Western Environmental Law Center

May 1, 2013

Sent via Federal Express Delivery (comments and exhibits) and Electronic Mail (comments only)

Appeals Deciding Officer
U.S.D.A. Forest Service
Rocky Mountain Region
740 Simms Street
Golden, Colorado 80401

Re: Citizens for a Health Community’s Appeal of Federal 11-90-9 APD Approval

Dear Appeals Deciding Officer:

The Western Environmental Law Center submits the following appeal on behalf of our client, Citizens for a Healthy Community, regarding the USDA Forest Service decision to authorize development of the Federal 11-90-9 #3 well application for permit to drill through a categorical exclusion under Section 390 of the Energy Policy Act of 2005, 42 U.S.C. § 15942 (hereinafter “Decision Memo”).

Citizens for a Healthy Community (“CHC”) is a grass-roots organization formed in 2010 for the purpose of protecting people and their environment from irresponsible oil and gas development in the Delta County region. CHC’s members and supporters include farmers, ranchers, vineyard and winery owners, and other concerned citizens impacted by oil and gas development.

I. Argument

The use of a categorical exclusion (“CE”) to approve the 11-90-9 application for permit to drill (“APD”) is inappropriate for various reasons. The Forest Service has failed to conducted site-specific analysis upon which the agency can justify its use of a CE. Specifically, the document the Forest Service identifies to support its use of a CE on the 11-90-9 APD is itself a Forest Service approval of a natural gas development proposal through a CE and contains no NEPA analysis. Even if the analysis that has been done on other oil and gas development in the area could qualify as site-specific to this well, it is deficient in numerous respects and thus cannot be relied upon here. Notably, there has not been analysis of the cumulative impacts of oil and gas development in this area, especially given recent proposals for expanded drilling. Finally, the Forest Service must consider any extraordinary circumstances before proceeding with approval based only on a CE, which it has failed to do.
A. There has been no site-specific analysis of the 11-90-9 APD.

The Forest Service’s use of a CE to approve the 11-90-9 APD is inappropriate given the agency’s failure to perform site-specific analysis of potential impacts, as required by the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq., and Council on Environmental Quality (“CEQ”) implementing regulations, 40 C.F.R. §§ 1500 et seq.

Category 1 of Section 390, relied upon here, allows the use of a CE where: “Individual surface disturbances of less than 5 acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.” 42 U.S.C. § 15942(b)(1). It is the third factor – prior site-specific NEPA analysis – that CHC is particularly concerned with, here.

According to a June 9, 2010 Forest Service letter (“2010 letter”):¹

The Authorized Forest Officer must determine and document that a site-specific NEPA document exists that previously analyzed oil or gas exploration and/or development…. The NEPA document must have analyzed the exploration and/or development of oil and gas (not just leasing) and the proposed activity must be within the general boundaries of the area analyzed in the EA or EIS.

Here, the Forest Service decision asserts that “[t]his requirement has been fulfilled by the NEPA analysis that was carried out for the Gunnison Energy 16 Well Master Development Plan.” (hereinafter “16-well MDP”). Decision Memo at 3. However, the Federal 11-90-9 APD was not covered by the decision memorandum (“DM”) for the 16-well MDP (hereinafter 16-well DM), and, thus, the Forest Service cannot approve the development of this well through Section 390, Category 1. 42 U.S.C. § 15942(b)(1).

Remarkably, the 16-well MDP – which the Forest Service relies upon here for the site-specific analysis necessary to justify its use of a CE for the 11-90-9 APD – was itself a Forest Service approval based on a CE, and, thus, contains no site-specific analysis. In other words, there has never been any NEPA analysis performed for the 11-90-9 APD – or, for that matter, the 16-well MDP – and therefore the Forest Service approval of this well through Category 1 of Section 390 is unlawful. 42 U.S.C. § 15942(b)(1). The Forest Service decision authorizing the use of a CE for the 16-well MDP itself identifies no prior site-specific NEPA analysis for these 16 wells, and, instead, relies on a Surface Use Plan of Operations that was completed in the “area.” 16-well DM at 3. It is unclear from this document whether sufficient NEPA analysis of oil and gas development in the “area” has ever been performed. What is clear, however, is that there has never been site-specific NEPA analysis for the 11-90-9 APD. Under these

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¹ In second Forest Service letter, dated September 1, 2011, in response to a Federal District of Wyoming Order in Western Energy Alliance v. Salazar, 10-cv-237F, the agency provided: “Effective immediately, the agency is prohibited from considering extraordinary circumstances… when evaluating use of any Section 390 CE;” and later continued: “The remaining portions of the June 9, 2010, guidance remain in effect.” Accordingly, the following remains proper guidance when evaluating the appropriateness of the 11-90-9 APD.
circumstances, it is impossible to satisfy the requirements of Section 390, 42 U.S.C. § 15942(b)(1).

Further, CEQ regulations prohibit “tiering” from one CE to another, as the Forest Service attempts to do, here. As described in CEQ regulations at 40 C.F.R. § 1508.28:

“Tiering” refers to the coverage of general matters in broader environmental impact statements … with subsequent narrower statements or environmental analyses … incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

CEQ regulations further provide that “Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Id. Plainly, this is not a situation where the Forest Service can tier to prior NEPA analysis, because no such NEPA analysis has ever been completed. The agency’s attempt to approve oil and gas development without ever conducting site-specific NEPA analysis is incredible, and must be corrected prior to 11-90-9 APD development.

NEPA instructs that an agency is required to “take a ‘hard look’ at the impacts of a proposed action.” Citizens’ Committee to Save Our Canyons v. Krueger, 513 F.3d 1169, 1179 (10th Cir. 2008) (quoting Friends of the Bow v. Thompson, 124 F.3d 1210, 1213 (10th Cir. 1997)). This hard look promotes NEPA’s “sweeping commitment to ‘prevent or eliminate damage to the environment and biosphere’ by focusing Government and public attention on the environmental effects of proposed agency action.” Marsh v. Or. Nat. Resources Council, 490 U.S. 360, 371 (1989). NEPA achieves this focus through “action forcing procedures … requir[ing] that agencies take a hard look at environmental consequences.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (citations omitted). These “environmental consequences” include direct, indirect, and cumulative impacts. 40 C.F.R. §§ 1508.7, 1508.8; Custer Co. Action Assn. v. Garvey, 256 F.3d 1024, 1035 (10th Cir. 2001). Without site-specific analysis of this well, it is impossible for the Forest Service to determine if development will result in direct, indirect or cumulative impacts to the environment – in direct violation of NEPA’s mandate. Because the 11-90-9 APD was not covered by the 16-well MDP – and the 16-well MDP itself contains no analysis – site-specific NEPA analysis for the 11-90-9 APD must be performed prior to the Forest Service approval of well development.
B. Sufficient NEPA analysis must be conducted prior to the Forest Service’s approval of the 11-90-9 APD.

The 16-well MDP, itself approved through a CE, contains no site-specific NEPA analysis. Rather, the Forest Service approval of this project ambiguously refers to “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.” 16-well DM at 3. Although CHC was unable to comment on the 16-well MDP, CHC has serious concerns regarding the validity of using a CE to approve such a significant project, and, as pointed out above, serious concerns regarding the audacity of the agency to use the 16-well MDP to support its use of a CE for the 11-90-9 APD.

Further emphasizing the insufficiency of the Forest Service approval of the 16-well MDP through a CE – and, subsequently, the approval of the 11-90-9 APD through a CE – is the Bureau of Land Management (“BLM”) NEPA process undertaken for the directly adjacent Bull Mountain MDP, DOI-CO-150-2009-0005 EA, which, like the 11-90-9 APD, was proposed by SG Interests. The BLM’s Draft EA for this project failed to sufficiently analyze myriad impacts from the 150-well Bull Mountain project, which were identified in comments by CHC, and are hereby incorporated by reference (attached as Exhibit A). Subsequently, BLM determined that an environmental impact statement (“EIS”) was required. See 78 Fed. Reg. 20133 (April 3, 2013) (BLM’s Notice of Intent to prepare an EIS for the Bull Mountain MDP); DOI-BLM-CO-S050-2013-0022 EIS. As evidenced by BLM’s decision to prepare an EIS for the Bull Mountain MDP, the scale of oil and gas development in this area may indeed result in significant impacts to the environment – both on an individual well basis, as well as cumulatively. Although the Forest Service – and certainly SG Interests – would like to expedite the approval of the 11-90-9 APD, the agency cannot view this project in a vacuum unto itself. See Grand Canyon Trust v. Federal Aviation Administration, 290 F.3d 339, 342 (D.C. Cir. 2002).

NEPA mandates that federal agencies, like the Forest Service, assess potential environmental consequences of a proposed action. Utah Env’tl Cong. v. Bosworth, 443 F.3d 732, 736 (10th Cir. 2006). A federal action “affects” the environment when it “will or may have an effect” on the environment. 40 C.F.R. § 1508.3 (emphasis added). Without the benefit of site-specific NEPA analysis, as here, it is impossible for the Forest Service to determine if the 11-90-9 APD may have such an effect. While the 11-90-9 APD is not included in either the 16-well MDP or the 150-well Bull Mountain MDP projects, preparation of an EIS for the adjacent Bull Mountain project reveals that significant environmental impacts may individually or cumulatively result from development of this well, as it did for wells within the Bull Mountain MDP. Approval of the subject well through a CE is improper, and site-specific NEPA analysis for the 11-90-9 APD is required prior to an “irreversible and irretrievable commitment of resources.” Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988).

2 CHC was formed in 2010 and was therefore unable to participate in agency decisionmaking regarding the 16-well project.
C. Approval of the 11-90-9 APD cannot be isolated from other oil and gas development in the area.

Although the Federal 11-90-9 APD is an APD for up to five natural gas wells on a single well pad, its approval cannot be isolated from the broader oil and gas development proposed for this area. Indeed, this well pad is located directly between both the 16-well MDP and the 150-well Bull Mountain MDP; with another 16-well development approved by BLM within the West Muddy Creek area, CO-150-2008-35-EA (“16-well EA”), as well as a 50-well MDP by Petrox, LLC planned for the Somerset Unit. See Decision Memo at D-4. Pursuant to CEQ regulations, the Forest Service may use a CE for “actions which do not individually or cumulatively have a significant effect on the human environment,” and for which the agency has therefore found that “neither an environmental assessment nor an environmental impact statement is required.” 40 C.F.R. § 1508.4. In other words, if a project may individually or cumulatively have a significant effect, an agency cannot approve the project through a CE. As provided above, the 11-90-9 APD may have a significant effect, and, therefore, the Forest Service’s approval of this project through a CE is unlawful.

1. Without site-specific analysis, it is impossible to determine if the 11-90-9 APD will have a direct or indirect impact on the environment.

As noted above, the Forest Service has never performed site-specific analysis for the 11-90-9 APD. Accordingly, it is impossible to determine if development of this well will result in direct or indirect impacts to the human environment. 40 C.F.R. § 1508.8. Site-specific NEPA analysis for the 11-90-9 APD must be completed prior to an “irreversible and irretrievable commitment of resources.” Conner, 848 F.2d at 1446.

2. The 11-90-9 APD will contribute to cumulatively significant impacts.

While we do not know the specific impacts of the 11-90-9 APD without site-specific analysis, we do know that development of this well will contribute to the cumulative impacts of oil and gas development in the area. Thus, the Forest Service’s approval of this well through a CE is unlawful. 40 C.F.R. § 1508.4.

Courts have expressly held that an agency “must give a realistic evaluation of the total impacts and cannot isolate a proposed action, viewing it in a vacuum.” Grand Canyon Trust, 290 F.3d at 342. By proceeding with the approval of the 11-90-9 APD – through a categorical exclusion, no less – without the benefit of a true understanding of the cumulative impacts that oil and gas development will have in this area is a clear violation of NEPA’s mandate as well as CE regulations. To date, no such cumulative analysis has occurred.

A cumulative impact is 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 what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7. The Forest Service’s cumulative impacts analysis “must be more than perfunctory; it must provide a ‘useful analysis of the

CITIZENS FOR A HEALTHY COMMUNITY’S APPEAL
USDA FOREST SERVICE, 11-90-9 APD APPROVAL PAGE 5 of 8
cumulative impacts of past, present, and future projects.” Ocean Advoc. v. U.S. Army Corps of Engrs., 402 F.3d 846, 868 (9th Cir. 2005). “The analysis in the EA ... cannot treat the identified environmental concern in a vacuum, as an incremental approach attempts.” Grand Canyon Trust, 290 F.3d at 346. Consideration of cumulative impacts requires “some quantified or detailed information; ... general statements about ‘possible’ effects and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.” Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1075 (9th Cir. 2002).

“Without analyzing the total [ ] impact,” which, here, includes impacts that would result from oil and gas development across the entire area, the Forest Service “is not in a position to determine whether the additional [impact] that is projected to come from [development of the proposed action] would cause a significant environmental impact [ ] and, thus, to require preparation of an EIS.” Grand Canyon Trust, 290 F.3d at 346.

The concern of isolating a project in a vacuum is amplified when approval is granted through a CE because no actual NEPA analysis is conducted at the time of the approval. In this case, the Forest Service has approved the 11-90-9 APD without ever having conducted site-specific analysis – a decision in direct contravention of Section 390, Category 1 requirements. See 42 U.S.C. § 15942(b)(1). In effect, this approach permits the piecemeal, one-off approval of an APD without understanding if the well individually or cumulatively has a significant effect on the human environment. See 40 C.F.R. § 1508.4.

Because the Forest Service has relied on the 16-well MDP to support its use of a CE for the 11-90-9 APD, no NEPA analysis has ever been performed, and, thus, there is no basis to determine the cumulative impacts that may result from development of the 11-90-9 APD. Indeed, to date, no federal agency has ever performed a sufficient cumulative impacts analysis addressing all oil and gas development in this area. As noted above, the 150-well Bull Mountain MDP is now undergoing an EIS, which will hopefully include such analysis. However, the only other project in the area that has attempted to address cumulative impacts was the 16-well EA conducted by BLM. While the 16-well EA contains a cumulative impacts section, BLM’s analysis therein is deficient and fails to account for the full scope of impacts from oil and gas development in this area. See Nat. Resources Def. Council v. Hodel, 865 F.2d 288, 298 (D.C. Cir. 1988) (providing that section headings without the “requisite analysis” are insufficient). For example, when describing anticipated future development, the BLM provides generally that “[Gunnison Energy] and possibly other operators would pursue additional development in the area;” using the “10 well permits in Gunnison County” pending approval to provide a gauge for such development. 16-well EA at 66.

As the Forest Service should now be acutely aware, this assessment is not even close to the scope of oil and gas development that this area is presently facing. As noted above, in addition to this 16-well EA, there is the 16-well MDP, the 150-well Bull Mountain MDP, a proposal for a 50-well Petrox MDP, the one-off approval of single-well APDs such as the 11-90-9 APD, as well as the recent industry nomination of 30,000 acres of public lands in the North Fork Valley for oil and gas development. See DOI-BLM-CO-S050-2012-0009 EA. The scale and pace of recent oil and gas development in this area far surpasses anything the North Fork Valley has experienced to date, and there has never been a holistic analysis of these cumulative impacts as required by NEPA and CEQ regulations. The Forest Service cannot proceed with approving

CITIZENS FOR A HEALTHY COMMUNITY’S APPEAL
USDA FOREST SERVICE, 11-90-9 APD APPROVAL
PAGE 6 of 8
the 11-90-9 APD without first understanding the cumulative impact that development of this well represents. 40 C.F.R. § 1508.7.

D. Approval of the 11-90-9 APD may cause significant harm to the area’s elk population and the local economy.

As CHC provided in Scoping Comments, hereby incorporated by reference (attached as Exhibit B), the proposed 11-90-9 APD pad location is located in Sensitive Wildlife Habitat, Elk Winter Concentration Area. See Scoping Comments at 2. The Forest Service lists only one condition of approval ("COA") relating to big game habitat, COA 14, which states that “no heavy construction or drilling operations will be allowed from March 1-April 30, unless specifically authorized by the Paonia District Ranger after consultation with Colorado Parks & Wildlife regarding the presence/absence of big game in that area.” DM at A-2. However, this COA fails to address the concerns raised in Scoping Comments regarding the cumulative impact of increased well pad densities on the big game populations, and thus on the North Fork Valley’s wildlife viewing and hunting economy. See Scoping Comments at 2 (citing a BLM study that found that elk avoid wells within at least 1.7 miles, and roads within 0.5 miles). Approval of the 11-90-9 APD without adequate analysis of the direct, indirect and cumulative impacts to important big-game habitat, and, by extension, socioeconomic impacts to the surrounding community based on existing wildlife viewing and hunting economy, directly violate NEPA’s mandate. 40 C.F.R. §§ 1508.7, 1508.8.

E. The Forest Service should consider the extraordinary circumstances related to the use of a CE to approve the 11-90-9 APD.

The Forest Service has relied on Western Energy Alliance v. Salazar, 2011 WL 3738240 (D. Wyo. 2011) to avoid considering “extraordinary circumstances” surrounding the 11-90-9 APD approval. See Decision Memo at 3. However, Judge Freudenthal’s decision was narrowly decided on procedural grounds – focusing on the legislative rulemaking process associated with the Forest Service’s 2010 Letter – and does not address the underlying substantive merits of considering “extraordinary circumstances” in the Section 390 CE process. See Western Energy, 2011 WL 3738240 at 7. Specifically, the court’s decision states that the Forest Service’s 2010 Letter cannot be used “to the extent that [it] address[es] and limit[s] the use of Section 390 [CEs] by … establishing a screening process to consider extraordinary circumstances.” Id. In other words, extraordinary circumstances can be considered, just not to establish a “screening process” before that process undergoes public notice and comment, as required by 5 U.S.C. § 553.

The Tenth Circuit has recognized that “Federal law limits categorical exclusions in one critical respect: a proposed action is precluded from categorical exclusion if ‘extraordinary circumstances’ exist such that ‘a normally excluded action may have a significant environmental effect.'” Utah Environmental Congress v. Dale Bosworth, 443 F.3d 732, 736 (10th Cir. 2006) (citing 40 C.F.R. § 1508.4); see also Utah Environmental Congress v. Russell, 518 F.3d 817, 821 (10th Cir. 2008) (“[T]he presence of an extraordinary circumstance precludes the application of a categorical approach.”). “To determine whether extraordinary circumstances exist, [an agency] must consider if the proposed action may have a potentially significant impact on certain ‘resource conditions.’ ” Id. The agency’s consideration of extraordinary circumstances has been...
described as the “safety-valve” of the CE process – designed to prevent situations where a “large number of small projects [ ] collectively create conditions that could significantly effect the environment” – precisely the scenario currently before us. Bosworth at 741; see also WildEarth Guardians v. U.S. Forest Service, 668 F.Supp.2d 1314, 1322 (D. N.M. 2009) (“an agency must determine that extraordinary circumstances do not exist before relying on a CE in a particular instance.”). Accordingly, considering the extraordinary circumstances surrounding a CE is fundamental to the agency’s decisionmaking process, and, here, the Forest Service’s unwarranted decision to ignore extraordinary circumstances, based on a procedural decision in the District of Wyoming, unlawfully robs the public of the lone “safety-valve” in the CE process. Ignoring the extraordinary circumstances of this well approval is unlawful. Russell, 518 F.3d at 821.

Any review of the circumstances and environmental conditions surrounding the 11-90-9 APD would suggest that the use of a CE is inappropriate. While this is one well pad with up to five natural gas wells, it is located in the middle of a rapidly expanding oil and gas development area – one that is facing industrial scale oil and gas development for the first time. Moreover, this development is concentrated in the headwaters of the North Fork of the Gunnison River; a watershed serving the agricultural and municipal water needs for the whole of the North Fork Valley. Although these extraordinary circumstances should not be used as a screening process, they should be enough for the agency to decide “to prepare [an] environmental assessment for the reasons stated in § 1508.9.” 40 C.F.R. 1508.4.

II. Conclusion

For the foregoing reasons, the Forest Service should grant CHC’s administrative appeal of its decision to approve the Federal 11-90-9 #3 well APD through a categorical exclusion, and proceed in the preparation of appropriate NEPA analysis.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

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