



POWDER RIVER BASIN RESOURCE COUNCIL, *ET AL.*

180 IBLA 32

Decided September 15, 2010



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

POWDER RIVER BASIN RESOURCE COUNCIL, *ET AL.*

IBLA 2010-77

Decided September 15, 2010

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, affirming in part and setting aside and remanding in part, on State Director Review, a Finding of No Significant Impact and Decision Record of the Buffalo (Wyoming) Field Office, Bureau of Land Management, approving a plan of development for Federal oil and gas leases in the Fortification Creek Area of the Powder River Basin. SDR WY-2009-17.

Motion to intervene granted; motion to dismiss denied; decision affirmed.

1. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

A party will be deemed to have standing, under 43 C.F.R. § 4.410, to appeal from a State Director's decision, on State Director Review, where, although the State Director affirmed in part and set aside and remanded in part a Field Manager's decision approving a coal-bed natural gas plan of development for further environmental review, he allowed operations to start by the time of his decision.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact--Oil and Gas Leases: Drilling

BLM's decision to approve a coal-bed natural gas plan of development will be deemed to comply with section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006), where BLM has, in an environmental assessment tiered to a programmatic environmental impact statement, taken a hard look at the environmental consequences of such action and reasonable alternatives thereto, considered

all relevant matters of environmental concern, and made a convincing case that no significant impact will result therefrom which was not already addressed in the environmental impact statement or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. BLM's decision not to prepare a new environmental impact statement will be affirmed where the appellant does not demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by the statute.

APPEARANCES: Shannon R. Anderson, Esq., Powder River Basin Resource Council, Sheridan, Wyoming, for the Powder River Basin Resource Council, *et al.*; Jack D. Palma, II, Esq., Cheyenne, Wyoming, and Hadassah M. Reimer, Esq., Jackson, Wyoming, for the Lance Oil and Gas Company; Arthur R. Kleven, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Powder River Basin Resource Council and others (collectively, Powder River) have jointly appealed from a December 8, 2009, decision of the Wyoming State Office (WSO), Bureau of Land Management (BLM), affirming in part and setting aside and remanding in part, on State Director Review (SDR) (WY-2009-17), a July 22, 2009, Finding of No Significant Impact and Decision Record (FONSI/DR) of the Buffalo (Wyoming) Field Office (BFO), BLM.¹ The FONSI/DR resulted in the approval of the Coal Bed Natural Gas (CBNG) Plan of Development (POD) for the Augusta Unit Zeta (AUZ) Federal oil and gas leases within the Fortification Creek Area (FCA) of the Powder River Basin (Basin or PRB), in northeastern Wyoming.²

¹ The appeal was filed by the Powder River Basin Resource Council, together with the Wyoming Outdoor Council, Wyoming Wildlife Federation, and National Wildlife Federation. The Lance Oil and Gas Company (Lance), a wholly-owned subsidiary of the Anadarko Petroleum Corporation (Anadarko), is the Unit operator and holder of the unitized Federal oil and gas leases, and, as the proponent of the proposed action at issue, has moved to intervene in the pending appeal. For good cause shown, Lance's motion to intervene is granted.

² The Wyoming portion of the PRB covers a total of approximately 8 million acres of Federal, State, and private land, with the Federal lands under the jurisdiction of BLM
(continued...)

The FONSI/DR was based on a July 2009 Environmental Assessment (EA) (WY-070-08-154), prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006).³

For the reasons that follow, we conclude that Powder River has not carried its burden to demonstrate that BLM failed to comply with section 102(2)(C) of NEPA and, accordingly, we affirm BLM's decision to approve existing activity under the POD.⁴

I. BACKGROUND

As originally proposed by Lance on April 28, 2008, the POD would involve the drilling and development of 134 CBNG wells at 67 sites at close to 80-acre spacing, which is referred to as "full-field development." See SDR Decision at 9. Lance viewed 80-acre spacing as necessary for efficient CBNG recovery in the 9,994-acre area of

² (...continued)

or the Forest Service, U.S. Department of Agriculture. BLM administers 883,061 acres of Federal surface/mineral estate and 3,443,643 acres of Federal mineral estate, both of which are considered public lands. See 43 U.S.C. § 1702(e) (2006). The FCA is located in the center of the PRB and covers private, State, and public lands in Ts. 50-54 N., Rs. 74-77 W., Sixth Principal Meridian, in Campbell, Johnson, and Sheridan Counties, Wyoming. The public lands consist of Federal surface/mineral estate (38,584 acres) and Federal mineral estate (44,416 acres).

³ The EA contains both the EA and the FONSI/DR in one continuously-paginated document, with the FONSI/DR appearing at pages 1-13. We will cite to the FONSI/DR and EA as the "EA."

⁴ In its request for SDR, Powder River argued not only that BLM had violated its NEPA obligations, but also its land use planning obligations under section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (2006). Powder River does not pursue its FLPMA objections on appeal.

The Greater sage-grouse (*Centrocercus urophasianus*), a BLM-designated sensitive species, uses the sagebrush grasslands in the POD and surrounding areas as its habitat. BLM imposed specific measures to avoid or mitigate adverse impacts on sage-grouse arising from CBNG drilling and development in the POD area. However, Powder River raises no issues concerning the sage-grouse as part of its appeal, so we do not consider the adequacy of BLM's NEPA review or other aspects of its decisionmaking concerning the species.

Federally-leased public lands known as the AUZ POD area.⁵ The POD area, which is criss-crossed by existing roads, has been the site of ongoing oil and gas drilling and development, owing to the presence of non-Federal mineral estates, and included at the time of the EA a total of approximately 61 CBNG and conventional wells, or 3.9 wells per square mile. See POD, Map D (Project Work Map), dated May 12, 2009; EA at 30, 32 (Figure 3.1 (AUZ POD Security Habitat 2005 to Present)); Affidavit of Charles Dein, Production Engineering Manager, Anadarko, dated Sept. 3, 2009 (Ex. E attached to Answer), ¶ 4, at 1.

The POD area is situated almost entirely south of what is known as the Fortification Creek Planning Area (FCPA), a 100,655-acre area cutting across Campbell, Johnson, and Sheridan Counties, Wyoming. The FCPA, which BLM recognizes as requiring “unique resource management,” includes “an isolated elk herd and its habitat, high visual quality, a 12,[832] acre wilderness study area (WSA),⁶ steep slopes with erosive soils, and significant cultural, historic, and paleontological values.” BLM Decision, dated Sept. 18, 2009, at 2; see EA at 8. Importantly, the FCPA encompasses the year-long range of the Fortification Creek elk herd, a geographically isolated herd currently numbering close to 219, that was originally introduced into the area by the Wyoming Game and Fish Department

⁵ The POD area is situated in Ts. 50 and 51 N., R. 76 W., and T. 51 N., R. 77 W., Sixth Principal Meridian, Campbell County, Wyoming, near the town of Gillette, within the Fortification Creek, Barber Creek, and Turner Draw drainages, tributary to the Powder River. Most of the lands are split-estate lands (private surface/Federal minerals), with a small amount of Federal and State surface/minerals. The POD area falls within the Augusta Unit (WYW-150647X), encompassing unitized Federal, State, and private oil and gas leases.

⁶ BLM established the Fortification Creek WSA (WY-060-204) pursuant to section 603 of FLPMA, 43 U.S.C. § 1782 (2006), in 1980. The WSA is situated near the center of the FCA and covers a substantial part of the crucial winter and parturition (as well as year-long and winter year-long) ranges of the elk in the FCA. The WSA has not been leased for oil and gas, and leasing is not permitted pending Congressional action on whether or not to designate the area as wilderness pursuant to the Wilderness Act, 16 U.S.C. § 1131-1136 (2006). BLM declined to recommend the WSA for wilderness designation when it issued the Record of Decision (ROD) approving the Resource Management Plan (RMP) for the Buffalo Resource Area on Oct. 4, 1985, and on July 18, 1986, when it approved a Wilderness Study Report concluding that the area was unsuitable for designation and should be released by Congress.

(WGFD) in the 1950s.⁷ See EA at 29, 30; Modified DR, dated Feb. 10, 2010 (Ex. A attached to Answer), Attachment 3 (Public Comments), at 2. As designated by WGFD, the FCPA covers the northern portion of the year-long range, leaving the southern portion of the year-long range, where the POD area is situated, entirely outside the FCPA. See EA at 29, 30, 56; Fortification Creek SDR Map (attached to SDR Decision); Table of Range Acreage Impacted by Fortification Creek PODs (Document (Doc.) 8 attached to Statement of Reasons (SOR)).

Oil and gas leasing and associated activity in the POD area is governed by the October 1985 Buffalo RMP, as revised in 2001. The Buffalo RMP was amended by a July 30, 2003, ROD that adopted the April 2003 RMP Amendment for the Powder River Basin Oil and Gas Project. On August 20, 2007, BLM published notice in the *Federal Register* of its intention to further amend the RMP to address oil and gas leasing and related activity in the FCPA. Of particular focus was whether and how to preclude or restrict such activity in order to protect the Fortification Creek elk herd, and to preserve visual quality and minimize soil erosion and impacts to water quality in the FCPA. See 72 Fed. Reg. 46511 (Aug. 20, 2007). The RMP Amendment was intended to address management issues regarding the Fortification Creek elk herd *within the FCPA, i.e.*, to “provide guidance in the management of the approximately 100,655 acres of the Fortification Creek Planning Area (FCPA) in regard to special resource values in light of future coal bed natural gas (CBNG) development.” *Id.*

On August 7, 2008, BLM issued a Draft RMP Amendment EA (WY-070-EA08-135) that considered the environmental impacts of the proposed Amendment and alternative courses of action, which included, *inter alia*, allowing CBNG drilling and development to continue in accordance with the existing land-use planning decisions (Alternative I (No Action)); designating a 52,069-acre Area of Critical Environmental Concern (ACEC) and geographically phasing drilling and development and adopting other management prescriptions (Alternative II); or designating a 33,757-acre ACEC and geographically phasing drilling and development and adopting other management prescriptions (Alternative III). See SDR Decision at 3; Draft RMP Amendment EA at 2-28 to 2-31. However, owing to concerns raised during the 60-day public comment period, BLM determined to issue a revised EA to address the changes to the proposed RMP Amendment and alternatives thereto. See SOR at 3. BLM has yet to issue a final decision regarding adoption of the RMP Amendment. See SDR Decision at 3.

⁷ WGFD set a population management objective for the Fortification Creek elk herd of 150 elk, which are subject to licensed seasonal hunting. The elk are neither a threatened or endangered species under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (2006), nor a Federal or State special status species.

As noted, under the proposed POD, 134 CBNG wells would be drilled and developed at 67 sites in the POD area, resulting in a density of 8 wells per square mile, or 1 well for each 80 acres. Together with existing CBNG wells, there would be a total of 12.5 wells per square mile. *See EA at 56.* Almost all of the approved drilling would occur on split-estate lands in the POD area, which is virtually surrounded by existing or proposed oil and gas drilling. At the conclusion of drilling, each well pad would be reclaimed, except for a minor area of disturbance associated with producing operations. The POD would also involve the construction of 20.81 miles of new roads and 1.52 miles of new pipelines within the POD area. *See EA at 56, 68.* The CBNG wells would generally connect to the existing gas and water gathering systems and an underground electrical distribution system already installed by Lance in the POD area in connection with its drilling and development on private and State lands. Drilling and related construction was expected to take no more than 2 years, and the overall projected life of the POD, including production and reclamation, was likely 20 years.

Since elk are known to avoid areas with traveled roads and active CBNG drilling and development, BLM imposed specific measures for protecting the Fortification Creek elk herd. No drilling and development would occur within the FCPA. However, because the POD area encompasses the year-long range and, to a significant extent, crucial winter range and parturition range for the elk, the POD precluded all surface-disturbing activities within crucial winter range from November 15 to April 30, and within parturition range from May 1 to June 30, for the life of the project. *See EA at 12.*

Lance originally submitted a water management plan (WMP) in February 2008, which was later revised in November 2008. Lance rejected options for the direct discharge of produced water that would involve application of the water to the land or containment of the water in impoundments. *See EA at 22.* Rather, Lance developed a WMP that would dispose of the produced water by one of three methods. *See EA at 19, 59-60, 75; WMP at 1, 11-13, 15.* The water would be (1) piped approximately 11 miles west through an existing pipeline and pump station for treatment at the existing Barber Creek facility and discharge into the Powder River; (2) treated at the existing Camp John Augusta facility and discharged into the Fortification Creek, a tributary of the Powder River; or (3) piped through an existing pipeline and pump station to the Salt Creek Oil Field, in Midwest, Wyoming, for re-injection into the Madison aquifer.

Both the Camp John Augusta and Barber Creek facilities are permitted by the Wyoming Department of Environmental Quality (WDEQ), acting as the primary regulatory authority under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2006). *See EA at 75, 77-78; WMP at 3-4.* In issuing State permits, WDEQ has determined that discharges from the facilities will not exceed the Federal and State

water quality standards, where undertaken in accordance with specified terms and conditions. *See, e.g.*, Wyo. Stat. Ann. § 35-11-801(a) (Michie 2009). In the WMP, Lance concluded that, “[a]fter treatment, the quality of discharge water within the Augusta Unit Zeta POD will meet all SAR [sodium adsorption ratio] and EC [electrical conductivity] limitations imposed by WDEQ for discharge into the Powder River and/or Fortification Creek.” WMP at 14.

In order to address the likely direct, indirect, and cumulative environmental impacts of the proposed CBNG drilling and development in the POD area, and four alternatives thereto, including the No Action Alternative, BLM prepared EA WY-070-08-154, dated June 7, 2009. The EA was tiered to the January 2003 Final Environmental Impact Statement (FEIS) and Proposed Plan Amendment for the Powder River Basin Oil and Gas Project (WY-070-02-065), which was prepared in conjunction with promulgation of the April 2003 RMP Amendment for the Powder River Basin Oil and Gas Project. The FEIS specifically addressed the proposed drilling of 39,367 CBNG wells and 3,200 conventional oil and gas wells in the Basin over the course of 10 years.

In the EA, BLM considered Alternative A, the “No Action” alternative, under which none of the 134 CBNG wells would be drilled; Alternative B, the “Proposed Action” alternative; Alternative C, the “Incorporates Changes as a Result of the On-Sites” alternative, under which all of the 134 CBNG wells would be drilled but require on-site inspections and additional mitigation measures before drilling begins, if necessary or appropriate; Alternative D, the “Deferral of Locations” alternative, under which drilling at 2 well sites would be deferred for protection of the remaining elk security habitat (areas of at least 250 acres of contiguous undisturbed elk habitat) in the POD area; and Alternative E, the “Sage-grouse Emphasis” alternative, under which additional mitigation measures would be adopted for the protection of the Greater sage-grouse and its habitat. *See* EA at 14-22, 81-82.

The EA was offered for public comment for a 30-day period, eliciting comments from Powder River and others.

Based upon consideration of the EA, public comments, and the administrative record, the Field Manager issued the July 2009 FONSI/DR approving the proposed POD.⁸ The Field Manager adopted Alternative C, thus approving the drilling and

⁸ In conjunction with issuance of the FONSI/DR, BLM approved applications for permits to drill (APDs), authorizing the drilling of all of the 134 CBNG wells in the POD area. By the time of the Deputy State Director’s December 2009 SDR decision, Lance had constructed well pads at each of the 67 well sites, as well as most of the
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development of 134 CBNG wells at 67 sites, because, *inter alia*, “[i]t is in the public interest to approve this development to help meet the nation’s future needs for energy reserves and reduce the U.S. dependence on foreign sources of energy.” EA at 11. Such approval was subject to adherence to the master surface use plan of operations, drilling plan, and WMP submitted by Lance, as well as mitigation measures developed by BLM in connection with the EA and January 2003 PRB FEIS. The Field Manager imposed Conditions of Approval (COAs) on CBNG drilling and development for the protection of the Fortification Creek elk herd and other natural resource values. *See id.* at 11-12, General COAs, Surface Use COAs, and Drilling Program COAs. He also noted Lance’s commitment to obtain the necessary permits from other Federal and State agencies “for the drilling, completion and production of the . . . wells including water rights appropriations, the installation of water management facilities, [and] water discharge permits.” *Id.* at 11.

The Field Manager concluded that the POD conformed to the RMP, as revised in 2001 and amended in 2003, and was not likely to result in undue or unnecessary environmental degradation. EA at 11, 14. He determined that POD approval was not likely to significantly impact any aspect of the human environment, and accordingly that BLM was not required by section 102(2)(C) of NEPA to prepare an EIS before taking such action. *See id.* at 12.

On August 19 and 21, 2009, Lance and Powder River, respectively, sought SDR of the Field Manager’s July 2009 FONSI/DR. Powder River objected in general terms to BLM’s decision to approve CBNG drilling and development in the POD area, while Lance focused solely on the two additional COAs imposed by the Field Manager for protection of the Greater sage-grouse and the Fortification Creek elk herd.⁹ BLM consolidated the two SDR requests and denied Powder River’s request

⁸ (...continued)

roads accessing the sites and connections to the gas and water gathering systems, and underground electrical distribution system. *See* Dein Affidavit, ¶ 5, at 2; Letter to BFO from Lance, dated Nov. 10, 2009 (part of Doc. 7 attached to SOR). It had also drilled most of the first wells, and some of the second wells at each of these sites. *See* SDR Decision at 4; Dein Affidavit, ¶¶ 5, 6, at 2, 3; Letter to BFO from Lance, dated Nov. 10, 2009.

⁹ These two COAs provided: (1) to facilitate protection of sage-grouse and their habitat, 3 well site visits per week were required during the first 6 months after the wells were completed, whereupon BLM would assess the necessity for multiple monthly visits based on monitoring data; and (2) for the purpose of engaging in adaptive management, monthly elk observation reports were required for purposes of
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for a stay of the effect of the FONSI/DR by decisions dated August 28 and September 18, 2009, respectively.

In his December 2009 SDR decision, the Deputy State Director generally affirmed BFO's decision to approve the POD, rejecting most of the assertions by Powder River regarding NEPA deficiencies. However, he set aside the BFO's decision to approve the POD to the extent BLM had failed to consider the likely cumulative impacts of the AUZ POD and other PODs on the year-long range of the Fortification Creek elk herd, as argued by Powder River. He also set aside the BFO's decision with regard to two issues raised by Lance concerning the COAs, *i.e.*, (1) limiting POD area site visits to 3 per week during the first 6 months after the wells are completed, followed by further consideration of the necessity for multiple monthly visits; and (2) requiring monthly elk observation reports.

Concerning cumulative impacts, the Deputy State Director noted that BLM had not addressed the likely cumulative impacts of CBNG drilling and development under the proposed action or any of the alternatives thereto in either the PRB FEIS or the POD EA. *See* SDR Decision at 8-10. He pointed out that the cumulative impacts of full-field development throughout the year-long range, which is properly considered the Cumulative Impacts Assessment Area (CIAA) for purposes of addressing the likely cumulative impacts to the Fortification Creek elk herd, had been considered in BLM's "Environmental Report: Coalbed Natural Gas Effects on the Fortification Creek Area Elk Herd," dated September 2007 (Elk Study). He noted that the EA had relied upon the Elk Study to address the cumulative impacts of full-field development on the elk herd. *See* SDR Decision at 8-9; EA at 59. He also noted that in *William P. Maycock*, 177 IBLA 1, 24 n.25 (2009), the Board had acknowledged that the Elk Study was in fact "prepared for the purpose of analyzing the cumulative effects of CBNG development on the elk herd, and it effectively supplemented the 2003 PRB FEIS." *See Wyoming Outdoor Council*, 173 IBLA 226, 245 (2007).

However, the Deputy State Director stated that the Elk Study did not fully satisfy BLM's NEPA obligations because (1) it was not prepared pursuant to section 102(2)(C) of NEPA; (2) it did not address the cumulative impacts of less than full-field development in the CIAA; and (3) it did not consider changes in the amount of existing CBNG drilling and development in the CIAA since it was prepared in 2006. *See* SDR Decision at 9. He concluded that since the EA was "not sufficient to inform the decisionmaker about the incremental impacts *arising from the different alternatives*," it was necessary to "remand BFO's decision with regards to

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assessing actual impacts of the POD on the Fortification Creek elk herd and its habitat. *See* EA at 11-12; EA, Surface Use COAs, at 12, 17.

the impacts *arising to elk from the various alternatives* for further analysis.” *Id.* at 10 (emphasis added).

The Deputy State Director concluded that BFO had failed to define adequately the restrictions placed on the required visits. He found that BFO had not adequately defined what was meant by site visits, explained how BLM would establish limitations on site visits after the initial 6-month time frame, or addressed the environmental advantages and disadvantages of limiting those visits. He particularly noted that “the EA does not point to any scientific study or analysis to demonstrate that reducing ‘site visits’ to three or less per week will yield any tangible benefits to sage-grouse,” especially given the fact that there are already 393 CBNG wells (or 6.4 wells per square mile) in the CIAA. SDR Decision at 23. He acknowledged Lance’s stated need for the flexibility to visit well sites when and as necessary, especially in order to ensure that operations continued to pose no threat to its employees, the public at large, or the environment, and otherwise meet its legal obligations as a prudent operator. *See id.* at 19-21. He further recognized that the limitation on site visits placed Lance in the untenable position of having to choose between complying with the COA and fulfilling its legal obligations to avoid safety, operational, and environmental hazards, which would require a suitable number of preemptive site visits designed to detect and rectify any hazards in a timely fashion. *See id.* at 22-23.

Concerning elk observation reports, the Deputy State Director concluded that BFO had failed to justify requiring Lance’s employees, who were actively engaged in drilling and other development activities, to record observations of elk in the vicinity of operations on a monthly basis. He found that this effort was not likely to result in the collection of scientific information regarding the actual effects of POD activity on the Fortification Creek elk herd that would be suitable for adaptive management purposes. *See SDR Decision* at 25-27.

The Deputy State Director set aside the FONSI/DR in part and ordered BFO to complete a new NEPA analysis addressing these three matters. *See SDR Decision* at 10, 25, 26-27. While generally affirming POD approval, he also set aside the decision to approve the POD and remanded the case to the Field Office for additional environmental review concerning the likely cumulative impacts of POD drilling and development on the Fortification Creek elk herd. In view of his decision to partially set aside the FONSI/DR, the Deputy State Director noted that “new activities” under the approved POD, including the construction of new well pads, roads, and utilities and the spudding of new wells, must necessarily be barred, while BLM remedied the deficiencies in its NEPA analysis. *Id.* at 27. He concluded: “New activities within the POD may be re-initiated should a new FONSI/DR be issued, and consistent with that decision.” *Id.* However, he noted that between the time of issuance of the July 2009 FONSI/DR and the December 2009 SDR decision Lance

had drilled at least one CBNG well at most of the 67 sites, and had also constructed most of the approved roads and utilities. He stated his view that “operations at existing facilities” might “continue.” *Id.* at 4, 27.

Powder River appealed the Deputy State Director’s SDR decision, characterizing this POD as BLM’s “first” effort to authorize “large-scale” CBNG drilling and development within the year-long range, as well as crucial winter and parturition range, of the Fortification Creek elk herd, since other PODs have skirted the edges of such range. SOR at 1; *see, e.g., Wyoming Outdoor Council*, 173 IBLA at 232-33.¹⁰

Following the SDR decision, on December 30, 2009, BFO released for public comment a draft Cumulative Impacts Analysis addressing in more detail the likely cumulative impacts to the Fortification Creek elk herd of CBNG drilling and development throughout the year-long range.¹¹ Thereafter, on February 10, 2010, BFO issued a Modified DR and FONSI.¹²

In the Modified DR, the Acting Field Manager decided to adopt a modified Alternative C, approving certain “modifications to the remanded portions of [the] . . . POD.” Modified DR at 1. He specifically provided that “[a]ll affirmed portions of the original Augusta Unit Zeta DR and EA remain in effect.” *Id.* at 2. He confirmed BFO’s original approval of all of the CBNG drilling and development that had been initiated by the time of the December 2009 SDR decision and approved all

¹⁰ Powder River notes that BFO has approved two other PODs (Carr Draw III West and Carr Draw V, Addition II), south of the FCPA and within the year-long range of the elk herd, and that in SDR decisions dated Dec. 8, 2009, the Deputy State Director affirmed in part and set aside in part BFO’s FONSI/DRs approving those PODs and remanded them to BFO for analysis concerning the likely cumulative impacts on the Fortification Creek elk herd. *See* SOR at 3, n.3. BFO issued Modified DRs on Apr. 9, 2010, approving the two PODs. In another Dec. 8, 2009, SDR Decision, the Deputy State Director vacated BFO’s FONSI/DR approving the Michelena POD pending completion of the RMP Amendment to the extent development would occur entirely within the year-long range, within the FCPA. *See* Excerpts of SDR Decision (Michelena POD), dated Dec. 8, 2009 (Doc. 4 attached to SOR).

¹¹ The final Cumulative Impacts Analysis, which appears as Attachment 1 to the Feb. 10, 2010, Modified DR, was substituted as the “Big Game Cumulative Effects” section of the original EA. *See* Modified DR at 1; Modified FONSI at 2.

¹² A copy of the Modified DR and FONSI are attached to Lance’s Answer as Ex. A. Lance reports that SDR has been sought for the Modified DR, but that final action by the State Director has not yet been taken.

of the CBNG drilling and development under Alternative C that had not yet been initiated.

The Acting Field Manager's approval was subject to existing mitigation measures designed to avoid or minimize the adverse impacts of drilling and development on the Fortification Creek elk herd. Among these were the timing restrictions on drilling and development, specifically precluding all surface disturbing activities within crucial winter range and parturition range during the periods, respectively, from November 15 to April 30 and from May 1 to June 30, for the life of the project. See Modified FONSI at 2. BLM then noted that elk would likely continue to use crucial winter and parturition range during the time periods when no surface disturbing activity was occurring. See Modified DR, Attachment 2 at 2. However, in general, BLM expected that, while elk would otherwise be completely displaced from the POD area during the drilling and construction phases of POD activity, approximately 50 percent would return during the production phase, and that at no time would the viability of the elk herd be compromised. See Modified DR at 2; Modified DR, Attachment 2 at 2; Modified FONSI at 2.

II. RIPENESS AND STANDING

[1] Lance requests the Board to dismiss Powder River's appeal as failing to present issues that are ripe for review and/or as not supported by its standing to appeal. Powder River opposes dismissal. In his December 2009 SDR decision, the Deputy State Director excepted existing drilling and development of the POD area from his stay of the effect of the FONSI/DR while BFO was conducting additional environmental review and deciding whether to approve the remainder of the drilling and development of the POD area.

In order to pursue an appeal from a BLM decision, the issues raised by the appeal must be ripe for review by the Board and the appellant must have standing to appeal that decision. The requirements of ripeness and standing are generally related, both arising from 43 C.F.R. § 4.410. See, e.g., *Nevada Outdoor Recreation Association*, 158 IBLA 207, 209-10 (2003); *Devon Energy*, 171 IBLA 43, 48 (2007). Here, the questions of ripeness and standing hinge on the same assertion that BLM has not yet fully and finally authorized Lance to go forward with CBNG drilling and development under the approved POD, deferring such authorization until after it undertakes further analysis. We conclude that BLM's decision to approve drilling and development in the POD area, to the extent it is final, not only raises issues concerning compliance with NEPA that are ripe for review by the Board, but also adversely affects Powder River, a party to the case who has standing to appeal. Accordingly, as discussed below, we deny Lance's motion to dismiss.

To be ripe for review, an appeal must be taken from a final BLM “decision.” See 43 C.F.R. § 4.410(a). A “decision” is generally held to take or prohibit some action which affects a person having or seeking some right, title, or interest in public lands or resources. See, e.g., *Defenders of Wildlife*, 169 IBLA 117, 127 (2006). Where a BLM decision is not yet final, an appeal is premature and properly dismissed if it does not present any issues ripe for review. See, e.g., *Sierra Club, Grand Canyon Chapter*, 136 IBLA 358, 363-64 (1996).

To have standing under 43 C.F.R. § 4.410(a) to appeal from a final BLM decision, an appellant must be a “party to a case” and be “adversely affected” by the decision within the meaning of 43 C.F.R. § 4.410(b) and (d). See 43 C.F.R. § 3165.4(a); e.g., *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 81-86 (2005). An appeal must be dismissed if either element is lacking. *Southern Utah Wilderness Alliance*, 140 IBLA 341, 346 (1997); *Mark S. Altman*, 93 IBLA 265, 266 (1986). It is the responsibility of the appellant to demonstrate the requisite elements of standing. *Concerned Citizens for Nuclear Safety*, 175 IBLA 142, 146 (2008); *Colorado Open Space Council*, 109 IBLA 274, 280 (1989).

Powder River is clearly a party to a case by virtue of its prior participation in BLM’s deliberations regarding whether to approve the POD, through the submission of comments during the environmental review process and the filing of its SDR request. See 43 C.F.R. § 4.410(b); e.g., *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 81-82.

A party to a case is adversely affected by a decision when that decision has caused or is substantially likely to cause injury to a legally cognizable interest of the party. Such a legally cognizable interest must be shown to have been held by the party at the time of the decision that it seeks to appeal. *Center for Native Ecosystems*, 163 IBLA 86, 90 (2004). Further, when an organization appeals a BLM decision, it must demonstrate that one or more of its members has a legally cognizable interest in the subject matter of the appeal, coinciding with the organization’s purposes, that is or may be negatively affected by the decision. *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 86-87.

The burden falls upon the appellant to make colorable allegations of an adverse effect, supported by specific facts set forth in an affidavit, declaration, or other statement of an affected individual, that are sufficient to establish a causal relationship between the approved action and the injury alleged. *The Fund for Animals, Inc.*, 163 IBLA 172, 176 (2004); *Southern Utah Wilderness Alliance*, 127 IBLA 325, 327 (1993); *Colorado Open Space Council*, 109 IBLA at 280. It need not prove that an adverse effect will, in fact, occur as a result of the BLM action.

Donald K. Majors, 123 IBLA 142, 145 (1992). However, we have long held that the threat of injury and its effect on the appellant must be more than hypothetical. See *Missouri Coalition for the Environment*, 124 IBLA 211, 216 (1992); *George Schultz*, 94 IBLA 173, 178 (1986). “Standing will only be recognized where the threat of injury is real and immediate. *Laser, Inc.*, 136 IBLA [271,] 274 [(1996)]; *Salmon River Concerned Citizens*, 114 IBLA 344, 350 (1990).” *Legal & Safety Employer Research Inc.*, 154 IBLA 167, 172 (2001). “[M]ere speculation that an injury might occur in the future will not suffice.” *Colorado Open Space Council*, 109 IBLA at 280.

In his December 2009 SDR decision, the Deputy State Director expressly set aside “the portions of the BFO’s July 22, 2009[,] decision *with respect to cumulative impacts to elk, site visit limitations, and monthly elk observation reports*,” but affirmed the remaining portions of BFO’s decision concerning “the other issues presented by both appellants.” SDR Decision at 27 (emphasis added). He further stated: “BFO is instructed to complete new analysis pursuant to NEPA to address the[se] issues”; “new activities [within the POD area] were precluded during the preparation of such analysis”; and “[n]ew activities . . . may be re-initiated should a new FONSI/DR be issued, and consistent with that decision.” *Id.* Indeed, he stated that new activities could not be allowed to proceed “until the procedural NEPA errors [which BLM had] identified . . . can be remedied.” *Id.* Lance acknowledges this fact at page 4 of its Motion to Dismiss: “All new development activities are stayed pending completion of the NEPA analysis and issuance of a new decision.”

However, the Deputy State Director further stated that “th[e] prohibition of new activities will allow for *continued operations at existing facilities*, in order to avoid creating a hazardous work environment for Lance’s employees and to prevent avoidable resource impacts as a result of an unplanned stoppage of work.” SDR Decision at 27 (emphasis added). While the SDR decision clearly suspended all new activities, it did not suspend existing activities under the approved POD pending preparation of a new EA or EIS and issuance of a new FONSI/DR: “[T]his prohibition of new activities will allow for continued operations at existing facilities.” SDR Decision at 27.

The Deputy State Director provided for the continued operation of existing facilities for the express purpose of allowing Lance to stabilize disturbed areas, protect geological resources in open wellbores, and take any and all steps to avoid “creat[ing] workplace hazards and/or compromis[ing] the protection of environmental resources.” SDR Decision at 27. The overall “intent of th[e] prohibition of new operations is to preserve the status quo without unduly causing or contributing to resource damages, unsafe conditions, or *imposing unreasonable costs on the operator*.” *Id.* (emphasis added). It seems evident that operations were allowed to continue in part so as to avoid the costs to Lance of shutting down and

ceasing operations already begun. See “Early Alert” Memorandum to Washington Office, BLM, from Wyoming State Office, dated Nov. 30, 2009, at 1.

Lance is incorrect in stating that the Deputy State Director’s SDR decision “resulted in a [setting aside and] remand of *the POD approval*.” Motion to Dismiss at 4 (emphasis added). All that was set aside and remanded was the approval of new activities under the POD. As Powder River correctly notes, “[t]he partial affirmation [by the Deputy State Director of the FONSI/DR] is a final decision of the BLM, subject to appeal.” Response to Motion to Dismiss at 1. In fact, Lance admits that “BLM allowed for continued operations at existing facilities, but prohibited all new operations,” and that “[t]he State Director . . . stayed *further* development [of the POD] pending additional environmental review.” Motion to Dismiss at 1, 3 (emphasis added); *see id.* at 4. To the extent existing activities continued to be authorized by the July 2009 FONSI/DR, the issues raised by Powder River concerning such continued authorization are ripe for review, and, being adversely affected, Powder River has standing to appeal.

Powder River has a legally cognizable interest that is or is substantially likely to be injured by BLM’s decision to approve existing activities under the POD. Powder River offers statements from its members whose recreational use of the POD and surrounding areas is likely to be negatively impacted by the approved CBNG drilling and development. See Doc. 2 (Declaration of Jill Morrison, dated Jan. 14, 2010) and Doc. 3 (Declaration of William M. (Mark) Winland, dated Jan. 14, 2010) (attached to SOR). Recreational use of lands is a legally cognizable interest that may serve to support standing to appeal. See, e.g., *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 85-88. We agree with Powder River that Lance did not dispute the fact that Powder River’s interest was “legally sufficient” for purposes of standing to appeal. Response to Motion to Dismiss at 3.¹³

Lance argues that BFO may, on remand, “materially alter the POD approval,” rendering any decision by the Board “based on the current POD and NEPA analysis moot.” Motion to Dismiss at 6. We agree that BFO may decide, based on its cumulative impacts analysis regarding the Fortification Creek elk herd, to impose “new or different mitigation measures” for the protection of the herd. *Id.* However, since the Deputy State Director’s decision left Lance free to proceed with existing activities under the POD, it is appropriate for the Board to now address the adequacy of BLM’s environmental review of the likely impacts of such activities under NEPA. BLM has rendered a final decision regarding existing activities, and the issues raised

¹³ Lance notes that neither Morrison nor Winland is a member of the Wyoming Outdoor Council, and thus, absent a showing of adverse affect supported by specific facts, we hereby dismiss the appeal as to the Wyoming Outdoor Council. See Motion to Dismiss at 7.

by Powder River regarding those activities are presently ripe for our review. We conclude that Powder River has standing to appeal BLM's outstanding decision to approve existing activity under the POD, since that decision remains in effect. *See, e.g., West Virginia Highlands Conservancy, Inc.*, 166 IBLA 39, 44 (2005); *Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement*, 102 IBLA 111, 121 (1988). Accordingly, we deny Lance's motion to dismiss the appeal.¹⁴

III. BLM'S COMPLIANCE WITH SECTION 102(2)(C) OF NEPA

On appeal, Powder River limits its objection to BLM's approval of the POD to two basic issues, each of which concerns an alleged violation of section 102(2)(C) of NEPA: (1) whether BLM violated NEPA by failing to incorporate the question of approval of the AUZ POD into the environmental review and decisionmaking process concerning the pending RMP Amendment; and (2) whether BLM violated NEPA by failing to adequately analyze the likely impacts to surface resources of producing underground water in connection with CBNG drilling and development. *See SOR* at 2.

A. Standard of Review

[2] Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), requires consideration of the 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." A BLM decision to proceed with a proposed action, based on an EA tiered to a programmatic EIS, will be upheld as being in accord with section 102(2)(C) of NEPA where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result that was not already addressed in the EIS or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *E.g., Wyoming Outdoor Council*, 173 IBLA at 235. In assessing the adequacy of an EA, the Board is guided by the "rule of reason," such that the EA need only briefly discuss the likely impacts of a proposed action: "By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises." *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (quoting *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247 (M.D. Pa. 1992)). An appellant seeking to overcome such a decision carries the

¹⁴ However, Powder River lacks standing to appeal any final BLM decision to approve new activity under the POD, since no such decision has been made. Powder River's challenge to the approval of new activity must await the conclusion of SDR review of the February 2010 Modified DR and FONSI. *See, e.g., Salmon River Concerned Citizens*, 114 IBLA at 348-50.

burden to demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Bales Ranch, Inc.*, 151 IBLA at 357.

BLM's decision to issue a FONSI and not prepare an EIS "implicates agency expertise." *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004). Where, in assessing environmental impacts, BLM properly relies upon the professional opinion of its technical experts, concerning matters within the realm of their expertise and which is reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert. *Wyoming Outdoor Council*, 173 IBLA at 235 (citing *Fred E. Payne*, 159 IBLA 69, 77-78 (2003)). A mere difference of opinion, even of expert opinion, will not suffice to show that BLM failed to fully comprehend the true nature, magnitude, or scope of the likely impacts. *Id.* The fact that an appellant has a differing opinion about likely environmental impacts or prefers that BLM take another course of action does not show that BLM violated the procedural requirements of NEPA. *Biodiversity Conservation Alliance*, 174 IBLA 1, 13 (2008); *Wyoming Audubon*, 151 IBLA 42, 50 (1999); *San Juan Citizens Alliance*, 129 IBLA 1, 14 (1994).

B. Whether BLM Violated NEPA by Not Incorporating POD Approval into the RMP Amendment Process

In preparing an EA, BLM is required by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2006), to consider "appropriate alternatives" to the proposed action, which will accomplish its intended purpose, are technically and economically feasible, and have a lesser impact. *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *Bales Ranch, Inc.*, 151 IBLA at 363. Generally, an EA must include a "brief discussion . . . of alternatives." 40 C.F.R. § 1508.9(b). If BLM declines to afford detailed analysis of an alternative and briefly explains the reasons for its finding, one challenging that finding has the burden to demonstrate, with objective proof, that the alternative not only would achieve the intended purpose of the proposed action at less cost to the environment, but also be technically and economically feasible in the particular circumstances of the case. *Biodiversity Conservation Alliance*, 171 IBLA 218, 238 (2007).

Powder River first contends that BLM's decision to approve the POD at the present time violates NEPA and its implementing regulations because, in failing to incorporate consideration of the proposed POD into its RMP Amendment process, BLM (1) prejudiced the selection of alternative courses of action with regard to its pending NEPA review of the RMP Amendment; and (2) failed to consider reasonable alternatives to the proposed POD, including deferral of its POD decision until BLM

concluded its NEPA review and decisionmaking concerning the RMP Amendment. SOR at 2-4, 8-9 (citing 40 C.F.R. §§ 1502.2(f), 1502.14(a), and 1506.1(a)). Each of these claims is addressed separately below.

1. *Whether BLM Prejudiced Selection of Alternatives under RMP Amendment*

Specifically, Powder River argues that BLM violated NEPA by not incorporating the proposed POD and other PODs within the year-long range of the elk, south of the FCPA, into the proposal for an RMP Amendment. According to Powder River, such incorporation is important since any decision to approve the PODs will “greatly limit the ability of a successful phased development approach or other alternatives and mitigation that BLM has proposed to implement in the RMP Amendment because the projects will cause habitat fragmentation and degradation and will limit elk movement within the year-long range.” SOR at 3. Powder River asserts that the POD area constitutes a significant percentage of the overall year-long, crucial winter, and parturition ranges, in the entire FCA area, and that drilling and development of this area will result in the fragmentation and/or permanent loss of such habitat to the elk, potentially reducing the remaining habitat below the “biologically significant” threshold. *Id.* at 13. Powder River states that “[i]t is apparent that the POD area and the rest of the southern portion of the year-long range have significant biological value to the elk herd and BLM has arbitrarily separated the southern portion of the year-long range from its [land-use] planning process.” *Id.*

BLM confined the RMP Amendment process, which involves its own environmental review pursuant to section 102(2)(C) of NEPA, to the question of how best to manage the FCPA, encompassing the northern portion of the year-long range. That process did not implicate BLM’s management of the southern portion of the year-long range where the POD is situated. *See* SOR at 3. In Powder River’s view, this scope was drawn too narrowly, and should be expanded to include the question of the proper management of the entire year-long range of the Fortification Creek elk herd. In effect, Powder River argues that BLM should undertake an entirely new analysis that considers the overall question of how BLM should manage the entire year-long range, both the northern and southern portions, from the standpoint of CBNG drilling and development.

The RMP Amendment is specifically intended to address the question of the proper management of CBNG drilling and development *within the FCPA, i.e.*, in the northern portion of the year-long range, from the standpoint of the protection of the Fortification Creek elk herd and other important resource values. *See* EA at 7. As drawn, the RMP Amendment does not raise any questions regarding the proper management of CBNG drilling and development outside the FCPA, and thus in the

southern portion of the year-long range of the Fortification Creek elk herd, where the POD area is situated.¹⁵

In arguing that the RMP Amendment process should be expanded to include questions regarding the proper management of CBNG drilling and development in the southern portion of the year-long range, Powder River is effectively objecting to the scope of the RMP Amendment process. See Answer at 4. However, questions regarding the proper scope of the RMP Amendment are outside the purview of the Board, in that they plainly implicate BLM's land-use planning activities. See 43 C.F.R. § 1610.5-2; *Rainer Huck*, 168 IBLA 365, 396 (2006); *Oregon Natural Resources Council Action*, 148 IBLA 186, 190 (1999); *Max Wilson*, 131 IBLA 306, 308-09 (1994).

Powder River properly emphasizes that NEPA requires BLM not to “commit resources prejudicing selection of alternatives before making a final decision” concerning a proposed project, and, similarly, not to take any action concerning the project “which will . . . [l]imit the choice of reasonable alternatives” while it is deciding whether to approve the project. SOR at 4 (quoting 40 C.F.R. §§ 1502.2(f) and 1506.1(a)). BLM is precluded from allowing any aspect of a proposed action to go forward, where it is still engaged in NEPA review concerning the action, when doing so would prejudice its decision concerning approval of the action by limiting the choice of reasonable alternatives. See *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998); *State of Idaho v. Interstate Commerce Commission*, 35 F.3d 585, 595-96 (D.C. Cir. 1994); *Wyoming Outdoor Council*, 159 IBLA 388, 416 (2003). Powder River argues that by going forward with the POD BLM has limited its options with respect to the RMP Amendment because it has eliminated the ability to curtail or otherwise restrict CBNG drilling and development in the POD area. See SOR at 3. Lance contends that since the RMP Amendment relates to BLM's management activities *within the FCPA*, BLM's decision here regarding the POD, which approves CBNG drilling and development “outside the planning area,” “cannot possibly limit BLM's choice of reasonable alternatives for management inside the planning area.” Answer at 8.

¹⁵ We note that Powder River and others have previously argued that the southern portion of the year-long range should be included in the proposed RMP Amendment, but that BLM has plainly determined to concentrate on the northern portion of the year-long range, within the FCPA. See Letter to State Director from Powder River dated Aug. 27, 2009, at 3; Letter to BFO from Powder River dated May 19, 2009. However, WGFD did not support inclusion of the year-long range into the proposed RMP Amendment process. See Letters to BFO from WGFD dated July 8, 2009, at 2, and Aug. 31, 2009, at 1.

The fact that BLM has approved the POD does not foreclose the future adoption of a phased approach to development or any particular mitigation measures for the protection of the Fortification Creek elk herd. Moreover, the Deputy State Director finds it unnecessary to include the proposed POD in the RMP Amendment process where the effectiveness of elk habitat, in the year-long, crucial winter, and parturition ranges, has already been substantially reduced in the POD area. See SDR Decision at 7; Modified DR, Attachment 1 at 7 (Figure 3 (Existing Wells (as of December 15, 2009) within the CIAA)); EA at 8, 10, 30, 32 (Figure 3.1), 54-58. He indicated that the proposed drilling and development in the POD area is likely to result in little additional impacts to the environment given the existence of ongoing drilling and development on non-Federal leases, and will contribute in only a small way, if at all, to the likely cumulative impacts of drilling and development throughout the year-long range. He concluded that the planning issues concerning elk habitat in the FCPA, which has not been subjected to large-scale CBNG drilling and development, are simply not applicable to the POD area, where drilling and development is ongoing in the case of non-Federal leases. See SDR Decision at 6-8. We agree with the Deputy State Director that Powder River has not provided convincing evidence that approval of the POD would prejudice the outcome of the RMP Amendment or foreclose feasible alternatives to the Amendment. See SDR Decision at 8; see *Wilderness Watch*, 142 IBLA 302, 305 (1998); *Southern Utah Wilderness Alliance*, 141 IBLA 85, 89 (1997); *In Re Bryant Eagle Timber Sale*, 133 IBLA 25, 27-29 (1995).

2. *Whether BLM Violated NEPA by Not Considering the Alternative of Deferring POD Approval until Conclusion of RMP Amendment Process*

During its NEPA process for the POD, BLM in fact briefly considered an alternative whereby it would incorporate consideration of the proposed POD into its environmental review and decisionmaking regarding the pending RMP Amendment proposal, thus deferring approval of the 134 proposed CBNG wells in the POD area. See EA at 22-23. It declined to do so since (1) the delay of CBNG drilling and development in the POD area during the RMP Amendment process would result in the loss of CBNG to drainage by ongoing production from non-Federal wells in the vicinity; (2) “the planning issues associated with the FCPA . . . do not apply to this project area”; and (3) the delay of CBNG drilling and development in the POD area during the RMP Amendment process is unnecessary, given the existence of non-Federal drilling and development which has already disturbed elk habitat in the POD area. EA at 22, 23; see SDR Decision at 7 (quoting EA at 56).

In deciding not to afford detailed consideration to a possible alternative, BLM is only required to “briefly discuss the reasons” for having eliminated the alternative from such consideration. 40 C.F.R. § 1502.14(b); see *Rocky Mountain Pipeline*

Trades Council, 149 IBLA 388, 403 (1999). In this case, BLM adequately justified its decision not to afford the alternative at issue detailed consideration.

We have noted that in his December 2009 SDR decision, the Deputy State Director concluded that the Elk Study did not fully satisfy NEPA, because it did not address the likely cumulative impacts of less than full-field development or take into account changes since 2006 in the amount of existing development in the year-long range. *See* SDR Decision at 8-9. He set aside BLM's approval of any *new* drilling and development in the POD area, pending the completion of a cumulative impacts analysis. *See id.* at 10, 27. But he deemed the current analysis to be sufficient to support the decision to allow *existing* drilling and development to continue in the POD area. *See id.* at 27. The July 2009 EA, together with the Elk Study, represents a comprehensive analysis of the potential cumulative impacts of full-field development in the year-long range. Powder River fails to establish that BLM's analysis of likely cumulative impacts is inadequate to support the current level of existing activity permitted by the Deputy State Director's December 2009 SDR decision.¹⁶

Powder River asserts that the potential concentration of elk in the northern portion of the year-long range "will lead to overcrowding and the degradation of the habitat that is left for the elk." SOR at 7 (citing Letter to Jill Morrison, Powder River, from Larry Gerard, former BLM Wildlife Biologist, BFO, dated Aug. 18, 2009 (Doc. 9 attached to SDR Request); and Declaration of Dr. A. William (Bill) Alldredge, Professor Emeritus, Department of Fishery and Wildlife Biology, Colorado State University, dated Jan. 13, 2010 (Doc. 4 attached to SOR)). Powder River offers no evidence to support this view, however, which is contradicted by BLM's expert opinion that the viability of the elk herd is not threatened by the POD, and fails to take into account what BLM anticipates is the continuation of a certain

¹⁶ Relying on the Elk Study, BLM concluded that CBNG drilling and development in the southern portion of the year-long range would likely cause the elk to shift their principal centers of activity to the WSA and other parts of the northern portion of the year-long range, where drilling and development is currently precluded or limited. Thus, the EA states at page 57 that "[b]ecause of their affinity for the Fortification Creek area and their wary nature, the most probable scenario for elk response to the proposed [full-field] CBNG development is for the herd to seek out security patches within the Fortification Creek herd unit and attempt to avoid the CBNG activities, at least during the development stage." *See* Elk Study at 16-18, 25. Indeed, the existing non-Federal drilling and development that has occurred since the Elk Study was prepared in 2007 was known to be already causing such a shift in use, even before the Federal drilling and development associated with the POD is taken into account. *See* EA at 56, 57.

amount of elk use even during active drilling and construction, followed by a significant movement by elk back to the southern portion of the year-long range once active drilling and construction concludes at the end of 2 years. See EA at 8, 10, 11, 54-57.

We conclude that Powder River has failed to demonstrate that the existing drilling and development in the POD area that continues to be authorized following the Deputy State Director's SDR decision is likely to result in any impacts not already considered in the EA, or that such impacts are likely to be significant, thus requiring an EIS. BLM was not barred, by NEPA or the implementing regulations, from deciding whether to approve the POD before the conclusion of the RMP Amendment process. Powder River has not established a NEPA violation based on BLM's decision to approve the POD even while it is considering whether and in what manner to amend the RMP, and not incorporating the evaluation of the POD into that RMP Amendment process. In fact, the Board rejected this argument in *Powder River Basin Resource Council*, 180 IBLA 1, 17 (2010), stating that "BLM is not required to await a further decision regarding the amendment or revision of an existing land use plan, before taking an action that comports with the existing land use plan." See *Montana Trout Unlimited*, 178 IBLA 159, 172 (2009). In the narrow context of BLM's decision to approve the AUZ POD, we find no violation of NEPA arising from BLM's failure to consider the alternative of deferring a decision regarding the POD until the conclusion of the RMP Amendment process, which would address CBNG drilling and development in the FCPA.

The intended purpose of the proposed POD is to authorize the drilling and development of the Federally-leased CBNG resources in the POD area, which, as noted, is situated south of the FCPA that is the subject of the proposed RMP Amendment. See SDR Decision at 6 (citing EA at 14). Deferring approval of the POD until conclusion of the RMP Amendment process would render any decision regarding the POD dependent on BLM's analysis and decision regarding the RMP Amendment. We have stated that "[n]othing in NEPA or [its implementing] . . . regulations requires BLM to postpone or deny a proposed action *that is covered by the EIS for the current land use plan*, in order to preserve alternatives during the course of preparing a new land use plan and EIS." *Colorado Environmental Coalition*, 169 IBLA 137, 144 (2006) (emphasis added). BLM is not required to await the completion of environmental analysis and decisionmaking concerning a comprehensive land-use management scheme, implicating in some way the particular proposed action at issue, before it decides whether to adopt the particular course of action. *Id.* To hold otherwise would jeopardize or impair BLM's ability to manage the public lands, since it is often engaged in plan amendment or revision.

See *Sierra Club Legal Defense Fund, Inc.*, 124 IBLA 130, 140 (1992).¹⁷ Given the present purpose of the POD, which concerns a limited drilling program in a particular geographic area, we conclude that BLM rightly declined to consider alternatives that implicated the POD in the RMP Amendment process, which concerned the question of the permissibility of drilling in a different and much larger geographic area.

C. Whether BLM Adequately Considered Cumulative Impacts

Powder River argues that, given BLM's lack of appreciation of the true extent of elk use in the POD area and remainder of the southern portion of the year-long range, BLM should defer any decision regarding the POD until after it has finished assessing the cumulative impacts of permitting drilling and development generally in the year-long range. See SOR at 14-15. However, Powder River offers no support for its position that BLM had failed to appreciate, even as of the time of its July 2009 EA, the extent of elk use in the POD area and the remainder of the southern portion of the year-long range. Nor does Powder River show that the level of existing drilling and development that is permitted by the Deputy State Director's December 2009 SDR decision is likely to result in any cumulative impact that BLM failed to consider, or is likely to be significant, and should be considered in an EIS.¹⁸

¹⁷ We find no requirement in section 202 of FLPMA, 43 U.S.C. § 1712 (2006), or its implementing regulations (43 C.F.R. Part 1600) that BLM postpone or deny a proposed action pending completion of amendment or revision of an existing land use plan that currently supports that action. See *Oregon Natural Resources Council v. BLM*, 150 F.3d 1132, 1139 (9th Cir. 1998); *Colorado Environmental Coalition*, 161 IBLA 386, 396 (2004) (citing *Southern Utah Wilderness Alliance*, 122 IBLA 165, 173 (1992)); *Wyoming Outdoor Council*, 156 IBLA 377, 384 (2002).

BLM provided, at page 47 of its *Land Use Planning Handbook* (H-1601-1) (Rel. 1-1693 (Mar. 11, 2005)), that it should, “[d]uring the amendment or revision process,” determine whether to approve a proposed action where it “would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined,” and then decide whether to postpone, modify, or deny the proposed action, even where it is permitted by the existing plan. (Emphasis added.) The *Handbook* did not preclude approval of a proposed action while the RMP was being amended or revised. See *Wyoming Outdoor Council*, 156 IBLA at 384-85. Rather, it left it to BLM’s “discretion” whether to postpone, modify, or deny the proposed action. *Land Use Planning Handbook* at 47.

¹⁸ In the context of commenting on the RMP Amendment, WGFD supported designation of an ACEC in the northern portion of the year-long range that would afford greater protection for elk and other high value wildlife habitat from the effects

(continued...)

Powder River argues that CBNG drilling and development within the year-long range of the Fortification Creek elk herd, whether inside or outside the FCPA, pursuant to the AUZ and other PODs, will likely have cumulative impacts “that should be considered in a single planning document.” SOR at 7. Powder River is correct that BLM is required by section 102(2)(C) of NEPA and its implementing regulations to consider the cumulative impacts of past, present, and reasonably foreseeable future actions. *See* 40 C.F.R. §§ 1508.7 and 1508.25; *e.g.*, *Park County Resource Council, Inc. v. United States Department of Agriculture*, 817 F.2d 609, 623 (10th Cir. 1987); *Howard B. Keck, Jr.*, 124 IBLA 44, 53 (1992), *aff’d*, *Keck v. Hastey*, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). However, the record makes clear that BLM was well aware that CBNG drilling and development within the year-long range of the Fortification Creek elk herd, both inside and outside the FCPA, might cumulatively affect the herd. *See* EA at 7, 57-59. It prepared the Elk Study for the purpose of addressing the likely cumulative impacts of drilling and development throughout the year-long range, and that analysis was expressly incorporated into the EA. *See* EA at 57-59; Elk Study at iii, 4 (Table 3 (Existing and Proposed Wells within the FCA)).

D. Whether BLM Violated NEPA by Not Adequately Analyzing Produced Water Impacts

Powder River contends that BLM’s decision to approve the POD at the present time violates NEPA because BLM failed to consider the likely environmental impacts associated with the management of produced water from the CBNG wells. *See* SOR at 15-20. Powder River observes that BLM did not, in the 2003 PRB FEIS, analyze the likely impacts of produced water from drilling and development in the FCA area, or the likely impacts of treatment and discharge of the treated water. Further, Powder River states that BLM has failed to do so in its EA: “BLM falls short of what NEPA requires. BLM must disclose what the WMP for this project is and analyze the impacts of that WMP. The failure to do so prevents the BLM from taking the requisite ‘hard look’ at water quality and quantity impacts resulting from CB[NG] produced water.” *Id.* at 20. It specifically refers to BLM’s failure to analyze “the site specific or the cumulative impacts of that plan,” including the loss or diminishment of underground water available for human or animal use and the impacts to soils, vegetation, watershed, and fish and wildlife as a consequence of the production and discharge of large quantities of treated water. *Id.* at 16; *see id.* at 17-18.

¹⁸ (...continued)

of CBNG drilling and development. *See* Letter to BFO from WGFD, dated Nov. 30, 2007 (Ex. C attached to Answer). WGFD also recommended, in order to provide a “continuing refuge” for elk and other wildlife, “the completion of all construction activities south of Fortification Creek prior to development north of Fortification Creek.” *Id.* at 4.

Our review of the record shows, contrary to Powder River's argument, that BLM considered the impacts of treating and discharging produced water, under a State permit and in compliance with the WMP, on soils, vegetation, water resources, and other aspects of the human environment. The EA provides that approval of the POD "is subject to adherence with . . . [the] water management plan," EA at 4, and that "[t]he decision to authorize Alternative C" is based upon the fact that "[t]he Operator, in [its] POD, has committed to . . . [o]btain the necessary permits from other agencies . . . including . . . the installation of water management facilities[] [and] water discharge permits." *Id.* at 11; *see also* SDR Decision at 10-11. The POD is expected to produce water at a maximum rate of 5.98 cfs, generating a total of 4,322-acre feet of water on an annual basis throughout the operational phase of the POD. *See* EA at 75. Such production was deemed to be well within the parameters of expected produced water discharges to the Basin analyzed in the PRB FEIS. *See id.*

The PRB FEIS included extensive analysis of the likely impacts produced water discharges to surface and underground waters and downstream water users from CBNG production generally in the Basin, including the POD area. *See* PRB FEIS, Vol. II, at 4-1 to 4-124 (ground and surface water), 4-134 to 4-152 (soils), 4-153 to 4-172 (vegetation and land cover types), 4-235 to 4-249 (aquatic species), and 4-288 to 4-298 (land use). In the EA, BLM considered the site-specific impacts of treating and discharging produced water from the POD area that would affect both the surface and underground waters and downstream water users.¹⁹ *See* EA at 45-47, 50, 53, 59-60, 75-80. BLM provided for treating the water, in accordance with the WMP, to ensure the suitability of the water for discharge into the environment, thereby complying with State permitting requirements. *See* EA at 76-78; WMP at 12, 13, 14, 19-20. The WMP was incorporated by reference into the EA. *See* EA at 75.

Powder River argues that BLM cannot fail to undertake its own analysis of the likely impacts of producing and discharging large quantities of treated produced water, or conclude that such impacts are likely to be insignificant merely because they will occur pursuant to a State permit issued by the WDEQ. Powder River asserts that "the mere issuance of a permit cannot serve as the functional equivalent of NEPA analysis by a [F]ederal agency." SOR at 18.

Our review of the record shows, however, that the EA reflects BLM's own analysis of the likely impacts of producing, treating, and discharging large quantities

¹⁹ BLM noted that Lance provided for offering water well agreements, to ameliorate the adverse effects of drawdown, to permitted owners of water wells within the circle of influence (one-half mile) of any producing Federal CBNG well in the POD area. *See* EA at 11, 75, 78.

of treated water. In approving the PRB Oil and Gas Project, which encompasses the POD at issue, BLM provided that “[o]perations that would violate State water quality requirements will not be permitted by BLM or the State.” Record of Decision and RMP Amendments for the PRB Oil and Gas Project, dated July 30, 2003, at 20. It is appropriate for BLM to consider impacts that are likely to occur by assuming that the proposed action will be in compliance with applicable Federal, State, and local permitting requirements. See *Bristlecone Alliance*, 179 IBLA 51, 74-77 (2010); *Wyoming Outdoor Council*, 176 IBLA 15, 22-23, 26, 27, 30, 38-39, 42 (2008); SDR Decision at 10-11; Answer at 12.

BLM need not evaluate the potential environmental consequences resulting from noncompliance with Federal and State permitting requirements or assume that violations of Federal and State standards will inevitably occur. BLM is not attempting to substitute the State permit for its own analysis of the likely impacts of the POD. Rather, BLM has provided an evaluation of the State permit in the context of the impacts analysis, just as it would any mitigation plan adopted as part of the proposed action.²⁰ This approach is reasonable. See *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1526-27 (10th Cir. 1992); *City & County of San Francisco v. United States*, 615 F.2d 498, 501-02 (9th Cir. 1980); *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1244 (D. Wyo. 2005).²¹

²⁰ Powder River cites the case of *South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of Interior*, 588 F.3d 718 (9th Cir. 2009), in support of the proposition that BLM cannot simply rely on the fact that produced water discharges must be permitted, thus assuring compliance with Federal and State water quality standards, as a substitute for the analysis of likely water quality impacts. See SOR at 18. In that case, BLM completely failed to discuss the likely air quality impacts attributable to the transportation and off-site processing of ore before authorizing a gold mining operation on public lands. See 588 F.3d at 725-26. Having failed to address such impacts, the court rejected BLM’s argument that it could rely on the fact that the off-site processing facility “operates pursuant to a state permit under the Clean Air Act,” since “[a] non-NEPA document—let alone one prepared and adopted by a state government—cannot satisfy a [F]ederal agency’s obligations under NEPA.” *Id.* at 726 (emphasis added). Here, BLM analyzed the likely water quality impacts in its NEPA documents and, therefore, satisfied NEPA. See *Bristlecone Alliance*, 179 IBLA at 76-77.

²¹ The cited cases are taken from a Feb. 5, 2007, Memorandum to the Solicitor (attached to Instruction Memorandum No. WY-IM-2007-011, dated Mar. 19, 2007), in which the Regional Solicitor generally concluded, at page 7, that BLM may, in preparing its NEPA documentation for APDs for CBNG wells, rely on State decisions under the Clean Water Act, including the issuance of permits for regulated water

(continued...)

Powder River further argues that BLM has failed adequately to consider questions raised by the Environmental Protection Agency (EPA) and WDEQ's consultants regarding the adequacy of the "Tier 2" methodology proposed at the Camp John Augusta facility to generate water suitable for agricultural use. See SOR at 18-19 (citing Excerpt of Expert Scientific Opinion on the Tier-2 Methodology, Report to the WDEQ (Report to WDEQ), Jan M.H. Hendrickx and Bruce A. Buchanan, dated September 2009 (Doc. 10 attached to SOR); and Excerpt of Letter to Wyoming Environmental Quality Council from Region 8, EPA (EPA Letter), dated Sept. 29, 2009 (Doc. 11 attached to SOR)). Powder River concludes: "[I]t is the opinion of expert consultants and EPA that the scientifically flawed methodology [W]DEQ used to determine effluent limits for discharged produced water in the Augusta Unit Zeta POD is not protective of agricultural uses." SOR at 19.

The concern with the Tier 2 methodology relates to the fact that it appears not to account for the suitability of treated produced water for use in agricultural irrigation. The Report to WDEQ at ii-iii states that "Tier 2 . . . methodology . . . is not reasonable nor scientifically valid for determining the EC of water that can be discharged into an ephemeral drainage in Wyoming so that degradation of the receiving water will not be of such an extent to cause a measurable decrease in crop production." The EPA Letter at 1 states: "Our major concerns include . . . [t]he procedures for calculating effluent limits protective of irrigation, especially Tier 2." The record does not, however, support Powder River's conclusion that the Tier 2 methodology is "scientifically flawed" or will result in produced water unsuitable for agricultural irrigation. Powder River itself acknowledges that WDEQ continues to utilize the methodology. See SOR at 19. Further, Lance correctly states that it will operate under a "valid existing [surface] discharge permit," which was issued pursuant to specific State program requirements and that has not been challenged by EPA, which has oversight authority under the CWA. Answer at 12. Lance also notes that the permit sets specific effluent limits designed to protect agricultural and other human uses, as well as fish, wildlife, and other natural resource values, and contains "fourteen pages of robust reporting and monitoring requirements" and "additional anti-degradation and protective measures." *Id.*

Powder River presents no evidence that Lance will fail to comply with Federal and State permitting requirements, that Federal and State standards will not be met, or that BLM otherwise erred in its impacts analysis. Powder River has not established a NEPA violation based on BLM's failure adequately to consider the likely

²¹ (...continued)

discharges, "without further evaluation of the analyses underlying those CWA decisions," noting: "[T]here is ample judicial precedent to allow BLM to analyze water quality impacts for NEPA purposes *by describing how compliance with state permit conditions will impact water quality.*" *Id.* at 5 (emphasis added).

environmental impacts associated with produced water from the CBNG wells under the POD.

IV. CONCLUSION

We conclude, therefore, that absent any showing by Powder River that BLM violated section 102(2)(C) of NEPA, the Deputy State Director's December 2009 SDR decision, to the extent it approved the Field Manager's July 2009 FONSI/DR approving existing activities under the AUZ POD, is properly affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Lance's motion to dismiss Powder River's appeal is denied, and the Deputy State Director's December 2009 SDR decision, to the extent it approved existing activities, is affirmed.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge