

**WATER AND POWER
LAW GROUP PC**

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Via First Class and Electronic Mail

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Re: Notice of Intent to Amend a Portion of the Arizona Strip Field Office Resource Management Plan Related to the Kanab Creek Area of Critical Environmental Concern, Arizona

Dear Ms. Christian:

American Rivers provides these comments in response to the Bureau of Land Management's (BLM) "Notice of Intent to Amend a Portion of the Arizona Strip Field Office Resource Management Plan Related to the Kanab Creek Area of Critical Environmental Concern, Arizona" (Notice) published on June 22, 2018.¹

According to the Notice, the UBWR's proposed Lake Powell Pipeline (LPP) route would traverse approximately 1.5 miles of the Kanab Creek Area of Critical Environmental Concern (ACEC). More specifically, one mile of the pipeline would run within an existing utility corridor that overlaps the ACEC, but the remaining one-half mile would cross the ACEC *outside* of the designated utility corridor.² The Notice states that routing the pipeline outside of the utility corridor conflicts with the Arizona Strip Field Office (FO) Approved Resource Management Plan (Jan. 29, 2008) (RMP),³ but could avoid construction in "steep rugged terrain."⁴ For this reason, BLM proposes to amend the RMP to:

¹ 83 Fed. Reg. 29134.

² *Id.*

³ Available at <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=142108>.

⁴ 83 Fed. Reg. 29134.

(1) Resolve the conflict between the designated Section 368 utility corridor and the ACEC decisions; and (2) Determine whether to allow the proposed Lake Powell Pipeline outside of the utility corridor, and if so, change the visual resource management class for that portion of the ACEC from Class II ... to either Class III or Class IV in order to be compatible with utility development.⁵

We understand that amendment of the RMP would be followed by BLM's consideration of a right-of-way grant to UBWR.

As described below, American Rivers is concerned that amendment of the RMP to accommodate the LPP Project will adversely affect wildlife, including the endangered southwest willow flycatcher (SW flycatcher), and riparian, scenic, and cultural resources. These concerns are heightened by the UBWR's inability to date to demonstrate that the LPP Project is needed to satisfy projected demand for water supply or is economically feasible.⁶

American Rivers

American Rivers is a national, non-profit, 501(c)(3) conservation organization with an office in Denver, Colorado, offices nationwide, and headquarters in Washington, D.C. It serves more than 200,000 members and supporters nationwide, and over 20,000 members in the seven-state Colorado River Basin region. It is dedicated to protecting wild rivers, restoring damaged rivers, and conserving clean water for people and nature.

In the Colorado River Basin, American Rivers is focused on advancing sustainable water supply solutions so cities, farms, and fish and wildlife can thrive. Core to this objective is working to promote alternatives to large trans-basin diversion projects, like the proposed LPP Project, which tend to be costly and environmentally destructive. Throughout the Colorado River Basin, American Rivers is actively involved in system conservation in order to maintain water levels in Lake Powell and Lake Mead adequate to serve hydropower generation, water deliveries for municipal and agricultural uses, and flows for endangered species recovery.

American Rivers is concerned that the proposed LPP Project is inconsistent with efforts throughout the Colorado River Basin to reduce consumptive uses of water in order to defend against potential shortage, meet future demand, and adapt to climate change. It is also concerned that the construction and maintenance of hundreds of miles of pipeline will adversely affect riparian habitats that support wildlife and imperiled species like the endangered SW flycatcher.

Comments

Under its planning regulations, BLM may amend a resource management plan following environmental analysis and evaluation of the effect of the amendment on the plan.⁷ According to

⁵ *Id.*

⁶ American Rivers, "Comments regarding Utah Board of Water Resources' Socioeconomic Information," eLibrary no. 20171222-5045 (Dec. 21, 2017).

⁷ 43 C.F.R. § 1610.5-5.

the “Memorandum of Understanding between the Federal Energy Regulatory Commission [FERC] and the Bureau of Land Management for the Lake Powell Pipeline Project EIS” (MOU), BLM and FERC have agreed to joint preparation of an Environmental Impact Statement (EIS) that will satisfy their respective obligations to comply with the National Environmental Policy Act (NEPA). Under the MOU, BLM is the lead agency for purposes of preparing the environmental analysis for any land use plan amendments required for the LPP Project.⁸ Scoping Document 2 states that the FEIS will include “Effects of the project on important natural habitats, including the Kanab Creek Area of Critical Environmental Concern.”⁹

The purpose of NEPA’s requirement that federal agencies prepare an EIS prior to any decision that could significantly affect environmental quality is “to guarantee that agencies take a ‘hard look’ at the environmental consequences of proposed actions utilizing public comment and the best available scientific information.”¹⁰ “The hallmarks of a ‘hard look’ are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms.”¹¹

American Rivers provides the following comments for BLM’s consideration as it carries out its responsibilities under NEPA and its planning regulations.

1. BLM Should Consider a Reasonable Range of Alternatives to the Proposed Amendment.

Under its planning criteria, BLM is required to consider “all reasonable resources management alternatives and develop several complete alternatives for detailed study.”¹² This includes but is not limited to the “no action” alternative.¹³ BLM is also required “to estimate and display the physical, biological, economic, and social effects of implementing each alternative considered in detail.”¹⁴

American Rivers requests that the BLM consider a no action alternative that excludes construction of the pipeline on lands administered under the RMP. BLM’s alternatives analysis should serve to inform the public regarding the impacts of construction versus no construction on lands administered under the RMP, not just the differences in incremental impacts between

⁸ “Memorandum of Understanding between the Federal Energy Regulatory Commission and the Bureau of Land Management for the Lake Powell Pipeline Project EIS,” eLibrary no. 20090310-0059 (Mar. 10, 2009), p. 2.

⁹ FERC, “Scoping Document 2,” eLibrary no. 20080821-3005 (Aug. 21, 2008), p. 30.

¹⁰ *Colorado Env’tl. Coal. v. Dombeck*, 185 F.3d 1162, 1171–72 (10th Cir. 1999) (citing *Bissell v. Penrose*, 49 U.S. 317, 350, 12 L. Ed. 1095 (1850)); see also *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983). The purpose of taking a “hard look” is not “merely to force the agency to reconsider its proposed action, but, more broadly, to inform Congress, other agencies, and the general public about the environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action.” *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 296 (D.C. Cir. 1988).

¹¹ *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 187 (4th Cir. 2005) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989) (“*Robertson*”)).

¹² 43 C.F.R. § 1610.4-5.

¹³ *Id.*

¹⁴ 43 C.F.R. § 1610.4-6.

constructing the entire pipeline through the utility corridor and constructing 0.5 miles of the pipeline segment outside of the utility corridor.¹⁵

2. BLM Should Fully Consider the Potential Effects of the Proposed Amendment and Alternatives.

Under BLM’s planning criteria, it must fully consider the potential effects of the proposed amendment on the plan. Consistent with this requirement, BLM’s effects analysis should be provided in the context of the management goals stated in the RMP.

American Rivers requests that the Arizona Strip FO’s analysis address how the proposed plan amendment would affect BLM’s ability to achieve the management goals it established in the plan, which include:

1. The variety of remote natural and social settings will be managed to preserve essentially natural appearing landscapes. Visitors will have the opportunity to experience adventure, beautiful vistas, retreat from the pressures of modern life
....
2. The Arizona Strip FO lands will be managed to balance protection of the natural and cultural resources with recreational, community, commercial, scientific, and social interests and needs.
3. The [BLM] will provide long-term protection and sustain the health and diversity of the public lands and resources that they manage for the use and enjoyment of present and future generations.
4. The BLM will work cooperatively ... to achieve the above goals.¹⁶

The RMP states desired future conditions, and management actions intended to achieve such conditions, in furtherance of the management goals. American Rivers is concerned that the LPP Project’s construction through the Kanab Creek ACEC will impair BLM’s ability to achieve relevant desired future conditions and management goals. For example, the RMP establishes the following desired future conditions with respect to special status species and specifically riparian-dependent special status birds like the SW flycatcher:

A. DESIRED FUTURE CONDITIONS	
DFC-TE-01	All Federally listed threatened or endangered species found in the Arizona Strip FO will be recovered.
DFC-TE-03	The Arizona Strip will provide a block of remote, contiguous habitat that will serve as refugia for populations of special status species.
DFC-TE-33	No net loss will occur in the quality and quantity of suitable habitat for riparian-dependent special status bird species within the Arizona Strip FO.

¹⁵ See 40 C.F.R. §1502.14 (the alternatives analysis “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.”).

¹⁶ RMP, pp. 2-4 – 2.5.

DFC-TE-35	Riparian areas will be in proper functioning condition and be of sufficient quantity and quality to provide adequate foraging areas for SW flycatcher ... and other special status birds.
DFC-TE-36	SW flycatcher and Yuma clapper rail will be recovered and delisted.
DFC-TE-37	Riparian areas that can physically support SW flycatcher habitats due to floodplain width and gradient will attain the vegetation structure, plant species diversity, density, and canopy cover to be suitable habitat.
DFC-TE-38	Riparian vegetation will be sufficiently dense and structurally complex to minimize or eliminate the effects of SW flycatcher predators and preclude brown-headed cowbirds from finding SW flycatcher nests.
DFC-TE-41	Potential roosting and nesting sites for riparian dependent special status birds will be abundant.

It also establishes the following management actions (MA) intended to achieve the desired future conditions.

MA-TE-03	Management of special status species will be consistent with biological opinions, recovery plans, conservation strategies, BLM policies, and the ESA, and will be consistent with achieving all DFCs, to the extent possible.
MA-TE-17	New land use authorizations will only be allowed within listed species habitat when no reasonable alternative exists and impacts to the species and their habitat can be mitigated. New rights-of-way (ROW) will be routed away from high density listed species' populations and along the edges of avoidance areas.
MA-TE-82	<ul style="list-style-type: none"> ▪ Riparian areas will be managed to achieve and/or maintain proper functioning condition in accordance with prescriptions described in the vegetation management section... ▪ Suitable nesting riparian habitats for riparian-dependent special status bird species will be maintained or increased. Suitable structural characteristics may be achieved through restoring, maintaining, enhancing, and creating habitat. Management will aim for large, contiguous blocks of habitat rather than for small fragmented areas. Connectivity to currently isolated suitable sites will be enhanced. The use of buffer zones between riparian habitats and adjacent upland areas will be encouraged....¹⁷

¹⁷ RMP, pp. 2-38, 2-40, 2-55 – 2-56.

The RMP designated the Kanab Creek ACEC at 13,148 acres “for the protection of endangered SW flycatcher habitat.”¹⁸ It stated management actions in addition to those described above that apply specifically to the ACEC.¹⁹

BLM’s analysis should address how the proposed amendment and alternatives would affect BLM’s ability to achieve the desired future conditions for special status species, specifically SW flycatchers, and otherwise would be consistent with relevant management actions and goals.

The RMP also designates the Kanab Creek ACEC for “riparian, scenic, and cultural resources....”²⁰ BLM’s effects analysis should evaluate how the proposed amendment and alternatives would affect BLM’s ability to achieve the desired future conditions for riparian, scenic and cultural resources, and otherwise would be consistent with management actions and goals established for those resources.

3. BLM Should Provide a Robust Discussion of Potential Mitigation Measures.

The Council for Environmental Quality’s (CEQ) regulations implementing NEPA make clear that the “hard look” standard under NEPA applies to the agency’s consideration of measures to mitigate the environmental effects of the proposed and alternative actions.²¹ Without a reasonably complete discussion of possible mitigation measures, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.²²

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) *with Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where “[e]ach mitigating process was evaluated separately and given an effectiveness rating”). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. *Methow Valley*, 490 U.S. at 351–52, 109 S.Ct. 1835 (citing 42 U.S.C. § 4332(C)(ii)). A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination.²³

¹⁸ RMP, p. 2-57.

¹⁹ *See id.* at 2-125.

²⁰ RMP, p. 2-120.

²¹ 18 C.F.R. § 380.1 (“The Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission.”).

²² *Robertson*, 490 U.S. at 352.

²³ *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep’t of Interior*, 588 F.3d 718, 727 (9th Cir. 2009); *see also Pac. Coast Fed’n of Fishermen’s Associations v. Blank*, 693 F.3d 1084, 1103 (9th Cir. 2012).

CEQ's regulations governing procedures for preparing a final EIS require that the statement include "appropriate mitigation measures not already included in the proposed action or alternatives."²⁴ The regulations define mitigation as more than any improvement. "Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.²⁵

Given that the proposed amendment would affect lands specially designated for the protection of endangered SW flycatcher and riparian, scenic, and cultural resources, it is critical that the EIS consider the availability of measures that could effectively mitigate the likely impacts of constructing and maintaining the LPP Project right-of-way for at least the next 30-50 years, and likely longer.

²⁴ 40 C.F.R. § 1502.14(f).

²⁵ 40 C.F.R. § 1508.20.

Conclusion

American Rivers thanks BLM for considering these comments.

Respectfully submitted,



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