

**WYOMING OUTDOOR COUNCIL • GREATER YELLOWSTONE COALITION
THE WILDERNESS SOCIETY**

October 29, 2008

Marty Sharp
NEPA Coordinator, Shoshone National Forest
203A Yellowstone Ave.
Cody, Wyoming 82414-9313

Re: Scoping comments on Windsor Energy Group's proposed federal well #26-2

Dear Marty:

Please accept these comments on behalf of the Wyoming Outdoor Council, Greater Yellowstone Coalition and The Wilderness Society regarding the proposal by Windsor Energy Group ("Windsor") to drill a natural gas well on the Clarks Fork Ranger District of the Shoshone National Forest. We appreciate the Forest Service meeting with our organizations to hear our concerns, hosting a field trip to the proposed well site and hosting public meetings in both the communities of Cody and Clark as part of the scoping process.

As these comments will illustrate, there are a number of reasons why the Forest Service should take a cautious approach prior to authorizing the first well to be drilled on the Shoshone in more than a decade. From the outset, the Forest Service can demonstrate such an approach by taking a realistic and comprehensive "hard look" at the proposed development within the context of existing, nearby development and reasonably foreseeable future development. Windsor, too, can justify its representations that it intends to be a good operator by its support of such an approach. In this case, the necessary hard look cannot be accomplished via a categorical exclusion, but can only be realized through the preparation of an EIS. In the second half of our comments we have outlined the issues and resources that the Forest Service should analyze in the EIS and issues raised in the public meetings that it should respond to.

I. A Categorical Exclusion is not the appropriate level of NEPA analysis required in this situation.

Although the Forest Service assured the public during the field trip that the scoping period was intended to raise issues that would help it determine the level of NEPA required for this project and that it had not yet determined it would use a categorical exclusion ("CE"), the scoping notice suggests the opposite. By mentioning only a review of "extraordinary circumstances" as the criteria upon which the Forest Service will determine the "appropriate level" of NEPA review, the Forest Service seems to have already decided that unless the project would impair one or more of these circumstances, a CE is the appropriate level of NEPA analysis. Scoping notice at unnumbered page 2. This is inappropriate for two reasons.

First, the Forest Service should not limit itself only to the short list of extraordinary circumstances when considering the potential impacts from this project and the appropriate level of NEPA analysis required. It must consider all the issues raised—many of which are highly significant but may fall outside of the short list of extraordinary circumstances.

Second, the scoping notice seems to suggest that it is merely the identification of extraordinary circumstances that is necessary to raise the level of NEPA analysis required beyond a CE. This is too simplified an explanation and does not disclose the changed Forest Service policy with respect to extraordinary circumstances. Even if the Forest Service found that several extraordinary circumstances did in fact exist, the agency now operates under the policy that “the mere presence of one or more of these resource conditions does not preclude the use of a categorical exclusion (CE).” The two-part, case-by-case test the Forest Service applies is: 1) whether there is “a cause and effect relationship between a proposed action and the potential effect on these resource conditions;” and 2) if that relationship exists, “the degree of the potential effect of a proposed action on these resource conditions.” This shift in policy—allowing the Forest Service wide discretion to discard an extraordinary circumstance if in its opinion the “cause and effect” and “degree” tests are not met—is even more reason not to limit the decision about the level of NEPA analysis solely to a short list of extraordinary circumstances.

As will be discussed in greater detail below, the CE itself is poorly worded and leaves it vulnerable to an appeal and/or legal challenge. Even assuming the CE would be upheld on its face, which is highly unlikely, the circumstances unique to Windsor’s proposal do not qualify it for approval under any reasonable interpretation of the language of this CE. Finally, given the significant circumstances surrounding this proposal, the Forest Service should prepare an EIS prior to authorizing any new drilling proposal on this part of the Shoshone National Forest.

1. The new CE the Forest Service is considering using for this project is deficient as written and is susceptible to legal challenge.

The CE being considered for this drilling proposal was envisioned and promulgated to “compliment[]” the Section 390 CEs in the Energy Policy Act of 2005. 72 Fed. Reg. 7391, 7397. While many, including Governor Freudenthal have criticized the widespread use of these statutory CEs, the Forest Service CE is far more troublesome, as it doesn’t even require the existence of past NEPA documentation from which projects implemented under it must “tier.” The CE is relatively new; the final rule was published in the Federal Register on February 15, 2007. To our knowledge, it has not been applied widely and with the possible exception of the Thunder Basin National Grasslands, has not been applied at all in Wyoming. Pers. comm. with Barry Burkhart and Melody Holm (neither the Region 2 or Region 4 minerals staff could cite to an example where the Forest Service had used this CE.) Thus, the Shoshone National Forest may be one of the first forests in the country to authorize a drilling proposal SUPO under this CE and could be the first forest to defend its validity if faced with legal challenge.

The CE now appears in the Forest Service Handbook: 1909.15 ch. 30 #17 and reads:

Approval of a Surface Use Plan of Operations for oil and natural gas exploration

and initial development activities, associated with or adjacent to a new oil and/or gas field or area, so long as the approval will not authorize activities in excess of any of the following:

- (i) One mile of new road construction;
- (ii) One mile of road reconstruction;
- (iii) Three miles of individual or co-located pipelines and/or utilities disturbance; and
- (iv) Four drill sites.

The CE was controversial when proposed and many organizations and members of the public raised serious concerns about it. Two problems the Wyoming Outdoor Council noted when the CE was first proposed and which still exist in the rule's final form today are: 1) its vagueness with respect to the term "new field"; and 2) its authorization of an open-ended and seemingly unlimited amount of development (i.e. placing no limit on the number of wells that could be drilled from four pads or "drill sites" and no acreage limit on the size of the pads).

Just last year the Ninth Circuit Court of Appeals enjoined a Forest Service hazardous fuels-related CE for its failure to adequately identify activities covered by the CE. See Sierra Club v. Bosworth, 510 F.3d 1016 (9th Cir. 2007). Citing the CEQ regulations that require agencies to include: "[s]pecific criteria for and identification of those typical classes of action...[w]hich normally do not require either an environmental impact statement or an environmental assessment," the court found that "the Fuels CE as written lack[ed] the requisite specificity to ensure that the projects taken under it achieve the objective of hazardous fuels reduction, but do not individually or cumulatively inflict a significant impact." Id. at 1032 (citations omitted). The court cited examples such as the Forest Service's failure to "identify the maximum diameter or species of trees that [were] permitted to be logged," the fact that "no limit" was placed "on the proximity of different projects under the Fuels CE" and that the Forest Service had not issued a "cap on the number of projects in a particular watersheds..." that could be approved under the CE. Id. Other problems the court cited were instances where terminology within the CE was not defined. Id. at 1033.

The problems the court identified with the hazardous fuels CE are analogous to the problems we have raised with this drilling CE. The Forest Service has failed to define essential terms like "new field" opting instead to leave this determination open to various states' definitions—assuming such definitions exist. In the case of Wyoming, a state that does not define the term "new field," the uncertainty is compounded. Pers. comm. with Mark Watson, Wyoming Oil and Gas Conservation Commission, Sept. 15, 2008 (explaining that the state of Wyoming does not distinguish between or define "new" versus "existing" fields). Moreover, just as with the fuels CE, this CE places no limits or caps on the number of wells that can be drilled from each "drill site" and it imposes no limits or caps on the acreage of the drill sites. With such open-ended activity that could be authorized, there is no logical basis to claim that this is a narrow category of action that has been proven not to have a significant effect on the human environment, individually or cumulatively. This is a glaring deficiency in the CE as written.

It defies reason that the Forest Service could conclude that an unlimited number of wells permitted from up to four drill sites of undetermined size will not have a significant individual or cumulative effect such that a CE is warranted. Air quality concerns alone caution against the authorization of drilling any number of wells and ground disturbing activities obviously differ when a well pad is 2 acres in size in contrast to a pad (like those that exist in the Pinedale Field Office) of 20 or more acres in size. It doesn't matter whether the Shoshone National Forest intends to authorize such large-scale development under this CE. Implementing it under any circumstances puts the CE itself as written under scrutiny.

2. Windsor's proposed well does not qualify for authorization under this CE because it fails to meet any reasonable understanding of the terms "new field," "exploratory well" and "adjacent to or associated with" a new field.

There are numerous reasons why Windsor's proposed well/SUPO does not meet the categories described under the Forest Service's new CE. First, although it is difficult to state with certainty given the lack of definitive terminology in the CE itself, it is reasonable to conclude that Windsor's proposed well is not an exploratory well within a new field, but simply an extension of an existing, named field.

First, the Forest Service, the Wyoming Oil and Gas Conservation Commission and the BLM have each acknowledged that the area in question is an existing field. The Shoshone National Forest described in its 1992 final oil and gas leasing EIS that the Line Creek Field was discovered in 1972. FEIS at A-5 (Exhibit 1). In addition, the Wyoming Oil and Gas Conservation Commission issued a memo with the subject line "Line Creek Anticline, (Bennett Creek) Field Development" describing the Crosby well blow-out. See memo 8/18/06 from Gary Strong to Don Likwartz (the memo outlines some of the history of the field) (Exhibit 2). Finally, on the October 8th field trip (after Windsor was unable or unwilling to answer the question about its knowledge of whether the field was named and/or the boundaries of the field) David Seward with BLM acknowledged that indeed, the area has been a named and existing field since the 1970s. The fact that the Forest Service, Wyoming Oil and Gas Conservation Commission and the BLM are all on record that the area is an existing field should weigh heavily in the Forest Service's determination about whether the use of the "new field" CE is appropriate here.

It is not only the naming of the field that is a good indication of the fact that it is "existing" and not "new," although that is persuasive evidence. The number of producing wells within the named area also confirms the field's existence. There are six producing wells and two APDs in process in the field on lands just over the National Forest boundary. Well #26-2 would be well number nine in the Line Creek Field. Common sense implies that this is not an exploratory well, but rather a well that will extend an already developed field or attempt to delineate the boundary of an existing field.

The Forest Service should also avoid any attempts to justify the exploratory nature of the well or to define a "new field" by citing to a difference in subsurface formations. Although the rule's preamble (i.e. the Forest Service's response to comments on the proposed CE) states that a field "may" refer to both the "surface and the underground productive formations," the field

name generally “refers to the surface area.” 72 Fed. Reg. 7391, 7399. As such, the Forest Service should be conservative in its assessment, and focus mainly on the surface resources to determine whether this is a new field. Given the information provided above, it is clear that based on surface characteristics this is likely an existing field.

Even if the Forest Service does base its decision in part on subsurface resources, it appears the depth and the target formation of the proposed well is similar to and overlaps the depths and formations of other wells in the field currently in production. See WOGCC Information regarding the proposed well #26-2, which has a projected total depth of 9404 feet in the target formation of Dakota-Mowry-Frontier compared to two of the producing wells in the Line Creek Field: 1) Crosby Well #25-4 (9657 feet at Mowry target formation); and 2) Crosby Well #25-5 (9540 feet at Frontier target formation) (Exhibit 3). Thus, the proposed well appears not to be exploratory from either a surface or subsurface standpoint.

Finally, as noted by the Forest Service, BLM and WOGCC, because the Line Creek Field is already in existence and has been since the 1970s and is producing six wells to date and two more proposed off forest, there is no way for Windsor to claim that well #26-2 is “adjacent to or associated with a new field” such that it can use the CE under that category.

We urge the Forest Service not to accept the company’s characterization of the well as “exploratory” or any of its efforts to segment this well from association with the existing Line Creek field so as to fall within the criteria of the “new field” CE. The Forest Service describes this CE as one “designed for preliminary operations that are necessary to gather both the surface and subsurface resource information necessary to assess the potential for field development.” 72 Fed. Reg. at 7399. Given the information provided above, there is nothing to suggest that this well is “exploratory” or “preliminary” or that the field is “new.”

3. Drilling well #26-2 may implicate one of the Forest Service’s extraordinary circumstances and for this reason the CE is not appropriate.

At least one listed circumstance—municipal watersheds—is potentially implicated by the proposed development. In August 2006 Windsor’s drilling operations on Crosby Well #25-3 “contaminated shallow and deep aquifers, the wetland area below the well pad, at least five springs flowing into Line Creek and at least one private drinking water well.” Pers. comm. (email) from Deb Thomas, Line Creek landowner, 10/9/08. It is possible that contamination of water resources, some of which supply drinking water to the Line Creek community, could occur from Windsor’s drilling operations with respect to well #26-2. This threat is especially relevant given the company’s track record in this very field.

Application of the Forest Service’s “cause and effect” and “degree” tests to this extraordinary circumstance lends support to the argument that a CE is not appropriate here. First, the cause and effect relationship between the proposed action (drilling well #26-2) and the potential effect on these resource conditions (groundwater and community drinking water sources) is strong. It was the exact action just a few hundred yards away from the proposed drill site by this very company that caused the contamination of water sources in August 2006. Next, the degree to which the proposed action could affect these resource conditions is high.

Water contamination—especially when human health and safety are involved—is a serious issue that warrants the Forest Service’s careful consideration in a comprehensive environmental analysis, not through a CE.

II. An EIS is the appropriate level of NEPA analysis the Forest Service should require in this situation.

NEPA directs federal agencies to prepare a detailed environmental impact statement (“EIS”) for major federal actions that significantly affect the quality of the human environment. 42 U.S.C. § 4332(C)(i). The EIS must address all adverse environmental effects that cannot be avoided should the proposal be implemented, alternatives to the proposed action, and any irreversible and irretrievable commitment of resources that would be involved. *Id.* at § 4332(C)(ii), (iii) & (v). Unless the agency is certain that the project is the type that normally would require an EIS or is the type that normally would not require an EIS, (i.e. actions that are categorically excluded) it must prepare an environmental assessment (EA) to determine whether the project is one that may significantly affect the quality of the environment. 40 C.F.R. §§ 1501.4(b), 1508.9. If, through the process of preparing an EA, the agency concludes that the project will not significantly affect the environment, the agency must issue a finding of no significant impact (FONSI). *Id.* at §§ 1501.4(e), 1508.13. Otherwise, the agency must prepare an EIS. *Id.* at 1501.4(c).

Agencies may create categories of actions for which neither an EA nor an EIS is required. 40 C.F.R. §§ 1507.3(b)(2)(ii); 1508.4. These actions may be categorically excluded from NEPA review only if the agency determines that the specific category of proposed action will have no significant effect, either individually or cumulatively, on the quality of the environment. *Id.* at § 1508.4. The regulations implementing NEPA also require that “any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” *Id.*

The Forest Service’s directives require it to undergo scoping even on actions “that would appear to be categorically excluded.” FSH 1909.15 Chap. 30.3(5). “If the responsible official determines, based on scoping, that it is uncertain whether the proposed action may have a significant effect on the environment” the Forest Service is directed to prepare an EA. *Id.* If the Responsible Official determines that the proposed action may have a significant environmental effect, an EIS is required. *Id.*

To help define the meaning of “significantly” NEPA’s implementing regulations explain that the word as used in the Act requires consideration of both context and intensity. 40 C.F.R. § 1508.27. With regard to context, the “significance of the action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 C.F.R. § 1508.27(a). Intensity “refers to the severity of the impact” and ten issues should be considered when assessing intensity. 40 C.F.R. § 1508.17(b). These include:

- 1) Impacts may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes on balance the effect will be beneficial.
- 2) The degree to which the proposed action affects public health or safety.

- 3) Unique characteristics of the geographic area such as proximity to historical or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers or ecologically critical areas.
- 4) The degree to which the effects of the quality of the human environment are likely to be highly controversial.
- 5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- 6) The degree to which the action may establish precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- 7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.
- 8) The degree to which the action may adversely affect districts, sites, highways, structures or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural or historical resources.
- 9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- 10) Whether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27 (b)(1-10).

The ten factors listed above assist agencies in determining whether a project significantly affects the quality of the human environment, and thus whether an EIS is warranted. Arguably, seven of the ten factors are implicated in Windsor's drilling proposal: 1) public health and safety; 2) proximity to a wild and scenic river; 3) the project is highly controversial; 4) the effects are highly uncertain and involve unknown risks (especially given the past accidents the company has overseen); 5) the action may establish a precedent for further development; 6) the action is related to other actions that could have cumulatively significant effects; and 7) operations could violate federal and state environmental quality laws. Thus, it is these criteria in addition to other factors raised during scoping—and not only the short list of extraordinary circumstances—that the Forest Service should consider.

As the Forest Service's own policy explains, the test for preparing an EIS is not whether the project will have a significant effect on the environment, but whether the project individually or cumulatively may have a significant environmental effect. FSH 1909.15 Chap. 30.3(5). This is not a routine situation that warrants a CE, but an extremely sensitive development proposal that implicates seven factors used as criteria to determine significance and has the potential to impact surface and subsurface resources in a substantial way. As such, it is not much of a stretch to assume that this drilling proposal may affect the environment—quite a low threshold—and as a result, an EIS is required.

Six wells have already been drilled without the benefit of prior environmental analysis and another two are slated for approval off National Forest land. Because this well is the first

new well in the field to be drilled on federal land, this is the first opportunity to prepare a comprehensive NEPA analysis in the form of an EIS. This cautious approach benefits all involved.

First, preparation of an EIS would benefit Windsor. It would allow Windsor to demonstrate that it is serious about its promise to be a responsible company and a safe and competent operator by its willingness to pay for and commit to the time it will take for the Forest Service to prepare a comprehensive EIS. This builds trust between the company and local citizens—not only users of the Shoshone National Forest, but particularly the community members along Line Creek who will be most affected by the project. Windsor's leases remain in suspension while the analysis is prepared so the company's rights to the leasehold are not affected. While it is true that an EIS will be more costly and take more time than a CE, cost and necessary delay are part and parcel of operating on leased public lands. Windsor has waited nearly its entire 10-year lease term before filing its APD. It is unreasonable then to expect the federal agencies to rush within a period of a few short months to authorize its proposal.

Second, the preparation of an EIS benefits the Forest Service. A thorough analysis would provide the agency a safety net, allowing it to better understand, anticipate and mitigate impacts prior to approval of the project. A CE does not provide the kind of in-depth analysis required in this situation. Indeed, use of a CE indicates the Forest Service has determined up front that there would be no individual or cumulative impacts that would result from the project. It is difficult to imagine a situation in which this proposal would meet this very narrow test. An EIS will assist the Forest Service in its responsibility to manage resources on the forest and ensure that this project—if approved—occurs in a manner that does not harm other important resources.

Finally, preparation of a comprehensive EIS benefits the public. An EIS is a public disclosure document that outlines the environmental impacts of the proposed action and is a tool by which agencies make informed decisions through analysis of alternatives and public comment and participation. With an EIS, the public has the opportunity to weigh in at the scoping stage and again at the draft EIS stage and has the opportunity to learn about the potential impacts associated with the project and the ways in which the agency will mitigate. An EIS will do a far more thorough job of this than an EA and certainly will exceed any cursory remarks that might appear in a decision memo accompanying a CE.

Because of the circumstances surrounding the proposal and the human health risks already threatening the Line Creek community as a result of Windsor's nearby operations, an EIS is the most responsible course of action to take—and something the public in this case specifically deserves. Windsor is a company that owns nearly all of the leases on and off National Forest lands along the Beartooth Front and has been responsible for one of the worst accidents in Wyoming's recent oil and gas development history—an accident that has yet to be remediated. It is only reasonable for the public to expect that at the first opportunity in which NEPA is triggered, the level of NEPA analysis is adequate. It should encompass not only this single well proposal, but also the impacts of this well coupled with the existing nearby development (and all of its associated problems) and any reasonably foreseeable future development. This depth of analysis can best be accomplished within an EIS.

III. In the EIS, the Forest Service should define a balanced purpose and need statement for the project.

Because the stated purpose and need for a federal action determines the range of alternatives, it is essential that the Forest Service clearly articulates the project's purpose and need from the agency's perspective rather than simply adopting Windsor's objectives for the project as its own. 40 C.F.R. § 1502.13. As courts have cautioned, "One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence.)" Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002) (quoting Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 669 (7th Cir. 1997)).

The Forest Service should include a commitment to protect surface resources as a purpose and need on par with gas exploration rather than defining the purpose and need for the proposed action solely from Windsor's perspective. Although the goals of a private party proponent are, to a limited extent, relevant in determining a project's purpose and need, "more importantly, an agency should always consider the views of Congress, expressed, to the extent that an agency can determine them, in the agency's statutory authorization to act, as well as in other Congressional directives." Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). As just one example, Congress was unwavering in its message when it passed NEPA: federal agencies are entrusted to act as trustees of the environment for present and future generations. 42 U.S.C. § 4331(b).

The Forest Service should consider its broader responsibility as surface land manager and its affirmative responsibility to protect air quality related values in Class I areas, not to mention its responsibilities under the Endangered Species Act and other statutes so that the purpose and need statement encompasses greater protections for the sensitive and irreplaceable National Forest lands at stake—not only the desires of the project proponent. Because the purpose and need statement sets the stage for the range of alternatives the Forest Service selects, its importance should not be underestimated.

IV. The Forest Service should consider a reasonable range of alternatives in the EIS.

In an EIS the Forest Service can consider a reasonable range of alternatives; a CE does not allow such an expansive review. NEPA mandates that the Forest Service provide a detailed statement regarding the alternatives to a proposed action. 42 U.S.C. § 4332(2)(C)(iii). Its implementing regulations also require the Forest Service to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. In fact, a thorough and objective analysis of alternatives is so essential to reasoned and informed decision making that a discussion of alternatives is considered the "heart of the environmental impact statement." Id. at § 1502.14(a). Given the seriousness of this project and its potential to set a precedent for expanded oil and gas development in the field and onto National Forest lands, a CE is not the appropriate vehicle by which to analyze the impacts from the proposal. The Forest Service should develop a range of alternatives for the proposed drilling project and at minimum include the following three alternatives.

First, the Forest Service should analyze a directional drilling alternative. Although Windsor claims directional drilling is not a viable option, the Forest Service should evaluate this statement independently and not take Windsor's opinion at face value. While Windsor has certainly experienced problems with directional drilling in its operations in the past, there is no reason to assume directional drilling would never be a viable option in the area in the future given the proper procedures and technical expertise. Directional drilling is a method by which surface disturbance is limited and given the important resources of the Beartooth Front, directional drilling is worthy of consideration in an EIS. In this case, directional drilling from state or private surface to access federal minerals would still require NEPA analysis.

Second, the Forest Service should consider an alternative that includes the addition of strict stipulations or conditions of approval. The following is a list of resources and protective measures that could be required:

Air

- Green completions
- Capturing greenhouse gas emissions
- Capturing hazardous air pollutants
- Reduce total emissions
- Solar- or wind-powered equipment
- Catalytic converters on engines
- Dust suppression
- Electric or natural gas drill rigs instead of diesel
- Liquids gathering systems
- Baseline air quality monitoring
- Modeling for visibility impacts to Class I areas and hazardous air pollutants

Surface

- Directional drilling
- Use of removable wooden protective mats
- Locating within 100 meters (or some other close corridor) of existing roads
- No new roads
- 640-acre surface spacing
- Below-grade wellheads
- Use native seed mix
- Outside viewshed of historic sites
- Avoid archeological and paleontological sites
- Co-locate pipelines and roads
- Having a reclamation plan prepared prior to drilling
- Bond for 100% of reclamation costs
- Control/mitigation of noxious weeds
- Remove unneeded equipment and materials
- Setbacks from homes, schools, hospitals, etc.

Water

Baseline testing of ground and surface water quality and aquifer/groundwater characterization
Monitoring of ground and surface water quality (with adequate funding by Windsor)
Stormwater pollution prevention plan for construction
Runoff and erosion controls
Baseline data and ongoing monitoring of designated source water areas
Minimum 1000 foot setback from all streams
Minimum 1/4 mile (1,320 foot) setback around each developed surface water inlet and spring development
Groundwater modeling and adjust drilling based on projected impacts to springs, surface water, and groundwater.
Water management plan in place
Avoid riparian areas, wetlands, flood plains to the greatest extent possible

Toxic substances

Public disclosure of chemicals in drilling fluids
Closed-loop drilling system/no pits
Approved waste disposal procedures plan filed
Pipeline waste delivery for fluids disposal (rather than trucking)
Use of less toxic drilling fluids
Drilling waste management hierarchy: reduction/reuse/recycling of drilling fluids

Societal

Offer water well mitigation agreement
Noise controls/mufflers
Electric instead of diesel drill rigs
Emergency management plan in place
Agree to dispute resolution
Offer compensation for damages to all land uses
Landowner indemnity if operations damage third parties
Landowner attorney fees paid when prevailing in litigation arising from the lease
Vehicle/traffic management plan
Health Impact Assessment

Wildlife

In sensitive areas, move non-well equipment off-site, use pipelines, reduce traffic
Remote control of equipment/ well telemetry
Shaded lights (or lights on a timer so not on unless workers need them)
Noise controls
Avoid wildlife habitat and corridors
Screening flares
Avoid surface disturbance in key habitat for special status species (including ESA listed species, BLM and FS sensitive species, state listed species).
Utilization of the most protective mitigation measures for a special status species currently recommended in peer reviewed scientific literature, or by state or federal agencies.
Adhering to seasonal drilling stipulations to protect wildlife

No drilling during mating periods for critical wildlife
Buried power lines

A final alternative that the Forest Service should consider in conjunction with the BLM is a “hold” on approval, or in other words a decision to wait to approve the SUPO/APD until the Shoshone National Forest updates its oil and gas availability EIS and finalizes its Forest Plan. Although an update of these documents will not affect Windsor’s valid and existing lease rights, it would allow the Forest Service time to consider the consequences of full field development along the Beartooth Front and to revisit whether areas now open to leasing still fall appropriately within that category. The Forest Service would be able to outline its long-term vision for the forest with respect to the greatly expanded (and ever expanding) oil and gas development occurring off National Forest land. It would also allow the Forest Service to evaluate whether such a proposed action may foreclose future options for the protection of Shoshone National Forest lands from oil and gas development. If and when it does approve Windsor’s proposal, it would then do so with the benefit of updated, comprehensive, large-scale analyses—something it does not have now.

V. The Forest Service must take a “hard look” at the project’s likely environmental, human health and economic impacts.

As envisioned by Congress, one of NEPA’s goals is to “prevent or eliminate damage to the environment’ . . . by focusing government and public attention on the environmental effects of proposed agency action.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) (quoting 42 U.S.C. § 4321). “By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late.” Marsh, 490 U.S. at 371. As such, NEPA requires the Forest Service to take a “hard look” at a project’s environmental impacts. Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). In this case, that means giving thorough consideration to the direct, indirect and cumulative impacts of the project on fish and wildlife species and water resources. 40 C.F.R. §§ 1502.16, 1508.8.

Our organizations and the public have advocated that the Forest Service prepare the most comprehensive and erudite analysis that will not only meet, but exceed NEPA’s requisite “hard look” standard. People in Wyoming are keenly aware of the rapidly expanding natural gas development projects across the state and the impacts we are experiencing as a result. For example, development in the Upper Green River Valley has transformed sagebrush winter range into what some would consider industrial sacrifice zones whose impacts are felt far beyond the fields themselves, threatening air and water quality, viability of big game herds and the quality of life in surrounding small towns. This is not the scenario we want to see happen to the Beartooth Front.

A new gas well on National Forest land is an undesirable prospect for most of the concerned public. We urge the Forest Service to require nothing less than the “gold standard” for this project. In defining such a standard, the Forest Service should keep in mind that it must apply to both the design and conditions of approval for the project, but also to the scope and quality of the NEPA analysis prepared. The planning and potential authorization of this project cannot be business as usual, resulting in a fast-tracked decision where the NEPA analysis is a means to an end, rather than a cautious and comprehensive process in which impacts are fairly

evaluated. The Forest Service's well-informed decision whether to authorize the project can only result from a high quality NEPA analysis.

In response thus far to the public's request for a careful approach, the Forest Service has responded favorably—hosting a public field trip and two public meetings. We commend you on these decisions and urge a continuation of such an approach as the agency considers the proper level of NEPA analysis to prepare. Windsor has expressed its willingness to be a good operator and its intentions to “do it right.” This sentiment is applicable not only at the operational stages, but at the planning and environmental analysis phase as well. “Doing it right” means supporting a process by which the Forest Service prepares a comprehensive EIS that addresses all the potential impacts from the proposal and seeks ways to mitigate those impacts.

The Forest Service is fully empowered to require the highest level of comprehensive study and review. It should not be pressured by the project proponent or others to streamline the NEPA analysis. The Forest Service is not bound to any timetable Windsor has established or desires. Indeed, as mentioned above, Windsor has waited until the very end of its statutory lease term to apply for an APD/SUPO and is now taking full advantage of the suspensions the leasing regulations provide; its lease is not at risk of expiring. Thus, the Forest Service should feel secure that in order to address what is undoubtedly one of the most important decisions it will make and one that will have far-reaching consequences for future oil and gas development decisions on the forest, it can and should take all the time that is necessary to do it right.

Below are specific resources or issues that require comprehensive consideration in what we hope will be a draft EIS.

1. The EIS should address the potential cumulative impacts to air quality as a result of Windsor's proposal coupled with the existing field development and any reasonably foreseeable future development.

Natural gas development in other parts of the state, specifically in southwest Wyoming, has contributed to the degradation of air quality. This degradation has been well documented and is a serious concern—not only because it impairs visibility in what was once a region of the country with impeccably clear skies, but also because it poses threats to human health. The Greater Yellowstone Area Clean Air Partnership, of which the Shoshone National Forest is a member, identified oil and gas development in southwest Wyoming as one of four primary threats to the quality of air in its three Class I areas (the Fitzpatrick, Washakie and North Absoraka Wilderness areas) and in the remaining parts of the forest, all of which are Class II areas. See Greater Yellowstone Air Quality Assessment Update, Nov. 2005 (Exhibit 4); see also Air Quality Excerpt, Shoshone National Forest Plan Revision Comprehensive Evaluation Report (Exhibit 5). Because there is already evidence that air quality impacts from surrounding oil and gas development projects are affecting Shoshone National Forest lands and because this is the first drilling project to be proposed on the forest in many years, the Forest Service should proceed cautiously and ensure that: 1) comprehensive baseline studies are in place; 2) a quantitative air quality model is prepared as part of the EIS; and 3) if new development is authorized, that monitoring and mitigation are incorporated as part of any conditions of approval.

The Shoshone National Forest should follow the example of the Bridger-Teton National Forest with respect to the approach it ultimately decided to take in response to the first drilling proposal on its lands in many years. Although the project proponent and the Forest Service initially scoped and prepared a draft EIS for just 1-3 exploratory wells in the Noble Basin, after public investigation and scrutiny of the company's intentions, it became clear the wells were not exploratory, but in fact "appraisal" wells. (Evidence to support this assertion included the fact that a test well had been drilled in the area the 1970s that provided sufficient geologic information, the proposal included pipeline development, which was unusual for exploratory well operations, and the company had bragged about its intentions to develop a full field.) After public outcry, the company decided it should request that the Forest Service prepare a new EIS to include an analysis of the impacts from potential full field development. Included in the upcoming draft EIS will be a comprehensive, quantitative air quality model and analysis to ensure that the Forest Service, an agency that has an affirmative duty to protect visibility in its Class I areas, does not authorize a project that could violate the Clean Air Act.

In this situation, the Forest Service has even more justification to require that Windsor's proposal to drill a ninth well in the field (albeit the first on National Forest land) be preceded by a comprehensive EIS and adequate air quality model. Compartmentalizing the project as just "one well" fails to take into consideration the obvious connection with the other, existing development in the field and does exactly what the Forest Service has claimed it was its policy not to do. See 72 Fed. Reg. 7391, 7399 (stating that "segmenting a larger project into smaller projects in order to meet the stated constraints...[of the CE] is contrary to Forest Service guidance.")

The Shoshone National Forest, as the manager of three Class I areas, has an affirmative responsibility to protect air quality related values, including visibility over these lands. 42 U.S.C. § 7475(d)(1)(B). Forest Service wilderness areas are protected by provisions of the Clean Air Act. See 42 U.S.C. § 7401(b)(1) (stating that the purposes of the Clean Air Act are "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare..."); 42 U.S.C. § 7470(2), 7491(a)(1) (directing that air quality in protected landscapes and airsheds be protected). The Wilderness Act provides additional direction, requiring the Forest Service to administer wilderness areas so they are "unimpaired for future use and enjoyment as wilderness." 16 U.S.C. § 1131(a). The goal established by the Clean Air Act is that "any future" impairment of visibility must be prevented and that "any existing" impairment of visibility must be remedied. 42 U.S.C. § 7491(a)(1) (emphasis added). Likewise, air quality must be "preserve[ed], protect[ed], and enhance[ed]" in protected landscapes like wilderness areas, and the "affirmative responsibility" imposed on the Forest Service for these prevention of significant deterioration areas is to "protect" them, not to allow them to be incrementally degraded. Id. §§ 7470(2), 7475(d)(1)(B).

Although much of the existing and proposed oil and gas development across Wyoming is not occurring nor is it slated to occur on National Forest lands, the Forest Service is nevertheless in a unique position as the manager of Class I areas. It must remain actively involved in an inter-agency advisory capacity to ensure these off-forest projects are done in a manner and at a pace that will protect visibility in these protected areas. Arguably, the Forest Service's responsibility

is heightened when projects that have the potential to degrade air quality (like this one) are proposed on National Forest land.

Without proper analysis, the Forest Service cannot be sure that authorization of Windsor's proposal would not actively contribute to the problem of declining air quality and visibility on the Shoshone. To meet its responsibilities under the Clean Air Act, the Shoshone National Forest should be vigilant in protecting these areas by requiring the highest level of baseline analysis and quantitative air quality modeling prior to authorizing the first new oil and gas development on its lands in many years. If the impacts from this proposed well coupled with the existing wells and any reasonably foreseeable future wells would impair visibility (and thus violate a non-discretionary statute like the Clean Air Act), the Forest Service has the authority to deny Windsor's SUPO outright.

The Forest Service should consider the cumulative impacts to air quality stemming from the existing and proposed development coupled with the reasonably foreseeable future development in the area. Windsor holds substantial leases across the Beartooth Front on private, state and federal lands, and as this would be the ninth well permitted in the Line Creek drainage that Windsor would oversee (in addition to the plugged single well on private surface in the Bennett Creek drainage and the central facility/compressor station east of Sugarloaf Butte, in Clark) it makes sense to analyze them together. As this is the first new well in the field proposed on federal land, this is the first opportunity to fully consider impacts to air quality. The Forest Service should take full advantage of this opportunity.

There are numerous sources of air pollution associated with natural gas development including but not limited to vehicle exhaust, flared gas, nitrous oxides (NOx), volatile organic compounds (VOCs), and dust. While these impacts may be small for a particular well, the cumulative impact of multiple wells, vehicles, and the central facility/compressor station could be severe. In addition, the air sparge system that has been installed to remediate groundwater pollution stemming from the 2006 Crosby well blow out will be another source of emissions as contaminants are volatilized out of the ground and into the air.

Emissions from gas wells and associated production activities and storage facilities have been shown to contain benzene and other VOCs and have led to citizen complaints of foul air, dizziness, and various respiratory and other illnesses. The 2006 Crosby #25-3 well blowout released massive amounts of methane into the air, causing respiratory problems for citizens who live in the Line Creek Wilderness Subdivision. Thus, in addition to addressing degradation to air quality and visibility, the Forest Service should address the potential impacts to human health and safety.

Beartooth Electric, the regional electricity supplier, has announced that the current electrical usage in the Line Creek drainage will reach industrial capacity upon implementation of the air sparge system. Windsor has indicated that it will use diesel generators for any electrical needs associated with this project. These generators are another source of air pollution associated with the proposed project. Aside from the air and noise pollution that will result from the use of generators at the project site, we are concerned about the lack of electrical capability stemming from maxed-out power lines. If an accident were to occur there would be insufficient

electricity to deal with the problem and no way to provide the needed electricity. We request that the Forest Service include diesel emissions to any air quality analysis it prepares and consider adding, as a condition of approval, the requirement that additional industrial electrical capacity in the Line Creek drainage be acquired prior to project implementation.

In conclusion, air quality is a serious issue now facing the Shoshone National Forest. As this is the first drilling project proposed on the forest in many years, we ask that the Forest Service consider its affirmative responsibility to protect visibility on its lands by taking three important steps. First, the Forest Service should analyze all existing emissions closely in a baseline study. Second, it should prepare a quantitative air quality model to examine the impacts of increased drilling on the Shoshone's protected airsheds and an analysis as part of the EIS that examines impacts to human health. This modeling should also include hazardous air pollutants (HAPs) given the proximity to residences downwind. Finally, if the model predicts that there will be no air quality impacts or that the impacts can be effectively mitigated such that the Forest Service decides to authorize Windsor's proposal, the Forest Service should require monitoring throughout the development and production stages of the field as a condition of approval. If the monitoring reveals errors in the model, the Forest Service should have in place thresholds and standards to adaptively manage and remedy any future problems. It is unacceptable that this project (coupled with existing and reasonably foreseeable future development) could adversely impact the air in this world-class forest, especially when the Forest Service has the authority to prevent this from happening.

2. The EIS should fully address the potential impacts to water quality, riparian habitats and human health.

Windsor is responsible for severely polluting the shallow and deep aquifers in the Line Creek drainage, leading to the contamination of a private water well and likely the pollution of more private wells in the future as the contaminant plume moves downstream. In addition, contaminants have been found in Line Creek. This water pollution is primarily a result of the 2006 Crosby #25-3 well blowout; however, operator misconduct and leaky waste pits have contributed to water contamination as well.

Although Windsor has entered into the Voluntary Remediation Program ("VRP") with the state of Wyoming following the well blowout, no remediation has taken place. It has been more than one year since the interim Air Sparge/Soil Vapor Extraction ("AS/SVE") was first proposed and yet it is still not operational and the site is only in the monitoring phase of the VRP. Understandably, many Line Creek community members have noted that Windsor should first clean up its previous sites before being allowed to drill new wells, particularly on land as special as the Shoshone National Forest. In addition, given the company's history, the Forest Service should be extremely wary of allowing Windsor to drill on the Shoshone National Forest at all. We are concerned about the potential of this project to further pollute water sources in the area, impacting aquatic and terrestrial ecosystem health as well as the health of citizens who live in Clark. The environmental analysis should address these concerns and provide guidance for preventing and/or cleaning up further contamination.

It is imperative that the Forest Service ensure that water quality standards in the Federal Well #26-2 project area are not violated by natural gas exploration activities. Specifically, development cannot be allowed in or very near to streams, wetlands, and riparian areas. And certainly the problems that have already occurred with water contamination in the Line Creek drainage must not be repeated. As was suggested by a member of the public at the informational meeting in Cody on October 22, 2008, the Forest Service should establish a plan to monitor water quality. Windsor could fund these monitoring efforts—dedicating a pool of money for this purpose to ensure monitoring occurs.

We request that the Forest Service require baseline studies of water quality in the Line Creek drainage prior to project approval. These studies should include micro and macro-invertebrate sampling, pH testing, and identification of any hydrocarbons or other chemicals existing in the creek or aquifers. We also ask that the Forest Service require groundwater flow mapping as part of the EIS process or as a condition of approval to drill. Groundwater flow mapping will assist Windsor, the federal and state agencies overseeing the project and concerned citizens to more effectively address groundwater pollution by illustrating how and where contamination plumes will flow.

The Forest Service also should provide an analysis of project impacts to riparian areas and ground water resources including springs and seasonal ponds. The Forest Service must “design and implement activities in management areas to protect and manage the riparian ecosystem” and “protect wetlands and riparian areas from mineral activities.” Forest Plan III-69. Proposed well #26-2 is located less than one mile from Line Creek, a mountain stream that flows into the Clarks Fork River. The Forest Service has an obligation to protect riparian areas and properly managing these areas is a critical component of managing for biological diversity and for meeting many other needs, including protecting human health and safety.

3. The EIS should fully address the potential impacts to wildlife from this well proposal, coupled with the impacts from past, present and reasonably foreseeable future development in the area.

The Beartooth Front is home to all of the iconic wildlife species in Wyoming: elk, deer, pronghorn, bighorn sheep, mountain goats, wolves, black and grizzly bears, mountain lions, and sage grouse just to name a few. While the exact parcel of land upon which this proposed well will be located is not classified as critical wildlife habitat by the Wyoming Game and Fish Department, it is clear that the development of well #26-2 will impact nearby wildlife populations. The increased noise, air pollution, traffic, human activity, and light associated with drilling and production of a natural gas well are effects that spread beyond the boundaries of the well pad. Of particular concern is how this development—both individually and coupled with the reasonably foreseeable future development Windsor or other lessees might propose—will affect wildlife populations that winter on Bald Ridge and in the Clarks Fork River canyon.

Bald Ridge is home to a year-round elk population and is critical winter range for elk and mule deer. Surface land ownership is shared amongst the National Forest, the BLM, the state of Wyoming and private landowners and portions of it have been leased for energy development. We are concerned that allowing energy development to encroach onto the Forest will be the first

step towards developing the entire Beartooth Front and thus the critical habitat on Bald Ridge. As energy development increases along the Beartooth Front the wildlife populations that depend on this habitat for part or all of the year will suffer the consequences. If further development is authorized, restrictions must be placed on development and the Forest Service and BLM should require companies to carry out their operations with the least possible amount of disturbance.

The Clarks Fork River canyon is an important travel corridor for many species moving from the high country of the Beartooth Mountains down to winter range along the Beartooth Front. Bighorn sheep and mountain goat herds winter in the canyon, and the bighorn sheep migration through the Clarks Fork canyon (from the mountains around Cooke City) is the longest sheep migration in Wyoming. The Clarks Fork River canyon is located approximately 10 miles south of the proposed well site. There are several Forest Service, BLM, and state leases connecting this proposed well to those at the mouth of canyon and on Bald Ridge, and the Forest Service should examine how development along the Front will affect wildlife populations as part of this EIS.

Although the Line Creek drainage is not considered critical wildlife habitat at this time, the Forest Service should be conservative in allowing development of areas that may potentially meet critical habitat needs in the future. Twenty years ago elk utilized the Line Creek drainage with much greater frequency than they do today. Likewise, in twenty years this area may become critical habitat for elk or other species. With climate change and associated events it is impossible to predict habitat needs in the future. Pers comm. Doug McWhirter, 8/4/08. Thus it is imperative that “habitat buffers” are incorporated into land use planning, especially for major projects such as those associated with energy development. The EIS should analyze the cumulative effects of current development, the proposed project, and possible future development along the Beartooth Front. This is an essential component to responsible and conservative land use planning.

a. Mule Deer, Elk, and Pronghorn

In developing the EIS for this project, the Forest Service should consider and utilize data available from the Wyoming Game and Fish Department to determine protections for game species and other species. We particularly suggest the Forest Service refer to and incorporate the information in the Wyoming Game and Fish Department’s publication “Recommendations for Development of Oil & Gas Resources within Crucial & Important Wildlife Habitats.” A copy of this large document can be found online at: <http://gf.state.wy.us/downloads/pdf/og.pdf>. In addition, the Forest Service should fully consider and abide by the Western Governors Association’s Migration Corridors Initiative. The link to this document can be found online at: <http://www.westgov.org/>. The Forest Service should also utilize the information regarding the needs of big game species available from other updated sources and peer reviewed publications.

We urge the Forest Service to protect more than “critical” big game winter ranges. This approach is biologically and ecologically unsupportable and results in only limited protections. We therefore request that protective measures be considered for all winter range areas and seasonal habitats in the Line Creek drainage. To the extent the Forest Service excludes “general” winter range areas from the application of protective measures, it should provide a biologically

defensible rationale for such a decision. Consideration of the above issues is necessary to protect habitat on which wildlife rely. At a minimum the Forest Service should fully implement the protective provisions specified in the Shoshone Forest Plan. See Shoshone Forest Plan at III-50 (stating, "Manage minerals activities to protect Crucial Preferred Winter Range and unique wildlife areas during critical seasonal periods.") The Forest Service should also take steps to ensure that noise does not disturb big game, especially during critical periods such as parturition. Further, the impact of noise on hunters and the hunting experience should be fully considered and mitigated.

b. Ferruginous hawks and other raptors

The EIS should determine whether Ferruginous hawks and other raptors are using or could potentially use the area in and around the lease parcel. The Forest Service should then ensure that it meets its duties to provide management protections for the species that are addressed in the Forest Service's Sensitive Species Manual and given special management direction in the Shoshone Forest Plan. The Forest Service must ensure that no extreme noise occurs during nesting season or near to occupied nests. The EIS should examine whether habitat that could potentially be occupied by raptors, such as previously utilized nests, should receive protection so as to ensure the continued viability of raptors in the area. It should consider all biological needs of raptors and develop suitable protections for all significant life-stages of the various raptors, all of which should be included in the decision document. Additionally, the EIS should address compliance with the Bald Eagle Protection Act and Migratory Bird Treaty Act and the decision document should specify the means by which the Forest Service will ensure compliance with these laws as well as pursue (or facilitate) enforcement of them, relative to raptors as well as other bird species protected by these laws.

c. Greater sage-grouse

Greater sage-grouse populations and habitat throughout the West have been declining due to many influences including oil and gas development, and petitions have been filed to have the sage-grouse listed under the Endangered Species Act ("ESA"). While there are no sage-grouse leks on the Shoshone, sage-grouse do move into the project area for nesting and brood rearing. In order to keep populations healthy enough to avoid ESA listing the Forest Service should work to protect all the habitat areas that sage-grouse use throughout the life cycle rather than simply limiting protection to the mating season.

The Forest Service should impose protective measures to further conservation of the species and its habitat and to reverse the historic decline of both. In the context of oil and gas development and related activities such as transportation of equipment and produced products, the Forest Service should follow recommendations found in the following publications and state executive orders:

- Wyoming Game and Fish Department, Recommendations for Development of Oil & Gas Resources within Crucial & Important Wildlife Habitats;¹

¹ This large report can be found online at: <http://gf.state.wy.us/downloads/pdf/og.pdf>.

- The National Sage-Grouse Habitat Conservation Strategy;² and
- Governor Freudenthal’s Greater Sage Grouse Core Area Protection Executive Order.³

Typical lease stipulations limit oil and gas activities when sage-grouse are utilizing known leks. However, focusing exclusively on limited elements of a species’ ecological needs (courtship and nesting) may not only fail to protect the species, it might also blind the Forest Service to other critical factors affecting the species. For example, it is well known that sage-grouse chicks need access to wet meadow areas so they can find high-protein insects to support early growth. Dense stands of sagebrush are critical winter habitat. Thus, the appropriate means to protect sage-grouse is to not only focus management efforts (and protective measures) on particular habitat needs (e.g., protecting leks), but also to ensure sagebrush habitats, an increasingly imperiled ecosystems, remain largely protected from development.

Governor Freudenthal’s Executive Order focuses on the protection of “core breeding areas” across the state and provides that “[n]ew development or land uses within Core Population Areas should be authorized and conducted only when it can be demonstrated by the state agency that the activity will not cause declines in Greater Sage-Grouse populations.” Greater Sage-Grouse Core Area Protection Executive Order, (Exhibit 7). These core areas have been mapped and include some portions of the Beartooth Front. (Exhibit 8).

Although to our knowledge the Forest Service has not taken a formal position regarding the “core breeding area” approach the state has put forth, the U.S. Fish and Wildlife Service (“USFWS”) commented that the “core population area strategy . . . is a sound framework for a policy by which to conserve greater sage-grouse in Wyoming.” Letter from Brian Kelly, Field Supervisor, USFWS to Ryan Lance, dated May 7, 2008 (Exhibit 9). In addition, the Wyoming State BLM Director agreed, stating:

I am aware of your Sage-Grouse Implementation Team’s work to define “core areas” for sage-grouse within the Powder River Basin and across Wyoming. We have received maps of the core areas identified by the Team along with recommendations to you and understand that the U.S. Fish and Wildlife Service have provided an endorsement of both the areas and strategy. Consequently, it seems appropriate to base our management strategy on these “core areas.”

Letter from Donald A. Simpson, Acting State Director, Wyoming BLM, to Governor Dave Freudenthal, dated June 12, 2008 (BLM State Office files) (Exhibit 10).

We ask that the Forest Service, in consultation with the Wyoming Game and Fish Department, the BLM and the USFWS assess not only the lease parcel Windsor is proposing to develop for its impacts to grouse, but also consider the impacts to sage-grouse habitat given a

² BLM, National Sage-Grouse Habitat Conservation Strategy, Nov. 2004 (Exhibit 6).

³ Greater Sage Grouse Core Area Protection Executive Order (Exhibit 7).

reasonably foreseeable development scenario along the Front—on and off National Forest lands. This larger scale analysis would assist the agencies in planning comprehensively, rather than in a piecemeal fashion in order to avoid adverse impacts to sage-grouse.

4. The EIS should consider the impacts of the Windsor’s proposal on native vegetation and the impacts from the potential introduction of invasive/noxious weeds.

The Forest Service should ensure the decision document provides for compliance with Executive Order 13112, which establishes requirements and procedures federal agencies are to adhere to relative to invasive species. Section 2 of the Executive Order requires the Forest Service to identify actions that may affect the status of invasive species and to then:

Use relevant programs and authorities to: (i) prevent the introduction of invasive species; (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner; (iii) monitor invasive species populations accurately and reliably; (iv) provide for restoration of native species and habitat conditions in ecosystems that have been invaded; (v) conduct research on invasive species and develop technologies to prevent introduction and provide for environmentally sound control of invasive species; and (vi) promote public education on invasive species and the means to address them

Just as important, the Executive Order requires the Forest Service to “not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.” The EIS should fully analyze the extent of the invasive species problem in this area, the causes, and options for both restoration and prevention in the future.

The Forest Service can prevent invasive species from becoming established by protecting native plant species and communities, especially rare and special status species. The Forest Service should conduct surveys to determine the characteristics of native plant communities and rare or special status species in the project area. The survey results should be presented in the EIS, and the decision document should establish standards for protecting native plant communities and rare or special status species. It should seek to protect dense stands of sagebrush that could serve as sage-grouse wintering habitat, and recognize the special value of these stands.

5. The EIS should consider impacts to soils and surface geology.

Please provide an analysis of project impacts to soils, including cryptobiotic crusts and surface geology. Baseline soil surveys should occur prior to any surface disturbance. Studies should examine microbiotic community structure, cryptobiotic crusts, and determine the components of healthy topsoil. This proposed project site is a high elevation sagebrush

community. This is a very difficult habitat to remediate and a good understanding of soil qualities is essential for successful recovery.

It is accepted practice for energy companies to stockpile topsoil to use for later reclamation work. Recent studies, however, have shown that stockpiled topsoils lose many of their essential qualities if stored for more than two years. Particularly troubling is the loss of microbial communities that occurs in stockpiled topsoil as these are essential components in healthy soils.

Finally, we ask that the Forest Service perform geologic cross-sectioning of the project area. This will allow the agency, and the public, to better understand the fracture zones in and around the drill site and to anticipate if or how drilling fluids could migrate under the surface.

6. The EIS should analyze the effects of noise from the proposed project.

The EIS should address issues and impacts to humans and wildlife that are related to noise created by well pad construction, generators, truck traffic, drill rig operation, and other activities associated with this proposal. These impacts should be evaluated in terms of the remoteness and quietness that so many people seek on the public lands. Impacts on hunting should be considered, and mitigation that prohibits noisy activities during the hunting season should be required. Efforts should be made to alert hunters that their hunting experience and activities may be disrupted if noisy activities could occur during the hunting season. Additionally, the impacts on homeowners who live nearby, and on hikers and other visitors who may use the area, should be considered.

7. The EIS should consider the impacts to visual resources.

The Beartooth Front is an incredibly rugged and scenic landscape and an important visual gateway into Yellowstone National Park and the town of Cody. The Line Creek drainage is a particularly scenic and geologically unique section as the “gates of Line Creek” is clearly visible from the highway. These palisades are located just west of the proposed project site and are a view that will be marred by drill rig operation and other project infrastructure. The well site will be visible not only from the highway, but also from many homes in the Line Creek Wilderness Subdivision as well as from many Forest Service trails crossing along the Beartooth Front and the Line Creek Research Natural Area.

The Shoshone National Forest 1992 Oil and Gas Leasing EIS designates this area as having a visual quality objective of “partial retention.” This means that activities must remain “visually subordinate” to the characteristic landscape as viewed by the average public observer traveling on an adjacent route (III-25). According to the objectives laid out in the 1992 EIS, activities may repeat form, line color, and texture commonly found in the characteristic landscape but changes must remain visually subordinate. This proposed well will not be “visually subordinate” for people traveling on forest road 123 or highway 120. This discrepancy should be addressed in the EIS.

The Forest Service should also consider how this project may contribute to light pollution. A clear and starry night sky is an important, but often overlooked, visual resource in Wyoming and it is imperative that this project does not dim our night sky. Likewise, darkness is an often overlooked quality that many in Wyoming take for granted. Drilling rigs are the largest source of light pollution associated with this sort of project, but vehicle lights add to the problem as well. If the Forest Service authorizes the project it should require Windsor Energy to take steps to reduce light pollution throughout the drilling process.

8. The EIS should address impacts from the proposal on nearby Research Natural Areas Wilderness Areas.

The proposed project site is located within close proximity to the proposed Line Creek Plateau Research Natural Area (RNA). RNAs are designated by federal agencies in order to protect examples of natural ecosystems for scientific study, education, and maintaining biological diversity. They are managed in their natural state in order for scientists to understand natural processes, as benchmarks for measuring changes in similar ecosystems, and for use as controlled scientific studies. The Line Creek Plateau has been singled out as an area of special interest due to the unique geology and large number of unique plant species it contains. There are several species of concern in the RNA. These plant species depend on the unique alpine tundra ecosystem found on the plateau – an ecosystem that is very rare in the lower 48 states. It is likely that this habitat will only become increasingly more rare in the future given the predicted effects of global climate change.

The Line Creek RNA is an essential tool for protecting and understanding the alpine tundra. Any development activities that occur near the RNA could jeopardize the health of this ecosystem. It is important that the Forest Service consider the effects of this proposed project on the Line Creek RNA.

Also within striking distance of the proposed project site are the Absaroka-Beartooth Wilderness, the North Absaroka Wilderness, and the Clarks Fork Wild and Scenic River. As discussed above, the Forest Service has an affirmative responsibility to manage Class I areas (and Class II areas) to protect visibility. The EIS must include baseline studies reflecting current air quality and quantitative air quality model so as to take steps to protect air quality in these sensitive areas.

9. The EIS should consider the effects of the proposed drilling project on recreational use.

Hikers, hunters, mountain bikers, and horseback riders, wildlife watchers and others frequently use the area. We are concerned about the impact of the project on these recreational activities. The proposed well is sited on the only road that visitors can use to access the Line Creek portion of the Shoshone National Forest and the Custer National Forest. Access to these national forests will undoubtedly be impacted by the increased traffic and activity along forest road 123. The analysis should include the potential impacts of vehicle trips on the elk and other big game herds in the area, and on hunters and other people who value these herds. We are also concerned about how this project will impact visitors who travel to the Line Creek area to seek

solitude and quiet recreation. Please provide an analysis of the impact of the project on recreational activities.

10. The EIS should consider the adverse impacts of increased drilling on the local economy.

In the forest plan revision process, the Shoshone National Forest identified its niche as a wild, backcountry forest whose role as the gateway to Yellowstone National Park has a positive impact on a local tourism and amenity-based economy. The Shoshone National Forest plays a unique role in a regional economy reliant on the protection of natural resources in the Greater Yellowstone Area. The Forest Service should consider all factors that contribute both positively and adversely to the socio-economic spectrum of the region and the state's economy. The Forest Service should not limit its analysis to factors that can be easily quantified, but should approach this project with the aim to produce an analysis that considers all economic and social drivers and the impact from this and other reasonably foreseeable oil and gas development proposals on and off the forest.

The analysis should include, but not be limited to the following: baseline information about revenue sources from visitor spending (i.e. general tourism), hunting and fishing licenses and related expenditures, income from outfitting and guide businesses and from local businesses and real estate firms that literally market a healthy forest as an amenity to incoming residents. It should include not only revenue produced, but also costs associated with commodity-based endeavors, including the environmental costs. It should include amenity-based values associated with the quality of life and desirability of living in towns like Cody, Clark and Powell and surrounding communities that provide easy access to the forest and attempt to quantify these values. The detriment to property values when increased industrialized development is proposed just miles from one's home should also be analyzed. The agency should consider impacts from the new worker influx the project will create. Finally, the analysis should include an assessment of the value of "ecosystem services" that would be lost if the area is developed. This can be approached by quantifying what it would cost to artificially replace a healthy watershed for example or the costs associated with impacts to human health from polluted air. The analysis should be geographically broad enough to encompass local communities, but also address regional impacts.

VI. Issues raised in the Cody and Clark public meetings require clarification.

There were four issues raised in the Cody and Clark public meetings that we ask the Forest Service to clarify. These include: 1) the scope of a cumulative impacts analysis; 2) the regulations that prohibit the Forest Service from allowing Windsor to fund the preparation of an EIS if the Forest Service doesn't have the budget to do so; 3) the extent of Windsor's holdings along the Beartooth Front and whether this information is proprietary; and 4) that the denial of Windsor's APD would precipitate a takings lawsuit. We will briefly address these points, and would ask the Forest Service to respond to them in turn.

First, the Forest Service stated that its cumulative impacts analysis would only consider other existing development (not future development) on non-federal lands. In NEPA's

implementing regulations, a cumulative impact is defined as: “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of which agency (Federal or non-Federal) or person undertakes such action.” 40 C.F.R. § 1508.7. Thus, not only must the Forest Service consider the impacts from the proposed well, but it must also consider whether and to what extent any past developments or activities, existing nearby development regardless of surface ownership, or reasonably foreseeable future development coupled with the proposed well would have impacts to the environment. Windsor’s other lease holdings (regardless of whether these are located on private, state, BLM or Forest Service) along the Front must be disclosed and analyzed within any discussion of reasonably foreseeable future development in order to adequately analyze potential cumulative effects. Similarly, past incidents like the Crosby Well blow-out must be considered and impacts from existing nearby development must also be included in the analysis.

Second, the Forest Service stated that it was unlikely to prepare an EIS. The reason it gave was that an EIS is a very expensive undertaking. When the public pointed out that companies often pay for EIS preparation, the Forest Service said that certain regulations prohibited the agency from requiring Windsor to pay for it. We are not aware of any regulations that restrict the Forest Service from overseeing a process in which the Forest Service contracts with and oversees (and Windsor funds) an independent third party to prepare the EIS. This is routinely done—and is being done in the context of a similar drilling proposal on the Bridger-Teton National Forest at present. Please provide any information about and citations to Forest Service regulations that the Shoshone National Forest believes limits its authority to require Windsor to pay for the NEPA analysis for its APD approval.

In a situation like this one, where a private company’s lease rights are not in question, taxpayers should not foot the bill for analyses that private companies must secure in order to move forward with a project on public land. From a policy standpoint, Windsor should pay for all the necessary steps that precede the authorization. Because it is common practice for multi-million dollar companies like Windsor to pay for such analyses, it is curious why the Forest Service cited cost as a factor for not considering preparation of an EIS. There are far greater priorities on the Shoshone National Forest than approval of this one SUPO/APD. Forest plan revision, travel management and updating the oil and gas availability decision are all projects that were anticipated prior to Windsor’s proposed project. If, as is often the case, the project proponent wants its project to receive priority, it will fund an independent contractor to prepare the necessary analyses.

Third, Windsor was asked to provide information showing the extent of its leases, on and off National Forest land, along the entire Beartooth Front.⁴ Windsor claimed at the Cody public meeting that it would provide this information; however, at the Clark meeting the next evening it claimed that its leasehold information was proprietary and that the company was not willing to disclose it. We are unaware whether this is true with respect to non-federal leases, but certainly

⁴ Our organizations also asked the Forest Service in September for a narrative description and a map illustrating lessor information in the general Beartooth Front area (on and off National Forest land including federal, state and private surface and mineral estates) and also a narrative description and/or map that illustrates and describes all of the current operators/lessees with a notation about when these leases expire. We reiterate this request.

the BLM (on its LR-2000 website) tracks and makes public this information with respect to federal lands. It is the responsibility of the agencies to gather and distribute this information. Not only is it necessary data that will inform a proper cumulative effects analysis, but it will also help the agencies and the public to understand better the potential long-term development that could occur along the Beartooth Front.

Last, the question was raised about the Forest Service's and BLM's authority to deny Windsor's APD. The Forest Service responded that in limited circumstances—like in the situation where an agency discovers the presence of an endangered species—the Forest Service could withdraw its consent to lease and instruct the BLM to deny the APD. It cautioned, however, that to do so would give the company adequate reason to file a takings claim. The authority of federal agencies to condition the approval of (or even deny) an APD is much broader than the Forest Service described. Moreover it is highly unlikely a company would succeed in winning a lawsuit based on a takings claim in this type of situation. The Forest Service should refrain from downplaying its authority and from repeating industry's takings threats as statements with legal merit.

The discussion below provides pertinent information addressing the authority of federal agencies to condition oil and gas development and in some cases, to deny development altogether without risk of a takings challenge.⁵

1. The Forest Service and the BLM have broad authority to condition, or in certain instances, deny oil and gas development at the APD stage.

A number of federal laws impose a requirement on the Forest Service to consider environmental safeguards as a key component of oil and gas development. For example, the purposes of the Endangered Species Act “are to provide a means whereby the ecosystems upon which [listed] species depend may be conserved and to provide a program for the conservation of such [species], and the Secretary of the Interior shall “utilize [programs administered by him] in furtherance of the purposes of this chapter.” 16 U.S.C. §§1531(b), 1536(a)(1). The objective of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The purposes of the Clean Air Act are “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare” 42 U.S.C. § 7401(b)(1). See also id. §§ 7470(2), 7491(a)(1) (directing that air quality in protected landscapes and airsheds be protected). Under the National Historic Preservation Act, prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmarks” 16 U.S.C. 470h-2(f). This is just a small sampling of the numerous environmental protection statutes under which the BLM and the Forest Service operate.

⁵ The discussion on pages 26-29 was excerpted from a memo written by Bruce Pendery, staff attorney and public lands director for the Wyoming Outdoor Council. We would be happy to provide the full memo, which provides a more detailed discussion of the “retained rights” of agencies relative to conditioning oil and gas development after a lease has been issued if the Forest Service would find it helpful.

Given these mandates, it is clear that the Forest Service and the BLM are obligated to ensure environmental protection even in areas that have been leased. In addition to the legal obligations noted above, contractual provisions relative to oil and gas development allow and in fact demand protection of the natural environment in areas that have been leased. The BLM's standard lease form (form 3100-11) contains the following rights that federal lessors retain upon issuance of an oil and gas lease:

- Lease Terms Section 4: “Lessor reserves the right to specify rates of development and production in the public interest”
- Lease Terms Section 6: “Lessee must conduct operations in a manner that minimizes adverse impacts to the land, air, water, to cultural, biological, visual, and other resources Lessee must take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with lease rights granted, such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures.”
- Lease Terms Section 7: “To the extent that impacts from mining operations would be substantially different or greater than those associated with normal drilling operations, lessor reserves the right to deny approval of operations.”

The regulation at 43 C.F.R. § 3101.1-2 is also instructional:

A lessee shall have the right to use so much of the leased land as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to: stipulations attached to the lease; restrictions deriving from specific, non-discretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such reasonable measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. At a minimum, measures shall be deemed consistent with lease rights granted provided they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.

The Forest Service and BLM should not interpret this regulation narrowly; nor should the agencies claim that in the absence of a specific stipulation or non-discretionary statute it can only impose “reasonable measures” demanding no more than that lease operations be moved by a maximum of 200 meters, leasehold operations be prohibited for no more than 60 days, or that operations not be moved off the leasehold.⁶ The regulation is clear that this represents a minimum prescription for reasonable measures to remain consistent with lease rights granted. It does not rule out the application of more extensive mitigation measures. In fact, the Federal

⁶ 43 C.F.R. § 3101.1-2

Register preamble to this regulation states unequivocally that “the authority of the Bureau to prescribe ‘reasonable,’ but more stringent, protection measures is not affected by the final rulemaking.” Oil and Gas Leasing, Geothermal Resources Leasing, 53 Fed. Reg. 17,340, 17,341 (May 16, 1988). Put differently, the regulation establishes a floor, not a ceiling.

Other statutes and regulations give the Forest Service further authority to condition oil and gas development on National Forest lands. The Mineral Leasing Act itself instructs agencies as to their retained rights and puts leaseholders on notice that their right to develop is uncertain and conditioned on numerous factors.⁷ For example: “Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property....” 30 U.S.C. § 187. In addition, “The Secretary of the Interior, or for National Forest lands, the Secretary of Agriculture, shall regulate all surface disturbing activities pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources. *Id.* at § 226(g).⁸

It is worth noting that only three rights are conveyed when an oil and gas lease is issued:

- An “exclusive right” to remove all of the oil and gas on the leasehold.⁹
- The right to “use” as much of the leasehold as “necessary” to recover all of the leased resource.¹⁰
- The right to build and maintain “necessary” improvements to extract the leased resource.¹¹

Thus, Windsor has not been conveyed a right to develop the oil and gas in exactly the manner it desires or on the exact timeline it desires. Federal agencies have retained the right to condition those aspects of oil and gas development.

In contrast to the limited rights that have been conveyed, under the standard lease form and the 3101.1-2 regulation, the BLM has specifically retained the right to condition development based on the following:

- Applicable laws.¹²
- Terms, conditions, and stipulations in the lease.¹³
- Regulations and formal orders in effect when the lease is issued.¹⁴

⁷ See Wyoming Outdoor Council v. Bosworth, 284 F.Supp.2d 81, 92 (D.D.C. 2003) (explaining that a lessee’s right to drill is not absolute and a determination that drilling operations would violate a nondiscretionary statute gives the Forest Service the right to restrict the operator’s plans or “even disallow use.”).

⁸ Courts have determined that the meaning of the phrase “in the interest of conservation” in the Mineral Leasing Act allows suspension of operations so as to protect the environment. Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981).

⁹ Form 3100-11.

¹⁰ 43 C.F.R. § 3101.1-2.

¹¹ Form 3100-11.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

- Regulations and orders issued afterward, if not inconsistent with lease rights and provisions in the lease.¹⁵
- Specific, non-discretionary statutes.¹⁶
- Reasonable measures.¹⁷

We ask the Forest Service to pay particular attention to the aspect of the Standard Lease Form 3100-11 that makes the removal of oil and gas “subject to applicable laws.”¹⁸ This is a considerably broader provision than the reference to non-discretionary statutes in the 3101.1-2 regulation. Many laws are applicable even if they are not strictly non-discretionary and Windsor is “subject to” these laws under the explicit terms of the standard lease contract. We would also note that the “terms, conditions, and stipulations of this lease,” to which Windsor is also “subject to” under form 3100-11, specifically includes the three limitations noted above that are stated in the standard lease form. That is, the rate of development can be specified as needed in the public interest, reasonable measures not necessarily limited to only the three mentioned in the 3101.1-2 regulation that are deemed necessary to minimize adverse impacts can be required, and if the impacts of the proposed operation are substantially greater than normal, operations can be denied.

This broad range of retained rights gives the Forest Service and the BLM great authority to specify the time, place, and manner of oil and gas development. And while an agency cannot arbitrarily deny an APD, if denial is based on sound evidence that development would violate “applicable laws” (and other conditions), the Forest Service would have the authority to deny an APD outright.

The limited conveyance of rights under a federal oil and gas lease and the government’s high degree of retained authority to condition development is well established. Thus, the Forest Service and the BLM should not capitulate to the development desires of Windsor due to a belief that any standards or conditions imposed would risk a takings lawsuit. Before a taking can occur, a property right must have been given. While certainly the federal government has conveyed the right to extract oil and gas from a leasehold, using no more of the leasehold than is “necessary” and building only “necessary” improvements, it has done so subject to development occurring under a highly regulated, comprehensive framework administered by the federal agencies, as discussed in detail above. Specifically, whatever property right has been “given” has been made “subject to” applicable laws; terms, conditions and stipulations in the lease itself; other regulations and orders in place when the lease was granted; later-issued regulations if not inconsistent with the lease; specific, non-discretionary statutes; and any reasonable measures that the agencies may require.

The United States Supreme Court described the limited property right that is given when an oil and gas lease is granted:

¹⁵ Id.

¹⁶ 43 C.F.R. § 3101.1-2.

¹⁷ Id.

¹⁸ Form 3100-11.

Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary. . . . In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals.¹⁹

Having given only a highly conditioned right to development, federal agencies can fully regulate development of existing leases with little fear of there being a “taking,” and under the legal authorities discussed above the agencies are mandated to do so.

In sum, adding strict conditions of approval to the authorization to develop a lease would not present a “takings” situation.²⁰ Moreover, if the agency’s rationale for denying an APD altogether is well founded and based on conditions of which the lessee was given fair notice in the lease form and applicable regulations, the lessee would have a difficult time convincing a court a taking had occurred. We engage in this review of relevant law and policy so as to emphasize that the Forest Service and BLM certainly have the authority, and indeed the obligation, to fully protect the natural environment and human health in either authorizing the project with strict conditions or denying the project if the agencies determine the proposal will violate other applicable laws.

VII. Conclusion

We’ve raised numerous issues in these scoping comments in the hope that the NEPA analysis the Forest Service undertakes is comprehensive so that it serves as a useful decision making tool for the agency. Another important role of preparing an adequate NEPA analysis is to provide transparency so that the public is aware of the potential risks associated with the project. If done correctly a NEPA document can also provide assurance to the public that the lead agencies (and cooperating agencies and the company) are committed to a design and approval process that guarantees the protection of human health and safety and of the natural resources in the Beartooth Front area.

To highlight the main points we’ve raised, we provide this concluding summary:

- 1) The CE that the Forest Service is considering using to authorize the project is problematic as written and not appropriate for use in this specific situation.
- 2) Given the numerous resources that may be affected, the threat of future accidents that could endanger the nearby community, and the potential cumulative impacts that could arise from this and future development

¹⁹ Boesche v. Udall, 373 U.S. 472, 477-78 (1963).

²⁰ Besides the fact that the federal government has given only a significantly limited right, it is well established that a regulatory taking can only occur if an agency deprives a property owner all economically viable uses of the leasehold. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). It is unlikely that any restrictions that the Forest Service or BLM might place on lease development would deprive Windsor of all economically viable uses of the lease, and certainly a taking does not occur just because a company does not get to develop the lease in exactly the manner or on exactly the timeline it might desire.

proposals, an EIS is the appropriate level of NEPA analysis the Forest Service should prepare.

- 3) A balanced purpose and need statement should be included in the EIS.
- 4) A reasonable range of alternatives should be analyzed in the EIS, specifically an alternative that conditions development to a “gold standard” to avoid or at least minimize impacts to resources and risks to human health and safety.
- 5) The EIS should take a “hard look” at the direct, indirect and cumulative impacts of this project to the natural and human environment and the local economy.
 - i. Air and water quality are two of the most significant issues associated with this proposal. Collection of proper baseline data, a quantitative model to address the cumulative impacts to air and water quality from full field development on and off the National Forest (including a Health Impact Assessment) and a plan to address monitoring and mitigation are imperative aspects of the planning process.
- 6) Response to the public’s requests for information—particularly regarding maps or descriptions of the extent of leased land along the Beartooth Front is needed to better understand the potential development scenario in the area.

We appreciate the time and effort the Forest Service has taken thus far to meet with concerned organizations and citizens and to answer questions about the project. We are hopeful that as a result of these meetings and field trips—as well as through the process of reviewing substantive scoping comments—the Forest Service continues to approach this project with caution, requiring a comprehensive NEPA analysis before making any final decisions.

Thank you for considering our comments.

Sincerely,

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