



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

703-235-3750

703-235-8349 (fax)

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IBLA 2019-94)	DOI-BLM-UT-0300-2017-0003-EA
)	
SOUTHERN UTAH WILDERNESS)	Wildfire Management
ALLIANCE, <i>ET AL.</i>)	
)	Decision Set Aside

ORDER

The Southern Utah Wilderness Alliance, Western Watersheds Project, The Wilderness Society, and Grand Canyon Trust (hereinafter collectively referred to as SUWA) appeal from a decision by the Bureau of Land Management's Grand Staircase-Escalante National Monument and Kanab Field Office in Kane County, Utah (BLM), which approved the Skutumpah Terrace Sagebrush Steppe Enhancement Project (Project). BLM analyzed the Project in an environmental assessment (EA) it prepared to comply with the National Environmental Policy Act of 1969 (NEPA),¹ and BLM determined that the Project conforms to the applicable land use plan prepared under the Federal Land Policy and Management Act (FLPMA).² SUWA claims BLM violated both NEPA and FLPMA in approving the Project.

A party challenging an action that was analyzed in an EA has the burden of demonstrating that the EA failed to consider a substantial environmental question of material significance to the proposed action. SUWA met its burden by showing BLM failed to consider the cumulative effects of the Project on migratory birds. An appellant challenging the consistency of an action with a land use plan must show BLM erred in determining that its action complied with the terms of that plan. SUWA met its burden by showing BLM erred in approving the use of non-native seed in ways inconsistent with the applicable land use plan. We therefore set aside BLM's decision.

¹ 42 U.S.C. §§ 4321 - 4347 (2012).

² 43 U.S.C. §§ 1701-1787 (2012).

BACKGROUND³

SUWA appeals from BLM's February 27, 2019, decision, in which it approved the Project on 54,018 acres of BLM-administered land northeast of Kanab, Utah.⁴ The Project involves treating about 2,000 acres of vegetation within the Project area annually over an approximate 15-year period.⁵ BLM utilized an interdisciplinary team of experts (IDT) to evaluate potential environmental impacts and prepare an EA pursuant to NEPA and applicable implementing rules.⁶ Their resulting EA states:

The purpose of the Project is to improve land health, enhance sagebrush-steppe habitat, and return vegetative condition to a state that more closely resembles the historical fire regime. This would be accomplished by conducting a variety of vegetation treatments to reduce pinyon-juniper extent and density and diversifying existing sagebrush stands throughout the Project area.⁷

As part of its analysis, BLM documented the Project's conformance with applicable land use plans, determined it conformed to the Grand Staircase-Escalante National Monument Management Plan (MMP) and the Utah Greater Sage-Grouse Resource Management Plan

³ BLM supplied the Board with an administrative record (AR) on a thumb-drive that is divided into folders designated by letters and subdivided with individually numbered documents. For example, the environmental assessment at issue in this case may be found at "AR F2."

⁴ See Decision Record, Skutumpah Terrace Sagebrush Steppe Enhancement Project, DOI-BLM-UT-0300-2017-0003 at 1 (Feb. 27, 2019), AR F3 (DR) ; Skutumpah Terrace Sagebrush Steppe Enhancement Project Environmental Assessment, DOI-BLM-UT-0300-2017-0003 at 1 (Feb. 2019), AR F2 (EA).

⁵ EA at 4, 17.

⁶ *Id.* at 4, 23.

⁷ *Id.* at 3 (1.3 Purpose and Need for the Proposed Action); see *id.* ("A variety of resource management tools such as mechanical and chemical treatments, prescribed fire, and seeding are proposed to achieve this purpose.").

(RMP),⁸ and found that the Project would not have a significant effect on the human environment.⁹

SUWA timely appealed from BLM's decision. By order dated May 14, 2019, we granted BLM's Motion for Expedited Review and established an expedited briefing schedule. By order dated May 31, 2019, we granted the State of Utah's motion to intervene in the appeal. This matter is now ripe for decision.

DISCUSSION

SUWA claims BLM violated NEPA by failing to take a sufficiently hard look at cumulative impacts and the Project's impacts on greenhouse gas emissions and climate change and to use the best available scientific information to develop its proposed action.¹⁰ SUWA also claims BLM violated FLPMA by approving the Project because it does not conform to the applicable land use plan.¹¹ We address SUWA's trio of NEPA claims and then their FLPMA claim.

NEPA Claims

In evaluating the adequacy of an EA, the Board applies a "rule of reason."¹² A party challenging approval of an action that was analyzed in an EA and for which BLM issued a Finding of No Significant Impact has the burden of demonstrating with objective proof that the agency's decision was premised on an error of fact or law or that its analysis failed to consider a substantial environmental question of material significance to the proposed action.¹³

⁸ See *id.* at 4-6 (1.5 Conformance with BLM Land Use Plan(s)); see also Grand Staircase-Escalante National Monument Management Plan (November 1999), AR K1 (MMP); Utah Greater Sage-Grouse Approved Resource Management Plan Amendment, (September 2015), AR K3 (Sage-Grouse RMP).

⁹ Finding of No Significant Impact, Skutumpah Terrace Sagebrush Steppe Enhancement Project Environmental Assessment, DOI-BLM-UT-0300-2017-0003, at 3 (Feb. 27, 2019), AR F3.

¹⁰ See Appellants' Statement of Reasons (SOR) at 7-15.

¹¹ See *id.* at 15-18.

¹² *SUWA*, 194 IBLA 98, 102 (2019); *Klamath-Siskiyou Wildlands Center*, 190 IBLA 295, 304 (2017); *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000).

¹³ See, e.g., *SUWA*, 194 IBLA at 102; *Klamath-Siskiyou Wildlands Center*, 190 IBLA at 304-05; *Wildlands Defense*, 188 IBLA 68, 70-71 (2016).

I. *SUWA met its burden to show BLM failed to take a hard look at cumulative impacts on migratory birds.*

NEPA requires agencies to consider cumulative impacts, which are those resulting from the incremental impact of the proposed action “when added to other past, present, and reasonably foreseeable future actions,” regardless of who undertakes such other actions.¹⁴ To determine what constitutes a “reasonably foreseeable future action,” courts have required agencies to “engage in ‘reasonable forecasting and speculation,’ with *reasonable* being the operative word.”¹⁵ And in considering the adequacy of the cumulative impact analysis in an EA, we have held that BLM is under “no obligation ‘to consider the impacts of a proposed action together with speculative, or not reasonably foreseeable[,] impacts of future actions.’”¹⁶

To successfully challenge a cumulative impact analysis, the appellant must show a specific deficiency in that analysis; “it is not sufficient for an appellant merely to note the existence of other projects without concretely identifying the adverse impacts those projects caused and how the project under review will add to them.”¹⁷ Consequently, “[a]ppellants must demonstrate that, because of geographic proximity [or] other reasons, there is likely to be an interaction between other projects and the proposed project which may result in an enhanced or modified impact that BLM was required to consider.”¹⁸

SUWA alleges that BLM failed to analyze the project’s cumulative impacts on “migratory birds, macrobiotic soil crusts, visual resources, lands with wilderness characteristics, and other resources.”¹⁹ However, its arguments concerning cumulative impacts focus on BLM’s alleged failure to consider cumulative impacts to migratory birds.²⁰ With respect to the other resources it mentioned, SUWA made no effort to show there is likely to be an interaction between other projects and the proposed project that could

¹⁴ 40 C.F.R. § 1508.7 (defining Cumulative Impacts); *see, e.g., Western Watersheds Project*, 191 IBLA 351, 366-67 (2017) (cumulative impacts must be discussed in an EA).

¹⁵ *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)).

¹⁶ *Center for Biological Diversity*, 189 IBLA 117, 126 (2016) (quoting *Powder River Basin Resource Council*, 180 IBLA 119, 132-33 (2010)).

¹⁷ *Western Watersheds Project*, 191 IBLA 351, 366-67 (2017) (citing *COG Operating, LLC*, 190 IBLA 49, 72 (2017)).

¹⁸ *Id.* at 367 (quoting *Wyoming Outdoor Council*, 147 IBLA 105, 109 (1998)).

¹⁹ SOR at 11; *see also* Appellants’ Reply in Support of Their Statement of Reasons (Reply) at 5.

²⁰ SOR at 10.

result in enhanced or modified impacts to those other resources (*e.g.*, macrobiotic soil crust or visual resources).²¹ We therefore find that SUWA has not met its burden to demonstrate error in BLM’s cumulative effects analysis for resources apart from migratory birds.

SUWA alleges that BLM failed to adequately consider the cumulative impacts of the Project on migratory bird populations and habitat because it did not consider impacts from other proposed vegetation treatment projects.²² SUWA first states that BLM identified impacts the Project would have on migratory birds, namely that its pinyon and juniper removal actions may cause “habitat alteration, fragmentation, and/or loss” for various species of migratory birds.²³ SUWA then identifies nearby projects that will also impact migratory birds as including “the 93,000-acre Upper Paria River Watershed vegetation treatment project” that is “three times larger than, and is planned on land immediately adjacent to, the 30,000 Skutumpah Project” and the “13,000-acre Alvey Wash, Coal Bench, and Last Chance vegetation treatment projects.”²⁴ SUWA alleges that while the EA considered these projects as reasonably foreseeable and included them in its cumulative effects analysis concerning vegetation and invasive species, it did not do so with respect to cumulative impacts to migratory birds.²⁵ SUWA emphasizes that the scoping notices for each of those projects included project maps, quantified the acreage to be treated, and described proposed methods and time frames for treatment.²⁶

BLM responds that, while it identified the projects – the Upper Paria Watershed Project and the Alvey Wash, Coal Bench, and Last Chance Vegetation Restoration Projects – as “reasonably foreseeable” in its cumulative impact section on vegetation,²⁷ these projects

²¹ *Western Watersheds Project*, 191 IBLA at 367 (citing *Wyoming Outdoor Council*, 147 IBLA 105, 109 (1998)).

²² SOR at 10.

²³ *Id.* (citing EA at 45).

²⁴ SOR at 10.

²⁵ *Id.* at 9-10.

²⁶ See Reply at 3-4 (citing Upper Paria River Watershed Scoping Notice dated Oct. 24, 2018, with project map (Exhibits (Exs.) K & L), and Alvey Wash, Coal Bench, and Last Chance Vegetation Restoration Projects Scoping Notice dated Jan. 4, 2018, with project map (Exs. M & N)).

²⁷ EA at 57; see *id.* (“[I]t is reasonably foreseeable that an additional 109,823 acres could also be treated in the coming decades.”); but see BLM’s Answer to the Statement of Reasons (Answer) at 11 n.8 (arguing that while “BLM characterizes both projects as reasonably foreseeable” in the EA, “in the absence of any project specifics, that term, as used in the EA, is not synonymous with the legal term of art in NEPA and as further defined by the Board’s precedent”).

are “in their preliminary stages of development,” so BLM “was unable to define specific treatment areas, treatment methods, or other project[] specific[s].”²⁸ According to BLM, “there was nothing specific enough for BLM to analyze” regarding cumulative impacts of the Project on migratory birds.²⁹

Both parties argue that our decision in *Western Watersheds Project (WWP)*³⁰ supports their positions. In *WWP*, we found that appellants had not demonstrated that BLM erred in omitting consideration of cumulative impacts from two proposed projects because those impacts were not reasonably foreseeable.³¹ In reaching this conclusion, we stated that appellants had not specified, and the record had not revealed, the activities to be undertaken or their locations. Specifically, we noted that one project’s notice of intent to start initial scoping had only identified approximately 1,600 miles of roads in a 3.6 million acre project area that might be suitable for fuel break development.³² We found that the other programmatic proposal, which was only an entry on BLM’s e-planning website, provided only a general description of proposed activities including constructing fuel breaks, reducing fire loading, and restoring rangeland productivity, none of which would be authorized by the programmatic action to be considered.³³

We find that the differences between the current projects and those at issue in *WWP* outweigh the similarities such that the impacts on migratory birds from the projects at issue here are reasonably foreseeable. In contrast to the proposals at issue in *WWP*, the scoping notices here “reveal[] the activities to be undertaken” and “their location[s].”³⁴ The scoping notices map the projects, quantify the acreage to be treated, describe proposed methods of treatment, and include time frames.³⁵ The details of the scoping notices thus refute BLM’s assertion that it “was unable to define specific treatment areas, treatment methods, or other project[-]specific[s]” and that there were no project details for the agency to analyze in conjunction with the impacts from the Skutumpah project.³⁶

This conclusion comports not only with our precedent but with relevant federal caselaw, in which courts have held that projects are reasonably foreseeable when they have

²⁸ Answer at 10; *see id.* at 12.

²⁹ *Id.* at 10.

³⁰ 191 IBLA 351 (2017).

³¹ *Id.* at 368.

³² *Id.*

³³ *Id.* at 368-69.

³⁴ *Cf. id.* at 368.

³⁵ Reply Exs. K through N.

³⁶ BLM Answer at 10, 11.

been publicly announced and at least some of their specifics known. For example, the Ninth Circuit Court of Appeals has held that a future project is reasonably foreseeable when the project has been proposed.³⁷ In contrast, “[f]or any project that is not yet proposed, and is more remote in time . . . a cumulative effects analysis would be both speculative and premature.”³⁸ Here, BLM proposed the Upper Paria River Watershed, Alvey Wash, Coal Bench, and Last Chance vegetation treatment projects months before it made the decision on appeal with scoping notices containing “actual plan[s] or proposal[s] that [are] sufficiently well-defined to permit meaningful consideration” of the cumulative impact of the projects.³⁹ We therefore conclude that BLM failed adequately to consider cumulative impacts on migratory birds in this case.

II. *SUWA did not carry its burden to show BLM failed to take a hard look at greenhouse gas emissions and climate change impacts.*

SUWA next claims BLM did not take a hard look at greenhouse gas emissions (GHG) (*e.g.*, carbon dioxide) from the Project and their impact on climate change.⁴⁰ SUWA takes issue with BLM’s failure to quantify the Project’s GHG emissions when it did so in the 2011 South Warner Juniper Removal Project Environmental Assessment and with its summary conclusion that potential climate change impacts need not be quantified or considered in detail “if the Project emits less than EPA’s 25,000-ton reporting threshold.”⁴¹ BLM responds that it properly relied on its experts, “who reached different conclusions [from those] asserted by Appellants.”⁴²

When we evaluate the adequacy of an EA, we are mindful that it need only include a “brief discussion [] . . . of the environmental impacts of the proposed action and alternatives.”⁴³ As SUWA points out, some courts have required federal agencies to make “educated assumptions” to estimate GHG emissions where they possess information

³⁷ *Ctr. for Env'tl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1010 (9th Cir. 2011) (“We have define[d] . . . reasonably foreseeable action[s], for which cumulative impacts must be analyzed, to include proposed actions.”) (quoting *N. Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 980 (9th Cir. 2006) (internal quotation marks omitted)).

³⁸ *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 1000 (9th Cir. 2013) (quoting *Lands Council v. Powell*, 395 F.3d 1019, 1023 (9th Cir. 2005)).

³⁹ *Id.* at 1001 (internal quotation marks omitted)

⁴⁰ SOR at 11-13.

⁴¹ *Id.* at 13; *see id.* at 12-13.

⁴² Answer at 15; *see id.* at 13-15.

⁴³ 40 C.F.R. § 1508.9(b).

allowing for reasonable forecasting.⁴⁴ On the other hand, courts have held that “quantification of [GHG emissions] is [not] required *every* time those emissions are an indirect effect of an agency action,” so long as the agency provides “a satisfactory explanation for why” quantification is not feasible.⁴⁵ Armed with these principles, we evaluate whether this EA took a sufficiently hard look at GHG and climate change impacts of the Project.

The record shows GHG and climate change impacts were addressed in the IDT Checklist for the EA and in BLM’s response to comments.⁴⁶ The IDT Checklist states the team determined that detailed analysis of GHG was not required and explained:

The Proposed Action would not affect greenhouse gas emissions to a degree of detailed analysis. Mechanical tools will be used to implement most of the treatments resulting in some greenhouse gas emissions. Emissions are anticipated to be below the EPA GHG reporting limit of 25,000 tons per year. Short-term loss of carbon storage will occur due to biomass removal, but most evidence suggests that fuel treatments can reduce carbon-loss from wildland fire emissions over the long term. Soils store over 2/3 of carbon on Federal lands in Utah and reduction in biomass carbon storage from the Proposed Action will be small compared to the total land sequestration capability in the state. Net changes to carbon storage are not quantifiable as it varies based on vegetation type, vegetation density, vegetation regrowth, weather, and other factors.^[47]

BLM’s response to comments is similar:

As noted in the [IDT] checklist, net changes to carbon storage capabilities are not quantifiable based on various factors. Short term loss of carbon storage is

⁴⁴ *Sierra Club v. Fed. Energy Reg. Comm’n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (citation omitted).

⁴⁵ *Sierra Club*, 867 F.3d at 1374; *see League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1076 (9th Cir. 2012) (“We have previously suggested that qualitative analyses are acceptable in an EIS where an agency explains ‘why objective data cannot be provided.’”); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 69 (D.D.C. 2019) (“Defendants’ explanations for why BLM was not required to quantify GHG emissions at the leasing stage are unpersuasive because they do not address the volume of information available to BLM.”).

⁴⁶ *See* EA, App. C (IDT Checklist) and App. F (Response to Comments).

⁴⁷ *Id.* at C-1 to C-2.

likely to occur but treatments can reduce carbon-loss from wildland fire emissions over the long term. Soils store over 2/3 of carbon on Federal lands in Utah and reduction in biomass carbon storage from the Proposed Action will be small compared to the total land sequestration capability in the state. Further analysis within the EA is not warranted.^[48]

And in responding to comments suggesting the EA needed to detail reasonably foreseeable impacts of climate change in the Project area, BLM stated:

While greenhouse gas emission (GHG) factors have been developed, they are based primarily on laboratory measurements with regional fire assumptions. Additional field measurements are needed before emission factors are refined enough to quantify GHG emissions at a Project level. Emissions from a specific Project vary based on treatment type, vegetation type, acreage, mass of vegetation, combustion completeness, and meteorology. As a consequence, impact assessment of specific effects of anthropogenic activities cannot be determined. Over the short term there is likely to be emission of GHG and loss of carbon storage capability but [the Project will] have a long term benefit with reduced carbon-loss from wildland fire emissions and improved carbon sequestration with more resilient vegetation and soil ecosystems. . . . Existing climate prediction models are global in nature[,] so they are not at the appropriate scale to estimate potential impacts of climate change on the Project area.^[49]

SUWA claims BLM's rationale for not quantifying GHG "does not hold water" because it could have made assumptions and calculated what those emissions would be, particularly since it made detailed GHG calculations for other projects.⁵⁰

BLM is entitled to rely on its experts' opinions with respect to GHG emissions and climate change impacts.⁵¹ However, it may only do so when their opinions are reasonable

⁴⁸ *Id.* at F-5

⁴⁹ *Id.* at F-6.

⁵⁰ Reply at 6-7; *see id.* at 6-7 (citing Vegetation Treatments on BLM Lands in 17 Western States Programmatic Environmental Report (June 2007) (AR 136) and S. Warner Juniper Removal Project EA (Ex. O to the Reply)); *see also id.* at 8 ("Without performing an emissions calculation, it is impossible to know if Project emissions will be below the federal reporting threshold of 25,000 tons of CO₂.").

⁵¹ *Western Watersheds Project*, 188 IBLA 250, 258 (2016).

and supported by record evidence.⁵² We also note that to successfully challenge BLM's reliance on its experts' opinions, an appellant must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert.⁵³ Consequently, SUWA must demonstrate, by a preponderance of the evidence, an error in the data, methodology, analysis, or conclusion of BLM's experts.⁵⁴

The record shows BLM experts determined that GHG emission factors are not sufficiently refined for quantifying GHG emissions at the Project level without site-specific measurements and data, which meant BLM could neither quantify nor assess specific climate change impacts due to Project emissions that are below EPA's GHG reporting threshold of 25,000 tons per year.⁵⁵ Contrary to SUWA's contentions, we do not find such a rough estimate of GHG emissions by BLM experts means they could quantify GHG emissions when preparing the EA. Moreover, we do not find its quantifying carbon dioxide emissions for an Oregon project necessarily mean BLM or its IDT could quantify similar emissions from the Project (or any other project proposal evaluated by the Department). In short, we are satisfied by BLM's explanation for why a detailed analysis or quantification of GHG emissions and assessment of climate change impacts would not be feasible or useful in this case,⁵⁶ and SUWA has not shown error in BLM's data, methodology, analysis, or conclusion. We therefore conclude that SUWA has not carried its burden to show BLM failed to take a hard look at the Project's GHG emissions and their impact on climate change.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See EA at C-2 and F-6; see also C-2 ("Net changes to carbon storage are not quantifiable as it varies based on vegetation type, vegetation density, vegetation regrowth, weather, and other factors.").

⁵⁶ See *Sierra Club*, 867 F.3d at 1374; *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) ("[I]t is not currently useful for the NEPA analysis to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project or emissions, as such direct linkage is difficult to isolate and to understand.") (quoting Council on Environmental Quality, Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions at 3 (Feb. 18, 2010)).

III. *SUWA did not show BLM violated NEPA by failing to use the best available scientific information to develop its proposed action.*

SUWA claims BLM also violated NEPA by “failing to use the best available scientific information to develop the proposed action.”⁵⁷ According to SUWA, BLM did not use the best available scientific information because it did not conduct a sufficiently detailed, granular analysis of soil type and use that data and Ecological Site Descriptions (ESDs) to identify expected natural vegetation. As a result, BLM incorrectly identified expected natural vegetation in the Project area as sagebrush, instead of pinyon and juniper.⁵⁸ Rather than analyze each ecological site within a soil map unit to identify each site’s expected natural vegetation, BLM looked only at the “dominant soil type” for a soil map unit to identify its expected natural vegetation.⁵⁹ Had it better analyzed ESD data, SUWA claims BLM would not have identified a goal of having two thirds of the Project area dominated by sagebrush, when pinyon and juniper is the expected natural vegetation “on a significant portion of the [Project are].”⁶⁰

In resolving this issue, we reiterate that when it evaluates potential impacts of a proposed action, BLM properly relies on the professional opinion of its technical experts concerning matters within the realm of their expertise when their opinions are reasonable and supported by record evidence.⁶¹ The record shows the IDT relied not only on published ESD data, but also on information from “numerous site visits to the Project area” and consultations with cooperating agencies (e.g., Utah Division of Wildlife Resources and

⁵⁷ SOR at 13.

⁵⁸ *See id.* at 13-14

⁵⁹ *Id.* at 14; *see id.* (“By focusing only on the dominant soil type with the Project area’s soil map units . . . BLM erroneously portrayed vast swaths of the Project area as exclusively sagebrush ecological sites, when in fact much of the Project area’s expected natural vegetation is pinyon and juniper.”).

⁶⁰ *Id.* at 15.

⁶¹ *See Western Watersheds Project*, 188 IBLA at 258; *see also Or. Env’tl. Council v. Kunzman*, 817 F.2d 484, 496 (9th Cir. 1987) (“NEPA does not require that we decide whether an [EIS] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology.”) (quoting *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985)); *Cape Hatteras Access Pres. All. v. U.S. Dep’t of Interior*, 731 F. Supp. 2d 15, 35 (D.D.C. 2010) (“NEPA allows the agency the discretion of what methodology to use and does not require the use of the best scientific methodology available”).

Utah's Watershed Restoration Initiative).⁶² SUWA asserts in reply: "BLM made no claim that it did not skew the ESD data, presumably because it cannot make this claim."⁶³

These arguments, particularly SUWA's allegation that BLM "skewed" the data, reveal that they do not dispute BLM's reliance on ESD soil-type data for its analysis. In the final analysis, we find this dispute is not about a failure to use the best available scientific data, but about the methodology BLM used to analyze the ESD data. Because NEPA allows the agency the discretion of what methodology to use⁶⁴ and because SUWA did not demonstrate, by a preponderance of the evidence, any error in the data used by BLM or the methodology it applied to that data,⁶⁵ we conclude that BLM appropriately relied on the professional opinion of its technical experts to select and apply the methodology used in this case.

FLPMA Claim: BLM violated FLPMA by allowing the use of non-native seed when the Grand Staircase-Escalante Monument Management Plan prohibited such use.

SUWA's last claim is that the Project does not conform to the Grand Staircase-Escalante MMP because it allows for the use of non-native seed when the MMP prohibits such use.⁶⁶ FLPMA requires BLM to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans."⁶⁷ BLM actions conform to a land use plan when they are "specifically provided for in the plan, or if not specifically mentioned, [are] clearly consistent with the terms, conditions, and decisions of the approved plan . . ."⁶⁸ An appellant challenging the consistency of an action with an applicable land use plan must show BLM erred in determining its action conforms to that plan.⁶⁹

In this case, the Grand Staircase-Escalante National Monument Management Plan applies, prioritizes the use of native plants and seed, and allows for only limited use of non-native plants and seed:

⁶² BLM Answer at 17-18 (citing EA at 10. 23-25, 59, F-7).

⁶³ Reply at 10.

⁶⁴ *Cape Hatteras Access Pres. All.*, 731 F. Supp. 2d at 35.

⁶⁵ *Western Watersheds Project*, 188 IBLA at 258.

⁶⁶ SOR at 15-18.

⁶⁷ 43 U.S.C. § 1732(a) (2012).

⁶⁸ 43 C.F.R. § 1601.0-5(b).

⁶⁹ *See Southern Utah Wilderness Alliance*, 194 IBLA 79, 93 (2019) (citing *Klamath-Siskiyou Wildlands Center*, 192 IBLA 291, 306 (2018)).

NAT-1 In keeping with the overall vegetation objectives and Presidential EO 11312, native plants will be used as a priority for all projects in the Monument.

NAT-2 Non-native plants may be used in limited, emergency situations where they may be necessary in order to protect Monument resources by stabilizing soils and displacing noxious weeds. This use will be allowed to the extent that it complies with the vegetation objectives, Presidential EO 11312, and the *Standards for Rangeland Health and Guidelines for Grazing Management for BLM Lands in Utah* (1997). In these situations, short-lived species (i.e., nurse crop species) will be used and will be combined with native species to facilitate the ultimate establishment of native species.

NAT-3 All projects proposed in the Monument will contain a restoration or revegetation component and will budget for the cost of seeding with native species. All planning for projects, in all except limited, emergency situations, will use native species, and the use of non-native species will not be analyzed as an alternative.

NAT-4 Non-native plants may be used for restoration related research if the use is consistent with and furthers the overall vegetation management objectives, including NAT-2 above, and after consultation with the GSENM Advisory Committee.

NAT-5 Non-native plants will not be used to increase forage for livestock and wildlife.^[70]

Notwithstanding the plain language of these specific provisions, the Project EA identifies new exceptions from the MMP's prohibition on using non-native seed:

In treatment areas, native seed would be used as a priority except in limited circumstances for:

- Research plots to determine treatment effectiveness with native/non-native seed;
- Situations where non-native seed may better outcompete invasive species;
- Previously treated areas where non-native monocultures would be interseeded with a native/non-native mix to add diversity.^[71]

⁷⁰ MMP at 28, 30 (“Native Vs. Non-native Plants”).

⁷¹ EA at 20 (“Seed Selection/Seeding Methods”).

SUWA concedes that BLM may use non-native seed in sage-grouse priority habitat management areas under the Sage-Grouse RMP, which cover 2,843 of the 7,747 acres where the Project proposes to use non-native seed.⁷² As to the remaining 4,904 acres, SUWA claims “BLM has not met its burden under FLPMA to show that its actions are ‘clearly consistent with the terms, conditions, and decision of the approved plan.’”⁷³

We first address the use of non-native seed in research plots “to determine treatment effectiveness with native/native seed,” a design feature of the Project identified in the EA.⁷⁴ The MMP addresses this situation when it states: “Non-native plants may be used for restoration related research if the use is consistent with and furthers the overall vegetation management objectives, . . . after consultation with the [Grand Staircase-Escalante National Monument (GSENM)] Advisory Committee.”⁷⁵ The MMP thus specifically addresses this use, but the record does not show BLM consulted with the GSENM Advisory Committee. We therefore find this use does not conform with the MMP, unless and until BLM completes such consultations.

We next address the use of non-native seed where “non-native seed may better outcompete invasive species.”⁷⁶ The only MMP provision arguably applicable allows for the use of non-native plants in “limited, emergency situations where they may be necessary in order to protect Monument resources by stabilizing soils and displacing noxious weeds.”⁷⁷ But we find no indication in the EA or DR that a “limited, emergency situation[]” currently exists or that this proposed use is necessary to stabilize soil or displace noxious weeds. It also is not clear that the “invasive species” mentioned in the Project EA are the same as “noxious weeds” identified in the MMP. While BLM claims on appeal that the use of non-native seed to “outcompete invasive species” was based on a Utah grazing management guideline that applies under the MMP,⁷⁸ BLM concedes that conformance with the guideline is required when BLM issues a grazing decision, which it did not do in the DR on appeal.⁷⁹ Moreover, it appears that the proposed use of non-native seeds is inconsistent

⁷² See SOR at 17-18 (citing Sage-Grouse RMP at 1-6), *id.* at 18 n.3.

⁷³ SOR at 17 (quoting 43 C.F.R. § 1601.0-5(b)); *see id.* at 16-17.

⁷⁴ EA at 20.

⁷⁵ MMP at 30 (NAT-4); *see* EA at 5 (Project conforms to NAT-4).

⁷⁶ EA at 20.

⁷⁷ MMP at 28 (NAT-2); *see* EA at 5 (quoting NAT-2).

⁷⁸ See Answer at 19-20 (citing MMP at 92 (Appendix 3, Standards and Guides for Healthy Rangelands - Guidelines for Grazing Management - Guideline 5)).

⁷⁹ See Answer at 19 n.11 and 12; *see also* EA at F-3 (“Decisions related to grazing management would be made after treatment and are depending upon the outcomes of

with the express requirement that “[a]ll planning for projects, in all except limited, emergency situations, will use native species, and the use of non-native species will not be analyzed as an alternative.”⁸⁰ We conclude that the proposed use of non-native seeds where they “may better outcompete invasive species” is neither “specifically provided for” nor “clearly consistent” with the MMP.⁸¹

Finally, we address the use of non-native seed where “non-native monocultures would be interseeded with a native/non-native mix to add diversity.”⁸² We find nothing in the MMP that allows the use of non-native seeds “to add diversity.”⁸³ And, like the previous proposed use of non-native seed to outcompete invasive species, the use of non-native seed to add diversity does not appear to be consistent the MMP’s mandate that projects use native species “except [in] limited, emergency situations” and the prohibition on analyzing “the use of non-native species . . . as an alternative.”⁸⁴ We again conclude that the proposed use of non-native seeds is not “specifically provided for” or “clearly consistent” with the MMP.⁸⁵

CONCLUSION

In sum, with respect to its NEPA claims, SUWA carried its burden to show that BLM erred in approving the Project because it failed to take a hard look at the Project’s cumulative impacts on migratory birds under NEPA, but did not meet its burden to show that BLM failed to take a hard look at GHG emissions and climate change impacts. SUWA also carried its burden to show BLM erred in determining that using non-native seed to better compete with invasive species or to add diversity was consistent with the applicable land use plan under FLPMA.

monitoring.”), F-11 (“Livestock decisions are made outside the scope of this EA”); Reply at 12-13.

⁸⁰ MMP at 30 (NAT-3).

⁸¹ 43 C.F.R. § 1601.0-5(b).

⁸² EA at 20.

⁸³ See MMP at 28, 30.

⁸⁴ MMP at 30 (NAT-3).


⁸⁵ 43 C.F.R. § 1601.0-5(b).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁸⁶ we set aside and remand BLM's decision.



James K. Jackson
Administrative Judge

I concur:



Silvia Riechel Idziorek
Acting Chief Administrative Judge

⁸⁶ 43 C.F.R. § 4.1.

DISTRIBUTION:

Kya Marienfeld, Esq.
Southern Utah Wilderness Alliance
P.O. Box 968
Moab, UT 84532

kya@suwa.org

Kamran Zafar, Esq.
Grand Canyon Trust
15B Miller Dr.
Durango, CO 81301

kzafar@grandcanyontrust.org

Cameron Johnson, Esq.
Office of the Solicitor
Intermountain Region
U.S. Department of the Interior
125 South State Street, Suite 6201
Salt Lake City, UT 84138-1180

cameron.johnson@sol.doi.gov