

September 10, 2007

Bureau of Land Management  
Attn: Curtis Bryan, Natural Resource Specialist  
Lander Field Office  
1335 Main St.  
Lander, WY 82520

**RE: Draft Environmental Assessment for the Beaver Creek Coal Bed Natural Gas Pilot Project**

Dear Mr. Bryan,

Please accept these comments on behalf of the Wyoming Outdoor Council and Biodiversity Conservation Alliance regarding the Draft Environmental Assessment (“Beaver Creek EA”) for the Beaver Creek Coal Bed Natural Gas Pilot Project. Founded in 1967, the Wyoming Outdoor Council is a public interest conservation organization that works to protect Wyoming’s public lands, wildlife and environmental quality. Biodiversity Conservation Alliance is a nonprofit conservation group that works to protect wildlife and wild places in Wyoming and surrounding states, particularly on public lands.

**I. BLM failed to give notice to the public of the availability of the Beaver Creek EA.**

The BLM failed to post a notice of the availability of the Beaver Creek EA in any newspaper—a simple and inexpensive way to notify interested parties. Upon inquiring with your agency about what we assumed was a mere oversight, we learned that it is the general practice of the Lander Field Office not to solicit public comment on environmental assessments (pers. comm. Curtis Bryan, 8/30/07 and Carol-Anne Murray, 8/31/07). We were further disappointed to learn that the BLM was unwilling to remedy this error by posting a notice in the paper and giving the public sufficient time from the date of the notice in which to review the document and offer input. Even after acknowledging that some of the parties who had submitted scoping comments had been inadvertently dropped from the list (and thus given no notice of the EA’s availability), the BLM responded by only extending the deadline by seven days. This effectively gives a group of people who have participated in good faith from the beginning of the project only two weeks in which to comment. It does nothing; however, to remedy the fact that people who were not involved one year ago might want to participate and learn about the project today.

NEPA requires federal agencies to “make diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). Specifically, an agency shall “provide public notice of . . . the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.” *Id.* at § 1506.6(b). To be sure, an environmental assessment is an “environmental document” as described in NEPA’s implementing regulations. See 40

C.F.R. § 1508.10 (defining “environmental document” to include environmental assessments as well as environmental impact statements).

One of the purposes of NEPA is to ensure that federal agencies make informed decisions based on input from the general public early on and throughout the decision making process. This purpose cannot be met in a situation where the BLM failed to even solicit comments beyond a small group of scoping participants. The general public should have been alerted to the availability of the EA (and thus the immanence of the project) by notice in the newspaper or Federal Register—particularly with respect to a project that is controversial and one that is likely to have serious impacts on the environment and cultural resources. The Interior Board of Land Appeals (“IBLA”) was clear in a recent decision that BLM’s choice not to provide notice of an EA or solicit public comments violated NEPA. The IBLA held: “BLM’s failure to provide notice of the availability of the draft EA to the general public, including interested and affected members of the public and organizations and allow a period for comment . . . violated 40 C.F.R. §1506.6(a), (b), and (d).” Lynn Canal Conservation, Inc., 167 IBLA 136, 145 (Oct. 19, 2005).

As the EA is a pre-decisional document, the BLM can remedy these significant procedural errors by posting notice of the EA’s availability in the local and state newspapers, holding an open house so that interested parties can ask further questions and provide the agency with input and by offering a reasonable period within which the public can submit comments. To do otherwise would be a breach of the public’s trust and a contravention of one of the core purposes of NEPA. We respectfully request the BLM reconsider its handling of the project to date and make the necessary changes to meaningfully involve the public.

## **II. The BLM failed to consider a reasonable range of alternatives.**

NEPA mandates that the BLM provide a detailed statement regarding the alternatives to a proposed action. 42 U.S.C. § 4332(2)(C)(iii). Its implementing regulations also require the BLM to “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14. In fact, a thorough and objective analysis of alternatives is so essential to reasoned and informed decision making that the discussion of alternatives is considered the “heart of the environmental impact statement.” Id. at § 1502.14(a).

The Beaver Creek EA considers only two alternatives: 1) the legally required “no action” alternative; and 2) the proposed action of developing twenty new CBM gas wells. Because the BLM failed to analyze a true range of alternatives, it is unable to “insure a fully informed and well-considered decision.” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). This failure must be remedied by a full and thorough consideration of alternatives that differ substantially from the current action alternative so as to allow the BLM the opportunity to adequately review a true array of options.

Several alternatives were briefly mentioned but not carried forward in the BLM's analysis. These include: 1) elimination of the evaporation pond; 2) surface discharge of produced water; 3) directional drilling; 4) construction of a second water disposal well; 5) drilling fewer than 20 pilot wells; 6) shutting in the wells when problems occur with the injection well; and 7) using evaporation ponds only. EA at 2-13 to 2-17. Many of them were eliminated prematurely by on relying on the opinion of the industry proponent, Devon Energy Production Company, that they were infeasible or too expensive.

The goals of a private party proponent are, to a limited extent, relevant in determining a project's purpose and need, but "more importantly, an agency should always consider the views of Congress, expressed, to the extent that an agency can determine them, in the agency's statutory authorization to act, as well as in other Congressional directives." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). As just one example, Congress was unwavering in its message when it passed NEPA: federal agencies are entrusted to act as trustees of the environment for present and future generations." 42 U.S.C. § 4331(b). Had the BLM considered this broader responsibility, it would have weighed Devon's proposal against the need to protect other surface resources, both natural and cultural. See Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 48 Fed. Reg. 18,026 (March 16, 1981) ("In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out the particular alternative.")

By analyzing only one action alternative the BLM has violated a clear mandate of NEPA. "[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action...[as] the EIS would become a foreordained formality." Citizens Against Burlington, 938 F.2d at 196. Because the BLM is unlikely to choose the no action alternative, it must then consider a range of reasonable action alternatives. See Curry v. U.S. Forest Service, 988 F. Supp. 541 (W.D. Penn. 1997) (holding that a timber sale EA that only addressed a "no action" alternative and the proposed action alternative violated NEPA's mandate to consider a range of alternatives.)

**a. Directional drilling is a reasonable alternative that should have been fully considered in the EA.**

The Beaver Creek EA is deficient in that reasonable alternatives that would have allowed the BLM to make informed decisions about the project and its design were not fully considered. For example, the EA is quick to conclude—without sufficient supporting literature or documentation—that directional drilling techniques, "while feasible in some cases, are considered to be potentially unreliable . . . when a project involves an exploratory area and exploration wells." EA at 2-14. The EA cites one USFS report from 2004 but does not explain how its findings inform the decision not to carry forward directional drilling as an alternative. Admittedly, there can be technical challenges with directional drilling; however, broad conclusions without any detailed analysis make it difficult to know whether and to what extent those conclusions are

applicable to this project. Directional drilling offers the promise of extracting mineral resources in a concentrated manner, which allows for production while minimizing impacts to surface resources and wildlife habitat. While not devoid of impacts, this technique can lessen the footprint that inevitably occurs with the construction of well pads, roads and other infrastructure.

The BLM should remedy the EA and include an alternative that analyzes the feasibility of directional drilling for the project under consideration. We have included a report entitled *Drilling Smarter: Using Directional Drilling to Reduce Oil and Gas Impacts in the Intermountain West* prepared by Biodiversity Conservation Alliance in which directional drilling for coalbed methane gas is discussed and literature is cited that offers a more thorough analysis of CBM directional drilling techniques. See Appendix A at 11-12.

In support of its statement that direction drilling would be infeasible, the BLM cites generally some problems CBM producers in the San Juan Basin in Colorado and New Mexico have experienced. EA at 2-14 (stating that holes plugged with coal fines, well bores became instable and fluids collected in deviated sections). The issue is that the EA fails to analyze the likelihood of those problems occurring in the Beaver Creek area, and it fails to mention the successes those producers have experienced.<sup>1</sup> It may be that directional drilling is not viable in this area; however, it is impossible to tell based on the limited and unsupported conclusions in the EA. For this reason, the BLM should have analyzed directional drilling as one of the alternatives in the EA.

**b. Drilling fewer than twenty wells is a reasonable alternative that should have been analyzed in the EA.**

Another alternative worthy of thorough analysis is a pilot project that includes fewer than twenty wells. This alternative was briefly mentioned, but eliminated solely on the project proponent's opinion that "based on [its] recent experience with CBNG development in other fields . . . [Devon] has determined that a pilot project of twenty wells was statistically necessary to obtain the . . . information [Devon claims it needs]." EA at 2-16. There is no citation to studies or technical information that supports Devon's claims. This is an example in which the BLM relied only on the advice of the project proponent, without independently analyzing the technical feasibility of a small pilot project.

Twenty new CBM wells with their associated roads, well pads and pond infrastructure is no small undertaking. The BLM is responsible for assessing whether the area's mineral resources can be extracted with the least possible surface disturbance. Failure to even include a smaller pilot project as an alternative is not only a violation of NEPA's requirement to analyze a range of alternatives, but also of FLPMA's requirement

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<sup>1</sup> A U.S. Department of Energy Report from 1993 describes how one horizontal well drilled in New Mexico's San Juan Basin produced almost seven times the CBM as the average vertical well in the area. Appendix A at 12. Moreover, in Colorado's San Juan Basin, directional drilling is expected to recover 50-75% of available CBM reserves, compared to the 10% expected from conventional techniques. Id.

that the BLM manage our public lands in a manner that will not cause undue or unnecessary degradation. 43 U.S.C. §1732(b). The BLM should remedy this clear error by including an adjusted number of wells as an alternative to Devon’s proposed project. If twenty wells are in fact the minimum number needed to reasonably explore the area, supporting documentation—other than bald statements by the project proponents—must be included in the EA or project file to verify this conclusion.

### **III. The BLM should prepare an EIS.**

NEPA requires the BLM to prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). If uncertain, the BLM can prepare an EA in order to determine whether a proposed action will have a significant impact and to determine whether preparation of an EIS is necessary. 40 C.F.R. § 1508.9. If the BLM concludes as a result of preparing the EA that there are no significant effects from the proposed project, the agency may issue a finding of no significant impact (a “FONSI”) instead of preparing an EIS. 40 C.F.R. § 1508.9(a)(1). However, if the BLM finds that there are substantial questions about whether a project may cause significant effects to the human environment, it must prepare an EIS. See Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1239 (9th Cir. 2005).

Based on the description of the proposed project in the Beaver Creek EA, the BLM should conclude that there are substantial questions about whether the project may cause significant degradation of the human environment and therefore it should prepare an EIS. To answer whether substantial questions exist about whether the project will significantly affect the environment, the BLM should consider both the project’s context and its intensity. 40 C.F.R. § 1508.27. With regard to context, the “significance of the action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). Intensity “refers to the severity of the impact” and ten issues should be considered when assessing intensity. 40 C.F.R. § 1508.17(b). These include:

- 1) Impacts may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes on balance the effect will be beneficial.
- 2) The degree to which the proposed action affects public health or safety.
- 3) Unique characteristics of the geographic area such as proximity to historical or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers or ecologically critical areas.
- 4) The degree to which the effects of the quality of the human environment are likely to be highly controversial.
- 5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- 6) The degree to which the action may establish precedent for future actions with significant effects or represents a decision in principle about a future consideration.

- 7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.
  - 8) The degree to which the action may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural or historical resources.
  - 9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
  - 10) Whether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment.
- 40 C.F.R. § 1508.27 (b)(1-10).

The ten factors listed above assist agencies in determining whether a project significantly affects the quality of the human environment. Courts have found, “The presence of one or more of these factors should result in an agency decision to prepare an EIS.” Public Service Co. of Colorado v. Andrus, 825 F. Supp. 1483, 1495 (D. Idaho 1993) (citing LaFlamme v. FERC, 852 F.2d 389, 398 (9th Cir. 1988)).

Coalbed methane exploration and development activities by their very nature create significant environmental risks and impacts. Although one of the most significant impacts is not being proposed—namely, surface discharge of produced water—there are numerous other impacts that warrant thorough consideration and study prior to authorization of the project. This project implicates many of the factors in the above list of criteria used to determine significance and the need to prepare an EIS.

First, the project has the potential to affect public health. 40 C.F.R. § 1508.27 (b)(2). The EA states, “Recent concern has been raised by the Wyoming DEQ regarding the potential air emissions of methanol, which is one of the 187 hazardous air pollutants identified by the EPA.” EA at 4-3. The EA discloses that “this topic is currently being studied and . . . methods for accurately quantifying potential methanol emissions... are still in the process of being developed.” Id. Thus, it is not clear to what degree this project may pose risks to human health. Further study via an EIS would allow the BLM to consult with WDEQ and the EPA to ascertain these risks.

Second, the project threatens to harm cultural and historic resources. 40 C.F.R. § 1508.27 (b)(3), (8). The EA states that records indicate that less than 12 percent of the total land area has been block surveyed for cultural resources. EA at 3-33. Of the areas surveyed, 31 cultural resource sites and 29 prehistoric sites have been recorded. Id. at 3-34. In addition, two historic sites have been recorded: a segment of wagon trail and a historic debris assemblage. Id. A portion of all of these sites have yet to be evaluated for eligibility on the National Register of Historic Places. Id. The EA conceded that direct impacts to cultural resources (i.e. “destruction or damage of archeological and historical resources as a result of surface disturbance”) could occur and that these impacts from pipeline and road construction are often “difficult to avoid.” Id. at 4-33. Surveys are necessary—as is consultation with tribal people—in order to avoid disturbance of cultural

and historical resources. Reliance on the operator to identify the resources and report their whereabouts wrongly assumes: 1) that the operator has the expertise to recognize the resources; and 2) that the operator has any incentive to report the discovery (as suspension of operations will result from a find.) It is the BLM's responsibility to safeguard surface resources and to work with the State Historic Preservation Office to ensure that energy exploration and development does not destroy other valuable parts of this country's heritage. The significance of the cultural resources warrant preparation of an EIS.

Third, the project is controversial. 40 C.F.R. § 1508.27 (b)(4). Initially slated to occur within the boundaries of the Wind River Reservation, the project was met with skepticism more than a year ago by the Arapaho and Shoshone tribes. The project's location was then moved just across the border of the reservation onto BLM land, where Devon has likely experienced less opposition to its proposal. Many of the concerns raised by the Shoshone and Arapaho communities persist and we urge the BLM to seek input from the people who will be most impacted by the development. Similarly, the communities of Lander and Riverton deserve an opportunity to learn about the project and offer input. It would be disingenuous for the BLM to claim there is no controversy surrounding this project when the agency purposely did not solicit public comments. An EIS process would allow all interested parties an opportunity to participate by learning about the proposal and offering meaningful comments.

For the reasons explained above, this project should receive the level of analysis that an EIS is designed to provide to the agency and the public. As a comparison, in March 2007, the BLM and the Bridger-Teton National Forest released a Draft EIS for a project that proposed three exploratory gas wells. The agencies properly concluded that such a project may have significant impacts to the human environment and prepared an EIS. See Draft EIS for the Eagle Prospect Exploratory Wells Project (<http://www.fs.fed.us/r4/btnf/projects>). It defies logic that in this case Devon's proposal to drill twenty exploratory CBM wells does not warrant a similar finding. Twenty CBM wells with their associated network of roads and well pads are a major federal action that may significantly affect the quality of the human environment. As such, an EIS is warranted. In this EIS the BLM should analyze a true range of alternatives and provide the public an opportunity to be involved at all stages of the planning process.

#### **IV. BLM's retained rights and legal obligations with respect to lands leased for oil and gas development**

After completing the appropriate level of NEPA analysis (in this case an EIS), should the BLM decide to authorize Devon Energy to proceed with its development proposal, we urge the BLM to exercise its retained rights by conditioning development so as to protect surface resources. The attached memo sets forth the legal framework under which the BLM has rights and responsibilities as mineral lessor and surface managing agency. See Appendix B. Please consider these points in any decisions the BLM makes to authorize surface disturbance relative to oil and gas exploration and development.

Thank you for considering our comments. Please keep us informed and on the mailing list to receive information about this project. We would be happy to meet with you to discuss the project further.

Sincerely,

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And on behalf of:

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