

September 5, 2008

Heather Nino, Realty Specialist
BLM Rawlins Field Office
1300 North Third Street
Rawlins, Wyoming 82301

Re: Chokecherry and Sierra Madre Wind Energy Project Environmental Impact Statement

Dear Ms. Nino:

The following scoping comments are submitted on behalf of the Wyoming Outdoor Council and The Wilderness Society for consideration during the environmental review for the Chokecherry and Sierra Madre Wind Energy Project (Chokecherry Project).

THE BLM SHOULD CONSIDER THE FOLLOWING ISSUES

We would like to emphasize our strong support for development of renewable energy sources such as the Chokecherry Project as a means to reduce our reliance on fossil fuels for our energy needs. We believe it is crucial that development of renewable energy sources be given priority and emphasized. Consequently we are supportive of development of this and other renewable energy projects. However, we believe it is equally crucial that these projects not create severe or unneeded environmental impacts in their own right, and we ask the Bureau of Land Management (BLM) to ensure this careful balancing is made as it moves toward approval of the Chokecherry project.

In particular, it appears, unfortunately, the Chokecherry Project as proposed in the Scoping Notice would have substantial impacts to sage-grouse. It would be located in a large and significant sage-grouse core breeding area. This is particularly true of the Chokecherry portion of the project area. We will discuss this issue in greater detail below in the Wildlife section of these comments, however, we feel a key for ensuring these significant impacts are avoided while allowing needed wind energy to be developed is for the BLM to ensure that appropriate siting is required of this project. There is a crucial need to ensure there is an established methodology and protocol that is adhered to for determining correct siting for this project that ensures it will not cause unacceptable environmental impacts such as substantial intrusion into sage-grouse breeding areas.

Consequently, we request the BLM to establish a siting methodology and protocol as part of the review of this proposal, and that it adhere to this methodology and protocol. We believe that if this done this project can likely pursued in a modified form that allows for development of needed wind energy while not harming other crucial resources, such as the sage-grouse.

In the Scoping Notice it is stated that the Chokecherry Project will not be approved until the Rawlins Resource Management Plan (RMP) is approved with a record of decision (ROD). Consequently, this environmental review will be governed by the provisions in the new RMP. As the Scoping Notice notes, this includes a provision that “Areas with important or sensitive resource values would be excluded or avoided.” We ask the BLM to ensure adherence to this requirement, particularly in the context of potential impacts to sage-grouse core breeding areas.

We would also note that this area is a Class III visual resource management area. RMP Final Environmental Impact Statement (FEIS) at Map 2-50. In the Scoping Notice it is stated “the potential exists for wind energy development to not be in conformance with VRM Class III.” But the Scoping Notice then suggests that this problem would be dealt with by amending the RMP. We strongly urge the BLM to not pursue this approach to dealing with environmental concerns related to this project. The Rawlins RMP has been under development for at least the last five years. After this length of time and the massive investment of resources in developing the plan—both by the BLM and the interested public and other agencies—we feel it would be a mistake to start to just change the plan to meet exigencies almost before the ink is even dry on the plan. Other means to address this potential problem should be sought first. We doubt that all Class III areas are created equally in term of sensitivity. The plan and the VRM designations were developed from a “50,000 foot perspective,” they are by definition very general; the Chokecherry Project environmental review can and should address this issue at a level of specificity the RMP simply does not, and using that more refined review seek to find means to avoid these impacts to Class III areas other than through plan amendment. Furthermore, in our view, pursuing this change may well necessitate an RMP revision because it could establish a precedent affecting much of the Rawlins Field Office area, and in any event, before pursuing an amendment the BLM should ensure careful compliance with the provisions at 43 C.F.R. §§ 1610.5-5 and 1610.5-6. If the BLM develops and adheres to the siting methodology and protocol mentioned above, many of these problems could likely be avoided through this mechanism rather than RMP amendment.

The Chokecherry Project environmental analysis must of course comply with the BLM’s programmatic plan for wind energy development, the “Record of Decision Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments.” We specifically note the following provisions and policies stated in the BLM’s wind energy plan:

- “These programmatic policies and BMPs will be applicable to all wind energy development projects on BLM-administered public lands. Site-specific concerns, and

the development of additional mitigation measures, will be addressed in project-level reviews, including NEPA analyses, as required.” Page 2

- “A primary purpose of the Wind Energy Development Program is the establishment of policies and BMPs to ensure that potential adverse impacts associated with the development of wind energy resources on BLM-administered public lands are minimized to the greatest extent possible.” Page 5.
- “The site-specific NEPA analyses will include analyses of project site configuration and micro-siting considerations, monitoring program requirements, and appropriate mitigation measures. In particular, the mitigation measures discussed in Chapter 5 of the PEIS may be consulted in determining site-specific requirements.” Page A-4.
- “The BLM will incorporate management goals and objectives specific to habitat conservation for species of concern (e.g., sage-grouse), as appropriate, into the POD [Plan of Development] for proposed wind energy projects.” Page A-5.
- “The BLM will consider the visual resource values of the public lands involved in proposed wind energy development projects, consistent with BLM Visual Resource Management (VRM) policies and guidance. The BLM will work with the ROW applicant to incorporate visual design considerations into the planning and design of the project to minimize potential visual impacts of the proposal and to meet the VRM objectives of the area.” Page A-5

In addition to these provisions and policies, the BLM’s wind energy plan establishes a number of Best Management Practices (BMP) that should be adhered to in the Chokecherry Project environmental analysis. In addition to the wind energy plan, the BLM has also issued an Instruction Memorandum (IM) relative to wind energy development, IM 2006-216. The BLM should also insure careful adherence to that IM.

Other issues that should be fully considered include the following. The Western Governors’ Association has released a “Western Governors’ Association Wildlife Corridors Initiative” report that outlines a number of needed measures to protect wildlife migration corridors and crucial wildlife habitats. We ask the BLM to fully consider this report and seek to implement it as it develops the Chokecherry Project environmental review. In particular, a key component of the Wildlife Corridors Initiative is the Western Renewable Energy Zones (WREZ) effort being pursued by the western governors. The WREZ will lead to the identification of areas where development of renewable energy is environmentally appropriate. The initial WREZ proposals will likely be released in October, 2008. It is intended that WREZ process be “a model for applying the wildlife corridor recommendations” in the Wildlife Corridors Initiative report. Thus, we ask the BLM to fully consider both the WREZ recommendations and the Wildlife Corridors Initiative report as it develops the Chokecherry Project.

It is also widely recognized that a key limitation on the development of wind energy is the lack of access to transmission lines. Consequently, the BLM should fully consider issues related to transmission lines as it develops the Chokecherry Project environmental review. These issues could clearly be connected actions, similar actions or cumulative

actions, which must be considered in the environmental review under the Council on Environmental Quality regulations. Another concern we ask the BLM to fully consider is compliance with Wyoming Industrial Information and Siting Act which likely governs state permitting of this project.

REQUIREMENTS THE BLM MUST COMPLY WITH DURING SCOPING

The “scoping” stage requires the BLM to make two determinations: (1) what is the scope of the project – in this case the Chokecherry Project– to be analyzed and (2) what are the issues that will be analyzed “in depth.” 40 C.F.R. § 1501.7(a). Other environmental reviews (such Biological Assessments and consultation for species listed pursuant to the ESA) should be identified so that they can be done concurrently and integrated with the environmental review. We believe the issues identified in these comments are within the legal scope of the Chokecherry Project, and therefore they should be analyzed in depth by the BLM.

In determining the scope of this project, BLM must consider “connected actions,” “cumulative actions,” and “similar actions.” 40 C.F.R. § 1508.25. Connected actions are actions that are “closely related” to the Chokecherry Project, such as related roads or transmission lines. Similar actions include other authorizations to build wind energy projects. The scope of the EIS should include a detailed analysis of these similar actions so as to foster informed public participation in the Chokecherry Project and informed decision-making by the BLM. Cumulative actions are actions that, incrementally, have cumulatively significant impacts, even if the individual impacts are minor. The BLM should define the scope of the environmental analysis to include analysis of the cumulative effects of actions/projects that have impacts in common with those resulting from this wind energy project, including those of transmission lines. Actions that should be addressed in a cumulative fashion include, but are not limited to: road construction activities, activities leading to soil and vegetation disturbance, activities leading to changed habitat structure, activities leading to habitat fragmentation, and activities causing air or water pollution. Similarly, the scope of the environmental analysis must include consideration of direct and indirect impacts this project. 40 C.F.R. § 1508.25.

The BLM must bear in mind that the “primary purpose” of an environmental review is to “insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.” 40 C.F.R. § 1502.1. The policies and goals of NEPA include,

- Encouraging a “productive and enjoyable harmony between man and his environment”,
- Promoting “efforts which will prevent or eliminate damage to the environment and biosphere”,
- Using “all practicable means and measures . . .to create and maintain conditions under which man and nature can exist in productive harmony . . .”,
- Fulfilling “the responsibilities of each generation as trustee of the environment for succeeding generations”,

- Assuring “all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings”,
- Allowing beneficial use of the environment “without degradation . . . or other undesirable or unintended consequences”,
- Preserving “important historic, cultural and natural aspects of our national heritage . . .”,
- Achieving a “balance between population and resource use . . .”, and
- Enhancing “the quality of renewable resources” and maximizing recycling of depletable resources.

42 U.S.C. §§ 4321-4331. See also BLM Handbook H-1790-1.V. B.2.a.(3). Thus, the needs that BLM must identify for analysis in its environmental analysis include the above goals and policies, and we ask BLM to “insure” that these goals and policies are “infused” into the Chokecherry Project environmental review and decision document, as required by NEPA and its implementing regulations. See generally 40 C.F.R. §§ 1500.2(f) (all possible means are to be used to protect the environment), 1502.1 (policies of NEPA are to be infused into the ongoing programs and actions of agencies).

ALTERNATIVES

The CEQ regulations require a reasonable range of alternatives to be presented and analyzed in an environmental review so that issues are “sharply defined” and there is “a clear basis for choice among options . . .” 40 C.F.R. § 1502.14. CEQ regulations and court decisions make clear that the discussion of alternatives is “the heart” of the NEPA process. Environmental analysis must “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). Such objective evaluation is gravely compromised when agency officials bind themselves to a particular outcome or foreclose certain alternatives at the outset.

Given the concerns we expressed above regarding possible impacts on the sage-grouse and impacts to VRM Class III areas, we request that the BLM consider a range of alternatives that ensure these problems are eliminated or minimized to the extent possible. Given the direction in the BLM’s wind energy programmatic EIS and the Rawlins RMP, we think it is clear that consideration of alternatives that prevent these impacts must be considered in the environmental review. The goals of the project proponent must not solely define what constitute reasonable alternatives; the BLM must recognize its oversight authority in order to develop a reasonable range of alternatives. “One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence.)” Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002) (invalidating a NEPA analysis partially on this basis) (quoting Simmons v. United States Army Corps of Eng’rs, 120 F.3d 664, 669 (7th Cir. 1997)).

“IN MANAGING THE PUBLIC LANDS THE SECRETARY SHALL, BY REGULATION OR OTHERWISE, TAKE ANY ACTION NECESSARY TO PREVENT UNNECESSARY OR UNDUE DEGRADATION OF THE LANDS”

This provision from the Federal Land Policy and Management Act (FLPMA) is a mandatory requirement applicable to all resource uses and decisions affecting BLM lands. 43 U.S.C. § 1732(b). Consequently, it must serve as a bedrock for all analyses in the Chokecherry Project environmental analysis, and activities undertaken pursuant to the decision document. It is crucial to recognize that unnecessary or undue degradation must be prevented; the Chokecherry Project environmental analysis and decision document must provide that both prongs of this standard are met.

Recognizing the dual obligation imposed by FLPMA’s unnecessary or undue degradation clause, the court in Mineral Policy Center v. Norton, 292 F.Supp.2d 30, 42 (D.D.C. 2003) held that “Congress’s intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that . . . is undue or excessive.” Id.

Despite this clearly established law, the BLM has often persisted in misstatements of the governing legal standard. It often continues to view its dual mandate under FLPMA as a unitary obligation (it still claims that unnecessary degradation and undue degradation are one and the same). The BLM’s attempts to read the plain language of FLPMA in the conjunctive rather than the disjunctive were firmly rejected by the Mineral Policy Center court. The court clearly held that the undue degradation prohibition relates to degradation of the environment on the public lands. Therefore, we urge BLM to require, in a direct and positive fashion, that the Chokecherry Project area not cause unnecessary or undue degradation, and to ensure that this is the case. Given the direct, unambiguous command from Congress to do whatever is needed to prevent unnecessary or undue degradation, the Chokecherry Project environmental analysis and decision document should define, and prevent, unnecessary or undue degradation in an equally direct, positive fashion. See also Kendall’s Concerned Area Residents, 129 IBLA 130, 138 (1994) (“If there is unnecessary or undue degradation, it must be mitigated” and “[i]f unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan.”).

WILDLIFE RESOURCES

The following concerns regarding wildlife touch on a number of issues. One common need, however, is the following. When considering impacts to wildlife, BLM must do more than consider just the area actually impacted by the wind energy facilities. BLM must ensure its analysis of impacts to wildlife considers indirect, connected, related, long-term, and cumulative impacts in as quantitative, and scientifically supported, a manner as possible. BLM must also ensure that it fully complies with BLM Manual MS-6840 (Special Status Species Management).

ESA Candidate and BLM Sensitive Species

BLM must ensure full compliance with BLM Manual MS-6840.06.E (Special Status Species Management). BLM Manual MS-6840.06.E requires that “protection provided by the policy for candidate species shall be used as the minimum level of protection for BLM sensitive species”—that is:

Consistent with existing laws, the BLM shall implement management plans that conserve candidate species and their habitats and shall ensure that actions authorized, funded, or carried out by the BLM do not contribute to the need for the species to become listed.

BLM Manual MS-6840.06.C & .06.E. See BLM Manual MS-6840.06.C (1&3) (discussing BLM’s responsibility to confer with U.S. Fish & Wildlife Service regarding individual species’ needs). BLM Manual MS-6840.06.C.2 imposes a series of additional substantive obligations on the BLM regarding candidate [and therefore sensitive] species management:

2. For candidate species [and sensitive species] where lands administered by the BLM or BLM authorized actions have a significant effect on their status, [the BLM shall] manage the habitat to conserve the species by:
 - a. Ensuring candidate [and BLM sensitive species] are appropriately considered in land use plans (BLM 1610 Planning Manual and Handbook, Appendix C).
 - b. Developing, cooperating with, and implementing range-wide or site-specific management plans, conservation strategies and assessments for candidate [and sensitive] species that include specific habitat and population management objectives designed for conservation, as well as management strategies necessary to meet those objectives.
 - c. Ensuring that BLM activities affecting the habitat of candidate [and sensitive] species are carried out in a manner that is consistent with the objectives for managing those species.
 - d. Monitoring populations and habitats of candidate [and sensitive] species to determine whether management objectives are being met.

The term “conservation” is defined in the BLM’s special status species manual and specifically with respect to special status species (as opposed to ESA listed species) it means “to use, and the use of, methods and procedures such that there is no longer any threat to their continued existence or need for continued listing as a special status species.” (emphasis added).

What this means is that at a minimum, the BLM must seek to “conserve” sensitive species that occur in the Chokecherry Project area in a manner which contributes to their removal from BLM’s sensitive species list. That is, the requirement established by the BLM Manual is not only to prevent threats to the continued existence of these species or their listing under the ESA, but also to remove them from the BLM sensitive species list. This is an affirmative obligation established by the BLM manual—the BLM must put in place specific habitat and population management objectives designed to remove these species from the special status species list, that is, to conserve them.

In addition, the special status species manual requires that “BLM activities affecting the habitat of candidate species [and consequently sensitive species] [be] carried out in a manner that is consistent with the objectives for managing those species.” That is, the BLM must ensure that activities that affect sensitive species are done in a manner that is consistent with these species being removed from the sensitive species list, that is, with their conservation.

The need to adhere to these requirements certainly applies to the sage-grouse, and could well also apply to the pygmy rabbit, and white-tailed prairie dog, all of which are BLM sensitive species also now being reconsidered for listing under the ESA. The burrowing owl may also occur in this area.

Hawks and Raptors, Songbirds, and Bats

The environmental analysis should determine whether these species are or could be using the Chokecherry Project area and ensure that BLM meets its duties to provide management protections for these species that meets the requirements of the Sensitive Species Manual and the RMP, as well as the wind energy programmatic EIS. BLM must ensure that no extreme noise occurs during nesting season or near to occupied nests, including during construction. The environmental analysis should examine whether habitat that could potentially be occupied by raptors, such as previously utilized nests, should receive protection so as to ensure the continued viability of raptors in the area. It should consider all biological needs of raptors and develop suitable protections for all significant life-stages of the various raptors, all of which should be included in the decision document. Additionally, the environmental analysis should address compliance with the Bald Eagle Protection Act and Migratory Bird Treaty Act and the decision document should specify the means by which BLM will ensure compliance with these laws as well as pursue (or facilitate) enforcement of them, relative to raptors as well as other bird species protected by these laws.

The potential direct impact of wind turbine blades directly hitting birds or bats must be fully considered and means put in place to minimize those impacts. Ensuring siting that does not allow wind towers to occupy high-use areas, migration routes, and other important habitats for these species can probably largely eliminate these impacts. One means to avoid these problems is to conduct a pre-construction avian use study that identifies high use areas for hawks, passerine birds, other small birds, songbirds, and bats. These pre-construction and pre-project approval studies would greatly aid in siting decisions and would help avoid such features as ridgelines and drainages that are important to these species. It would also be helpful to identify prairie dog colonies during these studies because prairie dog towns are very important for many bird species.

Sage-grouse

The sage-grouse too usually receives special protective measures, and BLM must ensure full compliance with its Sensitive Species Manual relative to this species, as well as other BLM guidance and guidance from the Wyoming Game and Fish Department. While it is specifically applicable to oil and gas development, the BLM should consider the Game and Fish Department's report "Recommendations for Development of Oil & Gas Resources within Crucial & Important Wildlife Habitats ." This report has many useful and important provisions and more generally outlines the Wyoming Game and Fish Department's views regarding needed wildlife protections.

The sage-grouse is of course a special case at this point. It is being reconsidered for listing under the Endangered Species Act by the Fish and Wildlife Service and could well be listed. Furthermore, as the BLM knows there is an increasing effort to ensure the protection of sage-grouse on a "landscape scale," with this being done through the protection of large "core areas." The Governor of Wyoming of course just released an Executive Order outlining needed protections for this bird. Exhibit 1. The key element of this protective plan is to recognize and protect sage grouse core breeding areas. As the Exhibit makes clear, the Chokecherry Project as proposed would likely intrude on a large sage-grouse core area just south of Rawlins and Interstate 80. The BLM should ensure that its approval of the Chokecherry Project does not degrade or destroy this core area. This would be contrary to its sensitive species manual, the wind energy programmatic EIS, and the Executive Order, and could lead to listing under the Endangered Species Act. As stated in the Executive Order, "New development or land uses within Core Population Areas should be authorized or conducted only when it can be demonstrated by the state agency that the activity will not cause declines in Greater Sage-Grouse populations." As discussed above, we believe that impacts to this important sage-grouse breeding area could largely be eliminated by careful attention to siting accomplished pursuant to a methodology and protocol regarding siting that is implemented and adhered to prior to any decisions being made about acceptable locations for wind turbines. As also mentioned above, ensuring that there are pre-construction avian studies would be one means to accomplish these needs.

Mule Deer, Elk, and Pronghorn

In developing the Chokecherry Project environmental analysis, BLM should consider and utilize data available from the Wyoming Game and Fish Department to determine protections for game species (and other species). We particularly direct the BLM to the Wyoming Game and Fish Department's publication "Recommendations for Development of Oil & Gas Resources within Crucial & Important Wildlife Habitats." The Rawlins RMP identifies much of the Chokecherry Project area as being crucial year-long habitat for mule deer. RMP FEIS at Map 2-54. This emphasizes the need to protect this area. The Chokecherry Project environmental analysis and decision document should also ensure that noise from this project does not disturb big game, especially during critical periods such as parturition. The impact of noise on hunters and the hunting experience must also be fully considered and mitigated.

INVASIVE SPECIES, NOXIOUS WEEDS, AND MANAGEMENT OF NATIVE VEGETATION

We ask that BLM ensure the decision document provides for compliance with Executive Order 13112, which established requirements and procedures Federal agencies are to adhere to relative to invasive species. Section 2 of the Executive Order requires BLM to identify actions that may affect the status of invasive species and to then:

Use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv) provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them

Just as important, the Executive Order requires BLM to "not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions." The environmental analysis should fully analyze the extent of the invasive species problem in this area, the causes, and options for both restoration and prevention in the future.

The flip side of preventing invasive species from becoming established is protecting native plant species and communities, especially rare and special status species. The BLM should conduct surveys to determine the location and characteristics

of native plant communities and rare or special status species. The survey results should be presented in the environmental analysis, and the decision document should establish standards for protecting native plant communities and rare or special status species. It should seek to protect dense stands of sagebrush that could serve as sage-grouse wintering habitat, and recognize the special value of these stands.

CULTURAL AND PALEONTOLOGICAL RESOURCES

Most if not all historical, archeological, and paleontological resources (hereinafter, “cultural resources”) are strictly non-renewable: once marred or destroyed, they are forever lost to future generations. Such fragility demands utmost care and humility from BLM managers and planners. The Chokecherry Project environmental analysis should reflect—and the decision document should require—this conservative approach to managing these priceless and irreplaceable resources.

BLM’s multiple-use mandate requires land managers to consider the value of cultural resources in their decision-making process. Unfortunately, these resources are frequently given short shrift in this calculus. Their value is not easily measured, and as a result they are sacrificed in pursuit of more obviously economically profitable resources. The Chokecherry Project environmental analysis should ensure this problem is avoided. BLM’s preparation of the Chokecherry Project environmental analysis provides an excellent opportunity for the agency to address concerns about these resources and to implement policies that will protect and preserve cultural resources.

Another concern is consultation with Native American tribes during the Chokecherry Project environmental review process. BLM is required to consult with tribes under a number of laws in order to learn of tribal concerns and places of traditional religious or cultural importance to the tribe. The BLM must specifically request the views of tribal officials, and must solicit the views of traditional leaders or religious leaders. BLM must be diligent in its pursuit of this information.

The Chokecherry Project environmental analysis document should identify areas where cultural sites are at risk, and the decision document should employ measures to protect these resources. The areas designated should be of sufficient size to allow viable protection of the resources; designation of just the site itself may not allow for effective management.

CONCLUSION

We would like to emphasize again our strong support for development of renewable energy sources such as wind energy. We trust that with careful attention to siting concerns prior to approval of wind turbine locations the Chokecherry Project can be a good example of good “green energy” development that is done in a way that increases the production of renewable energy sources without degrading other environmental values.

Sincerely,

Bruce Pendery,
And on behalf of:

Stephanie Kessler
The Wilderness Society

cc: Governor Dave Freudenthal