10 June 2019

Bakersfield Field Office, Bureau of Land Management
Attn: Bakersfield Hydraulic Fracturing Analysis
3801 Pegasus Drive,
Bakersfield, CA 93308

Comments submitted through BLM ePlanning website: https://eplanning.blm.gov/epl-front-office/eplanning/comments/commentSubmission.do?commentPeriodId=75786

Subject: **Comments on the Draft Supplemental EIS for the Bakersfield BLM Proposed RMP (PRMP) regarding Hydraulic Fracturing**

To Whom it May Concern,

Sequoia ForestKeeper provides the following comments with regard to the Draft Supplemental EIS for the **Bakersfield BLM Proposed RMP for Hydraulic Fracturing.** We hereby also incorporate by reference the comments submitted by the Center for Biological Diversity and the Sierra Club, as well as Los Padres Forest Watch.

Sequoia ForestKeeper is concerned about potential new oil and gas leasing and/or fracking in sensitive wildland areas in and around the Sequoia National Forest, Giant Sequoia National Monument, Sequoia and Kings Canyon National Parks, designated Wilderness Areas, Wilderness Study Areas, and other primitive wildlands areas in and adjacent to the areas proposed for new leases and/or fracking. These areas represent America's wildland heritage and should be fully protected and not leased or fracked for oil and gas development. As such, BLM should prepare an alternative that eliminates new oil and gas leasing and/or fracking adjacent to those areas.

Moreover, we are also concerned with the potential adverse effects from new oil and gas leasing and/or fracking on important public resources, including surface and groundwater, wildlife and wildlife habitat, and recreational resources.

Our position is that these and other concerns should counsel against any new leases and/or fracking, and BLM has broad discretion not to open public lands for minerals development in order to safeguard public resources and values. *See Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975); *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

The Federal Land Policy Management Act (FLPMA) requires that where oil and gas development would threaten the quality of critical resources, conservation of these resources should be the preeminent goal. *See* 43 U.S.C. § 1701(a)(8) (directing that "the public lands be managed in a manner that will protect the quality of 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.").

DETAILED COMMENTS

A. The DSEIS Fails to explain why BLM thinks the PRMP and SDEIS Shoule Preclude an Air Quality Analysis

Sequoia ForestKeeper commented extensively about this issue of Prevention of Significant Deterioration (PSD) with regards to our National Parks and Wilderness Areas, but the short statement in the DSEIS provides little insight as to why BLM thinks that "[n]one of the Action Alternatives proposed currently would require PSD permitting…."

On page 61 of the DSEIS it states:

> *4.1.5.1 Prevention of Significant Deterioration*
> *The federal Prevention of Significant Deterioration (PSD) program is a New Source Review program for major sources that are located in areas designated as in attainment with the National Ambient Air Quality Standards. PSD applies to both attainment and unclassifiable areas and PSD permitting requires the use of best available control technology, air quality modeling analysis, and public involvement or comment. None of the Action Alternatives proposed currently would require PSD permitting; however, if BLM-proposed actions resulted in emissions that met major source thresholds, a PSD review would have to be conducted and the relevant air quality permits would have to be issued prior to operations.*

In its SDEIS, BLM has failed to explain why it thinks the PRMP and SDEIS precludes an "air quality analysis," since the plan could enable many new major or modified major stationary air emissions from fracking operations?

To understand BLM's position, we sent a message to Carly Summers, primary BLM contact for the proposal, asking for clarification. In response, Ms. Summers provided the following statement:

> On page 44 of the analysis, we detail the "Number of Hydraulic Wells Assumption". Based on historical data, we do not anticipate large numbers of new wells on new leases, which also makes "many new major or modified major stationary air emissions from fracking operations" unlikely. However, my background is not in air quality, and I would encourage you to submit specific comments by the June 10 deadline if you have them.

June 3, 2019 E-Mail from Carly Summers to René Voss (attached as Exhibit 1).

Page 44 of the DSEIS analysis, in fact, states "that zero to four of these new wells on new leases would be hydraulically fractured in any given year, or 0 to 40 over the 10-year life of the 2014 RMP…." It is unclear whether any of these new wells (up to 40 over the life of the plan), however, would constitute major new sources that would require an air quality analysis.

Instead of the ambiguous statement that, "if BLM-proposed actions resulted in emissions that met major source thresholds, a PSD review would have to be conducted and the relevant air quality permits would have to be issued prior to operations" (SDEIS, p. 61), it would be much more helpful for the SDEIS to state clearly whether past drilling and/or fracking operation met the major source thresholds, and whether PSDs were required or air quality analyses were conducted.

The SDEIS must look beyond the alternatives and disclose whether the plan would enable potential major sources, and if so, provide an analysis with an estimate of potential air pollution that may affect the attainment or unclassified areas. This should be possible based on past air quality permits that may or may not have been issued or the fact that BLM may permit up to 40 new wells.

These new oil leases and/or fracking are likely to adversely affect unprotected wildlands and protected wildlands, by enabling new sources of air pollution. These adverse impacts must be disclosed and analyzed in the SEIS. Class 1 areas within reach of pollutants from oil and gas leasing and/or fracking in the Bakersfield BLM area include the adjacent Sequoia and Kings Canyon National Park (and maybe even Yosemite National Park and the adjacent Hoover and Emigrant Wilderness Areas), as well as several large Wilderness areas established before 1977. 42 U.S.C. § 7472(a); *see* also SFK Scoping Comments (list of Wilderness and roadless areas provided).

Degradation of air quality by any of the criteria air pollutants is prohibited in these areas. And since it is likely that new oil and gas leasing and/or fracking will significantly deteriorate air quality in Class 1 and Wilderness areas, the SDEIS must provide some sort of analysis, since leasing and potential major new sources are reasonably foreseeable. *See Kern v. U.S. Bureau of*

Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002) ("An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later when an [Environmental Assessment] is prepared for a site-specific program proposed pursuant to the RMP."). Deferral of such analysis "based on a promise to perform a comparable analysis in connection with later site-specific projects" risks defeating entirely the purpose of completing an EIS at the RMP stage. *Id*.

B. Areas With Other Important Public Resources Should Not Be Open to Oil & Gas Leasing or Fracking.

In our scoping comments, we admonished that California condor will likely be adversely affected by proposed fracking in most of the proposed BLM oil and gas leasing and/or fracking area. There, Sequoia ForestKeeper provided extensive data about the Condor's use of areas proposed for leasing and/or fracking. There is no question that California condors have recently reoccupied their historic habitat in the Southern Sierra Nevada in and near the Sequoia National Forest.

And while BLM estimates up to 40 new oil and gas leases and/or fracking on 446,000-acres within the range of the California condor, there is no further analysis of the effects this will have on condors in the form of disturbance, habitat loss, powerlines in their flyways, roads bringing hunters using lead ammunition, fire, trash, vehicle contaminants, air pollution, and water pollution. These significant adverse effects from the proposed oil and/or fracking on the endangered condor must be analyzed in detail, and BLM must re-initiate consultation with the U.S. Fish and Wildlife Service to mitigate any potential adverse effects. The result should be that BLM should prohibit these activities in the condor's critical habitat and within a 50 km radius of known occurrences.

C. Indirect and Downstream Effects from Greenhouse Gas (GHG) Emissions Were Not Considered or Analyzed in the DSEIS

In their scoping comments, incorporated by Sequoia ForestKeeper by reference, the Center for Biological Diversity and Sierra Club stated that BLM and the DSEIS must include an analysis of the downstream effects from greenhouse gas (GHG) emissions resulting from oil and gas drilling and/or fracking. It is not enough for BLM to only analyze the direct GHG emissions from drilling and/or fracking activities. BLM must also analyze the effects from the later burning of the oil and gas extracted, which will release significantly more CO2 and other GHGs into the atmosphere than the extraction operations alone.

Recent cases have held that where BLM fails to consider the indirect effects of downstream burning or combustion of resources extracted from RMP planning areas, they are in violation of NEPA's hard look requirements, since these emissions are reasonably foreseeable. And because the resources that are developed under a proposed RMPs are used for foreseeable

purposes, which generate emissions capable of estimation, NEPA requires an analysis of their effects. Because BLM knows they could permit up to 40 new wells, the burning of oil and gas from these new wells is capable of estimation.

A recent court ruling explains why the BLM must analyze indirect downstream effects from the consumption of oil and gas under NEPA:

> Foreseeable indirect impacts of oil and gas
>
> Plaintiffs argue that BLM failed to include in the RMP an analysis of the reasonably foreseeable indirect impacts of oil and gas. ECF No. 24 at 13. They contend that the "reasonably foreseeable effects of allowing fossil fuel extraction on public lands include the emissions resulting from eventual combustion of that fuel," and that BLM did not include the emissions analysis resulting from combustion. Id. at 13-14. Plaintiffs state that BLM recognized that decisions made under the RMP may have indirect effects resulting from activities that release GHG emissions, but BLM "failed to analyze the foreseeable emissions that will result from the processing, transmission, storage, distribution, and end use of these hydrocarbons." Id. at 14.
>
> BLM responds that it provided sufficient information on the indirect effects "while candidly discussing the limitations in BLM's ability to assess such impacts based on the information available at the planning stage." ECF No. 27 at 18. It adds that even though it estimated the total number of wells that would be drilled over the life of the RMP, it additionally noted the speculative nature of forecasting oil and gas production and was thus justified to provide a qualitative analysis. Id. at 19. Further, BLM points to reasoning in the RMP that because natural gas produces fewer GHG emissions, if it were to displace coal and oil, it could in fact reduce GHG emissions. Id. BLM surmises that this potential outcome means that quantifying GHG emissions would be potentially misleading and thus it was not arbitrary or capricious in leaving it out. Id.
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> Plaintiffs reply that BLM agrees that it must consider the indirect effects of burning the natural gas under the RMP and states it does so by focusing on a qualitative analysis. Pls.' Reply, ECF No. 28 at 3. Plaintiffs continue that this is flawed because it is not sufficient for BLM to claim as its qualitative analysis that an effect is unforeseeable and merely speculate without supplying what information is missing and why it could not be obtained. Id. at 4.
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> "Indirect impacts are defined as being caused by the action and are later in time or farther removed in distance but still reasonably foreseeable." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d at 1177 (citing 40 C.F.R. § 1508.8(b)). An effect is considered reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Colorado Envtl. Coal. v. Salazar*, 875 F. Supp. 2d at 1251 (citing cases).

Courts have found that combustion emissions are an indirect effect of an agency's decision to extract those natural resources. *See San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, No. 16-CV-376-MCA-JHR, 326 F. Supp. 3d 1227, 2018 U.S. Dist. LEXIS 99644, 2018 WL 2994406, at *10 (D.N.M. June 14, 2018) (collecting cases).

While *San Juan Citizens Alliance* concerned protests to oil and gas leasing, which occurs at a later stage of the oil and gas development process than what Plaintiffs are protesting here, another court has ruled that BLM needed to consider indirect effects of combustion of fossil fuels in an RMP. *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635, 2018 WL 1475470, at *13 (D. Mont. Mar. 26, 2018), appeal docketed, No. 18-35849 (9th Cir. Oct. 12, 2018) ("In light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs.").

In *High Country Conservation Advocates v. United States Forest Service*, the defendant argued that it was too speculative to know how much coal would be mined from then-unbuilt mines and it could not provide analysis of the potential combustion. 52 F. Supp. 3d 1174, 1196 (D. Colo. 2014) ("*High Country*"). That argument failed though, as the court found that

> [t]he agency cannot—in the same [final] EIS—provide detailed estimates of the amount of coal to be mined [] and simultaneously claim that it would be too speculative to estimate emissions from "coal that may or may not be produced" from "mines that may or may not be developed." The two positions are nearly impossible to reconcile.

Id. at 1196-97.

It is arbitrary and capricious for a government agency to use estimates of energy output for one portion of an EIS, but then state that it is too speculative to forecast effects based on those very outputs. *Cf. WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1234 (10th Cir. 2017) (holding that BLM erred by relying on some portions of a government report, but not acknowledging other portions).

Even though in *High Country* the challenged analysis regarding GHG emissions was of only three mines and here BLM estimates over 4,000 new wells will be drilled, the reasoning remains analogous. 52 F. Supp. 3d at 1198; AR 185778. BLM had data projecting outputs of natural gas under each alternative. AR 185947. Additionally, BLM had data comparing resultant GHG emissions from the combustion of different fossil fuels, including natural gas. AR 185232. BLM had the ability to provide more specific estimations than it did and BLM's reasoning that it was merely too speculative to provide the estimations is belied by its own analysis in the RMP. *See Kern v. U.S. Bureau*

> *of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002) ("An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later when an [Environmental Assessment] is prepared for a site-specific program proposed pursuant to the RMP.").
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> Therefore, BLM acted in an arbitrary and capricious manner and violated NEPA by not taking a hard look at the indirect effects resulting from the combustion of oil and gas in the planning area under the RMP. BLM must quantify and reanalyze the indirect effects that emissions resulting from combustion of oil and gas in the plan area may have on GHG emissions.

Wilderness Workshop v. United States BLM, 342 F. Supp. 3d 1145, 1154-56 (D. Colo. 2018).

A District Court in the 9th Circuit, cited in the case above, came to the same conclusion and provided further detail about this required analysis:

> Plaintiffs assert that BLM must "disclose and analyze" downstream emissions. (Doc. 72-1 at 26.) Plaintiffs reason that BLM's previous analysis of downstream effects in environmental analyses for lease-level coal projects demonstrates the reasonableness of this type of quantification. (Doc. 72-2 at 21.) Plaintiffs further argue that *High Country Conservation Advocates v. U.S. Forest Service*, 52 F.Supp.3d. 1174 (D. Colo. 2014), and *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), support the contention that NEPA requires that the RMP-level EIS contain a downstream emissions analysis.
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> The district court in *High Country* considered NEPA obligations where lease-level agency action would authorize additional coal mining. *High Country*, 52 F. Supp.3d. at 1189-90. BLM violated NEPA when it ignored a tool available to assess the impacts caused by emissions associated with new coal leases. The social cost of carbon protocol reasonably could have assisted the agencies in their analysis. *Id*. at 1190. BLM acted arbitrarily and capriciously when it decided to quantify the expected benefits of the modifications to the coal leases and yet claim that a similar effort to analyze the costs of the lease modifications would be impossible. *Id*.
>
> Similarly, the question presented in *Mid States* concerned final approval of a rail line proposal that would increase coal consumption. *Mid States*, 345 F.3d at 549-50. The Surface Transportation Board (STB) declined to consider the effects on air quality that an increase in the supply of low-sulfur coal would produce. The STB defended this omission on the basis that many utilities would shift to the use of low-sulfur coal regardless of whether it approved the new rail line.
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> The Eighth Circuit deemed it "illogical" to suggest that an increase in the availability of low-sulfur coal at lower prices would not affect the demand. The Court also rejected the

argument that the analysis of the effects of increased coal generation would be "too speculative." The increased emissions would be "reasonably foreseeable" in that context. An agency simply may not ignore an issue when the nature of the effect would be "reasonably foreseeable," but its "extent" may not. STB acted "irresponsibl[ly]" when it approved the proposed rail project "without first examining the effects" of a reasonably foreseeable increase in coal consumption. *Id*. at 550.

These cases admittedly analyzed projects narrower in scope and of a more discrete nature than the RMPs at issue here. The Ninth Circuit in *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002), likewise has instructed, however, that an agency may not "avoid" analysis of foreseeable environmental consequences in an RMP-level EIS "by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific program proposed pursuant to the RMP." Deferral of such analysis "based on a promise to perform a comparable analysis in connection with later site-specific projects" risks defeating entirely the purpose of completing an EIS at the RMP stage. *Id*.

As the Ninth Circuit observed, "no environmental consequences would ever need to be addressed in an EIS at the RMP level if comparable consequences might arise, but on a smaller scale, from a later site-specific action proposed pursuant to the RMP." *Id*. The EIS analysis at the RMP stage "may be more general" than the subsequent lease-level EA. Id. Analysis of environmental consequences at the RMP-level EIS can "guide" subsequent analyses, however, and prevent "wasteful duplication" among multiple lease-level EAs. *Id*.

NEPA requires that the agency conduct analysis of environmental consequences "as soon as it can reasonably be done." Id. (citations omitted). The Ninth Circuit in *Kern* determined that it was reasonable for the agency to analyze the risk of spreading a contagious root fungus during the preparation of an EIS and RMP in an area of federal land with harvestable timber resources. *Id*. at 1073. The "environmental problem" seemed "readily apparent at the time the EIS was prepared." *Id*. The RMP "contained enough specifics" to permit "productive analysis" and consider alternative proposals to mitigate the impact of the fungus. *Id*.

The Miles City RMP and the Buffalo RMP "contained enough specifics" to permit a "productive analysis" of the downstream burning of the coal, oil and gas open to potential development under the RMPs. *Kern*, 284 F.3d at 1073. The RMPs projected the quantity of recoverable fossil fuels to be extracted during the 20-year period of the RMPs. BUF:6-2232; MC:7-3799-3800. The RMPs also acknowledged that the coal recovered from the planning areas will be burned to generate electricity. BUF:6-2252; MC:7-3798. The impact on the climate borne by the burning of greenhouse gases proved "readily apparent" at the time that BLM scoped and completed the Buffalo EIS and Miles City EIS. *Kern*, 284 F.3d at 1073. Both the Buffalo PRMP and FEIS and Miles City PRMP and FEIS acknowledged climate change concerns. MC:7-2537; BUF:6-1419.

> In light of the degree of foreseeability and specificity of information available to the agency while completing the EIS, NEPA requires BLM to consider in the EIS the environmental consequences of the downstream combustion of the coal, oil and gas resources potentially open to development under these RMPs. Without such analysis, the EIS fails to "foster informed decisionmaking" as required by NEPA. *Block*, 690 F.2d at 761 (emphasis added). BLM may not defer wholesale such analysis to the leasing stage. To defer consideration would obviate the need for assessment of any environmental impact that also might arise in a site-specific EA. Kern, 284 F.3d at 1072.

W. Org. of Res. Councils v. United States BLM, No. CV 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635, at *34-40 (D. Mont. Mar. 26, 2018)

Since the Bakersfield BLM reasonably believes that it will enter into a specific number of leases (up to 40) over the term of the propose RMP, NEPA requires that it analyzed the downstream effects from the burning of GHGs from oil and gas drilling and/or fracking. The DSEIS fails to do this analysis.

D. BLM Must Consider and Evaluate the Global Warming Potential in the SDEIS over the Proper Time Horizon

After disclosing the downstream GHG emissions, BLM must also evaluate the global warming potential from the likely release of methane, and do so over the proper time horizon (20 years), since current scientific analysis dictates this shorter time horizon over a more politically-expedient 100-year time horizon, which is based on outdated science. Failing to do so would violate NEPA's requirement to ensure the scientific integrity of its analysis. The same court in *W. Org. of Res. Councils* explains:

> Plaintiffs' fifth claim argues that BLM violated NEPA by failing to quantify properly the magnitude of methane pollution by arbitrarily using outdated science. (Doc. 72-1 at 36.) Plaintiffs claim further that NEPA required BLM to analyze emissions over the short-term 20-year planning period of the RMP rather than the 100-year time horizon used by BLM. *Id*. at 37.
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> The Buffalo FEIS estimated emissions for carbon dioxide, methane, and nitrous oxide from activities within the planning area. BUF:6-2091. BLM multiplied these methane emissions by a factor of twenty-one, and the nitrous oxide emissions by a factor of 310. Id. These multipliers convert each gas to its CO2e, and represent the "global warming potential" (GWP) of the emissions. Id. The GWP "takes into account the intensity of the substance's heat trapping effect and its longevity in the atmosphere" as compared to carbon dioxide. Id.
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> The Miles City FEIS contained comparable data and GWP calculations. MC:7-2712. BLM noted additionally in the Miles City FEIS that EPA had proposed to change the GWP

factors to 25 for methane, and 298 for nitrous oxide. Id. BLM further included estimates of methane's GWP from various sources over a 20-year period "rang[ing] from 72 to 105." *Id*. BLM explained that it had selected the GWPs of 21 and 310 to allow "consistent comparison" with existing "state and national GHG emission inventories." Id. BLM invited the public to use the alternate data provided to calculate alternate CO2e amounts for methane and nitrous oxide. Id.

An EIS must provide a "full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. The environmental information made available to the public "must be of high quality." 40 C.F.R. § 1500.1(b). "Accurate scientific analysis" proves "essential to implementing NEPA." *Id.* NEPA requires an agency to ensure "scientific integrity" in the analyses contained in an EIS. 40 C.F.R. § 1502.24. NEPA finds relevant "both short- and long-term effects." 40 C.F.R. § 1508.27(a).

BLM based its GWP on existing EPA data. MC:7-2712; BUF:6-2091. The EPA based its GWP on a 100-year time horizon based on an agreement made by the parties to the United Nations Framework Convention on Climate Change ("UNFCC"). MC:2140-68693; BUF:2165-137116. EPA itself noted that "other time horizon values are available." MC:2140-68693; BUF:2165-137116. A public comment to the Miles City Draft RMP and EIS originally raised the existence and appropriateness of other time horizons. MC:7-3877. A protest submitted on the Buffalo PRMP and FEIS again highlighted the issue. BUF:1996-130451. Only the Miles City PRMP and FEIS noted GWP estimates based on 20-year time horizon. MC:7-2712.

EPA based its use of the 100-year time horizon on a political agreement between nations rather than on science. The Miles City PRMP and FEIS included estimates based on the 20-year time horizon. Neither the Buffalo PRMP and FEIS, nor the Miles City PRMP and FEIS, explain or justify, however, use of a GWP calculated over a 100-year time horizon. BLM failed in both the PRMP and FEIS to respond further to criticisms of this methodology raised through the comments or protest process. BLM's unexplained decision to use the 100-year time horizon, when other more appropriate time horizons remained available, qualifies as arbitrary and capricious under these circumstances. BLM's unexplained decision to use the 100-year time horizon further fails to satisfy NEPA's purpose of "foster[ing] informed decision-making." *Block*, 690 F.2d at 761.

BLM's decision to note alternate GWP figures in the Miles City FEIS further evidences its awareness that the evolving nature of the science regarding carbon emissions. BLM's failure to acknowledge this changing science in the Buffalo FEIS, however, constituted an additional arbitrary decision that undermined the accuracy and integrity of the GWP analysis. 40 C.F.R. § 1500.1(b); 40 C.F.R. § 1502.24. The Buffalo FEIS failed to provide a "full and fair discussion" as required by NEPA. 40 C.F.R. § 1502.1. The inclusion of this information in the Buffalo FEIS would have allowed members of the public and interested parties to evaluate this information and submit written comments where

> appropriate, and spur further analysis as needed. Without all the relevant information, the FEIS could not "foster informed decision-making." *Block*, 690 F.2d at 761.

W. Org. of Res. Councils v. United States BLM, No. CV 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635, at *44-48 (D. Mont. Mar. 26, 2018)

The DSEIS fails to do this analysis.

E. Failure to Consider a Reasonable Range of Alternatives – BLM Must Consider an Alternative that Closes Off Areas with Little or No Oil and Gas Potential

Scoping comments by CBD and Sierra Club stated that BLM must consider a wider range of alternatives, which consider options that close off areas to drilling or fracking.

BLM's proposal essentially relegates all the lands in the Bakersfield RMP area outside Wilderness or Wilderness Study Areas as potentially open to new oil and gas leasing and/or fracking, regardless of their accessibility or suitability. This gross, over-encompassing inclusion of lands in the BLM's proposal is not environmentally responsible and must be pared down significantly to exclude many, if not all, areas based on terrain, remoteness, and adjacency to wildlands and sensitive resources, as well as lack of potential for finding oil or gas. At the very least, BLM must consider and analyze an Alternative that would close off these areas to drilling.

Many areas near these wildlands are likely unsuitable for oil and gas leasing or fracking. Due to the steep terrain, inaccessibility, and remoteness of many of the areas proposed for leasing adjacent to wildland areas, especially in the Sierra Nevada and Coastal Mountains near Sequoia, Sierra, and Los Padres National Forests, the BLM should consider and analyze the physical and economic suitability of these areas and prohibit oil and gas leasing and/or fracking in these areas. Moreover, many areas have little or no oil and gas potential and should be excluded from oil and gas development and/or fracking.

In fact, Carly Summers confirmed this in her recent email message:

> With regard to projects near National Parks, on page 92 of our 2014 Resource Management Plan, there is a map showing the potential for hydrocarbon bearing geology. You'll notice that areas in close proximity to National Parks there is no potential for hydrocarbon bearing rock and we do not manage land near to Sequoia and Kings Canyon National Parks that has high or moderate potential. This again speaks to our conclusion that future development is most likely going to take place where or very near to where development currently takes place, and again, is unlikely to result in large numbers of new wells on new leases.

June 3, 2019 E-Mail from Carly Summers to René Voss (attached as Exhibit 1).

The original FEIS even acknowledged that BLM considered such an alternative, but then abandoned it as "unnecessary": "The concept of placing greater restriction (i.e., more closed acres or no surface occupancy (NSO) stipulation) was considered, however, closure of lands with little or no oil and gas development potential was deemed to be unnecessary." FEIS at 201. But a recent District Court decision in the 9th Circuit Court of Appeals held that limiting the range of alternatives to exclude options that limit oil and gas drilling where there is low potential for development is arbitrary and capricious.

The Court stated:

> Plaintiffs argue that BLM's range of alternatives violates NEPA by omitting any option that would meaningfully limit oil and gas leasing and development within the planning area. ECF No. 24 at 36. Plaintiffs note that "[o]f the 701,200-acre mineral estate to be managed through the RMP, no alternative closes more than 179,700 acres (or 25.7 percent) to future leasing—even though, in each alternative, a significant portion of the areas left open to development have a low potential for development." Id. at 38-39.
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> BLM explained its need to revise the then-enacted RMP by listing seven major issues contributing to the revision. AR 184603. These issues included managing recreation, protection of natural and cultural resources, managing vegetation, and managing surface water and groundwater. Id. Also included was "[m]anaging energy development, particularly regarding the designation of lands available for fluid minerals leasing and the application of lease stipulations, to protect cultural and natural resources and to minimize user conflicts." Id.
>
> These lease stipulations included no surface occupancy ("NSO") and controlled surface use ("CSU"). The NSO stipulation prohibits surface-disturbing activities, thus "[a]ccess to fluid minerals resources would require horizontal and/or directional drilling from outside the boundaries of the area with the NSO stipulation." AR 188349. The CSU stipulation "is a category of moderate constraint stipulations that allows some use and occupancy of surface lands while protecting identified resources or values." AR 188350. A CSU stipulation allows "BLM to require special operational constraints, including special design or relocating the surface-disturbing activity . . . ." *Id*. In the RMP, the studied alternatives projected between 239,400 to 356,700 acres covered under NSO stipulations and between 423,300 to 616,800 acres covered under CSU stipulations. AR 184620.
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> These stipulations interplay with the way development land is categorized for its potential. BLM classified development areas as high, medium, low, and no known potential. AR 185778. Within the defined areas, BLM found 20 percent of the land rated as having high potential, 12 percent with medium potential, 46 percent with low potential, and 22 percent with no known potential. Id. BLM estimated that 99 percent of future wells would be drilled within high potential areas—totaling 127,300 acres—with the remaining one percent of future wells on areas with medium or low potential. AR

185190, 185778. It added that "approximately 88 percent of the federal mineral estate in the planning area with high potential for oil and gas ha[d] been leased." AR 185762.

BLM noted that it did a cursory analysis of a no leasing alternative, but it reasonably rejected calls to further explore a no leasing alternative when it explained that because most of the high potential areas are already leased, "the majority of future leasing would take place in lands adjacent to existing leases." AR 223539. It added that, "[c]urrently there is no interest in leasing in areas outside high potential areas." *Id*. BLM stated that because "FLPMA mandates the BLM to manage its lands for multiple uses and sustained yield," BLM "eliminated such alternatives as closing all BLM lands to oil and gas leasing, or managing all lands for particular natural resource value to the exclusion of other resource use considerations." AR 184701.

Because of the low projected percentage of development on anything other than high potential lands, BLM argues that a no leasing alternative was not practically different than the studied alternatives, and thus BLM was not required to consider an alternative where low and medium potential lands were closed for leasing. ECF No. 27 at 14.

Plaintiffs dispute this reasoning, claiming that those areas with low and medium potential should be closed for leasing—especially if the potential for development is so low—because BLM could then use that land more productively in accordance with other values. ECF No. 24 at 39.

The NEPA framework concerning alternatives in a case such as this is well explained by the Tenth Circuit, who wrote that

> The "heart" of an EIS is its exploration of possible alternatives to the action an agency wishes to pursue. 40 C.F.R. § 1502.14. Every EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded. *See Baltimore Gas & Elec. Co.*, 462 U.S. at 97, 103 S.Ct. 2246. While NEPA "does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective," it does require the development of "information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." [*Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir.1999)] (quotations [*1166] and alteration omitted). It follows that an agency need not consider an alternative unless it is significantly distinguishable from the alternatives already considered. *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 868 (9th Cir.2004).

> We apply the "rule of reason" to determine whether an EIS analyzed sufficient alternatives to allow BLM to take a hard look at the available options. Id. The reasonableness of the alternatives considered is measured against two guideposts. First, when considering agency actions taken pursuant to a statute, an alternative is reasonable only if it falls within the agency's statutory mandate. *Westlands*, 376 F.3d at 866. Second, reasonableness is judged with reference to an agency's objectives for a particular project. *See Dombeck*, 185 F.3d at 1174-75; *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 668-69 (7th Cir.1997); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir.1992).

New Mexico [*ex rel. Richardson v. BLM*], 565 F.3d [683] at 708-09 [(10th Cir. 2009].

In relevant part, the court in *New Mexico* found that the defendant should have analyzed a management alternative that closed more than 17% of a certain portion of the plan area to leasing. *Id*. at 709. The court found that the defendant's justification—that it reasonably had analyzed an alternative of no development in the plan area as a whole—was in fact different than analyzing an alternative of no development for the specific portion of land at issue. *Id*. ("While agencies are excused from analyzing alternatives that are not 'significantly distinguishable' from those already analyzed, [] the alternative of closing only the Mesa—which represents a small portion of the overall plan area—differs significantly from full closure.").

The court reasoned that having considered an option of no development in the planning area at whole did not relieve the defendant of the duty to consider any other alternative along the spectrum between complete closure and the studied alternative which provided for the greatest closure. *Id*. at 711, n.32. "Otherwise, an agency could exclude any alternative it wished by considering (and rejecting) an extreme." *Id*. (citing *Dombeck*, 185 F.3d at 1175 (agencies must "take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes.")).

Here, the same issue is at play. BLM argues it reasonably considered a no development scenario, yet that scenario considers the plan area at whole and is succinctly discarded. AR 184701, 223539. However, Plaintiffs argue that BLM should have considered "an alternative eliminating oil and gas leasing in areas determined to have only moderate or low potential for oil and gas development." ECF No. 24 at 37. This would be an alternative within the spectrum mentioned by the court in *New Mexico*. 565 F.3d at 711, n.33.

I disagree with BLM's argument that there is no substantive difference between an alternative that opens low and medium potential areas for leasing and one that does not. The basis of BLM's argument here is that it was not required to consider the latter option because such a low percentage of the low and medium potential areas were projected to be developed. ECF No. 27 at 14-15. But if those areas were open for

leasing, even if there is a minimal chance for development, it would detract from BLM designating that land for other uses.

As such, "the principle of multiple use does not require BLM to prioritize development over other uses." *New Mexico*, 565 F.3d at 710. Since a "parcel of land cannot both be preserved in its natural character and mined" it seems a reasonable alternative would be to consider what else may be done with the low and medium potential lands if they are not held open for leasing. *Id*. (quoting *Rocky Mtn. Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 738 n.4 (10th Cir. 1982)).

BLM points to its field guidance, which reads that it should "close lands to mineral development only when 'other land or resource values cannot be adequately protected with even the most restrictive lease stipulations.'" ECF No. 27 at 13-14. However, this does not excuse the fact that BLM did not closely study an alternative that closes low and medium potential lands when it admits there is an exceedingly small chance of them being leased. This alternative would be "significantly distinguishable" because it would allow BLM to consider other uses for that land. *See New Mexico*, 565 F.3d at 708-09. Therefore, BLM's failure to consider reasonable alternatives violates NEPA.

Wilderness Workshop v. United States BLM, 342 F. Supp. 3d 1145, 1164-67 (D. Colo. 2018)

Since the facts in that case closely follow the BLM's failure in its SDEIS for the Bakersfield PRMP to analyze an Alternative that would exclude areas of low- or medium-potential of finding oil or gas, BLM violates NEPA. Therefore, to avoid this NEPA violation, BLM must go back and provide a full analysis based on such an Alternative, re-issue the SDEIS for comment, and fully consider it as a viable alternative in its final decision.

Sincerely and respectfully submitted,

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Rene Voss

From: Summers, Carly [csummers@blm.gov]
Sent: Monday, June 03, 2019 3:45 PM
To: Rene Voss
Cc: Ara Marderosian
Subject: Re: [EXTERNAL] Question re BLM Fracking DSEIS

Hi René,

Thank you for your patience on my response. I had several other projects that needed my attention.

On page 44 of the analysis, we detail the "Number of Hydraulic Wells Assumption". Based on historical data, we do not anticipate large numbers of new wells on new leases, which also makes "many new major or modified major stationary air emissions from fracking operations" unlikely. However, my background is not in air quality, and I would encourage you to submit specific comments by the June 10 deadline if you have them.

With regard to projects near National Parks, on page 92 of our 2014 Resource Management Plan, there is a map showing the potential for hydrocarbon bearing geology. You'll notice that areas in close proximity to National Parks there is no potential for hydrocarbon bearing rock and we do not manage land near to Sequoia and Kings Canyon National Parks that has high or moderate potential. This again speaks to our conclusion that future development is most likely going to take place where or very near to where development currently takes place, and again, is unlikely to result in large numbers of new wells on new leases.

Again, please submit your comments through our planning webpage if you would like for them to be formally addressed in the comment response.

Thank you,
Carly

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On Fri, May 24, 2019 at 2:30 PM Rene Voss <renepvoss@gmail.com> wrote:

> Ms. Summers,
>
> I'm preparing comments on the DSEIS and need clarification of one of the issues we are concerned about.

On page 61 it states:

> 4.1.5.1 Prevention of Significant Deterioration
>
> The federal Prevention of Significant Deterioration (PSD) program is a New Source Review program for major sources that are located in areas designated as in attainment with the National Ambient Air Quality Standards. PSD applies to both attainment and unclassifiable areas and PSD permitting requires the use of best available control technology, air quality modeling analysis, and public involvement or comment. None of the Action Alternatives proposed currently would require PSD permitting; however, if BLM-proposed actions resulted in emissions that met major source thresholds, a PSD review would have to be conducted and the relevant air quality permits would have to be issued prior to operations.

Sequoia ForestKeeper commented extensively about this issue of PSD with regards to our National Parks and Wilderness Areas, but this short statement provides little insight as to why BLM thinks that "[n]one of the Action Alternatives proposed currently would require PSD permitting...."

Could you explain why BLM thinks the PRMP precludes an "air quality analysis" since it will enable many new major or modified major stationary air emissions from fracking operations?

Your feedback will assist us in providing meaningful comments to the BLM with regard to the DSEIS.

Thanks you,

René Voss

Attorney for Sequoia ForestKeeper


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