Center for Regulatory Effectiveness

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September 18, 2012

Michael Pool, Acting Director
Bureau of Land Management
1849 C Street NW
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Dear Mr. Pool:

The Center for Regulatory Effectiveness (CRE) has been monitoring developments with the Bureau of Land Management's (BLM) decision to revisit decisions made in 2008 regarding the nation's oil shale development in Colorado, Utah, and Wyoming. CRE has prepared a white paper evaluating the impact that the environmental NGO's have had in changing BLM's oil shale policy.

BLM's decision to revisit oil shale decisions made in 2008 could have enormous impacts on domestic energy production. Specifically, The Government Accountability Office states, "The U.S. Geological Survey (USGS) estimates that the Green River Formation contains about 3 trillion barrels of oil, and about half of this may be recoverable, depending on available technology and economic conditions. **This is an amount about equal to the entire world's proven oil reserves**."[1] Nevertheless, BLM is now proposing to reduce the amount of federal land available for oil shale development by 75%, with a 90% reduction in Colorado. BLM is seeking to effectively eliminate oil shale development in the United States without offering any compelling basis, except for a lawsuit[2] challenging BLM's initial 2008 oil shale determinations.[3]

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[1] Government Accountability Office, *ENERGY-WATER NEXUS A Better and Coordinated Understanding of Water Resources Could Help Mitigate the Impacts of Potential Oil Shale Development*, page 1 (October 2010) available at http://www.gao.gov/assets/320/311896.pdf (emphasis added).

[2] Legal complaint, *Colorado Environmental Coalition v. Salazar*, p. 31-32 (civil action No. 1:09-cv-00085-jlk (D. Col. 2011) [hereinafter *Environmental NGO Coalition Legal Complaint*].

[3] BLM justifies its choice to reevaluate the land use plans with the 2012 PEIS by stating, "As part of a settlement agreement entered into by the United States to resolve the lawsuit *and in light of new information that has emerged since the 2008 OSTS PEIS was prepared*, the BLM has decided to take a fresh look at the land allocations analyzed in the 2008 OSTS PEIS and to consider excluding certain lands from future leasing of oil shale and tar sands resources." BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, p ES-3 (2012), available at http://ostseis.anl.gov/documents/peis2012/index.cfm

As a result of the lawsuit,[4] BLM entered into a settlement agreement with an Environmental NGO Coalition.[5] In the settlement agreement, BLM agreed to revisit within 120 days the decisions made in 2008 and to issue a new decision regarding the land allocated for oil shale development by January 15, 2013.[6] The settlement also provided the precise alternatives that BLM would be, at a minimum, to analyze.[7] Pursuant to the settlement agreement, BLM published a new PEIS in February 2012. In the 2012 PEIS,[8] BLM's preferred alternative for oil shale, Alternative 2b, would reduce the amount of land available for oil shale leasing from over 2,017,741 acres to 461,965 acres—greater than a seventy-five percent (75%) reduction in the land available. This would effectively eliminate oil shale production in the United State States.

This is an extreme example of regulation by litigation, where private parties achieve public policy goals that could not be achieved through the legislative or regulatory process.[9] In fact it is often the case, such as here, where private parties are able to circumvent the legislative and regulatory process. Former Secretary of Labor Robert Reich commented on the detrimental public policy impacts of regulation by litigation stating, "Regulating U.S. industry through lawsuits isn't the most efficient way of doing the job. Judges don't have large expert staffs for research and analyses, which regulatory agencies possess. And when plaintiffs and defendants settle their cases, we can't always be sure the public interest is being served."[10] Similarly, in the present case, the public interest is not being served by using a lawsuit and settlement agreement to circumvent congressional intent in the Energy Policy Act of 2005 and also the current regulatory framework for oil shale.

Interestingly, BLM justified its 2008 decision by stating that:

> ***Rationale for Selection:*** Alternative B [the current land allocation] for oil shale was selected as the Proposed Plan Amendment based on: 1) its consistency with the requirements of the Energy Policy Act of 2005, 2) its balanced use and protection of resources, 3) the FPEIS's analysis of potential environmental

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[4] Legal complaint, *Colorado Environmental Coalition v. Salazar*, p. 31-32 (civil action No. 1:09-cv-00085-jlk (D. Col. 2011) [hereinafter *Environmental NGO Coalition Legal Complaint*].

[5] The plaintiffs in the lawsuit included: Colorado Environmental Coalition, Western Colorado Congress, Wilderness Workshop, Biodiversity Conservation Alliance, Southern Utah Wilderness Alliance, Red Rock Forests, Western Resource Advocates, National Wildlife Federation, Center For Biological Diversity, The Wilderness Society, Natural Resources Defense Council, Defenders Of Wildlife, and Sierra Club.

[6] Settlement Agreement, *Colorado Environmental Coalition v. Salazar,* pp 3-5 (civil action No. 1:09-cv-00085-jlk (D. Col. 2011) *[*hereinafter *Oil Shale Settlement Agreement]*.

[7] *Id*. at 3-4.

[8] BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, (2012) available at http://ostseis.anl.gov/documents/peis2012/index.cfm [hereinafter *2012 PEIS*]

[9] *See generally*¸ Robert Reich, *Regulation is Out, Litigation is In*, USA Today, December 19, 2001.

[10] *Id.*

> impacts, and 4) the comments and recommendations from cooperating agencies and the public.
>
> Alternative B is structured to be consistent with the congressional mandate of the Energy Policy Act to emphasize the ―most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing.[11]

Further, BLM specifically chose Alternative B in 2008 (the current oil shale land allocations), on the basis that there would be two additional levels of environmental analysis required before any oil shale could be produced commercially. The 2008 oil shale Final PEIS was not the environmental analysis or final statement for oil shale development. Specifically, the land use plans developed in the 2008 PEIS were only the first of three steps in the decisionmaking process. The three steps are: (1) Land Use Planning; (2) Leasing; and (3) Project Development. This practice, referred to as tiering, is permitted under NEPA. In fact, the Council on Environmental Quality (CEQ) endorses this very practice in its NEPA regulations. Specifically, CEQ regulations state, "Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review."[12]

In contrast, in the 2008 Record of Decision, BLM also argued against the current 2012 Preferred Alternative (which was Alternative C in the 2008 PEIS):

> Alternative C was not selected as the Proposed Plan Amendment because the alternative would not make the ―most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing. Thus it is not fully consistent with the mandate of the Energy Policy Act of 2005. Much of the most geologically prospective acreage would be excluded under Alternative C…In addition, this unreasonably fragments the area that would be available for application, resulting in parcels that are unlikely to be explored, leased, or developed. This could be an impediment to sound and rational development of the resource and can reduce the economic return to the public. If oil shale resources are by-passed because of the exclusions in Alternative C, that could also limit the benefits to the nation from exploitation of a domestic unconventional energy source.
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> Selection of alternative C precipitously limits or restricts the decisionmaker's discretion to balance oil shale use and the protection of resources or resource

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[11] Bureau of Land Management, *Record of Decision: Oil Shale and Tar Sands Resources Resource Management Plan Amendments*, page 22 November 17, 2008, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy.Par.23588.File.dat/OSTS_ROD.pdf (emphasis added).

[12] 40 C.F.R. 1502.20

> values, in accordance with FLPMA's principal of ―multiple use.…*It would be premature to eliminate areas prior to site-specific analysis based on factors that are not known now, but that would be known at the leasing or operation permitting stages*, such as location, timing and type of oil shale technology, that may show that these resources could be adequately protected through mitigation. Unlike Alternative B, Alternative C does not give the decisionmaker the necessary discretion to optimize the recovery of energy resources, establish appropriate lease stipulations to mitigate anticipated impacts, or to fully protect a resource or resource value by choosing not to offer an area for lease.[13]

BLM needs to only look to its own findings to conclude that the 2012 PEIS Preferred Alternative "is not fully consistent with the mandate of the Energy Policy Act of 2005."

Not one of the pieces of "new information" justify changing the Resource Management Plans (RMPs) nor justify BLM's altered conclusions in the 2008 and 2012 PEIS. What is driving BLM's decision to modify the RMPs is the lawsuit and settlement agreement with the Environmental NGO Coalition. A lawsuit representing a special interest group's narrow perspective is clearly not a legal justification for an abrupt change in a policy, which was developed lawfully through the regulatory process and required by Congress. It is instead a blatant instance of an interest group that has circumvented the regulatory process, and public input, to achieve its narrow policy objectives. In effect, the only aim that has been achieved is greater regulatory costs and policy paralysis by analysis for BLM.

Recommendation

CRE finds it incomprehensible that oil shale offers the United States the potential to extract over 1.5 trillion barrels of oil, an amount about equal to the entire world's proven oil reserves, yet BLM has drastically shifted its policy position to one which will prohibit the development of this vital resource.. This is especially troubling in that the 2008 PEIS BLM specifically outlined two additional steps of environmental analysis that would need to be completed before any oil could be commercially extracted. Accordingly, CRE recommends the following:

1. BLM adopt the No Action Alternative in the 2012 PEIS.

2. BLM consult with the Department of Energy (DOE) as required by the Department of Energy Organization Act[14] and does not issue the Final PEIS until DOE has commented on the Draft PEIS.

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[13] Bureau of Land Management, *Record of Decision: Oil Shale and Tar Sands Resources Resource Management Plan Amendments*, page 22 November 17, 2008, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy.Par.23588.File.dat/OSTS_ROD.pdf (emphasis added).

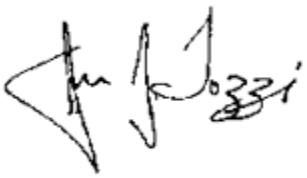
[14] Recognizing that prior to 1977, "responsibility for energy policy, regulation, and research, development and demonstration [was] *fragmented in many departments and agencies* and thus [did] not allow for the

CRE is troubled by the fact that the Department of Energy is a "no show" in this important policy decision. OMB's Office of Information and Regulatory Affairs should correct the absence of such an important player. CRE is also concerned that the root of this deprecation in established public policy is the result of an extreme case of "regulation-by-litigation" as detailed in the following White Paper.

CRE has conducted an extensive review of the comments sent to BLM on its proposal. CRE's detailed analysis is contained in the following report, *A "Hard Look" at the Environmental NGO Coalition's Comments on the Oil Shale PEIS*. We invite your particular attention to the multi-stage permitting process described on page 7 which is required before any oil is extracted. We believe these safeguards are more than adequate to address the concerns expressed by a number of participants in the planning process.

CRE provides the public with the opportunity to comment on all of its submissions to federal agencies; to this end we invite the public to visit the Interactive Public Docket (IPD) titled *BLM Oil Shale* located at http://www.thecre.com/oil/ and offer their comments.

Respectfully,



Jim Tozzi
Member, Board of Advisors
Center for Regulatory Effectiveness

Enclosure

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comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs,"[14] Congress passed the Department of Energy Organization Act to create the Department of Energy DOE.

Congress found that the "formulation and implementation of a national energy program require[d] the integration of major Federal energy functions into a single department in the executive branch,"[14] and thus it integrated all major Federal energy functions into DOE.

A "HARD LOOK" AT THE ENVIRONMENTAL NGO COALITION'S COMMENTS ON THE OIL SHALE PEIS

CENTER FOR REGULATORY EFFECTIVENESS

WASHINGTON, DC

AUGUST 2012

A "HARD LOOK" AT THE ENVIRONMENTAL NGO COALITION'S COMMENTS ON THE OIL SHALE PEIS

A "HARD LOOK" AT THE ENVIRONMENTAL NGO COALITION'S COMMENTS ON THE OIL SHALE PEIS

I. INTRODUCTION

The Bureau of Land Management (BLM) is currently revisiting decisions made in 2008 regarding the nation's oil shale development in Colorado, Utah, and Wyoming. The Government Accountability Office states, "The U.S. Geological Survey (USGS) estimates that the Green River Formation contains about 3 trillion barrels of oil, and about half of this may be recoverable, depending on available technology and economic conditions. **This is an amount about equal to the entire world's proven oil reserves**."[15] Nevertheless, BLM is now proposing to reduce the amount of federal land available for oil shale development by 75%, with a 90% reduction in Colorado. BLM is seeking to effectively eliminate oil shale development in the United States without offering any compelling basis, except for a lawsuit challenging their initial 2008 oil shale determinations.[16]

Specifically, a coalition of environmental non-governmental organizations (NGOs)[17] ("Environmental NGO Coalition") filed a lawsuit in June 2009 challenging BLM's 2008 Programmatic EIS ("2008 PEIS"). The 2008 PEIS was finalized pursuant to the Energy Policy Act of 2005 which declared "that it is the policy of the United States that— (1) United States oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically

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[15] Government Accountability Office, *ENERGY-WATER NEXUS A Better and Coordinated Understanding of Water Resources Could Help Mitigate the Impacts of Potential Oil Shale Development*, page 1 (October 2010) available at http://www.gao.gov/assets/320/311896.pdf (emphasis added).

[16] BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, page E-1 (2012) available at http://ostseis.anl.gov/documents/peis2012/index.cfm [hereinafter *2012 PEIS*]("As part of a settlement agreement entered into by the United States to resolve the lawsuit *and in light of new information that has emerged since the 2008 OSTS PEIS was prepared,* the BLM has decided to take a fresh look at the land allocations analyzed in the 2008 OSTS PEIS and to consider excluding certain lands from future leasing of oil shale and tar sands resources."

[17] The plaintiffs in the lawsuit included: Colorado Environmental Coalition, Western Colorado Congress, Wilderness Workshop, Biodiversity Conservation Alliance, Southern Utah Wilderness Alliance, Red Rock Forests, Western Resource Advocates, National Wildlife Federation, Center For Biological Diversity, The Wilderness Society, Natural Resources Defense Council, Defenders Of Wildlife, and Sierra Club

and economically unstable sources of foreign oil imports."[18] In the legal complaint, the Environmental NGO Coalition argued that BLM failed to account for the impacts of indirect and cumulative impacts of oil shale development on climate change, and the impacts climate change could have on ecosystems.[19] In addition, the complaint maintained that the final PEIS failed to consider action alternatives that excluded wilderness lands or sage grouse habitat.[20] Furthermore, the Environmental NGO Coalition contended that the final PEIS failed to account for the "large amounts of oil [that oil shale development will insert] into the energy markets for refining into liquid fuels, and the potential direct and indirect impacts of such development."[21] A peculiar claim considering the very purpose of the oil shale program as declared by Congress was "that it is the policy of the United States that— (1) United States oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports."[22]

In sum, the Environmental NGO Coalition claimed that these alleged deficiencies in the final PEIS were: (1) violations of the Administrative Procedures Act as an "arbitrary and capricious" agency action, (2) violations of the National Environmental Protection Act (NEPA) for neither considering a range of reasonable alternatives nor disclosing the direct, indirect, and cumulative impacts to climate change, (3) violating the Endangered Species Act for failing to consult with US Fish and Wildlife Services (FWS) to ensure that BLM's action would not jeopardize any listed species (although there are no known endangered species in the area). The Environmental NGO Coalition asked "the Court to throw out the 2008 decision" to allocate certain lands for oil shale development, despite the three years of environmental analysis preceding the 2008 PEIS.[23]

Nevertheless, these allegations would have still been legally insufficient to vacate BLM's amendments to the Resource Management Plans (RMPs). This is particularly the case where BLM was acting pursuant to the Congressional mandate in the Energy Policy Act of 2005

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[18] Energy Policy Act of 2005, P.L. 109–58, § 369

[19] Legal complaint, *Colorado Environmental Coalition v. Salazar*, p. 31-32 (civil action No. 1:09-cv-00085-jlk (D. Col. 2011) [hereinafter *Environmental NGO Coalition Legal Complaint*].

[20] *Id.* at 31.

[21] *Id.* at 32.

[22] Energy Policy Act of 2005, P.L. 109–58, § 369

[23] Earth Justice, *Fact Sheet: Oil Shale Litigation Settlement Agreements Filed February 15, 2011*, available at http://earthjustice.org/sites/default/files/FACT-SHEET-Oil-Shale-Settlements-2011-02-15.pdf

to issue an EIS no later 18 months after the passage of the Act for a commercial leasing program "with an emphasis on the most geologically prospective lands within Colorado, Utah, and Wyoming."[24]

As a result of the lawsuit, BLM entered into a settlement agreement with the Environmental NGO Coalition. In the settlement agreement, BLM agreed to revisit within 120 days the decisions made in 2008 and to issue a new decision regarding the land allocated for oil shale development by January 15, 2013.[25] The settlement agreement further required BLM to analyze an alternative in a NEPA analysis that would exclude the following lands from any commercial oil shale leasing:

a. All areas that Defendants have identified, or may identify as a result of inventories conducted during this planning process, as lands containing wilderness characteristics;
b. The whole of the Adobe Town "Very Rare or Uncommon" area, as designated by the Wyoming Environmental Quality Council on April 10, 2008;
c. Core or priority sage grouse habitat, as defined by such guidance as Defendants may issue;
d. All areas of critical environmental concern ("ACEC") located within the areas analyzed in the September 2008 Oil Shale and Tar Sands Resources Leasing Final Programmatic Environmental Impact Statement ("OSTS PEIS"); and
e. All areas identified as excluded from commercial oil shale and tar sands leasing in Alternative C of the September 2008 OSTS PEIS.[26]

The settlement also provided the precise alternatives that BLM would be, at a minimum, to analyze.[27] Pursuant to the settlement agreement, BLM published a new PEIS in February 2012. In the 2012 PEIS,[28] BLM's preferred alternative for oil shale, Alternative 2b, would reduce the amount of land available for oil shale leasing from over 2,017,741 acres to 461,965 acres—greater than a seventy-five percent (75%) reduction in the land available. This would effectively eliminate oil shale production in the United State States.

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[24] Energy Policy Act of 2005, P.L. 109–58, § 369(c).

[25] Settlement Agreement, *Colorado Environmental Coalition v. Salazar*, pp 3-5 (civil action No. 1:09-cv-00085-jlk (D. Col. 2011) *[*hereinafter *Oil Shale Settlement Agreement]*.

[26] *Id.* at 3.

[27] *Id*. at 3-4.

[28] BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, (2012) available at http://ostseis.anl.gov/documents/peis2012/index.cfm [hereinafter *2012 PEIS*]

This is an extreme example of regulation by litigation, where private parties achieve public policy goals that could not be achieved through the legislative or regulatory process.[29] In fact it is often the case, such as here, where private parties are able to circumvent the legislative and regulatory process. Former Secretary of Labor Robert Reich commented on the detrimental public policy impacts of regulation by litigation stating, "Regulating U.S. industry through lawsuits isn't the most efficient way of doing the job. Judges don't have large expert staffs for research and analyses, which regulatory agencies possess. And when plaintiffs and defendants settle their cases, we can't always be sure the public interest is being served."[30] Similarly, in the present case, the public interest is not being served by using a lawsuit and settlement agreement to circumvent congressional intent in the Energy Policy Act of 2005 and also the current regulatory framework for oil shale.

Accordingly, this paper will analyze the comments[31] submitted by the Environmental NGO Coalition[32] for the 2012 PEIS and will demonstrate how its unsubstantiated lawsuit and position on oil shale has singlehandedly altered the three years of research and regulatory processes that led to the United States oil shale policy.

II. WHETHER THE PEIS SATISFIES NEPA REQUIREMENTS

The Environmental NGO Coalition recommends that BLM adopt Alternative 3, which would limit oil shale production to the current R&D leases, which total 32,640 acres. This is 1.5% of the amount of land allocated in the 2008 decision. In support of Alternative 3, the Environmental NGO Coalition claims in its comments that not only does the 2008 PEIS fail to meet NEPA's requirements, but that the 2012 PEIS also fails to satisfy NEPA's requirements.[33] Specifically, the Environmental NGO Coalition claims that the 2008 NEPA analysis in the Final

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29 *See generally*¸ Robert Reich, *Regulation is Out, Litigation is In*, USA Today, December 19, 2001.

30 *Id.*

31 Western Resources Advocates, et al., *Comments: 2012 Draft Oil Shale and Tar Sands PEIS*¸ April 27, 2012 [hereinafter *Environmental NGO Coalition 2012 PEIS Comments]*.

32 The public comments submitted to BLM for the 2012 PEIS includes the majority of the plaintiffs in the lawsuit filed. Specifically, the particular comment analyzed was signed by the following organizations: Colorado Environmental Coalition, Western Colorado Congress, Wilderness Workshop, Biodiversity Conservation Alliance, Southern Utah Wilderness Alliance, Western Resource Advocates, Center For Biological Diversity, The Wilderness Society, Natural Resources Defense Council, Defenders Of Wildlife, Sierra Club, Ecoflight, National Parks Conservation Association, Utah Physicians for a Healthy Environment, Western Colorado Congress, Wild Utah Project, and Wyoming Outdoor Council.

33 NGO Coalition 2012 PEIS Comments ,*supra* note 17 at 8. .

PEIS was deficient because BLM acknowledged that it was not able to do the appropriate analysis in the PEIS to support immediate leasing decisions, because they would need to make assumptions regarding unproven technologies.[34] The Coalition claims, "In 2012, the BLM faces the same challenge…[and] due to the challenges, this NEPA analysis is deficient."[35]

Contrary to what the Environmental NGO Coalition concludes, BLM was not skirting its obligations in the 2008 PEIS to analyze the environmental impacts of leasing decisions. BLM is simply deferring that analysis to later site-specific analyses. This practice, referred to as tiering, is permitted under NEPA. In fact, the Council on Environmental Quality (CEQ) endorses this very practice in its NEPA regulations. Specifically, CEQ regulations state, "Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review."[36] CEQ regulations continue that

> Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions.

BLM's NEPA Handbook also endorses the practice of tiered NEPA analysis, "Tiering is appropriate when the analysis for the proposed action will be a more site-specific or project-specific refinement or extension of the existing NEPA document."[37] BLM's Handbook further provides, "Tiering can be particularly useful in the context of the cumulative impact analysis. A programmatic EIS will often analyze the typical effects anticipated as a result of the individual

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[34] Bureau of Land Management, *2008 Final Oil Shale and Tar Sands Programmatic Environmental Impact Statement*, pages ES-3, available at http://ostseis.anl.gov/documents/fpeis/volumes/OSTS_FPEIS_Vol_1.pdf at 8.

[35] *Id*.

[36] 40 C.F.R. 1502.20

[37] Bureau of Land Management, *BLM National Environmental Policy Act Handbook*, page 27 available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf.

actions that make up a program, as well as the total effects of the overall program. An EA prepared in support of an individual action can be tiered to the programmatic EIS."[38]

CEQ provides further guidance on when tiering is appropriate:

> 'Tiering' refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:
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> (a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site- specific statement or analysis.
>
> (b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.[39]

The Oil Shale PEIS, both in 2008 and 2012, is the exact circumstance where tiering is appropriate. Tiering enables BLM to prepare "a program, plan, or policy environmental impact statement" and apply it to later "analysis of lesser scope or to a site-specific statement or analysis."[40] In this case, the site specific analysis that will be prepared is the environmental analysis for specific leases. At the PEIS stage of analysis, it is appropriate for BLM "to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe."[41] At this PEIS stage, it not appropriate for BLM to conduct the full analysis to support immediate leasing decisions. Importantly, this does not make the PEIS insufficient nor provide a justification for altering the decisions made in the 2008 PEIS.

Moreover, BLM acknowledges the future environmental analysis that will be required to move forward with the actual commercial development of oil shale. The 2008 oil shale Final

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38 *Id.*
39 40 C.F.R. 1502.28
40 *Id.*
41 *Id.*

PEIS was not the environmental analysis or final statement for oil shale development. Specifically, the land use plans developed in the 2008 PEIS *were only the first of three steps in the decisionmaking process*. The three steps are: (1) Land Use Planning; (2) Leasing; and (3) Project Development.

Land Use Planning Environmental Stage - PEIS

The Land Use Planning stage is the first step in which lands are allocated or closed to oil shale development.[42] Lands allocated as open are those within which the Secretary of the Interior may initiate a call for nominations, and to which parties may submit applications to develop a project. This is the current stage of analysis addressed in the 2012 Draft PEIS.[43] Admittedly, BLM acknowledges, "the current experimental state of the oil shale and tar sands industries does not allow this PEIS to include sufficient specific information or cumulative impact analyses to support future leasing decisions within these allocated lands." However, BLM has accommodated the required analysis before leasing and development can occur in the in the next two stages.

Leasing Stage Environmental Analysis

BLM states, "Leasing is a federal action subject to all pertinent law, regulations and policies, including NEPA, NHPA, and ESA."[44] During the leasing phase, BLM must review the technical and economic aspects of any proposal to ensure its viability and BLM must ensure the necessary coordination and consultation with other entities, including other federal agencies, tribes, states, local governments, and the public in its consideration of a lease application.[45] The Draft PEIS provides:

> The BLM's consideration of a proposal for an oil shale or tar sands lease must be sufficient to take into account predictable impacts of the action on natural and cultural resources, as well as other potential effects. If and when applications to lease oil shale or tar sands for commercial development are received and accepted by the BLM, it may be necessary to develop a reasonably foreseeable

42 2012 PEIS, *supra* note 2, at 1-2.
43 *Id.*
44 *Id.*
45 *Id.*

> development scenario (RFDS). An RFDS is a critical component for the effects analysis required by NEPA, but the information contained in this PEIS is too speculative to permit adequate RFDSs for future leasing proposals. The analyses conducted as part of the review for a lease application may result in a decision to approve, modify, or deny a lease. The BLM may authorize a lease with stipulations and requirements for best management practices, and may amend local land use plans if necessary.[46]

Notably, during the leasing phase, BLM "may amend local land use plans if necessary" to account for any new findings.[47]

Project Development Stage Environmental Analysis

After obtaining a lease, the oil shale developer must submit an application to approve a plan of development. The plan of development identifies the specifics of the development plan such as location, facilities, and timing.[48] Approval of the plan of development constitutes a federal action that is also subject to NEPA, NHPA, and ESA. During this stage, BLM must review the plans of development for economic and technical viability and consultation with states, tribes, local governments, and the public. Moreover, "It is at this final stage, when the particulars of a project are known, that the BLM requires the most detailed analyses and may condition approval on specific requirements to avoid, minimize, or mitigate adverse impacts on various resources."[49]

Accordingly, it is during the final phase of actual project development for which the most environmental analysis is required and actions taken to minimize adverse impacts on the environment.[50] The oil and lease program has not yet even made it out of the first stage. By reconsidering the 2008 allocations, BLM has prematurely reset the entire oil shale development program without ample justification. Furthermore, the second two stages provide adequate safeguards and required analysis to ensure that the development of oil shale does not adversely impact the environment.

The 2008 land allocations for oil shale do nothing more than lay the foundation for future commercial oil shale development. It is not the final policy statement, nor is it the final

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46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*

statement of the environmental impacts of oil shale development. Thus, it is disingenuous to conclude that the 2008 PEIS and the 2012 PEIS "is deficient" where BLM has prescribed subsequent NEPA analyses to be conducted when reasonable foreseeable issues become "ripe."

BLM has adhered to CEQ's NEPA requirements in the 2008 PEIS and upheld the spirit of NEPA by outlining the tiers of environmental analyses that will be conducted when the site specific issues are ripe. *A lawsuit challenging BLM's analysis and strong-arming BLM to alter its statutorily required oil shale development policy is an extreme example of regulation by litigation*. It is a blatant instance of an interest group that has circumvented the regulatory process, and public input, to achieve its narrow policy objectives. In effect, the only aim that has been achieved is greater regulatory costs and policy paralysis by analysis for BLM.

III. WHETHER THE STIPULATIONS PROPOSED BY THE ENVIRONMENTAL NGO COALITION ARE REQUIRED BY LAW

Despite the clear direction from CEQ's NEPA regulations and BLM's adherence to the regulations, the Environmental NGO Coalition seeks to impose an even greater requirement than is required on BLM. Specifically, the Environmental NGO Coalition seeks to require "that the Final PEIS state in clear and unambiguous terms what companies will need to provide and what protections they will need to ensure before any consideration of commercial leasing."[51] The Coalition outlines extensive requirements to be imposed on potential lessees that should be included in the 2012 PEIS, which would address the following: water demands, energy demands, water quality, air quality, socio-economic impacts, greenhouse gas emissions, and the greater sage grouse. BLM does intend to address any issues not addressed in the PEIS during the leasing and site-development when more specific data will be available regarding the technology proposed to be used and the associated water requirements, energy requirements, and environmental impacts of the particular project. Attempting to establish such requirements at this stage is premature.

Moreover, while it falls within the purview of NEPA for BLM to require potential lessees to conduct research and produce relevant data, BLM is not required under NEPA to establish

[51] Environmental NGO Coalition 2012 PEIS Comments, *supra* note 17, at 14.

these stipulations at the PEIS stage. Specifically, BLM concluded that at this stage any "analysis to support immediate leasing decisions would require making speculative assumptions regarding potential, unproven technologies, and consequently" it was not appropriate to make any decisions for commercial leasing."[52] Accordingly, any stipulations and considerations that condition the receipt of a commercial lease should be developed during the environmental analysis that BLM will conduct during the leasing stage.

In addition, the Environmental NGO Coalition also seeks to have BLM add "language providing that the BLM can, in appropriate circumstances, rely on the broad discretion it has under FLMPA to deny commercial oil shale lease and tar sands nominations without completing the NEPA."[53] This demonstrates another instance where the Environmental NGO Coalition seeks to circumvent the regulatory process and the public participation required under NEPA in order to achieve its narrow policy goal to eliminate potential oil shale development. Such a provision also stands contrary to the Congressional requirement in the Energy Policy Act of 2005 providing, "that it is the policy of the United States that— (1) United States oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports,"[54] and that BLM issue an EIS no later 18 months after the passage of the Act for a commercial leasing program "with an emphasis on the most geologically prospective lands within Colorado, Utah, and Wyoming."[55]

IV. WHETHER THERE ARE ADEQUATE WATER SUPPLIES FOR THE COMMERCIAL PRODUCTION OF OIL SHALE

The Environmental NGO Coalition views water availability for oil shale development as the primary basis for not pursuing oil shale development in the United States. The Coalition asserts, "Water resources in the West are scarce and under increasing pressure from development. In Colorado and Utah, water will be largely, if not completely spoken for by 2050, the timeline the BLM projects industry could develop large-scale oil shale or tar sands

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52 2012 PEIS, *supra* note 2, at 2-1.
53 Environmental NGO Coalition 2012 PEIS Comments, *supra* note 16, at 16.
54 Energy Policy Act of 2005, P.L. 109–58, § 369
55 Energy Policy Act of 2005, P.L. 109–58, § 369(c).

operations."[56] Unfortunately, the Coalition is unable to support this proposition with any data. While it is important to be cautious about resource availability and its competing uses, the Environmental NGO Coalition's assertion also contradicts the data incorporated into the PEIS by BLM. Both the 2008 PEIS and 2012 draft PEIS conclude that there will be a water surplus of 340,348 (ac-ft/yr) in 2000 and 268,425 (ac-ft/yr) in 2030 in Colorado.[57]

Water availability also served as a primary justification for bringing the lawsuit by the Environmental NGO Coalition. The complaint contended that "commercial oil shale development will impact water supplies, as water dedicated to this use will increase stress on a resource already over taxed by other activities....[And] commercial oil shale development will cumulatively impact water supplies by contributing to global warming."[58] Likewise, reports issued by Western Resource Advocates offer cautionary language about water usage and oil shale development.[59] While extracting oil from oil shale would require significant amounts of water, there is no evidence that the water usage required would be unsustainable or problematic.

Of great importance, in the 2012 Draft PEIS, BLM has not identified the water usage required for the development of oil shale as a justification to revisit the 2008 land use plans.[60] Moreover, there has been no developments or research between the 2008 and 2012 PEIS that justify altering the 2008 land allocations based on water availability. Both the 2008 Final PEIS and the 2012 use the same assumptions and analyses regarding water usage for oil shale development. For example, both the 2008 PEIS and 2012 Draft PEIS assume (based on a 2005 study by the Rand Corporation) that the in-situ process would require 1-3 bbl of water per barrel of oil shale produced; and that 2.6-4.0 bbl of water per barrel of oil shale produced would be required for a surface mine and surface retort. Likewise, both the 2008 PEIS and 2012 Draft

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56 Environmental NGO Coalition 2012 PEIS Comments, *supra* note 17, at 16.

57 2012 PEIS, *supra* note 2, at 3-67.

58 *Id.*

59 Western Resource Advocates, Oil Shale 2050: Data, Definitions, and What You Need to Know About Oil Shale in the West, p 21, available at http://www.westernresourceadvocates.org/oilshale2050/WRA-OilShale2050.pdf.

60 2012 Draft Oil Shale and Tar Sands Programmatic Environmental Impact Statement, pages 1-5, available at http://ostseis.anl.gov/documents/peis2012/vol/OSTS_VOLUME_2.pdf. The reasons stated in the April 14, 2011 Notice of Intent mirror the reasons outlined in the 2012 PEIS. Notably, BLM does not cite water issues as being a justification for "taking a hard look" or a "fresh look" at the land use plans finalized in the 2008 PEIS.

PEIS find that production levels of 50,000 bbl of oil per day would require 7,050 acre-ft/year of water.

Nevertheless, none of these assumptions factor in current and future technological advancements. For instance, Red Leaf Resources has recently stated that the company uses less than half barrel of water to produce a barrel of oil.[61] Red Leaf further explains that the amount of water required for oil shale production is unrelated to the technology used to produce the oil shale, but is instead required for dust control and to meet on-site worker demand.[62]

While the water requirements for oil shale production should not be overlooked it is also necessary to have some perspective, especially with the competing uses for water. In particular, a 23,800 bbl oil/day production facility would require the same amount of water daily as a golf course in a desert region, such as Palm Springs.[63] Palms Springs has fifty seven (57) golf courses. Fifty-seven (57) oil shale production facilities could produce 1,356,600 bbl oil/day. Thus, the same amount of water consumed for Palm Springs golf courses could produce 1.35 million barrels of oil per day.

V. INCORPORATION OF NON-FEDERAL DATA INTO THE PEIS

As one of its recommendations, the Environmental NGO Coalition argues that the BLM should incorporate data from States data into the PEIS. The Coalition argues, "In Utah, water in the DPEIS is projected through 2050. The data needs to be cross referenced against state's data included in 'Utah's M&I Conservation Plan.'"[64]

The CRE endorses the Environmental NGO's position that BLM should incorporate non-federal data into the PEIS. Before issuing a Final PEIS though, BLM should seek public input on which non-Federal datasets to incorporate into the PEIS. Accordingly, BLM should obtain an

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61 Amy Joi O'Donoghue, *Oil Shale Project Approved*, KSL, April 1, 2012, available at http://www.ksl.com/?nid=960&sid=19773270

62 *Id.*

63 Frank Deford, *Water-Thirsty Golf Courses Need to Go Green*, National Public Radio, June 11, 2008, available at http://www.npr.org/templates/story/story.php?storyId=91363837 (stating "Audubon International estimates that the average American course uses 312,000 gallons per day. In a place like Palm Springs, where 57 golf courses challenge the desert, each course eats up a million gallons a day." Based on the assumption of Red Leaf's technology that only requires 1 barrel of water to produce 1 barrel of oil, 1,000,000 gallons of water per day could produce 1,000,000 gallons of oil per day, the equivalent of 23,809 barrels of oil per day.

64 Environmental NGO Coalition 2012 PEIS Comments, *supra* note 17, at 16.

Information Collection Request (ICR) for the public input on non-Federal datasets to be included, and provide the public with a public comment period on the ICR.

This is the precise procedure followed by the Department of Health and Human Service (HHS) when HHS sought "Public Input to Nominate Non-Federal Health and Health Care Data Sets and Application for Listing on Healthdata.gov." HHS set an important precedent for incorporating non-Federal data into federal databases, specifically for data.gov. BLM should closely follow the process established by HHS by seeking an ICR for the use of non-Federal data.

Importantly, BLM must ensure that any current data and also any potential non-Federal data incorporated into the PEIS is compliant with the Data Quality Act (DQA). The Data Quality Act (DQA) and its general government-wide guidance requires that information disseminated to the public shall be "accurate, clear, complete and unbiased," shall be developed "using sound statistical and research methods," and shall be useful for its intended purpose.[65] If the information is considered "influential," it should be held to higher standards.[66] In particular, "influential" scientific information must be transparent with regard to the data and methodology used so that it is substantially reproducible.[67] Information is "influential" if it would have a "clear and substantial impact on important public policies or important private sector decisions."

Moreover, the DQA created an administrative process "allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines." In short, the DQA empowers citizens and non-citizens to "seek and obtain" correction of data used and maintained by the agency, which does not comply with OMB and agency quality standards. Accordingly, the use of any additional data for the 2012 PEIS, which was not incorporated in the 2008 PEIS, is subject to the DQA and to citizen petitions for the correction of information.

VI. THE IMPACT OF OIL SHALE DEVELOPMENT ON AIR QUALITY

The Environmental NGO Coalition argues, "The PEIS does not fully analyze air quality…. The quality of air resources in Western Colorado, eastern Utah, and southwestern

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65 67 Fed. Reg. at 8459.
66 *Id.* at 8452.
67 *Id.* at 8460.

Wyoming is quickly degrading due to ongoing oil and gas development."[68] The Coalition believes that "Protecting Air Quality alone is cause for the BLM to adopt Alternative 3 as the preferred alternative."[69] (note: Alternative 3 would limit oil shale production to the current R&D leases which total 32,640 acres. This is 1.5% of the amount of land allocated in the 2008 decision).

BLM correctly states, "It is not possible to predict site-specific air quality impacts until actual oil shale projects are proposed and designed. Once such a proposal is presented, impacts on these resources would be further considered in project-specific NEPA evaluations and through consultations with the BLM prior to actual development. As additional NEPA analysis is done for leasing and site specific development, it may be necessary as part of the air quality analysis to conduct air quality modeling."[70] BLM then prescribes the air quality issues that would need to be addressed in future environmental reviews which includes temporary and localized impacts, the long-term and regional impacts, and the Greenhouse Gases emitted from combustion sources that could contribute to climate change.[71]

Accepting the recommendation of the Environmental NGO Coalition would eliminate the possibility of any commercial oil shale development, because the Final PEIS could not be released until it contained specific analysis of the cumulative impact of oil shale project, which BLM has admitted is not possible without actual proposed oil shale projects. The approach taken by BLM in 2008is the best alternative that balances "the congressional mandate of the Energy Policy Act to emphasize the ―most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing" with the "protection of resources on the public lands during subsequent site-specific NEPA analysis."[72]

VII. WHETHER THE REASONS STATED BY BLM TO "TAKE A FRESH LOOK" DO JUSTIFY AMENDING THE LAND USE PLANS

BLM states that the "purpose and need for this proposed planning action is to reassess the appropriate mix of allowable uses with respect to oil and shale and tar sands leasing and potential

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68 Environmental NGO Coalition 2012 PEIS Comments, *supra* note 17, at 16.

69 *Id.*

70 2012 PEIS, *supra* note 2, at 4-52.

71 *Id.*

72 Bureau of Land Management, *Record of Decision: Oil Shale and Tar Sands Resources Resource Management Plan Amendments*, page 16-17 November 17, 2008, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy.Par.23588.File.dat/OSTS_ROD.pdf.

development." BLM further justifies "tak[ing] a fresh look" for the reasons stated in the April 14, 2011 Notice of intent, [73] further specifying "Chief among these was "new information" available in 2008, including:

1. A recently completed U.S. Geological Survey (USGS) in-place assessment of oil shale and nahcolite resources in Colorado, Utah, and Wyoming,
2. A March 2010 U.S. Fish and Wildlife Service (USFWS) Notice of Petition Findings, Endangered Wildlife and Plants, 12-month Findings to List the Greater Sage-Grouse as Threatened or Endangered.
3. BLM's updated inventory of lands having wilderness characteristics (LWC) and Areas of Critical Environmental Concern (ACECs)." [74]

These justifications are important to address, because these are the very same arguments made by the Environmental NGO Coalition in its lawsuit and its comments for the 2012 PEIS.[75] Each of these are addressed in more detail below:

i. USGS In-Place Assessment Of Oil Shale Resources In Colorado, Utah, And Wyoming

Although USGS has completed its in-place assessment of oil shale since the 2008 PEIS, the findings in the report do not justify amending the 2008 land use plans. In fact, the USGS report does just the opposite and actually justifies devoting additional resources to developing oil shale resources. Specifically, in the report, USGS concluded that there is 1.525 trillion barrels of oil alone in just the Piceance Basin of western Colorado—an upward increase of nearly 50% from the 1989 USGS assessment of 1 trillion barrels of oil.[76] However, BLM specifically chose not to incorporate the only Federal research development since the 2008 PEIS by refusing to update the boundaries of the study area based on USGS's report.

ii. 2010 U.S. Fish and Wildlife and Plants, 12 month Findings to List the Greater-Sage Grouse as Threatened or Endangered

The USFWS did release a finding in 2010 on the Greater-Sage Grouse, but importantly USFWS decided not to list the Greater Sage-Grouse as a threatened or endangered species,

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[73] The reasons stated in the April 14, 2011 Notice of Intent mirror the reasons outlined above (which are contained in the 2012 PEIS). Notably, BLM does not cite water issues as being a justification for "taking a hard look" or a "fresh look" at the land use plans finalized in the 2008 PEIS.

[74] 2012 PEIS at 1-5.

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[76] USGS in place assessment Fact sheet available at http://pubs.usgs.gov/fs/2009/3012/pdf/FS09-3012.pdf

because there were "higher priority listings."[77] Moreover, the 2008 EIS thoroughly analyzed the impact of oil shale development on the Greater Sage-Grouse,[78] for which the analysis is nearly identical as that listed in the 2012 Draft PEIS.[79] Thus, absent any new findings or analyses concerning the impact of oil shale development on the Greater Sage-Grouse, BLM is not justified in amending the 2008 land use plans based on the Greater Sage-Grouse.

iii. BLM's updated inventory of lands having wilderness characteristics (LWC) and Areas of Critical Environmental Concern (ACECs).

Lands having wilderness characteristics is a designation that takes place during the land use planning process, which is required pursuant to a Secretary Order from December 2010.[80] Clearly, BLM does not intend to amend all existing land use plans as a result of Secretary Order 3310. Nor should Secretary Order 3310 now serve as a basis for amending the land use plans established in the 2008 EIS.

Likewise, ACECs only account for a small proportion of land coincident with land that is designated for oil shale development. Specifically, ACECs comprised only 76,666 acres of the 2,017,714 acres of land available for oil shale leasing. The environmental integrity of the ACECs can be preserved with the additional required NEPA analysis for the leasing and project development phases.

Not one of three justifications by BLM for "taking a hard look" at the RMPs finalized in the 2008 EIS justify amending the land use plans. Especially, because all of the "new information" can be accommodated during the environmental analyses required during leasing and site development stages.

VIII. CONCLUSION

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[77] U.S. Fish and Wildlife Service (USFWS) Notice of Petition Findings, Endangered Wildlife and Plants, 12-month Findings to List the Greater Sage-Grouse as Threatened or Endangered.

[78] 2008 Final Oil Shale and Tar Sands Programmatic Environmental Impact Statement, pages 3-148 – 3-149; 4-78 – 4-80, available at http://ostseis.anl.gov/documents/fpeis/volumes/OSTS_FPEIS_Vol_1.pdf

[79] 2012 Draft Oil Shale and Tar Sands Programmatic Environmental Impact Statement, pages 4-124 – 4-126; available at http://ostseis.anl.gov/documents/peis2012/vol/OSTS_VOLUME_2.pdf

[80] Department of the Interior, Secretary Order 3310: Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management, available at http://elips.doi.gov/elips/0/doc/172/Page1.aspx

The analyses for the 2008 and 2012 are notably consistent. The major difference between NEPA documents are the alternatives, which is a direct result of the lawsuit filed by the Environmental NGO Coalition. NEPA is a procedural law, not a substantive law. Thus, challenges to Environmental Impact Statements can only allege that the agency has failed to comply with necessary NEPA procedures. Third parties cannot challenge the outcome that the agency arrived at after its analysis and prevail. In the present case, the Environmental NGO Coalition effectually challenged the conclusions reached by BLM in the 2008 PEIS. This resulted in an abrupt change in a policy that has been enacted pursuant to a Congressional statute and the regulatory process.

It is insightful to recall BLM's initial reasoning in its 2008 PEIS Record of Decision (ROD) explaining why it chose the current land allocations for oil shale. BLM justified its decision in the 2008 ROD (alternative B in the 2008 PEIS):

> ***Rationale for Selection:*** Alternative B for oil shale was selected as the Proposed Plan Amendment based on: 1) its consistency with the requirements of the Energy Policy Act of 2005, 2) its balanced use and protection of resources, 3) the FPEIS's analysis of potential environmental impacts, and 4) the comments and recommendations from cooperating agencies and the public.
>
> Alternative B is structured to be consistent with the congressional mandate of the Energy Policy Act to emphasize the ―most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing. Alternative B, therefore, identifies and offers the most geologically prospective acreage (based on grade and thickness of the oil shale deposits) of the Green River Formation located in the Piceance, Uinta, Green River, and Washakie Basins of Colorado, Utah, and Wyoming. As compared with Alternative C, Alternative B makes more Federal oil shale available for application, and provides for fewer fragmented tracts. Alternative B also provides for more contiguous tracts that could be configured for economically and technically feasible extraction or recovery of the resources. Alternative B would also allow access to more of the most geologically prospective oil shale lands, particularly in Colorado.
>
> Unlike Alternative C, which excludes lands based on existing management decisions for oil and gas development, Alternative B provides the decisionmaker with the discretion to balance the oil shale use and protection of resources on the public lands during subsequent site-specific NEPA analysis. This balanced approach is consistent with FLPMA principles of ―multiple use, and ―sustained yield. The requirement to perform future NEPA analyses and to comply with other environmental laws allows the decisionmaker to optimize the recovery of energy resources, to establish appropriate lease stipulations to mitigate anticipated impacts, or to fully protect a resource or resource value by choosing not to offer

> an area for lease at any particular time. Even if some technologies may not allow mining of some tracts to proceed without unacceptable impacts to other resource values, Alternative B would allow the agency the opportunity to choose to offer leases when a technology is proposed that can be used compatibly with the resource values in question. This is consistent with the comments that supported a viable and sustainable commercial oil shale leasing program, while ensuring that any impacts to sensitive resources or resource values are mitigated to any commercial development. It is also consistent with the planning decisions for other mineral resources for these parcels which authorize leasing subject to restrictive conditions, rather than preclude leasing altogether.
> Alternative B does, however, exclude certain lands within the most geologically prospective oil shale areas under the basis of existing laws and regulations, executive orders and other administrative designations or withdrawal. These include WSAs, National Monuments, WSRs, NCAs, and existing ACECs that are closed to mineral development.[81]

Also worthy of note, in the 2008 ROD, BLM also argued against Alternative C, which happens to be the exact same as BLM's Preferred Alternative in the 2012 PEIS. Specifically, BLM argued against what is now its Preferred Alternative:

> ***Rationale for Non-Selection:*** Alternative C was not selected as the Proposed Plan Amendment because the alternative would not make the ―most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing. Thus it is not fully consistent with the mandate of the Energy Policy Act of 2005. Much of the most geologically prospective acreage would be excluded under Alternative C…In addition, this unreasonably fragments the area that would be available for application, resulting in parcels that are unlikely to be explored, leased, or developed. This could be an impediment to sound and rational development of the resource and can reduce the economic return to the public. If oil shale resources are by-passed because of the exclusions in Alternative C, that could also limit the benefits to the nation from exploitation of a domestic unconventional energy source.
> Selection of alternative C precipitously limits or restricts the decisionmaker's discretion to balance oil shale use and the protection of resources or resource values, in accordance with FLPMA's principal of ―multiple use.…*It would be premature to eliminate areas prior to site-specific analysis based on factors that are not known now, but that would be known at the leasing or operation permitting stages*, such as location, timing and type of oil shale technology, that may show that these resources could be adequately protected through mitigation. Unlike Alternative B, Alternative C does not give the decisionmaker the necessary discretion to optimize the recovery of energy resources, establish

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[81] Bureau of Land Management, *Record of Decision: Oil Shale and Tar Sands Resources Resource Management Plan Amendments*, page 16-17 November 17, 2008, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy.Par.23588.File.dat/OSTS_ROD.pdf.

> appropriate lease stipulations to mitigate anticipated impacts, or to fully protect a resource or resource value by choosing not to offer an area for lease.[82]

Not one of the pieces of "new information" justify changing the RMPs nor justify BLM's altered conclusions in the 2008 and 2012 PEIS. What is driving BLM's decision to modify the RMPs is the lawsuit and settlement agreement with the Environmental NGO Coalition. A lawsuit representing a special interest group's narrow perspective is clearly not a legal justification for an abrupt change in a policy, which was developed lawfully through the regulatory process and required by Congress. It is instead a blatant instance of an interest group that has circumvented the regulatory process, and public input, to achieve its narrow policy objectives. In effect, the only aim that has been achieved is greater regulatory costs and policy paralysis by analysis for BLM.

Accordingly, the only alternative in the 2012 PEIS that is "consistent with the congressional mandate of the Energy Policy Act to emphasize the ―most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing [and also] provides the decisionmaker with the discretion to balance the oil shale use and protection of resources on the public lands during subsequent site-specific NEPA analysis"[83] is Alternative 1—the No Action Alternative. Only the No Action Alternative in the 2012 PEIS, will enable BLM to fulfill its mandate to pursue a "commercial leasing program for oil shale and tar sands resources on public lands, with an emphasis on the most geologically prospective lands within each of the States of Colorado, Utah, and Wyoming."[84]

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82 Bureau of Land Management, *Record of Decision: Oil Shale and Tar Sands Resources Resource Management Plan Amendments*, page 22 November 17, 2008, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy.Par.23588.File.dat/OSTS_ROD.pdf (emphasis added).

83 *Id*. at 16-17.

84 Energy Policy Act of 2005, P.L. 109–58, § 369(c).