

May 4, 2005

Eldon Allison, Project Lead
Bureau of Land Management
Rawlins Field Office
P.O. Box 2407
Rawlins, Wyoming 82301

Dear Mr. Allison.

Please accept these scoping comments on the Continental Divide-Creston environmental impact statement (EIS). On November 3, 2005 the Wyoming Outdoor Council and several other groups submitted scoping comments on what was then entitled the Creston/Blue Gap II Natural Gas Development Project. Those comments were submitted to you at the above address. Those comments are incorporated into these comments in their entirety and we request that they be considered as part of these scoping comments. In addition, we would like to offer the following comments.

We would like to point out that under the National Environmental Policy Act (NEPA), the Bureau of Land Management (BLM) has a duty to “independently evaluate the information submitted [by a project applicant] and shall be responsible for its accuracy.” 40 C.F.R. § 1506.5(a). The failure to ensure this duty is met can invalidate an environmental impact statement (EIS). Utahns for Better Transportation v. U.S. Dep’t of Transp., 305 F.3d 1152, 1165, 1171 (10th Cir. 2002). Something that is common is for BLM to accept various input data for air quality modeling from the project proponent. BLM has a duty to independently verify the accuracy and reasonableness of this data, and we ask that it do so. And to the extent the project proponents (BP America Production Company, Devon Energy Corporation, and other companies) submit other information that is used in the EIS or which supports the EIS, BLM must ensure the accuracy of that data as well. To demonstrate this requirement has been met, we request that BLM provide evidence of the “truth-checking” and validation procedures that it uses in the EIS.

While addressed in our prior comments, we would like to ask that BLM ensure that at least one alternative in the EIS fully explore and require the use of phased development and directional drilling to the maximum extent possible. These techniques can greatly reduce the environmental impacts of oil and gas development. Consequently, BLM has a duty to require their use to the maximum extent possible. See 40 C.F.R. §§ 1500.1(c) (NEPA is intended to foster “actions that protect, restore, and enhance the environment”), 1500.2(f) (agencies are to use “all practicable means . . . to restore and enhance the

quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment”), 1502.1 (“The primary purpose of an [EIS] is to serve as an action-forcing device to ensure that the policies and goals [in section 101 of NEPA] are infused into the ongoing programs and actions of the Federal Government.”), 1502.1 (“An environmental impact statement is more than a disclosure document.”), 1502.2(c) (an EIS must state how it will or will not achieve the “requirements” of sections 101 and 102(1) of NEPA and other environmental laws), 1502.2(g) (an EIS shall not be used to “justify[] decisions already made.”), 1502.14(f) (mitigation measures to be presented), 1502.16(h) (same), 1502.24 (scientific integrity must be insured), 1505.2(c) (a record of decision must state whether all practicable means to avoid or minimize environmental harm have been adopted, “and if not, why they were not” as well as include a monitoring and enforcement program for the mitigation), 1505.3 (mitigation to be implemented). See also 43 U.S.C. 1701(a)(8) (the public lands are to be managed so as to “protect” natural and ecological values), 1702(c) (multiple use management requires that there be no “permanent impairment of the productivity of the land and the quality of the environment”), 1732(b) (BLM shall take “any” action that is necessary to prevent unnecessary or undue degradation of the public lands).

The BLM has begun to recognize the need for using the techniques of phased development in the Seminole Road Natural Gas Development Project EIS, and we request that our comments on the appropriate use and definition of phased development that were submitted in our comments on the draft EIS for that project to the BLM Rawlins Field Office on January 31, 2006 be considered as part of these scoping comments. Moreover, we request that BLM consider and apply the report found at <http://www.voiceforthewild.org/blm/pubs/DirectionalDrilling1.pdf> (report on directional drilling by Biodiversity Conservation Alliance). BLM has recognized the viability of using directional drilling and its legal obligation to do so under Interior Board of Land Appeals precedent:

. . . BLM can regulate the manner and pace of development.^[1] In fact, the Interior Board of Land Appeals (IBLA) based on 42 U.S.C. 4322(2)(E) considered staggering development over time an “*obvious alternative*.”^[1] . . . None-the-less, as shown in Chapter 4 and was suggested during public scoping and the workshops, many of the impacts could be significantly reduced by slowing the pace of development. It is therefore appropriate to present to the public in this EIS the benefits associated with this “*obvious alternative*.”

Draft Environmental Impact Statement for the Pinedale Anticline Oil and Gas Exploration and Development Project at 2-43 (emphases in original; citing Wyoming Outdoor Council, 147 IBLA 105 (1998) and Powder River Basin Resource Council, 120 IBLA 47 (1991)). Thus, BLM should fully consider and in fact adopt an alternative that requires the use of phased development and directional drilling in the Continental Divide Creston project EIS and decision document.

Included with these comments is an expert report prepared by Dr. Jana Milford that addresses issues related to ozone pollution and its proper modeling and analysis. Also attached is her curriculum vitae which shows the high level of expertise she brings to this subject. We ask that this report be fully considered as the Continental Divide Creston EIS is prepared, and specifically that it be considered as the air quality modeling protocol is developed. Among many other things, this report shows that it is entirely inappropriate to use the method developed by Richard Scheffe in 1988 for use in ozone modeling and that up-to-date photochemical models (such as CAMx and CAMQ) are available and applicable in rural areas and in fact are being used in areas where oil and gas development is occurring in rural areas. Consequently, we request that the BLM reject the Scheffe method for use here and apply a scientifically up-to-date model. As noted above, under the NEPA regulations, BLM must insure the scientific integrity of its NEPA analyses, and under BLM's own regulations it must "require compliance" with Clean Air Act standards. 43 C.F.R. § 2920.7(b)(3). It is impossible to show that BLM has provided for compliance with an applicable air quality standard if BLM attempts to make a determination of compliance with a totally antiquated and out-of-date method that is not recognized by EPA or other experts in the field.

It appears that the nearly-9000 wells proposed for the Continental Divide Creston project will exceed the Reasonably Foreseeable Development scenario (RFD) established in the Great Divide Resource Area Resource Management Plan Record of Decision (1440 wells). This is impermissible under the Federal Land Policy and Management Act (FLPMA). FLPMA is premised on Congress' understanding that "the national interest will best be realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process." *Id.* § 1701(a)(2). To this end, FLPMA mandates that BLM "shall manage the public lands ... in accordance with ... land use plans." *Id.* § 1732(a) (emphasis added); see also id. § 1712 (requiring BLM to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of public lands").

In keeping with FLPMA's statutory requirements, BLM's planning regulations provide that "[a]ll future resource management authorizations and actions ... and subsequent more detailed specific planning, shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a) (emphases added). Thus, before the agency can approve a proposal that is inconsistent with the governing land use plan, BLM must amend its land use plan. See id. § 1610.5-3(c) ("If a proposed action is not in conformance, and warrants further consideration before a [land use] plan revision is scheduled, such consideration shall be through a plan amendment.") (emphasis added); see also id. § 1610.5-5 ("An amendment shall be initiated by the need to consider ... a proposed action that may result in a change in the scope of resource uses or a change in the terms, conditions and decisions of the approved plan.") (emphasis added).

As the Supreme Court recently summarized, “[t]he statutory directive that BLM manage ‘in accordance with’ land use plans, and the regulatory requirement that authorizations and actions ‘conform to’ those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law pursuant to 5 U.S.C. § 706(2).” Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 69 (2004); see also Pennaco Energy, Inc. v. U.S. Dep’t of Interior, 377 F.3d 1147, 1151 (10th Cir. 2004) (explaining that “[i]n the context of oil and gas development, the BLM is initially charged with determining ... consisten[cy] with the RMP”).

From a practical standpoint, FLPMA’s land-use planning and conformity requirements serve to ensure that ad hoc decision-making does not undermine important values such as preservation of air quality and wildlife habitat on public lands.¹ Thus, for individual field offices such as the Rawlins Field Office, the BLM is required to develop overarching resource management plans or “RMPs.” 43 C.F.R. §§ 1601.0-5(j),(n); see also 43 U.S.C. § 1712(c). These RMPs identify sensitive areas that must be closed to extractive uses, and, in less sensitive areas, they prescribe the “[a]llowable resource uses (either singly or in combination) and related levels of production or use to be maintained.” 43 C.F.R. §§ 1601.0-5 (n)(2), (3). In addition, they specify the overall “[r]esource condition goals and objectives to be attained” in the resource area. 43 C.F.R. § 1601.0-5(n)(3); see also 43 U.S.C. § 1712(c). At a minimum, RMPs must set limits on development that “prevent unnecessary or undue degradation of the lands” and “provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans.” Id. §§ 1732(b), 1712(c)(8); see also 43 C.F.R. § 1610.3-2 (similarly requiring consistency with state, federal, and tribal resource protection plans and standards).

Once BLM has developed an adequate RMP, the agency can achieve desired conditions in the resource area by conforming all site-specific decisions to its master plan. However, when proposed development exceeds the “levels of production or use” contemplated in the RMP (i.e., the RFD), the agency can no longer assume that it will meet its desired “[r]esource condition goals and objectives,” including compliance with federal and state air quality standards. 43 C.F.R. §§ 1601.0-5(n)(2),(3). At this point, FLPMA requires a plan amendment to the RMP. See id. §§ 1610.5-3(c), 1610.5-5 (requiring initiation of amendment process to address any “change in the scope of resource uses” within the resource area).

During the amendment process, the agency considers whether it is possible to approve more intensive land use without compromising resource values such as air quality that are entitled to protection under FLPMA and other federal laws and regulations. For example,

¹ See 43 C.F.R. § 1701(a)(8) (mandating that “the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values ... that will provide food and habitat for fish and wildlife and domestic animals; and that will provide outdoor recreation and human occupancy and use”).

in the oil and gas context, BLM might decide that it can accommodate intensified development, but only if more protective stipulations are attached to future oil and gas leases and if future application for permit to drill (“APD”) approvals are conditioned on implementation of more stringent mitigation measures. Alternatively, BLM might conclude that phased development is necessary to avoid unacceptable environmental impacts. Indeed, BLM might conclude that certain development proposals cannot be approved under any circumstances because there is no way to reconcile them with important land management objectives. Thus, the amendment process forces BLM to stop and consider its options in light of its stewardship responsibilities. In this way, the conformity requirement serves as a check on land-use decisions that might otherwise result in “undue degradation” of public lands or preclude approval of future development proposals. 43 U.S.C. § 1732(b).

Here, given that the RFD will be greatly exceeded, BLM would entirely bypass the FLPMA planning process and its safeguards for preventing undue degradation of the Rawlins Field Office area if it allows for the Continental Divide Creston project to be approved and perhaps even developed prior to revision of the Rawlins/Great Divide RMP. BLM would violate FLPMA. To avoid this violation of the law, BLM should not approve the Continental Divide Creston Project prior to revision of the Rawlins RMP so that the Continental Divide Creston Project can be pursued under the framework of an updated RFD that has been developed under the “big picture” framework and field-office-wide perspective that will underlie the updated RMP.

Thank you for considering these comments.

Sincerely,

Bruce Pendery
Program Director