WESTERN ENERGY ALLIANCE

April 20, 2015

Via Email & First Class Mail

Ruth Welch
Director, Colorado State Office
Bureau of Land Management
2850 Youngfield Street
Lakewood, CO 80215

Re: Response to WildEarth Guardians Protest of BLM's May 2015 Lease Sale

Dear Ms. Welch:

Western Energy Alliance (Alliance) submits this letter in response to the WildEarth Guardians' (WEG) protest filed on March 16, 2015, of the May 2015 Competitive Oil and Gas Lease Sale Environmental Assessment (Lease Sale EA). Through this letter, the Alliance provides additional legal support demonstrating that the Bureau of Land Management (BLM) conducted a sufficient NEPA analysis for the parcels subject to the Lease Sale EA. The Alliance asks that this letter be considered by BLM and included in the administrative record for the lease sale.

At bottom, WEG disagrees with the level of National Environmental Policy Act (NEPA) analysis that legal precedent has long established is sufficient for leasing, and desires BLM to conduct a hypothetical full field development analysis prior to leasing, and prior to submission of any site-specific proposals for exploration and development by the eventual successful high bidders, assuming the parcels are in fact sold.

WEG contends that through the Lease Sale EA, BLM is impermissibly "kicking the can down the road" and warrants the immediate removal of all federal parcels from the upcoming May 2015 Oil and Gas Lease Sale, including those parcels within the Pawnee National Grasslands. *See* WEG Protest 5. WEG's Protest asserts that the Lease Sale EA violates NEPA, 42 U.S.C. § 4321 *et seq.,* and that BLM has failed to comply with its obligations under the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.,* and the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq. *Id*.

WEG's concerns and arguments advanced in its protest are factually and legally unfounded. As explained below, BLM has complied with its obligations under the NEPA, CAA, and ESA. The Lease Sale EA constitutes a "hard look" at the resource values that may be impacted by the parcels' future development and it expressly provides for additional NEPA analysis once any concrete plans for such development are put forward. Thus, the Lease Sale EA's environmental analysis comports with BLM's phased approach to

1775 Sherman St., Ste 2700 Denver, CO 80203
P 303.623.0987 F 303.893.0709 W WesternEnergyAlliance.org

environmental resource analysis in the context of federal oil and gas leasing and development.

The Alliance believes that the shortcomings identified below in WEG's Protest warrant the Protest's dismissal and demonstrate that the inclusion of all the Parcels in the upcoming Lease Sale is permissible under the NEPA, CAA, and ESA.

Statement of Interest

The Alliance represents over 450 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance's member companies participated in the oil and gas lease process by submitting various Expressions of Interest, and the Alliance commented on the draft Lease Sale EA. Therefore, the Alliance has substantial interest in the Lease Sale EA and BLM's determination to offer the parcels for lease that are analyzed in the Lease Sale EA.

With the filing of this opposition to the protest, the Alliance seeks to become a "party to the case" in accordance with the IBLA's Order in *Contex Energy Company*. *See Contex Energy Company*, *Order on Motion to Dismiss, Motion to Consolidate, and Petition for Stay*, IBLA 2006-51, 2006-52 (Feb. 10, 2006). In this IBLA Decision, Contex sought IBLA review of BLM's decision to uphold a lease protest filed by Red Rock Forests. Under the *Contex* case, and BLM's current lease protest procedures, for a party such as the Alliance to be a party to the case for a lease protest, it "must provide BLM with input concerning that protest prior to its decision."[1] *Contex*, IBLA 2006-51, 2006-52, *Order* at 2. Accordingly, by this letter, the Alliance provides input to: (1) submit a rebuttal to the Protest; (2) offer further support for BLM's decision to lease the parcels at issue; and (3) become a party to this case.

Moreover, the Alliance and its member companies would be adversely affected by a decision of BLM to suspend, rescind or delay issuance of any of the leases for the parcels at issue. In sum, BLM had full authority to offer the parcels for lease under applicable federal statutes, implementing regulations, federal and IBLA case law, and current BLM policies.

I. BLM Fully Complied with the Requirements of the National Environmental Policy Act in Preparing the Lease Sale EA

WEG's allegations that BLM's environmental resource analysis in the Lease Sale EA is deficient are based upon the misapplication of NEPA and a failure to recognize the phased approach to federal oil and natural gas leasing and development. WEG chiefly asserts that

[1] The Board held that "because Contex is not a party to the case for the Protest Decision, its appeal of that decision must be dismissed." *Contex*, Order at 2.

the Lease Sale EA either cannot tier to the underlying Royal Gorge Field Office's Resource Management Plain and Environmental Impact Statement (RMP/EIS) in regards to hydraulic fracturing and horizontal drilling, or that it fails to properly analyze the potential impacts from unconventional oil and natural gas development. *See* WEG Protest 5. Similarly, WEG maintains that BLM's air quality analyses and its assessment of greenhouse gas (GHG) emissions are insufficient for this stage of the oil and natural gas leasing process. *Id.*

The Lease Sale EA's environmental resource analyses, however, are entirely consistent with the requirements imposed on BLM under NEPA. BLM utilized best available information, and using its expertise, properly identified and analyzed to the extent possible the impacts of issuing oil and natural gas leases upon the human environment, and it retained sufficient authority to engage in subsequent NEPA analysis once a specific project is submitted for review.

A. NEPA Legal Framework and BLM's Phased Approach for NEPA Compliance for Land Use Planning, Oil and Gas Leasing, and Oil and Gas Development

NEPA is a procedural statute promulgated to ensure that an agency makes an informed decision. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978) (indicating that NEPA does not require the full disclosure of impacts that are remote or speculative). NEPA requires an agency to take a "hard look" at the environmental consequences of a proposed action and prescribes the public dissemination of relevant environmental information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson*, 490 U.S. at 350; *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1240 (10th Cir. 2000) (citations omitted). NEPA "does not require agencies to elevate environmental concerns over other appropriate considerations." *Citizens' Comm. to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1022 (10th Cir. 2002).

Further, in the context of federal oil and gas leasing in Alaska, the Ninth Circuit articulated the parameters of NEPA compliance and the detail required at each step of the federal oil and gas leasing, exploration and development process. *See Northern Alaska Environmental Center v. Kempthorne* (*NAEC*), 457 F.3d 969, 977 (9th Cir. 2006). The Ninth Circuit explained that "[a]t the earliest stage, the leasing stage we have before us, there is no way of knowing what plans for development, if any, may eventually materialize." *Id*. (emphasis added).

Thus, BLM is not required to conduct a site-specific analysis at the leasing stage. *Id*. ("[G]overnment was not required at [the leasing] stage to do a parcel by parcel examination of potential environmental effects."). Of course, NEPA would still apply to subsequent proposals for exploration and development when more site-specific effects are identifiable. *Id*.

Under these legal standards and principles, and as explained in more detail below, the record for the Lease Sale EA demonstrates that BLM complied with its NEPA obligations and properly analyzed the impacts from hydraulic fracturing and horizontal drilling, as well as the potential for exceedances of National Ambient Air Quality Standards (NAAQS) or the emission of GHGs associated with leasing.

B. The Lease Sale EA Sufficiently Analyzed the Impacts of Horizontal Drilling and Hydraulic Fracturing

The Lease Sale EA's analysis of the potential impacts to surface and groundwater resources, and in particular the impacts from hydraulic fracturing, is consistent with the objectives of NEPA. WEG's assertion the Lease Sale EA violates NEPA because the underlying RMP/EIS does not specifically address hydraulic fracturing or horizontal drilling fails to demonstrate that BLM did not take a "hard look" at the impacts of unconventional development to water and other resources.

Specifically, the protest does not provide any information indicating that hydraulic fracturing has the potential to impact the human environment in a manner different from conventional oil and gas development. *See* WEG Protest 6-7; *cf. Pennaco Energy, Inc. v. U.S. Dept. of Interior*, 377 F.3d 1147, 1157-62 (10th Cir. 2004) (finding BLM violated NEPA, in part, because development from coal bed methane development "pose[d] unique environmental concerns" related to water).

Moreover, the Lease Sale EA identifies the potential risks associated with conventional and unconventional development to surface and ground water resources. *See* Lease Sale EA § 3.4.1.2. The Lease Sale EA explicitly provides for the protection of all surface water and groundwater through the application of Best Management Practices that if properly followed will avoid adverse impacts to water quality. *Id.*

At the leasing stage, BLM is not required to conduct a more detailed analysis of the impacts to water quality since leasing does not authorize any development activities. *NAEC*, 457 F.3d at 977 ("[G]overnment was not required at [the leasing] stage to do a parcel by parcel examination of potential environmental effects."). The Lease Sale EA provides an assessment of the potential impacts from conventional and unconventional oil and gas development and the measures that will be taken protect water resources thereby satisfying the requirements that BLM make an informed decision as to the impacts of leasing. *Robertson*, 490 U.S. at 350. BLM will not have more information to conduct an informed and refined analysis until after the lease sale, when lessees may submit proposals to BLM for site-specific development activities.

Further, BLM is not subject to any mandate under NEPA requiring it to engage in speculative environmental analysis, and WEG does not identify any information demonstrating that development of the parcels is reasonably foreseeable at this stage or

that any concrete development plans exist. *See New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 716 (10th Cir. 2009) (stating that "the operative inquiry was simply whether all foreseeable impacts of leasing had been taken into account before leasing could proceed."); *cf. Park County Res. Council v. Dep't of Agric.*, 817 F.2d 609, 624 (10th Cir. 1987), *overruled on other grounds*, 956 F.2d 970 (10th Cir. 1992) (stating that "[w]hen an APD is submitted, BLM then has a concrete, site-specific proposal before it and a more useful environmental appraisal can be undertaken.").

Accordingly, BLM's decision to defer certain site-specific analyses until later in the exploration and development process is consistent with the requirements of NEPA. Dismissal of the Protest is warranted.

C. The Lease Sale EA Properly Analyzed Air Quality Impacts and Greenhouse Gas Emissions at this Phase in the Oil and Gas Leasing Process

WEG's challenge to the adequacy of the Lease Sale EA's air quality assessments is misplaced and conflicts with the well-established phased approach to NEPA analysis. Contrary to the WEG's assertions, the Lease Sale EA identifies and provides an assessment of the potential impacts to air quality from possible future development of the parcels. Further, BLM has explicitly retained the authority to limit future leasehold development to ensure compliance with applicable air quality laws.

As noted previously, BLM's land management process includes several analytical steps for oil and natural gas: (1) land use planning; (2) leasing; and (3) exploration and development. The Lease Sale EA is only the second step in a multi-step process that will analyze and consider air quality before any specific authorizations are proposed or executed. *See New Mexico*, 565 F.3d at 716; *NAEC*, 457 F.3d at 977 ("[Oil and gas] projects generally entail separate stages of leasing, exploration and development. At the earliest stage, the leasing stage we have before us, there is no way of knowing what plans for development, if any, may eventually materialize.").

In the instant case, WEG's varying contentions purportedly establishing a violation of NEPA rely almost exclusively upon an unsubstantiated assertion that impacts from leasing to air quality are reasonably foreseeable and require additional analysis. *See* WEG Protest 7-11. This position summarily dismisses the Lease Sale EA's detailed air quality analysis, *see* Lease Sale EA § 3.4.1.1 analyzing direct, indirect, and cumulative impacts, and instead focusses in part upon the speculative impact of a future changes in NAAQS upon leasing. *See* WEG Protest 7.

While during the land use planning and leasing stages, BLM ensures that lease notices and stipulations provide for future compliance with the CAA and Clean Water Act, BLM does not have jurisdiction to enforce compliance with these statutes. Rather, the appropriate state and federal agencies with such permitting authority will have jurisdiction upon

submission of a site-specific permit application by the company seeking to explore or develop its leases.

Further, there is nothing in the Lease Sale EA suggesting that BLM is skirting the NEPA process and avoiding a thorough air quality analysis. Rather, BLM explicitly recognized that future oil and natural gas development on the parcels may impact air quality and that future air quality analysis will occur prior to authorizing specific proposed projects. Lease Sale EA § 3.4.1.1. In particular, Lease Notice Exhibit CO-56 provides BLM ample authority to conduct this analysis upon its receipt of an application for permit to drill (APD) or other field development plan in order to continue its compliance with NEPA. *See* Lease Sale EA Attachment D at 142 ("Due to potential air quality concerns, supplementary air quality analysis may be required for any proposed development of this lease. This may include preparing a comprehensive emissions inventory, performing air quality modeling, and initiating interagency consultation . . . .").

WEG also spends considerable time noting that the Lease Sale EA's assessment of GHG emissions is deficient because BLM did not estimate possible emission figures irrespective of the speculative nature of any such estimate. The Lease Sale EA, however, generally addresses the potential impacts to the human environment from climate change and explicitly provides that GHGs emissions will be analyzed along with all emissions potentially affecting air quality at the project-specific stage. Lease Sale EA § 3.4.1.1. Although WEG points to several other lease sale EAs where GHGs were analyzed in some manner, the inconsistencies between the approaches adopted in the other EAs actually underscores the completely speculative nature of any such analysis at the leasing stage. *Cf. Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 551 (recognizing that NEPA was not meant to require agencies to consider remote and speculative possibilities, the effects of which cannot be readily ascertained).

NEPA analysis is guided by a rule of reason. NEPA does not require the full disclosure of impacts that are remote or speculative. *Vermont Yankee*, 435 U.S. at 551. The Supreme Court has characterized the "rule of reason" as requiring an agency "to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible." *New York Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1311 (1976).

Moreover, a primary goal of NEPA is to inform agency decision-making. At the leasing stage, one of the purposes of NEPA is to inform BLM on potential lease notices and stipulations to include in the leases offered for sale so that future operations can address and mitigation impacts to the extent needed at the site-specific development stage.

The U.S. Supreme Court has also explained that an agency's jurisdictional limits must be taken into account in deciding the proper scope of analysis under NEPA for a project. *See*

Dep't. of Transp. v. Public Citizen, 541 U.S. 752, 767-770 (2004) ("Rule of reason" limits agency obligation under NEPA to considering environmental information of use and relevance to decision-maker. Agency need not evaluate an environmental effect where it "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions").

Regarding GHGs, BLM does not have primary jurisdiction regarding applicable GHG reporting requirements. This falls within the sole purview of the Environmental Protection Agency (EPA), and companies are already required to comply with EPA GHG provisions. BLM does not have the jurisdictional authority to regulate GHGs, and significantly, the NEPA process cannot be used as a surrogate for promulgating *de facto* GHG regulations under the CAA or other regulatory programs within the jurisdiction of the EPA.

EPA has promulgated a regulatory program for GHGs that are relevant to an upstream oil and natural gas project: 40 C.F.R. § 98 Subpart W Mandatory Reporting. This rule is applicable to Petroleum and Natural Gas Systems and does not require any controls or establish any emissions limits related to GHG emissions or impacts. Therefore, at the leasing stage, additional analysis will not inform agency decision making. Moreover, even in the context of a site-specific, project-level NEPA analysis, there is no requirement under the Subpart W Mandatory Reporting Rule that would affect any of the analyzed alternatives of the proposed project, other than the possibility of monitoring, recordkeeping, and reporting of GHG emissions.

Finally, if leases are sold and a winning bidder applies for a permit from the appropriate regulatory agency, the permit analysis will require an evaluation of GHG and criteria pollutant emissions from each source. If the emissions levels trigger the Prevention of Significant Deterioration (PSD)/non-attainment New Source Review (NSR) requirements, the applicant will be required to analyze best available control technology options that could be adopted to reduce emissions of targeted pollutants. However, it is impossible to conduct such an analysis at the leasing stage since it would be entirely speculative to identify sources and emissions levels.

In sum, the Lease Sale EA sufficiently identified, analyzed, and disclosed the impacts to air quality from oil and natural gas leasing in conformance with its obligations under NEPA. Therefore, WEG's Protest should be rejected and the parcels offered for sale.

II. The Lease Sale EA Comports with the Conformity Analysis Requirements of the Clean Air Act

WEG's primary contention is that some of the Parcels are located within an ozone nonattainment area and therefore, BLM erred in failing to assess whether future oil and natural gas development will conform to the applicable Colorado State Implementation Plan. However, WEG's assertions are premised upon the misapplication of the regulations

governing conformity analyses under the CAA.[2] As detailed below, the Lease Sale EA is in compliance with the CAA because: (1) the indirect emissions from lease issuance are not reasonably foreseeable; and (2) the Lease Sale EA is exempt from CAA's conformity analysis.

A. Legal Framework for Conformity Analyses under the Clean Air Act

The CAA imposes specific requirements on federal agencies whose actions may affect state efforts to attain the national ambient air quality standards.[3] Under the CAA, if a federal agency's actions will likely result in "direct" or "indirect" emissions exceeding a certain EPA mandated threshold, the agency must prepare a conformity analysis looking at the effects and must mitigate the project's emissions. *See* 40 C.F.R. §§ 93.150(b), 93.153(a)-(b).

"Direct emissions" are defined in EPA's regulations as emissions of a criteria pollutant "that are caused or initiated by the Federal action and occur at the same time and place as the action." 40 C.F.R. § 93.152. Alternatively, "indirect emissions" are those:

> (1) That are caused or initiated by the Federal action and originate in the same nonattainment or maintenance area but occur at a different time or place as the action; (2) That are reasonably foreseeable; (3) That the agency can practically control; and (4) For which the agency has continuing program responsibility. *Id.* (emphasis added).

Thus, in the context of oil and natural gas leasing where lease issuance does not authorize any specific activities and therefore produces no direct emissions, the assessment turns to whether the action produces indirect emissions that are reasonably foreseeable and within the BLM's control. *See Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 772 (2004). Further, it must be determined whether the Federal action is excused from the conformity analysis because it subject one of several enumerated exemptions. *See* 40 C.F.R. § 93.153(c).

[2] The conformity provision of Section 176 of the CAA applies only to nonattainment areas, and not areas in attainment. Moreover, as explained in Section C below, the lease sale EA is a federal action that is excluded from the CCA's conformity analysis requirements.

[3] At the outset, we note that absent another exemption from the conformity requirements, the agency must determine whether emissions of a particular pollutant would exceed a *de minimus* level, typically tied to the CAA's definition of major stationary sources. As we note, however, it is not only impossible to anticipate direct and indirect emissions, but also to predict whether emissions would exceed a major stationary source threshold. In any event, actions at the leasing stage are exempt from conducting a conformity analysis. R. Martineau, Jr. & D. Novello, THE CLEAN AIR ACT HANDBOOK at 96-103 (American Bar Ass'n 3rd Ed.2011).

B. The Lease Sale EA Does Not Trigger a Conformity Determination Because it Does Not Result in Any Reasonably Foreseeable Indirect Emissions

BLM is under no obligation to conduct a conformity analysis as part of the Lease Sale EA because the issuance of oil and gas leases does not result in any reasonably foreseeable indirect emissions under the CAA. WEG contends that BLM's Reasonably Foreseeable Development Scenario (RFDS) for the Royal Gorge Field Office conclusively establishes that lease issuance will result in reasonably foreseeable indirect emissions. WEG's contention, however, incorrectly attributes foreseeability to the Lease Sale EA through the RFDS, is contrary to regulations governing "indirect emissions," and is otherwise unsupported by any evidence.

EPA defines the "reasonably foreseeable emissions" as "projected future . . . indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable . . . ." 40 C.F.R. § 93.152. Here, the leases that may be issued pursuant to Lease Sale EA do not result in any emissions that are quantifiable or are from a known location.

For example, the Ninth Circuit recently determined that emissions from an approved natural gas pipeline were not reasonably foreseeable because of uncertainty regarding the likely capacity of the pipeline, natural gas demand, and several other factors. *S. Coast Air Quality Mgmt. Dist. V. F.E.R.C.* (*S. Coast*), 621 F.3d 1085, 1101 (9th Cir. 2010). Specifically, the court found that evidence of the maximum capacity of the pipeline, the existence of firm contracts with suppliers and purchasers of gas, the expected NOx emissions resulting from end user gas' consumption, and the environmental harm from such consumption was insufficient to establish the existence of reasonably foreseeable indirect emissions. *Id.* The court determined that maximum pipeline capacity or sales estimations are not representative of the actual or likely amounts of natural gas to be transported, bought or sold through the pipeline. *Id.*

Here, in the context of WEG's Protest, the potential indirect emissions from the leases that may or may not be sold pursuant to the Lease Sale EA are not reasonably quantifiable nor can the location of any future oil and gas well be determined with any degree of reasonable certainty. *See* 40 C.F.R. § 93.152; Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 13836, 13839 (Mar. 15, 1993) (Fed. Reg. rule proposal for 40 C.F.R. § 93.153) (stating that BLM is not required to "speculate or guess at indirect emissions which are conceivable but not actually known.") (emphasis added). BLM will not have such information available until after the leases are sold, and lessees submit proposals to BLM for exploration and development of their leases.

Moreover, WEG's reliance upon the RFDS to establish reasonably foreseeable emissions from the leases is entirely misplaced. *See* WEG Protest 13-14. The RFDS is a speculative

assumption regarding the "potential magnitude" of oil and natural gas development within the Royal Gorge Field Office and does not require BLM to engage in a CAA conformity analysis. *See S. Coast*, 621 F.3d at 1101; *see also* Royal Gorge Field Office RFDS at 5.

Accordingly, there are no reasonably foreseeable indirect emissions from leases subject to the Lease Sale EA that require BLM to conduct a conformity analysis under the CAA, and WEG's protest on this point should be dismissed.

C. The Lease Sale EA is Excluded from the Clean Air Act's Conformity Analysis Requirements

BLM did not violate the CAA by failing to conduct a conformity analysis because the Lease Sale EA is excluded from CAA's conformity determination requirements. Because the Lease Sale EA fits within a regulatory provision exempting it from the CAA's conformity analysis requirements, WEG's asserted violations of the CAA warrant immediate dismissal.

The regulations implementing the CAA's conformity requirement enumerate several federal actions that are deemed not to result in reasonably foreseeable emissions requiring a conformity analysis. In particular, 40 C.F.R. § 93.153(c)(3) states that a conformity determination is not required for:

> "[a]ctions where emissions are not reasonably foreseeable, such as . . . [i]nitial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level . . . . 40 C.F.R. § 93.153(c)(3) (emphasis added).

WEG attempts to limit the application of this regulation through a strained construction of its plain language that ignores the intent of the exclusion. *See* WEG Protest 14 (stating that because BLM did not specifically reference "all lease sales . . . [c]learly, onshore oil and gas leases were not included."). The plain language of the regulation, however, demonstrates that the list is not intended to be exhaustive, but is meant to provide an example of those federal actions that are presumed not to result in reasonably foreseeable emissions. *See* 40 C.F.R. § 93.153(c)(3) (the phrase "such as" denotes a non-exhaustive list).

Further, this construction of Section 93.153(c)(3) is bolstered by the Federal Register notice promulgating the regulation, which states as follows:

> In actions such as outer continental shelf lease sales, it will often be difficult or impossible to locate and quantify emissions early in the Federal agency review process. Thus, the emissions may not be reasonably foreseeable. Further, a conformity review is unnecessary at that time since the Federal agency must take future actions related to the lease sale

> which are subject to conformity review. That is, the exploration and development actions at the project level would be subject to conformity review prior to any action that would actually result in emissions. In such cases, the EPA believes that a conformity review is not required prior to the project level analysis. Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63214, 63226, Nov. 30, 1993 (emphasis added).

In short, EPA specifically excluded federal lease sales from the conformity analysis requirements of the CAA because any subsequent leasehold development is subject to additional NEPA analysis as well as a conformity determination. Therefore, WEG's Protest should be dismissed.

III. The Lease Sale EA Complies with the Section 7 Consultation Requirements of the Endangered Species Act

WEG's challenge to BLM's decision not to conduct consultation is misplaced because the Lease Sale EA does not authorize any surface disturbing activities. *See NAEC*, 457 F.3d at 977; *see also* WEG Protest 15. Rather, BLM has reserved the authority to conduct all necessary consultation in accordance with Section 7 of the ESA prior to approving any activities that could possibly impact any threatened or endangered species.

The Lease Sale EA correctly notes that leasing the parcels at issue does not create an action that will affect an endangered, threatened, candidate or otherwise special status species, but that future development activities may result in an impact. *See, e.g.*, Lease Sale EA § 3.4.2.3 ("Special Status Animals").

Accordingly, BLM attached lease stipulation Exhibit CO-34 to every parcel, which expressly provides that BLM "will not approve any ground-disturbing activity until it completes its obligations under applicable requirements of the ESA as amended, 16 United States Code (USC) 1531 et seq. including completion of any required procedure for conference or consultation." Lease Sale EA Attachment D at 141 (emphasis added). This stipulation ensures that BLM will not authorize surface disturbing activities if site-specific analysis and Section 7 consultation under the ESA are deemed necessary. *See, e.g.*, *Center for Native Ecosystems*, 170 IBLA 331, 351 (2006).

At the leasing stage, BLM and the United States Forest Service (USFS) have complied with their ESA obligations. A decision to lease does not authorize development and does not require Section 7 consultation. Consultation will correctly be triggered at the site-specific development stage upon submission of a site-specific APD or development proposal to BLM.

WEG has no legal basis to contend that ESA Section 7 consultation needs to occur earlier, nor can it show that consultation will not happen at the appropriate stage in the development process. *Cf.* Lease Sale EA § 3.4.2.3 (stating that "[s]ite specific field visits will be conducted as deemed necessary for those parcels that contain federally listed and sensitive species habitat" to ensure compliance with the ESA).

Therefore, WEG's ESA challenges to the Lease Sale EA should be dismissed because the Lease Sale EA provides for ongoing consultation prior to authorizing any surface disturbing activities and does not violate the ESA or NEPA.

IV. Conclusion

For the foregoing reasons, BLM should deny WEG's protest and offer all of the parcels at the May 15, 2015 lease sale.

Thank you for your time and consideration of this matter, and please do not hesitate to contact me at (303) 501-1059 if you have any questions or would like additional information.

Sincerely,

Kathleen M. Sgamma
Vice President of Government & Public Affairs

cc: Mr. Lonny Bagley, Deputy State Director, Energy Land & Minerals
Mr. John Beck, Chief, Branch of Lands and Realty
Ms. Megan Stouffer, Chief, Branch of Planning and Assessment