeable future activity with impacts that may interact with Willow.⁶⁴ The SEIS also discloses that Greater Willow will generate approximately 65,500 metric tons of GHG emission from construction, development drilling, and routine operations.⁶⁵ However, BLM never quantifies or analyzes the downstream GHG emissions or climate impacts that will result from the consumption of the oil and gas that will be produced from Greater Willow. The SEIS also fails to address ConocoPhillips’ plans for additional expansion beyond Greater Willow. ConocoPhillips plans to “leverage the Willow infrastructure” to access up to 3 billion barrels of oil equivalent nearby.⁶⁶ The SEIS does not acknowledge this additional

⁶¹ ConocoPhillips Market Update, *supra* note 3.

⁶² AR821124; AR821122.

⁶³ AR821124.

⁶⁴ *Id.*

⁶⁵ AR822689-90.

⁶⁶ ConocoPhillips Market Update, *supra* note 3, at 10.

future expansion, and therefore fails to disclose the cumulative GHG emissions and climate impacts that will result. Omitting the downstream GHG emissions of Greater Willow, and failing to analyze the GHG emissions of Greater Willow and ConocoPhillips' additional expansion plans cumulatively with Willow's emissions, was arbitrary and capricious, and violated NEPA.

IV. Any Remedy Short of Vacatur Will Have Disastrous Climate Impacts.

Vacatur is the presumptive remedy for unlawful agency actions.⁶⁷ Remand without vacatur is warranted only in “rare circumstances.”⁶⁸ In evaluating whether an exception to the presumption of vacatur is warranted, courts: (1) consider the extent to which vacating the decision would risk environmental harm; and (2) weigh the seriousness of an agency's error against “the disruptive consequences of an interim change that may itself be changed.”⁶⁹

Vacating the decision would not risk environmental harm. Rather, vacatur is the only way to avoid disastrous ramifications for the climate. Every increase in fossil fuel extraction and use pushes us towards a more dangerous and unlivable future on the planet. Willow alone is estimated to extract 576 million barrels of oil which would emit

⁶⁷ 5 U.S.C. § 706(2) (courts “shall . . . set aside” any agency action found to be “arbitrary, capricious, . . . or otherwise not in accordance with law”); *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015).

⁶⁸ *Humane Soc’y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010).

⁶⁹ *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir.1993); *Pollinator Stewardship Council*, 806 F.3d at 532.

more than 239 million metric tons of greenhouse gas emissions over the next 30 years.⁷⁰ Willow is incompatible with the US and the world's efforts to address the climate crisis, while vacating BLM's unlawful approvals would not risk any comparable environmental harm.

Furthermore, BLM's legal violations are serious enough to warrant vacating the decision, and remand without vacatur would subvert the purpose and structure of NEPA. BLM failed to consider a reasonable range of alternatives to Willow, including any reduced-production alternatives. BLM also failed to adequately assess and disclose the greenhouse gas emissions and climate change impacts of Willow, as required by NEPA. These are not minor or technical errors that can be easily corrected on remand. Rather, they are fundamental flaws that go to the heart of NEPA's mandate to ensure that agencies take a hard look at the environmental consequences of their actions before deciding whether to approve a project.⁷¹ If BLM is allowed to proceed with Willow while it revises its SEIS on remand, it will have no incentive to conduct a meaningful analysis of alternatives or climate impacts, since it will have already committed to a course of action that cannot be reversed. This would render NEPA review a mere pro-forma exercise to support a predetermined outcome, which is contrary to NEPA's purpose and

⁷⁰ AR824901.

⁷¹ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (“NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise case.”); see also 88 Fed. Reg. 1197, 1198 (Jan. 9, 2023) (“Consistent with NEPA, climate change analysis is a critical component of environmental reviews.”)

structure.⁷² Vacatur is the only remedy that serves NEPA’s purpose of requiring agencies to take a hard look at the environmental consequences of their actions before deciding to approve a project.

The economic costs of vacatur ConocoPhillips may point to as disruptive consequences, whether delayed profits or tax revenue, are entirely speculative and relatively minor. The costs of climate change on the outdoor recreation industry and the U.S. and global economy are enormous.⁷³ One study from the journal *Science Advances* found that heat waves over the last forty years, and the resulting impact on human health, productivity, and agricultural output, have cost the global economy trillions of dollars.⁷⁴ Another analysis estimates that continued warming could cost the U.S. economy \$14.5 trillion in the next 50 years, with a loss of 900,000 jobs *every year* due to climate change.⁷⁵ The International Labor Organization estimates that by the end of this decade, rising temperatures will cause a productivity loss equivalent to 80 million full-time jobs,

⁷² *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000); *Save the Yak Committee v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (“[p]roper timing is one of NEPA’s central themes. An assessment must be ‘prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.’”) (quoting 40 C.F.R. § 1502.5).

⁷³ See Sections I. and II., *supra*.

⁷⁴ Callahan & Mankin, *supra* note 34, at 5.

⁷⁵ Pradeep Philip, et al., *The turning point: A new economic climate in the United States*, DELOITTE (Jan. 2022), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-the-turning-point-a-new-economic-climate-in-the-united-states-january-2022.pdf>.

with an economic loss of \$2.4 trillion.⁷⁶ Accordingly, vacatur of BLM's record of decision and all associated approvals is warranted.

CONCLUSION

Amicus Curiae Patagonia respectfully requests that this Court grant Plaintiffs' Motion for Summary Judgment, and vacate the ROD, FSEIS, BiOp, and all decisions that rely on these documents.

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⁷⁶ International Labour Organization, *Working on a warmer planet: The impact of heat stress on labour productivity and decent work* (2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_711919.pdf.

CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a)(3), I certify that this brief complies with the type-volume limitation of Local Civil Rule 7.4(a)(1) and Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,806 words, excluding the parts of the brief exempted by Local Civil Rule. 7.4(a)(4).

/s/ Rebecca L. Davis

Rebecca L. Davis

CERTIFICATE OF SERVICE

I certify that on July 26, 2023, I caused a copy of the foregoing was served by electronic means on all counsel of record by the County's CM/ECF system.

/s/ Rebecca L. Davis

Rebecca L. Davis