



## GREAT BASIN RESOURCE WATCH

185 IBLA 1

Decided June 30, 2014



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

GREAT BASIN RESOURCE WATCH

IBLA 2011-60

Decided June 30, 2014

Appeal from a decision of the Humboldt River Field Office, Bureau of Land Management, approving the Coeur Rochester Mine Expansion Project, Plan of Operation Amendment No. 8. EA DOI-BLM-NV-W010-2010-001-EA.

Affirmed.

1. Federal Land Policy and Management Act of 1976:  
Surface Management--Mining Claims: Surface  
Management: Generally--Water Pollution Control

Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006), requires the Secretary to prevent unnecessary or undue degradation of the lands. BLM's Surface Management regulations at 43 C.F.R. § 3809.5 define unnecessary or undue degradation as "conditions, activities, or practices" that, *inter alia*, "[f]ail to comply with . . . the performance standards in § 3809.420" which include "applicable Federal and state water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 et seq.)." 43 C.F.R. § 3809.420(b)(5). FLPMA does not expand the requirements of the Clean Water Act, under which the Environmental Protection Agency and the States are responsible for regulating the discharge of pollutants. Minor exceedances of a State water quality standard will not be considered unnecessary or undue degradation where the State agency has issued a permit.

2. Administrative Procedure: Generally--Administrative Procedure: Adjudication--Administrative Procedure: Standing--Administrative Review: Generally--Rules of Practice: Board of Land Appeals

Under 43 C.F.R. § 4.410(c), a party to the case may raise on appeal only issues the party raised in its earlier participation in BLM's decisionmaking process or those which have arisen since the close of the comment period.

3. Mining Claims: Surface Management: Generally

Under 43 C.F.R. § 3809.401(b), an initial mining plan of operations must include provisions for reclamation, closure, and post-closure management. BLM's regulations plainly distinguish the closure and reclamation plan required by § 3809.401(b) for a plan modification for further exploration or development from a plan modification for final closure under § 3809.431(c).

4. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

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." An agency may prepare an EA first to determine whether an EIS is necessary. If the EA leads the agency to conclude that the proposed action will not significantly affect the environment or that any significant impacts can be mitigated to insignificance, the agency may issue a FONSI and forego the further step of preparing an EIS.

5. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

Determining the significance of the impacts of a proposed action "requires considerations of both context and intensity." 40 C.F.R. § 1508.27. Analyzing significance in

terms of “context” involves consideration of the affected region, the affected interests, and the locality. “Intensity” or the “severity of an impact” involves factors such as: (1) beneficial and adverse impacts; (2) effects on public health or safety; (3) unique characteristics of the geographic area including proximity to wetlands, cultural or historic resources, park lands, or ecologically critical areas; (4) the degree to which the effects are likely to be highly controversial; (5) the degree to which the environmental effects are uncertain or involve unknown or unique risks; (6) the degree to which the action may set a precedent; (7) whether the action is related to others that have individually insignificant but cumulatively significant impacts; (8) the degree to which the action may adversely affect places listed in the National Register of Historic Places or may cause the loss or destruction of significant historical, cultural, or scientific resources; (9) the degree to which the action may have an adverse effect on a threatened or endangered species or its habitat; and (10) whether the action risks violating federal, state, or local law or requirements that protect the environment.

6. Environmental Quality: Environmental Statements--  
National Environmental Policy Act of 1969:  
Environmental Statements

In determining whether a proposed action calls for an EIS, it is sometimes helpful to consider first whether or not similar activities have been found to require an EIS, then determine how the proposal differs from the norm, and finally determine whether these differences are significant enough to warrant a different result.

7. Environmental Quality: Environmental Statements--  
National Environmental Policy Act of 1969:  
Environmental Statements

In assessing the significance of a proposed action, BLM is required to consider whether the action is related to others that have individually insignificant but cumulatively significant impacts.

8. Environmental Quality: Environmental Statements--  
National Environmental Policy Act of 1969:  
Environmental Statements

The Board applies an “independent utility” test to determine whether actions are so connected as to require analysis in a single environmental statement. When one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not “connected” for NEPA’s purposes.

9. Environmental Quality: Environmental Statements--  
National Environmental Policy Act of 1969:  
Environmental Statements

When an environmental analysis concludes that a project will have virtually no effect on cumulative impacts, it is unnecessary for the agency to detail other actions.

APPEARANCES: Roger Flynn, Esq., and Jeffrey C. Parson, Esq., Lyons, Colorado, for appellant; Elizabeth A. Gobeski, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Robert A Maynard, Esq., and Erica E. Malmen, Esq., Boise, Idaho, and R. Timothy McCrum, Esq., and Brian Barner, Esq., Washington, D.C., for Coeur Rochester, Inc., Intervenor.

#### OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Great Basin Resource Watch (GBRW) has appealed from the October 26, 2010, Decision Record/Finding of No Significant Impact (DR/FONSI) of the Humboldt River Field Office (HRFO) in the Winnemucca, Nevada, District, Bureau of Land Management (BLM), approving the Coeur Rochester Mine Expansion Project, Plan of Operation Amendment No. 8 (POA8), that was based on Environmental Analysis (EA) DOI-BLM-NV-W010-2010-001-EA. Under POA8, Coeur Rochester, Inc. (CRI), would expand the existing pit, which would be backfilled as the expansion proceeded to avoid formation of a pit lake. POA8 would add another heap leaching facility whose fluids would be managed separately from other leaching facilities at the site. Meanwhile, CRI would continue implementing its site-wide closure study plan to acquire necessary data for a final permanent mine closure plan. After completing the study, CRI would submit a final site closure plan.

GBRW expresses a number of objections to BLM's decision. GBRW claims that the project would violate numerous water quality standards. Statement of Reasons (SOR) at 1, 10-15. GBRW also contends it was improper for BLM to approve POA8 without a final closure and reclamation plan, along with an adequate financial guarantee or bond. *Id.* at 1, 15-20. GBRW further argues that BLM violated section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), by failing to prepare an environmental impact statement (EIS), by failing to take a hard look at the project's impacts, including its cumulative impacts, and by failing to consider an alternative of backfilling the pit lake to a higher level than that required by POA8 as approved. *Id.* at 2, 13-15, 20-25.

More fundamentally, GBRW believes that by approving POA8 without a final reclamation and closure plan, BLM failed to consider cumulative effects the project would have on the surrounding environment and has not obtained the data necessary to make a proper analysis of the impacts of its action that NEPA requires. *See* SOR at 1-2, 15-18, 24, 25-26. In GBRW's view, approval of POA8 will only exacerbate existing problems for which BLM has yet to develop a solution. BLM and CRI argue that POA8 and the final reclamation plan are not connected actions and that it properly approved POA8 while studies for the final reclamation plan were still underway. BLM Answer at 20-21; CRI Answer at 26-28. To assess the merits of GBRW's argument, one must understand how the reclamation issue developed over the history of the mine. We now turn to that history.

### *Mine History*

CRI has operated the Rochester mine since 1985, producing silver and gold from an open pit heap leach operation situated 28 miles northeast of Lovelock in Pershing County, Nevada. The permit area encompasses 4,370 acres, of which 1,714 acres have been disturbed by construction of the Rochester Pit, the Nevada Packard Pit, heap leach facilities, rock disposal sites, stockpiles, haul and access roads, and processing facilities.

CRI's 1985 Plan of Operations provided for an open pit mine, Stage I and Stage II heap leach facilities, a processing plant, rock disposal facilities, haul and access roads, and topsoil stockpiles. EA at 1-5. A drilling program identified additional ore reserves, and in 1993, BLM approved a plan amendment to extend the plan boundary to accommodate the Stage IV Heap Leach Facility and expand rock disposal sites. *Id.* In June 2000, BLM approved an expansion of the west rock disposal site, backfill of the Rochester Pit, and expansion of the Stage II Heap Leach Facility. *Id.* The nearby Nevada Packard project was incorporated in 2002.

Meanwhile, leakage from the Stage I heap leach pad was detected in 1991. Correcting this problem has been an ongoing iterative process. *See* SOR Ex. 1,

Rochester Mining Project Fact Sheet, Nevada Department of Environmental Protection (NDEP) (February 2011) (NDEP Fact Sheet) at 5-6.<sup>1/</sup>

In an August 6, 2003, decision, BLM approved POA6, which provided for expansion of the Rochester Pit, in-pit disposal of development rock, and expansion of the Stage IV Heap Leach Facility. EA at 1-5. BLM and CRI thought POA6 would extend the mine life of the Rochester and Nevada Packard Mines by 18 to 24 months. 2003 Mine Expansion EA at 2-1. The plan provided for concurrent reclamation and anticipated that final reclamation would occur in 2015. *Id.* at 2-8. Because POA6 was viewed as extending the life of the mine for up to only 2 years, BLM anticipated the need to plan for mine closure. Indeed, the perception that the mine was nearing the end of its productive life prompted consideration of post-mining use of the land. *See, e.g.*, Northern Nevada Sustainable Development in Mining Act, H.R. 3419, 109th Cong. (2005). Because unanticipated conditions had arisen during the development of the mine, BLM's August 6, 2003, decision included a stipulation (Stipulation 6) that required CRI to submit another POA that would "address final closure of the mine, including but not limited to heap leach closure, post-closure fluid management, potential pit lake, geochemistry and waste management addressing sulfide material." Aug. 6, 2003, Decision at 3. CRI was required to cooperate with BLM to initiate an EIS to analyze proposed actions for reclamation and closure of the site. *Id.*; *see* 43 C.F.R. § 3809.431(c).

In 2003, CRI proposed POA7 to expand the mine and to effect final closure and reclamation activities. *See* 70 Fed. Reg. 9,379 (Feb. 25, 2005). However, CRI withdrew the plan in 2008 after NEPA review resulted in requests for further analysis and study of other closure alternatives. Meanwhile, CRI suspended active mining operations in August 2007 but active leaching continued at the Stage II and IV facilities. EA at 1-6.

BLM did not terminate the NEPA review for final mine closure when CRI withdrew POA7. In a letter dated August 8, 2008, BLM explained that the issues that had prompted the stipulation to POA6 had not been resolved, so CRI was required to submit a "work plan detailing the studies and actions Coeur will undertake in order to develop an updated closure plan that addresses agency concerns." BLM added that the plan should address relevant comments on an October 2007 Preliminary Draft EIS.

Once CRI's closure work plan has been accepted, BLM will begin the review process for the plan amendment for expanding the Rochester Pit

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<sup>1/</sup> The EA for POA8 states that CRI is operating in compliance with an NDEP Corrective Action Plan to remedy the localized impacts from this release, and Stage I is no longer actively leaching. EA at 3-40.

and construction of the Stage III leach pad. After review of the forthcoming plan amendment for expansion, BLM will consider whether an environmental analysis of the expansion components may be considered separately from the ongoing analysis of the mine closure or whether they are connected actions. We will also consider the level of analysis (environmental assessment or environmental impact statement) that may be required.

Aug. 8, 2008, Letter from BLM at unpaginated (unp.) 2. A matter of specific concern involved management of fluids from the heap leach pads, particularly the Stage I pad where leakage had been discovered.

It is important to emphasize the timing for distinct stages for reclamation planning set forth in BLM's August 8 letter and their relationship to a future plan amendment for pit expansion. First, a "work plan" for studies would be developed and submitted to BLM; then, after the work plan was approved, the studies would be conducted. According to the letter, BLM would review the plan amendment for pit expansion *after* the *work plan* was approved which would occur *before* the studies required by the work plan had been completed. Because a closure plan could not be developed until the studies had been completed, it is clear that CRI's pit expansion amendment could be reviewed before its final closure plan was developed. Although GBRW argues that BLM "abruptly dropped th[e] requirement" to submit a reclamation/closure plan when it approved POA8, *see* SOR at 18, the above-quoted language makes it clear that BLM had previously left open the question whether the expansion proposed in POA8 could be considered separately from mine closure. A draft study plan dated November 2008 anticipated submission of a final site closure plan at the end of 2011. BLM's letter shows no intention of deferring its consideration of pit expansion and the Stage III leach pad until after 2011.

#### POA8

In December 2008, CRI submitted POA8 for the purpose of resuming and expanding mining operations. Although BLM had previously entertained the possibility of evaluating the expansion proposed in POA8 separately from its analysis of mine closure, BLM indicated otherwise a year later. In a September 2, 2009, briefing document, BLM argued that there was "a nexus that cannot be overlooked," particularly the management of fluids from the heap leach pads, based on the assumption that the "Stage III heap leach pad would be interconnected with the entire fluid management system of the mine facility." BLM claimed that POA8 would lead to cumulative impacts connected to the closure of the mine, which involved unknown risks. Contending that such impacts must be deemed significant, BLM asserted that an EIS was necessary.

Out of concern that BLM's decision to prepare an EIS instead of an EA would delay for years a project that would create up to 200 new jobs and add up to \$20 million to CRI's payroll, Nevada's governor requested that BLM first prepare an EA.<sup>2/</sup> In a letter to the governor dated September 28, 2009, BLM agreed to prepare an EA first, stating that "an EIS would be required if all impacts cannot be mitigated through the EA process." A year later, BLM issued the EA and DR/FONSI that are the subject of this appeal.

POA8 authorizes disturbance of 207.7 acres, of which 162.1 acres would be new surface disturbance. This includes extending the existing Rochester Open Pit by 38.6 acres and the construction and operation of a Stage III Heap Leach Facility.<sup>3/</sup>

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<sup>2/</sup> On average, Federal agencies take 3.4 years to prepare an EIS, but an EA usually takes half that time or less. For BLM, the average EIS took 3.67 years between 1998 and 2008. Eric S. Spengler, *A Shift in the Wind: the Siting of Wind Power Projects on Public Lands in the Obama Era*, 86 IND. L.J. 1185, 1196 (2011) (citing Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement?* 10 ENVTL. PRAC. 164, 165-67 (2008)). In an update of their study, the deWitts found that BLM's overall average preparation time for EISs increased. Piet deWitt & Carole A. deWitt, *Preparation Times for Final Environmental Impact Statements Made Available from 2007 through 2010*, 15 ENVTL. PRAC. 123, 128 (2013). Although part of the increase was attributable to EISs for resource management plans, which averaged 5.6 years, BLM's nonplanning EISs required an average of 3.9 years to complete. *Id.*

<sup>3/</sup> The EA describes CRI's proposal as follows:

Under POA No. 8, Coeur proposes to extend the existing Rochester Open Pit by 38.6 acres into existing waste rock facilities located to the west and southwest of the pit, construct a 7-acre layback to the North Highwall of the open pit, backfill the pit to preclude formation of a pit lake, build and operate a Stage III Heap Leach Facility, and construct a buttress against the southeast pit wall to provide a conveyor/pipeline corridor from the ore crushing facility to the Stage III Heap Leach Facility and the process plant. At closure, the northern portion of the Stage III Heap Leach Facility would be covered with high density polyethylene (HDPE) liner to minimize infiltration. The remainder of the facility would have an engineered soil cover. Spent process water from the Stage III Heap Leach Facility would be managed separately from the other leach facilities in 2 evaporation ponds. One 3.5-acre pond would be within the liner of the Stage III Heap Leach Facility and the other 3.0-acre pond would be within an undisturbed portion of the ancillary area adjacent to the Stage II Heap Leach Facility.

(continued...)

The EA addressed four alternatives. Alternative A, the no action alternative, would maintain the status quo and CRI would continue to operate its existing facilities and close the mine under the currently approved POA. The existing pit lake would continue.

Alternative B is the proposed action that would extend the existing pit by 38.6 acres. This alternative provides for fully backfilling the eastern portion of the pit up to an elevation of approximately 6,175 feet above medial sea level (amsl) in order to eliminate and preclude a post-mining pit lake. It also provides for constructing, operating, and closing a new heap leach pad, resulting in 145.7 acres of new disturbance; two evaporation ponds totalling approximately 6.5 acres; and pumping the Black Ridge Fault (BRF) for needed water supply. Although BLM had originally assumed that the new heap leach pad would be interconnected with the fluid management system of the mine facility, the proposed "Stage III Heap Leach Facility would be hydraulically independent of the other facilities (no commingling of long-term draindown solutions)." EA at 2-12 to 2-13; *see* BLM Answer at 20.

Under Alternative C, the pit would be backfilled to a level at approximately 6,150 feet amsl to eliminate the pit lake while still allowing evaporation to occur, thereby creating an evaporative sink. This would allow for evaporation of any water falling into the pit and not result in any permanent open water surface or any long-term flow-through to the underlying ground-water. Backfilling to 6,175 feet under Alternative B, however, would create a flow-through condition. Alternative D was developed to compare a different heap leach process.

On October 26, 2010, BLM issued the DR/FONSI, selecting Alternative B modified by Alternative D and approving the plan amendment under 43 C.F.R. Part 3809. BLM found that an EIS was unnecessary because potential environmental impacts of the action were not anticipated to significantly affect the quality of the environment.

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<sup>3/</sup> (...continued)

Constructing the Stage III Heap Leach Facility and ancillary facilities would specifically disturb approximately 162.0 acres. The 162.0 acres of new disturbance would occur on public lands administered by BLM. The other proposed facilities covered in this Environmental Assessment (EA) (*i.e.*, the expanded pit and layback of North Highwall) would be constructed on areas previously disturbed and would cover approximately 45.6 acres.

EA at 1-1.

*GBRW's Arguments on Appeal*

GBRW makes three principal challenges to BLM's action. First, GBRW argues that BLM failed to prevent "unnecessary and undue degradation" of public lands as required by section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2006), because the project is predicted to violate numerous water quality standards, particularly in regard to the effect of the pit lake on groundwater. *Id.* at 1, 10-15. Second, GBRW argues that BLM violated FLPMA by failing to require CRI to submit a closure and reclamation plan and a financial guarantee or bond. SOR at 1, 15-20. Third, GBRW argues that BLM violated section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), by failing to prepare an EIS, by failing to take a hard look at the project's impacts, including its cumulative impacts, and by failing to consider an alternative of backfilling the pit lake to a higher level than that required by POA8 as approved. *Id.* at 2, 13-15, 20-25. Although GBRW's challenges pertain to different aspects of BLM's decision, its FLPMA and NEPA claims both involve the decision to backfill the pit lake in the Rochester Pit and its effects on groundwater. Accordingly, we focus first on the pit lake.

*The Pit Lake*

When a mining pit becomes deep enough to penetrate groundwater, a lake forms from the inflow of groundwater, surface water runoff, and precipitation. EA at 3-23. In June 2000, BLM approved POA4 with stipulations that required backfilling the pit where mining has occurred below the pre-mining water table (estimated at that time to be approximately 6,120 feet amsl). The backfill was to be completed using waste rock without acid-generating potential. The western portion of the Rochester Pit that was above the pre-mining water level was backfilled with waste rock beginning in 1995. A pit lake formed in the Rochester Pit after mining ceased in 2007 that penetrated the groundwater table by approximately 225 feet. *Id.* at 3-36. In 2009, BLM rescinded authorization to backfill the eastern portion of the pit, pending further analysis, when low pH water was detected in the very bottom of the pit. *Id.* at 1-9.

As of February 2010, the pit lake water level was at 5,997 feet amsl. When the EA was prepared, the lake was about 25 feet deep and covered 2 to 3 acres. EA at 3-24. The quality of the lake water is poor, "characterized by low pH and high trace metals and sulfate . . . ." *Id.* at 3-28. Lime has been added to the lake to control acidity, but because sulfide areas have become covered with water, BLM expects the pH to become neutral and water quality to improve. *Id.* at 4-16.

Without further action, a lake would form in the pit after mine closure. Although its size would vary seasonally, it would cover approximately 16.5 acres at its largest and would be approximately 125 feet deep at its deepest part. EA at 4-10;

4-42. The pit lake would pose potential risk to humans and a number of wildlife species. *Id.* at 4-19, 4-31 to 4-32, 4-43, 5-15. Lake water would not be likely to contaminate groundwater because evaporation of water from the lake would cause groundwater to flow into the lake.

Backfilling the pit to prevent formation of a lake would limit the risk to wildlife, and BLM's EA considered two backfilling alternatives. Under Alternative C, the pit would be backfilled to a level at approximately 6,150 feet amsl to eliminate the pit lake while still allowing evaporation to occur, thereby creating an evaporative sink that would allow for evaporation of any water falling into the pit, but not result in permanent open water surface, although water would appear seasonally at the surface and a wetland would develop. Under Alternative C, there would be no long-term flow-through to the underlying ground water.

Alternative B provides for fully backfilling the eastern portion of the pit up to an elevation of approximately 6,175 feet amsl in order to eliminate and preclude a post-mining pit lake. Backfilling to 6,175 feet under Alternative B, however, would create a flow-through condition. Because it would also reduce evaporation, water entering the pit from groundwater and precipitation would flow into the groundwater, increasing the risk of groundwater contamination. The EA summarizes the effects of Alternative B as follows:

After closure, precipitation and run-off into the pit would evaporate in part, but some ground water infiltration would occur, recharging the aquifer at a low rate of approximately 2 gpm [gallons per minute] after 200 years. Levels of cadmium, lead, and manganese may exceed standards but are within the range of background conditions. Ground Water Quality is discussed in section 3.7.3.5 of the EA.

EA at Table 2.3.1.

#### *Unnecessary or Undue Degradation*

[1] GBRW has argued that the flow-through resulting from backfilling the lake would contaminate groundwater in the BRF by exceeding limits for lead and cadmium, resulting in “unnecessary or undue degradation” in violation of FLPMA and in significant impacts requiring an EIS under NEPA. Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006), requires that “[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” BLM's Surface Management regulations at 43 C.F.R. § 3809.5 define unnecessary or undue degradation as “conditions, activities, or practices” that, *inter alia*, “[f]ail to comply with . . . the performance standards in § 3809.420” which include “applicable Federal and state

water quality standards, including the Federal Water Pollution Control Act, as amended (30 U.S.C. 1151 et seq.).” 43 C.F.R. § 3809.420(b)(5).

We note that GBRW made essentially the same arguments in an appeal from BLM’s approval of another mine expansion in *Great Basin Res. Watch*, 183 IBLA 55 (2012). In that case, we agreed with BLM’s argument that the appellants were mistaken in presuming that any exceedance of a Nevada water quality standard is a *per se* violation of Nevada law and/or water quality standards. *Id.* at 62-63. We further noted that NDEP had issued a permit for the pit lake, *id.* at 63 n.9, as it did here on the basis that POA8 operations would not degrade the waters of the State. Answer at 7-8, Ex. 1; see EA at 2-18. In *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 964-66 (9th Cir. 2006), the court recognized the responsibility of the Environmental Protection Agency and NDEP for regulating the discharge of pollutants in addressing a similar challenge in a case where NDEP had issued a permit and concluded that FLPMA “does not expand the requirements of the Clean Water Act.”

In concluding that the proposed action would not result in unnecessary or undue degradation or have significant impacts, BLM’s EA and FONSI relied on Table 3.7.14 of the EA, which sets forth water quality data for the BRF including the highest, lowest, and average levels of lead and cadmium measured over a period of time. BLM concluded that the range of existing water quality conditions in the BRF includes concentrations of lead and cadmium that exceed Nevada maximum contaminant levels (MCLs) so that discharge from the backfill would not degrade water quality in the BRF. “After closure, precipitation and run-off into the pit would evaporate in part, but some ground water infiltration would occur, recharging the aquifer at a low rate of approximately 2 gpm after 200 years. Levels of cadmium, lead, and manganese may exceed standards but are within the range of background conditions.” FONSI at 3.

On the basis of data presented in Table 3.7.14, BLM concluded that the range of existing water quality conditions includes concentrations of lead and cadmium that exceed Nevada MCLs to a higher degree than any predicted exceedances in pore water in the pit backfill. Thus, “any allegedly ‘degraded’ water would flow into groundwater that is already elevated for the same constituents.” BLM Answer at 8.

However, BLM later found an error in its analysis. On March 5, 2012, BLM filed a supplemental brief explaining how its earlier conclusions concerning the background conditions of groundwater quality were incorrect. “In its Reply, GBRW attempted to discredit BLM’s argument by stating that Table 3.7.14 improperly included outlier data and thus was not truly representative of water quality in the

BRF.”<sup>4/</sup> BLM Supp. Brief at 3. After receiving GBRW’s Reply to its Answer, BLM reviewed its data and agreed with GBRW that there was not sufficient evidence in the record to support the conclusion that the range of background conditions exceeded Nevada MCLs. Nevertheless, BLM maintains that other evidence in the record supports its decision which is also confirmed by updated information developed after the discovery of BLM’s error. BLM asserts that there is no likelihood that discharge from the pit would even have localized impacts for lead or cadmium because the rate of discharge is extremely low and the originally-predicted exceedances are extremely minor. *Id.* at 4.

Although BLM may have erred in its analysis of the existing lead and cadmium levels in the BRF groundwater, BLM also argues that its geochemical model overestimated the lead and cadmium levels in the discharge from the pit because it failed to consider certain factors that are known to reduce concentrations of those metals in groundwater. First, BLM notes that its earlier analysis excluded the effects of co-precipitation, a process known to reduce trace metal concentrations. BLM Supp. Brief at 5-6. Further, BLM points out that its model used a figure representing concentrations of those metals obtained in the “first flush” of humidity cell testing which is not representative because it excludes reduced concentrations of those metals that occur in later tests. *Id.* at 6.

Accordingly, BLM ran a new geochemical model that addresses the effects of co-precipitation on groundwater. That test shows that the levels of lead and cadmium in pore water in the pit backfill will not exceed Nevada MCLs. Even so, BLM points out that this new model is overly conservative in several respects: (1) the co-precipitation processes used in the model were based on the most conservative assumptions; (2) two additional co-precipitation processes known to reduce lead and cadmium concentrations were not simulated in the modeling; (3) the model still used the “first flush” humidity cell testing results, which overestimate concentrations of lead and cadmium. BLM Supp. Brief at 8-9. Although GBRW has argued that BLM failed to prevent “unnecessary and undue degradation” because the project is predicted to violate several water quality standards, the new analysis disposes of that argument because it shows that the project is no longer predicted to violate those standards.

GBRW argues that BLM violated NEPA by failing to subject its corrected analysis to public review. GBRW overstates BLM’s public participation obligation under NEPA, and minimizes the agency’s considerable discretion. As we recently

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<sup>4/</sup> BLM noted that “GBRW’s SOR did not challenge the underlying methodology or data used by BLM to support its finding regarding groundwater quality in the BRF. Thus BLM did not address this issue in its Answer.” BLM Supplemental (Supp.) Brief at 3 n.2.

held, “[n]either NEPA nor CEQ regulations explicitly require a Federal agency to allow public comment on every EA. Instead, ‘the question of whether the public was adequately involved in BLM’s NEPA process depends on a fact-intensive inquiry made, on a case-by-case basis.’” *Birch Creek Ranch, LLC*, 184 IBLA 307, 321-22 (2014) (quoting *Lynn Canal Conservation, Inc.*, 169 IBLA 1, 4 (2006)). Similarly, the Department’s NEPA rules state that BLM “must, to the extent practicable, provide for public notification and public involvement when an [EA] is being prepared,” but the “methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.” 43 C.F.R. § 46.305(a); see *Birch Creek Ranch, LLC*, 184 IBLA at 322. Moreover, Departmental rules are also clear that, even if the agency revises the EA in response to comments received, it is not required by NEPA to “initiat[e] another comment period.”<sup>5/</sup> 43 C.F.R. § 46.305(b). Here, BLM used its discretion to present the EA, including the geochemical model it used to estimate pollutant levels in water from mining operations, for public review and comment. When it subsequently corrected an error in the modeling parameters to conclude it overestimated pollutant levels, it had no obligation under NEPA to initiate an independent public review and comment period for the corrected model. GBRW certainly has not supported its public participation claim and shown that BLM abused its discretion and violated NEPA or implementing regulations.<sup>6/</sup>,<sup>7/</sup>

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<sup>5/</sup> In the case at hand, because the corrected analysis shows less of an adverse effect than originally anticipated, no revised or supplemental EA was required. See *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1154 (9th Cir. 2008).

<sup>6/</sup> GBRW also argues that the corrected analysis requires preparation of an EIS, but it has not preponderated in showing that the proposed action will affect the quality of the human environment in a significant manner or to a significant extent not already considered. See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989); *Biodiversity Conservation Alliance*, 183 IBLA 97, 116-17 (2013). In fact, the corrected analysis shows less of an impact than originally anticipated.

<sup>7/</sup> Pointing out that one reason BLM gave for not considering a higher-backfill alternative was its potential for adverse effects on water quality, GBRW also argues that the corrected analysis now undermines BLM’s decision not to consider that alternative. GBRW Response to BLM Supp. Brief at 3-6. The proposed backfill will only recharge the aquifer at 2 gpm, but the higher backfill would allow 22 gpm to flow through and thus prevent the loss of 10,512,000 gallons per year. GBRW further argues that BLM’s failure to choose the higher backfill alternative violates its duty under FLPMA to prevent unnecessary and undue degradation. *Id.* at 6-7. GBRW argues that the corrected data speaks to the controversial nature of the project to an extent that necessitates an EIS. We find no merit in these arguments, and, to the extent they are newly-raised, consider them no further, as discussed next.

*GBRW's Arguments not Raised during the Comment Period*

Having resolved GBRW's water quality issues with respect to the pit lake, we now consider GBRW's argument that BLM violated NEPA by failing to consider an alternative to backfill the pit lake to a higher level than that required by POA8 as approved. BLM and CRI both argue that we need not address GBRW's arguments concerning the higher backfill alternative because these were not raised during the comment period before BLM made its decision.<sup>8/</sup> BLM Answer at 26; CRI Answer at 11. CRI also argues that the same applies to GBRW's arguments concerning the financial guarantee. CRI Answer at 11. Accordingly, we now consider which arguments presented in GBRW's appeal are properly before us.

[2] In arguing that we need not address GBRW's arguments that it did not raise during the comment period before BLM made its decision, BLM and CRI refer to 43 C.F.R. § 4.410(c), which provides as follows:

Where BLM provided an opportunity for participation in its decisionmaking process, a party to the case, as set forth in paragraph (a) of this section, may raise on appeal only those issues:

- (1) Raised by the party in its prior participation; or
- (2) That arose after the close of the opportunity for such participation.

In cases such as *Thomas S. Budlong*, 165 IBLA 193, 197 (2005), we have recognized that under 43 C.F.R. § 4.410(c), a party to the case may raise on appeal only issues the party raised in its earlier participation in BLM's decisionmaking process or those which have arisen since the close of the comment period. *See also Forest Guardians*, 170 IBLA 253, 259 (2006); *Colo. Env'tl. Coalition*, 169 IBLA 137, 140 (2006). The regulation codifies a practice evident from earlier decisions of this Board. *Grynberg Petroleum Co.*, 137 IBLA 76, 79 (1996); *Henry A. Alker*, 62 IBLA

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<sup>8/</sup> BLM nevertheless points out the three alternatives analyzed in the EA involved three distinct pit outcomes: a pit lake, backfill to create an evaporative sink, and backfill to create a flow-through condition. An additional flow-through alternative with a higher backfill would increase flow from the pit into the groundwater, and BLM believed that the lower flow-through alternative would minimize the potential for the pore water to contaminate groundwater. BLM Answer at 28; *see also* CRI Answer at 19. Further, we note that this is not a case where the selected alternative irreversibly forecloses a higher backfill; BLM can always require an increase in the backfill if groundwater monitoring shows that its model predictions were not correct. *See* 43 C.F.R. § 3809.431(c); BLM Answer at 29; CRI Answer at 19.

211, 212 (1982). As we explained in *S. Utah Wilderness Alliance*, 128 IBLA 52, 59 (1993):

The rationale for the approach taken in these cases is that generally it is best to allow the initial decisionmaker to confront objections to proposed actions and to limit the Board's review to appeals of decisions addressing those objections because such a process follows the logical framework for decisionmaking within the Department, as it relates to BLM actions. See *California Association of Four Wheel Drive Clubs*, 30 IBLA 383, 385 (1977).

Although the foregoing rationale applies to IBLA appeals generally, courts have recognized its particular applicability to NEPA challenges: "Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2008) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 553 (1978)). In this case, GBRW's comments did not call for consideration of a higher backfill alternative that would increase the flow-through of groundwater. On the contrary, GBRW appears to have opposed any flow-through: "It is not clear to GBRW that the 'flow-through' pit lake in the proposed action is the best endstate for the pit." GBRW letter to BLM dated Aug. 23, 2010, at 2.<sup>2/</sup>

In *Public Citizen*, the Court held that "[b]ecause respondents did not raise these particular objections to the EA, [the agency] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action." *Id.* at 764-65. The same is true here. See *Powder River Basin Res. Council*, 180 IBLA 119, 136-37 n.23 (2010), *aff'd*, *Wildearth Guardians v. Salazar*, 880 F. Supp. 2d 77, 90 (D.D.C. 2012), *aff'd*, 738 F.3d 298 (D.C. Cir. 2013) (recognizing that plaintiff had waived an issue that was first raised in their administrative appeal after BLM's record of decision had been signed); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 515 (D.C. Cir. 2010) ("Appellants had ample opportunity to submit the evidence of the environmental impact of wind energy development to the Bureau as it crafted the Atlantic Rim Project EIS, but they did not."); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (finding that when the tribe's views were

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<sup>2/</sup> GBRW's Aug. 23, 2010, letter included a technical memorandum dated Sept. 29, 2009, addressing the renewal of CRI's water pollution control permit. Questioning the assumption that submergence of backfill in the lake would prevent oxidation, the memorandum suggested consideration of an alternative that involved removal of sulfide rock from the pit wall and allowing a pit lake to form. Memorandum at 10-12.

solicited during the comment process and the tribe failed to raise groundwater issues, it could not raise the issue as “a basis for reversal of an agency decision” later). As the court observed in a case in which this appellant was a party: “Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *Great Basin Mine Watch v. U.S. Dep’t of the Interior*, 2004 WL 5613610 (D. Nev. 2004) at \*3 (quoting *U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)). “[T]he time appropriate under [our] practice” is identified in 43 C.F.R. § 4.410(c).

GBRW nevertheless argues that we should consider its arguments concerning the higher backfill alternative because similar arguments were raised in comments from NDEP, referring to a decision holding that a litigant need not have personally raised an issue if that issue was raised by another party. *Kern v. BLM*, 38 F. Supp. 2d 1174, 1180 (D. Or. 1999), *rev’d on other grounds*, 284 F.3d 1062 (9th Cir. 2002). This argument fails for two reasons. First, the *Kern* case did not involve 43 C.F.R. § 4.410(c), which informs participants in advance of the need to raise their issues in comments on the EA to have them considered further. Second, NDEP did not submit a comment calling for consideration of a higher-backfill alternative in the EA. As BLM and CRI point out, NDEP only suggested that BLM use a higher-backfill variation in running its model for contaminants as part of its technical review for CRI’s water pollution control permit. BLM Answer at 28; CRI Answer at 18 and Ex. B. As the Court stated in *Vermont Yankee*, “[a]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that ‘ought to be’ considered and then, after failing to do more to bring the matter to the agency’s attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters ‘forcefully presented.’” 535 U.S. at 553.

We consider arguments that appellant declined to raise during the scoping and comment periods no further.

### *Reclamation and Bonding*

We now turn to GBRW’s argument that BLM violated FLPMA by failing to require CRI to submit a closure and reclamation plan and a financial guarantee or bond. SOR at 1, 15-20. GBRW further argues the financial guarantee is insufficient because it does not cover the costs of a closure plan that has yet to be developed.

However, GBRW waived its argument on bonding because it did not raise that issue before filing this appeal.<sup>10/</sup> Therefore, we address only its argument on reclamation.

[3] GBRW observes that BLM's regulations under 43 C.F.R. § 3809.401(b)(2), (3) require an operator's plan of operations to include provisions for reclamation, closure, and post-closure management. However, BLM explained: "[T]his information is only required to the extent it is applicable to the operation." 65 Fed. Reg. 70,040 (Nov. 21, 2000). Although BLM expects that post-closure management will be addressed in an initial plan to the extent possible, BLM recognizes that requirements for subsequent management and maintenance of the site will be evaluated again at or nearer to the time of mine closure. *Id.* at 70,015. Indeed, BLM acknowledged "that it is difficult at best to accurately assess the post-closure treatment needs of a mine up front, which could be decades before actual closure would take place." *Id.* at 70,046. Recognizing that "unanticipated events or conditions, or newly discovered circumstances or information" may arise, BLM added § 3809.431(c) to its regulations to require an operator to submit a modification prior to final mine closure. *Id.* at 70,058, 70,060. Thus, over the life of any given mine, a number of POAs may be approved before a final reclamation plan is submitted. BLM's regulations plainly distinguish the closure and reclamation plan required by § 3809.401(b) for a plan modification for further exploration or development from a plan modification for final closure under § 3809.431(c). Therefore, BLM did not act improperly in approving POA8 before a final closure plan is submitted. According to the EA, a site-wide closure study plan that was expected to be completed in 2012 would provide necessary data for a final permanent mine closure plan. EA at 1-5 to 1-6.

Although GBRW points out that BLM required a closure plan as a condition of approval of POA6 in 2003, BLM imposed that requirement because BLM then expected that plan and amendment would extend the life of the mine for up to only 2 years. Because of the expansion proposed in POA8, final closure would not occur

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<sup>10/</sup> We note that CRI has provided financial guarantees covering all approved operations. *See* CRI Answer at 20-21. BLM points out that in *Great Basin Mine Watch v. Hankins*, 456 F. 3d at 974, the court rejected a similar argument made by appellant:

Great Basin's interpretation of the regulation is also in conflict with other regulations allowing the bond amount to be posted in phases. *See* 43 C.F.R. § 3809.553(a) ("BLM may authorize you to provide a financial guarantee covering a part of your operations"); 43 C.F.R. § 3809.553(b) ("BLM will review the amount and terms of the financial guarantee for each increment of your operations at least annually"). The Bureau did not act arbitrarily or capriciously in failing to calculate the bond amount for the entire project.

until 2020.<sup>11/</sup> See EA at 4-24. Arguing that it is sufficient for the reclamation plan (and bonding) to cover approved operations, BLM and CRI state that reclamation plans are in place for previously-approved operations over the entire mine site. BLM Answer at 12-13; CRI Answer at 20; see EA at 1-7, 2-17.

#### NEPA

We finally address GBRW's argument that BLM violated NEPA by failing to prepare an EIS and by failing to take a hard look at the project's impacts including its cumulative impacts. 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." Although GBRW faults BLM's "sudden reversal" of its initial announcement to prepare an EIS, see SOR at 23-24, an inconsistent statement by an agency's regional office during early stages of review does not render the decisionmaking process arbitrary and capricious where proper procedures are followed. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658-59 (2007). BLM points out that "new and more detailed information" justified its decision to prepare an EA and FONSI, such as updated groundwater modeling and ecological risk assessment, and other design changes. BLM Answer at 18-22. As we noted above, the particular "nexus" identified by BLM for preparing an EIS was based on its assumption that the leach pad developed under POA8 would be interconnected with the entire fluid management system of the mine facility. However, this assumption was no longer valid after the Stage III Heap Leach Facility was designed to be hydraulically independent of the other facilities. EA at 2-12 to 2-13; see BLM Answer at 20.

[4] In arguing that BLM erred in departing from its earlier decision to prepare an EIS, GBRW overlooks the fact that regulations promulgated by the Council on Environmental Quality (CEQ) allow for preparation of an EA to determine whether an EIS is necessary. 40 C.F.R. §§ 1501.3, 1501.4(b), (c); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1328 (9th Cir. 1993); *Or. Chapter Sierra Club*, 176 IBLA 336,

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<sup>11/</sup> It now appears that any "final" closure and reclamation plan for the Rochester mine that would have been submitted with POA8 would have been somewhat premature. Although it may have appeared that the mine was reaching the end of its productivity and headed for closure in 2003 when POA6 was approved and even in 2010 when POA8 was approved, Coeur recently announced a 91% increase in silver reserves and a 96% increase in gold reserves for the mine that would keep it operating until 2023. See Russell A. Carter, *Rochester Reloads*, ENGINEERING AND MINING JOURNAL (Nov. 12, 2013) 17:22, available at <http://www.e-mj.com/features/3405-rochester-reloads.html> (last viewed June 21, 2014).

346 (2009).<sup>12/</sup> As one court explained: “[O]ne of the principal purposes of an EA is to ‘[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].’” *Comm. to Preserve Boomer Lake Park v. Dep’t of Transp.*, 4 F.3d 1543, 1554 n.9 (10th Cir. 1993). If the EA leads the agency to conclude that the proposed action will not significantly affect the environment or that any significant impacts can be mitigated to insignificance, the agency may issue a FONSI and forego the further step of preparing an EIS. 40 C.F.R. § 1501.4(e); *Or. Chapter Sierra Club*, 76 IBLA at 346; *cf. Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002); *Comm. to Preserve Boomer Lake Park v. Dep’t of Transp.*, 4 F.3d at 1554, n.9.

### *Significance*

[5] Determining the significance of the impacts of a proposed action “requires considerations of both context and intensity.” 40 C.F.R. § 1508.27. Analyzing significance in terms of “context” involves consideration of “society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). Thus, the significance of an impact may vary with the setting of a proposed action. *Id.* “Intensity” or the “severity of an impact” involves factors such as: (1) beneficial and adverse impacts; (2) effects on public health or safety; (3) unique characteristics of the geographic area, including proximity to wetlands, cultural or historic resources, park lands, or ecologically critical areas; (4) the degree to which the effects are likely to be highly controversial; (5) the degree to which the environmental effects are uncertain or involve unknown or unique risks; (6) the degree to which the action may set a precedent; (7) whether the action is related to others that have individually insignificant but cumulatively significant impacts; (8) the degree to which the action may adversely affect places listed in the National Register of Historic Places or may cause the loss or destruction of significant historical, cultural, or scientific resources; (9) the degree to which the action may have an adverse effect on a threatened or endangered species or its habitat; and (10) whether the action risks violating federal, state, or local law or requirements that protect the environment. 40 C.F.R. § 1508.27(b). In reaching its conclusion that POA8 will have no significant impacts, BLM’s DR/FONSI addresses each of these factors.

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<sup>12/</sup> Preparing an EA enables an agency to identify environmental impacts of a proposed action and develop measures that prevent those impacts from becoming significant with less time and cost than a full-blown EIS. As one authority on NEPA has remarked: “That is a positive outcome, not a negative one. It is evidence that NEPA works.” Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 349 (2004).

Nevertheless, even with the guidance provided by this 10-factor analysis, “there is no hard and fast definition of ‘significant effect,’” and the “courts have struggled to give it concrete meaning.” *Vieux Carre Prop. Owners, Residents, and Assocs., Inc. v. Pierce*, 719 F.2d 1272, 1279 (5th Cir. 1983). “Courts, no less than the agencies themselves, have found it trying to imbue this ‘vague and amorphous term’ with a consistent and coherent definition.” *Pub. Citizen v. Nat’l Highway Traffic Safety Admin.*, 848 F.2d 256, 266 (D.C. Cir. 1988). Almost 30 years ago, this Board observed: “The volume of litigation over the past 15 years concerning the applicability of this requirement to a myriad of Federal actions establishes that the line separating significant impacts from insignificant ones is neither clear nor uniformly applied by the courts.” *Glacier-Two Med. Alliance*, 88 IBLA 133, 139 (1985). Nor have three more decades of litigation yielded much more clarity or uniformity. See Feldman, Murray D., *Taking a Harder Look at Direct, Indirect, and Cumulative Impacts, National Environmental Policy Act, Paper No. 4*, (ROCKY MT. MIN. L. FDN. (2010)); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 920 (2002).<sup>13/</sup>

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<sup>13/</sup> We note that the government’s reliance on EAs has long drawn criticism from practitioners representing environmentalists and industry. *E.g.*, Thomas France, *NEPA--The Next Twenty Years*, 25 LAND & WATER L. REV. 133, 139 (1990) (“That federal agencies even attempt to use EAs for many controversial projects is a source of wonderment to many environmental litigators, but despite continued whippings in court, the federal bureaucracy shows little sign of abandoning this procedural shortcut.”); John F. Shepherd, *Key NEPA Issues Affecting Oil and Gas Development on Federal Lands*, 37 ROCKY MTN. MIN. L. INST. 15-1, 15-6 (1991) (“[C]ourts are more inclined to reverse a decision based on an EA (even a comprehensive one) than to overturn a decision based on an EIS (even a relatively skimpy one).”). Experienced practitioners continue to recognize that deciding to prepare an EA instead of an EIS for a mining project increases the risk of reversal on judicial review, which could unnecessarily delay the implementation of a proposed action. See, *e.g.*, Patricia J. Winmill & Stephen Hull, *Current Challenges to Obtaining Exploration, Mining, and Associated Rights to Public and Private Lands, Uranium Exploration and Development*, 14-30 to 14-31 (ROCKY MT. MIN. L. FDN. 2006)). However, agency practice evolved in a different direction.

When the CEQ issued its regulations in 1978, it expected that an EIS would normally be less than 150 pages or no more than 300 pages for a proposal of unusual scope or complexity. 40 C.F.R. § 1502.7. However, the litigation generated by NEPA’s broad and undefined requirements has impelled risk-averse agency managers to generate EISs that are often hundreds of pages longer. As one critic observed: “The consequence of open ended information production requirements enforceable through relatively easy access to judicial review, then, is that the effective standard  
(continued...)

[6] We noted in Glacier that certain actions will almost always require the preparation of an EIS but others never will. 88 IBLA at 140. In determining whether a proposed action calls for an EIS, we found it helpful “to consider first whether or not similar activities have been found to require an EIS, then determine how the proposal differs from the norm, and finally determine whether these differences are significant enough to warrant a different result.” *Id.* Indeed, agencies are required to adopt procedures to determine whether or not certain actions will normally require an EIS. 40 C.F.R § 1501.4(a).

The CRI permit area encompasses 4,370 acres of which 1,568 acres have been disturbed by construction of the pit, heap leach facilities, disposal sites, stockpiles, haul and access roads, and processing facilities.<sup>14/</sup> EA at 1-6. The Department has recognized that preparation of an EIS is normally required for BLM’s “[a]pproval of any mining operations where the area to be mined, including any area of disturbance, over the life of the mining plan, is 640 acres or larger in size,” but “[i]f potentially significant impacts are not anticipated for these actions, an EA will be prepared.” 516 DM 11.8.1.B(7), (C); BLM NEPA Handbook H-1790-1, § 7.2. Although GBRW points out that an EIS has never been prepared for this mine, BLM has recognized that an EIS will be prepared in connection with the site closure plan.

A recent court decision involving the Department’s Office of Surface Mining Reclamation and Enforcement (OSM) illustrates the use of such a guideline. In *Dine Citizens Against Ruining our Env’t. v. Klein*, 747 F. Supp. 2d 1234, 1250-51 (D. Colo. 2010), the plaintiffs argued that OSM should have prepared an EIS before approving a permit revision application that would expand the permittee’s mining operations by 3,800 acres. The plaintiffs referred to OSM’s guidelines that require an EIS to be prepared “when the impacts were not examined in an earlier environmental document, when the area to be mined is 1280 acres or more, and when mining and reclamation operations will occur for 15 years or more.” *Id.* at 1251 (citing 516 DM 13.4(A)(4)). Although the court found that the guideline did not *require* OSM to prepare an EIS, it nevertheless “create[d] a presumption that an EIS will normally be prepared, and Defendants bear the burden of establishing why that presumption should not apply in this particular case.” *Id.* at 1253. On remand, however, OSM

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<sup>13/</sup> (...continued)

for the quantity of information that must be produced in an EIS is set extremely high, and the process is painfully slow and costly.” Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 919 (2002).

<sup>14/</sup> Adding the Nevada Packard pit brings the total disturbed area to 1,714 acres. DR/FONSI at 1.

reduced the size of the proposed mine expansion, prepared another EA, and issued a FONSI. See *Dine Citizens Against Ruining our Env't v. U.S. Office of Surface Mining Reclamation and Enforcement*, 2013 WL 68701, at \*2 (D. Colo. Jan 4, 2013).

Nevertheless, as one court observed: “[A]ctions which an agency determines will normally require an EIS, do not always require an EIS.” *Comm. to Preserve Boomer Lake Park v. Dep’t of Transp.*, 4 F.3d at 1555 (citing 40 C.F.R. § 1501.4(e)(2)). In this case, the EA and DR/FONSI for POA8 demonstrate that this project does not involve the same level of disturbance as other mine expansions for which an EIS was prepared, nor is that disturbance comparable in context or intensity to those cases where an EIS was prepared. See *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143 (9th Cir. 2012);<sup>15/</sup> *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 588 F.3d 718 (9th Cir. 2009);<sup>16/</sup> *Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2008);<sup>17/</sup> *Great Basin Res. Watch*, 182 IBLA 55 (2012);<sup>18/</sup> *W. Exploration, Inc.*, 169 IBLA 388 (2006).<sup>19/</sup> We note that smaller projects have been sustained on the basis of EAs. *Mary Lee Dereske*, 162 IBLA 303 (2004);<sup>20/</sup> *Sierra Club*, 131 IBLA 342 (1994);<sup>21/</sup> cf. *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 608 F.3d 592,

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<sup>15/</sup> In *Greater Yellowstone*, the mining operations encompassed 5 panels occupying around 5,000 acres of land. Overburden from these panels contained waste rock with a high selenium concentration and highly toxic selenium concentrations had been found in area streams. Because of the high selenium levels produced at the site, the existing mining operations are subject to an ongoing site investigation and response action under the Comprehensive Environmental Response, Compensation, and Liability Act. 628 F.3d at 1146.

<sup>16/</sup> *South Fork* involved a proposed project disturbing 6,792 acres within the 57,058-acre project boundary with significant impacts from mine dewatering that would cause local springs and streams to dry up and affect significant religious sites. 588 F.3d at 722, 724, 727.

<sup>17/</sup> *Great Basin* involved a project expanding an area with 7,960 disturbed acres to a total disturbance of 9,352 acres. 456 F.3d at 977-78.

<sup>18/</sup> *Great Basin* involved new surface disturbance of approximately 4,698 acres. 182 IBLA at 56.

<sup>19/</sup> *W. Exploration* involved an expansion project that would disturb an additional 1,474 acres. 169 IBLA at 390.

<sup>20/</sup> In *Dereske*, only about 276 acres were to be disturbed by mining and related activity. 162 IBLA at 305 n.2.

<sup>21/</sup> *Sierra Club* involved a total disturbance of 119 acres. 131 IBLA at 342-43.

603-07 (9th Cir. 2010) (whether an EA for mine exploration project was appropriate depended on cumulative effects analysis that BLM failed to make).

Inasmuch as BLM's FONSI considered each of CEQ's factors for evaluating the significance of the impacts of a proposed action, we now weigh appellant's arguments by reference to those factors. Appellant had argued that the impacts were significant because flow-through from the pit lake would violate water quality standards, *see* 40 C.F.R. § 1508.27(b)(10), but our earlier discussion of the pit lake shows that appellant is in error.

### *Connected Actions and Cumulative Impacts*

Appellant's remaining arguments on significance are based on the uncertain impacts that will not be resolved until the wider, final site closure plan is developed. GBRW points to the reasons BLM's District Manager originally gave for preparing an EIS. As we noted earlier, his statement that POA8 and the closure of the mine site as a whole were "clearly connected actions, and closure continues to be a significant issue" was based on the incorrect assumption that the leach pad developed under POA8 would be interconnected with the entire fluid management system of the mine facility. GBRW argues that BLM has failed to consider the cumulative impacts arising from past, present, and future mining activity at the site, as well as from other projects in area. SOR at 25-27.

[7] In assessing the significance of a proposed action, BLM is required to consider "whether the action is related to others that have individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." *Id.* A cumulative impact "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. "The purpose of this requirement is to prevent agencies from dividing one project into multiple individual actions 'each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" *Natural Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 297-98 (D.C. Cir. 1988) (quoting *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985)).

When a proposed action has significant impacts that require preparation of an EIS, the scope of the EIS must include "connected actions" and "cumulative actions." Actions are connected if they (i) automatically trigger other actions, which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; (iii) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R.

§ 1508.25(a)(1). Although this regulation by its plain language applies only to an EIS, courts have applied this requirement to EAs. *See, e.g., Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002).

[8] This Board and courts have applied an “independent utility” test to determine whether actions are so connected as to require analysis in a single EIS. In *Great Basin Mine Watch v. Hankins*, 456 F.3d at 969, the court explained:

The crux of the test is whether “each of two projects would have taken place with or without the other and thus had ‘independent utility.’” *Wetlands Action Network*, 222 F.3d at 1118 (internal quotations and citation omitted). When one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not “connected” for NEPA’s purposes. *Native Ecosystems Council*, 304 F.3d at 894.

In that case, the court recognized that a proposed new gold mine and a proposed expansion of an existing mine were not connected actions even though ore from the proposed mine would be processed at the existing mine. Similarly, BLM points out that fluids from the existing Stage II and IV heap leach pad will be produced in the same quantity and quality regardless of the POA8 expansion and future closure plans. BLM Answer at 21; *see* EA at Chapter 2.

In *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569 (9th Cir. 1998), the tribe challenged the FAA’s approval of an “arrival enhancement project” (AEP) at Los Angeles International Airport (LAX) that would shift an arrival pattern so that it would cross the tribe’s reservation instead of bypassing it. The approval was based on an EA/FONSI. Just as GBRW argues that BLM erred in failing to consider the impacts of POA8 and impacts from CRI’s site closure plan together, the tribe argued that the FAA improperly failed to consider the cumulative effects of increased air traffic resulting from the AEP and those from the LAX Expansion Project for which the FAA was preparing an EIS. The court rejected the tribe’s argument that these were “connected actions,” because each of the two projects would have taken place with or without the other and thus had “independent utility,” even though the EA did not discuss the growth-inducing impact of the AEP. *Id.* at 579-80.

Appellant argues that BLM has failed to adequately address the cumulative impacts from other activities in the cumulative effects study areas identified in the EA, noting that BLM has only listed other mining operations but provided no quantitative analysis of their impacts. SOR at 27 (citing *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 608 F.3d at 603-07; *Great Basin Mine Watch v. Hankins*, 456 F.3d at 971-74). BLM responds that because impacts of POA8 are limited to the immediate vicinity of the minesite, there are no foreseeable

activities in the cumulative effects study area that have the potential to combine with the impacts from the proposed action. BLM Answer at 23-24.

[9] BLM's argument is well taken. "[W]hen the analysis concludes that the project will have virtually no effect on cumulative impacts, it is unnecessary for the agency to detail other actions." *Bark v. U.S. Bureau of Land Mgmt.*, 643 F. Supp. 2d 1214, 1224 (D. Or. 2009) (citing *Nw. Env'tl. Advocates v. Nat'l Marine and Fisheries Serv.*, 460 F.3d 1125, 1140 (9th Cir. 2006)); see *Wilderness Society v. Salazar*, 603 F. Supp. 2d 52, 68-69 (D.D.C. 2009). GBRW has made no effort to demonstrate that the impacts of the proposed operation and those conducted at existing operations will overlap in a manner that would cause the consequent impact to properly be considered cumulative or synergistic. *Klamath-Siskiyou Wildlands Ctr.*, 182 IBLA 199, 216 (2012); *Mary Lee Dereske*, 162 IBLA at 326.

### *Conclusion*

We will affirm a decision to go forward with a proposed action if the record demonstrates that BLM has (1) considered the relevant environmental issues, (2) taken a "hard look" at potential environmental impacts, and (3) made a convincing case the action will not create a significant impact or that any such impact will be reduced to insignificance by mitigation measures. *Colo. Env'tl. Coal.*, 158 IBLA 137, 140 (2006). The ultimate burden of proof is on an appellant to show, through objective proof, that the agency's determination to go forward with the proposed action, without preparing an EIS, was premised on "a clear error of law or a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared." *Id.* For the reasons explained above, appellant has not met its burden in this case.

Appellant also failed to support its challenge under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006), as discussed above. It failed to raise its argument on bonding prior to this appeal, and, because BLM's regulations plainly distinguish the closure and reclamation plan required by 43 C.F.R. § 3809.401(b) for a plan modification for further exploration or development from a plan modification for final closure under 43 C.F.R. § 3809.431(c), BLM committed no error in approving POA8 before a final closure plan is submitted.

Therefore, 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 appealed from is affirmed.

// original signed \_\_\_\_\_

Christina S. Kalavritinos

Administrative Judge

I concur:

// original signed \_\_\_\_\_

James F. Roberts

Administrative Judge