REQUEST FOR STATE DIRECTOR REVIEW

Re: Whitewater Master Development Plan, DOI-BLM-CO-130-2012-0003-EA

Dear Director Welch:

In accordance with 43 C.F.R. § 3165.3(b), Citizens for a Healthy Community requests your administrative review of the June 13, 2014 decision regarding the Environmental Assessment (“EA”) and approval of the Whitewater Master Development Plan (“Whitewater MDP”).

We request that you reverse and remand the Decision Record (“DR”) and Finding of No Significant Impact (“FONSI”) because the Grand Junction Field Office (“GJFO”) failed to comply with the National Environmental Policy Act (“NEPA”).

I. Background

On June 13, 2014, the GJFO approved the Whitewater MDP. DR at 1. The Whitewater MDP proposes a 108-well oil and gas exploration project involving the construction, operation, maintenance, and abandonment of wells, well pads, roads, gas gathering pipelines, oil gathering pipelines, and produced water gathering pipelines.

For the reasons described below, the GJFO’s FONSI is unsupported by the record and an EIS is required. The GJFO also failed to provide for appropriate public engagement before issuance of its final determination not to prepare an EIS. We therefore urge the Colorado State Office (“CSO”) to reverse and remand the Whitewater MDP to the GJFO so that the field office
can correct these errors and fulfill its duties under NEPA. Alternatively, should the CSO accept the DR and FONSI, the agency should require additional mitigation measures and planning to address avoidable impacts to critical resources.

II. Statement of Standing

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 has members and supporters who work and recreate around the Whitewater area and who will be “adversely affected” by the decision within the meaning of 43 C.F.R. § 3165.3(b). Specifically, CHC’s members and supporters include local organic farmers, ranchers, vineyard and winery owners, sportsmen, and realtors who are adversely affected by oil and gas development in the Whitewater area. CHC has been an active participant in the process of commenting on issues related to oil and gas development in the region, including on development proposals submitted for the Whitewater area.

CHC herein incorporates by reference comments on the Preliminary EA for the Whitewater MDP, submitted August 13, 2014 (attached as Exhibit A), as well as Supplemental Comments, submitted February 14, 2014 (attached as Exhibit B). These comments contain detailed technical information and legal analysis which should guide the CSO’s decision-making on the SDR.

III. Because it is a major federal action significantly affecting the quality of the human environment, the Whitewater MDP must be analyzed in an EIS.

The 108-well Whitewater MDP project requires an Environmental Impact Statement (“EIS”) because it is a “major federal action” that “significantly affects the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.4. 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); Airport Neighbors Alliance v. U.S., 90 F.3d 426, 429 (10th Cir. 1996) (“If the agency determines that its proposed action may ‘significantly affect’ the environment, the agency must prepare a detailed statement on the environmental impact of the proposed action in the form of an EIS.”) (emphasis added). Similarly, according to the Ninth Circuit:

We have held that an EIS must be prepared if ‘substantial questions are raised as to whether a project ... may cause significant degradation to some human environmental factor.’ To trigger this requirement a ‘plaintiff need not show that significant effects will in fact occur;’ [but instead] raising ‘substantial questions whether a project may have a significant effect’ is sufficient.

Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (citations omitted) (emphasis original). Given the magnitude of the proposed action and possible direct, indirect and cumulative impacts to both the natural environment and human communities, BLM’s FONSI is completely unsupportable.
Critically, the GJFO has also failed to “put forth a convincing statement of reasons’ that explains why the project will impact the environment no more than insignificantly. This account proves crucial to evaluating whether the [agency] took the requisite ‘hard look.’” *Ocean Advoc. v. U.S. Army Corps of Engrs.*, 402 F.3d 846, 864 (9th Cir. 2005). Nowhere in BLM’s EA and FONSI does there exist a convincing statement explaining the insignificance of impacts from the Whitewater MDP. If BLM proceeds in its refusal to perform an EIS, it must provide a detailed accounting of each NEPA significance factor, as provided in 40 C.F.R. § 1508.27, explaining why the project will impact the environment no more than insignificantly. The cursory and evasive manner in which BLM has addressed these significance factors in the FONSI is insufficient to meet the agency’s NEPA mandate.

In determining significance, the BLM must consider two factors: “context” and “intensity.” 40 C.F.R. 1508.27. “Either of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.” *Natl. Parks & Conserv. Assn. v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001).

The GJFO claims that, after evaluation of “context” and “intensity,” the action does not have a significant effect on the environment. FONSI at 2. This conclusion is inconsistent with the analysis in the EA and with other available evidence.

A. **The Whitewater MDP’s impacts are significant given the project’s context.**

In finding no significance, the GJFO ignored the contexts in which the project is taking place. Context means “society as a whole (human, national), the affected region, the affected interests, and the locality.” 40 CFR § 1508.27(a). Here, the affected region and affected interests include organic farms, ranches, vineyards, and wineries. The Whitewater MDP will have significant impacts to these interests, including, but not limited to, the project’s impacts to air, water, and climate.

The GJFO must also consider “society as a whole (human, national).” We live in an era of human-caused climate change. “According to the U.S. Global Change Research Program (2009), global warming is unequivocal, and the global warming that has occurred over the past 50 years is primarily human-caused.” EA at 65. Our atmosphere today is akin to a bathtub that is filling with greenhouse gases faster than it is draining. Every addition of GHG emissions into this bathtub brings us closer to the “tipping point” beyond which catastrophic change is inevitable. In this context, a 108-well oil and gas development with projected GHG emissions of 63,949 metric tons per year is significant. EA at 65.

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If this amount of GHG emissions is not significant, the GJFO must provide articulated criteria grounded in scientific evidence to demonstrate why it is not. See Center for Biological Diversity v. NHTSA, 538 F.3d 1172, 1224 (9th Cir. 2008). The agency has not done so. Merely calculating the project’s percentage contribution to overall U.S. emissions and summarily concluding that that percentage is non-significant “cannot carry the day.” Id.

B. The Whitewater MDP’s impacts are significant given the intensity of the project’s impacts.

In evaluating intensity, the GJFO was obligated to consider the following factors: impacts that may be both beneficial and adverse; the degree to which the proposed action affects public health or safety; the unique characteristics of the geographic area; the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks; the degree to which the action may establish a precedent for future actions; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; the degree to which the action may adversely affect significant scientific, cultural, or historical resources; the degree to which the action may adversely affect an endangered or threatened species or its habitat; and 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). Where, as here, significance factors have been triggered, an EIS is required.

For example, the GJFO concedes that the project will have adverse impacts, including with respect to air and water quality. FONSI at 3. However, the GJFO concludes that impacts are non-significant. This conclusion is unsupported.

First, the GJFO ignores the extent of the public health effects that will be caused by the project’s air pollution. The EA reveals that the project will significantly elevate PM-10, PM-2.5, NO-X, CO2, SO2, VOCs, and Hazardous Air Pollutants (“HAPs”) including benzene, toluene, ethyl benzene, xylene, n-hexane, and formaldehyde. EA at 56. The impacts from particulate matter are particularly striking. The project will nearly quadruple the daily concentration of PM-10, from 30 µg/m³ to 110.2 µg/m³, bringing the background level of the pollutant close to the legal limit of 150 µg/m³. The project will also double the daily concentration of PM-2.5, bringing it from 12 µg/m³ to 22.8 µg/m³—close to the legal limit of 35 µg/m³. Major concerns for human health from exposure to particulate matter include effects on breathing and respiratory systems, damage to lung tissue, cancer, and premature death. PM-2.5 is small enough to lodge deeply in the lungs. The smallest particles can pass through the lungs to affect other organs. Even small increases in particulate matter concentrations can have significant health impacts. For example, according to a recent study published in the British Medical Journal, an increase in


5 Id.
estimated annual exposure to PM-2.5 of just 5 µg/m3 was linked with a 13% increased risk of heart attacks.  

The GJFO concludes that the air pollution, including particulate matter pollution, from the project is non-significant because the air quality in the area will remain within legal limits. EA at 57. Violation of law is one of the ten factors indicating significance, but there are nine other factors, including the degree to which the proposed action affects public health or safety. Here, the project will add significant amounts of pollution into the air, with significant health impacts that cannot be summarily dismissed. An EIS must be prepared to evaluate these impacts.

The GJFO’s failure to adequately analyze impacts to air quality is particularly troubling given that no sufficient EIS-level analysis of the area’s ongoing air quality problem—and the BLM’s oil and gas management decisions contribution to that problem—has taken place. The GJFO is nearing the final stages of updating its decades-old Resource Management Plan (“RMP”), which presumably will include a detailed analysis of oil and gas development’s impacts on air quality. In its response to public comments, the GJFO also pointed to a separate, ongoing study to look specifically at cumulative impacts to air quality from oil and gas development:

The modeling study, entitled the Air Resources Management Modeling Study (CARMMS), will assess predicted impacts from projected increases in oil and gas development. The CARMMS results will include the predicted impacts from projected BLM oil and gas authorizations within the Grand Junction and Uncompahgre field offices as well as cumulative impacts from all projected oil and gas development within the region.

BLM Response to Public Comments at 18. By the BLM’s own admission, the cumulative impacts analysis is ongoing and not yet complete, yet the agency is moving forward with approving the Whitewater MDP without the “hard look” analysis that NEPA demands. Furthermore, the GJFO makes no mention of how the operator’s potential future plans to drill for gas in the Whitewater Unit have been analyzed as part of this process. Previously, Fram proposed drilling 492 gas wells in the Whitewater Unit.  

Recently, the operator has stated that it plans to drill for gas in the unit once prices rise: “Fram still plans to drill for gas when prices

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6 Cesaroni et al., Long Term Exposure to Ambient Air Pollution and Incidence of Acute Coronary Events: Prospective Cohort Study and Meta-Analysis in 11 European Cohorts from the ESCAPE Project, BRITISH MEDICAL JOURNAL (2014), available at: http://www.bmj.com/content/348/bmj.f7412 (attached as Exhibit 2).

recover; it previously proposed drilling up to 500 wells across the unit." The GJFO has failed to consider these 500 wells in addition to the other projected oil and gas activity in the region. This leap before you look approach to resource management is contrary to the agency’s mandate under NEPA, and further underscores the importance of performing the type of detailed analysis that only an EIS can provide before deciding whether or not to approve the Whitewater MDP.

The GJFO also erroneously finds no significance with respect to the project’s impacts to water. The project will cause erosion and sedimentation and will likely increase selenium and salinity concentrations in streams. EA at 93. The project also threatens the contamination of both surface and groundwater from accidental releases of drilling fluids, produced water, condensate, lubricants, and fuels, and risks hydrocarbon leaks into groundwater. EA at 97, 98. These impacts implicate both human health and endangered species and their habitat, two factors that the GJFO was required to, but failed to, consider when evaluating significance.

For example, selenium concentrations in the endangered pikeminnow are already at toxic levels near the project area. EA at 126. All surface disturbance in the project area would be to selenium-containing soils. Id. Fifty-nine percent of the proposed surface disturbances would be to the particularly selenium-rich soils of the Mancos Shale. Id. An increase in selenium concentration in pikeminnow critical habitat—which the GJFO concedes will be a consequence of the project—is significant, especially where the pikeminnow is already suffering from selenium toxicity. EA at 127. Thus, an EIS is required.

Another significant impact is to the City of Grand Junction public water supply. The EA considers this impact to be of “special concern.” EA at 92. In particular, one of the project’s proposed well pads will be located “upslope of” and “adjacent to an unnamed ephemeral stream flowing towards” the Juniata Reservoir, a major water storage facility for the City of Grand Junction. EA at 92. The EA notes that, although the well pad has a “No Surface Occupancy” stipulation because of the potential for impact to the Grand Junction public water supply, Fram will secure an exception to this lease stipulation and will build the well pad anyway. Id. Locating a well pad upstream of and adjacent to a stream flowing into a major public water reservoir is significant given the serious risk to public health posed by contamination of the reservoir. The action deserves analysis in an EIS.

C. The BLM improperly relies on mitigation measures to justify its finding of no significance.

Throughout the EA, the GJFO relies on perfunctory descriptions (often in list form) of mitigation measures without meaningful analysis demonstrating that the measures will reduce impacts below the level of significance. See Nat’l Parks, 241 F.3d at 734. “[M]itigation measures, while necessary, are not alone sufficient to meet the [Agency’s] NEPA obligations to determine the projected extent of the environmental harm to enumerated resources before a project is approved.” Northern Plains Resource Council v. Surface Transportation Board, 668

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For example, in the context of selenium impacts to the pikeminnow, the GJFO merely states that “application of measures proposed in the Biological Resources Protection Plan and SWMP” will “minimize potential discharge of selenium-bearing sediments.” EA at 127. Similarly, the GJFO relies on mitigation measures such as “pitless drilling systems” and “notification of potentially impacted Public Water Systems” to dismiss effects from the well pad upslope of Juniata Reservoir, also concluding summarily that the presence of a ditch located between the proposed well pad and the reservoir “would prevent potential effects.” EA at 92. Perfunctory descriptions of mitigating measures and conclusory statements like these—which appear throughout the EA—are insufficient to support a finding of no significant impact.

The key question is whether mitigation measures will reduce impacts below the threshold of significance. See Nat’l Parks, 241 F.3d at 734. “A ‘perfunctory description,’ or ‘mere listing of mitigation measures, without supporting analytical data,’ is insufficient to support a finding of no significant impact.” Id. at 735. When determining the sufficiency of the mitigation measures, courts consider “whether they constitute an adequate buffer against the negative impacts that may result from the authorized activity. Specifically, [the court] examine[s] whether the mitigation measures will render such impacts so minor as to not warrant an EIS.” Id.; see also, Hill v. Boy, 144 F.3d 1446, 1451 (11th Cir. 1998) (explaining that where an agency relies on an assumption to reach a FONSI, the assumption must be supported by substantial evidence). Moreover, the proposed mitigation underlying the FONSI “must be more than a possibility” in that it is “imposed by statute or regulation or have been so integrated into the initial proposal that it is impossible to define the proposal without mitigation.” Wyoming Outdoor Council v. U.S. Army Corps of Eng’rs, 351 F.Supp.2d 1232, 1250 (D.Wyo. 2005).

Here, the agency offers nothing more than empty assurances that mitigation measures will generically “reduce” impacts or “improve” outcomes. The agency does not provide the necessary analytical data—as detailed below—to demonstrate specifically that impacts will be reduced below the threshold of significance. Indeed, in many cases, the agency does not even logically link mitigation measures to the reduced impacts. Instead, the agency merely mentions mitigation measures, or directs the reader to lists of mitigation measures elsewhere in the EA (e.g. Project Design Features and BLM COAs), without explaining how those measures will reduce impacts, and without any attention given to ensuring specifically that mitigation measures will cause impacts to fall below the threshold of significance. For example, the agency notes that the project will have sedimentation impacts to streams due to (1) stream crossings and increased vehicular traffic, which will be on-going for 4 years, and (2) runoff from access roads, which will remain in place for approximately 20 years. EA at 92, 93. The EA assures the reader that “preventive measures, proper site management and spill response procedures . . . would reduce the effects of erosion and sedimentation.” EA at 97. According to the EA, the preventive measures include measures that would “follow” the “recommendations” outlined in BLM’s “Gold Book”; requirements of the State’s site-specific Storm Water Discharge Permit and SWMP; and “recommendations” from the Town of Palisade and City of Grand Junction Watershed Plan. Id. The agency’s approach is flawed in several respects. First, two of the agency’s three proposed mitigation measures are mere recommendations, not statutory or other requirements creating binding commitments. Second, the agency has failed to ensure that sedimentation impacts will fall below the level of significance. Indeed, the agency offers no
explanation at all of how these mitigation measures will reduce sedimentation or erosion in any respect, much less below the level of significance. This conclusory approach is in evidence throughout the EA: the agency relies without support on mere mentions of mitigation measures—some of which are not even binding.

Notably, the fact that a best practice or mitigation measure improves a risky or harmful action does not necessarily mean that that measure lowers the action’s impacts below the level of significance. For example, in the case of the pikeminnow, the EA reveals that selenium will be released into pikeminnow critical habitat even with mitigation. Thus, even with mitigation, the project will have a significant impact. If the impact is not significant, the GJFO must explain why not. The GJFO has failed to “put forth ‘a convincing statement of reasons’ that explains why the project will not impact the environment no more than insignificantly.” Ocean Advoc., 402 F.3d at 864. Throughout the EA, the GJFO fails to provide the hard look that would support a finding of no significant impact.

Similarly, with regard to cumulative impacts, the agency must provide some explanation of how or why compensatory mitigation will reduce the cumulative adverse impacts on the resources in question to insignificance. Bare assertions of mitigation are insufficient. O’Reilly v. U.S. Army Corps of Eng’rs, 477 F.3d 225, 235 (5th Cir.2007) (“[A] bare assertion is simply insufficient to explain why the mitigation requirements render the cumulative effects of this project less-than-significant, when considered with the past, present, and foreseeable future development in the project area.” (emphasis in the original)). The agency’s analysis of cumulative impacts—particularly with regard to air quality, climate, and water resource impacts—fails to explain how mitigation will reduce these impacts to a level of insignificance.

D. The BLM may not label discussion of future environmental effects as “crystal ball inquiry” to avoid a finding of significant impact.

The GJFO refuses to undertake any meaningful analysis of climate impacts from the project, claiming: “specific impacts related to anthropogenic activities on global climate change cannot be accurately estimated.” EA at 65. In refusing to undertake this analysis, the GJFO evades its duty under NEPA. “Reasonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’” Save Our Ecosystems v. Clark, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984) (quoting Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm., 481 F.2d 1079, 1092 (D.C. Cir. 1973)). The GJFO is required to provide a “reasonably thorough discussion of the significant aspects of the probable environmental consequences” of the project on climate change, to “foster both informed decision-making and informed public participation.” Ctr. for Biological Diversity v. Natl Hwy. Traffic Safety Admin., 538 F.3d 1172, 1194 (9th Cir. 2008). Failure to meaningfully address the project’s impacts on climate denies both the agency and the public information necessary for informed decision-making. Without a reasonably thorough climate analysis, the EA cannot support a finding of no significant impacts.

NEPA imposes “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) (emphasis added). These “environmental consequences” may be direct, indirect, or cumulative. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. BLM is required to take a hard look at those impacts as they relate to the agency action. “Energy-related activities contribute 70% of global GHG emissions; oil and gas together represent 60% of those energy-related emissions through their extraction, processing and subsequent combustion.” Even if science cannot isolate each additional oil or gas well’s contribution to these overall emissions, this does not obviate BLM’s responsibility to consider oil and gas development from the Whitewater MDP from the cumulative impacts of the oil and gas sector. In other words, the BLM cannot ignore the larger relationship that oil and gas management decisions have to the broader climate crisis that we face. Here, the agency’s analysis must include the full scope of GHG emissions. See Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1379 (9th Cir. 1998) (“To ‘consider’ cumulative effects, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the [agency’s] decisions, can be assured that the [agency] provided the hard look that it is required to provide.”). If we are to stem climate disaster – the impacts of which we are already experiencing – the agency’s decision-making must be reflective of this reality and plan accordingly.

BLM is, at the end of the day, responsible for the management of 700 million acres of federal onshore subsurface minerals. Indeed, “the ultimate downstream GHG emissions from fossil fuel extraction from federal lands and waters by private leaseholders could have accounted for approximately 23% of total U.S. GHG emissions and 27% of all energy-related GHG emissions.” This suggests that “ultimate GHG emissions from fossil fuels extracted from federal lands and waters by private leaseholders in 2010 could be more than 20-times larger than the estimate reported in the CEQ inventory, [which estimates total federal emissions from agencies’ operations to be 66.4 million metric tons]. Overall, ultimate downstream GHG emissions resulting from fossil fuel extraction from federal lands and waters by private leaseholders in 2010 are estimated to total 1,551 [million metric tons of CO₂ equivalent (“MMTTCO₂e”)].” Id. To suggest that the agency does not, here, have to account for GHG pollution from oil and gas development authorized in the Whitewater MDP, would be to suggest that the collective 700 million acres of subsurface mineral estate is not relevant to protecting against climate change. This sort of flawed, reductive thinking would be problematic, and is contradicted by the agency’s very management framework that provides a place-based lens to account for specific pollution sources to ensure that the broader public interest is protected. Therefore, even though climate change emissions from the Whitewater MDP may look minor when viewed on the scale of the global climate crisis we face, when considered cumulatively with all of the other GHG emissions from BLM-managed land, they become significant and cannot be ignored.

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9 International Investors Group on Climate Change, Global Climate Disclosure Framework for Oil and Gas Companies (attached as Exhibit 3).


IV. The BLM has failed to take meaningful action to prevent the waste of oil and gas resources.

As detailed in our earlier comments, BLM’s duty to prevent waste is expansive: “[a]ll leases of lands containing oil or gas ... shall be subject to the condition that the lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land....” 30 U.S.C. § 225; see also 30 U.S.C. § 187 (“Each lease shall contain...a provision...for the prevention of undue waste....”). BLM is also required “to promote the orderly and efficient exploration, development and production of oil and gas.” 43 C.F.R. § 3160.0-4. As the Mineral Leasing Act’s (“MLA”), 30 U.S.C. § 181 et seq., legislative history teaches, “conservation through control was the dominant theme of the debates.” Bosenhe v. Udall, 373 U.S. 472, 481 (1963) (citing H.R.Rep. No. 398, 66th Cong., 1st Sess. 12-13; H.R.Rep. No. 1138, 65th Cong., 3d Sess. 19 (“The legislation provided for herein...will [help] prevent waste and other lax methods....").

Remarkably, the waste of natural gas is actually built into BLM’s approval of the Whitewater MDP. The EA acknowledges that natural gas will be co-produced with oil, EA at 19, but because of “the current low market price of natural gas, it is not economically viable to produce natural gas from the unit at this time.” EA at 10. Instead, Fram will combust the “excess” natural gas rather than sell it—despite the existence of the Trans-Colorado gas pipeline “providing a ready sales channel” and the Rocky Mountain Express Pipeline “which could provide a secure and cost efficient sales channel for Whitewater gas to the eastern coast of the United States,” EA at 10, as well as the planned construction of co-located gas gathering system to serve the Whitewater Unit. EA at 17.

BLM provides no data or analysis for the economic rationale for this decision, and instead apparently relies on the face-value assertion of Fram in this regard. BLM’s authority and responsibility to prevent methane waste—as provided by the MLA and reinforced by the Federal Land Policy and Management Act (“FLPMA”)—is not delimited by what is cost-effective (i.e., has net negative costs) for a particular oil and gas lessee or operator. The MLA instead mandates that “all reasonable precautions to prevent waste” are taken, not just those precautions that oil and gas lessees or operators deem sufficiently profitable. 30 U.S.C. § 225 (emphasis added). This authority and responsibility is expansive, compelling action to prevent waste even where it would cause oil and gas companies to incur net positive costs or, even, where it would forbid development pending satisfaction of certain conditions imposed on drilling authorizations.

When BLM does assess the economics of waste prevention action, the agency must consider—consistent with current NTL-4A policy—the total expected production of oil and gas from the relevant field or pool in gauging what is or is not economic (rather than considering the oil or gas resource individually and in isolation by the operator). Put differently, BLM should ensure that revenues from natural gas sales are considered in the aggregate to gauge the economic viability of, as put forward by Fram, separating nitrogen and carbon dioxide from the natural gas produced and routing the natural gas to the gathering system that Fram has committed to building. EA at 17. BLM should not allow lessees and operators to gauge the economic viability of methane capture and marketing by looking at only well-level production in
isolation. By considering total production—at the field or pool level—BLM furthers existing rules to ensure the “the maximum ultimate recovery of oil and gas with minimum waste and with minimum adverse effect on the ultimate recovery of other mineral resources.” 43 C.F.R. § 3161.2.

The use of economics to gauge the propriety and efficacy of methane waste prevention action must, furthermore, consider the true and full costs involved in oil and gas development, not just the narrow costs projected or incurred by oil and gas lessees or operators. BLM should, as explained in our prior comments, therefore ensure that economics to gauge action to prevent methane waste consider the total cost to the public of wasting methane production on public lands, including the costs to nonmarket resources such as air quality, water, public health, and wildlife. BLM should also consider economics with an eye towards optimizing the long-term value of oil and gas resources—and the lands and resources that overlie those resources—to the public.

Support for consideration of the true and full costs of development is found in FLPMA’s plain language. FLPMA explicitly provides that BLM must manage the public lands not simply as a resource for exploitation, but:

in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition, that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8) (emphasis added). BLM must also manage the oil and gas resource to “best meet the present and future needs of the American people” and ensure that management of the oil and gas resource “takes into account the long-term needs of future generations for…non-renewable resources, including…..minerals.” 43 C.F.R. § 1702(c). Furthering these objectives, BLM’s approval of the Whitewater MDP must, inter alia, specifically “use and observe the principles of multiple use and sustained yield,” “consider present and potential uses of the public lands,” and “weigh long-term benefits to the public against short-term benefits.” 43 U.S.C. §§ 1712(c)(1), (5), (7). Inherent in this framework is identifying, in the words of Gifford Pinchot, who laid the philosophical basis for multiple use: “the greatest good for the greatest number in the long run.”

Additional support for this approach to economic analysis is required by NEPA, which mandates that BLM take a hard look at the direct, indirect, and cumulative impacts of actions on the “human environment.” 40 C.F.R. §§ 1502.16(a), (b); 1508.25(c). Methane waste causes a variety of impacts to the “human environment”: the loss of oil and gas resource itself, climate impacts, public health impacts, increased pressure to lease and drill additional lands to meet demand for oil and gas, etc., none of which were sufficiently analyzed in BLM’s EA for the Whitewater MDP. NEPA also specifically mandates that BLM address, as part of the required hard look, “[e]nergy requirements and conservation potential of various alternatives and mitigation measures,” “[n]atural or depletable resource requirements and conservation potential
of various alternatives and mitigation measures,” and “[m]eans to mitigate adverse environmental impacts (if not fully covered under 1502.14(f)).” 40 C.F.R. §§ 1502.16(e), (f), (h). This hard look, in turn, informs BLMs’ consideration of alternatives, helping the agency “sharply define the issues and provide a clear basis for choice among options by the decision maker and the public.” 40 C.F.R. § 1502.14.

Here, BLM’s EA not only fails to provide the type of hard look economic analysis necessary to inform the decision-making process, but fails to provide any alternative in which to compare the agency’s choice to combust the “excess” natural gas. As detailed in NTL-4A:

Except as provided in II.C and III above, oil well gas may not be vented or flared unless approved in writing by the Supervisor. The Supervisor may approve an application for the venting or flaring of oil well gas if justified either by the submittal of (1) an evaluation report supported by engineering, geologic, and economic data which demonstrates to the satisfaction of the Supervisor that the expenditures necessary to market or beneficially use such gas are not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be recovered if the venting or flaring were permitted to continue or (2) an action plan that will eliminate venting or flaring of the gas within 1 year from the date of application.

NTL-4A § IV, B. BLM’s EA is devoid of the type of detailed hard look analysis required by both NEPA and NTL-4A, critically failing to quantify exactly how much gas will be co-produced with the oil, the amount of gas expected to be used in the operation of production equipment, or the amount of gas the agency anticipates will be combusted.

Moreover, “[i]n managing the public lands,” the agency “shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). Written in the disjunctive, BLM must prevent degradation that is “unnecessary” and degradation that is “undue.” Mineral Policy Ctr. v. Norton, 292 F.Supp.2d 30, 41-43 (D. D.C. 2003).

“Application of this standard is necessarily context-specific; the words ‘unnecessary’ and ‘undue’ are modifiers requiring nouns to give them meaning, and by the plain terms of the statute, that noun in each case must be whatever actions are causing ‘degradation.’ ” Theodore Roosevelt Conservation Partnership v. Salazar, 661 F.3d 66, 76 (D.C. Cir. 2011) (citing Utah v. Andrus, 486 F.Supp. 995, 1005 n. 13 (D. Utah 1979) (defining “unnecessary” in the mining context as “that which is not necessary for mining”—or, in this context, “for oil and gas development”—and “undue” as “that which is excessive, improper, immoderate or unwarranted.”)); see also Colorado Env’t Coalition, 165 IBLA 221, 229 (2005) (concluding that in the oil and gas context, a finding of “unnecessary or undue degradation” requires a showing “that a lessee’s operations are or were conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology, such that the lessee could not undertake the action pursuant to a valid existing right.”).
Here, the inquiry is whether the agency has conducted sufficient analysis and taken sufficient measures to prevent degradation unnecessary to, or undue in proportion to, the development the proposed action permits. See Theodore Roosevelt, 661 F.3d at 76. For example, methane waste and pollution may cause “undue” degradation, even if the activity causing the degradation is “necessary.” Where methane waste and pollution is avoidable, even if in the process of avoiding such emissions lessees or operators incur reasonable economic costs that are consistent with conferred lease rights, it is “unnecessary” degradation. 43 U.S.C. § 1732(b).

V. The BLM failed to provide a meaningful opportunity for public participation on its decision not to prepare an environmental impact statement.

Agencies have an obligation to involve the public in the preparation of an environmental assessment. See Citizens for Better Forestry v. U.S. Dept of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003). Here, the FONSI should have been made available for public review for 30 days before the agency’s final determination not to prepare an EIS.12 The BLM failed to provide this important review period. The CEQ explains in its “Forty Most Asked Questions”:

37b. What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?

A. Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Sections 1501.4(e)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

In this case, there is a reasonable argument—as demonstrated by this letter and our previous comments on this matter—for preparation of an EIS. Additionally, a 108-well oil and gas development is the sort of proposal which normally requires preparation of an EIS. For example, the BLM’s Uncompahgre Field Office is currently conducting an EIS on the proposed Bull Mountain MDP for 150 new wells (S050-2013-0022 EIS). The UFO chose to conduct an EIS after an initial public comment period on a draft EA and FONSI where numerous interested parties, including concerned local residents and conservationists, called on the agency to do so. Thus, under CEQ’s criteria, a 30-day public review period was required before the agency’s final determination not to prepare an EIS. This matter must be remanded to the agency to allow for this additional important public engagement.

VI. Conclusion

For the reasons described above, we urge the Colorado State Office to reverse and remand the Whitewater MDP to the GJFO so that the field office can undertake an EIS, or at a minimum, so that the field office can provide for an appropriate public review period before its final determination on whether an EIS is required.

Sincerely,

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