

**Defenders of Wildlife
Wyoming Outdoor Council
Oil and Gas Accountability Project
Southern Utah Wilderness Alliance
Colorado Environmental Coalition
U.S. PIRG**

September 28, 2001
Chair
Council on Environmental Quality
Executive Office of the President
17th and G Streets NW
Washington, DC 20503
Attention: Task Force

RE: Request for comments on the implementation of Executive Order 13212, “Actions to Expedite Energy-Related Projects”

On behalf of our hundreds of thousands of members nationwide, we submit the following comments solicited by the Council on Environmental Quality (CEQ) on the nature and scope of the federal interagency energy task force (Task Force) established under Executive Order 13212 (Executive Order) to “expedite” energy projects (66 Federal Register 43586). Federal agencies play a critical role in protecting wildlife, water and air quality, open spaces, archeological and historical resources, and public health and safety. We are concerned that the Executive Order and its implementation will compromise many of the resources federal agencies are mandated to protect.

I. General Comments

As the Task Force is developed, it is critical for the CEQ to bear in mind that a number of laws establish the mission, substantive requirements, and decision-making procedures for federal agencies. The Executive Order cannot supercede or interfere with those statutory duties. To use the Forest Service and Forest Service lands as but one example, the 1897 Organic Act, Multiple Use and Sustained Yield Act, National Forest Management Act, Endangered Species Act, and Clean Water Act, to name but a few relevant statutes, contribute to the mission of the Forest Service, as well as establish substantive management requirements and decision-making processes. This mission and the attendant duties are broad, meaning the Forest Service must ensure that many resources—not just energy resources—are fully considered and protected. The Forest Service Organic Act of 1897 and the Multiple Use and Sustained Yield Act make it abundantly clear that the Forest Service has to balance many competing values and no single resource takes priority:

“No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States” (16 U.S.C §475).

“It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes” (16 U.S.C §528).

Energy production does not enter either of these lists of resources. The Forest Service has a body of regulations and agency manual provisions that try to ensure these broad mandates are balanced and met. The Task Force, however, is narrowly focused on energy production and expediting it. The broad mission of the Forest Service, established by Congress, must not and cannot be altered or diminished by the Task Force, which was established by Executive Order.

Much the same is true for many other federal land management agencies, including the Bureau of Land Management (BLM), Fish and Wildlife Service, and Army Corps of Engineers, among others. The Federal Land Policy and Management Act (FLPMA) of 1976 guiding the BLM, the largest federal land manager and the federal land system with the most energy resources, declares:

“that it is the policy of the United states that... (7) ... management be on the basis of multiple use and sustained yield unless otherwise specified in law; (8) the public lands be managed in a manner that *will protect* the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, *will preserve* and protect certain public lands in their natural condition; that *will provide* food and habitat for fish and wildlife and domestic animals; and that *will provide* for outdoor recreation and human occupancy and use... (12) the public lands be managed in a manner *which recognizes* the Nation’s need for domestic sources of minerals, food, timber, and fiber from the public lands...” (43 U.S.C §1701) (emphasis added).

Not only is the Bureau of Land Management charged with balancing multiple uses of federal lands, priority is placed on environmental quality, fish and wildlife protection, and outdoor recreation, whereas the public lands need be managed only in a way that “recognizes” the need for resource extraction of minerals. Just as importantly, the Executive Order and the Task Force, in any effort to expedite permitting or to streamline projects, cannot override FLPMA’s proscription against unnecessary environmental harm: The Secretary of the Interior, in managing public lands, “shall . . . take any action necessary to prevent unnecessary or undue degradation of the lands. 43 U.S.C. § 1732(b).

That federal agencies have priorities that must be executed other than or in addition to

energy production has been reiterated by the courts. For example, relative to the duty of all federal agencies to ensure protection of threatened or endangered species, the Supreme Court stated in TVA v. Hill that, “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . .” and that Congress had determined endangered species have “incalculable” value. The Endangered Species Act mandates that “All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species” (16 U.S.C. §1536(a)(1)). The Task Force cannot alter this prioritization.

Similarly, in the Federal Register notice requesting comment on the Task Force, it is stated that the Task Force will use an approach that “addresses *impediments* to federal agencies’ completion of decisions about energy-related projects in a way that *will* increase the production, transmission, and conservation of energy” (emphasis added). This statement raises issues regarding the objectivity with which the CEQ is determining Task Force duties. We believe the choice of the word “impediment” says much about the thinking that is apparently going into development of the Task Force. Apparently anything that slows up (i.e., impedes) energy production might be modified to expedite production. But certainly only unnecessary and legally unrequired impediments can be eliminated. The CEQ and the Task Force should define in advance what is meant by impediments, and make a clear distinction between impediments that can be done away with or modified and legal requirements that must be followed. These ground rules need to be made clear up front, not after the fact, and certainly not on a case-by-case basis, which would be an approach fraught with opportunity for arbitrary decision making. Likewise, if the Task Force and CEQ are going to help “expedite” energy projects for agencies ranging from the Army Corps of Engineers and Bureau of Reclamation to the Forest Service and Fish and Wildlife Service, it is imperative that sufficient expertise be available on the Task Force and/or working group to understand and meet all statutory duties for these agencies. These duties include meeting the mandates of the Clean Air Act, Clean Water Act, and Endangered Species Act, among many other legal duties. The CEQ should explain clearly how this expertise will be marshaled and brought to bear on the issues raised in any given project.

The Federal Register notice requesting comments makes this troubling statement: “The Task Force will help manage the federal agency decision-making process for setting priorities, scheduling activities in accordance with those priorities, identifying staffing and resource needs, facilitating issue resolution, and measuring the achievements of federal agencies in implementing Executive Order 13212.” This statement indicates the Energy Task Force chaired by the CEQ is going to be directly involved in the day-to-day micromanagement of agencies with the sole purpose of its involvement being to hasten energy production. In addition to the over-emphasis on energy to the exclusion of other public interests, this statement is troubling for several reasons. First, it implies that endangered species experts, for example, might be diverted from an important effort to save a

species in an area where there are no real energy issues to an area that has energy issues, regardless of the relative gravity of the endangered species issue involved. For land management agencies, this could easily lead to a myopic view where energy projects guide the management of other uses instead of comprehensively evaluating multiple uses to determine the appropriateness and scope of energy projects. Efforts to expedite energy resource development could siphon resources from many other equally crucial (and often statutorily required) projects. That must be avoided if, for example, endangered species “train wrecks” are to be prevented. CEQ should explain how it will prevent these kinds of misallocations of resources.

The statement that the Task Force will “help” agencies in setting priorities and scheduling activities to meet those priorities also is troubling and needs explanation. The BLM, Forest Service, and Fish and Wildlife Service all have statutorily prescribed planning processes to do just these things. The CEQ must ensure that the planning processes of land management agencies are not interfered with, overridden, or otherwise usurped by the Task Force. Rather, the CEQ should work with land management agencies as appropriate to ensure that federal land planning adequately protects the environment, ecological, and wildlife values of the public’s land. This is essential for meeting the requirement in the Executive Order that energy projects can only be expedited if safety, public health, and environmental protections are maintained, and these planning processes are critical means by which land management agencies protect the environment.

The Federal Register Notice implies that certain federal lands will be designated for priority treatment (i.e., energy projects in these areas will be expedited) and that those areas can be “nominated” for priority treatment by interested parties, including industry. The CEQ should address the extent to which federal land management agencies managing federal lands will determine what lands they manage will receive priority for energy production versus the extent to which any area given priority was nominated by an entity outside the federal government. The process by which any such nominations by outside entities are transformed into actual priority areas should be made transparent. Similarly, if an area managed by a land management agency is given priority because of the recommendations of other departments or agencies—including offices in the White House—that too should be made clear. Equal opportunity and weight should be given to nominations opposing energy projects or urging certain areas to be put off-limits to energy exploration and development.

As we have stated above, federal agencies operate under a variety of important and legitimate mandates. That one mandate must be accounted for in the decision making of another is a measure of our democracy. This inherently makes decision making complex and takes time. The best way to increase the speed and efficiency of federal decision making and carry out the laws of the United States is to provide federal agencies sufficient budgets and personnel to meet all their mandates, including permitting energy development projects. Land managing agencies such as the BLM and the Forest Service should be given sufficient budgets to update their land use plans that guide energy development on the lands they

manage. We ask that the CEQ address the pros and cons of expediting energy projects through these means, and to what extent this approach is being used.

II. Comments on the Oil and Gas Extraction Permitting Process

The Federal Register notice asks for recommendations on “improving agency activities, consistent with the purposes and policies the National Environmental Policy Act [NEPA]” as they relate to energy projects and permitting. One area that needs improvement is the onshore oil and gas permitting processes on public lands administered by the BLM and the Forest Service. This permitting process needs improvement relative to NEPA compliance; public involvement in the process; inspection, enforcement, and monitoring; and coordination among interested parties.

1. Tiering of NEPA Documents

Generally there is a multi-stage process before oil and gas exploration and development can legally occur on our public lands: (1) land use planning; (2) the sale of oil and gas leases; (3) NEPA analysis of specific oil and gas projects as submitted by industry on a valid lease; and (4) approval of an Application for Permit to Drill (APD). This last stage, approval of an APD, presents the Task Force with an important opportunity to oversee improvements in the permitting process that would be consistent with, and are required by, NEPA.

“Tiering” in NEPA analysis is an approach encouraged by the CEQ. When tiering is used, analysis in a primary document (here an APD) is not performed anew because the necessary evaluation of impacts was done in a prior document, so that analysis can simply be used to support the primary document. Tiering is used primarily to avoid unnecessary paperwork. See BLM NEPA Handbook, H-1790-1 at III.C.1 (1988). Currently, in the NEPA process for APDs a significant amount of tiering takes place. The problem, however, is that often the tiering is to land use plans and other NEPA documents that are a decade or more old. Yet resource conditions, uses, and understanding often have changed substantially since those documents were prepared, so tiering is no longer appropriate. In short, tiering in these circumstances is a violation of NEPA because circumstances have changed significantly, meaning that new and updated information and analyses are needed in these underlying documents before they can be used to support APD analyses. Increasing the number of APDs processed (i.e., expediting approval) without a concomitant effort to update underlying land use plans and other NEPA documents will only exacerbate this problem.

Another key issue with tiering is that broader NEPA documents such as land use plans, leasing EISs, etc. often defer NEPA analysis to subsequent (i.e., APD) stages because of the lack of specificity of projects at these earlier stages. The problem is that the APD review then tiers back to the old document, which never dealt with the site specific issues in

the first place, with the end result being that no analysis occurs on many issues (they are ignored in both NEPA documents). This lack of analysis of key issues violates NEPA, and we respectfully ask the Task Force to review and correct this substantial flaw in BLM's oil and gas APD process as a means to improve the permitting process in a way consistent with NEPA.

2. Limiting Public Input at the APD Stage

The key problem here is that BLM is limiting opportunities for public involvement when it performs NEPA analysis for APDs. We believe this violates the Mineral Leasing Act (MLA) and NEPA. This is a serious issue because the APD review process is the last stage of environmental review prior to the commencement of drilling operations. The Task Force has an opportunity to rectify this problem so as to improve the permitting process and thus ensure environmental protections are maintained.

In 1987 the MLA was amended with provisions aimed at improving public notice and participation. Those amendments, contained in the Federal Onshore Oil and Gas Leasing Reform Act, require that “. . . at least 30 days before approving applications for permits to drill under the provisions of a lease . . . , the Secretary shall provide notice of the proposed action. Such notice shall be posted in the appropriate local office of the leasing and land management agency The requirements of this subsection are *in addition* to any public notice required by other law.” 30 U.S.C. § 226(f) (1994).

The “in addition” to language is a clear reference to NEPA. The involvement of the public in agency decision-making, prior to final agency decisions, is a core underpinning of NEPA. The public participation and notice requirements of NEPA are “in addition” to the public notice provision for APDs in the MLA, and it is clear the public must be given a meaningful opportunity to participate in the APD process prior to a decision being made. See generally, 40 C.F.R. §§ 1500.1(b), 1501.4(b), 1501.4(e)(1), 1500.2(d), 1506.6(a)-(d); 46 Fed Reg. 18,026, 18,037 (March 23, 1981) (Question 38); Department of the Interior Manual 516 DM 1.2.F, 1.6, 2-4, 3.3.

Despite these clear requirements to maximize public participation in the APD process prior to a decision being made, the BLM in Wyoming (and likely in other states) limits public opportunities to participate in the review of Environmental Assessments (EA) supporting ADP decisions. The BLM in Wyoming routinely posts EAs in obscure notebooks in field offices and ignores specific requests of affected citizens to comment on the EA prior to, not after, a final decision being made on an APD. A recent example from a Wyoming BLM field office on the Black Rock coalbed methane project near Gillette, Wyoming illustrates the problem:

- Late July 2000: Wyoming Outdoor Council (WOC) learns of water management plan being prepared for the Black Rock project and 32 pending

- APDs;
- August 2, 2000: WOC writes letter to BLM requesting, *inter alia*, to be made part of the NEPA process prior to any final decision,
 - August 11, 2000: A Finding of No Significant Impact and Record of Decision for the 32 APDs is signed,
 - August 15, 2000: Four days after the final decision had been reached on the 32 APDs, BLM notifies WOC of the decision, effectively precluding pre-decision record comment and input, as specifically requested by WOC, and in our view required by NEPA.

This approach violates the provisions of NEPA even if it meets the requirements of the MLA. BLM reached a final decision on an important issue facing the public without disseminating the information to the public. We note that making an EA available, prior to and not after a decision is reached is required under NEPA regulations. Indeed this is but one example of a widespread BLM practice. CEQ is presented with an opportunity for improving this process to make it consistent with NEPA, and certainly there should be no effort to further expedite the APD process until these and the other problems discussed here are corrected because to do so would be inconsistent with maintaining environmental protection, as required by the Executive Order.

3. Inspection, Enforcement and Monitoring

Another problem in the arena of BLM APD permitting is that the agency often treats its obligations to protect natural resources as ending once the permit is granted. Of course, this is not the case—BLM has mandatory continuing duties concerning inspection, enforcement, and monitoring. BLM has recently received appropriations that—depending on the state—almost double the budget to process APDs. We ask that the Task Force consider the effect this (or any action taken to increase the number of APDs granted) will have on BLM’s post-permitting duties concerning inspection, enforcement, and monitoring, which could suffer if resources are disproportionately applied to getting permits approved. This review and corrective measures would be consistent with the Executive Order’s mandate to ensure that permitting procedures “maintain[] safety, public health, and environmental protections.”

4. Coordination of Federal, State, Tribal, and Local Entities

In our view, any “streamlining” of permitting should be done with the goal of ensuring better, not necessarily faster, coordination and consultation among entities and agencies. With respect to oil and natural gas, BLM and the Forest Service should engage, at the earliest possible point, the Fish and Wildlife Service, the Environmental Protection Agency, and any potentially affected Tribes, in addition to state and local regulatory bodies. Regarding state agencies, the BLM often defers all analysis of well spacing and timing, and duration of operations to state oil and gas commissions, despite the fact that the standard

BLM oil and gas lease provides BLM with the authority to regulate these aspects of operations. We urge the Task Force to review coordination with state agencies to ensure that on federal lands BLM is the entity charged with these functions and completing NEPA review of these issues. Finally, BLM often fails to seek input from local authorities, such as counties and cities, to ensure that public safety, health, and environmental concerns of these entities are considered.

III. Comments on Specific Areas

The CEQ request for comments asks that projects be brought to the attention of the CEQ for priority treatment. Defenders of Wildlife would like to highlight the following project areas or potential project areas:

Rocky Mountain Front, Montana. This area is largely closed to oil and gas development at this time and should remain so regardless of any “nominations” received. After careful review and extensive public comment, the forest supervisor for Lewis and Clark National Forest - in weighing the many mandates and values placed on the National Forest - closed the area to new leasing. This area has significant national wilderness, open space, and endangered species and other wildlife values that must not be sacrificed in any efforts to expedite energy development.

Bridger-Teton National Forest, Wyoming. Portions of this area have been proposed by the Forest Service in a draft environmental impact statement for closure to oil and gas development due to the overwhelming recreational, wildlife, and wilderness values in the area. That process should be allowed to proceed under the existing NEPA and Forest planning process and should not be “expedited” by a new entity that would be unfamiliar with the issues and area.

Upper Green River Basin, Wyoming. Oil and especially natural gas development is proceeding at record levels in this area, particularly in the Jonah II Gas Field and Pinedale Anticline Gas Field. Massive increases in the number of wells drilled and anticipated has occurred and is predicted. There is no need to “expedite” what already is an explosive level of development; such an approach runs the risk of harming wildlife and other values in the area, including the large mule deer and pronghorn antelope herds and the increasingly imperiled sage grouse. Expediting development in this area cannot be done without further endangering resources and communities in the area. What is needed is just the opposite: a more careful and thorough analysis of the full impacts of energy development.

In addition, the BLM’s Pinedale Field Office is granting record numbers of exceptions to recently developed proscriptions against winter drilling and other environmental protection measures. These exceptions are coming at or near the permitting stage and are undermining environmental protections that were carefully developed as a

result of a 2 year NEPA process. The Task Force must ensure that existing, carefully developed environmental protections are maintained in the Upper Green River Basin, as required by the Executive Order.

Red Desert/Jack Morrow Hills, Wyoming. Our comments on the Upper Green River Basin are just as applicable to this nearby area. We would only note that additional wildlife of concern in this area include the mountain plover, black-tailed prairie dog, and a unique herd of desert elk. Furthermore, because the Red Desert is a one-of-a-kind resource in the U.S., BLM was directed to develop a supplemental draft environmental impact statement making a conservation alternative the preferred choice. The Task Force should not allow expediting energy projects in this area to interfere with the development of this conservation alternative.

Powder River Basin, Wyoming. An utterly explosive and out of control level of coalbed methane natural gas development is occurring in this area. Just as in the Upper Green River Basin, there is no need to expedite development in this area, what is needed is even more careful and thorough analysis of impacts before the development proceeds. Toward that end, BLM is developing an environmental impact statement regarding the impacts of coalbed methane development in the Powder River Basin, and that existing process should not be interfered with by an entity unfamiliar with the area and issues. In fact, the existing EIS process is already being done on an expedited time line, and certainly it would be inappropriate to allow drilling prior to its completion. See 40 C.F.R. § 1506.1. In this area the highly endangered black-footed ferret is of concern, as are other species such as the mountain plover and ferruginous hawk. Moreover, water quality issues are of paramount importance where coalbed methane is produced.

Southeastern Green River Basin, Wyoming. BLM has just completed scoping for the massive (4000 wells) Atlantic Rim coalbed methane project in this area in south central Wyoming near Rawlins. We express the same concerns as were mentioned above relative to the Upper Green River Basin, Red Desert/Jack Morrow Hills, and Powder River Basin.

Piceance/Uinta Basins, Colorado & Utah. Particularly in the Utah section of this area there are world class big game populations of mule deer and elk, some of the best black bear habitat in Utah, and four endangered Colorado River fish species. Those resources must not be sacrificed in any effort to expedite development in this area. Oil and gas development is occurring just outside of Canyonlands National Park near Moab, Utah. Given that this area contains two National Parks (Canyonlands and Arches) and a number of proposed wilderness areas exist in the area, expediting energy development cannot be done in a way that sacrifices these values. Desert bighorn sheep occur in this area, so this species deserves special consideration if any effort is made to expedite development.

San Juan Basin, New Mexico. This area is already the location of a huge number of oil and gas wells. Further development should only proceed in a carefully planned manner,

and no development should be allowed in roadless areas that might qualify as wilderness due to the wildlife habitat values of these areas.

Otero Mesa, New Mexico. This relict of Chihuahuan desert grasslands has tremendous ecological, wildlife and education values. Development should be precluded in this area due to these overwhelming countervailing values. Apparently the company wanting to develop natural gas in the area has been exceedingly reluctant to implement or consider state-of-the art drilling and production techniques, which would reduce environmental impacts. Under these circumstances, the Federal government should not make any effort to expedite a project.

Thank you for considering these comments.

Sincerely,

Noah Matson
Defenders of Wildlife
1101 14th St NW Suite 1400
Washington, DC 20005

Tom Darin
Wyoming Outdoor Council
262 Lincoln Street
Lander, Wyoming 82520

Travis Stills
Oil and Gas Accountability Project
P.O. Box 1102
863 ½ Main Avenue
Durango, Colorado 81302

Heidi McIntosh
Southern Utah Wilderness Alliance
1471 South 1100 East
Salt Lake City, Utah 84105

Elise Jones
Colorado Environmental Coalition
1536 Wynkoop St. #5C
Denver, Colorado 80302

Matthew Hollamby
U.S. PIRG
218 D Street SE
Washington, DC 20003