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April 22, 2019

Via Electronic Mail and Federal Express

Duane Spencer and Merry Gamper
Bureau of Land Management
Wyoming State Office
5353 Yellowstone Road
Cheyenne, WY 82009

Re: *WildEarth Guardians v. Zinke, Case No. 1:16-cv-1724-RC*
Comments on Draft Supplemental Environmental Assessment for the May 2015–August 2016 Sold and Issued Leases, DOI-BLM-WY-0000-2019-0007-EA

Dear Mr. Spencer and Ms. Gamper:

On behalf of our client Western Energy Alliance (Alliance), we are submitting these comments on the Bureau of Land Management's (BLM) Draft Supplemental Environmental Assessment for the May 2015–August 2016 Sold and Issued Leases, DOI-BLM-WY-0000-2019-0007-EA (Supplemental EA). The Alliance is a Defendant-Intervenor in *WildEarth Guardians v. Zinke*, Case No. 1:16-cv-1724-RC, and Alliance members hold many of the Federal leases analyzed in the Supplemental EA.

In submitting this letter, the Alliance does not waive its right to appeal the decision in Case No. 1:16-cv-01724-RC, nor does it concede that federal law required BLM to engage in supplemental National Environmental Policy Act (NEPA) analysis for its leasing decisions, including the preparation of the Supplemental EA. Rather, the Alliance provides its comments in this letter to preserve standing for any future legal action and to assist BLM in compiling a robust record for future legal challenges to this or subsequent BLM decisions governing these or related leasing decisions.

The Alliance does appreciate BLM's work on this Supplemental EA and the opportunity to provide comments. The Supplemental EA provides detailed technical information regarding greenhouse gas (GHG) emissions in response to the trial court's decision in *WildEarth Guardians*. Because the Alliance disagrees with the Court's decision, our comments have two main components.

First, the Alliance addresses certain technical issues regarding the Supplemental EA's evaluation of GHG emissions. Second, the Alliance addresses significant legal and policy issues regarding how BLM should respond to the Court's order in the context of the Supplemental EA, particularly regarding the framing of the purpose and need statement and the parameters of the draft No Action Alternative.

We encourage BLM to stand by its original analyses of the lease sales, pursue relief before the Court of Appeals, and use the Supplemental EA to bolster the record in anticipation of future litigation.

I. GHG ANALYSIS

The Supplemental EA thoroughly describes the affected environment and evaluates and quantifies direct, indirect and cumulative GHG emissions in great detail. The Supplemental EA builds on the original analyses of GHG emissions and climate change. The methods used to estimate the direct, indirect and cumulative GHG emissions are reasonable and within the agency's discretion.

In short, the technical data contained in the Supplemental EA is among the most comprehensive GHG analyses the Alliance has seen and is more than sufficient to satisfy NEPA for purposes of informing BLM decision-making at the leasing stage of the federal onshore oil and gas program.

Indeed, this level of GHG analysis is unnecessary. Even so, if BLM chooses to finalize a Supplemental EA with a detailed GHG analysis, the Alliance provides the following feedback and clarifications regarding certain discrete technical issues.

A. Global Warming Potential of Methane

Comment No. 1: BLM should clarify the explanation of the global warming potential (GWP) of methane in Section 3.4 on page 16. The Alliance is not aware of authority for the proposition that the GWP of methane depends on the source of the methane. The choice of GWP for methane generally depends on the time frame selected. The Alliance encourages BLM to clarify that the Supplemental EA uses a GWP value of 28 over a time frame of 100 years, in accordance with the IPCC's "AR5 Synthesis Report: Climate Change 2014."

B. The GHG Emission Estimates are Significantly Over-Estimated

Comment No. 2: The Supplemental EA's calculations of GHG emissions are conservative, *i.e.* likely significantly over-estimated, because BLM calculated the emissions that would occur from each planning area if development reaches **100% of the RFD**. Supplemental EA Section 3.4 at 20; Section 4.1.1 at 29.

The Supplemental EA discloses, however, that at the end of fiscal year 2018, 50.4% of the acres leased by BLM Wyoming were in production and over the last eleven years approximately 47% of the acres leased by BLM Wyoming are in producing status. Supplemental EA at 17. The Supplemental EA also discloses that approximately 50% of the federal APDs approved are actually started, and drilling activity has declined by approximately 27% from the 2008 levels of new wells spud and total APDs approved. Supplemental EA Section 3.4 at 19.

Moreover, the original EAs for the applicable lease sales explain that lease issuance does not guarantee lease development because of significant uncertainties and risks inherent in the exploration and development of oil and natural gas resources, and from 1960 through 2011, only

5.3 percent of Federal acreage leased in Wyoming were held by production. August 2015 High Plains District Lease Sale EA at 12.

Furthermore, numerous variables impact emissions, making estimation at the lease sale stage speculative. At the site-specific level, factors impacting emissions include equipment used, use of emission reduction technology, drilling density, geological formations, development type (horizontal, vertical or directional wells), and hydrocarbon characteristics. *See, e.g.,* August 2015 Wind River/Bighorn Basin District Lease Sale EA at 4-31. Future production and downstream emissions are increasing speculative, as factors that impact emissions include energy prices, resource supply and demand, regulatory procedures, volume of GHGs vented from processing facilities, and processing and pipeline technologies. August 2015 High Plains District Lease Sale EA at 58.

Based upon these facts in the record, a 100% development assumption is not accurate or appropriate for use for emissions calculations.

Requested Revisions: The Supplemental EA does not reduce GHG emissions to account for historical development statistics. BLM has discretion over its analytic methods but should acknowledge that actual emissions are likely to be substantially less than the Supplemental EA's projections.

BLM should revise the Supplemental EA to clarify the discrepancy between the Federal acreage historically held by production and the percentage of Federal leases currently in producing status.

In addition, because the Court in *WildEarth Guardians* suggested that BLM tie its GHG emission estimates to the percentage of leases or acres that are historically developed, the Alliance encourages BLM to do so here. 2019 U.S. Dist. LEXIS 44995, at *41 (D.D.C. March 19, 2019).

C. End Use Analysis Uncertainty

Comment No. 3: The actions analyzed in the underlying EAs were the offering of lease parcels for competitive sale. Consequently, consistent with Council on Environmental Quality regulations, the direct impacts of the proposed actions was the offering of leases, for which no emissions were authorized. 40 C.F.R. §1508.8(a). The reasonably foreseeable, indirect impacts of the action are the emissions from the exploration and development of the leases. 40 C.F.R. § 1508.8(b).

The Supplemental EA goes further to provide estimates of indirect, *end use* emissions that could occur from the leasing of the parcels in question. Supplemental EA Section 4.1.2 at 30–32. BLM qualified these estimates by stating that the calculations assume that all potential development identified in the reasonably foreseeable development scenario for each planning area is developed and produced, and that the produced oil and gas is 100% combusted. Supplemental EA Section 4.1.1 at 27; Section 4.1.2 at 31.

As stated in the Supplemental EA, end uses of oil and gas may be used for transportation, heating, medicines, plastics, asphalt, or electricity generation. Supplemental EA Section 4.1.3.2 at 33. "The BLM does not control the specific end use of the oil and gas produced from the federal leases." *Id.* at 33–34 (emphasis added). In addition to being beyond the BLM's regulatory jurisdiction, it is impossible to know how oil and gas produced on these Federal leases will be used. Despite this uncertainty, BLM makes a speculative estimate based on flawed assumptions.

BLM's inability to control—or even know—what the end uses of oil and gas produced on Federal leases will be, in addition to the inability to know if the leases will even be developed, shows that the analysis of downstream uses is uncertain. BLM rightly acknowledges this uncertainty and discloses the percentages of petroleum and natural gas that are used for non-combustive purposes.

Requested Revision: The Alliance recommends applying the data regarding non-combustive end uses to the Section 4.1.2 estimates of indirect emissions and providing a qualitative explanation to the extent feasible on how the indirect emissions may vary based on different end uses.

D. Cumulative Impacts

Comment No. 4: The Supplemental EA's discussion of direct emissions from the proposed action discloses that the "total BLM Wyoming planning documents projected annual direct CO2e" is 6,318,393.4 mt/year. Supplemental EA Section 4.1.1 at 30.

Requested Revisions: The Alliance recommends that BLM further explain how BLM arrived at this number, describe the planning documents that are included, and consider disclosing similar data regarding the cumulative impacts analysis. In particular, BLM should clarify whether it reviewed all planning documents in its possession to estimate the number of leased acres, leased wells, or other factors that could be used to quantify emissions from future projects, or whether it simply reviewed the RFD scenario in the applicable EA.

BLM should also revise the Supplemental EA to explain that the 6,318,393.4 metric tons per year represents 0.09% of the 6,456.7 million metric tons (MMT) of total U.S. greenhouse gas emissions per year, as specified in EPA's greenhouse gas emissions inventory. Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017 at ES.2, EPA 430-R-19-001 (April 2019).

Section 7.1.1 of the Supplemental EA identifies all of the leases at issue in the Supplemental EA. We recommend you add two columns to the tables to disclose the direct and indirect GHG emissions from each lease based on the number of acres involved and the per-acre emissions factor previously disclosed. Doing so will help to respond to the court's statement that "BLM could have reasonably forecasted, by multiple methods, the GHG emissions to be produced by wells on the leased parcels." *WildEarth Guardians,* 2019 U.S. Dist. LEXIS 44995, at *43–*44.

Comment No. 5: The Supplemental EA reports the total projected direct and indirect federal oil and gas CO2e. Supplement EA Section 5.1.1 at 39. These values are used to calculate the average per-acre direct federal CO2e/acre/year.

Requested Revision: The Supplemental EA should disclose the source of the estimates for the total projected direct and indirect federal oil and gas CO2e.

E. National Greenhouse Gas Emission Trends

Comment No. 6: BLM should consider national trends when evaluating the proposed action's direct, indirect and cumulative GHG emissions.

First, national GHG emissions have flattened or declined in recent years.

Second, the increased use of natural gas in the electric generating sector is a key driver of GHG emission reductions. When quantifying the indirect effects of the decision to lease federal natural gas reserves, BLM should calculate not only the emissions resulting from burning natural gas but also the GHG emissions reduced by generating more electricity with natural gas. Because natural gas has 55% lower CO2 emissions than coal,[1] it delivers huge GHG reductions in the electricity sector, where emissions are nearly ten times higher.[2] Natural gas has delivered 61% of the reduction in greenhouse gas emissions resulting from fuel switching in the electricity sector, removing 2,360 million metric tons of CO2e since 2005.[3]

Third, EPA's promulgation of New Source Performance Standards for the Oil and Natural Gas Industry, 40 CFR Part 60 Subpart OOOOa, in conjunction with improved technologies for detecting methane leaks from upstream, midstream and downstream facilities, will limit direct, indirect and cumulative GHG emissions. Finally, BLM should recognize that downstream emissions from the combustion of oil and gas are more strongly related to demand than supply. As such, any reduction in oil and natural gas produced from Federal leases will merely be offset by non-Federal production in the United States, in which the GHG emissions would be similar, or overseas, in which case the GHG emissions would be higher, as that energy would need to be physically transported into the county.

1. Natural Gas Reduces GHG Emissions in the Electric Generating Sector

The EPA's GHG inventory acknowledges that natural gas plays a key role in decreasing U.S. GHG emissions. "The decrease in total greenhouse gas emissions between 2016 and 2017 was driven in part by a decrease in CO2 emissions from fossil fuel combustion. The decrease in CO2 emissions from fossil fuel combustion was a result of multiple factors, including a continued shift from coal to natural gas and increased use of renewable energy in the electric power sector, and milder weather that contributed to less overall electricity use." *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017* at ES-4.

[1] *Cost and Performance Baseline for Fossil Energy Plants*, U.S. Department of Energy, July 2015.
[2] *Sources of Greenhouse Gas Emissions*, EPA, 2016.
[3] *U.S. Energy-Related Carbon Dioxide Emissions, 2017*, EIA, September 2018.

The U.S. Energy Information Administration's April 2019 Short-Term Energy Outlook (STEO) also reflects the GHG benefits of generating electricity with natural gas. Discussing energy-related carbon dioxide (CO2) emissions, the EIA says it "expects emissions to fall in 2019 and in 2020 as forecasted temperatures return to near normal after a warm summer and cold winter in 2018, and because the share of electricity generated from natural gas and renewables is forecast to increase while the share generated from coal, which produces more CO2 emissions, is forecast to decrease." April 2019 STEO at 2.

The same document projects that CO2 emissions from coal will decrease from 1,260 million metric tons (MMT) in 2018 to 1,035 MMT in 2020 (a decrease of 125 MMT), while CO2 emissions from natural gas will rise just 57 MMT from 1,630 MMT in 2018 to 1,687 MMT in 2020 and petroleum CO2 emissions will rise just 31 MMT from 2,369 in 2018 to 2,400 MMT in 2020. Transitioning from coal to natural-gas fired electric generation has a clear GHG benefit.

The Center for Climate and Energy Solutions agrees that the "[c]ombustion of natural gas emits about half as much carbon dioxide as coal." https://www.c2es.org/content/natural-gas/ (visited April 16, 2019). C2ES explains that "[t]echnological advances have greatly increased U.S. natural gas production, keeping prices low and spurring many utilities to switch from coal to natural gas." *Id.* As a result, "[n]atural gas is now the largest source of U.S. electric power generation, helping reduce U.S. greenhouse gas emissions to mid-1990 levels." *Id.* The C2ES cautions that "[t]o fully realize the potential climate benefits of natural gas, technologies and policies must be put in place to minimize methane leaks and capture carbon emissions." *Id.* Methane leak detection is now mandatory at new oil and gas well production facilities.

2. Leak Detection Reduces Methane Leaks

GHG emissions resulting from oil and gas production will decrease in response to EPA's adoption in 2016 of its New Source Performance Standards (NSPS) for the Oil and Gas Industry, 40 C.F.R. Part 60 Subpart OOOOa. The NSPS reduces methane emissions from new, reconstructed and modified oil and gas wells by requiring operators to use optical gas imaging or approved alternatives to find and repair leaks, among other requirements. Operators of oil and natural gas well production facilities must capture emissions from natural gas driven pneumatic pumps. The rule also phases in requirements to capture emissions from hydraulically fractured oil wells using a process known as "green completions."

EPA estimated in 2016 that NSPS Subpart OOOOa would reduce nationwide methane emissions by 510,000 short tons or 11 million tons of carbon dioxide equivalent (mtCO2e) in 2025. EPA-451/R-16-002, Regulatory Impact Analysis of the Final Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources at 1-5 (May 2016).

Requested Revision: BLM should include information and discussion in the Supplemental EA to provide information on the reduction of GHG emissions, particularly as a result of increased natural gas usage, the current flat line of GHG emissions, as well as the likely further reduction of GHG emissions based upon reduction of methane leaks.

F. Substitution of Alternative Oil and Gas Supplies

Comment No. 7: The market for oil and natural gas is global. Production is diversified across the nation and world, with only a fraction of production in the state, nation or world markets originating on federal lands or federal minerals. Data from the DOI Office of Natural Resources Revenue and the U.S. Energy Information Administration indicate that oil production from federal lands represented 24% of U.S. oil production in 2017 (0.81 billion barrels out of 3.4 billion barrels total) and natural gas production from federal lands represented 16% of U.S. natural gas production in 2017 (4.3 billion mcf out of 27.3 billion mcf). https://revenuedata.doi.gov/explore/ (visited April 17, 2019); EIA Crude Oil Production data, https://www.eia.gov/dnav/pet/PET_CRD_CRPDN_ADC_MBBL_A.htm (visited April 17, 2019); EIA Natural Gas Annual Supply Data, https://www.eia.gov/dnav/ng/ng_sum_snd_a_EPG0_FPD_Mmcf_a.htm (visited April 17, 2019).

While this is not a trivial share, the US oil and gas industry is nimble and can increase production of private minerals if federal oil and gas becomes less available. BLM should disclose these facts in the Supplemental EA and explain that the agency's ability to influence consumption of oil and gas by increasing or decreasing the supply is limited at best.

Changes in the supply and the price of oil and natural gas barely affect consumption. *See* U.S. EIA, "Gasoline Prices Tend to Have Little Effect on Demand for Car Travel" (Dec. 15, 2014), https://www.eia.gov/todayinenergy/detail.php?id=19191 (viewed April 17, 2019). According to the EIA, "[g]asoline is a relatively inelastic product, meaning changes in prices have little influence on demand." The price of gasoline must change 25% - 50% to cause automobile travel to change 1%. *Id.* Other sources confirm that "oil consumption is highly price inelastic both in short-run and long-run." Tsirimokos, *Price and Income Elasticities of Crude Oil Demand* 2011, https://stud.epsilon.slu.se/3594/1/Master%20Thesis.pdf (viewed April 17, 2019); *see also* "Global Oil Demand Can Only Increase," Forbes (Aug 28, 2016), https://www.forbes.com/sites/judeclemente/2016/08/28/global-oil-demand-can-only-increase/#572c843631a0 (viewed April 17, 2019).

The Tenth Circuit rejected NEPA documents that assumed without factual support that denying federal coal leases would have no impact on GHG emissions because the market would find substitute supplies. *WildEarth Guardians v. BLM,* 870 F.3d 1222, 1234 (10th Cir. 2017). The plaintiffs in that case challenged BLM coal leases totaling 230 million tons per year at two Powder River Basin mines that together account for approximately 20% of the nation's domestic coal supply. *Id.* at 1227 and 1234. The court rejected BLM's "perfect substitution assumption" because it lacked any support in the administrative record, was contradicted by record evidence showing that higher coal prices would decrease consumption and was contrary to basic supply and demand principles. *Id.* at 1234–36.

However, the coal and petroleum markets are significantly different. While the Powder River Basin supplied over 38% of the nation's coal in 2008 and is largely dependent on federal leases, *WildEarth Guardians v. BLM* at 1227, national and global petroleum supplies are diversified. BLM could not meaningfully affect supply by denying the leases, and the change in supply would have only a modest effect on consumption.

Requested Revision: In short, BLM lacks the leverage over national and global petroleum markets to "keep it in the ground" by curtailing supply. Approving or disapproving the leases would not significantly affect downstream GHG emissions because the market will provide substitute supplies effectively, if not perfectly. BLM should provide this narrative and explanation in the Supplemental EA to minimize future litigation risk.

II. LEGAL COMMENTS REGARDING SCOPE AND STRUCTURE OF THE SUPPLEMENTAL EA

A. Legal Framework

NEPA is a procedural statute that does not mandate particular results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

Importantly, BLM may not prioritize environmental concerns at the expense of operators or the development of their valid existing lease rights. NEPA "does not require agencies to elevate environmental concerns over other appropriate considerations." *Citizens' Comm. to Save Our Canyons v. U.S. States Forest Serv.*, 297 F.3d 1012, 1022 (10th Cir. 2002).

NEPA mandates that BLM consider alternatives that accomplish the intended purpose of the proposed action. 40 C.F.R. § 1500.2(e). NEPA requires a federal agency to include a brief discussion of alternatives to the proposed project in an EA. *See* 40 C.F.R. § 1508.9(b). NEPA does not mandate a "minimum number of alternatives that must be discussed." *Laguna Greenbelt, Inc. v. Dep't of Transp.,* 42 F.3d 517, 524 (9th Cir. 1994); *see also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) (affirming that BLM only need to consider two alternatives in an EA, no action and preferred alternative); *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 916 (9th Cir. 2012) (same). Similarly, NEPA does not require BLM to conduct a "separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences." *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990) (citation omitted).

B. Purpose and Need

Comment No. 8: The Supplemental EA states that the purpose and need for the analysis is "to comply with the court's decision in *WildEarth Guardians, et al. v. Zinke* (D.D.C. No. 1:16-cv-01724-RC)." Supplemental EA Section 1.3 at 7.

NEPA requires BLM to briefly describe the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action. 40 C.F.R. § 1502.13; *see also Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, 177 F. Supp. 3d 1, 14 (D.D.C. 2016) (purpose and need describes the objectives and goals of the analysis and provides a point of reference for reasonable alternatives).

The Mineral Leasing Act of 1920 (MLA) requires that "[l]ease sales shall be held for each State where eligible lands are available *at least quarterly* and more frequently if the Secretary of the Interior determines such sales are necessary." 30 U.S.C. § 226(b)(1)(A)

(emphasis added). In the lease sales challenged in the *WildEarth Guardians* case, BLM described the purpose and need of the environmental analysis as a way to comply with statutory obligations. *See, e.g.,* May 2016 High Plains District Lease Sale EA at 7 (purpose and need of lease sale is to respond to expressions of interest and statutory requirements; decision to be made is whether to lease nominated parcels, and subject to what stipulations).

The purpose and need of the challenged leasing decisions was entirely appropriate, and BLM should not have modified the purpose and need of the Supplemental EA. The Supplemental EA is not a new action that requires a new purpose and need statement; rather the analysis and data *supplements* the existing analysis in the challenged leasing decisions. By modifying the purpose and need statement, BLM inappropriately changes the scope of the underlying EAs and analysis.

BLM properly defined a purpose and need for the challenged leasing decisions that conformed to the agency's statutory obligations. Plaintiffs in the *WildEarth Guardians* litigation did not challenge the purpose and need or the range of alternatives, and the Court's decision did not require BLM to reevaluate the existing purpose and need or alternatives. Simply put, BLM should not have modified the purpose and need of the underlying NEPA documents when the Supplemental EA is merely enhancing the underlying analysis.

Requested Revision: BLM should revise the Supplemental EA to specify that the purpose and need of the underlying leasing EAs has not changed.

C. No-Action Alternative

Comment No. 9: The Supplemental EA states that the Proposed Action Alternative is to "affirm the issuance of the leases for 283 parcels offered and sold between May 2015 and August 2016." Supplemental EA Section 2.2 at 11. The No-Action Alternative in the Supplemental EA is to "negate the issuance of leases for 283 parcels." Supplemental EA Section 2.3 at 11.

BLM's stated alternatives are inappropriate, and also open BLM to significant litigation risk. First, as described above, BLM is merely supplementing the existing analysis for the challenged leasing decisions. BLM should not have modified the underlying purpose and need statements for the challenged leasing decisions, nor should it modify the alternatives analyzed in the underlying NEPA documents. By creating new alternatives, BLM is not "supplementing" the analysis, but completely changing the action that was previously analyzed.

Second, BLM's range of alternatives is not consistent with the Court's order in the *WildEarth Guardians* litigation. The Court ordered that BLM "supplement [the lease sale EAs], addressing the deficiencies identified by the Court." *WildEarth Guardians*, 2019 U.S. Dist. LEXIS44995, at *80. The Court did not order BLM to change the scope of the analysis, the alternatives considered, or—most importantly—to consider negating the issuance of the leases.

Finally, BLM's "No-Action Alternative" is not a no-action alternative at all. The stated No-Action Alternative would go beyond the Court's order and affirmatively cancel leases, which is unquestionably an action. Moreover, this action would subject BLM to liability because

Federal oil and gas leases constitute real property interests, and simply canceling the leases would be a taking. *See Union Oil Co. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975) (stating that a mineral lease granted under the Mineral Leasing Act "does convey a property interest enforceable against the Government. . ."); *Utah v. Babbitt*, 830 F. Supp. 586, 594 n.14 (D. Utah 1993) ("A traditional oil and gas lease is an actual conveyance of a real property interest . . . ."); *Bass Enters. Prod. Co. v. United States*, 45 Fed. Cl. 120 (Fed. Cl. 1999) (holding that BLM's refusal to permit drilling on lease land constituted taking of cognizable property right); *Landis v. Watt*, 510 F. Supp. 178, 180 (D. Idaho 1981) (Federal oil and gas leases are real property interests).

BLM's alternatives in the Supplemental EA signify an entirely new action that is not what the Court ordered in the *WildEarth Guardians* litigation. BLM was ordered to supplement its prior analysis, not create new alternatives or consider negating issued leases. Indeed, negating leases would subject BLM to liability.

Requested Revision: BLM should revise the Supplemental EA to remove the stated alternatives, including the revised proposed "No Action Alternative." The Supplemental EA, as ordered by the Court in *WildEarth Guardians*, was intended to supplement allegedly deficient analysis, not constitute a new federal undertaking with a different range of alternatives.

D. Range of Alternatives

Comment No. 10: BLM properly considered a reasonable range of alternatives in the EAs for the challenged leasing decisions.

In the underlying EAs for the challenged leasing decisions, BLM considered a reasonable range of alternatives that conformed to the stated purpose and need in those NEPA documents. As previously noted, Plaintiffs in the *WildEarth Guardians* litigation did not challenge BLM's range of alternatives.

The Supplemental EA provides new alternatives but does not address the underlying alternatives considered in the challenged leasing decision NEPA documents. In addition to removing the stated alternatives in the Supplemental EA, BLM should consider revising the Supplemental EA to describe the underlying alternatives considered in the lease sale EAs.

Specifically, BLM should reiterate that the lease sale EAs tiered to underlying resource management plans (RMP) and RMP Amendments, including the Wyoming Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement (Wyoming 9-Plan FEIS). The Wyoming 9-Plan FEIS considered numerous alternatives, including alternatives that would phase development or restrict fluid mineral development on Federal lands. *See* Wyoming 9-Plan FEIS Table 2-11 (comparing alternatives considered); Rocky Mountain Region Record of Decision at 3-21–3-22 (Buffalo and Bighorn Basin RMPAs considered, and rejected, phased development and leasing).

Consequently, through the development of RMPAs and subsequent leasing decisions, BLM has considered a wide range of alternatives and is not required to reanalyze alternatives that would have similar consequences. *Headwaters*, 914 F.2d at 1181.

Requested Revision: BLM should revise the Supplemental EA to clarify that various alternatives have been considered, and the alternatives considered in the underlying lease sale EAs complied with NEPA.

E. Mitigation Measures

Comment No. 11: The Federal Land Policy and Management Act (FLPMA) mandates that BLM prevent unnecessary or undue degradation of public lands. 43 U.S.C. § 1732(b). "Preventing unnecessary or undue degradation does not mean preventing all adverse impacts upon the land. . . . [A] certain level of impairment may be necessary and due under a multiple use mandate." BLM Instruction Memorandum (IM) 2019-018. As the Interior Board of Land Appeals has explained:

> Congress thus recognized that the mere act of approving oil and gas development does not constitute unnecessary or undue degradation under FLPMA, and that something more than the usual effects anticipated from such development, subject to appropriate mitigation, must occur for degradation to be "unnecessary or undue."

Intrepid Potash – New Mexico, LLC, 176 IBLA 110, 123 (2008) (emphasis added).

To qualify as unnecessary or undue degradation, a lessee's operations must be "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 that action pursuant to a valid existing right." *Colorado Envtl. Coal.*, 165 165 IBLA at 229 (emphasis added).

FLPMA states that use of public lands may be subject to conditions to "minimize adverse impacts on . . . resources and values . . . ." 43 U.S.C. § 1732(d)(2)(A). Pursuant to the MLA implementing regulations, BLM may require reasonable measures "to minimize adverse impacts to other resource values . . . ." 43 C.F.R. § 3101.1-2.

The legal authority and jurisdiction to regulate air quality resides exclusively with the Environmental Protection Agency (EPA) and EPA-authorized state programs under the Clean Air Act and individual state statutory authority. 42 U.S.C. § 7401 *et seq.*; 40 C.F.R. Parts 50–99; 40 C.F.R. §§ 52.320–52.353. BLM does not have direct authority over air quality or air emissions under the Clean Air Act. Courts have held that an administrative agency's power to regulate must be grounded in a valid grant of authority from Congress, and any agency action that exceeds the scope of those delegated duties and powers are void. *Food and Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 162 (2000); *Denver Local 2-477, Oil, Chemical & Atomic Workers' Int'l v. Metro Wastewater Reclamation*, 7 P.3d 1042, 1045 (Colo. Ct. App. 1999).

FLPMA, which grants BLM authority to manage public lands, states that BLM should provide for compliance with applicable pollution control laws, including State and Federal air standards or implementation plans. 43 U.S.C. § 1712(c)(8). However, this grant does not delegate authority to BLM to regulate air quality and impose specific measures for the control of

air emissions. Conversely, the Clean Air Act expressly grants the EPA authority to promulgate regulations to protect air quality, including regulating air emissions.

In the Supplemental EA, BLM identifies a list of potential mitigation measures that may be imposed on lessees to reduce impacts of climate change and GHG emissions. Supplemental EA Section 4.2.1 at 35. However, BLM provides no analysis on the cost or appropriateness of some of these measures. For example, BLM states that lessees may be required to use electric drill rig engines. *Id.* However, providing electricity to a lease may require significant expenditures and construction that makes such a measure infeasible. The impacts from such construction may have a more detrimental effect on resource values than the use of the electric drill rig.

Some of the mitigation measures identified in Section 4.2.1 have no bearing on GHG emissions. For example, the draft requirements to water dirt roads, use selective catalytic reduction and low sulfur fuel, and protect frac sand from wind erosion do not relate to climate change and should be deleted. Moreover, BLM provides no analysis as to the BLM's authority to impose these mitigation measures, and whether these measures are consistent with EPA and/or state regulations.

The Supplemental EA includes a discussion of how best management practices have reduced emissions and minimized environmental impacts from oil and gas operations. Supplemental EA Section 4.2.1 at 36. This discussion is well received and supports the issuance of a finding of no significant impact (FONSI).

Requested Revisions: BLM should revise the Supplemental EA to clarify that the EPA and Wyoming have direct authority over air quality or air emissions under the Clean Air Act.

BLM should revise the Supplemental EA to include a discussion on the appropriateness of the proposed mitigation measures and whether such requirements are consistent with EPA and Wyoming regulations.

F. BLM Lacks Jurisdiction Over Downstream Emissions

Comment No. 12: The analysis of downstream combustion is entirely speculative, contrary to law, and does not aid BLM in informing decision-making. Significantly, established legal precedent—including from the U.S. Court of Appeals for the D.C. Circuit—holds that an agency is not required to conduct analyses of events and activities outside of its jurisdiction. Moreover, BLM's approach opens Pandora's Box for downstream analysis parameters, and thereby expands future litigation risk for BLM leasing decisions and project authorizations.

The downstream section of the Supplemental EA needs to be revised to explain these legal parameters and limitations. The Alliance encourages BLM to explain that it lacks jurisdiction over the use of oil and gas and cannot legally rely on downstream emissions as a reason to deny, delay or reduce lease sales or impose mitigation measures.

NEPA requires federal agencies to evaluate the environmental impacts of major federal actions significantly affecting the quality of the human environment. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-39, (1989), *quoting* 42 U.S.C. § 4332(C). NEPA's twin aims are to promote informed agency decision-making and public access to information. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). NEPA does not expand the agency's substantive authority nor confer upon it powers not granted to it by Congress.

Agencies may act only within the bounds of their enabling statutes. "[A]dministrative agencies are generally limited to the exercise of powers delegated them by Congress." *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1359 (Fed. Cir. 2008), *citing Civil Aeronautics Bd. v. Delta Air Lines, Inc*., 367 U.S. 316, 322 (1961). "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Public Serv. Com v. FCC*, 476 U.S. 355, 374 (1986).

The federal court in Wyoming relied on this principle to vacate the Department of Interior's attempt to regulate hydraulic fracturing. "A federal agency is a creature of statute and derives its existence, authority and powers from Congress alone. It has no constitutional or common law existence or authority outside that expressly conveyed to it by Congress. In the absence of a statute conferring authority, then, an administrative agency has none." *Wyoming v. DOI*, 2016 U.S. Dist. LEXIS 82132 at *39 (D. Wyo. June 21, 2016) (citations omitted). The District Court's opinion was vacated after the Department of Interior proposed to withdraw its fracking rule, *Wyoming v. Zinke,* 871 F.3d 1133 (10th Cir. 2017), but there is no question that agencies must have statutory authority for each action they take.

Congress has not authorized or empowered the BLM to establish national energy or climate policy. While some may wish to see BLM limit the production of oil, gas, and coal as part of an overall strategy to curtail the use of fossil fuels, the agency has no authority to do so. Only Congress may establish national energy or climate policy and it has not directed BLM to restrict the nation's supply of fossil fuels. Instead, Congress has directed BLM to manage public lands under principles of multiple use and sustained yield. 43 U.S.C. 1732(a).

The District Court in *WildEarth Guardians* stated that BLM may deny or restrict leasing as a way to prioritize the public's long-term interests over short-term interests. 2019 U.S. Dist. LEXIS 44995, at *52. However, FLPMA's mandate for the Secretary of Interior to weigh long-term and short-term benefits when developing land use plans falls short of granting authority to set national energy policy. 43 U.S.C. § 1712(c)(7). Notably, the same section repeats Congress' directive to the Secretary to use and observe the principles of multiple use and sustained yield and directs the Secretary to provide for compliance with applicable pollution control laws, including state and federal air quality standards. This makes clear that Congress intended for environmental regulatory agencies, not DOI, to regulate greenhouse gases.

The United States Supreme Court has made clear that NEPA does not require an agency to analyze the environmental impacts of actions that are outside the agency's jurisdiction. In *Department of Transportation v. Public Citizen,* the Supreme Court held that the Federal Motor Carrier Safety Administration (FMCSA) did not need to evaluate the environmental impacts of

allowing Mexican trucks to operate in the United States when it promulgated vehicle safety rules that enabled cross-border operations. *Dep't of Transp. v. Public Citizen,* 541 U.S. 752, 767 (2004). The Court explained that the FMCSA is obligated to prescribe safety standards and must grant registration to motor carriers that are willing and able to comply with the safety requirements. *Id.* at 758-59. The FMCSA "lacks discretion to prevent these cross-border operations" and was not required to evaluate their environmental impacts even though such environmental impacts would not occur "but for" the FMCSA's action. *Id.* at 756, 767. "Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decision-making—FMCSA simply lacks the power to act on whatever information might be contained in the EIS." *Id.* at 768.

The D.C. Circuit applied this principle in *Sierra Club (Freeport) v. FERC* where it held that FERC's decision to increase the production capacity of a liquefied natural gas terminal was not a legally relevant cause of pollution that may result from increased LNG exports, and therefore FERC could omit the pollution impacts from its NEPA analysis. 827 F.3d 59, 68 (D.C. Cir. 2016). The D.C. Circuit further clarified in *Sierra Club II* that NEPA requires agencies to evaluate only those environmental impacts that the agency may "consider when regulating in its proper sphere," and not environmental impacts upon which the agency would be forbidden from relying as a justification for its decision. *Sierra Club II v. FERC,* 867 F.3d 1357, 1373 (D.C. Cir. 2017). In *Sierra Club II,* the court held that Congress instructed FERC to consider the "public convenience and necessity" for a pipeline and authorized FERC to deny a pipeline certificate on the ground that downstream GHG emissions would be too harmful to the environment. *Id.* at 1373. FERC was therefore required under NEPA to evaluate downstream emissions. *Id.*

Public Citizen and the *Sierra Club* cases are controlling here. BLM may impose reasonable environmental mitigation measures within the scope of its statutory authority when it sells oil and gas leases and approves APDs, but it cannot categorically prevent the production or combustion of fossil fuel and cannot act on any information it compiles regarding downstream emissions. The Mineral Leasing Act and the Federal Land Policy and Management Act require BLM to conduct quarterly competitive oil and gas lease sales for lands that are eligible and available for leasing. 30 U.S.C. § 181 *et seq.*; 43 U.S.C. § 1701 *et seq*.; 43 C.F.R. § 3120.1-2(a). Just as the FMCSA lacked the discretion to prevent safe vehicles from operating in the United States, BLM lacks the discretion to prevent consumers from using oil or natural gas or to attempt to constrain supplies. And unlike FERC, which has the ability to consider downstream environmental impacts when deciding whether to issue a certificate of public convenience and necessity for a pipeline, BLM lacks the authority to refuse to lease oil and gas resources or deny an APD based on downstream combustion emissions.

Requested Revision: BLM should remove the downstream, indirect analysis from the Supplemental EA and explain it is beyond BLM's regulatory jurisdiction and statutory obligations and does not aide the agency's decision-making.

III. A FONSI IS APPROPRIATE

Comment No. 13: In determining whether to issue a FONSI, BLM determines whether the proposed action would have a significant impact or have planned measures to mitigate such impacts. *Myersville Citizens for a Rural Cmty, Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015). When determining whether an action is "significant," BLM is only obligated to consider the impacts from the action. *See Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1247 (D. Wyo. 2005) (significance determination requires consideration of effects and can be obviated by mitigation measures).

BLM must consider context and intensity when evaluating whether the GHG emissions related to the leases are significant. 40 C.F.R. § 1508.27. Context "means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. § 1508.27(a). This context includes the observed reductions in total U.S. GHG emissions and electric sector GHG emissions since 2014.

National GHG trends also factor into the intensity of the impacts of the proposed action. Intensity refers to the severity of the impact. 40 C.F.R. § 1508.27. The GHG emission reductions resulting from the increased use of natural gas and from EPA's adoption of NSPS Subpart OOOOa are lowering the intensity of U.S. greenhouse gas emissions.

BLM fulfilled its NEPA obligations in the Supplemental EA by considering the environmental effects of GHG emissions and describing mitigation measures to minimize such impacts. BLM specifically looked at the impact of GHG emissions from leasing the parcels in the context of other reginal and national emissions. Supplemental EA at 30 (full development of the leases would represent 0.77% of CO_2e emissions on all federal lands, and 1.16% of total BLM Wyoming projected annual direct emissions). BLM also considered the intensity of the effects. Supplemental EA at 24 (natural gas emissions have surpassed coal emissions and substitution from coal to natural gas has decreased CO_2 emissions).

BLM also recognized the impact of GHG emissions on climate change, while explaining the inability to accurately assess the relationship between project-scale GHG emissions and climate change impacts on the global scale. Supplemental EA at 30. However, Courts have found that the BLM can analyze GHG emissions as a proxy by which to analyze climate change impacts. *See, e.g., W. Org. of Resource Councils v. BLM*, 2018 U.S. Dist. LEXIS 49635, at *54 (D. Mont. Mar. 26, 2018) (BLM's decision to quantify GHG emissions as a proxy by which to analyze climate change is deserving of deference).

Requested Revision: BLM should revise the Supplemental EA to recognize that increased production of natural gas has climate benefits because it lowers electric sector GHG emissions and has been responsible for a large share of the country's overall GHG reductions.

IV. CONCLUSION

The Alliance recognizes the substantial detail contained in the Supplemental EA. The Alliance requests that the BLM incorporate the Alliance's technical comments if the agency finalizes the Supplemental EA substantially as proposed. The Alliance, however, encourages the BLM to reconsider its strategy for responding to the District Court's order. Building a record to support the original analyses and a judicial appeal of the Court's order is more consistent with the National Environmental Policy Act and judicial precedent.

Respectfully,

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