Appeal No. 22-8022

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WESTERN WATERSHEDS PROJECT, et al., Plaintiffs-Appellants,
v.
U.S. BUREAU OF LAND MANAGEMENT, et al., Defendants-Appellees,
and
JONAH ENERGY, LLC and STATE OF WYOMING, Defendants-Intervenors-Appellees

On Appeal from the United States District Court for the District of Wyoming
The Honorable Scott W. Skavdahl, Civil Action No. 2:19-cv-146-SWS

ORAL ARGUMENT IS REQUESTED

REPLY BRIEF OF APPELLANTS
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STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Except for the regulations in the supplemental addendum attached hereto, the relevant statutes and regulations are contained in the addendum to Appellants' opening brief.

GLOSSARY OF TERMS

APA	Administrative Procedure Act
Area 1	Development Area 1
Area 2	Development Area 2
Area 3	Development Area 3
Conservation Groups	Appellants Western Watersheds Project, Upper Green River Alliance, and Center for Biological Diversity
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLPMA	Federal Land Policy and Management Act
Grand Teton	Grand Teton National Park
Land Use Plans	BLM Pinedale and Rock Springs Field Offices' Resource Management Plans
Jonah Infill	Jonah Infill Drilling Project
NEPA	National Environmental Policy Act
NPL	Normally Pressured Lance
PAPA	Pinedale Anticline Project Area
Park	Grand Teton National Park
Park Service	National Park Service
ROD	Record of Decision

SUMMARY

Appellees' responses are riddled with impermissible post-hoc attempts to rationalize BLM's (1) failure to adopt the Required Design Feature of phased development or demonstrate that an exemption applies; (2) authorization of development in greater sage-grouse Winter Concentration Areas to test the effects of development, without addressing whether BLM could have gathered baseline information and analyzed effects before authorizing the Project; and (3) failure to analyze the NPL Project's effects on the world-renowned Path of the Pronghorn and on Grand Teton National Park ("Grand Teton"). Respondents resort to post-hoc rationalizations, apparently because the EIS and record often lack any explanation for why BLM did not conduct the missing analysis. In addition, Appellants' FLPMA claim did not require exhaustion because BLM considered the issue sua sponte, and their NEPA pronghorn claim was properly exhausted before BLM.

ARGUMENT

I. BLM Violated FLPMA by Exempting the Project from Phased Development Without Demonstrating that an Exemption Applied.

A. The District Court Did Not Abuse Its Discretion in Rejecting Appellees' Exhaustion Defense.

The district court properly rejected Appellees' exhaustion argument because BLM had independent knowledge of the phased development Required Design Feature and gave it extensive consideration.

This Court reviews a district court's exhaustion ruling for abuse of discretion. *Carr v. Comm'r, SSA*, 961 F.3d 1267, 1270 n.2 (10th Cir. 2020), *rev'd on other grounds Carr v. Saul*, 141 S. Ct. 1352 (2021). Under that standard, a decision will be disturbed only where the district court: (1) "commits a legal error," (2) "relies on clearly erroneous factual findings," or (3) provides "no rational basis in the evidence for its ruling." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence*, 22 F.4th 892, 899 (10th Cir. 2022) (citation omitted).

Appellees fail to acknowledge this deferential standard or identify any abuse of discretion. The district court correctly stated the law, explaining that "relevant objections must usually be raised during the public comment period." App.-I-237. It also correctly explained that exhaustion is not required where the flaw is "obvious" or "otherwise brought to the agency's attention." App.-I-237 (citing *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1048 (10th Cir. 2015)). The district court then reasonably found this exception applicable because BLM was already aware of the phasing requirement and deliberated on it extensively:

> BLM was aware it needed to comply with the resource design features of the 2015 Sage Grouse RMP. (BLM015436; BLM015450.) Jonah

> Energy and the BLM worked together to discuss phased development, to ensure compliance with the RMPs. (BLM015450.) The BLM later discussed removing the phased development plan as "discretionary" in an email. (BLM015699.) The BLM was already aware of the need to comply with FLPMA and contemplated this independently.... Petitioners' comment on this issue would not have served any purpose—the BLM was already aware the project needed to comply with the RMP and was working towards that goal.

App.-I-238; *see also* App.-II-414; App.-IV-819, 822, 824, 833 (comments requesting phased development).

BLM claims the district court relied solely on BLM's awareness of the "need to comply with FLPMA." BLM Br. 28. This distorts the district court's reasoning, which rested on BLM's consideration of the precise issue here. This was not error. *See NRDC v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014) (issue "expressly addressed by" the agency "is properly before the court"); *DOT v. Public Citizen*, 541 U.S. 752, 764 (2004) (exhaustion requirements exist so agency can give issue "meaningful consideration").

Appellees further claim BLM was unaware it needed to *explain* its decision and had "no opportunity" to demonstrate that an exception applied. Jonah Br. 21; BLM Br. 27-28. Nonsense. Appellees acknowledge that BLM *did* explain its decision. BLM Br. 21; Jonah Br. 25. The record also confirms BLM knew that to excuse a Required Design Feature, its NEPA analysis must "demonstrate[]" that an exception applies. App.-III-747; App.-I-297; App.-I-282. BLM thus conducted a line-by-line assessment of all 72 applicable Required Design Features and required

Jonah to "thoroughly explain" why any measure was excluded, listing the few justifications that would suffice. App.-I-282-96. BLM cannot reasonably claim that it had no opportunity to demonstrate the applicability of a Required Design Feature exception.

Thus, the district court did not abuse its discretion in denying Appellees' exhaustion defense.

B. Appellees Misstate the Required Design Feature Exemption Criteria and Still Cannot Explain Which One Applies.

Appellees next argue that BLM reasonably decided to waive the phased development Required Design Feature. They claim the following constitutes BLM's "reasonable explanation":

> Alternative B will best avoid or reduce impacts to sensitive resources while still allowing for recovery of natural gas and condensate resources, as described in Section 3 (The Decision) of this ROD. This alternative will allow development on valid existing leases throughout the NPL Project Area and will best meet the purpose and need of the project.

App.-III-576; BLM Br. 25, 30.

If this is BLM's explanation for rejecting phasing, it is arbitrary. The Land Use Plans allow BLM to exempt this Required Design Feature for only two reasons: (1) the measure "is documented to not be applicable"; or (2) an "alternative" measure "is determined to provide equal or better protection for [sage-grouse] or its habitat." App.-III-747. BLM's explanation does not fit within either exemption.

Neither does the EIS demonstrate that an exemption applies. Jonah's only support for its suggestion that BLM found phasing to be infeasible is its own comments and BLM's paraphrasing of them. *See* Jonah Br. 26-27. BLM rejected these arguments. App.-II-335 ("[T]here would be no waste or inefficiencies associated with a phased approach"); App.-IV-841(BLM "believes that the phased-development approach included in Alternative A is feasible."); App.-II-361; App.-II-310; App.-I-299.[1]

BLM also did not adopt "equal or better" protections for sage-grouse. Although BLM's counsel claims BLM replaced phasing with "other features designed to achieve the same benefits," BLM Br. 21, this is a post-hoc rationalization. Alternative B—the selected alternative—contains only the minimum sage-grouse protections already required by the Land Use Plans without additional measures to replace the benefits of phasing, SA-734-37, whereas Alternative A alone included "additional" sage-grouse protections, SA-737.

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[1] The "paced development" alternative BLM briefly considered is not relevant. *Contra* Wyo. Br. 17; BLM Br. 25. Whereas "phased development" would restrict the *location* of wells to protect wildlife, "paced development" would restrict the *number* of wells to reduce air emissions. SA-III-756. The pacing alternative was not offered to satisfy the phased development Required Design Feature, because it would have allowed development in all priority habitat simultaneously.

Because Alternative B contained "no additional resource protection measures" for priority habitat as compared to the Proposed Action, App.-III-728, BLM concluded that both could result in "fragmentation" of priority habitat and "displacement" of birds from these vital areas—effects phasing would avoid. App.-III-704; App.-III-728 ("similar impacts on [priority habitat]" under both alternatives). According to BLM, Alternative A would have harmed sage-grouse "to a substantially lesser degree," App.-III-704, and provided the "greatest protection for sensitive wildlife habitat while also providing for development of the Project Area." App.-III-631. The Wyoming Game and Fish Department agreed that "Alternative A will result in the fewest adverse impacts on wildlife." App.-II-414.

Tellingly, Appellees never pinpoint which exemption BLM relied on or where it was "demonstrated in the NEPA analysis," as the Land Use Plans require. App.-III-747. Instead, they attempt to rewrite the standard. For example, Appellees claim Required Design Features are just "recommended" or "best management practices," Jonah Br. 17; BLM Br. 24; Wyo. Br. 21, but cite a record clearly explaining that these measures had *formerly* been mere recommendations but were *now* mandatory "to ensure regulatory certainty and the conservation of [greater sage-grouse]." App.-II-381. In fact, Required Design Features are a "Key Component" of the Land Use Plans. SA-423.

BLM also incorrectly claims the Land Use Plans "simply instruct[] BLM to include those features it deems appropriate." BLM Br. 29. Required Design Features are the "minimum specifications" for projects in priority sage-grouse habitat and "are required." App.-III-747. Although BLM can eliminate a feature in certain circumstances, "[a]ll variations in [Required Design Features] would require that at least one of the" specified criteria "be demonstrated in the NEPA analysis." App.-II-381; App.-III-747. It is also untrue that BLM can eliminate a Required Design Feature if it determines a project includes "sufficient protection" for sage-grouse. BLM Br. 29. The actual standard is "equal or better," not "sufficient." App.-II-381, 747. Nor can a desire to "advance[e] other important interests" justify an exemption. BLM Br. 30.[2]

BLM and Wyoming both mention interim reclamation, as though that alone might satisfy the Required Design Feature. Wyo. Br. 25-26; BLM Br. 26-27. It does not, and in any case, this too is an improper post-hoc rationalization. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574-75 (10th Cir. 1994). The Required Design Feature demands both phased development and concurrent reclamation. App.-II-383. The point is to set aside expanses of wholly undisturbed

[2] Wyoming confuses matters by citing cases concerning an agency's discretion to choose alternatives for NEPA study. *See* Wyo. Br. 32-33. This is not a NEPA claim, and Land Use Plan compliance is mandatory, not discretionary. *See Utah Shared Access All. v. Carpenter*, 463 F.3d 1125, 1129 (10th Cir. 2006).

and unfragmented sagebrush habitat where birds can seek refuge—allowing those areas to be developed only *after* earlier phases are reclaimed. *See* App.-III-696; App.-IV-853 (defining "phased development" as developing in sequential "geographically defined phases"); App.-III-704 (phasing "would localize potential impacts" to one Development Area each phase to avoid disturbance "across the entirety of the Sage-Grouse [priority habitat] at the same time"); App.-II-414 (phasing "localize[s] industrial activity, leaving larger tracts of undisturbed habitat for dispersal and occupancy of displaced wildlife"). Accordingly, as BLM itself concluded, an approach that allows "drilling across all [priority habitat] at the same time" "does not meet the requirements" of the Land Use Plan. App.-IV-803-804; *see also* App.-IV-811 (describing "intent" of phased development as "avoiding disturbance occurring across [priority habitat] at the same time").

Finally, holding BLM to its obligation to "demonstrate" that an exception applied does not "impose procedural requirements above and beyond those" required by law, as BLM protests. BLM Br. 29. The Land Use Plans impose this requirement. Even if they did not, BLM was still required to "make plain its course of inquiry, its analysis and its reasoning." *Olenhouse*, 42 F.3d at 1575. The agency failed to do so.

C. BLM Already Made Its Decision on Phasing Because Phasing Cannot Be Accomplished Through a Site-Specific Permit Condition.

As a last resort, Appellees argue there is no FLPMA violation because BLM could "conceivably" still consider requiring phasing when it approves permits to drill at individual locations throughout the Project Area. Jonah Br. 21-231; BLM Br. 32. The argument fails.

First, the record does not support it. BLM did not decide "to evaluate the phased development Required Design Feature at the site-specific permitting stage, rather than as part of the NPL EIS or ROD," as Jonah claims. Jonah Br. 24. BLM evaluated and rejected phasing in the NPL EIS and ROD. App.-III-548. It is also untrue that BLM only rejected phasing across the *entire* project area, as opposed to in priority habitat. BLM also evaluated splitting priority habitat into three Development Areas with one developed in each phase. App.-III-574; SA-988 (map). The ROD approved Alternative B instead, which BLM described as requiring *no* phasing within priority habitat. App.-IV-852. The ROD also explicitly authorizes development in all three priority habitat Development Areas to occur "simultaneously." App.-III-548. If BLM wished to reject project-wide phasing while still requiring priority habitat phasing, it could have done so. *See* SA-719 (explaining that ROD could select "combination" of alternatives).

Jonah is correct that the ROD contains a boilerplate statement that "BLM will apply appropriate required design features ... as Stipulations/[conditions of approval]/Terms and Conditions within [priority habitat] for all program areas, as applicable." App.-III-554. However, that does not overcome the far more specific language on phasing. A well-established canon of construction instructs "that general language of [one clause], although broad enough to include it, will not be held to apply to a matter specifically dealt with in [a second clause]." *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012) (internal citation omitted). Here, the ROD contains more specific language as to the phased development Required Design Feature, which provides that Jonah is authorized to develop "all [development areas] simultaneously" and that development "is not required to be sequential or phased over time." App.-III-548. BLM nowhere suggests it will revisit that decision later. Instead, it said "future authorizations within the NPL Project Area will comply with the required design features of the Selected Alternative," which excludes phasing. App.-III-571. If BLM intended to continue evaluating phasing during site-specific permitting, it knew how to say so. *See, e.g.*, App.-III-566-68 (specifying measures for evaluation at "site-specific stage"); App.-I-284-91, App.-I-298 (identifying Required Design Features that were "better suited for incorporating at the site-specific stage").

Second, phasing cannot be accomplished through ad hoc permitting decisions for individual drilling sites. In contrast with simpler Required Design Features that can be attached as permit conditions, like the "[c]lean up refuse" measure Jonah highlights, Jonah Br. 24, phasing requires planning and coordination across the Project Area to sequence development across a series of confined geographic areas while restricting development elsewhere. That is precisely why BLM extensively studied and reached a concrete decision on phasing in this project-level ROD. As BLM staff explained, the ROD "will need a logical progression of development spelled out in black and white in order to meet this [phased development] RDF." App.-I-287. Stated otherwise, phased development cannot be simply attached as a permit condition because it requires drilling in large contiguous areas to be prohibited altogether—and under a coordinated plan that exceeds BLM's decisionmaking authority as to any single drilling site.

BLM's approach of addressing phasing at the programmatic stage while deferring consideration of more site-specific mitigation measures is consistent with its practice elsewhere, such as the Pinedale Anticline Project Area bordering the NPL Project which incorporated phased development into the programmatic ROD. *See* App.-IV-835-839; SA-229. The Continental Divide-Creston example is inapposite, *see* Jonah Br. 25, as BLM determined phasing there was infeasible because it involved an infill project over an existing development and nearly two dozen operators. SA-II-310-11.

Third, that BLM *might* reconsider its decision does not render the NPL ROD lawful. BLM made its decision on the phased development Required Design

Feature in the NPL ROD and explicitly authorized the NPL Project to proceed without phasing. App.-III-548. That decision will govern subsequent permitting, App.-III-546, 571, and no further decision on phasing is contemplated or even possible at the permitting stage, as explained above. Tellingly, Appellees carefully avoid saying that BLM *will* reconsider phasing later and instead observe the ROD doesn't *prohibit* BLM from doing so. BLM Br. 21, 26. The speculative possibility that BLM will change its mind does not render its current decision lawful. *Cf. GE v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002) ("If the possibility … of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule ... would ever be final....").

II. BLM's Failure to Gather Missing Information About Sage-Grouse Winter Concentration Areas Violated NEPA.

A. The EIS's Programmatic Nature Was No Excuse.

Appellees argue that BLM need not gather baseline information regarding Winter Concentration Areas because the programmatic NPL ROD will be followed by site-specific NEPA reviews. NEPA, however, "is not designed to postpone analysis of environmental consequences to the last possible moment. Rather, it is designed to require such analysis *as soon as it can reasonably be done*." *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 707-708 (10th Cir. 2009) (citation omitted) (emphasis added); *see also* 40 C.F.R. § 1501.2 (agencies must conduct NEPA analyses "at the earliest possible time").

Here, BLM unlawfully failed to establish baseline conditions, because it was reasonably possible at this stage for BLM to gather at least some additional baseline data necessary to understanding the effects of Winter Concentration Area development. BLM's own scientist crafted a concrete proposal for identifying the full extent of Winter Concentration Areas, geophagy sites, and movement corridors, including methods for data collection. App.-II-466-475. The EIS explained that "additional research" on the "use and role" of Winter Concentration Areas would "better inform the appropriate level of development, potential impacts, and appropriate mitigation in Sage-Grouse Winter Concentration Areas." App.-III-688. Contrary to Jonah's post-hoc complaint about expense (raised for the first time on appeal), BLM did not identify any cost barrier to collecting this information. Indeed, the draft EIS proposed gathering this information before authorizing any development. App.-II-374.

Additionally, the notion that information collection would become more feasible at the site-specific stage strains credulity. Although BLM suggests it might collect more research on Winter Concentration Areas before site-specific approvals, it does not explain why such information was not gathered earlier to inform the NPL ROD. *See Northern Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2012) (rejecting agency's excuse for delaying information gathering where agency failed to explain "how waiting until post-approval ... to conduct the survey alleviates this issue"); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732-33 (9th Cir. 2001) (agency's proposal for a "park research and monitoring program" to obtain missing information post-approval suggested that the information was "obtainable" before its approval).[3]

This case is thus unlike *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009), *Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014), and *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), which involved not concrete development projects but large-scale fossil fuel leasing for which the missing data was not essential to a reasoned choice. Indeed, *Native Village* supports Appellants' position, confirming that the missing information on wildlife would have to be collected as soon as "reasonably

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[3] The record does not establish that BLM *will* collect the missing information *before* approving Winter Concentration Area drilling. BLM alone makes this claim, BLM Br. 38, and its sole support is one page of the final EIS describing BLM's original proposal to "defer authorizing development in [sage-grouse] Winter Concentration Areas until additional research is conducted." App.-II-374. But BLM abandoned this proposal. App.-III-748 (noting it would "remove requirements for deferring development in Sage-Grouse Winter Concentration Areas until further research has been conducted"); *see also* SA-IV-918-19 ("a *concurrent study* would be conducted *while development is occurring*"). Likewise, the ROD does not commit to "additional research" before drilling in Winter Concentration Areas. Rather, it says research would "be conducted concurrently with limited development activities." *See* App.-III-554-55. The text BLM cites thus appears to be a remnant from the draft EIS and scrivener's error.

possible" and once "a project proponent actually submits a plan." 740 F.3d at 497-99. Likewise, neither *Northern Alaska Environmental Center v. Lujan*, 961 F.2d 886 (9th Cir. 1992) ("*Lujan*") nor *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 (9th Cir. 2003), involved review of a concrete development proposal. *Lujan* concerned permitting programs for mining operations, making detailed analysis of mitigation measures unnecessary. 961 F.2d at 890-91. *Friends of Yosemite* concerned "broad guidelines" for zoning "future uses" in a river management area, such that programmatic review was appropriate. 348 F.3d at 801.

Far more analogous is this Court's decision in *Richardson*, which held that BLM was required to analyze the habitat fragmentation effects of its plan to open over 400,000 acres of New Mexico's Otero Mesa to fossil fuel development. *Richardson*, 565 F.3d at 709. This Court rejected BLM's claim that such analysis was "impracticable until the leasing stage because the overall level of development could not be sufficiently predicted at the [planning] stage." *Id*. at 707. Because such analysis was reasonably "possible," and because NEPA analysis "must be conducted at 'the earliest possible time,'" BLM violated NEPA by failing to "thoroughly analyz[e]" these habitat impacts "at the planning stage." *Id*. at 708 (citing 40 C.F.R. § 1501.2).

B. The Missing Information Was Essential to a Reasoned Choice.

1. BLM Defined Development Parameters Without Delineating Baseline Conditions.

Contrary to Appellees' suggestions, the ROD made concrete decisions on how development would proceed in Winter Concentration Areas, which made understanding the extent, location, and characteristics of Winter Concentration Areas essential to that decision. The ROD states:

> This decision authorizes limited development in Sage-Grouse Winter Concentration Areas.... A study will be conducted concurrently with limited development activities to better understand the impacts of development in Winter Concentration Areas.... BLM initially authorizes Winter Concentration Area Development Scenario 1. The decision allows for consideration of Winter Concentration Area Development Scenario 2 based on results of the study and appropriate review of site specific applications.

App.-III-554-55. BLM also set concrete parameters for development in Winter Concentration Areas until the "results of the study" of actual impacts were available. *See* App.-III-555 (listing parameters for Scenarios 1 and 2).

BLM's authorization of this scheme before gathering missing baseline information contradicts NEPA and the EIS's recognition that "additional research" concerning the "use and role" of Winter Concentration Areas was needed to determine appropriate mitigation. App.-III-688. Establishing the boundaries of Winter Concentration Areas, geophagy sites, and movement corridors used to reach them was necessary for BLM to forecast the possible effects of even limited Winter Concentration Area development, to decide whether *any* disturbance should be allowed there, and to select the parameters (location, extent, and conditions) for the study-period development it authorized.

Jonah is also wrong that the EIS explains why BLM chose not to collect the missing baseline information. Jonah Br. 32-33. BLM staff merely opined that *impacts* could only be studied by observing them after the fact. But BLM never explained its decision not to collect pre-development baseline data, as NEPA requires. *Or. Nat. Desert Ass'n v. Rose* ("*ONDA*"), 921 F.3d 1185, 1190 (9th Cir. 2019) (establishing baseline conditions is necessary to properly forecast environmental effects under NEPA); *Lands Council v. Forester of Region One of the U.S. Forest Serv*., 395 F.3d 1019, 1031 (9th Cir. 2004) (same).

2. *BLM's Experimental Approach Did Not Obviate the Need to Collect the Missing Information.*

Jonah suggests that the missing information was not essential to a reasoned decision because BLM chose to use an "adaptive" approach. Jonah Br. 37-38, 43. The argument fails for two reasons.

First, as the declaration of sage-grouse expert Clait Braun explains,[4] natural population fluctuations and the time lag of population declines means it "may take 10 years of data collection to even come close to understanding the response of sage-grouse to the NPL project." App.-I-043, ¶ 37. By the time the study is

[4] The extra-record Braun Declaration was admitted for purposes of assessing BLM's compliance with 40 C.F.R. § 1502.22. *See* App.-I-104. Appellants do not contest that decision on appeal.

complete, and BLM corrects course "based on results of the study," App.-III-555, steep population declines may be irreversible. App.-I-041-42, ¶¶ 32-34.

Second, even assuming the study will be completed before the point of no return, this approach still violates NEPA because the missing baseline information was relevant to the decision of how much study-period development to allow in Winter Concentration Areas and under what terms. This is especially true where even a relatively small development site may cause outsized impacts to high-quality habitat, displacing birds within several miles. App.-III-689, App.-II-338-39. The seasonal timing restriction will not avoid such impacts, as facilities constructed in non-winter months will remain during winter and result in direct habitat loss and sage-grouse avoidance. App.-III-687-88. Without limiting the total amount, density, and rate of development during the study period (notwithstanding the ROD's vague commitment to "limited development activities"), App.-III-554-55, BLM cannot credibly maintain that its "develop first, study later" approach would avoid irreversible damage before BLM understands the effects, contrary to NEPA's core "look-before-you-leap" mandate.

3. The Record Contradicts Appellees' Claims that BLM Already Had Sufficient Information to Inform Its Decision.

Jonah claims that the information was not essential to a reasoned choice because the Land Use Plans already prescribe measures for Winter Concentration Areas' protection. Jonah Br. 39. This glosses over the controversy among Jonah, BLM, Wyoming Game and Fish, and the Governor's Office over the adequacy of existing Land Use Plan protections for Winter Concentration Areas, given their scarcity and vital importance to core-area birds. Opening Br. 32-34. Whether Winter Concentration Areas should receive additional protections, such as those afforded to core areas, was a key issue during Project deliberations. App.-II-311-17, App-II-318-19, App.II-361-363, App.-II-519-20, App.-II-522-23. BLM never resolved that controversy. Instead, it elected to make this decision after observing the *actual effects* of drilling in Winter Concentration Areas.

Wyoming's related claim that BLM sufficiently defined Winter Concentration Areas is also unsupported. Wyoming Br. 31-32. BLM did not explain why it was appropriate to define Winter Concentration Areas based on sage-grouse locations within a narrow temporal window, or leave out core-area populations, geophagy sites, and movement corridors from the EIS's assessment.

C. Alternatively, BLM Was Required to Analyze the Project's Impacts on Core Area Populations Under 1502.22(b)(4).

Even if BLM had concluded that the missing baseline information was unobtainable or not essential to a reasoned choice, it still had an obligation to consider and evaluate the effects of development in Winter Concentration Areas on core-area sage-grouse populations "based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. § 1502.22(b)(4). Respondents fail to identify where in the EIS BLM did so. Contrary to Jonah's assertion, the EIS's literature survey does not evaluate local and regional population effects or draw any conclusions about them.

Jonah claims that BLM could not possibly gain better understanding of gas development impacts in Winter Concentration Areas without first allowing development there. Jonah Br. 33. But neither the ROD nor EIS provide this explanation, rendering it an improper post-hoc rationalization. In any case, such a self-defeating excuse does not justify BLM's failure to use "theoretical approaches or research methods" to forecast impacts. 40 C.F.R. § 1502.22(b)(4). "[T]he basic thrust of ... NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting ... is thus implicit in NEPA, and [courts] must reject any attempt by agencies to shirk their responsibilities" by labeling them a "crystal ball inquiry." *Scientists' Inst. for Pub. v. Atomic Energy*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

Jonah and Wyoming suggest it was Conservation Groups' burden to identify a feasible theoretical approach for BLM during the administrative process. Jonah Br. 45-46; Wyoming Br. 36. Wrong. After commenters identified BLM's obligations under section 1502.22, it was BLM's burden to do the work necessary to comply. Conservation Groups present the Braun Declaration here for the limited purpose of demonstrating that there were *potential* approaches available to BLM for evaluating Winter Concentration Area impacts. At least one such approach was also explicitly presented during public comment. App.-II-417 (recommending BLM develop a model to evaluate impacts on wintering sage-grouse). Whether this was feasible was for BLM to determine. *See Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329-30 (D.C. Cir. 2021) (agency failed to address whether it could have evaluated impacts using suggested approach under section 1502.21(c)(4) (formerly 1502.22(b)(4)), "and if not, why not").

D. 40 C.F.R. § 1502.22 Contemplates Original Research.

Jonah and BLM argue that 40 C.F.R. § 1502.22 "does not require BLM to initiate studies." Jonah Br. 44; BLM Br. 39. They are incorrect. Section 1502.22's plain text contemplates that an agency may have to conduct surveys or otherwise fill data gaps, where the information is essential, where the methods are "known," and where the costs are not "exorbitant." 40 C.F.R. § 1502.22(b). And even if the information is unobtainable, the agency must study the subject using "theoretical approaches or *research methods* generally accepted in the scientific community." *Id*. § 1502.22(b)(4) (emphasis added).

Courts have confirmed that compliance with section 1502.22 may require original research. *See, e.g.*, *Or. Env't Council v. Kunzman*, 817 F.2d 484, 495 (9th Cir. 1987) ("NEPA imposes a duty on federal agencies to gather information and do independent research when missing information is ... 'essential' to a reasoned choice among alternatives."); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1249

(9th Cir. 1984) ("section 1502.22 clearly contemplates original research if necessary"), *abrogated on other grounds by Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987).[5] Courts also confirm that NEPA may require original research to establish baseline conditions. *See Northern Plains*, 668 F.3d at 1086-87 (faulting agency for failing to conduct "additional studies and surveys"); *ONDA*, 921 F.3d at 1191 (suggesting agency should have surveyed "actual" baseline conditions or estimated them "using data from a similar area, computer modeling, or some other reasonable method" (citation omitted)).

Lee v. U.S. Air Force, 354 F.3d 1229 (10th Cir. 2004) is not to the contrary. *Contra* BLM Br. 39; Jonah Br. 44. *Lee* does not hold that original research is not required under section 1502.22. Rather, the court rejected the argument that NEPA required the agency to update existing research on livestock impacts because there was "no reason to believe [the existing] studies' conclusions are inaccurate," and appellants supplied only "anecdotal evidence" of impacts beyond those in studies. *Lee*, 354 F.3d at 1244. No argument was made under section 1502.22 that livestock information was "incomplete or unavailable." In contrast here, the information was not merely outdated but rather missing altogether, and BLM itself—not mere

[5] Although these cases predate the revised version of section 1502.22, the 1986 revisions did not narrow an agency's obligation to gather missing information. *Compare* 40 C.F.R. § 1502.22 (1985) with 40 C.F.R. § 1502.22 (2019); *cf.* Jonah Br. 45 n.16.

anecdotal evidence—confirmed that possible impacts to Winter Concentration Areas were "not well understood." App.-III-688.

Likewise, in *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999), this Court did not hold that original research is not required under section 1502.22, only that plaintiffs "fail[ed] to show how additional, site-specific lynx data [was] 'essential' to reasoned decision making." *Id*. at 1172.

Town of Winthrop v. FAA, 535 F.3d 1, 12-13 (1st Cir. 2008) is also inapposite. That case held only that an agency has no obligation to prepare a "supplemental EIS" every time "newer studies" are published on impacts evaluated in a prior EIS. The court did not reference or analyze an agency's obligations to fill research gaps under section 1502.22.

In sum, BLM's failure to gather baseline information regarding Winter Concentration Areas and failure to forecast development effects on local and regional core-area populations that winter in these areas violated NEPA.

III. BLM Failed to Take a Hard Look at the Project's Impacts on the Path of the Pronghorn, Grand Teton Herd, and Grand Teton National Park.

A. The EIS Fails to Consider the Risk of Losing the Path of the Pronghorn and Its Significance.

Appellees fail to show that BLM complied with its duty to consider and analyze effects on the Grand Teton pronghorn herd and its "Path of the Pronghorn" migration, and their significance. An EIS must address environmental consequences "and their significance." 40 C.F.R. § 1502.16(a), (b). The "context" and "intensity" of effects must inform a significance analysis. *Id.* § 1508.27. That the potential loss of the Grand Teton herd would be felt within Grand Teton's iconic park landscape and could doom an exceptionally long and rare migration, which scientists have intensively studied, make this loss highly significant.

BLM points to nothing limiting the CEQ's context and intensity factors to an agency's decision to prepare an EIS. BLM Br. 49-50. In any case, Appellees do not seriously dispute that the Grand Teton herd migration is a scientifically and ecologically significant phenomenon of regional, national, and international renown, which state and private entities have spent tens of millions of dollars preserving and which the U.S. Forest Service has protected along its northern end. Opening Br. 23-26. Such considerable investments, on their own, make its potential loss significant.[6]

NEPA thus required the EIS to address the potential loss of this phenomenon "in proportion to [its] significance." 40 C.F.R. § 1502.2(b). But Appellees fail to point to any EIS analysis addressing whether there was a threshold of development under which pronghorn would no longer return to Grand Teton, as the National

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[6] Wyoming's suggestion that the Path of the Pronghorn does not traverse the Project Area is false. *Compare* Wyoming Br. 52 *with* App.-I-261 (Park Service: "Radio collared pronghorn from the park have moved through the NPL project area en route to wintering grounds."); Opening Br. 65.

Park Service advised, Opening Br. 30; the herd's unique susceptibility to extirpation, *id*. at 63; and how significant this risk would be under each alternative. None of the vague statements Appellees' point to meaningfully address this risk. "[G]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification for why an agency could not supply more definitive information." *ONDA*, 921 F.3d at 1191 (citation omitted).

That BLM may consider these effects when reviewing subsequent individual drilling proposals does not excuse these failures. *Cf.* Jonah Br. 57-58. Again, agencies must conduct NEPA analysis "at the earliest possible time." 40 C.F.R. § 1501.2. Here, it was possible to examine the effects of Jonah's concrete development plan on Grand Teton pronghorn—the ROD established development limits, including density restrictions, total development acreages, road and pipeline mileage limits, and discretionary measures to "preserve" migration routes and avoid crucial habitats (which do not guarantee their preservation or avoidance). App.-III-547-49, 558-564, 608. The EIS fails to explain why further analysis was not possible at this stage, perfunctorily stating: "The information and analysis is appropriate at this programmatic level based on the issues identified during scoping. Additional analysis of potential impacts to pronghorn and appropriate site-specific protection measures would be assessed during site-specific permitting." App.-III-750. Nor does it explain why at this stage BLM could not identify a threshold of development at which pronghorn would no longer return to Grand Teton, which analysis the Park Service stated was "feasible" in light of existing research. App.-I-262. Without such a threshold, BLM could not meaningfully compare alternatives. *See Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 138 (D.D.C. 2001) (finding "conclusory remarks" that failed to discuss "the nature and extent" of pronghorn impacts did "not equip a decisionmaker to make an informed decision about alternative courses of action" (citing *NRDC v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988))).

Contrary to Appellees' claims, the record does not provide a reasoned explanation regarding the EIS's exclusive focus on the Sublette herd for the Court to review, much less any scientific or technical determination to which the Court could defer. *See Richardson*, 565 F.3d at 715 (courts "cannot defer to a void" (citation omitted)). BLM's exclusive focus on the Sublette herd and disregard of unique impacts on Grand Teton pronghorn violated NEPA. *See Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 187 (4th Cir. 2005) (NEPA required Navy to "take particular care to evaluate how its actions will affect the unique biological features of [a] congressionally protected [wildlife refuge]").

B. The EIS Failed to Consider the Project's Indirect Effects on Grand Teton National Park, and Appellants Timely Raised This Issue.

Appellees fail to show that BLM took a hard look at the Project's downstream consequences on Grand Teton National Park, including its ecology and wildlife viewing. They fail to establish any mention of this issue in the EIS, either in its discussion of "direct," "indirect," or "cumulative impacts." Instead, Jonah and BLM resort to arguing—for the first time on appeal—that Appellants did not administratively exhaust this claim.

Appellants' argument that BLM failed to disclose the Project's impacts on Grand Teton's environment and recreational values is not "undeveloped and thus forfeited," as BLM avers. BLM Br. 52. Unlike in *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1055-56 (10th Cir. 2011), Appellant's argument here was not buried in a footnote and cryptically presented but argued clearly in Appellants' Brief (at 67-69).

BLM and Jonah further allege that Appellants' arguments concerning impacts to the Park's ecology and visitors were "not presented to BLM during the administrative process." BLM Br. 52; *see also* Jonah Br. 56-57. To the contrary, Appellants and others flagged that the Project could eliminate pronghorn in Grand Teton, Opening Br. 30, App.-II-413, 424, and the Project Area's importance to wildlife viewing, App.-I-264. Appellants raised that the EIS failed to disclose the Project's impacts on Grand Teton's ecology and wildlife viewing. App.-II-504.

Appellees' argument that comments on the Final EIS fell outside the administrative process is contradicted by BLM's review and consideration of such comments, and modifying its decision in response to some of them. SA-577-617 (describing comments and agency's response); App.-III-581 (ROD stating "BLM considered comments received during [the ROD's] preparation"). Appellants' comments, and BLM's receipt, analysis, and response to final EIS comments, show that BLM had ample "opportunity to correct its own mistakes … before it [was] haled into federal court." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).[7]

Nor is this case like *Wildearth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013), where appellants relied on comments submitted on the final EIS that "did not really respond [to that document]; instead they raised new issues." Not so here, where Appellants' comments squarely addressed final EIS omissions, and raised longstanding issues concerning pronghorn and Grand Teton. *See* App.-II-497-505.

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[7] Jonah alleges that Appellants' attempt to litigate issues raised in comments on the final EIS amounts to "sandbagging." Jonah Br. 57. However, Jonah submitted its *own* comments on the final EIS which resulted in changes, clarifications, and BLM's commitment to consider modifying the ROD. App.-IV-844-851 (Jonah's comments); SA-577-586 (BLM's responses).

REMEDY AND CONCLUSION

For the foregoing reasons, this Court should vacate the NPL ROD and EIS. Vacatur is the "default response" to unlawful agency action. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021).

Last month, this Court for the first time explicitly adopted the D.C. Circuit's *Allied-Signal* test for determining whether a departure from the default remedy of vacatur is necessary:

> Under the *Allied-Signal* test, courts must consider two factors—(1) "the seriousness of the [agency action's] deficiencies (and thus the extent of doubt whether the agency chose correctly)," and (2) "the disruptive consequences of an interim change that may itself be changed."

Diné Citizens Against Ruining Our Env't v. Haaland, 59 F.4th 1016, 1049 (10th Cir. 2023) (citing *Allied-Signal v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). It is a defendant's burden to show that compelling equities "overcome the presumption of vacatur." *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1122 (9th Cir. 2018). Vacatur is warranted here because only BLM bothered to address remedy, and in so doing acknowledged the *Allied-Signal* test but declined to provide evidence concerning either factor.

Respectfully submitted, March 14, 2023

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,488 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft 365 in 14 point font size and Times New Roman.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Emsisoft Business Security, version 2023.3.1.11864, last updated March 14, 2023, and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I certify that on March 14, 2023, I electronically filed the foregoing REPLY BRIEF OF APPELLANTS WESTERN WATERSHEDS PROJECT, et al., with attached Addendum, using the court's CM/ECF system, which sent a notice of electronic filing to all counsel of record.

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SUPPLEMENTAL ADDENDUM

SUPPLEMENTAL ADDENDUM INDEX

2019 40 CFR 1501.2

2019 Code of Federal Regulations Archive

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1501 -- NEPA AND AGENCY PLANNING > § 1501.2 Apply NEPA early in the process.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609,* and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 55992, Nov. 29, 1978.

End of Document

2019 40 CFR 1502.2

2019 Code of Federal Regulations Archive

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT > § 1502.2 Implementation.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609),* and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 55994, Nov. 29, 1978.

End of Document

2019 40 CFR 1502.16

2019 Code of Federal Regulations Archive

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT > § 1502.16 Environmental consequences.

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

[*43 FR 55994*, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

End of Document

1985 40 CFR 1502.22

1985 Code of Federal Regulations Archive

Title 40--Protection of Environment; > CHAPTER V--COUNCIL ON ENVIRONMENTAL QUALITY > PART 1502--ENVIRONMENTAL IMPACT STATEMENT

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating significant adverse effects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.

(a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence.

Statutory Authority

AUTHORITY:

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

History

SOURCE: 43 FR 55994, Nov. 29, 1978

End of Document