WYOMING WILDLIFE FEDERATION, *et al*.

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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

WYOMING WILDLIFE FEDERATION, *et al*.

IBLA 2012-279 Decided May 21, 2014

Appeal from a decision by the Wyoming State Office, Bureau of Land Management, on State Director Review of the decision by the Rawlins Field Office, approving two plans of development in the Atlantic Rim Project Area. SDR-WY-2011-31 (Pt. 2).

Affirmed.

1. National Environmental Policy Act of 1969: Generally--National Environmental Policy Act of 1969: Environmental Statements

   A Federal agency must discuss mitigation measures in its NEPA documents so environmental consequences can be fairly evaluated under 42 U.S.C. § 4332(2)(C)(ii). Without such a discussion, the agency cannot properly evaluate the severity of the adverse effects, which is a necessary component of its taking a "hard look" at the environmental consequences of a proposed Federal action. NEPA does not impose a substantive requirement on Federal agencies to actually formulate and adopt a complete mitigation plan before it can act to approve a proposed action. Mitigation measures are neither a substantive nor enforceable requirement under NEPA.

APPEARANCES: Theodore Hewitt, Esq., Michael Soules, Esq., Boulder, Colorado, for Appellant; 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 JACKSON

The Wyoming and National Wildlife Federations (collectively WWF) appeal from the August 1, 2012, decision by the Wyoming State Office, Bureau of Land Management (BLM), on State Director Review (SDR) of the approval by the BLM Rawlins Field Office (RFO) of two plans of development (PODs). RFO's approval was reflected in a Decision Record (DR), which included and was based on a Finding of No Significant Impact (FONSI) and Environmental Assessment No. DOI-BLM-WY-030-2009-0155 (EA) prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). For the reasons discussed below, we affirm BLM's decision and its upholding of that DR and FONSI.

Background

Double Eagle Production Company (Double Eagle) proposed PODs for subunits G and I of its Catalina Unit (Catalina G and I)[1] and submitted related Applications for Permit to Drill (APDs) in 2005, followed by a request for a right-of-way (ROW) to access these and other drilling opportunities in the area. The APDs were posted for public review in May of 2005, but BLM deferred further action on them, its proposed PODs, and the requested ROW pending completion of an environmental impact statement (EIS) for the operator-proposed Atlantic Rim Natural Gas Field Development Project (Atlantic Rim Project). *See* 66 Fed. Reg. 33975 (June 26, 2001). As then envisioned, up to 3,880 wells would be drilled over 6 to 10 years in southwestern Carbon County by Double Eagle and others, "with a 20 to 30 year expected life-of-project." *Id.* at 33976. BLM approved a plan to manage development in the 270,080-acre Atlantic Rim Project Area (ARPA) when it issued a record of decision (ROD) based on its Final Environmental Impact Statement for the Atlantic Rim Project (FEIS). *See* 72 Fed. Reg. 28518 (May 21, 2007).

RFO established performance goals *(e.g.,* 6.5 acres per newly-drilled well, no more than 7,600 newly-disturbed acres at any one time, and a maximum of 13,600 acres disturbed over the life of the Project), adopted performance requirements (*e.g.*, best management practices (BMPs), conditions of approval (COAs), and protective stipulations[2]), and instituted an adaptive management

[1] Catalina G and I are in T. 16 N., R. 92 W. and T. 17 N., R. 91 W., 6th Principal Meridian, Carbon County, Wyoming.

[2] For example, any approved POD within the Project area must prohibit surface disturbance or occupancy within 0.25 miles of the perimeter of an occupied lek, as

(continued...)

program to ensure that performance goals were met or re-evaluated in the ARPA. ROD at 10-11, 21-22; *see, e.g.*, ROD, Appx. B (Performance-Based Monitoring and Best Management Practices).[3] The ROD identified a Review Team to evaluate mitigation efforts against environmental impacts predicted in the FEIS by monitoring impacts, gathering data, and making changes in its mitigation tactics as circumstances and conditions may then mandate.[4] *See* ROD at 21-22; *id.*, Appx. B. This process of adaptive management would occur on both a Project-wide and site-specific basis, with operators required to monitor the effect of their development activities and submit wildlife, habitat, and reclamation reports and operating plans for the Review Team to consider, which could recommend changes in current and future mitigation measures. *See* ROD at 3, A-5 to A-6, B-4. RFO would implement adaptive management throughout the life of the POD based on monitoring results. ROD at B-3. WWF and others timely appealed to the Board, but their appeals were withdrawn after they sought judicial review of the ROD.

The Federal District Court denied motions for a preliminary injunction and then granted the Government's motion for summary judgment. *See Natural Res. Def. Council v. Kempthorne* (*NRDC*), 525 F. Supp. 2d 115 (D.D.C. 2007); *Theodore Roosevelt Conservation P'ship v. Salazar*, 605 F. Supp. 2d 263 (D.D.C. 2009). Since it found the ROD incorporated multiple mitigation techniques, the District Court rejected WWF's claim that adaptive management under that ROD was too amorphous

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[2] (...continued)
well as human activity in that area between 6:00 p.m. and 9:00 a.m. during critical sage grouse breeding periods (from Mar. 1 to May 20). ROD at B-16. To reduce raptor predation, surface disturbance and other actions that create permanent, high-profile structures (*e.g.*, buildings, storage tanks, and overhead power lines) cannot be constructed within 1.0 mile of a lek, as determined on a case-by-case basis. *Id*. Surface disturbance and disruptive activities will not be allowed within 2.0 miles of an occupied lek or in nesting and early brood-rearing habitat associated with individual leks (when identified and delineated) from Mar. 1 to July 15. *Id.*

[3] In its rules implementing NEPA, the Department defines adaptive management as "a system of management practices based on clearly identified outcomes and monitoring to determine whether management actions are meeting desired outcomes; and, if not, facilitating management changes that will best ensure that outcomes are met or re-evaluated. Adaptive management recognizes that knowledge about natural resource systems is sometimes uncertain." 43 C.F.R. § 46.30; *see also* www.doi.gov/initiatives/AdaptiveManagement/TechGuide.pdf (technical guidance for implementing adaptive management within the Department).

[4] RFO noted that, "in most cases, monitoring must occur for several years to detect trends and establish that successful mitigation has occurred." ROD at 20.

to mitigate environmental impacts and ruled: "NEPA does not prevent agencies from adopting mitigation techniques and acknowledging they may be adjusted later depending on their effectiveness." 605 F. Supp. 2d at 280. On appeal, the Court of Appeals similarly concluded: "By setting forth both fixed mitigation measures and an adaptive management plan, the [FEIS] amply fulfills NEPA's mandate to discuss mitigation measures. We can require no more." *Theodore Roosevelt Conservation P'ship v. Salazar* (*TRCP*), 616 F.3d 497, 517 (D.C. Cir. 2010).[5]

RFO was then preparing an EA for the Double Eagle PODs, which was tiered to the FEIS and made available for public comment on January 27, 2011. *See* WWF Comments, dated Feb. 11, 2011. WWF contended that RFO was precluded from tiering its EA to the FEIS because Double Eagle had not submitted reports or conducted wildlife monitoring studies/surveys specified in the ROD. *Id.* It provided RFO with the Fish & Wildlife Service finding (FWS Finding) on petitions to list the Greater Sage-grouse as endangered or threatened under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2006), *see* 75 Fed. Reg. 13910 (Mar. 23, 2010), and a monograph discussing the effect of energy development on Sage-grouse that was cited in the FWS Finding and published by the U.S. Geological Survey.[6] WWF urged RFO to incorporate this new information into its decision-making process and claimed that natural gas development was impacting Sage-grouse at a level beyond what was discussed in the FEIS. *See* Summary of EA Comments and BLM Responses at 1-2, 5.

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[5] As found by the Court of Appeals, the adaptive management plan specified in the ROD outlined performance goals but provided that "wildlife monitoring and protection measures developed to fulfill these goals are not fixed, but flexible," because they could be adjusted by the ROD's Review Team. *TRCP*, 616 F.3d at 516; *see id*. ("[the ROD] also discusses adapting monitoring efforts in response to observed trends"). The Court then added: "While the exact application of mitigation measures will be determined on a site-specific basis, the adaptive management plan also incorporates a detailed, thirteen-page list of specific protective measures that the review team is to consider for each drill plan." *Id.* Although that Review Team met in 2007 but was not formally constituted until its charter was approved in December 2008, we note it has met annually since then, as required by the ROD.

[6] This cited monograph is David Naugle *et al.*, "Energy Development and Greater Sage-Grouse," which was published in ECOLOGY AND CONSERVATION OF GREATER SAGE-GROUSE: A LANDSCAPE SPECIES AND ITS HABITATS, STUDIES IN AVIAN BIOLOGY Vol. 38, Ch. 21 (S. T. Knick and J. W. Connelly, eds., 2011) (Naugle Study). *See* Statement of Reasons (SOR) at 15 n.7; *id.*, Ex. M. The Naugle Study reviews scientific literature that documents negative biological responses of sage-grouse to oil and gas development.

The proposed action analyzed in the EA was to approve both PODs, their APDs, and an access route through relatively undisturbed areas of the ARPA; Alternative A was similar, but would route access through an area already disturbed and impacted by drilling and related activities.[7] The EA assessed these alternatives under Wyoming Instruction Memorandum, "Greater Sage-grouse Habitat Management Policy on Wyoming Administered Lands including the Federal Mineral Estate," WY-IM-2010-12 (WIM), which was based in part on the Naugle Study. *See* WIM at 8. Since the proposed PODs and APDs did not include a Greater Sage-grouse Core Population Area, RFO analyzed Sage-grouse impacts within a 4-mile buffer zone around each POD area, as required by the WIM, found the loss of shrubs and indirect impacts from dust, noise, and continued human presence during drilling and production under the PODs would disturb Sage-grouse and result in their loss of habitat, but concluded that those impacts were no greater than the significant impacts analyzed in the FEIS. EA at 5, 41-42 (citing FEIS at 4-75 to 4-76).

The RFO Field Manager issued his FONSI and DR on June 30, 2011. He found Alternative A "incorporates all mitigation measures, best management practices and operating practices found in the [FEIS], ROD, the EA and associated appendices" and that his selection of that alternative "would not create any additional significant effects (above and what was already disclosed in the [FEIS] and ROD)." FONSI at 1. The Field Manager selected Alternative A and adopted all project design features identified in the EA and its appendices. DR at 2; *see* EA, Appendix 3 (Alternative A General Design Features). He recognized that inventory and monitoring frequency under the ROD was "dependent upon the level of development in the project area" and that drilling in the ARPA was then occurring at less than half the rate predicted in the FEIS. DR at 5 (citing FEIS at 2-3, E-2 to E-3).

WWF filed a timely request for SDR, SDR-WY-2011-31. *See* 43 C.F.R. § 3165.3(b).[8] WWF claimed the EA was improperly tiered to the FEIS because RFO had not fully implemented the adaptive management plan under the ROD and because a supplemental EIS was required to address the new information it had provided (*i.e.*, the FWS Finding and Naugle Study). The Wyoming Deputy State Director rejected WWF's claims of error by decision dated August 1, 2012 (SDR

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[7] The no action alternative was considered in the FEIS. Since the ROD approved coalbed methane and natural gas development of up to 2,000 wells and infrastructure, the no action alternative at the site-specific level was not to approve individual APDs. The EA considered that no action alternative. *See* EA at 15.v

[8] Double Eagle also requested SDR, claiming that RFO should have approved its proposed access route rather than Alternative A, which would require it to use a longer route. *See* SDR-WY-012-05. Its request for SDR was denied on Mar. 5, 2012.

Decision), and affirmed RFO's DR, FONSI, and EA. SDR Decision at 5. WWF filed a timely notice of appeal and stay petition, which BLM opposed. We denied their stay petition by order dated March 14, 2013, after which WWF filed its SOR. BLM responded by incorporating its opposition to a stay as its response to the SOR (Answer). This matter is now ripe for our resolution.

Arguments on Appeal

WWF contends the EA was improperly tiered to the FEIS: "Because BLM failed to implement the adaptive management process required by the ROD, the Atlantic RIM Project being developed on the ground is a fundamentally different project than the one that was authorized in the ROD." SOR at 22; *see* SOR at 21-23.[9] Thus, according to WWF, RFO did not take a hard look at impacts and should have issued a supplemental EIS to assess how its failure to comply with and implement the ROD affected the surrounding environment before the EA could be tiered properly to that EIS. WWF also contends the FWS Finding and Naugle Study that it provided to RFO constitute significant new information, which were unavailable when the FEIS was prepared and that undercut the efficacy of lek buffer zones that it specified to protect Greater Sage-grouse. *See id.* at 23-28. By failing to address that finding and study in the EA, WWF contends BLM failed to take a "hard look" at the impacts they discussed and, therefore, violated NEPA. *Id.* at 28.

BLM counters by asserting: "Appellants' claim that the [Atlantic Rim P]roject has changed fails because it is grounded in the erroneous supposition that RFO has not complied with the adaptive management process of the Atlantic Rim Project ROD." Answer at 13. In support, it details how RFO appropriately implemented that adaptive management plan, "commensurate with the greatly reduced level of proposed activity." *Id.* at 6; *see id.* at 6-8, 13-14. BLM avers that "potential environmental impacts of full development of the Atlantic Rim Project, including the potential impacts associated implementing the alternatives with varying levels of mitigation and no adaptive management, were disclosed and thoroughly analyzed in the FEIS" and that the site-specific EA for these proposed PODs "identified no significant impacts beyond those identified in the FEIS." *Id.* at 14 (citing FEIS at ES-1 to ES-2). Since WWF "identified no significant new circumstances" or any impact not already addressed in the FEIS and EA, BLM contends it properly tiered the EA to the FEIS and that appellant's claim to the contrary "lacks legal merit." *Id.* at 14, 18; *see id.* at 18-20.

[9] The ROD outlined an adaptive management plan for monitoring, evaluating, and mitigating potential significant impacts that development could have on vulnerable resources, as identified in the FEIS.

BLM also disagrees with WWF's claim that RFO failed to consider new information and was required to prepare a new EIS to address the FWS Finding and Naugle Study that it provided to RFO. *See* Answer at 14-18. It emphasizes that the FEIS recognized that full field development of the ARPA would cause a substantial loss of habitat and disruption to Sage-grouse even if its suite of mitigation measures was fully implemented. *Id.* at 16. BLM then argues:

> In light of the FEIS's analysis, while appellants may have identified new circumstances or information not expressly considered in the FEIS, the information is not relevant to environmental concerns for purposes of [40 C.F.R. § 1502.9(c)(1)(ii)[10]], i.e., the information does not show that the remaining action will affect the environment in a significant manner or to a significant extent not already considered.

Id.; *see id.* at 18 ("Appellants have failed to show that development of the Catalina G and I PODs will affect the environment in a significant manner or to a significant extent not already considered in the FEIS.").

Discussion

Section 102(2)(C) of NEPA requires Federal agencies to take a "hard look" at the potential environmental impacts of a proposed Federal action and alternatives thereto. *See, e.g., Southern Utah Wilderness Alliance* (*SUWA*), 182 IBLA 377, 386 (2012). When BLM tiers an EA to a programmatic EIS, the record must show it considered all relevant matters of environmental concern and took a hard look at potentially significant environmental consequences of the project under review. *See* 40 C.F.R. § 1508.13; 43 C.F.R. § 46.140; *Western Watersheds Project*, 183 IBLA 297, 318 (2013); *SUWA*, 182 IBLA at 386, and cases cited. An appellant seeking to overcome a decision based on an EA tiered to an EIS must 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. *See WildEarth Guardians*, 182 IBLA 100, 106 (2012); *SUWA*, 177 IBLA 29, 34 (2009). A simple disagreement with the outcome, BLM's analysis, or

[10] The rule at 40 C.F.R. § 1502.9(c)(1) was issued by the Council on Environmental Quality (CEQ) to implement NEPA and requires Agencies to prepare supplements to their environmental impact statements if they make "substantial changes in the proposed action that are relevant to environmental concerns" or if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(I-ii).

its decision choice is not proof of a NEPA violation. *See, e.g., Western Exploration Inc.*, 169 IBLA 388, 404 (2006).

The burden on WWF is to demonstrate, by a preponderance of the evidence, that BLM failed adequately to take a hard look at environmental effects and to consider significant new information. We address its claims separately below but find it has not preponderated in showing that RFO violated applicable NEPA requirements when it prepared and issued this EA, FONSI, and DR.

I. RFO Did not Err in Tiering its EA to the FEIS.

WWF claims, as it did on SDR, that RFO violated NEPA because it failed to implement fully the adaptive management program identified in the ROD or prepare a supplemental EIS (SEIS) to address the environmental impacts of that management failure. *See* SOR at 21-22; SDR Decision at 2-4. By arguing that the DR and FONSI must be set aside, based upon an alleged failure by RFO to implement an adaptive management program for the ARPA or prepare a SEIS, we find that it is laboring under several misconceptions and, therefore, affirm the BLM decision on SDR.

WWF asserts that NEPA requires RFO to implement and enforce the mitigation measure adopted in the ROD. *See* SOR at 17 ("[T]o comply with NEPA, BLM must implement mitigation measures that will minimize, rectify, or eliminate adverse impacts over time."). We disagree.[11]

[1] NEPA is a procedural statute that ensures the Federal government has detailed information concerning a proposed action's foreseeable and significant environmental impacts, as well as information on whether such impacts can be avoided. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1; *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004). A Federal agency must therefore discuss mitigation measures in its NEPA documents so their environmental consequences can be fairly evaluated:

> To be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences. The requirement that an EIS contain a detailed

[11] WWF also maintains that since the Court of Appeals held "the validity of the ROD is contingent on its adaptive management program," RFO is legally obligated to fully implement that program. SOR at 21 (citing *TRCP*, 616 F.3d at 515). The Court held the FEIS and ROD met the procedural requirements of NEPA, *see e.g.*, *TRCP*, 616 F.3d at 517, but we do not find it placed any contingencies on the validity of that ROD under NEPA, as is here claimed by WWF.

discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ's implementing regulations. Implicit in NEPA's demand that an agency prepare a detailed statement on "any adverse environmental effects which cannot be avoided should the proposal be implemented," 42 U.S.C. § 4332(C)(ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided. *See* D. Mandelker, NEPA Law and Litigation § 10:38 (1984). More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects. An adverse effect that can be fully remedied by, for example, an inconsequential public expenditure is certainly not as serious as a similar effect that can only be modestly ameliorated through the commitment of vast public and private resources. Recognizing the importance of such a discussion in guaranteeing that the agency has taken a "hard look" at the environmental consequences of proposed federal action, CEQ regulations require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b) (1987), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c).

There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. In this case, the off-site effects on air quality and on the mule deer herd cannot be mitigated unless nonfederal government agencies take appropriate action. Since it is those state and local governmental bodies that have jurisdiction over the area in which the adverse effects need be addressed and since they have the authority to mitigate them, it would be incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary. Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms-as opposed to substantive, result-based standards-to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act. *Cf. Baltimore Gas &*

> *Electric Co.*, 462 U.S., at 100 ("NEPA does not require agencies to adopt any particular internal decisionmaking structure").
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> We thus conclude that the Court of Appeals erred, first, in assuming that "NEPA requires that 'action be taken to mitigate the adverse effects of major federal actions,'" [*Meadow Valley v. Regional Forester Citizens Council*, 833 F.2d. 810, 819 (9th Cir. 1987)] (quoting *Stop H-3 Assn. v. Brinegar,* 389 F.Supp., [1102, 1111 (D. Hawaii. 1987)], and, second, in finding that this substantive requirement entails the further duty to include in every EIS "a detailed explanation of specific measures which *will* be employed to mitigate the adverse impacts of a proposed action," 833 F.2d, at 819 (emphasis supplied).

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-54 (1989) (footnotes omitted); *see also* 40 C.F.R. §§ 1502.14(f), 1502.16(e)-(h), 1505.2(c), 1508.25(b)(3); 43 C.F.R. § 46.130. Simply stated, mitigation measures are not a substantive obligation under NEPA.[12] WWF has cited no law, rule, or precedent to the contrary that supports its contention that NEPA is violated whenever BLM fails fully to implement a mitigation measure or an adaptive management program.[13]

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[12] This is not to suggest that mitigation measures are unenforceable. To the contrary, a failure to comply with lease terms or subsequently-approved PODs and APDs renders leases and lessees subject to cancellation and penalties. *See* Mineral Leasing Act, 30 U.S.C. § 189 (2006); 43 C.F.R. §§ 3108.3 (cancellation), 3163.1 (noncompliance); *see* 43 C.F.R. § 3101.1-2 (BLM may require reasonable mitigation measures to ensure that proposed operations minimize adverse impacts, consistent with granted lease rights); Onshore Oil and Gas Order Number 1, 72 Fed. Reg. 10308 (Mar. 7, 2007) (approval of operations); ROD at 3 ("Operators are responsible for demonstrating successful achievement of Performance Goals. In the absence of sufficient data illustrating Operator achievement of Performance Goals, the BLM will use a conservative approach when considering additional approvals.").

[13] Even if WWF's legal theory had some merit under NEPA, we would find it has not shown that RFO failed adequately to implement the ROD's adaptive management program. BLM asserts that RFO implemented an adequate adaptive management program, given that development was proceeding "at a much reduced pace than anticipated [in the FEIS]." Answer at 13-14. For example, the Review Team documented its progress towards attaining performance goals and published those documents online, including Wildlife Monitoring Reports (2007 through 2010), information on the number of wells drilled, their operating status, total ground disturbance, and reclamation reports. Double Eagle and other operators in the ARPA

(continued...)

WWF contends BLM must "complete a new and independent Atlantic Rim EIS for the Catalina PODs or a Supplemental EIS to discuss the unexamined environmental harms being inflicted on the [ARPA]" because "the Atlantic Rim Project being developed on the ground is a fundamentally different project than the one that was authorized in the ROD." SOR at 22; *see id*. at 21 ("conditions and environmental effects described in the Atlantic Rim EIS are not valid because . . . on-going natural gas development has altered the environmental conditions in the ARPA"). We disagree.

Rules implementing NEPA require an SEIS if the "agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1)(I). More specifically, a "substantial change that requires an SEIS under 40 C.F.R. § 1502.9(c)(1)(I) is one that is *not* 'qualitatively within the spectrum of alternatives that were discussed' in a prior FEIS." *In re Operation of Mo. River Sys. Litig*., 516 F.3d 688, 693 (8th Cir. 2008) (quoting *Dubois v. U.S. Dep't of Agric.,* 102 F.3d 1273, 1292 (1st Cir. 1996)); *accord Wyoming v. U.S. Dept. of Agric.*, 661 F.3d 1209, 1260 (10th Cir. 2011); *see also In Re Stratton Hog Timber Sale*, 160 IBLA 329, 334 (2004). The FEIS discussed multiple alternatives, the nature, magnitude, and scope of their impacts, and a variety of measures to mitigate those impacts. *See TRCP*, 616 F.3d at 517 (citing *NRDC*, 525 F. Supp. 2d at 122). The EA considered site-specific data on Greater Sage-grouse habitat and other resources and identified BMPs, COAs, design requirements, operating standards, and environmentally-protective stipulations from the FEIS that were intended to mitigate or reduce substantial impacts. *See* EA at Appx. 3, 4; FEIS at Appx. B; *Western Watersheds Project,* 175 IBLA 237, 249 (2008); *see also* DR at 2 ("I have also decided to adopt and require . . . all the mitigation measures, best management practices and operator committed practices found in the Atlantic Rim Final EIS, ROD, the EA and their appendices.").

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[13] (...continued)
"supplied BLM with Annual Operating Plans[,] including Final Annual Reports acceptable to the RFO, at the annual Atlantic Rim Review Team meetings," and the record shows these data were utilized to mitigate the impacts of development in the ARPA. Summary of EA Comments and BLM Responses at 5; *see* EA, Appx. 5; IM WYD-03-2013-006, *Impact Thresholds on Mule Deer Migration Corridors and Crucial Winter Range in the Atlantic Rim Project Area* (July 12, 2013). WWF may believe implementation of the ROD is wholly deficient, but it did not demonstrate that deficiency by a preponderance of the evidence. *See WildEarth Guardians*, 182 IBLA at 106; *SUWA*, 177 IBLA at 34; *see also Nat'l Wildlife Fed'n*, 170 IBLA 240, 251 (2006).

WWF has not shown RFO failed to consider a substantial environmental question of material significance to the proposed action before it issued this DR and FONSI. Displeasure with or dislike for a decision is not enough to show BLM disregarded its obligations under NEPA. *See WildEarth Guardians*, 182 IBLA at 105; *see also, Birch Creek Ranch LLC,* 184 IBLA 307, 330 (2014) (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"). Beyond quibbling over how well RFO is implementing adaptive management under the ROD, *see supra* n.13, WWF identifies no environmental issue that was not addressed in the FEIS and/or EA. Nor has it proffered any objective evidence showing that a failure to implement fully an adaptive management program in the ARPA is likely to result environmental consequences not evaluated in the FEIS and EA. *See* 43 C.F.R. § 46.120.[14]

As defined and explained by CEQ: "[T]iering is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." 40 C.F.R. § 1508.28(b). WWF has not met its burden to show that RFO erred in tiering this EA to the FEIS or that the FEIS must be supplemented simply because RFO may have failed to implement fully the ROD's adaptive management plan. We therefore affirm that aspect of the decision on appeal. *See* SDR Decision at 2-4.

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[14] The Department rule at 43 C.F.R. § 46.120(c) states:

> An existing environmental analysis prepared pursuant to NEPA and [CEQ] regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.

The ROD utilized an adaptive management program to reduce significant impacts that would undoubtedly result from approval of the Atlantic Rim. As discussed below, BLM necessarily considered the consequences of a faulty, unimplemented, or wholly inadequate mitigation program. We are unpersuaded that BLM must consider a possible program failure in a NEPA document before it can act to approve an action that is consistent with managing public lands and resources in conformity with the ROD and approved Atlantic Rim Project.

II. RFO Was Not Required to Supplement its NEPA Analysis to Address the FWS Finding and Naugle Study.

WWF separately contends "BLM failed to take a hard look at significant new information regarding greater sage-grouse, which Appellants presented to BLM prior to the publication of the Catalina EA." SOR at 23. It claims RFO failed adequately to consider the FWS Finding and Naugle Study in its EA, FONSI, and DR. *See* SOR at 23-28. WWF argues that rather than take this "new information into account by performing a Supplemental EIS, BLM failed to consider these studies at all." *Id.* at 26-27; *see id*. at 28 ("BLM gave no reasoned explanation for why it did not look at or take into account the new studies"). We are unpersuaded and find that WWF has failed to show error under 40 C.F.R. § 1502.9(c)(1)(ii) or that RFO was otherwise required to address the FWS Finding and Naugle Study in its EA, FONSI, and/or DR.

Rules implementing NEPA require a supplemental environmental document when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). The Supreme Court has held a "rule of reason" applies when evaluating new information to determine whether a supplemental NEPA document is required and that an

> [a]pplication of the "rule of reason" thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 373-74 (1989) (footnote omitted). The Board has applied that ruling and held "an appellant must not only show there is something new, but also that these new circumstances (or information) present 'a seriously different picture of the likely environmental consequences of the proposed action not adequately envisioned by the original EIS.'" *SUWA*, 177 IBLA at 36 (quoting *Forest Guardians*, 170 IBLA 80, 96 (2006)), and cases cited.

Appellants claim RFO failed to consider the FWS Finding and Naugle Study in its EA, FONSI, and DR. SOR at 23-28. According to WWF, that finding and study show "natural gas development inflicts more significant harm on sage-grouse and its habitat than BLM believed when it issued the ROD" and that the "quarter-mile lek buffer, which the Atlantic Rim EIS and the Catalina EA assume protects sage grouse,

has 'no support in published literature,' as 'affording any measure of protection [for the Greater Sage-grouse].'" *Id.* at 23, 25-26 (quoting 75 Fed. Reg. at 13978 [FWS Finding]). It states Naugle found "sage-grouse may exhibit behavioral impacts early in the energy development process, but other effects may not appear until three to four years after the onset of development." *Id.* at 26 (citing Naugle Study at 16-17). WWF recognizes the FEIS found "energy development negatively impacts sage-grouse breeding and nesting areas, displaces sage-grouse, causes nest abandonment, and destroys sage-grouse habitat," the ROD established performance goals (*e.g.*, "provide well-dispersed sage-grouse breeding, nesting, brood rearing, and winter habitat"), and that the FEIS and ROD identify multiple mitigation measures. SOR at 24-25 (quoting ROD at 19) (citing FEIS at 3-96, 4-75 to 4-76, ROD at B-16). WWF also recognizes the Naugle Study was used in the WIM and that RFO applied and used the WIM in this EA. *See* SOR at 27 n.11; *see also* FEIS at R-15 (Naugle Study).

WWF makes broad generalizations about what is in the FWS Finding and Naugle Study and what is in the FEIS, EA, ROD, and DR, but it does not articulate how or in what specific way impacts identified in that finding and study differ significantly or substantially from those discussed in the FEIS and EA. Nor do they present substantial new information showing that mitigation measures required by the ROD and DR are (or will be) inadequate.[15] WWF simply has not carried its burden to show that the FWS Finding and/or Naugle Study present a seriously different picture of likely environmental consequences than was painted in the FEIS and EA or that RFO was otherwise required to prepare a supplemental environmental document under 43 C.F.R. § 1502.9(c)(1)(ii). *See SUWA,* 177 IBLA at 36. We therefore affirm that aspect of the decision here appealed. *See* SDR Decision at 4-6.

[15] The only specific mentioned by WWF is the continuing efficacy of the quarter-mile lek buffer zone to protect sage-grouse, but we do not read the record as showing that doubts about the efficacy of this zone were new or different from those identified in the FEIS and EA or that BLM placed seminal reliance on that zone to protect Sage-grouse. Rather, it shows RFO used data and coordinated with biologists from FWS and the State to develop measures to mitigate impacts on Sage-grouse that are now required by the DR. *See* EA at 49, *id.*, Appx. 3, 4. For example, in addition to a no surface occupancy of 0.25-miles to protect leks, RFO specified that no human activity can occur within that perimeter between 6 PM and 9 AM from Mar. 1 through May 20, no equipment could exceed 55 decibels, and no activities would be permitted within 2 miles of an occupied lek or in Greater Sage-grouse nesting and early brood-rearing habitat associated with individually identified leks from Mar. 1 through July 15.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision by the Deputy State Director, dated August 1, 2012, is affirmed.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
T. Britt Price
Administrative Judge