

December 2, 2013

Via Electronic Filing

NEPA Coordinator
Bureau of Land Management
Greater Sage Grouse EIS
2815 H Road
Grand Junction, CO 81506

Re: Northwest Colorado Greater Sage Grouse Draft Land Use Plan Amendment and Environmental Impact Statement

Dear Sir or Madame:

Nucor Corporation (Nucor) would like to take this opportunity to express its concerns regarding the Northwest Colorado Greater Sage Grouse Draft Land Use Plan Amendment and Environmental Impact Statement (DLUPA/EIS). Nucor adopts those comments submitted by Encana (Encana Comments) and the American Petroleum Institute, Western Energy Alliance, Independent Petroleum Institute of America and the Colorado Oil & Gas Association (API Comments). In an effort to avoid redundancy, Nucor only summarizes some of the comments below.

Nucor supports the Bureau of Land Management's (BLM's) and U.S. Forest Service's (FS's) efforts to draft new management procedures to conserve and protect the Greater Sage Grouse and its habitat in northwest Colorado in order to demonstrate to the U.S. Fish & Wildlife Service (FWS) that listing the species under the Endangered Species Act (ESA) is unnecessary. However, among other things, Nucor has concerns regarding the scientific data relied upon in developing the DLUPA/EIS alternatives and management practice recommendations and the one-size-fits-all approach of those practices in light of the geographic extent of the DLUPA/EIS.

Rather, the BLM and FWS should consider more flexible alternatives, instead of relying on a general “nationwide” approach developed in the absence of those local, specific circumstances.

Section 4 of the Endangered Species Act (ESA) states that the Secretary of Interior “shall designate critical habitat, and make revisions thereto . . . on the basis of the *best scientific data available* and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.”¹

In deciding what constitutes the “best scientific data available,” agencies are required to seek out and consider all existing scientific data, and may not ignore existing data.² In considering the data, the agency must “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”³ An agency’s failure to “respond meaningfully” to objections and “answer objections that on their face seem legitimate” renders a final decision arbitrary and capricious.⁴ Therefore, an agency must seek out and respond in writing to all existing legitimate scientific data concerning the designation of critical habitat in coming to its final designation of critical habitat.

The NTT Report

The DLUPA/EIS references and adopts many of the recommendations set forth in the National Technical Team’s *A Report on National Greater Sage-Grouse Conservation Measures* (the NTT Report). The NTT Report is a “nation-wide document” and does not take into account

¹ 16 U.S.C. § 1533(b)(2) (2003) (emphasis added).

² *Heartwood, Inc. v. United States Forest Service*, 380 F.3d 428, 436 (8th Cir. 2004).

³ *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

⁴ *Id.*

area-specific factors that are present in Northwest Colorado. As the NTT Report acknowledges, the

conservation measures described in this report are not an end but, rather, a starting point to be used in BLM's planning processes. Due to time constraints, they are focused primarily on priority sage-grouse habitat areas. General habitat conservation areas were not thoroughly discussed or vetted through the NTT, and the concept of connectivity between priority sage-grouse habitat areas will need more development through the BLM planning process.

A Report on National Greater Sage-Grouse Conservation Measures, p. 5 of 74 (December 21, 2011).

On its face, the NTT Report acknowledges that it is not intended to be used as a final template for BLM land use planning purposes. Unfortunately, BLM has done just that; it has adopted the most stringent recommendations set forth in the report in its alternatives and management practice recommendations.

In addition, the NTT Report recommendations are to be limited to "priority" habitat, which is limited to areas including "breeding, late brood-rearing, winter concentration areas, and where known, migration or connectivity corridors." *Id.* at 7 of 74. The recommendations do not include general habitat areas. Nevertheless, it appears that the DLUPA/EIS includes priority habitat *and* general habitat and applies the recommendations to the same despite the fact that the NTT Report expressly states that such habitat was not discussed. DLUPA/EIS, p. 6 (August, 2013).

Also, the NTT Report has a number of technical errors such as no sources available for review and misstating conclusions in cited works. The NTT Report fails to address papers and reports on mitigation measures undertaken by the oil and gas industry as well as findings in studies regarding impacts of oil and gas development (i.e., greater geographic dispersion of sage-

grouse). The NTT Report fails to meet the requirement that it seek out and consider pertinent scientific data, as is required if it is to be relied upon in this process.

The COT Report

The DLUPA/EIS alternatives were developed to address threats and conservation objectives set forth in the USFWS *Greater Sage-Grouse Conservation Objectives Final Report* (the “COT Report”). Nucor has grave concerns regarding the scientific viability of this document and does not believe that it meets the “best scientific data available” criterion for the same reasons set forth in the API Comments (for example, the COT Report’s reliance on flawed data, assumptions and methodology utilized in information upon which it relies and lack of unbiased peer review).

Four-Mile NSO Buffers

The DLUPA/EIS proposes a four-mile No Surface Occupancy (NSO) buffer around active leks during lekking, nesting and early brood rearing in designated habitat. The DLUPA/EIS relies on the NTT Report for the proposition that oil and gas activities disturb sage-grouse behavior at distances of up to four miles. The NTT Report’s four-mile NSO buffer conclusion is based on several studies that suffered from flawed methodologies, among other things. In addition, the four-mile NSO buffer is impractical in that it effectively bars activity within approximately 50 square miles of each lek. More alarmingly, there is no mechanism for determining, on a site-specific level, whether there is sage-grouse habitat within the “automatic” NSO buffer.

Finally, the DLUPA/EIS alternatives considered only include the four-mile NSO buffer. None of the alternatives provide for a buffer of a different size or for a mechanism to address on-

the-ground circumstances, despite the fact that there is no data that demonstrates that the arbitrary four-mile NSO buffer would address any of the concerns raised in the NTT Report.

Disturbance Caps

The DLUPA/EIS imposes disturbance caps of less than five percent (anthropogenic disturbance) and less than thirty percent (total disturbance). These caps are far too restrictive and are unsupported by *any* scientific data. For example, the NTT Report fails to provide any data in support of the conclusion that these caps are necessary for or, in fact, would have any impact on, the protection of sage-grouse habitat. Just as with the four-mile NSO buffer, the disturbance cap recommendation fails to account for area-specific conditions. In addition, the DLUPA/EIS provides that the agencies may apply surface disturbance on private lands against the proposed surface caps on public lands. This has the effect of placing federal leaseholders at a severe disadvantage as the caps apply only on public lands and any development on public lands would “absorb” private land development.

Noise Impacts

The DLUPA/EIS relies on the NTT Report for the proposition that oil and gas development, and specifically noise from such development, will impact sage-grouse behavior. As has been stated above, reliance on the NTT Report is questionable based on its failure to consider the “best scientific data available.” The NTT Report either mischaracterizes the findings in cited studies or fails to consider more recent studies which reach the opposite conclusions from those in the NTT Report.

Existing Rights

As currently written, it appears that the DLUPA/EIS has the potential to interfere with existing lease rights. This is especially true given the overly-burdensome four-mile NSO buffer,

disturbance caps and noise restrictions, among other things. BLM must recognize that, under Federal Land Planning Management Act (FLPMA), it cannot interfere with existing lease rights and that BLM cannot unilaterally change the conditions or terms of those leases.

Stipulations for Future Oil and Gas Leases

As currently written, the proposed alternatives and management practices in the DLUPA/EIS will impose severely restrictive stipulations on future oil and gas development. This runs afoul of the Energy Policy Act of 2005, which, in effect, required that lease stipulations be applied consistently and are “only as restrictive as necessary.” Energy Policy Act of 2005, Pub. L. No. 109-58, § 363(b)(3), 119 Stat. 594, 722 (2005). As demonstrated above and in the Encana Comments and API Comments, the proposed management practices fall far outside the “restrictive as necessary” statutory limitation.

Conclusion

For the above reasons and those set forth in comments submitted by Encana and the American Petroleum Institute, Western Energy Alliance, Independent Petroleum Institute of America and the Colorado Oil & Gas Association, Nucor believes the DLUPA/EIS has significant and fatal flaws. The one-size-fits-all approach taken by the DLUPA/EIS in reliance upon the NTT Report, among others, in developing alternatives and management recommendations fails to take into consideration local conditions and circumstances. In addition, as the Encana Comments and API Comments amply demonstrate, the scientific data relied on by the NTT Report, the COT Report and others does not meet the required “best scientific data available” standard, as required by the ESA. Inasmuch, the BLM should not rely on these documents in developing alternatives and management practices. Rather, BLM should



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re-evaluate its alternatives and revise its preferred alternative to be more flexible. Nucor appreciates this opportunity to provide these comments and looks forward to your response.

Sincerely,

Jeff Braun
Manager of Environmental Affairs
Nucor