UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

Wyoming Outdoor Council Greater Yellowstone Coalition The Wilderness Society	*	Appeal of the Dismissal of Protest of the Sale of Oil and Gas Lease Parcels WY-0604-147, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 159, April 4, 2006 Lease Sale
	*	BLM Wyoming State Office
Appellants	*	IBLA No. 2006-208
	*	

STATEMENT OF REASONS

Pursuant to 43 C.F.R. §§ 4.411(b) and 4.412(a), Appellants hereby give notice that they adopt and incorporate by reference their Petition for Stay Pending Appeal filed on June 23, 2006 as a portion of their Statement of Reasons in this matter. In addition, Appellants submit the following information and arguments as their Statement of Reasons.

On July 10, 2006, this Board made a preliminary determination that the BLM failed to take the legally required "hard look" at the environmental impacts associated with the sale of an oil and gas lease, and stayed issuance of that parcel. Order, Wyoming Outdoor Council et al. No. 2006-184 (July 10, 2006) (the "Order") (Exhibit 1). The Order pertained to a 1280-acre parcel (the "December parcel"), which was the first of 44,600 acres the Forest Service consented to lease in the Bridger-Teton National Forest's Wyoming Range.[1] Prior to offering the December parcel for lease sale, the BLM prepared no NEPA analysis of

[1] In December 2005, the BLM sold a 1280-acre parcel. In April 2006, the BLM sold eleven parcels totaling 19,682.75 acres. In June 2006, the BLM sold thirteen parcels totaling 12,494.81 acres. In the August 2006 sale, ten parcels are slated for lease sale. These 10 August parcels comprise 11,262.74 acres and represent the final leases the Forest Service has consented to lease in the Wyoming Range at this time. Together, the December, April, June and August lease sales would total 44,720.3 acres in 35 parcels.

its own, relying instead on the Forest Service's NEPA analyses from the early 1990s. Three months after the sale of the December parcel, the BLM completed a worksheet documenting land use plan conformance and NEPA adequacy (a "DNA"). See Order at 8.[2] This DNA ostensibly applied not only to the December parcel, but to a much larger acreage the BLM assumed the Forest Service had consented to lease. See DNA entitled "Proposed Action Title/Type: Leasing within MA 12, 22, 23, 24, 25, 26, 31, 32, 49" (stating that the action was the leasing of "41 parcels totaling 128,066A [acres] over several sales") (Exhibit 2).[3] Thus, this Board's identification of the failings of the DNA with respect to the December 2005 lease sale together with the additional DNA deficiencies discussed below (in addition to the reasons stated in the Petition for Stay Pending Appeal) support a finding that a stay is also warranted with respect to the April parcels.

The DNA prompts the responsible official to answer the questions listed in the worksheet. After the questions are answered completely, the official then has the opportunity to conclude that the NEPA documentation "fully covers the proposed action and constitutes BLM's compliance with the requirements of NEPA" by checking a box and signing the document. DNA at 5. This Board identified several failings in the DNA. First, spaces that required answers or checkmarks were left blank. See Order at 10 (stating that "the box for the conclusion on page 5 of the DNA is not checked."); see also Order at 9 (stating that where the worksheet instructs the responsible official to "[l]ist by name all applicable NEPA documents that cover the proposed action," that space in the worksheet "is blank."). Second, the BLM failed to mention the Jonah FEIS and the Final Air Quality TSD as documents "relevant to the proposed action" anywhere in the DNA even though these

[2] Appellants learned of the DNA for the first time upon reading about it in this Board's July 10, 2006 Order. For this reason, we had not addressed it in any previous briefings.

[3] Appellants assume the handwritten number is 41, although it could be 71.

documents served as the basis for BLM's contention that Appellants' air quality concerns were mooted by the existence of these documents. See Government's Motion to Dismiss for Lack of Standing, Mootness and Improperly Filed Appeal at unnumbered page 2 (Exhibit 3). Last, the responsible official who signed the DNA is "not the same person who prepared it" and "[n]o title is given for the responsible official." Order at 10 n. 15.

As this Board stated, "BLM may adopt an EA prepared by FS, but it must have independently reviewed the EA and determined that it satisfied NEPA." Order at 8. The only independent review that the BLM conducted, however, was the completion of the five-page DNA worksheet. In addition to the many failings this Board identified in its July 10, 2006 Order, there are several other significant problems that establish Appellants' claim that the BLM did not take the legally required "hard look" that NEPA requires prior to offering the April leases for sale. See BLM IM No. 2001-062: Documentation of Land Use Conformance and NEPA Adequacy, December 29, 2000, at 1 (Exhibit 4) (instructing BLM employees that they "must establish an administrative record that documents clearly that [they] took a 'hard look' at whether new circumstances, new information, or environmental impacts not previously anticipated or analyzed warrant new analysis or supplementation of existing NEPA documents . . . .").

First, the only Forest Service EA the BLM mentions under the heading "other documentation relevant to the proposed action" is Decision Notice/EA on MA 12 dated 4-15-1992. See DNA at 2. This is curious because both the December parcel and all of the April parcels fall within Management Area 24—not Management Area 12. See Environmental Assessment for Making the Oil and Gas Leasing Decision for Specific Lands Within the Horse Creek (MA 24) Management Area and the Decision Notice and

FONSI, 1993. (Exhibit 5); see also Environmental Assessment for Making the Oil and Gas Leasing Decision for Specific Lands within LaBarge Creek Management Area (MA 12) and the Decision Notice and FONSI, 1991 and the Supplemental Decision Notice, FONSI and EA Supplement, 1992 (Exhibit 6). The MA-24 EA is listed earlier in the DNA; however, it is not clear why the BLM only listed the MA-12 EA as "other documentation relevant to the proposed action," an EA not even implicated until the fourth and final Wyoming Range lease sale slated for August.[4] The BLM's choice of this one EA and its omission of EAs from other Management Areas demonstrates a failure to thoroughly review the record and to assess whether the Forest Service's NEPA compliance was adequate.

Second, the BLM's description of the proposed action as "41 parcels (or 71 parcels) totaling 128,066 acres over several sales" is inaccurate. Although the Forest Service first proposed to lease a much larger acreage before settling on 44,600 acres, the area proposed for leasing was never 128,066 acres. It is not clear, therefore, what the BLM is referring to when it cites the proposed action as implicating 128,066 acres. Since April 2005, it has been well established that the Forest Service lease sale offerings in the Wyoming Range encompassed 44,600 acres. See Letter from Jack Troyer, Regional Forester to Governor Freudenthal, April 3, 2006 (Exhibit 7). Moreover, assuming the BLM will proceed with the August 1, 2006 sale of the final Wyoming Range parcels, there will have been 35 parcels offered for lease sale, not 41 or 71. See supra at 1 n.1. These errors demonstrate that the BLM did not take a hard look at what the proposed action even involved, let alone that the BLM adequately determined whether the NEPA analyses relative to the proposed action were sufficient such that a supplemental NEPA analysis was not warranted.

[4] Although the maps available to the public are inexact, it is probable that the upcoming August 1, 2006 lease sale implicates Management Area 12. The December, April and June lease sales fall outside of Management Area 12.

Third, the BLM's statement that "RFD assumptions used were reviewed by BLM and are still accurate and can be used to revalidate the NEPA decisions for O&G leasing [and] selected alternatives and their effects are consistent with the Forest Plan objectives for the affected area" is inaccurate and misleading. DNA at 2. This language is paraphrased from the Forest Service's SIR in which the Forest Service states that the BLM "reviewed past assumptions in the original Assessment of Oil and Gas Potential, July 30, 1987 and determined that the assumptions made in the analysis are still accurate and can be used to revalidate these NEPA decision for oil and gas leasing." SIR at 4 (Exhibit 8). The BLM does not meet its independent responsibility to assess the adequacy of another agency's NEPA compliance merely by reiterating that agency's conclusory statements, particularly when the BLM itself is on record disputing those statements in a past interagency correspondence.

In September 2003, Mr. Ashghar Shariff, the BLM's Chief of the Reservoir Management Group, reviewed the Forest Service's RFD scenario and found that although "most" of the assumptions made in the analysis were "still accurate," there had been no discussion whatsoever of the "potential for future coalbed methane gas related activity." Letter from Ashghar Shariff, BLM to Brent Larson, USFS Sept. 18, 2003 (Exhibit 9). This omission was troubling, Shariff explained, because the "U.S. Geological Survey [had] recently published data indicating that a potential coalbed methane gas resource lies within some of the subject review area." Id. Thus, the BLM's statement in the DNA appears to have been copied nearly verbatim from a Forest Service document that does not accurately reflect the BLM's prior finding that the potential for coalbed methane development was not included in the RFD scenario. This past finding is particularly relevant to the April lease

parcels, as they lie within Management Area 24, one of the areas Mr. Shariff identifies as having the potential for coalbed methane gas. Id. The BLM violated its NEPA obligations in failing to address this inconsistency in its DNA and in failing to determine whether the omission of potential coalbed methane development from the Forest Service's RFD required BLM itself to supply supplemental analysis. See Pennaco Energy, Inc. v. U.S. Dept. of the Interior, 377 F.3d 1147, 1159 (10th Cir. 2004) (affirming IBLA's decision to invalidate leases based on BLM's failure to consider the unique environmental impacts associated with coalbed methane development).

Fourth, in Section D.2 of the DNA, the BLM is asked whether the range of alternatives analyzed in the existing NEPA documents are appropriate with respect to the current proposed action, given current environmental concerns, interest, resource values, and circumstances. DNA at 2. The person preparing the DNA responds, "Yes, per FS Supplemental Info Report submitted 02-25-04 and my review of the plan and MAs."[5] Id. In response to the next four questions (D.2, D.3, D.4 and D.5) the answer is "Yes. See #2." DNA at 3-4. These short and conclusory responses fail to meet the BLM's own policy directives that state that although the answers can be "concise", they "must adequately address the criteria in the worksheet" and the responsible official must "[r]eview the relevant parts of the record, including the terms, conditions and mitigation measures, in the context of existing on-the-ground conditions." BLM IM No. 2001-062: Documentation of Land Use Conformance and NEPA Adequacy, December 29, 2000 at 2. The age of the documents reviewed is also something the BLM must consider. Id.

[5] We assume the BLM meant to state that it reviewed the 1990 Bridger-Teton Forest Plan and the Management Area EAs.

There is no documentation in the DNA explaining the rationale behind BLM's conclusions. Instead, the BLM merely lists the documents the Forest Service used—all of which are the subject of numerous protests and appeals due to their age or the outdated or inaccurate information contained within them—and fails entirely to give any explanation regarding why these documents justify the "Yes" answers the BLM repeatedly asserts. This type of response is not sufficient to satisfy the BLM's own instructions to its employees, much less NEPA's "hard look" requirement.

Fifth, in section D.7 the BLM is asked, "Are the public involvement and interagency review associated with existing NEPA document(s) adequately [sic] for the current proposed action?" The person preparing the DNA responded, "Yes, BLM and public involvement with the plan and subsequent MA analyses." Although the wording of this answer is fragmented and thus cryptic, it seems to state that any public or interagency involvement with the proposed action happened in relation to the adoption of the 1990 Bridger-Teton Forest Plan and the release of EAs that were prepared for the nine Management Areas between 1991 and 1993. An unsupported statement that public involvement occurred some sixteen or even thirteen years ago, however, does not answer the question. The question is whether the historic degree of public involvement is adequate for the proposed action today. It is not. The BLM could have answered the question by reviewing the record to attempt to discover the historic level of public involvement, the concerns raised some thirteen years ago or how the new concerns raised by the public today are addressed by these old documents. The BLM did not do this. A statement merely asserting that public involvement was adequate without any further explanation is not sufficient.

There has been an outpouring of public opposition to new leasing in the Wyoming Range, especially with regard to the April parcels at issue in this appeal. See Jackson Hole News and Guide, "The Costs of Drilling, The Value of the Wyoming Range" Todd Wilkinson, January 2006 (Exhibit 10); Jackson Hole News and Guide, "Letter to the Editor" Gary Amerine, March 2006 (Exhibit 11); Casper Star Tribune, "Labor protests oil, gas lease" Jeff Gearino, May 2006 (Exhibit 12) and Casper Star Tribune, "Sportsmen's group proposes wildlife coalition" Jeff Gearino, July 2006 (Exhibit 13). A decision that no supplemental NEPA analysis was warranted effectively denied the public any opportunity to participate in the new leasing decision. At no time either before or after the Forest Service announced its decision in April 2005 to lease 44,600 acres in the Wyoming Range did the Forest Service or the BLM seek public involvement. Neither the Forest Service nor the BLM made any attempt to meet with the public formally in an open house or workshop event. Neither did the agencies provide a period of time for public comment after notice of the proposed action was publicized. As this Board held, the purposes of NEPA "cannot be met when . . . there has been little or no public involvement." Lynn Canal Conservation, Inc., 167 IBLA 136 at 145 (October 19, 2005).[6] Had public involvement been solicited, the agencies would have quickly learned that any historic involvement "with the plan and subsequent MA analyses" was not adequate to address the current proposed action.

[6] Although the facts of this case differ from those in Lynn Canal Conservation, Inc., 167 IBLA 136 (2005) in which a draft EA was not noticed or circulated to the public, the general premise that public involvement is essential to implementing NEPA is applicable here. In Lynn Canal II (April 20, 2006), this Board clarified that whether the public was adequately involved in BLM's NEPA process was a "fact-intensive inquiry made on a case-by-case basis." Because BLM decided not to prepare a supplemental NEPA analysis prior to leasing the December and April parcels, the public was not adequately involved and the goals of NEPA were not met.

Last, the BLM merely lists a document it calls "BA for Oil and Gas Leasing on Canada Lynx 01-06-04" in its DNA as "other documentation relevant to the proposed action."[7] See DNA at 1. This cursory reference does not satisfy the requirement that the BLM independently review existing NEPA documents to determine whether supplemental NEPA analysis is warranted. As this Board noted, "There is no indication in the record that any BLM wildlife specialist reviewed any existing documentation related to Canada lynx . . . as part of the DNA process." Order at 11.

In the BLM's dismissal of Appellants' protest of the April lease sale, the BLM states, "The FWS concurred with the Forests' [sic] 'no effect' determinations." Protest Dismissal, May 30, 2006 at 11 (Exhibit 15). Appellants have seen no evidence in the record to support this assertion. In fact, the only expert wildlife agency that did weigh in on the leasing decision—the Wyoming Game and Fish Department—raised concerns that the proposed action not only could cause adverse impacts to lynx, but that the "[a]dditional loss of lynx habitat and construction of new roads in the area as a result of oil and gas activity may well be the final threshold for the continued existence of the species in the Wyoming Range." Letter from Bill Wichers, WGFD Deputy Director to Greg Clark, USFS, at 4, May 26, 2005 (emphasis added) (Exhibit 16). The Wyoming Game and Fish Department recommended a "thorough analysis of habitat within each [lynx analysis unit] before any lease sales occur on the east slope of the Wyoming Range. . . ." Id. This analysis was not done. It also requested from the Forest Service the FWS's letter of concurrence on the proposed action for threatened and endangered species including Canada lynx. Id. To date,

[7] We assume that the BLM is referring to the Supplemental Biological Assessment (BA) for Oil and Gas Leasing, Kemmerer, Big Piney, Grey's River and Jackson Ranger Districts, Bridger-Teton National Forest. The preparer, James Johnston signed the document on January 10, 2004 and the document was reviewed and signed by Brent Larson, Deputy Forest Supervisor on January 15, 2004. This document is included as Exhibit 14.

the Department has not received such a letter. Phone conversation with Vern Stelter, WGFD July 12, 2006.

In conclusion, for all the foregoing reasons (in addition to the reasons set forth in Appellants' June 22, 2006 Petition for Stay Pending Appeal), Appellants request that the Board grant their Petition for Stay Pending Appeal and issue a stay of BLM's decision to issue lease parcels WY-0604-147, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 159 pending a decision on the merits of this appeal by the Board.

Respectfully submitted this ____ day of July, 2006.

BY:

_____

Lisa Dardy McGee
Wyoming Outdoor Council
262 Lincoln Street
Lander, WY 82520
(307) 332-7031 (phone)
(307) 332-6899 (fax)

Attorney for Appellants