



July 24, 2014

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**BY OVERNIGHT DELIVERY AND
ELECTRONIC MAIL TO:**

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Re: Proposed SUPOs for two Petrox Resources Wells and five Elm Ridge Resources Wells in HD Mountains

Dear Mr. Brown and Mr. Janowiak:

Please accept these comments from the San Juan Citizens Alliance, Conservation Colorado, The Wilderness Society, Earthworks Oil and Gas Accountability Project, and Rocky Mountain Wild (collectively, the Conservation Groups or SJCA) regarding the seven gas wells proposed in the HD Mountains by Elm Ridge Resources and Petrox Resources (the Seven Wells). In a June 23, 2014 letter, the Forest Service announced that it is accepting scoping comments on this proposal.

INTRODUCTION

The Conservation Groups have long worked to preserve this area of the San Juan National Forest from oil and gas development. We were actively engaged in the process leading to approval of the Northern San Juan Basin Coal Bed Methane (NSJBCBM) project – of which the Seven Wells are a part – and challenged the approval of that project in the district court and Court of Appeals for the Tenth Circuit.

Given that history, we are dismayed by the Forest Service’s proposal to approve the Seven Wells using a categorical exclusion. During litigation over the NSJBCBM project, the Forest Service and Bureau of Land Management (BLM) repeatedly assured the court that more National Environmental Policy Act (NEPA) analysis would be completed before approving individual oil and gas wells in this area of the HD Mountains. The court, in fact, expressly relied on those assurances to reject several of the Conservation Groups’ legal claims. And for several years after the Tenth Circuit’s 2011 decision, the San Juan National Forest represented to the public that the agency planned to prepare additional NEPA analysis for these wells. *See, e.g.,* Appendix of Exhibits (Appx) at 1-9 (April 1, 2011 Fed. Post-hearing br. (10th Cir.)), 15 (Forest Service Oct.-Dec. 2012 Schedule of Proposed Actions (2012 SOPA)).

The Forest Service and BLM may not reverse course now. Attempting to approve the Seven Wells with a categorical exclusion would represent a flagrant “shell game” that does not comply with NEPA, the 2005 Energy Policy Act, the applicable forest plan, or the Forest

Service's Colorado Roadless Rule. The Forest Service and BLM must prepare a full NEPA analysis analyzing and disclosing to the public the impacts of approving this drilling.

DISCUSSION

I. THE SEVEN WELLS CANNOT BE APPROVED USING A CATEGORICAL EXCLUSION.

According to its June 23 letter inviting comments, the Forest Service intends to rely on a Category 3 categorical exclusion from Section 390 of the 2005 Energy Policy Act. Pub. L. 109-58 § 390, codified at 42 U.S.C. § 15942 (the 2005 Act). The 2005 Act provides “a **rebuttable presumption** that the use of a categorical exclusion under [NEPA] would apply” for:

Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 (five) years prior to the date of spudding the well.

42 U.S.C. §§ 15942(a), (b)(3) (emphasis added). This categorical exclusion is inapplicable here for several reasons.

A. The Forest Service's Prior Commitments To Conduct Additional NEPA Analysis Rebut Any Presumption That A Categorical Exclusion Applies.

By its plain language, the 2005 Act creates only a “rebuttable presumption” that the action can be excluded from NEPA. *Id.* Moreover, even where the requirements of Section 390 are met, application of a categorical exclusion is merely “discretionary, rather than mandatory.”¹

Even if Category 3 applied here, any presumption that the Seven Wells are excluded from NEPA has been overcome by the Forest Service's prior commitments to the court during litigation over the NSJBCBM project. The government repeatedly told the court and the public that additional NEPA analysis would be done prior to approving individual oil and gas wells. For example:

¹ Appx at 27 (Sept. 9, 2011 Statement of BLM Deputy Director Mike Pool Before the House Natural Resources Subcommittee on Energy and Mineral Resources, available at: http://www.doi.gov/ocl/hearings/112/390CX_090911.cfm); see also, BLM NEPA Handbook H-1790-1 ch. 4 at 17 (2008) (providing that “you may elect to prepare an [environmental assessment] for proposed actions otherwise excluded” from NEPA by a categorical exclusion); FSH 1909.15.

- During oral argument in the Tenth Circuit, federal attorneys represented to the court that the Forest Service would prepare a new NEPA analysis analyzing and disclosing the losses of old growth forest for every individual well approval. Appx at 31 (May 6, 2011 letter from M. Freeman to M. Janowiak).
- In discussing impacts to riparian areas from the NSJBCBM project, the Forest Service Environmental Impact Statement (EIS) and Record of Decision (ROD) committed that “further review will take place when the Lessees submit site-specific permit applications. That review will ‘be tiered to the [EIS]’ and will ‘be limited in scope ... to the site-specific aspects of the environmental analysis that were not covered by the [EIS].” San Juan Citizens Alliance v. Stiles, 654 F.3d 1038, 1055 (10th Cir. 2011) (quoting Forest Service documents).²
- As part of its argument that SJCA’s claims were not ripe, the Forest Service even filed a post-oral argument memorandum in the 10th Circuit announcing its “plans to prepare an Environmental Assessment [EA] evaluating the impacts of two proposed wells and facilities” that are part of the NSJBCBM project. Appx at 3 (Fed. Post-hearing brief). That promised NEPA analysis, in fact, involved two of the same wells for which a categorical exclusion is now proposed. Id. at 6. In notifying the court of its plan to prepare an EA, the Forest Service committed that it would “analyze and disclose the environmental impacts of the proposal” for individual wells, with “updated information on botanical (includes old growth vegetation), wildlife, cultural, air, and water resources.” Id. at 3-4.
- The Forest Service explained to the Tenth Circuit that the ROD approving the NSJBCBM project “estimate[s] that the Lessees will submit between 20 to 30 new APDs per year, each of which, as noted above, will undergo an environmental review when submitted.” Stiles, 654 F.3d at 1044 (paraphrasing government’s argument) (emphasis added); see also, NSJBCBM ROD at 49 (“[w]hen submitted, the National Environmental Act (NEPA) review of each of these APDs will be tiered to the” EIS).
- Similarly, the Forest Service told the Court that “[o]nce [permit] applications and [SUPOs] are submitted the Forest Service has enough information to conduct additional analysis of the environmental impacts,” at which time changes would be made regarding individual wells. “The Forest Service thus acknowledged the practical limitations on its [EIS] analysis and committed to analyze each application further.” Appx at 95 (Fed. 10th Cir. br.).

² In defending the NSJBCBM EIS, the Forest Service repeatedly stated that well-specific analyses would “tier” to that EIS. Id. The use of the term “tiering” further underscored the agencies’ commitment to do further NEPA analysis. By definition, “tiering” involves preparation of a narrower, more focused EIS or EA at a later stage. 40 C.F.R. §§ 1502.20, 1508.28.

- The Forest Service also told the Tenth Circuit that following the agencies' approval of the NSJBCBM project, substantial new information was developed regarding the location of old growth stands. The agencies explained that they would utilize this new information when evaluating individual permit applications, "in accordance with the multi-leveled [sic] regulatory scheme that requires the Forest Service to conduct additional analysis before approving surface plans." Id. at 67 n. 3.
- Furthermore, outside of the litigation, the Forest Service's NEPA log continued to indicate that an EA was planned for these wells. See, e.g., Appx at 6 (Ex. 1 to Fed. Post-hearing br.), 15 (2012 SOPA).

These promises were successful: the Tenth Circuit ruled in the Forest Service's favor. In so doing, the court directly quoted some of the statements above. See Stiles, 654 F.3d at 1044, 1055. Using a categorical exclusion now would amount to renegeing on the Forest Service's earlier commitments to the court and the public.

This history rebuts any presumption under the 2005 Act that a categorical exclusion could apply. Moreover, the government's commitments to the court – and the court's reliance on those commitments to uphold the NSJBCBM project – estop the Forest Service and BLM from claiming that no further NEPA analysis is required here. See Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1357-58 (9th Cir. 1994) ("Having persuaded the district court that it understands its duty to follow NEPA in reviewing future site-specific programs, judicial estoppel will preclude the Service from later arguing that it has no further duty to consider the cumulative impact of site-specific programs"); Northcoast Env'tl. Ctr. v. Glickman, 136 F.3d 660, 670 (9th Cir. 1998) (similar).³

Moreover, use of a categorical exclusion here runs directly counter to NEPA's purpose of facilitating informed public participation in agency decisions. Without a NEPA analysis, SJCA and other members of the public will be denied an adequate understanding of the expected impacts of the Seven Wells to wildlife, water, the forest and other resources. Nor will the public have an opportunity to submit informed comments on the proposal. The Forest Service recognized the importance of that opportunity when arguing its case to the Tenth Circuit. The agency committed that the promised NEPA analyses would "analyze and disclose the environmental impacts of the proposal" for individual wells, with "updated information on botanical (includes old growth vegetation), wildlife, cultural, air, and water resources." Appx at 3-4 (Fed. post-hearing br.). The Forest Service also assured the Court that in connection with

³ Use of a categorical exclusion also would invite a motion asking the court to reconsider its earlier rulings, which relied on the government's representations that additional NEPA analysis would precede the approval of individual wells. See Fed. R. Civ. P. 60(b); In re. Gledhill, 76 F.3d 1070, 1081 (10th Cir. 1996) (affirming order granting relief under Rule 60(b)(6) where "the circumstances of the case had changed significantly").

additional NEPA analysis, the “public will have two opportunities to provide comments . . . before the agencies make any decisions concerning the wells.” *Id.* This all will be lost if a categorical exclusion is used to approve the Seven Wells.

B. The Forest Service May Not Use A Categorical Exclusion Because It Has Not Analyzed The Seven Wells Within The Past Five Years.

Moreover, the proposed categorical exclusion does not apply because the Forest Service has not analyzed the Seven Wells as part of a plan or NEPA document approved in the past five years. *See* 42 U.S.C. § 15942(b)(3) (five-year limit for Category 3 exclusions under 2005 Act). The Forest Service’s June 23 letter relies on two documents to support its use of a categorical exclusion: (a) the EIS and ROD for the NSJBCBM project, and (b) the 2013 San Juan National Forest Land and Resource Management Plan and EIS (2013 Forest Plan EIS). June 23, 2014 scoping letter at 1-2. Neither document supports a categorical exclusion.

First, the EIS for the NSJBCBM project was issued in July 2006 – fully eight years ago. The Forest Service’s ROD for that project and denial of SJCA’s administrative appeal were issued more than seven years ago, in 2007. The NSJBCBM EIS cannot serve as the basis for using a categorical exclusion here.

Second, the 2013 Forest Plan EIS also cannot support a categorical exclusion. While the 2013 Forest Plan EIS was issued less than five years ago, it did not analyze the impacts from drilling the Seven Wells. The Forest Service Handbook requires that the NEPA document supporting a categorical exclusion must “provide[] an adequate consideration of effects of such drilling and the proposed activity [must be] within the range of identified environmental effects.” FSH 1909.15 ch. 32.3; June 9, 2010 Memorandum from Deputy Chief Joel Holtrop to Regional Foresters at 7-8.

The 2013 Forest Plan EIS does not purport to adequately consider the effects of drilling the Seven Wells. The 2013 EIS describes itself as a general “programmatic document” that only “discusses environmental effects on a broad scale and does not predict what would happen when [plan standards] are implemented on individual, site-specific projects.” 2013 Forest Plan EIS at 61 (emphasis added). Instead, the Forest Service told the public that the “analysis in this [2013] EIS would be used to ‘tier’ to future [NEPA] analyses” for specific projects. *Id.* Thus, in issuing the 2013 EIS the Forest Service deferred analysis of specific wells by telling the public that more NEPA analysis would follow. The agency cannot now claim that such site-specific analysis is unnecessary. *See generally*, Appx 280-81 (General Accounting Office, Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act, No. GAO-09-872 (Sept. 2009) (2009 GAO Report)) (describing use of Category 3 exclusion in such circumstances as a “shell-game”).

Considering the history of the NSJBCBM EIS and 2013 Forest Plan EIS makes even more clear that a categorical exclusion does not apply. The purpose of the Category 3 exclusion

is to create a safe harbor allowing the agency to forego NEPA where a reasonably current NEPA document exists that adequately analyzes the impacts of proposed drilling. That is plainly not the situation here. Eight years ago, the NSJBCBM EIS discussed the Seven Wells but deferred analysis of several critical environmental issues such as their impacts on old growth forests, rivers and streams, and wildlife. See pp. 10-13, infra. Seven years later, the 2013 Forest Plan EIS took a similar approach: it disclaimed any attempt to analyze the impacts of site-specific projects like the Seven Wells, instead promising more NEPA analysis at a later stage. As a result, using a categorical exclusion here would disregard the Forest Service's express statements in the two prior EISs that it was only deferring its analysis of critical environmental issues – not avoiding that analysis altogether. The Forest Service cannot take this approach.

C. A Categorical Exclusion May Not Be Used To Approve The Roads, Pipelines And Other Infrastructure Associated With The Seven Wells.

The Forest Service's proposal also misapplies the 2005 Act by using a categorical exclusion to approve the roads and pipelines associated with the Seven Wells. See June 23 scoping letter at 2-3. The plain language of the 2005 Act authorizes a Category 3 exclusion only for “[d]rilling an oil or gas well” 42 U.S.C. § 15942(b)(3). Category 3 does not cover other activities such as road construction or pipeline installation. Id.⁴ The General Accounting Office has expressly called out the practice of “[u]sing a [Category 3 exclusion] to approve an activity other than drilling an oil or gas well” as a violation of the 2005 Act. Appx at 260-61 (2009 GAO Report).

This violation of the 2005 Act would be problematic because many of the expected environmental impacts result from the proposed roads and pipelines – not just the Seven Wells themselves. Those roads and pipelines are proposed to run through stands of old growth forest, along streams, and into the HD Mountains roadless area. See June 23 scoping letter at 3 and attached maps. These impacts must be addressed in a NEPA analysis.

Further, the June 23 scoping letter proposes using just “two separate categorical exclusions” to approve the SUPOs for all Seven Wells. June 23 scoping letter at 2. This is not permitted under the 2005 Act. Category 3 covers only the drilling of a single “oil and gas well.” 42 U.S.C. § 15942(b)(3). As a result, a separate exclusion decision document must be issued for

⁴ 2005 Act exclusions other than Category 3 do cover activities outside of drilling a well, such as “individual surface disturbances” (Category 1) and “[p]lacement of a pipeline in an approved right-of-way corridor” (Category 4) under certain circumstances. 42 U.S.C. § 15942(b). The circumstances here do not meet the requirements for applying those other exclusions, however, and the Forest Service has not proposed to use them.

each well. See Appx at 260 (2009 GAO Report) (identifying this as a common violation of the Act).⁵

D. A NEPA Analysis Is Required To Address The Seven Wells' Impact On The HD Mountains Roadless Area.

Moreover, a NEPA analysis is required because the Seven Wells will impact the HD Mountains roadless area. Using a categorical exclusion to approve drilling in a roadless area violates the 2005 Act, NEPA, and the Forest Service's Colorado roadless rule.

First, the impact of the Seven Wells on the HD Mountains roadless area is another factor rebutting any presumption that a categorical exclusion may be used.

Second, the impact on the roadless area represents an extraordinary circumstance making a categorical exclusion inappropriate. 36 C.F.R. § 220.6(b)(1)(iv). The Forest Service has not taken a consistent position on whether screening for extraordinary circumstances is necessary when applying Section 390 categorical exclusions.⁶ But the plain language of the statute demonstrates that extraordinary circumstances are a necessary consideration when applying categorical exclusions under the 2005 Act, as they are with other types of categorical exclusions.

When the 2005 Act was adopted, long-standing Forest Service, BLM and Council on Environmental Quality regulations all made extraordinary circumstances a standard limitation on the applicability of categorical exclusions. By using the term "categorical exclusion" in Section 390, Congress understood that extraordinary circumstances also should apply under the 2005

⁵ Moreover, we do not understand the basis for treating the Seven Wells as occurring in an "developed field," as is required for this categorical exclusion. 42 U.S.C. § 15942(b)(3). The proposal would open to drilling parts of the HD Mountains – including in the roadless area – that have not previously been developed for oil and gas.

⁶ Compare June 9, 2010 Memorandum from Forest Service Deputy Chief Joel Holtrop to Regional Foresters, Energy Policy Act of 2005, Use of Section 390 Categorical Exclusions for Oil and Gas (directing that extraordinary circumstances should be considered in applying 2005 Act categorical exclusions) with Sept. 1, 2011 Memorandum from Forest Service Deputy Chief Joel Holtrop to Regional Foresters, Energy Policy Action [sic] of 2005, Adjusted Use of Section 390 Categorical Exclusions for Oil and Gas due to Western Energy Alliance v. Salazar (reversing position in light of district court ruling in Western Energy Alliance v. Salazar, 2011 WL 3738240 (D. Wyo. Aug. 12, 2011)); see also FSH 1909.15 ch. 32.3. While Western Energy Alliance v. Salazar struck down a BLM instruction memorandum that directed the agency to screen for extraordinary circumstances, the court did so only on procedural grounds under the Administrative Procedure Act. See Western Energy Alliance, 2011 WL 3738240 at * 7; Appx at 28 (Pool testimony). That unpublished district court decision does not preclude agencies, independent of the instruction memorandum, from screening for extraordinary circumstances such as the roadless area here.

Act. When Congress borrows a term that has a well-understood legal meaning, it must be presumed to know and adopt that meaning. See Appx at 429-32 (correspondence from Sen. Jeff Bingaman). This meaning is further confirmed by the fact that the 2005 Act establishes only a “rebuttable presumption” of an exclusion from NEPA – not an across-the-board exemption. 42 U.S.C. § 15942(a). The plain language of the 2005 Act shows that Congress did not intend to excuse consideration of extraordinary circumstances.

Third, the Forest Service’s 2012 roadless rule for Colorado requires a NEPA analysis here. The Colorado roadless rule directs preparation of “environmental documentation pursuant to [NEPA, Council on Environmental Quality regulations] and 36 C.F.R. Part 220 for any proposed action within a Colorado Roadless Area.” 36 C.F.R. § 294.45(a). Moreover, an EIS is required for proposals “that would significantly alter the character of a Colorado Roadless Area.” Id.

The Colorado rule requires an EIS because the proposed drilling will significantly alter the character of the HD Mountains roadless area. The proposal by Elm Ridge and Petrox calls for developing a well pad and access road into the roadless area, along with several other wells and roads at the very edge of the roadless land. Those wells have added significance because they are unlikely to be the last wells proposed inside the roadless area. And to the extent there is any uncertainty about significance, the Forest Service regulations referenced in the Colorado rule direct that an EA should be prepared to address the question. 36 C.F.R. § 220.6(c).

Regardless of the significance of impact, the Colorado rule does not allow the Forest Service to categorically exclude oil and gas development inside a roadless area from NEPA. The roadless rule requires NEPA documentation in compliance with Part 220 of the Forest Service regulations. Id. § 294.45(a). While Part 220 allows the use of categorical exclusions, it does not permit them for activity inside a roadless area. To the contrary, Part 220 specifically identifies roadless areas as an extraordinary circumstance where such exclusions are inappropriate. 36 C.F.R. § 220.6(b)(1)(iv). Part 220, moreover, makes no mention of the 2005 Act categorical exclusions. In effect, the Colorado roadless rule mandates a layer of analysis for activities within roadless areas regardless of what NEPA and the 2005 Act alone require.

The requirement of NEPA analysis for approval of drilling inside a roadless area is reinforced by other provisions of the Colorado rule. For example, in considering a SUPO for oil and gas operations affecting a roadless area, the rule requires the Forest Service to “consider an alternative” that uses pre-existing sites. Such an alternative can “be dismissed from detailed analysis with clear justification.” Id. § 294.46(d)(2). These requirements plainly contemplate the preparation of a NEPA analysis. See FSH 1909.15 chs. 14.3, 14.4 (requirements for development of EIS alternatives).

II. A NEPA ANALYSIS IS NECESSARY TO EVALUATE AND DISCLOSE A VARIETY OF IMPACTS ASSOCIATED WITH THE SEVEN WELLS.

Any presumption that a categorical exclusion applies is rebutted for another reason: the Seven Wells raise several significant environmental concerns that have never been addressed. A NEPA analysis will benefit the agency and the public by addressing these issues. They include:

A. Roadless Area And Colorado Roadless Rule

A Forest Service NEPA analysis must analyze and disclose to the public whether the Seven Wells comply with the Colorado roadless rule. See 40 C.F.R. § 1502.2(d). We are troubled by the Forest Service's statement that "these leases pre-date roadless rule making; therefore the Colorado Roadless Rule . . . does not apply" to the Seven Wells. See June 23 scoping letter at 3. This is incorrect. While its provisions for new oil and gas leases (e.g., 36 C.F.R. §§ 294.46(b), (c)) may not apply here, the Colorado rule includes many other requirements that apply to existing leases and to the Seven Wells. See, e.g., 36 C.F.R. § 294.46(d).

Here, the Colorado rule requires the Forest Service to:

- Minimize the amount of surface disturbance and new road construction affecting the roadless area;
- Consider an alternative using pre-existing areas of surface disturbance for the proposed operations;
- Restrict road construction to outside the roadless area where doing so is feasible, will not cause substantially more environmental damage, and will not compromise safety standards;
- Require incremental reclamation of disturbance to minimize the amount of land disturbed at any one time;
- Minimize visual impacts;
- Co-locate pipelines and power lines within road rights-of-way; and
- Consider best available technologies along with new and developing low impact technologies.

See 36 C.F.R. § 294.46(d). Without a NEPA analysis, it will be impossible for the public to assess whether the Forest Service is complying with these legal requirements or to submit informed comments.

Conducting a NEPA analysis is particularly important here because of the controversy over the Forest Service's departure in Colorado from the national roadless rule. The Forest Service has repeatedly insisted that, despite its many exemptions, the Colorado rule is highly protective of roadless areas in this state. That assertion rests in part on the agency's enforcement of the terms listed above. Denying the applicability of the Colorado rule – and using a categorical exclusion to avoid a transparent public analysis of whether the Seven Wells comply with that rule – seriously undercuts the credibility of roadless protection in this state. The Forest Service must analyze and disclose whether the proposed drilling meets the rule's requirements for minimizing impacts to the roadless area.

B. Unanswered Questions From NSJBCBM EIS

A NEPA analysis is needed to address the questions about these wells left unanswered in the NSJBCBM EIS. For example, that EIS deferred its analysis of how impacts to riparian areas, old growth, and wildlife could be brought into compliance with Forest Plan standards for those resources. See pp. 11-13, infra. As a result, Forest Plan compliance, and the damage to old growth, riparian areas and wildlife habitat, are central issues in considering whether to approve the Seven Wells. The Forest Service and BLM cannot sweep these issues under the rug again. The agencies must demonstrate that they will comply with the Forest Plan, and disclose what their impacts will be to riparian areas, wildlife and old growth. 40 C.F.R. § 1502.2(d).

C. Significant New Information

In the eight years since the Forest Service completed its EIS for the NSJBCBM project, circumstances have changed and significant new information has arisen bearing on the environmental consequences of the Seven Wells. For example:

- As noted above, the Forest Service told the Tenth Circuit in 2011 that it had developed significant new information about old growth forest in this part of the HD Mountains, and that the new information would be analyzed under NEPA. Pp. 3-4, supra.
- In addition, the NSJBCBM EIS and ROD require monitoring of wildlife populations and methane seeps from the Fruitland outcrop. NSJBCBM EIS at 3-293 to 294 (wildlife); NSJBCBM ROD at 23-25, 28 (Fruitland). This monitoring should have generated significant information that must inform decisions on the Seven Wells.
- There is new data on ozone and air quality in the Four Corners region, and impacts from oil and gas facilities. See, e.g., NSJBCBM ROD at 26-27 (anticipating analysis from Four Corners Air Quality Task Force).

These and other new developments must be addressed under NEPA.

D. Chimney Rock National Monument

In 2012, several years after completion of the NSBJCBM EIS, the Chimney Rock National Monument was designated immediately east of the HD Mountains for protection of ancestral Pueblo structures and artifacts. Given the proximity of the Seven Wells to Chimney Rock, the Forest Service must prepare a NEPA analysis to address whether drilling will affect the monument or violate the Antiquities Act by damaging the objects of historic or scientific interest there. Moreover, the NSJBCBM project requires an “intensive[] inventory for cultural resources prior to approval” of the Seven Wells, NSJBCBM EIS at 3-570, along with compliance with the consultation requirements of the National Historic Preservation Act. That information should be analyzed and disclosed to the public in a NEPA analysis.

E. Cumulative Impacts

The Forest Service needs to analyze the cumulative impacts of the Seven Wells when combined with other reasonably foreseeable future actions. 40 C.F.R. §§ 1508.25(a)(1)-(2), 1508.7. For example, the Forest Service is expected to finalize its decision this Autumn on the Fosset Gulch/Northern HDs Ecosystem Restoration Project, which will involve timber cutting and controlled burns in the same area as the Seven Wells.⁷ NEPA requires the agency to analyze and disclose to the public how wildlife, streams, forest, soils and other resources will be impacted by the combination of oil and gas development, logging and burning in this part of the forest.

F. Consideration of Reasonable Alternatives

A NEPA analysis must consider alternatives to the proposals by Elm Ridge and Petrox for location of the Seven Wells. Options include: (a) requiring horizontal or directional drilling to keep well pads and roads out of riparian areas, old growth stands and the roadless area, (b) using horizontal or directional drilling to reduce the number of well pads, and (c) different alignments for access roads that reduce impacts to old growth and riparian areas. We incorporate by reference the arguments (on this and other issues) made in our May 6, 2011 comments on two of the Elm Ridge Resources wells. Appx at 29-37 (May 6, 2011 letter). Those comments apply with equal force to the other three proposed Elm Ridge wells, and the two proposed Petrox wells.

III. THE FOREST SERVICE HAS NOT DEMONSTRATED THAT THE SEVEN WELLS WILL COMPLY WITH THE FOREST PLAN.

Finally, the Seven Wells may not be approved because the Forest Service has not demonstrated their compliance with applicable Forest Plan standards. 36 C.F.R. § 219.15(d)

⁷ http://data.ecosystem-management.org/nepaweb/nepa_project_exp.php?project=43000 .

(2013); 16 U.S.C. § 1604(i). In particular, the EIS and ROD from the NSJBCBM project make clear that these wells have not been shown to comply with Forest Plan.

For example, the NSJBCBM EIS acknowledged that the Forest was not meeting the Forest Plan's five percent old growth standard, and that the NSJBCBM project would further reduce old growth. Appx at 30 (May 6, 2011 scoping comments), 328-29 (SJCA 10th Cir. Open. Br.). While the Forest Service subsequently suggested that new surveys identified additional old growth that may bring the area above the five percent threshold, *id.* at 30, no such demonstration has been made. For the reasons stated in our May 6, 2011 comments, an analysis of compliance with the old growth standard requires an EIS. Appx at 29-37.

Similarly, the Forest Service has never analyzed whether the Seven Wells (or the NSJBCBM project as a whole) complies with the Forest Plan's requirements to maintain wildlife habitat in Management Areas 4B and 5B. Appx at 32 (May 6, 2011 comments), 335-351 (SJCA 10th Cir. Open. Br.). As with the old growth standard, this assessment requires an EIS. *Id.* at 32, 335-351.

Third, the NSJBCBM EIS acknowledged that these wells may not comply with Forest Plan standards protecting rivers and streams. Appx at 33 (May 6, 2011 comments), 351-59 (SJCA 10th Cir. Open. Br.). This inconsistency must be addressed before the Seven Wells can be approved.

Fourth, the record shows that the NSJBCBM project would cause a violation of the Forest Service road density standards for Management Areas 4B and 5B. Appx at 33-34 (May 6, 2011 scoping comments). The Seven Wells cannot be approved without resolving this inconsistency with the Forest Plan.

While the Forest Service revised its Forest Plan in 2013, the ROD for the 2013 plan expressly states the Elm Ridge Goose Creek wells will be governed by the provisions of the prior (1983) Forest Plan. The 2013 Forest Plan ROD states:

The following site-specific planning projects have been substantially developed using, and the decisions will be made under, the previous 1983 San Juan Land and Resource Management Plan, as amended:

Columbine Ranger District

- BP Sauls Creek Waterline
- Bullion King Abandoned Mine Lands Project
- ***Elmridge Goose Creek Wells***
- Logchutes Downhill Mountain Bike Zone
- Tri-State Cascade to Silverton Line
- Zink Access Road and Utilities

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2013 Forest Plan ROD at 23 (emphasis added). Thus, the 2013 Forest Plan carries forward the pre-existing standards from the 1983 plan, with which the Seven Wells do not appear to comply.

While the two proposed Petrox wells are not expressly included in the list above, the same result holds. Even without the express ROD provision quoted above, the 2013 Forest Plan makes clear that the terms of the NSJBCBM ROD are incorporated into the new plan. The 2013 Forest Plan EIS provides that for all alternatives being considered gas development in the HD Mountains would proceed “as described in the ROD for the Northern San Juan Basin EIS.” 2013 Forest Plan EIS at 20.

The NSJBCBM ROD and EIS in turn require compliance with the 1983 plan. The 2007 NSJBCBM ROD expressly provides that “SUPOs and APDs authorized subsequent to but consistent with this ROD, will conform to the . . . approved LRMP/RMP.” NSJBCBM ROD at 46. And as noted above, the agency repeatedly stated during litigation that individual well approvals will be analyzed to ensure compliance with the 1983 Forest Plan. Thus, all Seven Wells cannot be approved without a demonstration that they comply with the Forest Plan terms for old growth, wildlife, riparian areas and road densities, among others.

CONCLUSION

Thank you for your consideration of these comments. We appreciate being notified of the proposed Seven Wells and ask that the Forest Service promptly notify us of any future NEPA documentation and draft or final decisions regarding the Seven Wells.

Sincerely,



Michael S. Freeman

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Earthworks Oil and Gas Accountability Project, and
Rocky Mountain Wild

/Enclosures

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