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May 21, 2010

FR Doc. 2010-3535

Council on Environmental Quality  
Attn: Ted Boling  
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Re: NEPA Draft Guidance ``NEPA Mitigation and Monitoring''

## **I. Introduction**

The Council on Environmental Quality (CEQ) proposes to provide guidance for departments and agencies of the Federal government on the mitigation and monitoring of activities undertaken in a National Environmental Policy Act (NEPA) process. Through guidance, CEQ seeks to enable agencies to create successful mitigation planning and implementation procedures with robust public involvement and monitoring programs.

The Upper Green River Alliance appreciates this opportunity to provide comments to the CEQ as they develop more effective and accessible tools for citizen involvement in government decision-making, especially to enhance assessment and reporting requirements, and ensure transparency and openness of mitigation and monitoring, in compliance with NEPA.

Our staff has been actively involved during all public opportunities in development and implementation of a number of Bureau of Land Management (Pinedale, Wyoming) NEPA documents, including the Jonah Prospect Field EA (1994); Jonah II Project EIS (1998); Modified Jonah II Project EA (2000); Jonah Infill Project EIS (2006); Pinedale Anticline Project EIS (2000); Pinedale Anticline Project SEIS (2008); and Pinedale Resource Management Plan revision EIS (2002-2008).

Appointed by the Secretary of Interior, our staff has served two terms as Chair of the Pinedale Anticline Working Group (or PAWG, a Federal Advisory Committee), and on the Wildlife, Air Quality, and Water Resources Task Groups for the PAWG.

More recently, we have provided comments and recommendations on the *Pinedale Anticline Wildlife Monitoring and Mitigation Plan and Matrix*, and have participated in meetings with the Jonah Interagency Office and the Pinedale Anticline Project Office (JIO/PAPO).

Our staff has extensive experience, as interested and affected public, in the mitigation and monitoring of activities undertaken in many National Environmental Policy Act (NEPA) processes. We believe that the CEQ *Draft Guidance for NEPA Mitigation and Monitoring*

proposes to create a more advantageous, collaborative process for more effective monitoring and more responsive, public reporting of mitigation success. We would also like to offer additional suggestions to help improve this process, with specific, illustrative examples derived from twelve years of experience with NEPA project implementation in the Pinedale, Wyoming BLM area.

## **II. NEPA-Designated Agency Positions May Help Assure Mitigation Success**

In the *Draft Guidance for NEPA Mitigation and Monitoring*, CEQ notes that, “Decisions to employ mitigation measures should be clearly stated.”

We agree that decisions to employ mitigation measures should be clearly stated, and often are. For example, the Pinedale Anticline Oil and Gas Exploration and Development Project Record of Decision (PAPA ROD 2000, pp. 14-15) clearly indicated that mitigation measures would be employed through designation of Environmental Compliance Coordinators.

However, procedures to ensure designation of Environmental Compliance Coordinators were not specified in the PAPA ROD 2000, and so as development proceeded, and Pinedale area managers changed, agency positions were not designated nor personnel tasked with applying mitigation measures to prevent the eventual 46% mule deer population decline, and 37% sage-grouse population decline within the Anticline gas field during the years 2000-2008.<sup>1</sup> (Sawyer, 2006; WGFD, 2007)

We would like to suggest that, in addition to clearly stated mitigation measures, there also be specific, technical agency personnel designations and specific mechanisms identified for enforcement of mitigation measures in NEPA documents.

## **III. Wildlife Monitoring May Effectively Determine Impacts From Oil and Gas Development**

In the *Draft Guidance for NEPA Mitigation and Monitoring*, CEQ notes that, “a monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective.”

The Western Governors’ Association notes in their *Wildlife Corridors Initiative Report*, “Monitoring helps achieve management objectives. Inadequate monitoring leaves decision-makers uninformed of whether they have achieved their desired objectives and can leave parties with few informed choices for improving actions. Poor monitoring can have serious consequences for both wildlife and development. Without appropriate monitoring, significant wildlife resources could go unnoticed. In the most extreme situation, significant impacts could

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<sup>1</sup> Sawyer, H., R. Nielson, D. Strickland, and L. McDonald. 2006. 2006 Annual Report. Sublette Mule Deer Study (Phase II): Long-term monitoring plan to assess potential impacts of energy development on mule deer in the Pinedale Anticline Project Area. Western Ecosystems Technology, Inc. Cheyenne, Wyoming, USA.

Wyoming Game and Fish Dept. 2007. 2007 Sage-Grouse Job Completion Report. pp. 5. Cheyenne, Wyoming USA. ([http://gf.state.wy.us/wildlife/wildlife\\_management/sagegrouse/pdf/2007sgjcrsbyregion/2007%20Upper%20Green%20River%20JCR.pdf](http://gf.state.wy.us/wildlife/wildlife_management/sagegrouse/pdf/2007sgjcrsbyregion/2007%20Upper%20Green%20River%20JCR.pdf))

result in a listing as a threatened or endangered species or prevent the recovery and delisting of a protected species. Also, protocols and collection practices vary. This prevents data from being the foundation for broad understanding and can lead to unsatisfactory policy outcomes.”

We agree that creating and strengthening monitoring programs is an important and necessary improvement to current and proposed BLM NEPA documents. As an example, the PAPA ROD 2000 (pp.15) required creation of “specific monitoring plans” including wildlife monitoring.

However, in August 2006, Ecosystem Research Group (ERG) conducted an independent review of wildlife monitoring data to identify trends in population sizes and/or changes in activity/occupancy that may be related to energy development on the Pinedale Anticline Wildlife Study Area (PAWSA). (ERG 2006)

ERG concluded that, “ERG found it difficult to determine impacts to wildlife,” because “No data existed for 1999–2002 due to some past problems with the database and data collection.” The monitoring program required by the 2000 PAPA ROD was *ineffective in determining impacts to wildlife populations* in the Pinedale Anticline gas field: monitoring that was designed “to ensure mitigation measures are implemented and effective.”

The necessity of strengthening monitoring programs is again apparent in the Record of Decision that was approved for the Pinedale Anticline in 2008. (PAPA SEIS ROD 2008)

While the PAPA SEIS ROD 2008 included a brief, *Wildlife Monitoring and Mitigation Matrix* (pp. B-1), this NEPA document did not include a *Wildlife Monitoring and Mitigation Plan* (WMMP) upon which the *Matrix* was based. Only after ROD approval was the WMMP designed, approved and implemented, but without any opportunity for public involvement.

The effectiveness of the new *Wildlife Monitoring and Mitigation Plan* was reviewed by two independent panels of scientists, convened by Dr. Matthew Kauffman of the University of Wyoming Cooperative Fish and Wildlife Research Unit. The “Review of Sage-Grouse Monitoring for the Pinedale Anticline Project Area” (Connelly, et al., 2010) states, “The panel reached overall consensus on all issues and agreed that the experimental designs and methods for monitoring changes in sage-grouse populations as described in the Wildlife Monitoring Plan are *generally not adequate to detect changes* in the criteria identified by the PAPA Wildlife Monitoring Matrix within a reasonable timeframe.” [Emphasis added]

The independent panel report, “Review, Sensitive Species Wildlife Monitoring Plan, Pinedale Anticline” (Buskirk, et al., 2010) states that, “the design of the protocol is not based on well-established sampling principles.” The panel also determined that, “The monitoring plan does not provide information about how abundance will be estimated, and therefore how a change in abundance such as that described in the matrix will be determined to have occurred.” Finally, “The protocol for white-tailed prairie dogs does not provide a basis for estimating changes in presence-absence.”

Again, an independent panel of scientists has determined that the PAPA SEIS ROD 2008 Wildlife Monitoring and Mitigation Plan is inadequate to detect changes in wildlife populations on the Pinedale Anticline: monitoring that is intended “to ensure mitigation measures are implemented and effective.”

So for the past ten years, BLM has apparently been unable to design and implement effective, scientifically valid monitoring plans that are capable of detecting changes in wildlife populations in NEPA-reviewed and approved natural gas field projects, despite NEPA documents that specifically require BLM to monitor wildlife.

#### **IV. The Regulated Community Should Not Participate in Monitoring Plan Design, RFPs, and Contractor Selection**

We believe that part of the problem in the PAPA SEIS ROD 2008 *Wildlife Monitoring and Mitigation Plan* stems from the impropriety of the regulated community (the oil and gas operators and/or their consultants) being involved with monitoring plan design, review of monitoring proposals, and the ultimate choice of contractors who will conduct wildlife monitoring.

Although the PAPA SEIS ROD 2008 has allowed industry a role in development of the *Wildlife Monitoring and Mitigation Plan*, we recommend that there be a clear division between this planning process and the implementation that involves development of Requests for Proposals (RFPs), review of proposals, contract negotiations and actual selection of contractors. This has been permitted in the Pinedale, Wyoming BLM office, and is supported by the BLM State Director in Cheyenne.

It must be clear that BLM is ultimately responsible for monitoring plans and is the entity designing and implementing them, not those in the oil and gas industry with a clear self-interest. Even the appearance of impropriety taints the integrity of the monitoring process and any resulting data and conclusions, and thus reduces public trust and confidence in the BLM.

#### **V. Monitoring Plans Should Recognize and Implement Existing State Game and Fish Agencies’ Data into Mitigation Strategies**

The Wyoming Game and Fish Dept. (WGFD), tasked with protection and enhancement of Wyoming’s wildlife, has for years conducted wildlife monitoring in the Pinedale Anticline Project Area and throughout Upper Green River Valley mule deer herd units and sage-grouse lek complexes.

WGFD has determined, through lek counts, the percentage of change from pre-development to present on sage-grouse leks in the Pinedale Anticline area from years 2000-2008 (WGFD, 2007).

WGFD states, “An analysis was completed in 2008 to assess natural gas development impacts in the Pinedale area. This analysis compared leks within a 1-mile radius of any gas field activity (primarily based on well pads) to leks outside 1 mile of gas activity but within the same

lek complex (Tables 1-4). *The results clearly demonstrate declining trends on sage-grouse leks within or closely adjacent to gas field development compared to increasing sage-grouse lek trends outside gas development and throughout the UGRBWGA in recent years. Leks within the Pinedale Anticline Project Area (PAPA) that are located within gas development areas showed a 37% decline, compared to a 37% increase documented on leks away from gas development activities (Table 1 & 2). [Emphasis added]*

<b>Lek</b>	<b>Lek Classification</b>	<b>Peak # Males (2008)</b>	<b>Average # of Males</b>	<b>% Change (2008 data compared to average)</b>	<b>Most recent 2-year average # males</b>
Lovatt Draw Reservoir	Occupied	0	14	-100%	0
Mesa Springs	Occupied	0	10	-100%	0
Big Fred	Occupied	2	35	-94%	1
*Little Fred	Occupied	22	22	0%	23
Shelter Cabin Reservoir	Occupied	51	53	-4%	63
*The Rocks	Occupied	24	42	-43%	25
		<b>17</b>	<b>27</b>	<b>-37%</b>	<b>19</b>
* right at 1 mile from gas field activity					

The PAPA SEIS ROD 2008 states at page B-4, “During the first annual planning meeting a monitoring and mitigation plan will be initiated to describe more specifically the details and process of monitoring and selection of actual mitigation responses. This plan will be updated each year, based on the monitoring and mitigation results and future needs that are apparent at that time.” “When monitoring indicates a change requiring mitigation, serious mitigation efforts would be made to avoid the change becoming greater.”

Despite ROD guidance and WGFD data showing an already severe decline in greater sage-grouse populations beyond the 30% decline requiring mitigation in the *Wildlife Monitoring and Mitigation Matrix*, to date, specific mitigation addressing this population decline has not been identified.

We strongly suggest that existing data and research, even that data gathered prior to NEPA document approval, be consulted to help identify which “serious mitigation efforts” would “avoid the change becoming greater.”

## **VI. Funding Sources for Wildlife Monitoring Should Be Specified in NEPA Documents**

Upper Green River Alliance staff has served on the Wildlife Task Group since the year 2000, and from the beginning, there has been a great deal of discussion and disagreement regarding monitoring funding. While the BLM clearly stated in the PAPA ROD 2000 (pp. 15)

that, “All monitoring, except for the tracking of NO<sub>x</sub> emission, will be cooperatively funded by the Oil/Gas Operators and the agencies participating in the technical agency work group,” the Operators and the agencies could not agree on how, or how much, funding would be provided for monitoring.

The issue was further complicated by language later in the PAPA ROD 2000 (pp. C-5) with the statement, “the majority of costs to implement these monitoring programs will have to be borne by the operators. The agencies will cooperate in the funding of monitoring to the extent that budget allocations permit.”

This confusing ROD language may be one of the reasons why ERG’s report noted that, “No data existed for 1999–2002 due to some past problems with the database and data collection.” The problem of monitoring funding persists today.

The Western Governors’ Association also notes in their *Wildlife Corridors Initiative Report* (pp. 25) “Funds should be available for research that improves wildlife information and monitoring programs and evaluation of options for wildlife conservation as habitats are impacted by climate change and associated changes in land/water uses.”

Therefore, we strongly recommend that funding sources for wildlife monitoring be specified in NEPA documents.

## **VII. A Wildlife Monitoring Plan Framework Would Provide Cross-Agency Consistency**

The Western Governors’ Association notes in their *Wildlife Corridors Initiative Report*, “Currently, there is no consistent monitoring program design across the multiple states and other relevant jurisdictions. Existing programs within individual jurisdictions provide inadequate support for either systematic monitoring efforts or comprehensive data analysis and dissemination.”

We agree with the Western Governors that, “With the states, the WAAC [Wildlife Adaptation Advisory Council] should develop coordinated monitoring programs to assess response of the targeted species or processes to management actions and support active adaptive management.

## **VIII. Public Participation and Accountability Should be Supported**

In the *Draft Guidance for NEPA Mitigation and Monitoring*, CEQ notes that, “public participation and accountability should be supported through proactive disclosure of, and access to, agency mitigation monitoring reports and documents.” We agree with and strongly support this draft guidance.

For example, the Jonah Field II Project EIS (U.S. Dept. of Interior, Bureau of Land Management, 1998 pp. D-1) and Jonah Infill Project EIS (U.S. Dept. of Interior, Bureau of Land Management, 2006 pp. A-4) Records of Decision both require wildlife monitoring/protection

plans. But in the twelve years since the Jonah II Project ROD was approved and development began, wildlife monitoring data and trend analysis is not readily available to the general public in either electronic or hard copy format.

The Upper Green River Alliance has requested Jonah Field wildlife monitoring data from the BLM in an email request two months ago, and via a Freedom of Information Act (FOIA) request thirty (30) days ago. To date, we have not received the requested data.

It appears that agency accountability has been seriously compromised; and proactive disclosure of monitoring and other data will greatly benefit the public's perception of agencies' transparency and responsibility.

## **IX. General Recommendations to Improve Wildlife Monitoring**

In all on-site and off-site monitoring projects designed, approved and implemented to measure development's impacts on wildlife populations, ensure: 1) goals and objectives are specified and in accord with agency missions to *maintain and enhance* wildlife populations; 2) credible science is cited and used to create wildlife monitoring plans; 3) monitoring plans attempt to establish baseline information to the extent possible; 4) monitoring plans attempt to identify, qualify and quantify which impacts from development are most limiting to wildlife populations.

## **X. Recommendations to Improve Internal Processes for Mitigation**

In the *Draft Guidance for NEPA Mitigation and Monitoring*, CEQ proposes, "To provide for the performance of mitigation, agencies should create internal processes to ensure that mitigation actions adopted in any NEPA process are documented and that monitoring and appropriate implementation plans are created to ensure that mitigation is carried out."

To accomplish monitoring and mitigation, the Pinedale BLM has been crafting precedent-setting processes to accomplish these goals. The PAPA SEIS ROD 2008 (pp. 17) created the Pinedale Anticline Project Office (PAPO) which has been merged with the Jonah Interagency Office (JIO). Together, these offices are now known as the JIO/PAPO. They are governed by the Pinedale Anticline Monitoring and Mitigation Board, to provide overall management of on-site monitoring and off-site mitigation activities.

The BLM and the Pinedale Anticline Operators have approved the Pinedale Anticline Monitoring and Mitigation Fund "to mitigate potential impacts to wildlife, air, and other resources identified in the Final SEIS." The total contribution to the Fund by the Anticline Operators will be \$36 million, with each Operator contributing \$7,500 for each well spudded on their respective leaseholds the previous calendar year.

This mitigation process mirrors the monitoring and mitigation funding structure identified in the Jonah Infill Drilling Project ROD (pp. 9), which totals \$24.5 million in Jonah Field mitigation funds, and appears to satisfy CEQ's draft guidance.

This unusual mitigation funding structure may soon be used in other agency offices, and has been heralded by the JIO/PAPO as a mitigation success. However, the specific details of many of the mitigation projects proposed and already approved are not available to the public through the JIO/PAPO board and staff, or at their website. There is not a clear connection between monitoring results and mitigation projects funded by the board, nor assurance to the public that “that mitigation actions adopted are documented and that monitoring and appropriate implementation plans are created to ensure that mitigation is carried out.”

In addition, there does not appear to be a clear process and protocol with which the board and staff analyze proposed mitigation projects. Proposed projects for funding are considered on an ad hoc basis.

Neither does the public have access to final project reports for each completed project, nor knowledge of whether mitigation has been successful.

One of the mitigation responses identified in the PAPA SEIS ROD 2008 (pp. B-5) is the funding of conservation easements. Despite some of the obvious benefits of easements, the easement proposals and accompanying maps with (Township, Range, Section) legal descriptions of easement locations are unavailable to the public. However, it is clear that at least one proposed conservation easement lies within the boundaries of an oil and gas development unit (the Plains Exploration and Production “South Rim” Unit) that can legally be developed with normal, 16-wells-per-section spacing. The JIO/PAPO board has been made aware of this situation, but approve nonetheless. This is a concern for future mitigation projects, because it is not apparent how a conservation easement funded by mitigation funds and located within a developed oil and gas field is accomplishing the goals of either mitigation or conservation.

So while we strongly approve of CEQ’s intention “to provide for the performance of mitigation,” and we would like to suggest some improvements to the mitigation structure based on the problems already encountered in Pinedale and outlined above.

In all on-site and off-site mitigation projects designed, approved and implemented to maintain and enhance wildlife populations as development occurs, ensure: 1) mitigation goals and objectives are identified and specific enough that project proposals can be measured against them, and inserted as needed to complete a holistic mitigation plan that spans landscapes and species in the target area; 2) a formal set of protocols is developed for evaluating and ranking proposed mitigation projects, rather than the ad hoc approval process now used; 3) mitigation projects are designed to target and specifically address wildlife impacts identified during monitoring, including the species, scale and/or habitat affected; 4) habitats designated for mitigation projects actually offer mitigation value (i.e., meadows/hay fields are equal in habitat value to sagebrush/grasslands; 5) verification is made of mitigation effectiveness; (i.e. mitigation is quantified by each project proposal, and each acre of habitat lost in Jonah/PAPA is mitigated at a 1:3 ratio); 6) identification of any improvements that might be made to mitigation efforts; 7) timely, public reporting of mitigation success; 8) effective utilization of mitigation funds; 9) prioritization of project type in future mitigation funding decisions.

## **XI. We Recommend the Use of Best Available Science**

CEQ recommends that, “The agencies should ensure that the expertise and professional judgment applied in determining the appropriate mitigation measures is reflected in the administrative record, and when and how those measures will be implemented are analyzed in the EA or EIS.”

We agree. While state and federal management agencies have an ever-increasing and more complex set of responsibilities, it only makes sense that the agencies draw upon the peer-reviewed publications, experience and expertise of researchers with thousands of collective hours designing, conducting and analyzing field research on target species and habitats.

## **XII. We Encourage Research**

CEQ recommends that, “Monitoring plans and programs should be described or incorporated by reference in the agency decision documents.”

Where baseline data has not been collected through monitoring prior to natural gas development, and the opportunity to collect baseline is no longer a possibility, well-designed research projects are often the only way to identify, qualify and quantify which impacts from development are most limiting to wildlife populations, and to offer appropriate mitigation strategies. If you don't know what the problem is, approved “mitigation” projects are simply exercises with unproven value; mitigation funds are wasted; and wildlife may continue to decline.

In the rapidly developing gas fields of Sublette County and the Intermountain West, research must be a component of development if we are to understand impacts. We recommend that appropriate research projects be funded using mitigation funds that will help compensate for the dearth of baseline data in and around existing natural gas fields.

Again, thank you for the opportunity to comment, and we look forward to continued discussions on these important topics. We would be glad to meet with you personally in Washington sometime during the month of June, 2010 to hear your responses and answer any questions that these comments may raise.

Sincerely,

/s/

Linda F. Baker  
Director

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