Nos. 10-72552, 10-72356, 10-72762, 10-72768, 10-72775

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,
Petitioner,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT *et al.*,
Respondents,

RUBY PIPELINE, L.L.C.,
Respondent-Intervenor.

DEFENDERS OF WILDLIFE *et al.*,
Petitioners,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT *et al.*,
Respondents,

RUBY PIPELINE, L.L.C.,
Respondent-Intervenor.

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GLOSSARY

ACOE	U.S. Army Corps of Engineers
AD	Petitioners' Addendum
APA	Administrative Procedure Act
BiOp	Biological Opinion
BLM	U.S. Bureau of Land Management
BLM ROD	BLM Record of Decision for the Ruby Pipeline Project
Br.	Petitioners' Opening Brief
CAP	Conservation Action Plan
CLGER	Excerpts of Record of Petitioner Coalition of Local Governments
CWA	Clean Water Act
EIS	Environmental Impact Statement
ER	Petitioners' Excerpts of Record
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
FWS	U.S. Fish and Wildlife Service
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NEPA Handbook, or Handbook	BLM National Environmental Policy Act Handbook H-1790-1
NWP	Nationwide Permit
Petitioners	Center for Biological Diversity, Defenders of Wildlife, Sierra Club, and Great Basin Resource Watch
Pipeline	Ruby Pipeline Project
Resp.	Response Brief of Federal Respondents
Respondents	Federal Respondents BLM, ACOE, and FWS
Ruby	Respondent-Intervenor Ruby Pipeline, LLC
Ruby AD	Addendum to Response Brief of Ruby
Ruby Resp.	Response Brief of Ruby
Ruby SER	Supplemental Excerpts of Record of Ruby
SER	Supplemental Excerpts of Record of Respondents
SOF	Statement of Findings

ARGUMENT

I. RESPONDENTS CANNOT JUSTIFY THE BIOP'S FATAL FLAWS

Respondents' arguments regarding FWS's reliance on the CAP measures fail.[1]

A. RESPONDENTS CANNOT SQUARE FWS'S RELIANCE ON THE CAP MEASURES TO SUPPORT THE "NO JEOPARDY" DETERMINATION WITH FWS'S OWN CONTENTION THAT IT COULD NOT DO SO

Respondents provide no lawful rationale for the BiOp's reliance on the CAP measures for its "no jeopardy" determination.[2] The Record shows that solicitors contended that FWS could *not* use the CAP measures to "influence [its]

[1] Respondents have not met their "heavy" burden of demonstrating that any of Petitioners' claims are moot. *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). Respondents' cursory suggestion notwithstanding, Resp. 108 n.30, Petitioners' claims are not moot, for even once Ruby completed work at the waterbody crossings, the Court can still afford "effective relief" addressing Petitioners' concerns, *e.g.*, by ordering restoration and mitigation of waterbodies, wetlands and habitat, as well as mitigation and conservation measures enforceable under the ESA. *Oregon Natural Resources Council v. Bureau of Land Mgmt.*, 470 F.3d 818, 820-21 (9th Cir. 2006); *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007).

[2] Respondents and Ruby disagree on whether the BiOp relies on the measures to find "no jeopardy". While Respondents at least recognize – as they must – that FWS took these measures into consideration, Resp. 91-95, Ruby claims the opposite. Ruby Resp. 36 (claiming that the "incidental take" authorized under the BiOp is "authorized regardless of whether the ESA Plan is implemented"). Ruby is simply wrong. FWS determined that there was no risk of jeopardy due to the Project's "Cumulative Effects" – *i.e.*, the "conservation actions in the action area" which, "when implemented", "would … contribute to the conservation and recovery of these fishes." ER267; Br. 24-26, 29. That FWS also relied on *additional* factors to find no jeopardy to the fish does not negate this indisputable fact.

determination of effects for the Proposed Action", implicitly recognizing that this would violate the ESA. ER907; ER914 ("[w]e cannot use" measures "in our jeopardy determination"); ER760 ("make sure none of the effects determinations [in the Biological Assessment] have reference to the ESA plan").[3]

Respondents now seek to rationalize FWS's ultimate reliance on the CAP measures as Cumulative Effects to support the BiOp's "no jeopardy" determination, Resp. 88-95, Ruby Resp. 34-43, but their post-hoc rationalizations only "underscore the absence of an adequate explanation" – and indeed, a contrary explanation – "in the [Record] itself." *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1049-50 (9th Cir. 2010) ("*HSUS*"); *id.* ("[W]e may not accept appellate counsel's post hoc rationalizations for agency action.") (quotations omitted); *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) ("an agency must establish a record to support its decisions") (citing *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985)).

[3] Before its about-face, FWS intended to incorporate the CAP into the Project so that Ruby would be bound to implement them and so they could properly support the "no jeopardy" determination. ER917; ER918 ("if Ruby/FERC truly want us to use the ESA plan in our jeopardy analysis … it [must] be included … as part of the proposed action" and "if that is what they want – the actions will be required"); ER1019 (measures should be "part of the proposed action" and "required in the terms and conditions" and "we … just have to get Ruby to put them in the proposed action"); *accord*, ER926; ER910.

FWS's earlier conclusion that it could not consider the CAP measures in the BiOp's jeopardy determination was correct, and its about-face is entitled no deference. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 933 (9th Cir. 2007) (where Service "dramatically changed its approach, its new interpretation is entitled to less deference than we might usually give") (citation omitted). FWS's wholly unsupported, irrational reliance on the CAP is a "clear error" of judgment that renders the BiOp arbitrary and capricious.[4] *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004) (Court "must ensure that the FWS's decisions are based on a consideration of relevant factors and … assess whether there has been a clear error of judgment"); *Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv.*, 475 F.3d 1136, 1145 (9th Cir. 2007) ("[t]he only question … is whether the [agencies], in reaching [the] ultimate finding, considered the relevant factors and articulated a rational connection between the facts found and the choices made") (quotation omitted).

[4] Petitioners hereby adopt and incorporate by reference Petitioner Summit Lake Tribe's argument responding to Respondents' erroneous assertion that the "substantial evidence" standard governs review of Respondents' factual findings. Resp. 18.

B. THERE IS NO SUPPORT FOR FWS'S SEVERANCE OF THE CAP MEASURES FROM THE PROJECT'S SCOPE, WHICH ARE INDISPUTABLY AN INTEGRAL PART OF THE PROJECT

Respondents' post-hoc rationalizations notwithstanding, with the critical exception of their enforceability, *everything* about the measures shows that they were intended to offset the Project's impacts.[5] They arose out of the need to ensure the Project did not appreciably diminish the species' survival and recovery.[6] *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944 (9th Cir. 2003) ("*Selkirk*") (upholding BiOp where project incorporated measures to offset adverse effects). FWS and Ruby selected the CAP measures from the species' "recovery

[5] The Record shows that the CAP are unquestionably intended to mitigate the Pipeline's adverse effects to five endangered and threatened fish species that will be killed, injured, and exposed to predation, cannibalism, disease, and stress from Pipeline construction. The CAP was developed to aid these species' survival and recovery in light of the Pipeline's additional threats – and in devoting substantial efforts to CAP development, Ruby anticipated, and obtained, a "no jeopardy" BiOp and Project approval. ER1067 (CAP measures are "mitigation" to "offset Ruby's adverse ESA impacts or fulfill the ESA conservation responsibility of this broadscale, multibillion dollar federal project"); ER1068 ("a negotiated ESA mitigation … plan … would dually offset [the Project's] adverse impacts … and provide associated conservation benefit"); *accord*, ER141.

[6] FWS repeatedly referred to the need for the measures to ensure the fishes' "survival and recovery," ER932; ER937; ER1126; ER1253; ER1266, and thereby ensure that the Project would not "jeopardize" the species. 50 C.F.R. § 402.02 (defining "jeopardize" to mean to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the *survival and recovery* of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species") (emphasis added); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 518 (9th Cir. 2010) ("the jeopardy regulation requires [FWS] to consider both *recovery and survival* impacts") (quotation omitted) (emphasis added).

plans," ER1068, which are a "road map to recovery" that FWS is required to develop and implement. *Ctr. for Biological Diversity v. Kempthorne*, 607 F.Supp.2d 1078, 1088 (D. Ariz. 2009); 16 U.S.C. § 1533(f). The BiOp includes the CAP measures as "conservation recommendations," ER281, reflecting FWS's intention that they would "minimize or avoid adverse effects" to listed fish. 50 C.F.R. § 402.02 (defining "conservation recommendations").

Respondents make much of the fact that the measures would not be implemented within the Pipeline's *direct footprint*. Resp. 90. From this, they claim that the CAP "are not designed to mitigate the effects of this project." *Id.* This is misleading; the CAP were designed to be implemented within the Project's "action area" – *i.e.*, "areas to be affected" by the Project, and "not merely the immediate area involved in the action." 50 C.F.R. § 402.02 ("action area" definition); ER271-72 (BiOp stating that the CAP for specific species would be implemented "in the action area"); ER763 ("the only [CAP] actions that this BO can review will be those that Ruby proposed to conduct that occur in the … action area"). Indeed, the measures were specifically selected based on their proximity to the Pipeline route. ER1064 ("we are rapidly converging on some supportable fish project proposals, that … *are closely linked to the location* and types of Project impacts") (emphasis added); *id.* ("These projects are excellent options for projects

to enhance the habitats of [listed] species found *along the route*.") (emphasis added).[7]

The *only* way in which the CAP measures do not conform to the ESA is in their total lack of enforceability, under the Act. This is critical, for as Petitioners have explained, by considering the measures as cumulative effects, FWS eliminated the two means by which the ESA would have ensured that the CAP measures were implemented – through the reinitiation requirement and by ensuring that citizens could enforce any "take" that is not in compliance with the ITS.

Respondents ignore the fact that FWS would have to reinitiate consultation or enforce the terms and conditions of the ITS if the measures had been included within the proposed action, or as terms and conditions, as required by the ESA.[8]

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[7] Likewise, Ruby's assertion that the CAP measures would be implemented "outside the action area", Ruby Resp. 42, is patently wrong, and undermines Respondents' position that the CAP are properly "cumulative effects", because the regulatory definition of "cumulative effects" ***requires*** that such effects be within the "action area" of the action. 50 C.F.R. § 402.02 (cumulative effects are "are reasonably certain to occur ***within the action area***") (emphasis added).

[8] Ruby claims that it may ignore a BiOp's terms and conditions with impunity. Ruby Resp. 34-35. This is incorrect. If an applicant fails to abide by conditions in a BiOp, the BiOp no longer authorizes the applicant to engage in the "take" of the species covered by the ITS, and the FWS is equipped to enforce unlawful "take" under the ESA. 16 U.S.C. § 1538(a)-(b), (e); *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001) ("if the terms and conditions of the [ITS] are disregarded and a taking does occur, the action agency or the applicant may be subject to potentially severe civil and criminal penalties under Section 9").

Instead, Respondents focus only on *Petitioners'* ability to bring citizen suits, and cynically claim that it is Petitioners' sole interest here. However, ESA citizen suits serve a critical enforcement purpose that Respondents ignore. *See Bennett v. Spear*, 520 U.S. 154, 165 (1997) (citizen suit provision's "obvious purpose" "is to encourage enforcement").[9] In severing the measures from the Project's scope and the BiOp's ITS, FWS eviscerated citizen suits as an enforcement mechanism to insure that the measures on which FWS relied are actually implemented.

Moreover, contrary to Respondents' claims, Resp. at 87-88; Ruby Resp. at 34, Condition 1 of the FERC Certificate and the BLM ROD cannot ensure that the CAP measures will be implemented, or that any noncompliance with them does not jeopardize listed fish. Condition 1 states that Ruby "shall follow" the "mitigation measures" described in its application, supplemental filings, and the EIS, CLGER-82, but the measures were not described in any of these documents as they were not finalized until May 2010. ER344. While implementation of the measures is included in the BLM ROD's "Terms, Conditions, and Stipulations", ER136, compliance with these will be monitored *solely by Ruby's inspectors*. ER135.

[9] This Court has recognized the value of citizen suits under the CWA, Clean Air Act, and ESA, *i.e.*, as "broad public interest statutes that authorize citizen suits to enforce their substantive provisions… ." *See St. John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1063 (9th Cir. 2009); *cf. Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources*, 299 F.3d 1007, 1014 (9th Cir. 2002) ("The plain language of the [CWA] has created opportunity for citizen suit when government agencies do not act.").

Even if Ruby's self-reporting were acceptable, enforcement for any reported non-compliance will be at the discretion of FERC and BLM, the action agencies, and not to FWS, the expert agency entrusted with ESA determinations. *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006). Thus, Condition 1 and the BLM ROD place the risk of any noncompliance on the species, which is unacceptable. *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (risk of noncompliance with mitigation measures must be "borne by the project, not by the endangered species").

Respondents are also wrong to assert that Petitioners must prove that "jeopardy" will result to show the BiOp's flaws. Resp. 87; Ruby Resp. 37; *Wild Fish Conservancy*, 628 F.3d at 527 ("It is not our role to decide whether the findings in the … BiOp require a jeopardy conclusion."). Yet, it is notable that even if the CAP are fully implemented by Ruby, that still does not mean they will be adequately funded. Br. 30-31. Nor will the CAP measures be implemented before the Project causes significant degradation. *Id.* at 31; ER942 (requiring only that measures are "initiated" within five years).

This is precisely why it matters that FWS did not squarely address the measures within the scope of the BiOp, because by avoiding this question, FWS did not assess whether the measures will adequately mitigate the Project's adverse effects. Had FWS done so, it would have had no choice but to conclude that, as

agreed to by Ruby, the measures are *inadequate* as ESA conservation measures. *See, e.g.*, *Ctr. for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1133 (N.D. Cal. 2006) ("deferring any mitigation measures until after significant degradation has occurred … does not address the threats to the species in a way that satisfies the jeopardy" standard) (citing *Sierra Club*, 816 F.2d 1376).[10]

Respondents also claim that the reasons why FWS severed the CAP measures from the Project and BiOp are "irrelevant" because this occurred before "formal" ESA consultation, Resp. 89, but what occurred before formal consultation is directly relevant to the CAP measures' purpose, and Respondents ignore these highly-relevant factors. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (review is based on the full and complete administrative record, which consists of "everything that was before the agency pertaining to the merits of its decision") (citing *Thompson v. U.S. Dep't of Labor*,

[10] For these reasons also, the CAP are not "reasonably certain to occur," 50 C.F.R. § 402.02, but whether they are is irrelevant, as "cumulative effects" simply do not encapsulate conservation measures that are developed to offset a Project's adverse effects. In *Selkirk*, the Court also found adequate FWS's consideration of cumulative effects, including a timber company's planned activities in the action area, as they were private, "*other* … activities" that are "*unrelated to the action under consultation.*" 336 F.3d at 963-65; *see also* 51 Fed. Reg. 19,926 (June 3, 1986) (emphasis added); AD95-96 (ESA Handbook stating that cumulative effects are "actions that are *unrelated* to the action undergoing consultation") (emphasis added); *accord*, *Sierra Club*, 816 F.2d at 1387. *Selkirk* illustrates which activities are *supposed* to be considered as "cumulative effects" under the ESA—*i.e.*, other, unrelated, and potentially harmful activities, not conservation measures developed to mitigate the action's effects, like the CAP.

885 F.2d 551, 555-56 (9th Cir. 1989)); *id.* ("incomplete record must be viewed as a fictional account") (quotation omitted).[11]

Finally, contrary to Respondents' assertions, the CAP measures are *not* properly "cumulative effects" under the ESA. Indeed, the only case on which Respondents rely—*Selkirk*—supports this conclusion. As Defendants note, in reaching its "no jeopardy" determination in *Selkirk*, FWS properly considered a conservation agreement, Resp. 93-95, but in *Selkirk*, the agreement was "*incorporated … into the terms and conditions of the [ITS.]*" 336 F.3d at 953 n.4 (emphasis added). Thus, *Selkirk* involved a critical distinction from this case – unlike the BiOp here, the *Selkirk* BiOp "*ma[de] [the permittee's] compliance with the Agreement mandatory if [it] wishes to avoid liability for the unauthorized taking of endangered and threatened species*." *Id.* (emphasis added); *id.* at 964 (noting that *Selkirk* BiOp "concluded that the '… project is not likely to jeopardize the continued existence of the grizzly bear' because of [the] requirements imposed by the Conservation Agreement") (quoting BiOp). Rather than supporting Respondents' arguments, *Selkirk* thus reinforces Petitioners' position by

[11] FWS evidently severed the measures from the Project's scope and the BiOp at FERC's request, but it is unclear why FERC did this and, in any event, FERC is not the expert federal agency for ESA consultation or equipped to make that decision. *City of Tacoma*, 460 F.3d at 75 (FWS is "in the best position to make discretionary factual determinations about whether a proposed agency action will create a problem for a listed species and what measures might be appropriate to protect the species").

illustrating how the CAP measures were required to be incorporated into the Project before FWS could consider them in its jeopardy determination in the BiOp.

Respondents cannot have it both ways, and rely on the CAP measures to mitigate the Pipeline's effects to listed species to gain federal authorization to go forward with the Project, but then avoid ESA regulatory enforcement over their implementation. For all of the foregoing reasons, this is unlawful under the ESA, with potentially dire consequences for listed fish.

II. HAVING TRIGGERED ITS REVIEW PROCESS, THE ACOE WAS REQUIRED TO EXPLAIN HOW ITS AUTHORIZATION OF THE PIPELINE COMPLIED WITH THE TERMS AND CONDITIONS OF THE NWP AND ENSURED MINIMAL IMPACTS

The Record does not support the ACOE's conclusion that the final authorization for the Ruby pipeline (a) eliminated the concerns that triggered the District Engineer's exercise of discretionary authority, (b) complied with NWP 12's terms and conditions, and (c) ensured the trenching, blasting, dewatering and backfilling necessary for construction of the Pipeline would have only minimal individual and cumulative effects, as required by the Clean Water Act. 33 U.S.C. § 1344(e)(1). The permit should therefore be remanded for an adequate explanation. *Selkirk*, 336 F.3d at 954 (factual conclusions entitled to deference "so long as the agency's decision is based on a reasoned evaluation of the relevant factors") (internal citations omitted).

A. ACOE OBLIGATIONS DURING PCN REVIEWARE MORE THAN MINISTERIAL

The ACOE requires a PCN for certain activities in order to devote "individual review," Ruby AD32 (Decision Document NWP 12, at 3), and dedicate "additional scrutiny" to those activities with "the potential to have more than minimal adverse effects …." 72 Fed. Reg. 11,092, 11,098 (Mar. 12, 2007); *but see* 33 C.F.R. § 330.1(e)(1) (except where PCN required, permittees may proceed without notifying the ACOE). The Pipeline will have far more than minimal adverse impacts, and thus Ruby was required to submit a PCN for the ACOE's review. In claiming that the ACOE need not verify and document compliance with an NWP's terms and conditions, Ruby misunderstands the extent to which the NWP program streamlines ACOE permitting. Ruby Resp. 53, 55-56. Determining compliance with the terms and conditions during PCN review is a necessary step in ensuring that an activity will have only minimal impacts. *See* 72 Fed. Reg. at 11,179 ("The terms and conditions of the NWPs … are imposed to ensure that the NWPs authorize only those activities that result in minimal adverse effects …."). Compliance with the terms and conditions is so critical that the ACOE may condition an authorization "to ensure that the activity complies with the terms and conditions of the NWP …." 33 C.F.R. § 330.1(e)(2).

Moreover, contrary to Ruby's assertions, Ruby Resp. 45, the ACOE has 30 days to determine whether a PCN is *complete* —not whether the activity can be

authorized; and, furthermore, a prospective permittee shall not begin the activity until notified by the ACOE or 45 days have passed since the ACOE received a complete PCN. 72 Fed. Reg. at 11,194. This further shows the purpose and need of thorough PCN review.

B. THE ACOE'S EXERCISE OF DISCRETIONARY AUTHORITY MUST ENSURE MINIMAL IMPACTS

It is undisputed that the ACOE raised concerns during the review that led the agency to exercise discretionary authority and impose additional modifications and conditions on the authorization. Thus, the Statement of Findings ("SOF") for the Pipeline differs from the earlier Memorandum for the Record in that it includes special conditions "to ensure that the activity being authorized by the Corps will have no more than minimal adverse effects on the environment." ER300.[12]

[12] While Respondents and Ruby attempt to dispute that the ACOE exercised discretionary authority, Resp. 114; Ruby Resp. 51-52, the ACOE's inclusion of special conditions in the authorization was, in fact, *such an assertion of discretionary authority* "to restrict the otherwise automatic application of the NWP program." *Crutchfield v. County of Hanover*, 325 F.2d 211, 215 (4th Cir. 2003). It is not necessary to require an individual permit to assert discretionary authority. *See* 72 Fed. Reg. at 11,095 ("If the district engineer reviews a pre-construction notification and determines that the impacts are more than minimal, discretionary authority will be exercised and either the NWP will be conditioned to require mitigation or other actions to ensure minimal adverse effects *or* an individual permit will be required.") (emphasis added); *see also* 33 C.F.R. § 330.4(e)(2) ("A [district engineer] may assert discretionary authority by modifying … NWP authorization *for a specific activity* …") (emphasis added); *id.* § 330.4(e) (defining modification as the imposition of additional conditions on an authorization for an activity).

Once the ACOE asserted its discretionary authority to modify the authorization, the ACOE was required to explain how its "reason for asserting discretionary authority ha[d] been satisfied by a condition, project modification, or new information." 33 C.F.R. § 330.4(e)(3); *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985) ("The Corps has the authority and duty … to ensure that parties seeking to proceed under a nationwide permit meet the requirements for such action."). No such explanation exists in this Record.

Thus, while the SOF documents the ACOE's decision-making process in authorizing the Pipeline under NWP 12, it does not contain any underlying analysis demonstrating how the modifications and special conditions address the contrary conclusions in the Memorandum for the Record, bring the Pipeline into compliance with the terms and conditions of the NWP and ensure only minimal individual and cumulative impacts. This violates the APA. *See HSUS*, 626 F.3d 1040, 1049 (9th Cir. 2010) (holding agency failed to offer satisfactory explanation for its "[d]ivergent factual findings"); *compare Crutchfield*, 325 F.2d at 217 (upholding NWP authorization supported by 47-page SOF).

The ACOE has not demonstrated that its exercise of discretionary authority worked as intended because the agency has neither articulated how the special conditions ensured compliance with the NWP's terms and conditions and ensured minimal impacts nor supported its decision with examination of the relevant data.

See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Unable to find support in its SOF, Respondents attempt to rely on instances of the ACOE seeking, and Ruby supplying, supplemental information but not on any actual *assessment* of that information by the ACOE. Receipt does not equal review or reasoning. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 835 (9th Cir. 1986) ("Thus, while the Corps could, and did, base its permit decision exclusively on the information provided by [the applicant], the Corps nonetheless had an obligation to independently verify the information supplied to it."). The Court must make a "searching and careful" inquiry to determine if the ACOE actually did consider the relevant information. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Overall, the ACOE must explain how the Pipeline qualified for a NWP and will not cause more than minimal adverse environmental impacts.

Instead of pointing to some ACOE analysis in the Record, Respondents and Ruby rely on a variety of other documents prepared by the *permittee*. Resp. 111-12, 117-18; Ruby Resp. 47-48. But Respondents do not show that the ACOE independently *analyzed* these documents and articulated how they supported a modified authorization that would bring the Pipeline into compliance with NWP 12's terms and conditions and ensure no more than minimal impacts to environmental resources.

In any event, even as to the permittee's documents, Respondents rely on documents that were not even included in the Record considered by the agency in rendering the decision under review. Resp. 113, 123. For example, the original Certified Index states that the PCN was "not relied upon during the Corps' NWP 12 decision-making process and therefore ha[s] not been reproduced." ER287; ER 291 (PCN). Rather, nearly two months after Petitioners filed their opening brief, which pointed out the ACOE's failure to explain the basis for its determination, Respondents sought to *amend* the Record to assert, for the first time, that the ACOE had, in fact, relied on these documents.

The Court should not permit Respondents to rely on the amended Record in its Response. *See Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792-94 (D.C. Cir. 1984) (vacating and remanding where proceeding on a partial record would be unfair). Respondents' untimely motion to amend the Record plainly prejudiced Petitioners, as it seeks to supplement it with ***thousands of pages*** of documents that include for the first time Ruby's PCN and photographic logs of each crossing.[13] Moreover, this is not the typical situation where the

[13] Respondents assert Petitioners were only minimally prejudiced because the documents were elsewhere in the Record. Federal Resp'ts' Mot. to File U.S. Army Corps of Eng'rs' Corrected Administrative Record Index and Certification 2. This is incorrect on two bases. First, most of the new documents were not elsewhere in the Record. And, second, when they were present, it is far from clear that they were the excluded documents. For example, of the PCN's ten appendices, ***only one*** appendix and a portion of another are elsewhere in the Record, and it is not

agency simply omitted documents from the Record—here, as noted, the ACOE listed the documents in the index, but excluded them from the Record and explicitly and affirmatively stated that the ACOE did *not* rely on them in its decision-making process.

1. The ACOE Has Not Supported Its Reliance on Mitigation

Even assuming the ACOE could rely on the permittee's materials, the ACOE has not demonstrated that the mitigation developed by Ruby eliminates the need for an individual permit, complies with General Condition 20, and generally ensures that adverse effects on the environment are minimal. Resp. 112-13, 119-22; Ruby Resp. 49-49, 56. Courts apply the same considerations to assessing the adequacy of mitigation relied upon to minimize impacts under the CWA as under NEPA: mitigation measures must be "detailed and justified by some evidence in the record that would support their efficacy." *Sierra Club v. U.S. Army Corps of Eng'rs*, 464 F.Supp.2d 1171, 1214 (M.D. Fla. 2006) (citing *Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F.Supp.2d 1232, 1251-52 (D. Wyo. 2005)). As such, the ACOE must provide data and analysis that demonstrate why the proposed mitigation will "constitute an adequate buffer against the negative impacts that

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apparent from either the index or the documents themselves that they were also part of the PCN: one appendix is attached to the authorization letter and labeled in the index as "NWP Verification Letter" and another is part of the ACOE's jurisdictional determination and labeled "Application Receipt PJD and additional info letter."

may result from the authorized activity." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001).

Respondents and Ruby rely on Ruby's Plan of Development ("POD")—a special condition of its authorization—as the source of most of Ruby's mitigation and restoration commitments. Resp. 113-14; Ruby Resp. 48-49. The mitigation the ACOE relies upon, however, is not supported by scientific studies, papers, or even comments from the ACOE itself. *Wyo. Outdoor Council*, 351 F.Supp.2d at 1251-52 (finding reliance on mitigation arbitrary and capricious where not supported by substantial evidence).

Based on the information provided by the permittee, there is no basis to conclude that the plan will be effective in ensuring minimal impacts to the environment. For example, the impacts from blasting may be severe, including injury or death to fish and other aquatic organisms, increases in stream turbidity, and changes in hydrologic functions. *See, e.g.*, ER621. Ruby provided the ACOE with a website link to the Plan of Development's treatment of restoration from blasting in the text and Appendix M, ER335, but there is no basis to conclude that this Plan will be adequate.[14]

[14] That these versions of the POD also are not in the Record indicates the ACOE did not "definitively review[]" them. *Cf. Ctr. for Public Integrity v. U.S. Dep't of Health and Human Services*, No. 06-1818, 2007 U.S. Dist. LEXIS 56172, at *15 n.3 (D.D.C. Aug. 3, 2007) ("The mere inclusion of a website address in a FOIA

2. The ACOE Has Not Shown It Fully Evaluated or Mitigated Impacts to Spawning Areas

Respondents and Ruby rely on Ruby's use of a waterbody crossing risk assessment tool developed by FWS to demonstrate that the ACOE met General Condition 3 protecting spawning areas. Resp. 117; Ruby Resp. 49. However, Ruby's contractor's draft memorandum describing the assessment results does not show that Ruby expanded use of the FWS risk assessment tool to the *entire project*. SER 819. In fact, the draft memorandum reviews application of the tool to only 135 streams—less than one-tenth of those crossed—and to *none* of the 347 wetland areas. *Id.*; *compare* ER296 (authorizing crossings of 1,472 waters and 347 wetland areas). The draft memorandum does not explain why those particular streams were selected or whether they encompass *all* spawning areas potentially impacted by the project. It does not follow that, because Ruby applied this tool to a subset of streams, the ACOE ensured the project was protective of important spawning areas for all fish. *Contrast* ER277 (applying assessment to waterbodies specified in the biological opinion in order to minimize impacts to federally listed fish).

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request is not sufficient to render any and all material appearing on that website part of the record before the agency.").

3. The ACOE Did Not Perform Individualized Assessment of Each Crossing

Respondents and Ruby attempt to support their claim that the ACOE assessed each crossing individually on the basis that ACOE staff received—again, via web link—an *incomplete draft* of Ruby's Plan of Development. Resp. 113, 121, 123; Ruby Resp. 49. Respondents cite reviews of the draft Plan of Development by two ACOE districts—Wyoming and Portland—but exclude assessment by the *lead* district. *Id.* Moreover, even those reviewers qualified their conclusions because Appendix G, a Waterbody Crossing Plan, was a *missing* but critical piece. SER 916 ("we need[] appendix G to be able to provide them complete comments on the POD and also to document our record"). As with the ACOE's reliance on the POD for mitigation, it is not clear from the Record when the ACOE received or ever reviewed Appendix G.

Respondents also rely on application of the waterbody crossing risk assessment tool to demonstrate that the ACOE assessed each individual crossing and its impacts. Resp. 123. As discussed above, the assessment did not review all of the crossings, only a mere fraction. The assessment also did not have information regarding—and thus did not consider—the risks of blasting in Utah or Wyoming, even though blasting automatically rendered the crossing high risk. SER 819.

4. The ACOE Did Not Assess the Pipeline's Cumulative Impacts

Contrary to Respondents' assertion, Resp. 124, there is nothing in the Record to indicate that the analysis of cumulative impacts in the EIS was the basis for the ACOE's conclusion that the project will not result in more than minimal cumulative impacts. Neither the Memorandum for the Record, which contains no cumulative impacts findings, SER388, nor the SOF points to it. SER302; *but see* ER395 (finding by the Portland District of more than minimal impacts). Moreover, the timing of the EIS and the ACOE's review of the PCN counsel against it.

The FEIS was issued just weeks after the ACOE received Ruby's PCN; therefore, the cumulative impacts analysis could not have taken into account missing information that the ACOE later found necessary to request from Ruby during PCN review—including site-specific crossing methods, the condition of waterbodies and wetlands, protection of spawning areas, the conversion of wetlands, activities at Goose Lake, and mitigation plans—without which the ACOE could not properly assess the cumulative impacts of the Pipeline as authorized. *See, e.g.*, Br. 46; Resp. 111-12 (listing information required by ACOE); ER347-348 (requesting drawings for and photos of each crossing); ER351 (requesting application of the waterbody crossing risk assessment to all sites); SER698 (questioning construction methods and conversion of wetlands to "better

understand the proposed project and impacts"); SER789 (altering Goose Lake activities); SER924 (discussing forthcoming info regarding drawings, revised blasting and wetland reclamation plans); SER811 (noting wetland restoration plans are being developed).

Though the purpose of permit conditions is to reduce the individual and cumulative impacts to a minimal level, the ACOE had not yet made its permitting decision at the time the FEIS was issued and permit conditions were not yet known. *See, e.g.*, ER645, ER139. The ACOE cannot rely on EIS findings that depend on future unknown permit conditions, and Respondents' claim accordingly must fail. *See Steamboaters v. FERC*, 759 F.2d 1382, 1393 (9th Cir. 1984) (finding that agency cannot rely on imposition of conditions in agency order because of failure to explain how conditions would mitigate impacts).

III. BLM VIOLATED NEPA IN ADOPTING THE FEIS

A. THE STATEMENT OF PURPOSE AND NEED IS UNREASONABLY NARROW AND RESULTED IN THE REJECTION OF REASONABLE ALTERNATIVES

1. BLM's Rejection of "Dozens of Alternatives" Demonstrates that the Statement of Purpose and Need was Unreasonably Narrow

Contrary to Respondents' assertion, the consideration—and summary rejection—of "dozens of alternatives" does not mean a purpose and need statement is reasonably broad or an outcome is "far from foreordained." Resp. 31, 34.

Rather, the rejection of "alternatives [that] failed to meet the narrowly drawn project objectives" proves the opposite. *Nat'l Parks & Conservation Ass'n v. BLM* ("*NPCA*"), 606 F.3d 1058, 1072 (9th Cir. 2010). In *NPCA*, BLM only considered in detail action alternatives meeting private objectives. *Id.* As here, BLM also briefly considered alternatives that would have met public objectives, but did not "*consider these options in any detail* because each of these alternatives failed to meet the narrowly drawn project objectives, which required that [developer's] private needs be met." *Id.* (emphasis added). This Court rejected that approach, explaining that Circuit precedents "forbid the BLM to define its objectives in unreasonably narrow terms." *Id.* at 1072.

While BLM cursorily considered "dozens of alternatives" here, that is of no moment, because, as in *NPCA*, these alternatives were summarily rejected, and the only alternatives considered in detail were those meeting Ruby's private needs.

2. BLM Improperly Rejected Alternatives that Failed to Meet Ruby's Private Objectives

Respondents are also incorrect in asserting that the unreasonably narrow purpose and need statement did not lead to the improper rejection of alternatives. Resp. 35. Specifically, using the Jungo-Tuscarora Route Alternative example, Respondents state that the "claim that this alternative was rejected because of costs to Ruby is belied by the record," and assert that it was rejected because it "would

not 'confer a significant environmental advantage,'" with costs merely a secondary consideration. *Id.* at 35-36. This is incorrect.

First, additional costs to Ruby were just *one* of the private objectives for which BLM limited its consideration of alternatives. The FEIS notes as to Jungo-Tuscarora:

> Ruby stated that it has committed to transportation rates in binding precedent agreements with its shippers and increased construction costs associated with this route alternative would increase transportation rates and the project would be infeasible (i.e., Ruby would not be able to build the project to meet the open season contracts; *as such, the project objective would not be met*).

ER607 (emphasis added). That is, the *entire* project objective will not be met if Ruby cannot meet its contracts. This framing of the project objective ventures far from satisfying "the public's need for natural gas supplies and transportation capacity." Resp. 31. It also goes beyond simple cost concerns. Indeed, couching the project objective in Ruby's contracts clearly uses "private objectives as defining characteristics of the proposed project." *NPCA*, 606 F.3d at 1072.

Similarly, the FEIS states that the alternative's "routing the pipeline in California would trigger additional environmental review by the California Public Utilities Commission under the California Environmental Quality Act. The time required for this additional review (up to 1 year or more) would prevent Ruby from meeting its in-service date and would *render the project infeasible*." ER607-08. Again, this conflates Ruby's objectives and preferences—avoiding California

environmental review to meet a specific timeframe—with project objectives, thereby "necessarily and unreasonably constrain[ing] the possible range of alternatives." *NPCA*, 606 F.3d at 1072.

Second, contrary to Respondents' claim that costs were a secondary consideration, the FEIS's analysis considered an alternative's "ability to meet the overall project objective of transporting Rocky Mountain natural gas to customers in Nevada and on the West Coast; technical and economic feasibility and practicality; and significant environmental advantage over the proposed project." ER558; ER886. That is, rather than just comparing all alternatives' environmental merits, the FEIS first considered their ability to meet the project objectives—which included Ruby's objectives. From there, "[t]hose alternatives that meet the project objective and appear to be the most reasonable with less than or similar levels of environmental impact are reviewed in the greatest detail." ER558. Thus, BLM acted precisely as prohibited: it did not "*consider these options in any detail* because each of these alternatives failed to meet the narrowly drawn project objectives, which required that . . . private needs be met." *NPCA*, 606 F.3d at 1072.

Third, while Respondents state that the Jungo-Tuscarora was "[t]he only alternative" Petitioners identified in this respect, Resp. 35, BLM rejected several alternatives on this basis. For example, BLM raised almost identical issues as to

the I-80 Route Alternative—a longer route aligned along existing rights-of-way, including Interstate 80: "Ruby would not be able to build the project to meet the open season contracts; *as such, the project objective would not be met*." ER573 (emphasis added). Similarly, BLM noted costs and California routing for the West-Wide Energy Corridor Alternative: "The time required for this additional review (up to 1 year or more) would *prevent Ruby from meeting its desired in-service date*." ER585 (emphasis added).

Respondents attempt to avoid these conclusions by claiming that "the purpose and need statement describes both FERC's and BLM's purpose." Resp. 35. However, by admission of the FERC project lead, in response to staff comments, the "Purpose and Need section . . . present[s] the PROJECT purpose and need. That is, what the APPLICANT puts forth as the purpose and need. The EIS does NOT reflect an 'agency purpose and need.'" ER890.

In sum, BLM improperly rejected and failed to fully consider alternatives because they did not meet Ruby's private objectives, including meeting contracts, the "desired in-service date," and avoiding environmental review.

3. BLM Arbitrarily Failed to Comply with Agency Practice in Adopting Ruby's Purpose and Need as Its Own

Respondents and Ruby misapprehend Petitioners citation of BLM's NEPA Handbook as an attempt to "judicially enforce[]" it.[15] Resp. 34; Ruby Resp. 10 n.6. Rather, Petitioners have demonstrated that BLM diverged from its official practice for no apparent reason and with no reasoned explanation. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("an agency changing its course must supply a reasoned analysis") (internal citations omitted). This divergence gives weight to the conclusion that BLM acted arbitrarily and capriciously in adopting a narrow purpose and need containing private objectives and using such to improperly reject reasonable alternatives. Moreover, this Court has used the very same provision of the Handbook to demonstrate BLM's failure to comply with NEPA. *NPCA*, 606 F.3d at 1071 n.9 (internal citations omitted); *see also New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 718 n.44 (10th Cir. 2009) (citing BLM handbook to demonstrate NEPA

[15] Additionally, Ruby argues cooperating agencies are somehow exempted from purpose and need requirements, Ruby Resp. 7-10, without authority to support this novel theory, because, simply, there is none. NEPA's regulations grant no such exemption. 40 C.F.R. §§ 1502.13 (purpose and need); 1501.6 (cooperating agencies); 1501.5 (lead agency). Nor does BLM's Handbook disclaim cooperating agencies' responsibility. AD146-49; AD173-75. Rather, NEPA places full responsibility on cooperating agencies for an EIS's quality; they may adopt the EIS only if it is adequate and has satisfied their comments and suggestions. 40 C.F.R. § 1506.3(a), (c); Br. 52-53. BLM was aware of this responsibility. ER884-85 (discussing BLM purpose and need), 1013 (BLM may "have to complete its own NEPA analysis."). Ruby's creative interpretation of NEPA must fail.

violation); *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1160 (10th Cir. 2004) (same). Arguments regarding the "enforceability" of the Handbook are misplaced.

4. BLM's Analysis of Route Alternatives Did Not Properly Evaluate the Alternatives' Comparative Merits

Respondents correctly note that an EIS must "[d]evote substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits." Resp. 37 (quoting 40 C.F.R. § 1502.14(b)). This is the hallmark of an alternatives analysis, but did not occur here. The FEIS evaluated the major route alternatives separately, against inconsistent factors, and with opaque reasoning as to the basis for the decision made. Br. 58-65. This analysis entirely failed to "objectively evaluate" and "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issue and providing a clear basis for choice. . . ." 40 C.F.R. § 1502.14.

Indeed, the FEIS's repeated conclusion that alternatives failed to "confer a significant environmental advantage," *see, e.g.*, ER608, provides not so much a "clear basis for choice" but rather the inference that the preferred route was the foreordained frontrunner and other routes were arbitrarily rejected for failing to overcome some threshold that this preference provided. *See* ER894-95 ("We stick with Ruby's proposal unless there is a compelling reason to change. . . ."). This is what NEPA attempts to avoid: by presenting all alternatives in comparative form,

the decisionmakers—and public—are provided with an objective, clear picture of the alternatives' "comparative merits." While Respondents attempt to disclaim this duty because the Pipeline is "nearly 700 miles long," Resp. 37, this is precisely the scenario to which comparative evaluation brings clarity. Without such objective evaluation along consistent factors, the decision is made in the dark against any combination of factors, and the basis for choice appears irrational or absent.

This is particularly important when combined with BLM's wholesale failure to examine the relative *severity* of impacts: for example, why do greater impacts to pronghorn and pygmy rabbit habitat outweigh avoidance of impacts to sage-grouse and mule deer habitat? ER602; ER605. The reviewer is never told what impacts are most severe or important and accordingly the reasoned basis for the decisionmaker's choice. *See HSUS*, 626 F.3d 1040, 1048 (9th Cir. 2010) (internal citations omitted). In short, the FEIS presented one frontrunner route and summarily rejected nearly every other major alternative separately, against inconsistent factors, and for unclear reasons. This is not the clarity NEPA requires; rather, this is arbitrariness.

5. BLM Failed to Independently Verify Ruby's Cost Estimates

Neither Respondents nor Ruby are able to show that BLM complied with its duty to independently verify Ruby's cost estimates of the major route alternatives. Respondents correctly recognize that an agency must "independently evaluate the

information submitted and shall be responsible for its accuracy." Resp. 43 (quoting 40 C.F.R. § 1506.5(a)). Beyond this, their protests fail.

First, the cases Respondents cite are readily distinguishable—and lead to the opposite conclusion. *River Road Alliance, Inc. v. Corps of Engineers* approved the Corps' reliance on a developer's review of alternative sites, since no rebuttal had been raised. 764 F.2d 445, 452-53 (7th Cir. 1985). Notably, the Seventh Circuit later distinguished this standard where objections *had been* raised as to the relied-upon information. *Van Abbema v. Fornell*, 807 F.2d 633, 639-40 (7th Cir. 1986) ("[T]he Corps must undertake some independent effort to verify or discredit the challenged material."). Petitioners have highlighted similarly significant concerns. Br. 67; ER893; ER670.[16]

More extraordinarily, Respondents' citation—and, in fact, parenthetical—of *Mid-States Coalition for Progress v. Surface Transportation Board* highlights what BLM did not do here: "critically evaluate" the project costs. 345 F.3d 520, 547

[16] Respondents complain of "selective" citation of staff comments, but offer no evidence that such citation is, in fact, selective. Resp. 33 n.9. Moreover, the authority they cite for the premise that "statements of individuals cannot be used to impeach the agency's official statement of its rationale" is entirely inapplicable. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife* confronted "the fact that the agencies changed their minds—something that, as long as the proper procedures were followed, they were fully entitled to do." 551 U.S. 644, 658-59 (2007); *see also Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1169 (9th Cir. 2010). By contrast, the issue here is that BLM failed to offer any "meaningful response to serious and considered comments," thereby violating BLM's NEPA obligations. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492-93 (9th Cir. 2011).

(8th Cir. 2003); Resp. 45. The critical evaluation there involved the agency's *hiring of an engineering firm*, which analyzed and verified the data at issue. *Mid-States*, 345 F.3d at 547. Here, no such critical evaluation took place. Although Respondents submit FERC's requests and Ruby's filings as to project costs, *see* Resp. 43-44, these provide no evidence that FERC or BLM *independently evaluated or verified any of the information*. They demonstrate nothing if not whole-hearted reliance on Ruby's information—even against specific objections. *See* Br. 67. Indeed, the only response to objections appears to be that "Ruby filed this information under oath. No change to EIS necessary." ER893.

Rather than being "contrary to the record," Resp. 45, Petitioners' argument is entirely *supported* by what the Record demonstrates: blind reliance and an absence of critical evaluation, even against objections.

B. BLM FAILED TO CONDUCT A PROPER CUMULATIVE EFFECTS ANALYSIS

BLM failed to analyze the Pipeline with the effects of "past, present, and reasonably foreseeable future actions," and specifically to provide "a sufficiently detailed catalog of past, present, and future projects. . . ." *See* Br. 67-71; 40 C.F.R. § 1508.7; *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005). Despite Respondents' attempts to cite unavailing case law and excerpts of the Record, this failure stands unrebutted.

First, the "aggregate" standard does nothing to affect the deficiencies in BLM's analysis. Indeed, aggregating only applies to *past* projects or effects. *League of Wilderness Defenders v. Allen*, 615 F.3d 1122, 1135-36 (9th Cir. 2010) ("not required to list or analyze the effects of individual past actions . . . .") (quoting Council on Environmental Quality memorandum). An agency still must specifically identify and catalogue relevant *present and future actions*. Moreover, the "aggregate" standard merely *clarifies* this Court's "repeatedly held" requirement "that general statements about prior projects affecting environmental conditions are insufficient; 'quantified or detailed data' about the effects of specific projects is necessary." *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 666 (9th Cir. 2009) (internal citations omitted). While past actions may be analyzed in the aggregate, *id.* at 666-67, an agency is not absolved of providing detailed or quantified analysis. Rather, it need not delve into the *individual* details of *specific* past projects.

BLM's analysis falls far short of this mark. Consider, for example, the impacts of grazing on the sagebrush steppe. Br. 70. While aggregating and discussing the effects elsewhere in the FEIS are permissible, these effects are not in fact discussed elsewhere. For example, while the FEIS notes that grazing has occurred "for more than a century," ER640, there is no detailed and quantified analysis of its *effects* on the sagebrush steppe, aggregated or otherwise. Nor is

there analysis of the "existing condition" in light of the effects. *Castaneda*, 574 F.3d at 667. The closest BLM comes to providing such detail is noting that wildfires—alone—have resulted in a 2.5-million acre net loss of key sagebrush habitat in Nevada. ER645. This is precisely the sort of information necessary to meaningful analysis.

Second, the FEIS fails to examine future cumulative impacts of grazing. Respondents attempt to explain this away, claiming that "speculating on whether grazing policies would change 'is beyond the scope of this EIS.'" Resp. 49 (quoting ER640). Even accepting this premise, the FEIS does not attempt to explore grazing impacts under current policy, even though it is "likely to continue in the project area into the foreseeable future." ER640. While BLM considers grazing a predictable "part of the ecological regime," it constructs a straw man of changing policies and shirks any form of future cumulative effects analysis.[17]

Finally, Respondents misconstrue Petitioners' claims regarding the cumulative impacts of mining. Resp. 49 n.13; Br. 70 n.12. While 1,500 feet may

[17] Respondents' supporting citation is readily distinguishable. *League of Wilderness Defenders-Blue Mtns. Biodiversity Project* found proper not examining the future cumulative impacts of grazing because the agency was actively developing "alternative grazing regimes," which would "be developed and considered under a separate environmental analysis and decision." 549 F.3d 1211, 1220 (9th Cir. 2008). That is, the agency was actively making yet-finalized changes to the regimes, and *future analysis was forthcoming* within a year. *Id.* By contrast, BLM's excuse here is that grazing policy may change at some indeterminate time, thereby excusing it from *any* analysis.

be a reasonable scope when examining impacts *on* mining, it is unreasonable for analyzing the impacts *of* mining *on the sagebrush steppe*—impacts BLM entirely neglected, against repeated objections. *See* Br. 70 n.12; ER996; ER1141; ER1158; ER1269; *see also* ER406-08. Though Respondents claim that past mining impacts are "subsumed in the discussion of those resources," they offer no supporting examples. Resp. 49 n.13. Furthermore, Respondents' assertion that Petitioners failed "to identify a single reasonably foreseeable future mining operation" is belied by Petitioners' explicit identification of such projects. *Id.*; Br. 70 n.12 ("'clear errors' in missing unpatented mining claims"); ER406-08.

CONCLUSION

In light of the foregoing, Petitioners respectfully request that the Court set aside the BLM ROD, BiOp, and NWP authorization.

Respectfully submitted the 26th day of April, 2011,

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CERTIFICATE OF COMPLIANCE

This joint reply brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5)and (6). This brief is 8,389 words, excluding the portions exempted by Fed. R. App. P.32(a)(7)(B)(iii). I relied on my word processor to obtain the word count. Because these consolidated cases are expedited, Petitioners filed a motion for enlargement of 1,400 words pursuant to Ninth Circuit Rule 28-4 seven days prior to today's date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on *April 26, 2011*.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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