

NATIONAL WILDLIFE FEDERATION
BIODIVERSITY CONSERVATION ALLIANCE
WYOMING OUTDOOR COUNCIL
WYOMING WILDLIFE FEDERATION

IBLA 2003-57, 2003-58

Decided June 13, 2006

Appeal from decisions of the Acting Deputy State Director, Wyoming State Office, Bureau of Land Management, affirming the Decision Record/Finding of No Significant Impact approving the Cow Creek Pod Environmental Assessment, WY-030-EA1-242, and the Decision Record/Finding of No Significant Impact approving the Blue Sky Pod Environmental Assessment, WY-030-EA1-244. SDR No. WY-2002-19 and SDR No. WY-2002-20.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally--
Federal Land Policy and Management Act of 1976: Land Use
Planning--Oil and Gas: Generally--Oil and Gas Leases:
Generally

Because coalbed methane (CBM) is a fluid gas mineral, a land use planning decision that opens a planning area to oil and gas leasing opens it to CBM exploration and development as well.

2. National Environmental Policy Act of 1969: Finding of No Significant Impact

When an agency issues a decision record and finding of no significant impact based on an environmental assessment, that decision will be deemed to comply with the National Environmental Policy Act of 1969 (NEPA) if the record demonstrates that the agency has considered all relevant matters of environmental concern, taken a hard look at potential environmental impacts, and made a convincing case that any potentially significant impact

will be reduced to insignificance by imposing appropriate mitigation measures.

3. National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas: Generally--Oil and Gas: Drilling

An Interim Drilling Policy that establishes numerous conditions and criteria designed to ensure that exploratory drilling activity does not exceed the limitations on interim actions specified by 40 CFR 1506.1 is not itself independently subject to review and analysis under NEPA, so long as when and to the extent it is incorporated into a proposed agency action, full NEPA review of the effects of that action is undertaken.

APPEARANCES: Thomas D. Lustig, Esq., and Michael A. Saul, Esq., for the National Wildlife Federation, Biodiversity Conservation Alliance, Wyoming Outdoor Council, and Wyoming Wildlife Federation; Jack D. Palma II, Esq., P.C., and Jerrold A. Long, Esq., Cheyenne, Wyoming, and Leah Kukowski, Esq., Denver, Colorado, for Anardarko E&P Company; Laura Lindley, Esq., and Robert C. Mathes, Esq., Denver, Colorado, for Double Eagle Petroleum Company; Andrea S. V. Gelfuso, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The National Wildlife Federation, Biodiversity Conservation Alliance, Wyoming Outdoor Council, and the Wyoming Wildlife Federation (collectively, NWF) have appealed two October 1, 2002, decisions of the Acting Deputy State Director, Wyoming State Office, Bureau of Land Management (BLM), affirming on State Director Review (SDR) the June 26, 2002, Decision Record/Finding of No Significant Impact (DR/FONSI) of the Rawlins (Wyoming) Field Office approving the Cow Creek Pod Environmental Assessment, WY-030-EA1-242 (CCEA), and affirming the July 29, 2002, DR/FONSI approving the Blue Sky Pod Environmental Assessment, WY-030-EA1-244 (BSEA), under the Atlantic Rim Coalbed Methane Project (ARP). Anardarko E&P Company LP (Anardarko) appears by virtue of its motion to intervene on the basis of an interest it owns in Atlantic Rim leases in Carbon County held by Petroleum Development Corporation (PEDCO), a wholly-owned subsidiary of Anardarko. Double Eagle Petroleum and Mining Company (Double Eagle) is the operator of the Cow Creek pod.

Because of the common legal and factual issues, we have consolidated these appeals on our own motion.

The Cow Creek and Blue Sky pods (or operational units) represent two of nine exploratory coalbed methane (CBM) projects within the Atlantic Rim CBM Project Area (ARPA) in southwestern Wyoming in Carbon County. The activities in the ARPA are governed by the 1990 Great Divide Resource Management Plan (Great Divide RMP) and its underlying environmental impact statement (EIS) (collectively the RMP/EIS). See Notice of Intent to Prepare an Environmental Impact Statement and Conduct Scoping for the Atlantic Rim Coalbed Methane Project, Carbon County, Wyoming; and to Amend the Great Divide Resource Management Plan, 66 FR 33975, 33976 (June 26, 2001). The ARPA encompasses 310,335 acres of Federal, State, and private lands, in which up to 3,880 CBM wells with related facilities and improvements could be drilled. Id. An RMP amendment and accompanying EIS are proposed because the development pursuant to the ARP is likely to exceed the reasonably foreseeable development analyzed in the 1990 RMP/EIS. Id. at 33975-76. The nine exploratory pods will conduct exploratory drilling to gather information “to define the coal structures in the area, to determine if the coal can be dewatered to allow for economic development of gas, and to support conclusions reached to be contained in the ARP EIS.” Id.

The Cow Creek pod is operated by Double Eagle, and is part of pod 6, the Sun Dog pod.^{1/} (CCEA at 2-1, 4-31, Appendix C-1 at 1-1 to 1-2.) The Cow Creek pod contains approximately 2,050 acres, and would add eight CBM wells and related facilities to six wells not at issue in this appeal, not including two conventional oil and gas wells that were recompleted as CBM wells with a projected project life of 10 and 15 years on an existing lease. (CCEA at 1-1.) The Blue Sky pod, operated by the PEDCO, contains approximately 1,921 acres, and 23 wells are proposed, not including two injection wells, over a project life of 10 to 20 years. (BSEA at 1-1.) To remain within the level of activity permitted pursuant to Council on Environmental Quality (CEQ) regulation 40 CFR 1506.1,^{2/} no drilling beyond the level described in

^{1/} The other portion of the Sun Dog pod project will be developed by PEDCO, and is the subject of a separate EA.

^{2/} CEQ regulation 40 CFR 1506.1, **Limitations on actions during NEPA process**, in part provides as follows:

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(continued...)

BLM's 2001 *Interim Drilling Policy, Conditions and Criteria Under Which Development Activities May Occur Concurrent with EIS Preparation for the Atlantic Rim Coalbed Methane Project* (IDP) will be permitted until the ARP EIS is completed.^{3/} The IDP prescribes the level of activity permitted pursuant to CEQ regulation 40 CFR 1506.1. See Appendix A to CCEA and BSEA. Accordingly, with respect to the impact of reasonably foreseeable actions, the EAs state that "the only major resource development currently proposed near the project area is the exploration activity allowed under the [IDP] for the Atlantic Rim Coalbed Methane area." (CCEA at 4-30; BSEA at 4-27.) That "exploratory activity" is a reference to the other eight pods. The pods are spaced apart by as little as 1.5 miles (pods 2 and 3), and as much as 6-plus miles (pods 7 and 8). (CCEA, Figure 1-2.) Overall, the distance between pod 1 and pod 9 is approximately 40 miles. (CCEA at 4-31; BSEA at 4-28.)

^{2/} (...continued)

(2) Limit the choice or reasonable alternatives.

* * * * *

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement;

and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives. * * *

^{3/} The IDP is attached to the CCEA and to the BSEA as Appendix A. It states: "The above regulations [40 CFR 1506.1] and the following criteria and conditions will be used by the BLM to determine new exploratory activities allowed on Federal surface and/or minerals during preparation of the EIS. They also establish conditions under which these activities will be approved. The intent of these criteria and conditions [is] to keep all activity within the scope of existing analysis and at a reasonable level, to allow limited drilling activity for the acquisition of additional data necessary for completion of the EIS, and to prevent unnecessary hardship to leaseholders. These criteria may be modified by the BLM [authorized officer] if any of the allowed activities are viewed as having a potentially significant effect on the environment or prejudice the ultimate decision on the drilling program for the EIS as outlined in the CEQ regulations quoted above." (Appendix A to CCEA and BSEA at A-1 (emphasis added).)

On the basis of the EA analyses, BLM determined that, with the protective measures specified, pod activities conformed to the 1990 Great Divide RMP and would have no significant impact on the environment and, accordingly, issued the two DR/FONSI.

NWF requested administrative review before the Director, Wyoming State Office, BLM, of both DR/FONSI under 43 CFR 3165.3(b). NWF argued that (1) the two EAs violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (2000), because they relied on the IDP, which had not been analyzed under NEPA as it should have been, arguing that “both the courts and BLM rules require the application of NEPA since the IDP substantially affects development of the [pods] and [their] accompanying impacts” (Requests for Administrative Review at 2); (2) the EAs failed to adequately consider connected, similar, and cumulative impacts, as required by NEPA; (3) the EAs violated the Federal Land Policy and Management Act of 1976 (FLPMA) because authorizing drilling for CBM does not conform to the RMP, as required by 43 U.S.C. § 1732(a) (2000); (4) the EAs failed to disclose likely environmental impacts that would occur during the production phase; and (5) the EAs failed to consider a reasonable range of alternatives.

In the October 1, 2002, decisions, the Acting Deputy State Director responded to NWF’s arguments, noting that the IDP “is neither a decision nor an action” (Decisions at 3), but a “guideline that the oil and gas operators will be required to follow during exploratory drilling activities.” (Decisions at 2.) In addition, the Acting Deputy State Director determined that the IDP is categorically excluded from NEPA analysis under BLM’s Handbook. The Acting Deputy State Director determined that the EAs and DR/FONSI were “consistent with management objectives and decisions currently in effect in the [RMP]” and affirmed the DR/FONSI. (Oct. 1, 2002, Decisions, SDR No. WY-2002-20 (Cow Creek), NWF Statement of Reasons (SOR), Ex. 16 at 17; SDR No. WY-2002-19 (Blue Sky), NWF SOR, Ex. 4 at 12.)

In its appeal, NWF attacks BLM’s decisions on three main fronts. First, NWF argues that the EAs do not comply with NEPA because they are predicated on the IDP, which was never analyzed under NEPA. (SOR at 7-13.)^{4/} More specifically, citing Kern v. U.S. Bureau of Land Management, 284 F.3d 1062 (9th Cir. 2002), NWF contends that, when the IDP was incorporated into site-specific proposals, independent of the analyses of the impacts of pod activities, BLM was required to analyze the IDP under NEPA. (Reply at 3-18.) Second, they argue that the approval of the projects for CBM development violates FLPMA because CBM development does

^{4/} In its SOR, NWF had asserted that under Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166 (D.D.C. 2000), and BLM’s NEPA Handbook, the IDP was itself subject to NEPA review at the time it was issued. However, relying on Kern, NWF subsequently abandoned that argument. (Reply at 18.)

not conform to the 1990 Great Divide RMP in that CBM impacts “are substantially different” in magnitude and nature from impacts contemplated in the RMP/EIS for conventional oil and gas production. (SOR at 18-35; Reply at 28-53.) Third, appellants assert that BLM cannot mitigate impacts to wildlife during the production phase of pod activities because lease provisions preclude the imposition of timing limitations once the projects are past the exploration and development phases, and thus they contend that the EAs failed to disclose “likely” impacts that will materialize “during the production phase.” (SOR at 35-38; Reply at 54-60.) NWF moves the Board to reverse the State Director’s decisions and remand them for compliance with NEPA and FLPMA and, in the event the Cow Creek and Blue Sky Pod decisions are fully implemented before these appeals are decided, NWF “nonetheless ask[s] for ruling[s] on the three issues raised in this appeal – for those same issues will be integral in BLM’s upcoming approval for development on the remaining seven pods in the Atlantic Rim Coalbed Methane Project.” *Id.* at 39.^{5/}

In response, Anardarko and Double Eagle argue that the EAs adequately analyzed the elements of the IDP they implement. (Anardarko Answer at 23-27; Double Eagle Answer at 10.) BLM argues that “most” of the conditions and operational criteria the IDP specifies were based on analysis supporting the Great Divide RMP/EIS (BLM Answer at 9-10), and that some of those criteria are more stringent than those that would otherwise apply (BLM Answer at 10-11). In addition, BLM disputes NWF’s conclusion that, because two leases contain no specific mention of timing restrictions to protect wildlife, BLM lacks authority to impose them. (BLM Answer at 19-20.)

NWF’s Reply questions the adequacy of the number of alternatives analyzed (proposed action and no action) (Reply at 5-6, 15-17), as well as the lack of reasonable alternatives to the IDP’s specifications (Reply at 7-15). NWF disputes BLM’s, Anardarko’s, and Double Eagle’s assertions and conclusions regarding the sufficiency of the EAs, arguing that, although some of the IDP’s guidelines were addressed in the Great Divide RMP/EIS, many were not (Reply at 19-21), and others were not adequately addressed (Reply at 21-28). NWF maintains its contention that the Great Divide RMP/EIS did not contemplate or analyze the “substantially

^{5/} NWF has also filed appeals of State Director decisions affirming DR/FONSI for the Brown Cow pod (IBLA 2004-133) and Red Rim pod (IBLA 2004-289). Although NWF’s reasons for appeal to us are substantially similar to those they filed with the State Director, and are therefore subject to dismissal for failure to affirmatively identify the errors in the State Director’s decisions (see, e.g., *Fletcher de Fisher*, 92 IBLA 226, 227 (1986)), we exercise our discretion to consider them because we clearly understand the basis for challenging the State Director’s decisions and it is in the public interest to decide the issues raised about the Atlantic Rim CBM Project as soon as possible.

different” impacts of CBM extraction and development, and therefore such activity does not conform to the RMP, in violation of FLPMA, 43 U.S.C. § 1732(a) (2000). (Reply at 28-31.) NFW argues that, in any event, the question of the adequacy of the Great Divide RMP/EIS for CBM development was decided against BLM in Wyoming Outdoor Council, 158 IBLA 384 (2003). (Reply at 53.) Lastly, NFW adheres to its conviction that the EAs’ analyses of impacts on wildlife are flawed, in that seasonal restrictions will not mitigate effects because BLM has limited authority to impose wildlife restrictions after the production phase commences (Reply at 54-58), and that the EAs therefore failed to take the requisite hard look at potentially significant impacts (Reply at 58-60).^{6/}

[1] As a way of setting the stage for the discussion of NWF’s NEPA arguments, we begin with NWF’s second group of arguments pertaining to compliance with FLPMA. NWF is correct in asserting that the public lands are to be managed under principles of multiple use and sustained yield in conformance with land use plans. 43 U.S.C. § 1732(a) (2000). The two EAs are tiered to the Great Divide RMP/EIS, which analyzed the impacts of oil and gas leasing in the planning area. The RMP/EIS does not specifically mention CBM in its discussion under the topics of “oil and gas” or “other leasable minerals.” Even so, CBM is a fluid mineral and, as such, must be regarded as subject to and a part of the land use planning pertaining to minerals management in general, and oil and gas in particular.^{7/} As approved by the Great Divide RMP Record of Decision (ROD), the management objective for oil and gas is to “provide opportunity for leasing exploration, and development of oil and gas while protecting other resource values.” (ROD at 30.) The management action for oil and gas is that “[t]he entire planning area is open to oil and gas leasing,” with restrictions necessary to protect resources listed in Table 3. Id. Those broad land use decisions include CBM exploration and development as a subset of fluid minerals exploration and development.^{8/}

^{6/} On June 23, 2003, Anardarko filed a Motion to Strike and Sur-Reply to NWF’s Reply. In that Motion, Anardarko contends that appellants’ argument that the BSEA had failed to consider an adequate range of alternatives was not raised in their SOR and therefore should be stricken. That Motion is denied as moot.

^{7/} Although CBM occurs in association with coal, it is clear that the Great Divide RMP land use planning decisions for development of Federal coal resources do not include the CBM resource. Nor does the ROD’s planning decision for other leasable minerals (i.e., “leasing, exploration, and development of oil shale, geothermal resources, and nonenergy leasable minerals while protecting other resource values”) include CBM.

^{8/} The conclusion that CBM is included in and subject to a land use decision permitting oil and gas exploration and development is also consistent with BLM’s Land Use Planning Handbook. Thus, section II.F, at p. 16 of Appendix C to BLM’s

continued...)

To be sure, in the decisions NWF appeals, BLM characterized CBM in the ARPA as an “unevaluated and unrecognized gas resource.” (Decisions at 6.) More precisely, the decisions state:

Also, on page 219, the Great Divide RMP states in part that the planning area has significant known conventional oil and gas resources. However, the RMP goes [on] to state that geologic relationships are favorable for the occurrence of additional, currently unevaluated or unrecognized oil and gas resources. As a result of new technology, industry has been able to produce this unevaluated and unrecognized gas resource (CBM) identified in the RMP.

To acknowledge that a particular mineral resource is presently “unevaluated and unrecognized” in the ARPA and may occur in economic volumes in no way alters the fact that CBM is a fluid mineral subject to the land use planning decisions applicable to such minerals, regardless of whether it is identified by name or not. Therefore, a land use planning decision that opens the planning area to oil and gas leasing opens it to CBM exploration and development as well. This Board has expressly stated as much in Wyoming Outdoor Council, 164 IBLA 84, 96 (2004). The proposition has been implicit in virtually every Board decision considering CBM activity. See e.g., Western Slope Environmental Resource Council, 163 IBLA 262 (2004); Wyoming Outdoor Council, 160 IBLA 387 (2004); Wyoming Outdoor Council, 156 IBLA 347 (2002); Wyoming Outdoor Council (On Reconsideration), 157 IBLA 259 (2002); Wyoming Outdoor Council, 158 IBLA 155 (2003). This conclusion squares with the facts that there is no separate leasing for CBM and that a Federal oil and gas lease conveys the “exclusive right and privilege to drill for, mine, extract, remove and dispose of all oil and gas deposits (*except helium*) in the lands leased.” See Standard Form 3110-11 (1992); see also Wyoming Outdoor Council, 158 IBLA at 175. We therefore reject the assertion that the failure to explicitly identify CBM as a gas resource in the RMP/EIS means that the land use planning decision authorizing oil and gas exploration and development does not embrace CBM exploration and/or development as well.

^{8/} (...continued)

Land Use Planning Handbook (H-1601-1), Resource Uses, is captioned “Fluid Minerals: Oil and Gas, Tar Sands, Geothermal Resources, and Coal Bed Methane.” There is no further mention of CBM in section II.F, but none is necessary because the objective of section II.F is to require a determination of which areas in the planning area are open to fluid minerals leasing and under what constraints, if any, and subject to what lease stipulations, if any; which areas are closed to leasing as a discretionary or nondiscretionary matter; and whether leasing and development decisions also apply to geophysical exploration.

We recognize that CBM development is a relatively recent phenomenon, and that the preparation and issuance of the 1990 Great Divide RMP predates that phenomenon. Nonetheless, for purposes of determining plan conformance under FLPMA, it is sufficient that CBM is a gas mineral and, as BLM notes, the RMP/EIS in general terms anticipated the discovery of additional fluid mineral resources that could be extracted by new technologies. Thus, the real issue presented by CBM activity in these appeals is not whether it conforms to the Great Divide RMP land use decision authorizing oil and gas activity, but whether there are any environmental impacts associated with CBM activity on the leased parcels beyond those resulting from conventional oil and gas activity, hence rendering them “unique” impacts or impacts never addressed in the EIS. To the extent truly unique CBM impacts demonstrably exist or are likely to materialize, it is not FLPMA’s land use planning provisions that are triggered, but those of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (2000), which requires an agency to analyze such impacts before undertaking an action.

This Board has already addressed the adequacy of the Great Divide RMP/EIS as it relates to pre-leasing environmental review and the possibility of unique environmental consequences of CBM extraction and development. See Wyoming Outdoor Council, 158 IBLA 384, 392 (2003), and Wyoming Outdoor Council, 160 IBLA 387, 402 (2004). We are not here concerned with a pre-leasing decision, however, as these appeals relate to leases issued as far back as 1948, and thus the time for challenging the adequacy of the RMP/EIS as a pre-leasing analysis has long since passed. Here, substantial EAs have been prepared specifically to address the environmental consequences that might be occasioned by pod activities, including any that might be deemed unique or that were not previously addressed in the Great Divide RMP/EIS. This disposes of NWF’s arguments that the proposed actions do not conform to the land use plan in violation of FLPMA’s mandates (see Reply at 32-45), as well as NWF’s argument that the IDP’s “environmentally critical specifications” were not addressed in the Great Divide RMP/EIS (see Reply at 7-11). Accordingly, the question before us is the adequacy of the EA analyses, to which we now turn.

[2] Section 102(2)(C) of NEPA requires consideration of potential environmental impacts of a proposed action in an EIS, if that action is a “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2000); Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985). An EA is prepared to determine whether an EIS is necessary. 40 CFR 1504.4. When an agency issues a DR/FONSI, based on an EA, concluding that it is not necessary to prepare an EIS before undertaking the proposed action, that decision will be deemed to comply with section 102(2)(C) of NEPA if the record demonstrates that the agency has considered all relevant matters of environmental concern, taken a “hard look” at potential environmental impacts, and made a convincing case that any potentially significant impact will be reduced to insignificance by imposing

appropriate mitigation measures. Cabinet Mountain Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982).

An appellant seeking to overcome a FONSI bears the burden of demonstrating, with objective proof, that BLM has failed to adequately consider an environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(c) of NEPA. Southern Utah Wilderness Alliance, 127 IBLA 331, 350, 100 I.D. 370, 380 (1993); Red Thunder, 117 IBLA 167, 175, 97 I.D. 263, 267 (1990); Sierra Club, 92 IBLA 290, 303 (1986). That an appellant has a differing opinion about the likelihood or significance of environmental impacts or prefers that BLM take another course of action does not establish that BLM violated the procedural requirements of NEPA. San Juan Citizens Alliance, 129 IBLA 1, 14 (1994). When BLM has completed the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at the potential environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by an appellant, this Board, or a court (in the event of judicial review). Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980); Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

When deciding whether BLM has taken a hard look, this Board is guided by the "rule of reason," as expressed in Don't Ruin Our Park v. Stone, 802 F. Supp. 1239, 1247-48 (M.D. Pa. 1992):

An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature it is intended to be an overview of environmental concerns, not an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on "incomplete and uncertain information." Blue Ocean Preservation Society v. Watkins, 767 F. Supp 1518, 1526 (D. Hawaii 1991) * * * . So long as an EA contains a "reasonably thorough discussion of . . . significant aspects of the probable environmental consequences," NEPA requirements have been satisfied. Sierra Club v. United States Department of Transportation, 664 F. Supp. 1324, 1328 (N. D. Ca. 1987) * * * quoting Trout Unlimited v. Morton, 509 F. 2d 1256, 1283 (9th Cir. 1974). [Footnote omitted.]

See 40 CFR 1508.9; 46 FR 18026, 18037 (March 23, 1981); Scientists' Institute for Public Information v. Atomic Energy Commission, 481 F.2d 1079, 1092 (D.C. Cir. 1973); Missouri Coalition for the Environment, 124 IBLA 211, 219-20 (1992).

Proceeding to NWF's first argument, NWF relies on Kern v. U.S. Bureau of Land Management, 284 F.3d 1062 (9th Cir. 2002), as a basis for challenging the IDP. In Kern, in the context of a timber sale, the court held that BLM had impermissibly attempted to tier its EA to a document for which no NEPA analysis had been completed.^{2/} In Kern, BLM initially prepared an EA in which the spread of the Port Orford Cedar root fungus was identified as an environmental issue. That issue was eliminated, however, with the statement that following BLM guidelines for managing the impacts should reduce the spread of the disease. The guidelines for taking action to minimize the impact had never been subjected to NEPA analysis. A FONSI was issued, and a number of sales ensued. 284 F.3d at 1068. After plaintiffs filed suit in Kern, BLM revised the EA to add a limited discussion of the spread of the fungus within the project area, but continued to rely on the guidelines. The court determined that the revised EA impermissibly attempted to tier to an EIS that relied on the guidelines and to the guidelines themselves. 284 F.3d at 1074. The court concluded that the revised EA was inadequate under NEPA and reversed and remanded with instructions.

[3] We do not share NWF's view of the situation before us or agree that Kern controls the outcome. The conditions and criteria in the IDP do not constitute agency action within the meaning of NEPA, as it proposes no agency action. See Northcoast Environmental Center v. Glickman, 136 F.3d 660, 669-70 (9th Cir. 1998). The IDP explicitly states that no surface-disturbing activity will be authorized without preparing an EA. It anticipates full environmental review of the proposed exploratory activity, and that the pod EA "will identify the most environmentally acceptable access route, well site, and pipeline location." Id. Moreover, the IDP confirms that no application for permit to drill or for a right-of-way action will be authorized before full environmental review is completed. Id. Thus, the IDP merely establishes the boundaries within which a surface-disturbing pod action, when it is proposed, must

^{2/} It is well-settled that an EA or EIS may be tiered to another NEPA document which has considered particular impacts of a broader Federal action. Tiering is defined in the CEQ regulations as "coverage of general matters in broader [EISs] * * * with subsequent narrower statements or environmental analyses * * * incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 CFR 1508.28. An EA which is tiered to a final EIS need not restate the cumulative impacts analysis or a no action alternative that was already considered in the document to which the EA is tiered. BARK, 167 IBLA 48, 77 (2005); In Re Stratton Hog Timber Sale, 160 IBLA 329, 331 (2004); Blue Mountains Biodiversity Project, 139 IBLA 258, 267 (1997); Oregon Natural Resources Council, 115 IBLA 179, 186 (1990); In re Long Missouri Timber Sale, 106 IBLA 83, 87 (1988), reconsideration denied (1989); In re Upper Floras Timber Sale, 86 IBLA 296, 311 (1985); see also Southern Utah Wilderness Alliance, 158 IBLA 212 (2003).

fit. The IDP is therefore not itself independently subject to NEPA's requirements, so long as, when and to the extent it is incorporated into a specific proposed agency action, full NEPA review and analysis of the effects of that action is undertaken. Contrary to the facts in Kern, BLM did not tier the EAs to an environmental analysis contained in the IDP as a means of avoiding the duplication of that analysis. Instead, BLM undertook the requisite environmental review of the effects of the proposed pod activity in each EA. Therefore, it is the quality and completeness of the EA analyses that determine whether BLM has met its obligations under NEPA.

Nonetheless, NWF contends that the IDP "will have a substantial impact on the extent of the environmental impacts resulting from drilling and related activities on the nine pods within the [ARPA]" (SOR at 8), and assails virtually every parameter articulated in the IDP: NWF points to the 200-well maximum, arguing that there is no documentation of alternative well numbers, the relative environmental impacts of alternative numbers, or the tradeoffs in CBM information that could be obtained under different alternatives (SOR at 9); it questions the selection of the pod locations, the individual pod maximum of 24 wells, and the decision not to count injection and monitoring wells in that maximum figure (SOR at 9-10). NWF challenges the basis for designating a 1/4-mile buffer zone instead of a larger zone (SOR at 10-11), the basis for BLM's conclusion that a water leak in an existing well in the Cow Creek pod had flowed to the surface without causing any adverse environmental impact or incident (SOR at 11), and the predicate for setting a 1-year clearance period rather than a longer period if a survey reveals the presence of black-footed ferret (SOR at 11-12). NWF similarly questions whether the prohibition against disturbing winter range for two or more big game species should also be extended to the winter range when only one species is involved. (SOR at 12.) NWF objects to the decision to limit rather than preclude activities within proven big game migration corridors at critical times, and it charges BLM with failure to more broadly define "sensitive resource areas" to include areas with recreation and scenic values, for example, for purposes of requiring protective stipulations or mitigation. (SOR at 12-13.) We do not agree that the EA analyses are not sufficient to address the environmental impacts of exploratory pod activities, as will be shown below.^{10/}

We start our discussion of the environmental reviews with the EAs' descriptions of the mineral resources within the pod areas. Both lie within the Washakie Basin in Carbon County. Numerous thin coal seams are present in the Allen Ridge and upper Almond Formations, both members of the Mesaverde Group. "These coal beds are targeted as having the greatest potential for CBM production."

^{10/} NWF alludes to the ARP and the prospect of drilling 3,880 wells, but does not directly challenge the adequacy of the cumulative impacts analyses. See, e.g., SOR at 9, 19, 34; Reply at 47 n.27.

(CCEA at 3-3; BSEA at 3-3.) “In the Washakie Basin, coal occurs in the Mesaverde Group and the Fort Union Formation.” (CCEA at 3-3; BSEA at 3-3.) Within the Project Area, coal primarily occurs in the Allen Ridge (Blue Sky) and Almond Formations (Cow Creek and Blue Sky) within the upper Mesaverde Group. “Coincident with the Fort Union and Mesaverde coal seams * * * are significant quantities of CBM.” (CCEA at 3-3; BSEA at 3-3 to 3-4.)

The EAs summarize the potential issues and concerns posed by the proposed exploration activity, including potential effects on surface and groundwater, air, soils, and wildlife. (CCEA at 1-5 to 1-6; BSEA at 1-4.) Each EA prescribes detailed project-wide mitigation measures and best-management practices (BMPs), which include both BLM-imposed and applicant-committed measures, to govern preconstruction planning, design, and compliance measures, as well as resource-specific requirements. (CCEA at 2-1 to 2-27; BSEA at 2-10 to 2-22; Appendices C-1 (Master Surface Use Plan), C-2 (Master Drilling Program), C-3 (Water Management Plan).) Operators must comply with all permitting requirements imposed under Federal or State law, including those that govern water quality, air quality, and wildlife. See CCEA and BSEA, Appendix B (Federal, State, and County Permits, Approvals, and Authorizing Actions). In addition, BLM has the authority to require further measures if circumstances warrant. See, e.g., BSEA at 2-15 (pit reinforcement or liner may be required); BSEA at 4-14 (although no activity or surface disturbance will be permitted near raptor nesting habitat from February 1 to July 31, BLM may modify the buffer zone or timing restriction); BSEA at 4-17 (BLM may set noise levels at greater sage grouse leks and other sensitive resource areas or require compressors to be housed in a building at least 600 feet away from sensitive receptors or sensitive resource areas).

With respect to water, typically one of the resources of greatest concern in CBM extraction and development, it is clear that the EAs have undertaken the requisite hard look at impacts. Most existing groundwater wells and the proposed CBM wells would penetrate Mesaverde aquifers. Mesaverde groundwater is suitable for livestock use, but is not suitable for domestic supplies or irrigation without treatment or dilution. (CCEA at 3-16; BSEA at 3-17.) The other land uses within the pod project areas consist of “[a]griculture (primarily cattle and sheep grazing), wildlife habitat, oil and natural gas exploration, development, and transmission, and dispersed outdoor recreation (primarily hunting in the fall).” (CCEA at 3-20; BSEA at 3-20.)

Both EAs state that impacts will maximize shortly after the start of construction activities, stabilize during production/operation, and decrease over time with reclamation. Id. Both pods are in the Muddy Creek drainage cumulative impacts area (CIA), and pod activities involve the permeable Browns Park Formation

which overlies the less permeable Almond Formation; the latter is a member of the Mesaverde Group. (CCEA at 4-34; BSEA at 4-32.) Where the contact between the Browns Park and Almond Formations is “exposed by erosion, a line of springs can result.” *Id.* No impact from well pumping is anticipated, because the source of the springs is “infiltrating precipitation.” Moreover, due to the thickness of confining layers, “wells completed in water-bearing strata above or below the Almond coal seams are not likely to be impacted,” although wells that are less than one mile from the pod could be impacted. *Id.* The BSEA further concludes, however, that “it is not likely that wells of this type exist.” (BSEA at 4-32.)

In the case of the Cow Creek pod, the majority of produced water volumes will be discharged to the surface into an ephemeral drainage that ultimately discharges into an existing reservoir, pursuant to a National Pollutant Discharge Elimination System (NPDES) permit issued by the Wyoming Department of Environmental Quality (WDEQ). The reservoir will serve as a stilling basin to prevent downstream input of sediment and pollutants. (CCEA at 4-9.) The ephemeral drainage is stable and supports a well-developed riparian vegetation community that arose solely as a result of water leaking to the surface from an existing gas well over a period of years. (CCEA at 4-9, 4-18.) Double Eagle recompleted the gas well as a CBM well and applied for and was issued the NPDES permit for water production up to the amount that had leaked out previously. The discharge point, which is the point of compliance for NPDES permitting purposes, will be rip-rapped to prevent erosion. The balance of produced water volumes will be discharged into a second permitted reservoir, recharge wells, or an off-channel reservoir/evaporation facility. (CCEA at 2-11 to 2-14.) Surface water quality will be monitored. Produced water is expected to meet the water quality established by analysis of water produced from a well completed in the Mesaverde Coals. (Appendix C to CCEA at C3-2 and Table 1 at C3-14.) BLM estimated a discharge rate of 1000 barrels/day and WDEQ/WQD analyzed storage requirements on that basis. However, information obtained since the EA was prepared strongly suggests that the estimate may be quite excessive: records show that produced water volumes from six of Double Eagle’s wells totaled 8895 barrels between November 2001 and March 2002. (Appendix B to Cow Creek DR/FONSI at B-34 to B-35.)

Produced water from the Blue Sky pod is to be disposed of via two injection wells into the Cherokee and Deep Creek Sandstones at 4170 and 4450 feet below the surface, respectively, below the coal seam targets. (BSEA at 2-7 to 2-8; 4-7.) Although background water quality analyses of the injection targets are not presently available, it is anticipated that the produced water will “be of equal or higher quality in regards to class of use as defined by WDEQ-GWD [Ground Water Division] regulations.” *Id.* No fracturing into fresh water zones is anticipated because the sandstone target horizons are “isolated above and below by competent shale barriers

that would prevent initiation and propagation of fractures through overlying strata.” Id. The effect on water quality and quantity at the injection horizon would be “minimal.” Id. No vertical migration is anticipated because of the fracture gradient of the over- and underlying shale aquitards, and the groundwater that is removed will come from a formation that is “stratigraphically lower and hydraulically isolated from the shallow groundwater sources that typically are developed with water wells.” Id. With the implementation of BMPs, no increased sedimentation is expected with respect to soil disturbance, impaired surface water quality, or stream channel morphology because of road and pipeline crossings. Id. at 4-8. Depletion of the Colorado River caused by reduced groundwater discharge is not expected, given the distance of the pod from the river and its subsurface orientation or the “bedding attitude” of the aquifers that would be affected.

Both EAs specify a number of mitigation measures and BMPs to further protect water quality and quantity. Contrary to NWF’s argument that the unique impacts of exploratory activity on water quality and quantity clearly were considered, as set forth above.

NWF contends that the Great Divide RMP/EIS includes a map but no discussion of potential impacts on big game migration corridors, and that, “[i]n developing the IDP, the agency should have described the significance of the big game corridors on the Atlantic Rim,” which would have included determining whether those areas should be avoided altogether and whether seasonal restrictions would be adequate. (SOR at 12; Reply at 25.) NWF questions whether limiting activities includes precluding them, and whether preclusion would result in “substantially fewer big game impacts.” (SOR at 12.) Yet no major big game corridors are to be found within either project area (CCEA at 3-21 to 3-22; BSEA at 3-22). Moreover, BLM intends to approve drilling in a manner that ensures that activities are limited at critical use times for other animals during the year.

NWF challenges the adequacy of the analysis of impacts on greater sage grouse, arguing that BLM “should have conducted a NEPA review that identified sage grouse nesting, breeding, and wintering habits on the Atlantic Rim and examined what protective measures are necessary to preserve sage grouse numbers.” (Reply at 23.) NWF further asserts that neither the Great Divide RMP/EIS nor the EAs discussed any mitigation measures beyond those identified in Appendix 1 to the RMP, BLM’s Standard Mitigation Guidelines for Surface-Disturbing Activities, and in the IDP. (Reply at 22-23.) The Standard Mitigation Guidelines protect “important” nesting habitat and protect “winter concentration areas” by prohibiting surface use and activities from February 1 to July 31 and from November 15 to April 30, respectively. No surface use or activities will be permitted on grouse breeding habitat. (Appendix 1 to RMP at 48-49; see also CCEA and BSEA Appendices A at

A-4.) The greater sage grouse receives special consideration because of population declines over much of its range in Wyoming and because of its importance as a game bird (CCEA at 3-22; BSEA at 3-23), but it is not a listed threatened, endangered or sensitive species. (CCEA at 3-22.) Aerial surveys in winter and early spring were conducted to identify crucial winter range and document known or new leks. Both pods contain grouse habitat.

No crucial winter habitat was found in the Cow Creek pod, but two patches within 1 mile of the pod boundary were identified. (CCEA at 3-22.) The pod does not contain any active leks, but two active leks are to be found within 2 miles of the pod. (CCEA at 3-23.) No crucial winter habitat was found in the Blue Sky project area, but two patches were found within a half-mile of the western project boundary. (BSEA at 3-23.) It also contains no active leks, but one active lek was located about 1.75 miles from the north boundary of the project area. The leks will be protected within a 2-mile buffer zone, which is defined as a “sensitive resource area,” with stipulations and mitigation, although 5 of the 8 wells and/or facilities in the Cow Creek pod lie within the 2-mile buffer zone. (CCEA at 3-23; Appendix A to CCEA at A-4.) According to Table 4-3, no surface occupancy is to be permitted within a quarter-mile of leks or crucial wintering areas. (CCEA at 4-32; BSEA at 4-29.) The EAs conclude that about 3.3 percent of available nesting habitat would be affected on a short-term basis, and 1.0 percent would be affected on a long term basis as a result of activity in all nine pods. (CCEA at 4-36; BSEA at 4-35). Based on the “vast amount of potential nesting habitat available” (CCEA at 4-36), both EAs conclude that the impacts on greater sage grouse are “minimal,” provided all BMPs and mitigation are implemented.

NWF is equally critical with respect to virtually every resource impact discussed in the EAs. Thus, for example, NWF complains that the RMP/EIS requires intensive land use practices to mitigate salt and sediment loading attributable to surface disturbances, but that it “does not implement measures to minimize soil erosion and runoff from constructing the roads and facilities that are related to CBM development.” (Reply at 27.) NWF acknowledges that, as specified in number 15 of the applicable criteria and conditions that govern interim drilling operations in the IDP (criterion), pipelines, power lines, cables, and so forth are to be buried and to follow road rights-of-way, conceding that the requirement is more than merely aesthetic, because the practice also reduces the degree of surface disturbance and habitat fragmentation. NWF argues that criterion 15 “does not address these problems,” and that BLM should have examined whether it was possible to co-locate all such lines and cables within existing corridors. (Reply at 27.)

In advancing this argument, NWF ignores the BMPs pertaining to ancillary facilities, preconstruction planning and design, transportation, soils, and water

resources set forth in Chapter 2 of the EAs. (CCEA at 2-14, 2-17 to 2-18, 2-19, 2-20 to 2-21, and 2-21 to 2-22; BSEA at 2-8, 2-11 to 2-12, 2-13 to 2-14, 2-14 to 2-16.) Criterion 15 of the IDP states that lines and cables will be buried and co-located within existing rights-of-way “where possible.” (Appendix A to EAs at A-4.) And while Criterion 15 is brief in stating its requirement, the Master Surface Use and Water Management Plans are considerably more detailed. See Appendices B and C to EAs. As those Appendices show, access to the pods will be obtained by existing highways and main roads and two-track roads, and all equipment and vehicles will be confined to those travel corridors when practical. Construction of some access roads is envisioned, and these will be spurs from existing roads and will be 16 feet wide and subject to a number of requirements regarding their construction and maintenance. (Appendix C-1 to CCEA at C1-3 to C1-4; Appendix B to BSEA at 2-3.)

The matter of salt loading to the Colorado River is regulated by the WDEQ, which imposed the requirements discussed in the Water Management Plan. (Appendix C-3 to CCEA at C-4 to C-5.) No such issue is presented with respect to the Blue Sky project because the plan is to inject produced water and because of both the distance from the river and subsurface orientation of relevant aquifers. Indeed, it appears that only the Cow Creek pod among the nine pods will be allowed to discharge to the surface, and the discharge, including the amount of sodium (350 tons/year per operator), will be subject to the terms of an NPDES permit and remain within the project area. (Appendix B to Cow Creek DR/FONSI at B-34.) Accordingly, we think it neither fair nor accurate to suggest that BLM failed to address the issue of salt and sediment loading caused by constructing roads and facilities.

NWF continues to challenge the adequacy of the quarter-mile buffer zone between surface-disturbing activities and the historic Overland Trail, asserting that “the IDP does not even evaluate which of the pods are close to the Overland Trail or whether increasing the buffer might force the elimination or relocation of one of the pods.” (SOR at 10-11.) We find this claim to be baseless, because in responding to NWF’s comments on the EAs, BLM clearly stated that neither pod is in or near the trail. (Appendix B to Cow Creek DR/FONSI at B-14, B-29; Appendix B to Blue Sky DR/FONSI at B-8, B-25.) NWF has not shown error in BLM’s responses, or even acknowledged that BLM responded to the concern.

The EAs examined only the proposed actions and a no action alternative. NWF complains that the “consideration of alternatives was constrained by the IDP.” (Reply at 12.) In NWF’s view, BLM should have considered that “the IDP’s failure to consider alternative specifications (such as the number of pods and their location) was not corrected in the pod EAs.” (Reply at 13.) We are not persuaded by NWF’s argument. NWF specifically inquired whether other pod areas and fewer pods were considered by BLM in its comments on the proposed action. BLM explained that the

number and location of the exploratory pods was based on sound reservoir management principles and a commitment to keep drilling outside sensitive resource areas. (Appendix B to Cow Creek DR/FONSI at B-28; Appendix B to Blue Sky DR/FONSI at B-24 to B-25.)^{11/} The number of wells likewise was based on sound reservoir management principles, as well as BLM's experience with the Dixon Field CBM development near Price, Utah, which was deemed to be a "good productive analogy" to the Atlantic Rim prospect. Moreover, the number of wells initially proposed by the operators was 400; when directed to formulate an exploratory plan outside areas of sensitive resources, the operators reduced the number of wells proposed to 228. BLM ultimately determined that 200 wells constituted an adequate research and exploration level. (Appendix B to Cow Creek DR/FONSI at B-28; Appendix B to Blue Sky DR/FONSI at B-24.) BLM also explained why directional drilling was not feasible. (Appendix B to Cow Creek DR/FONSI at B-25 to B-26; Appendix B to Blue Sky DR/FONSI at B-22 to B-23.)

In addition, however, we find merit in BLM's response to NWF's comment on the adequacy of the range of alternatives. BLM explained that the no action alternative in the instant cases represented an alternative in which the projects would not go forward as proposed: "Because this is a fairly small project, developing meaningful alternatives would be difficult. Because the impacts from implementing this project were minimal, and no unresolved conflicts were apparent, no other reasonable alternatives were considered[.]" (Appendix B to Cow Creek DR/FONSI at B-33; Appendix B to Blue Sky DR/FONSI at B-29 (emphases in the original).)

The argument that remains is NWF's third contention that the EAs did not disclose likely impacts that will occur during the production phase. The premise for this argument is lease language that states that the specified timing limitations do not apply to "maintenance and operation of production facilities." See Ex. 22 (Cow Creek lease WYW-131275); Ex. 10 (Blue Sky lease WYW-148481). NWF notes, in addition, that Cow Creek lease WYW-48862 (Ex. 21), executed in 1948, did not reserve to the United States any authority to impose timing limitations. (SOR at 37.) Thus, according to NWF, "BLM cannot rely on the timing stipulations to limit impacts to wildlife; the agency must instead disclose those impacts and assess whether they are significant." Id. BLM responds that NWF misconstrues the quoted phrase, which contemplates maintenance and monitoring of producing wells rather than negation of

^{11/} We presume as well that pod site designation was in part a function of existing leasehold boundaries and the need to locate operations within the leaseholds where necessary or feasible "specifically to assess the development potential of the [ARP] play." (IDP at A-4, Appendix A to CCEA and BSEA.)

applicable timing limitations, and notes that the SDR decisions make it clear that “although the operators would be allowed to perform ‘routine maintenance and monitoring’ during production, that ‘no activities will be allowed which could be potentially disruptive to wintering or nesting wildlife, without granting an exception for this use, if appropriate.’” (BLM Answer at 20.)

With respect to the 1948 lease, BLM argues that regulatory provisions at 43 CFR 3162.1(a) and 43 CFR 3101.1-2 and applicable onshore oil and gas orders vest it with adequate authority to protect wildlife values. We agree. Moreover, in other contexts, we have considered leases of similar vintage, and while it is correct that such leases do not contain the environmental encumbrances typical of more contemporary leases, Section 4 nonetheless is relevant to the Secretary’s authority to protect other resource values. Section 4 provides:

It is covenanted and agreed that the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both. 4/

4/ Section 4 is consistent with Board and judicial precedent recognizing that the Secretary’s discretion to manage oil and gas activities on the public lands in the public interest extends not just to the initial leasing decision, but also to subsequent regulation of the manner and pace of development activities. See, e.g., Powder River Basin Resources Council, 120 IBLA 47, 54-55 (1991), citing Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981), and Union Oil Company of California v. Morton, 512 F.2d 743, 749-51 (9th Cir. 1975).

Colorado Environmental Coalition, 165 IBLA 221, 227-28 (2005). Despite NWF’s apprehension about the lease phrase, BLM’s site-specific environmental review and decisionmaking regarding discrete surface-disturbing activities, such as applications for permits to drill, encompass the authority to impose reasonable measures to minimize adverse impacts on other resource values, and these include the siting or timing of lease activities. Deganawadah-Quetzalcoatl University, 164 IBLA 155, 164 (2004). We find no error in either BLM’s construction of the timing stipulation or its analysis of its regulatory authority to require such measures in any case and, accordingly, NWF’s argument is rejected.

Appellants have demonstrated their conviction that BLM should have imposed more stringent restrictions on interim exploratory activities and more intense mitigation measures. While NWF's arguments clearly reveal a difference of opinion, they do not demonstrate an error of law or fact, or show that the EAs failed to consider a substantial environmental problem of material significance. The Fund for Animals, Inc., 163 IBLA 172, 179 (2004); Rocky Mountain Trials Association, 156 IBLA 64, 71 (2001). Moreover, as we observed in Oregon Natural Resources Council, 116 IBLA 355, 361 n.6 (1980), NEPA is a procedural statute. It does not direct that BLM take any particular action and it specifically does not prohibit action even where environmental degradation is inevitable. The statute only mandates a full consideration of the environmental impact of a proposed action before undertaking it. The records in these cases clearly and convincingly show that BLM fulfilled its obligations under NEPA.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed and intervenor Anardarko's Motion to Strike is denied as moot.

T. Britt Price
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge