



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)

February 17, 2021

IBLA 2020-403 & 2020-404	)	DOI-BLM-UT-P020-2020-014-EA &
	)	DOI-BLM-UT-P020-2020-012-EA
SOUTHERN UTAH WILDERNESS	)	
ALLIANCE & WESTERN WATERSHEDS	)	Rangeland Wildfire Management
PROJECT	)	
	)	Set Aside and Remanded

ORDER

The Southern Utah Wilderness Alliance and Western Watersheds Project (collectively, SUWA) jointly appeal from two decisions issued by the Kanab (Utah) Field Office of the Bureau of Land Management (BLM), approving two post-wildfire stabilization and rehabilitation projects. SUWA asserts that BLM violated the National Environmental Policy Act (NEPA) by failing to consider certain alternatives and impacts. Because we find that BLM failed to consider appropriate alternatives, we set aside and remand BLM’s decisions, without reaching SUWA’s remaining arguments.

*BACKGROUND*

*Legal Background*

NEPA requires BLM to prepare an environmental impact statement (EIS) before it undertakes a “major Federal action[] significantly affecting the quality of the human environment.”<sup>1</sup> If it is unclear whether an action will significantly affect the quality of the environment, BLM may prepare an environmental assessment (EA) to assist it in

---

<sup>1</sup> 42 U.S.C. § 4332(2)(C). All citations to statutes are to the current version of the official U.S. Code, published in 2018.

determining whether an EIS is required.<sup>2</sup> If BLM concludes, based on the analysis contained in the EA, that an EIS is not required, it must document this conclusion in a finding of no significant impact (FONSI).<sup>3</sup>

NEPA also requires BLM to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”<sup>4</sup> When BLM prepares an EA, it must include a “brief discussion[]” of these appropriate alternatives and their environmental impacts.<sup>5</sup> “Appropriate alternatives are those that will accomplish the project’s intended purpose, are technically and economically feasible, and will avoid or minimize adverse environmental impacts.”<sup>6</sup> “A rule of reason applies to both the range of alternatives that must be considered and the extent to which each alternative must be addressed.”<sup>7</sup>

NEPA’s implementing regulations direct agencies to “involve . . . the public, to the extent practicable, in preparing” an EA, and the Department’s regulations require BLM to

---

<sup>2</sup> See 40 C.F.R. §§ 1501.4(b), 1508.9(a). All citations to regulations are to the current version of the official Code of Federal Regulations, published in 2019. On July 16, 2020, the Council on Environmental Quality published revisions to its NEPA regulations, which took effect on September 14, 2020, and “apply to any NEPA process begun after” that date. See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,372 (July 16, 2020). Because the environmental analyses and decisions at issue in this appeal were completed before the revised rule became effective, we review the decisions under the NEPA regulations in effect at the time of the decision.

<sup>3</sup> 40 C.F.R. §§ 1501.4(e), 1508.9(a)(1).

<sup>4</sup> 42 U.S.C. § 4332(2)(E); accord 40 C.F.R. § 1501.2(c).

<sup>5</sup> 40 C.F.R. § 1508.9(b); 43 C.F.R. 46.310(a)(4); see also *WildEarth Guardians*, 182 IBLA 100, 107 (2012) (“Section 102(2)(E) of NEPA requires consideration of a reasonable range of alternatives to a proposed action, including a no-action alternative.”).

<sup>6</sup> *Kevin Kane*, 195 IBLA 17, 23 (2019) (quotation marks omitted); accord *W. Watersheds Proj. (WWP)*, 191 IBLA 351, 358 (2017); *S. Utah Wilderness All. (Greater Deadman Bench)*, 191 IBLA 37, 40-41 (2017); *Klamath-Siskiyou Wildlands Center (KSWC)*, 190 IBLA 295, 306 (2017); *Randy L. Witham*, 187 IBLA 298, 303 (2016); *Roseburg Res. Co.*, 186 IBLA 325, 336 (2015); *Cascadia Wildlands*, 184 IBLA 385, 409 (2014).

<sup>7</sup> *S. Utah Wilderness All. (Upper Kanab Creek)*, 182 IBLA 377, 390-91 (2012) (quotation marks omitted); accord *Witham*, 187 IBLA at 303; *Roseburg Res. Co.*, 186 IBLA at 334; *S. Utah Wilderness All. (Mineral Bottom Airstrip)*, 152 IBLA 216, 223-24 (2000).

“consider comments that are timely received.”<sup>8</sup> Apart from these requirements, however, “the methods for providing public notification and opportunities for public involvement are at the discretion of” BLM.<sup>9</sup> Although BLM’s NEPA Handbook “recommend[s]” that the agency “respond to all substantive and timely comments” received in the course of preparing an EA,<sup>10</sup> “neither NEPA nor [its implementing] regulations explicitly require a Federal agency to allow public comment on every EA,”<sup>11</sup> and “there is no requirement that the EA list and respond to each of the comments received.”<sup>12</sup>

NEPA “does not mandate the particular substantive results of agency [decision-making], but rather imposes procedural obligations on the agency, which require that the agency and the public be fully informed of the environmental consequences” of the decision.<sup>13</sup> So long as its procedural requirements are met, NEPA “does not prohibit action where environmental degradation will inevitably result.”<sup>14</sup>

BLM’s land use decisions are also governed by the Federal Land Policy and Management Act of 1976 (FLPMA), which requires BLM to “develop . . . land use plans which provide by tracts or areas for the use of the public lands,” and to “manage the public lands . . . in accordance with [these] land use plans.”<sup>15</sup> Under BLM’s regulations, the adoption of a new land use plan “is considered a major Federal action significantly affecting the quality of the human environment,” requiring an EIS.<sup>16</sup>

---

<sup>8</sup> 40 C.F.R. § 1501.4(b); 43 C.F.R. § 46.305(a)(1); *see Or. Chapter Sierra Club (OCSC)*, 176 IBLA 336, 348 (2009) (“BLM is required under section 102(2)(C) of NEPA and its implementing regulations to encourage and facilitate public involvement in the NEPA process.”).

<sup>9</sup> *See* 43 C.F.R. § 46.305(a).

<sup>10</sup> BLM Handbook H-1790-1, National Environmental Policy Act at 65 (Jan. 30, 2008), [https://www.ntc.blm.gov/krc/uploads/366/NEPAHandbook\\_H-1790\\_508.pdf](https://www.ntc.blm.gov/krc/uploads/366/NEPAHandbook_H-1790_508.pdf) (last visited Feb. 8, 2021) (NEPA Handbook).

<sup>11</sup> *N.M. Wilderness All.*, 186 IBLA 183, 197 (2015) (quotation marks and alterations omitted).

<sup>12</sup> *Jack L. Caufield*, 195 IBLA 84, 89 (2020).

<sup>13</sup> *Backcountry Against Dumps*, 179 IBLA 148, 161 (2010).

<sup>14</sup> *Id.* (quotation marks omitted).

<sup>15</sup> 43 U.S.C. §§ 1712(a), 1732(a); *see* 43 C.F.R. § 1610.5-3(a) (requiring “[a]ll future resource management authorizations and actions” to conform to the land use plan).

<sup>16</sup> *See* 43 C.F.R. § 1601.0-6.

*Factual Background*The 2019 Land Use Plan FEIS and KEPA RMP

The lands at issue in this appeal are located in the Buckskin Mountain and House Rock Valley area of southern Utah, an area of mixed sagebrush and pinyon-juniper woodlands.<sup>17</sup> In September 1996, these lands became part of the Grand Staircase-Escalante National Monument, under Presidential Proclamation No. 6920.<sup>18</sup> In 2000, BLM completed a land use plan for the National Monument (the Monument Plan).<sup>19</sup>

In December 2017, the National Monument was modified by Presidential Proclamation No. 9682, and the lands at issue in this appeal were excluded from the National Monument.<sup>20</sup> BLM refers to the excluded lands, including the lands at issue in this appeal, as the Kanab-Escalante Planning Area (KEPA).<sup>21</sup> After the National Monument's boundaries were redrawn, BLM began a new land use planning effort, to replace the Monument Plan with a set of new land use plans, including separate plans for the remaining National Monument lands and the excluded KEPA lands.<sup>22</sup>

---

<sup>17</sup> See Administrative Record (AR), BLM, Wire Pass Fire Emergency Stabilization and Rehabilitation Project EA, DOI-BLM-UT-P020-2020-0012-EA at 2, 7 (Aug. 6, 2020) (Wire Pass EA); AR, BLM, Pine Hollow Fire Emergency Stabilization and Rehabilitation Project EA, DOI-BLM-UT-P020-2020-0014-EA at 2, 5 (Aug. 21, 2020) (Pine Hollow EA).

<sup>18</sup> Proclamation No. 6920, 60 Fed. Reg. 50,223 (Sept. 24, 1996); BLM Answer at 4 (filed Nov. 20, 2020) (Answer).

<sup>19</sup> Answer at 4.

<sup>20</sup> Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 8, 2017); see Answer at 3-4; see also Exec. Order No. 13,990 § 3(a), 86 Fed. Reg. 7037, 7039 (Jan. 25, 2021) (directing the Secretary of the Interior to “conduct a review of the monument boundaries and conditions that were established by . . . Proclamation 9682 of December 4, 2017 (Modifying the Grand Staircase-Escalante National Monument) . . . , to determine whether restoration of the monument boundaries and conditions that existed as of January 20, 2017, would be appropriate”).

<sup>21</sup> Answer at 4.

<sup>22</sup> See BLM, Grand Staircase-Escalante National Monument and Kanab-Escalante Planning Area Proposed Resource Management Plans and Final EIS at 1-1 (Oct. 2019), <https://eplanning.blm.gov/eplanning-ui/project/94706/570> (last visited Feb. 8, 2021) (FEIS). We take official notice of this document, and of the other publicly available BLM documents we cite in this decision that are not part of the AR. See 43 C.F.R. § 4.24(b).

In October 2019, BLM published a final EIS that analyzed the proposed land use plans (the 2019 Land Use Plan FEIS, or the FEIS).<sup>23</sup> This FEIS analyzed five alternatives, including a no-action alternative, which would continue managing the lands under the existing Monument Plan, and the proposed alternative, which “would emphasize resource use and reduce constraints while ensuring the proper care and management of monument objects.”<sup>24</sup> In February 2020, BLM published a record of decision approving the new land use plan for the excluded KEPA lands, which was “nearly identical” to the proposed alternative analyzed in the FEIS.<sup>25</sup> We refer to this plan as the KEPA Resource Management Plan (RMP).

### The Wire Pass and Pine Hollow Fires

On June 26, 2020, a lightning strike ignited the Wire Pass Fire, burning about 1500 acres of BLM-managed lands.<sup>26</sup> In accordance with agency policy, BLM moved quickly to prepare an initial emergency stabilization plan.<sup>27</sup> On July 28, 2020, BLM published a preliminary EA and FONSI for the Wire Pass Fire Emergency Stabilization and Rehabilitation Project (the Wire Pass Project).<sup>28</sup> After a six-day public comment period, during which it received a comment letter from SUWA,<sup>29</sup> BLM issued a final Wire Pass EA, FONSI, and decision record (DR) on August 6, 2020.<sup>30</sup>

---

<sup>23</sup> See FEIS, *supra* note 22.

<sup>24</sup> *Id.* at 2-1.

<sup>25</sup> AR, BLM, Record of Decision and Approved Resource Management Plan for the Kanab-Escalante Planning Area at ROD-2 (Feb. 2020) (RMP).

<sup>26</sup> Wire Pass EA, *supra* note 17, at 1.

<sup>27</sup> See AR, BLM Handbook H-1742-1, Burned Area Emergency Stabilization and Rehabilitation at 6 (Feb. 12, 2007) (requiring an initial emergency stabilization plan to be submitted to BLM management “*within seven calendar days of wildfire containment*”).

<sup>28</sup> See AR, BLM, Wire Pass Fire Emergency Stabilization and Rehabilitation Project Preliminary EA, DOI-BLM-UT-P020-2020-0012-EA (July 24, 2020); AR, BLM, Wire Pass Fire Emergency Stabilization and Rehabilitation Project Draft FONSI, DOI-BLM-UT-P020-2020-0012-EA (July 24, 2020).

<sup>29</sup> See AR, SUWA, Comments on the Draft EA for the Wire Pass Emergency Stabilization and Rehabilitation Project (submitted Aug. 2, 2020) (SUWA Comments).

<sup>30</sup> See Wire Pass EA, *supra* note 17; AR, BLM, Wire Pass Fire Emergency Stabilization and Rehabilitation Project FONSI, DOI-BLM-UT-P020-2020-0012-EA (Aug. 6, 2020) (Wire Pass FONSI); AR, BLM, Wire Pass Fire Emergency Stabilization and Rehabilitation Project DR, DOI-BLM-UT-P020-2020-0012-EA (Aug. 6, 2020) (Wire Pass DR).

Meanwhile, on July 29, 2020, the Pine Hollow Fire broke out close to the site of the Wire Pass Fire, burning about 3900 acres of BLM-managed lands.<sup>31</sup> On August 21, 2020, BLM issued a final EA, FONSI, and DR for the Pine Hollow Fire Emergency Stabilization and Rehabilitation Project (the Pine Hollow Project).<sup>32</sup> BLM did not publish a draft EA or provide a public comment period for the Pine Hollow Project.<sup>33</sup>

### The Wire Pass and Pine Hollow Projects

The Wire Pass and Pine Hollow Projects are generally similar. In each case, an initial mix of seeds would be broadcast across the burned area by airplane.<sup>34</sup> After the first round of aerial reseeding, most of the area would be treated using a device known as an “Ely Chain,” which consists of a “ship anchor chain with railroad iron welded perpendicular to the links.”<sup>35</sup> The Ely Chain would be dragged across the treatment area by “two tractor type crawlers,” in order to “prepare the soil and cover the seed” broadcast during the first flight.<sup>36</sup> The tractors would also broadcast additional seeds as they go along.<sup>37</sup> After the chaining is completed, a second round of aerial reseeding would occur, for species whose seeds “do[] not tolerate soil covering.”<sup>38</sup>

The seeds used in the two projects would consist of “a mix of introduced species for . . . initial stabilization and competition with invasive weeds and . . . native species for long-term plant community stability.”<sup>39</sup> The final selection of species would be made

---

<sup>31</sup> Pine Hollow EA, *supra* note 17, at 1.

<sup>32</sup> *See id.*; AR, BLM, Pine Hollow Fire Emergency Stabilization and Rehabilitation Project FONSI, DOI-BLM-UT-P020-2020-0014-EA (Aug. 21, 2020) (Pine Hollow FONSI); AR, BLM, Pine Hollow Fire Emergency Stabilization and Rehabilitation Project DR, DOI-BLM-UT-P020-2020-0014-EA (Aug. 21, 2020) (Pine Hollow DR).

<sup>33</sup> *See supra* notes 8-12 and accompanying text.

<sup>34</sup> *See Wire Pass EA, supra* note 17, at 3; Pine Hollow EA, *supra* note 17, at 3.

<sup>35</sup> *See Wire Pass EA, supra* note 17, at 3; Pine Hollow EA, *supra* note 17, at 3; BLM, Egan and Johnson Basins Restoration Project Final EA, DOI-BLM-NV-L010-2013-0014-EA at 20 (June 28, 2018),

[https://eplanning.blm.gov/public\\_projects/nepa/35903/150409/184605/EJB\\_EA\\_DOI-BLM-NV-L010-2013-0014-EA\\_Final\\_pdf.pdf](https://eplanning.blm.gov/public_projects/nepa/35903/150409/184605/EJB_EA_DOI-BLM-NV-L010-2013-0014-EA_Final_pdf.pdf) (last visited Feb. 8, 2021).

<sup>36</sup> *See Wire Pass EA, supra* note 17, at 3; Pine Hollow EA, *supra* note 17, at 3.

<sup>37</sup> *See Wire Pass EA, supra* note 17, at 3; Pine Hollow EA, *supra* note 17, at 3.

<sup>38</sup> *See Wire Pass EA, supra* note 17, at 3; Pine Hollow EA, *supra* note 17, at 3.

<sup>39</sup> *See Wire Pass EA, supra* note 17, at 3; Pine Hollow EA, *supra* note 17, at 3.

“at the time of implementation . . . depending on seed availability and price,” with “[a]n effort [to] be made to . . . prioritize the use of natives.”<sup>40</sup>

After reseeding, “[t]he seeded burn areas would be rested from livestock grazing for a minimum of two growing seasons.”<sup>41</sup> The Wire Pass Project would also include several other elements, including new road drainage features and cattle fencing.<sup>42</sup>

### The Wire Pass and Pine Hollow EAs

The Wire Pass and Pine Hollow EAs, like the projects they analyze, are generally similar; we refer to them collectively as the EAs. Each EA described the need for the proposed action as follows:

The stabilization and rehabilitation actions are proposed to stabilize soils, to prevent soil loss and to revegetate areas that are currently devoid of vegetation due to the . . . wildfire. This effort is needed to reduce accelerated soil erosion and to prevent the establishment and/or spread of noxious and invasive non-native species, especially cheatgrass. . . .

Once implemented, the Proposed Action would provide needed forage for wildlife populations (especially for crucial mule deer winter range, and the mule deer which overwinter in this area), forage for permitted livestock, and long-term stability of plant and animal communities.<sup>[43]</sup>

Each EA analyzed two alternatives: the proposed stabilization and rehabilitation project, and a no-action alternative.<sup>44</sup> “Other action alternatives that were considered but eliminated from detailed analysis include use of the Rangeland Drill to apply seed and use of the Dixie Harrow to incorporate seed into the soil. Because of the rocky nature of the soil, these methods would not be effective means of seeding.”<sup>45</sup>

The two EAs contained generally similar discussions of the affected environment and of the direct, indirect, and cumulative impacts of the two alternatives, with a few

---

<sup>40</sup> See Wire Pass EA, *supra* note 17, at 3; Pine Hollow EA, *supra* note 17, at 3.

<sup>41</sup> See Wire Pass EA, *supra* note 17, at 3; Pine Hollow EA, *supra* note 17, at 3.

<sup>42</sup> See Wire Pass EA, *supra* note 17, at 3.

<sup>43</sup> See Wire Pass EA, *supra* note 17, at 1; Pine Hollow EA, *supra* note 17, at 1.

<sup>44</sup> See Wire Pass EA, *supra* note 17, at 2-4; Pine Hollow EA, *supra* note 17, at 2-3.

<sup>45</sup> See Wire Pass EA, *supra* note 17, at 2; Pine Hollow EA, *supra* note 17, at 2.

differences that are not relevant to this appeal. The EAs also noted that the proposed projects are consistent with the February 2020 KEPA RMP.<sup>46</sup>

The Wire Pass EA did not specifically respond to the public comments received by BLM, including those submitted by SUWA, but included the following statement:

[P]ublic involvement for this project has been limited due to timing constraints and the emergency action nature of this project. The Preliminary EA for this proposal was posted to [BLM's website] on July 28, 2020, for a six-day comment period. Two letters were received, and the associated comments were considered. The EA was based on all information from public engagement, as well as ongoing internal scoping.<sup>[47]</sup>

The Pine Hollow EA, meanwhile, explained that no public comment period was provided because “[t]he Pine Hollow Fire occurred in the same landscape as the Wire Pass Fire that occurred only a couple weeks prior,” and BLM “anticipated” that the “landscape specific considerations,” “interested parties,” and “associated concerns” would be “very similar.”<sup>48</sup>

### SUWA's Appeals

SUWA filed timely notices of appeal, and we have jurisdiction over the claims addressed in this decision under 43 C.F.R. §§ 4.1(b)(2) and 4.410(a). Because BLM placed its decisions in effect immediately, pursuant to 43 C.F.R. § 4190.1,<sup>49</sup> we must decide this appeal “within 60 days after all pleadings have been filed, and within 180 days after the appeal was filed.”<sup>50</sup> Because SUWA filed its reply on December 22, 2020, the deadline for deciding this appeal is February 20, 2021.<sup>51</sup>

---

<sup>46</sup> See Wire Pass EA, *supra* note 17, at 1; Pine Hollow EA, *supra* note 17, at 1-2.

<sup>47</sup> Wire Pass EA, *supra* note 17, at 17 (footnote omitted); see *Caufield*, 195 IBLA at 89 (“While BLM must provide for public involvement to the extent practicable in preparing an EA and must consider comments that are timely received, there is no requirement that the EA list and respond to each of the comments received.” (quotation marks and footnote omitted)).

<sup>48</sup> See Pine Hollow EA, *supra* note 17, at 17.

<sup>49</sup> See Wire Pass DR, *supra* note 30, at 2; Pine Hollow DR, *supra* note 32, at 2.

<sup>50</sup> See 43 C.F.R. § 4.416.

<sup>51</sup> See Reply to BLM's Answer to Statement of Reasons (filed Dec. 22, 2020).

## DISCUSSION

*Standard of Review*

A party challenging a BLM decision to approve an action based on a FONSI “has the burden of demonstrating with objective proof that the decision is premised on [an] . . . error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.”<sup>52</sup> “Conclusory allegations, unsupported by evidence showing error, do not suffice.”<sup>53</sup> “[T]he fact that an appellant prefers that BLM take another substantive course of action does not show that BLM violated the procedural requirements of NEPA,”<sup>54</sup> nor does “mere disagreement or a difference of opinion.”<sup>55</sup> “[I]f BLM’s purpose is reasonable, we will uphold BLM’s identification of alternatives if they are reasonable in light of that purpose.”<sup>56</sup>

As an initial matter, we note that although BLM describes the Wire Pass and Pine Hollow Projects as “emergency action[s],”<sup>57</sup> the agency did not invoke its emergency authorities under 43 C.F.R. § 46.150. Because BLM did not rely on these emergency authorities, its actions must comply with NEPA in the same manner as any other agency action, notwithstanding its references to “emergency” circumstances.<sup>58</sup>

---

<sup>52</sup> *Kane*, 195 IBLA at 20; *accord WildLands Defense*, 193 IBLA 59, 68 (2018); *WWP*, 191 IBLA at 356; *KSWC*, 190 IBLA at 304-305; *OCSC*, 176 IBLA at 346-347; *Cal. Wilderness Coal.*, 176 IBLA 93, 105 (2008); *Mo. Coal. for the Env’t*, 172 IBLA 226, 239 (2007); *Biodiversity Conservation All.*, 171 IBLA 218, 226 (2007); *Mineral Bottom Airstrip*, 152 IBLA at 220; *Rocky Mtn. Pipeline Trades Council*, 149 IBLA 388, 398 (1999); *Powder River Basin Res. Council*, 124 IBLA 83, 91 (1992); *see also Upper Kanab Creek*, 182 IBLA at 386 (“An appellant seeking to overcome [a decision based on a FONSI] must carry its burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action . . . .”); *WildEarth Guardians*, 182 IBLA at 105 (same); *Powder River Basin Res. Council (Fortification Creek)*, 180 IBLA 32, 47-48 (2010) (same).

<sup>53</sup> *WWP*, 191 IBLA at 356.

<sup>54</sup> *WildLands Defense (Battle Mtn.)*, 192 IBLA 383, 400 (2018); *Kane*, 195 IBLA at 20.

<sup>55</sup> *OCSC*, 176 IBLA at 352.

<sup>56</sup> *Battle Mtn.*, 192 IBLA at 399; *see also id.* (“The identification of appropriate alternatives is informed by BLM’s stated purpose and need for its proposed action.”).

<sup>57</sup> *See Wire Pass EA*, *supra* note 17, at 17; *Pine Hollow EA*, *supra* note 17, at 17.

<sup>58</sup> *See WildLands Defense*, 189 IBLA 19, 26 (2016).

*The Relationship Between the EAs and the EISs*

SUWA argues that BLM violated NEPA by failing to consider certain alternatives and impacts. Before we can address these arguments, we must first examine the relationship between the EAs and two earlier EISs on which BLM relies in this appeal: the 2019 Land Use Plan FEIS, and an EIS (described below) that we refer to as the 2007 Vegetation Treatment Programmatic Environmental Impact Statement/Programmatic Environmental Report (PEIS/PER).<sup>59</sup> Because BLM did not properly tier the EAs to these EISs and incorporate the relevant material from the EISs by reference in the EAs, BLM cannot rely on those EISs to demonstrate that it complied with NEPA.

NEPA regulations allow BLM to “tier” an EA for a specific project to an existing, broader EIS.<sup>60</sup> Tiering an EA to an existing EIS allows BLM “to eliminate repetitive discussions of the same issues” that were already addressed in the EIS.<sup>61</sup> An EA that is tiered to an earlier EIS must “summarize the issues discussed in the [EIS] and incorporate discussions from the [EIS] by reference.”<sup>62</sup> The EA must also “include a finding that the conditions and environmental effects described in the [EIS] are still valid or address any exceptions.”<sup>63</sup>

BLM’s NEPA Handbook elaborates on these regulatory requirements, explaining that the EA must: “1. state that it is tiered to [an EIS]; 2. describe the [EIS] to which it is tiered; and 3. incorporate by reference the relevant portions of the [EIS] to which it is tiered.”<sup>64</sup> The Handbook also specifies procedures for incorporating materials into an EA by reference, prescribing that the EA must “[g]ive the name of the document and page numbers where the incorporated material can be found,” “[m]ake this citation as specific as possible,” “summarize the previous analysis,” and “explain what [BLM] conclude[s] based on that previous analysis and how it relates to the action in question,” in a manner

---

<sup>59</sup> See Answer at 15-16, 21-22.

<sup>60</sup> See 40 C.F.R. § 1508.28 (“*Tiering* refers to the coverage of general matters in broader [EISs] . . . with subsequent narrower [EISs] or [EAs] . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the [EIS or EA] subsequently prepared.”); 43 C.F.R. § 46.140(c) (“An [EA] prepared in support of an individual proposed action can be tiered to a . . . broader-scope [EIS].”).

<sup>61</sup> See 40 C.F.R. § 1502.20.

<sup>62</sup> *Id.*; see also *Blue Mtns. Biodiversity Proj.*, 139 IBLA 258, 266 (1997) (similar).

<sup>63</sup> 43 C.F.R. § 46.140.

<sup>64</sup> NEPA Handbook, *supra* note 10, at 27.

that is “sufficient to allow the decision-maker and other readers to follow the analysis and arrive at a conclusion.”<sup>65</sup>

BLM states on appeal that it “incorporated the [2007 Vegetation Treatment PEIS/PER] by reference in both EAs, and demonstrated its intent to rely on the [PEIS/PER’s] analysis.”<sup>66</sup> The 2007 Vegetation Treatment PEIS/PER is the product of a “comprehensive cumulative [environmental] analysis of BLM conservation and restoration treatments involving vegetation communities, watersheds, and wildlife habitats” throughout the western United States, which the agency began in 2001.<sup>67</sup> Six years later, BLM published the results of that analysis in the form of two documents.<sup>68</sup> The first document “analyze[d] the effects of herbicide use on humans, plants, and animals and other environmental and social resources,” and was referred to as the Programmatic EIS for Vegetation Treatments Using Herbicides on BLM Lands in 17 Western States (the PEIS).<sup>69</sup> The second document “evaluate[d] the effects of non-herbicide vegetation treatments,” and was referred to as the Programmatic Environmental Report for Vegetation Treatments on BLM Lands in 17 Western States (the PER).<sup>70</sup> Although BLM bifurcated the PEIS and the PER, the two documents were “linked,” and constituted “interrelated” parts of a single environmental analysis, which

---

<sup>65</sup> *Id.* at 26; *see also* 40 C.F.R. § 1502.21 (“Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described.”).

<sup>66</sup> Answer at 21.

<sup>67</sup> *See* Notice of Intent to Prepare an Environmental Impact Statement for the Conservation and Restoration of Vegetation, Watershed, and Wildlife Habitat Treatments on Public Lands Administered by the Bureau of Land Management in the Western United States Including Alaska, 66 Fed. Reg. 52,148, 52,148 (Oct. 12, 2001).

<sup>68</sup> *See* Notice of Availability of Final Programmatic Environmental Impact Statement and Environmental Report for Vegetation Treatments on Public Lands Administered by the Bureau of Land Management in the Western United States, Including Alaska, 72 Fed. Reg. 35,718 (June 29, 2007).

<sup>69</sup> AR, BLM, Final Programmatic EIS: Vegetation Treatments Using Herbicides on Bureau of Land Management Lands in 17 Western States at 1-2 to 1-3 (June 29, 2007) (PEIS).

<sup>70</sup> AR, BLM, Final Vegetation Treatments on Bureau of Land Management Lands in 17 Western States Programmatic Environmental Report at 1-2 (June 2007) (PER); *see also* PEIS, *supra* note 69, at 1-3 (“The PER discloses the general impacts on the environment of using non-herbicide treatment methods, including fire use, and mechanical, manual and biological control methods, to treat hazardous fuels, invasive species, and other unwanted or competing vegetation.”).

was intended to “allow[] effective tiering and incorporation by reference” in future environmental analyses.<sup>71</sup> As noted, we refer to the two documents collectively as the 2007 Vegetation Treatment PEIS/PER, or simply the PEIS/PER.

While BLM does not explicitly claim that it tiered the EAs to the PEIS/PER, it asserts on appeal that it “incorporated the 2007 PER by reference in both EAs, and demonstrated its intent to rely on the PEIS[’s] analysis.”<sup>72</sup> Specifically, BLM asserts that it incorporated the PEIS/PER’s analysis of “the impacts associated with mechanical treatments,” and of “impacts to cultural resources from mechanical treatments.”<sup>73</sup>

The only discussion of the PEIS/PER in the EAs, the FONSI, or the DRs consists of the following passage in the EAs:

The Proposed Action to stabilize public lands damaged by wildland fires through aerial re-seeding and associated actions (e.g. temporary closures to livestock grazing) was analyzed in the *Environmental Impact Statement Addressing Vegetation Treatment on BLM Lands in 17 Western States* (FEIS 2005). The FEIS also adequately considered the effects to the human environment of the same class of actions.<sup>[74]</sup>

Even if this statement were adequate to tier the EAs to the PEIS/PER generally (notwithstanding the misstatement of the documents’ titles and year of publication,<sup>75</sup> and the lack of any express “finding that the conditions and environmental effects described in the [EIS] are still valid or address any exceptions”<sup>76</sup>) we would still find that BLM failed to incorporate by reference the PEIS/PER’s discussion of any issues other than, at most, “aerial re-seeding” and “temporary closures to livestock grazing.”<sup>77</sup> We therefore

---

<sup>71</sup> See PEIS, *supra* note 69, at 1-2 to 1-3; PER, *supra* note 70, at 1-2 to 1-3; 72 Fed. Reg. at 35,719; see also PEIS, *supra* note 69, at 4-198 to 4-199 (“The effects of vegetation treatments disclosed in the PEIS and PER, combined with subsequent site-specific NEPA analysis, provide a comprehensive assessment of cumulative effects of future vegetation treatment activities on public lands.”).

<sup>72</sup> Answer at 21.

<sup>73</sup> *Id.* at 21, 22.

<sup>74</sup> Wire Pass EA, *supra* note 17, at 2; Pine Hollow EA, *supra* note 17, at 2.

<sup>75</sup> See Answer at 5 n.2 (explaining that the “FEIS” cited in the EAs “refers to [the PEIS and the PER] collectively,” and that “the year ‘2005’ is a clerical error”).

<sup>76</sup> 43 C.F.R. § 46.140.

<sup>77</sup> Wire Pass EA, *supra* note 17, at 2; Pine Hollow EA, *supra* note 17, at 2.

reject BLM's argument that the EAs incorporated by reference the PEIS/PER's discussion of "the impacts associated with mechanical treatments."<sup>78</sup>

Apart from suggesting that it tiered the EAs to the 2007 Vegetation Treatment PEIS/PER and claiming that it incorporated the PEIS/PER by reference, BLM also asserts on appeal that it was not required to analyze in the EAs any alternatives that it had already considered in the 2019 Land Use Plan FEIS.<sup>79</sup> BLM does not appear to claim that it tiered the EAs to the FEIS, and it is clear that it did not do so. Unlike the PEIS/PER, the EAs do not mention the FEIS at all (even though both the EAs and the associated FONSI discuss the KEPA RMP for which the FEIS was prepared,<sup>80</sup> and even though SUWA cited the FEIS in its comments on the draft Wire Pass EA<sup>81</sup>). Certainly, the EAs do not meet the detailed requirements of the NEPA regulations and BLM's NEPA Handbook for tiering and incorporation by reference. Therefore, although BLM *could* have tiered the EAs to the FEIS,<sup>82</sup> it did not do so.

Nonetheless, BLM asserts that because the FEIS supported the KEPA RMP, to which the projects must conform under FLPMA, we should consider the analysis found in the FEIS as part of BLM's environmental analysis in this appeal. In particular, BLM points to our decision in *Southern Utah Wilderness Alliance (Beef Basin)*, in which we stated that "when BLM has considered alternative land uses and their corresponding environmental impacts in a current [land use plan] and associated EIS, it is not required to consider them anew each time BLM decides to approve a particular project that is permissible

---

<sup>78</sup> Answer at 21; see *Public Emps. for Env't'l Responsibility v. U.S. Fish & Wildlife Serv.*, 177 F. Supp. 3d 146, 155 (D.D.C. 2016) ("Clearly, the agency knows how to incorporate by reference when it wants to. It did not do so with regard to its assessment of alternatives in Chapters 2 and 4 of the 2003 EIS. And FWS cannot accomplish post hoc in this litigation what it did not do in the 2014 EA itself.").

<sup>79</sup> See Answer at 15-16, 22.

<sup>80</sup> Wire Pass EA, *supra* note 17, at 1 (finding that the Project "is in conformance with" the KEPA RMP); Pine Hollow EA, *supra* note 17, at 1-2 (same); Wire Pass FONSI, *supra* note 30, at unpaginated (unp.) 1 ("Effects of the proposal would not exceed those effects described in the [KEPA RMP]. . . . Effects to visual, grazing and other resources were considered both individually and cumulatively [in the EA] and are not considered significant because they meet and do not exceed thresholds described in the KEPA RMP . . . ." (citation omitted)); Pine Hollow FONSI, *supra* note 32, at unp. 1 (similar).

<sup>81</sup> See SUWA Comments, *supra* note 29, at 12.

<sup>82</sup> See NEPA Handbook, *supra* note 10, at 28 (providing, as an examine of a "typical situation[] in which tiering is appropriate," the tiering of a "[p]roject-specific NEPA document . . . to a [land use plan]/EIS").

under the existing [land use plan].”<sup>83</sup> Elsewhere in our *Beef Basin* decision, however, we noted that the EA under appeal in that case was tiered to the land use plan EIS.<sup>84</sup> *Beef Basin* therefore does not stand for the proposition that BLM can rely on a land use plan EIS to bolster the analysis contained in a project-level EA without following the steps needed to tier its EA to the EIS.

For these reasons, we hold that BLM cannot rely on the environmental analysis contained in either the PEIS/PER or the FEIS to demonstrate its compliance with NEPA in this appeal. Although the circumstances in this case indicate that BLM and SUWA were both familiar with the PEIS/PER and the FEIS, the specific procedures for tiering and incorporating by reference found in the regulations and in BLM’s Handbook serve a critical purpose: to ensure that “the decision-maker and other readers [can] follow the analysis and arrive at a conclusion” based on that analysis.<sup>85</sup> The passing references in the record to these documents are not enough to demonstrate that the documents contributed to the EAs’ dual purpose of ensuring “that the agency and the public [are] fully informed of the environmental consequences” of the proposed actions.<sup>86</sup>

#### *BLM’s Analysis of Alternatives*

Having concluded that BLM cannot rely on the PEIS/PER or the FEIS to demonstrate its compliance with NEPA, we turn to the substance of SUWA’s argument. Because BLM did not address, even briefly, certain alternatives that the record suggests

---

<sup>83</sup> *Beef Basin*, 185 IBLA at 167; see Answer at 15.

<sup>84</sup> 185 IBLA at 154 n.4.

<sup>85</sup> NEPA Handbook, *supra* note 10, at 26; see also 40 C.F.R. § 1502.21 (allowing agencies to incorporate materials by reference “when the effect will be to cut down on bulk without impeding agency and public review of the action” (emphasis added)); *Blue Mtns. Biodiversity Proj.*, 139 IBLA at 266 (requiring the Board to determine “whether the EA demonstrates that BLM has taken a hard look at the proposed action, identified relevant areas of environmental concern, and made a convincing case that any environmental impacts of the proposed action not previously analyzed in the EIS are insignificant”).

<sup>86</sup> See *Backcountry Against Dumps*, 179 IBLA at 161; see also *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (describing NEPA’s “two purposes”); *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 690 (10th Cir. 2015) (similar); *Greater Deadman Bench*, 191 IBLA at 41 (“The requirement for appropriate alternatives in a NEPA analysis ensures that the BLM decisionmaker has before him [sic] and takes into proper account all possible approaches to a particular project.” (quotation marks omitted)).

were appropriate alternatives, we agree with SUWA that BLM “failed to consider a substantial environmental question of material significance to the proposed action.”<sup>87</sup>

In its comment letter, and again on appeal, SUWA asserts that BLM should have analyzed “[a]n alternative that considers only the use of native seeds” and “[a]n alternative that considers permanently removing livestock or, removing them long enough to truly recover native vegetation.”<sup>88</sup> SUWA also asserts that BLM should have analyzed an alternative that would require BLM to “(1) use only native seeds to restore the burned area, (2) use only manual and hand tools (rather than heavy industrial equipment such as two-way chaining with an Ely Chain . . .), and (3) modify livestock grazing to allow full establishment of native plant species.”<sup>89</sup> We therefore ask whether BLM was required to consider a) removing livestock until vegetation has recovered; b) treating the project areas using only native seeds; and c) combining these two elements with the third element of using only manual methods, rather than an Ely Chain.

The first of these alternatives is similar to BLM’s proposed alternative, which includes the requirement that “seeded burn areas would be rested from livestock grazing for a *minimum* of two growing seasons.”<sup>90</sup> While the EAs did not specify the conditions under which the prohibition on grazing would be extended past two years, the implication is clear that the purpose of the rest period is to allow vegetation to recover.<sup>91</sup> Therefore, BLM adequately analyzed “[a]n alternative that considers permanently removing livestock or, removing them long enough to truly recover native vegetation.”<sup>92</sup>

---

<sup>87</sup> *WWP*, 191 IBLA at 356.

<sup>88</sup> Statement of Reasons at 4 (filed Sept. 8, 2020) (SOR) (quotation marks omitted); *accord* SUWA Comments, *supra* note 29, at 7, 9.

<sup>89</sup> SOR at 3-4 (quotation marks omitted); *accord* SUWA Comments, *supra* note 29, at 6.

<sup>90</sup> Wire Pass EA, *supra* note 17, at 3 (emphasis added); Pine Hollow EA, *supra* note 17, at 3; *see also* Wire Pass EA, *supra* note 17, at 12 (“In order to allow the seeded species a better chance to establish within the treatment areas, the area would be excluded from grazing for at least two years . . .”); Pine Hollow EA, *supra* note 17, at 12 (same).

<sup>91</sup> *See* Answer at 19 (“[T]he proposed action alternatives analyzed in the EAs already contemplate removing the project areas from livestock grazing for an appropriate period of time to allow for re-vegetation, as suggested by Appellants.”).

<sup>92</sup> SOR at 4 (quotation marks omitted); *accord* SUWA Comments, *supra* note 29, at 9. *See Kane*, 195 IBLA at 25 (noting that “BLM is not required to discuss myriad alternatives, each resulting in an incremental change in the overall impact of a proposed action” (quotation marks omitted)); *Upper Kanab Creek*, 182 IBLA at 392 (“An agency need not

The same is not true, however, for alternatives that would limit treatments to native seeds and to manual methods. BLM first argues that it was precluded from analyzing these alternatives because they are inconsistent with the KEPA RMP, which directs BLM to “[u]se the full range of vegetation treatment methods and tools (e.g., chaining, prescribed fire, mechanical, chemical, biological, woodland product removal).”<sup>93</sup> This argument proves too much, however. The direction in the KEPA RMP to “[u]se the full range of . . . methods and tools” does not require BLM to use *every* tool in its toolkit for *every* vegetation treatment project, but rather allows BLM to exercise its judgment on a case-by-case basis to select the appropriate tools for each project from “the full range” of tools.<sup>94</sup> We therefore reject BLM’s argument that the KEPA RMP precluded it from considering these alternatives.

BLM next points out that (as we have held on numerous occasions) “it generally suffices for an agency to consider a no action and proposed action alternative in an EA, particularly if the proposed action will achieve environmental benefits.”<sup>95</sup> While this principle is correct, it does not mean that an EA that analyzes a no action alternative and a proposed action alternative is *per se* reasonable, however; rather, we must still look at “the substance of the alternatives” that BLM declined to consider, along with any rationale provided by BLM in the EA, in order to determine whether BLM’s decision not to consider those alternatives was reasonable.<sup>96</sup>

BLM next suggests that the EAs themselves established that SUWA’s proposed alternatives were not “reasonable . . . in light of the purposes and needs of the Wire Pass and Pine Hollow Projects.”<sup>97</sup> BLM’s NEPA Handbook “recommend[s],” but does not require, “that the EA contain a description of alternatives to the proposed action that were considered but not analyzed in detail,” and “[d]ocument the reasons for dismissing

---

discuss alternatives similar to alternatives actually considered . . . .” (quotation marks and alterations omitted)).

<sup>93</sup> RMP, *supra* note 25, at ARMP-13; see Answer at 14-15.

<sup>94</sup> See RMP, *supra* note 25, at ARMP-12 (directing BLM to “prioritize the use of native species,” while allowing it to “use . . . nonnative species where necessary”); *id.* at ARMP-14 (directing BLM to “[c]onsider all available tools when applying emergency stabilization and rehabilitation, as appropriate” (emphasis added)).

<sup>95</sup> See Answer at 16 (quoting *Battle Mtn.*, 192 IBLA at 400).

<sup>96</sup> *Beef Basin*, 185 IBLA at 166 (quotation marks omitted); see, e.g., *Battle Mtn.*, 192 IBLA at 399-400; *Witham*, 187 IBLA at 304; *Roseburg Resources*, 186 IBLA at 336.

<sup>97</sup> Answer at 17.

an alternative in the EA.”<sup>98</sup> If the EAs had in fact provided a reasoned explanation, however brief, for declining to consider these alternatives in detail, we would give that explanation considerable deference.<sup>99</sup> The EAs did not, however, address these alternatives, or explain why they are not “reasonable.”

With regard to the use of manual methods instead of an Ely Chain, BLM points to the passage in the EAs that discussed using a “Rangeland Drill” or a “Dixie Harrow” and concluded that “[b]ecause of the rocky nature of the soil, these methods would not be effective means of seeding.”<sup>100</sup> This passage is irrelevant to the alternatives proposed by SUWA. Although the EAs did not describe what a “Rangeland Drill” or a “Dixie Harrow” are, these terms appear to refer to different types of heavy machinery.<sup>101</sup> The fact that BLM concluded that using types of heavy machinery other than an Ely Chain “would not

---

<sup>98</sup> See NEPA Handbook, *supra* note 10, at 80. Cf. *Blue Mtns. Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (noting that the EA “is where the [agency’s] defense of its position must be found” (citing 40 C.F.R. § 1508.9(a)); accord *Or. Nat. Desert Ass’n v. Rose*, 921 F.3d 1185, 1191 (9th Cir. 2019).

<sup>99</sup> See, e.g., *Fortification Creek*, 180 IBLA at 48 (“If BLM declines to afford detailed analysis of an alternative *and briefly explains the reasons for its finding*, one challenging that finding has the burden to demonstrate, with objective proof, that the alternative not only would achieve the intended purpose of the proposed action at less cost to the environment, but also be technically and economically feasible in the particular circumstances of the case.” (emphasis added)); *Biodiversity Conservation All.* 171 IBLA at 237-238 (“We conclude that BLM has provided a reasoned explanation, supported by evidence, for its decision not to analyze in detail the directional drilling alternative.”); see also *Beef Basin*, 185 IBLA at 167 (“As to aerial seeding, we note . . . that BLM briefly considered [in the EA] an alternative providing for the aerial seeding of native plant species exclusively.”).

<sup>100</sup> Wire Pass EA, *supra* note 17, at 2; Pine Hollow EA, *supra* note 17, at 2; Answer at 17.

<sup>101</sup> See, e.g., BLM, Alvey Wash, Coal Bench, and Last Chance Vegetation Restoration Projects Scoping Notice, DOI-BLM-UT-0300-2017-0065-EA at unpaginated 5 (Jan. 4, 2018), [https://eplanning.blm.gov/public\\_projects/nepa/88916/130138/158270/AlveyWash-CoalBench-LastChanceScopingNotice\\_Final1--508v\\_1-4-18\\_esigned.pdf](https://eplanning.blm.gov/public_projects/nepa/88916/130138/158270/AlveyWash-CoalBench-LastChanceScopingNotice_Final1--508v_1-4-18_esigned.pdf) (last visited Feb. 8, 2021) (describing a “Rangeland Drill” as “[h]eavy equipment for distributing seeds in furrows or drills” that is “[t]owed by a tractor” and “consists of an angular piece of equipment composed of heavy steel members carried on steel rims and rubber tires”); *id.* at unpaginated 4 (describing a “Dixie Harrow” as a tractor-pulled “series of metal pipes with prongs that remove sagebrush and prepare a seed bed”).

be effective” sheds no light on whether it would be feasible to “use only manual and hand tools (rather than heavy industrial equipment such as . . . an Ely Chain . . . ).”<sup>102</sup>

Similarly, with regard to the use of native seeds only, BLM asserts on appeal that the EAs “determined that use of [non-native] species is necessary to ‘compete with the invasive species giving the native species the necessary time to establish.’”<sup>103</sup> The EAs, however, made no such determination. Rather, the cited passage in the EAs stated only that “[t]he use of [non-native] species *could* compete with the invasive species giving the native species the time necessary to establish.”<sup>104</sup> Although the EAs explained the advantages that non-native seeds would bring to the projects,<sup>105</sup> they did not find, as BLM asserts on appeal, that using non-native seeds is “necessary,” or that limiting the treatments to native seeds would not be “reasonable . . . in light of the purposes and needs of the Wire Pass and Pine Hollow Projects.”<sup>106</sup>

Finally, BLM points to its “internal comment response document for SUWA’s comments on the draft Wire Pass EA,” which it asserts “shows that BLM rejected SUWA’s proposed alternatives” because those alternatives “were not considered reasonable.”<sup>107</sup> This “internal comment response document,” which was included in BLM’s administrative record on appeal, is an undated, unattributed draft document containing

---

<sup>102</sup> SOR at 3-4 (quotation marks omitted).

<sup>103</sup> Answer at 18 (quoting Wire Pass EA, *supra* note 17, at 12; Pine Hollow EA, *supra* note 17, at 12).

<sup>104</sup> Wire Pass EA, *supra* note 17, at 12 (emphasis added); Pine Hollow EA, *supra* note 17, at 12 (emphasis added).

<sup>105</sup> *See also* Wire Pass EA, *supra* note 17, at 3 (“The proposed seed mixture for the Wire Pass Fire is comprised of a mix of introduced species for 1) initial stabilization and competition with invasive weeds and 2) native species for long-term plant community stability (Appendix A). A diverse mix of species that are appropriate for site conditions and competitive with invasive species was selected by the BLM and the Utah Division of Wildlife Resources (UDWR).”); Pine Hollow EA, *supra* note 17, at 3 (same).

<sup>106</sup> *See* Answer at 16.

<sup>107</sup> Answer at 20 (quoting AR, BLM, Wire Pass EA Comment and Response Document at 7 (date unknown) (Response Document)); *see also id.* at 17 (stating that the internal comment response document “shows that BLM considered and rejected as impractical Appellants’ proposed alternative to require hand-seeding techniques, because ‘the timing required to get the seed into the ground and covered with hand seeders and volunteer labor would not meet the purpose and need of getting the seed on a ground in a timely manner’” (quoting Response Document, *supra*, at 8)); *id.* at 18 (citing the response document’s discussion of the role of non-native seeds).

summaries of issues raised in SUWA’s comment letter, proposed responses to those issues, and comments from BLM staff on the proposed responses.<sup>108</sup> The document’s unnamed authors raise concerns about the feasibility of SUWA’s proposed alternatives, and their ability to satisfy the projects’ purposes.<sup>109</sup> The document bears no date, but an index provided by BLM with the administrative record assigns to this document the date August 15, 2020 – more than a week after BLM issued the Wire Pass DR.<sup>110</sup>

The fact that BLM did not make this document available to the public until this appeal does not by itself preclude us from considering the document’s contents, even though BLM’s NEPA Handbook “recommend[s]” that the agency make its comment responses available as part of the EA or the DR.<sup>111</sup> Nonetheless, in light of the document’s draft nature, its relatively cursory analysis, and the lack of evidence that it represents the agency’s official judgment, we cannot conclude, based on this document alone, that BLM considered SUWA’s proposed alternatives, and arrived at a reasoned conclusion that they would be infeasible, ineffective, or otherwise not “appropriate.”<sup>112</sup>

---

<sup>108</sup> See Response Document, *supra* note 107.

<sup>109</sup> See *id.* at 7 (“Seeding large areas by hand would be exorbitantly costly and less effective.”); *id.* at 8-9 (“The timing required to get the seed into the ground and covered with hand seeders and volunteer labor would not meet the purpose and need of getting the seed on the ground in a timely manner; additionally, the health and safety as well as logistics of that number of volunteers and the hazard associated with the volunteer labor would be a consideration and liability to BLM, especially given short timelines needed for action.”); *id.* at 9 (“Consideration will be given when finalizing the seed mix based on cultivar availability in seed warehouses throughout the State of Utah, and intermountain west. Due to competing rehabilitation and emergency stabilization plans not all seed could be available.”).

<sup>110</sup> See AR, Administrative Record Index (Nov. 13, 2020).

<sup>111</sup> See NEPA Handbook, *supra* note 10, at 65; see also *Blue Mtns. Biodiversity Proj.*, 161 F.3d at 1214 (noting that the EA “is where the [agency’s] defense of its position must be found” (citing 40 C.F.R. § 1508.9(a)); *Or. Nat. Desert Ass’n*, 921 F.3d at 1191 (same); *Witham*, 187 IBLA at 304 (“[T]he EA demonstrates that the agency responded to Appellant’s alternative in detail, both within the EA’s discussion of ‘Alternatives Considered But Not Analyzed in Detail’ as well as in the [Appendix], in which BLM provided reasoned explanations for either rejecting or incorporating his suggestions into the alternatives analyzed.” (citation omitted)).

<sup>112</sup> See 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1501.2(c); *Kane*, 195 IBLA at 23. *Cf. Wyo. Outdoor Council*, 147 IBLA 105, 114 (1998) (noting that even though “BLM did not set

Having concluded that the administrative record does not demonstrate that BLM adequately considered SUWA's proposed alternatives, we next ask whether SUWA has met its burden of showing that this omission constituted a "fail[ure] to consider a substantial environmental question of material significance to the proposed action."<sup>113</sup> We do so "in light of" the purposes of the Wire Pass and Pine Hollow Projects,<sup>114</sup> which are "to stabilize soils, to prevent soil loss and to revegetate areas that are currently devoid of vegetation," in order "to reduce accelerated soil erosion," "prevent the establishment and/or spread of noxious and invasive non-native species," "provide needed forage for wildlife populations," provide "forage for permitted livestock," and promote the "long-term stability of plant and animal communities."<sup>115</sup> The record before us demonstrates that the choices between the use or non-use of non-native seeds, and between manual methods or heavy machinery, pose complex tradeoffs between cost, adverse environmental impacts, and effectiveness at meeting the projects' diverse suite of purposes, across a variety of time scales.<sup>116</sup> We therefore conclude that the question of whether SUWA's proposed alternatives can "accomplish the project's intended purpose, [be] technically and economically feasible, and . . . avoid or minimize adverse environmental impacts" is "a substantial environmental question of material significance to the proposed action."<sup>117</sup>

The 2019 Land Use Plan FEIS, for example, analyzed an alternative that would have prohibited BLM from using non-native seeds for vegetation restoration treatments.<sup>118</sup> The FEIS noted that "[u]se of nonnative species could increase the potential for the spread and establishment of these species," which could in turn "alter native vegetation communities," "wildlife habitat," and "soil/plant interactions," and

---

forth the specific basis for its conclusion [in an appendix to the DR/FONSI] that directional drilling would be uneconomic and infeasible," the agency "did offer its expert opinion, which is sufficient in the absence of contrary evidence from Appellants").

<sup>113</sup> *Kane*, 195 IBLA at 20.

<sup>114</sup> *Battle Mtn.*, 192 IBLA at 399.

<sup>115</sup> See *Wire Pass EA*, *supra* note 17, at 1; *Pine Hollow EA*, *supra* note 17, at 1.

<sup>116</sup> Cf. *Beef Basin*, 185 IBLA at 166 (holding that BLM complied with NEPA where it "considered the likely effects of either treating or not treating the Project area by various means, or the effects at either end of the spectrum," and was not required to analyze in detail "alternatives for treating portions of the Project area by the same means," which lie "somewhere along the continuum between the proposed action and no action") (quotation marks and citations omitted).

<sup>117</sup> *Kane*, 195 IBLA at 20, 23.

<sup>118</sup> FEIS, *supra* note 22, at 2-21.

adversely affect other public lands resources.<sup>119</sup> Weighing the costs and the benefits of “limit[ing] vegetation restoration activities to native species,” it observed that such a limitation would “result[] in potential long-term benefits to native vegetation community enhancement, but eliminat[e] potential short-term benefits from the ability to use desirable nonnative species to accelerate restoration activities.”<sup>120</sup>

The 2007 Vegetation Treatment PEIS/PER, meanwhile, explored the tradeoffs associated with the choice between “[m]echanical methods,” including chaining, and “[m]anual treatments,” which involve “the use of hand tools and hand-operated power tools.”<sup>121</sup> The PEIS/PER disclosed that chaining can adversely affect soils and promote the spread of invasive plants,<sup>122</sup> and that these impacts are generally less severe with

---

<sup>119</sup> *Id.* at 3-32, 3-58; *see also id.* at 3-67 to 3-68 (“[U]se of nonnative species on BLM-administered surface land in certain circumstances . . . could result in adverse impacts on [National Park Service]-managed vegetation resources in lands adjacent to the Planning Area.”); *id.* at 3-102 (“It should be noted that effects on ecosystem function and biodiversity may occur when nonnative species . . . are applied to the range; these effects may result in long-term changes to or degradation of the health of allotments.”); *id.* 3-156 (“Alternatives D and E would allow the use of nonnative species . . . , which may increase flexibility in managing vegetation treatments and restoration in [wilderness study areas] but could also affect naturalness in the area depending on the type and extent of nonnative species and their possible spread.”).

<sup>120</sup> *Id.* at 3-65; *accord id.* at 3-104 to 3-105.

<sup>121</sup> PER, *supra* note 70, at 2-14 to 2-15.

<sup>122</sup> *See id.* at 4-15 (“Use of certain mechanical treatments would directly disrupt biological soil crusts. Crusts are sensitive to compaction by vehicles and other heavy equipment. The removal or destruction of biological soil crusts could adversely affect soil quality by increasing susceptibility to erosion, reducing nitrogen inputs, infiltration, and potentially encouraging weed establishment.” (citations omitted)); *id.* (“[C]haining can result in complete disruption and permanent displacement of the topsoil with dramatic loss in soil quality and function.”); *id.* at 4-16 (“[C]haining . . . would reduce soil structure and could lead to increased erosion, especially if revegetation did not occur.”); *id.* (“Treatments such as . . . chaining . . . drastically disturb the top 8 to 12 inches of the soil profile . . . .”); *id.* at 4-17 (“The effects of chaining on soil and vegetation have been an issue of concern in recent years.”); *id.* at 4-23 (“The soil disturbance associated with machinery used to remove vegetation, such as . . . chaining, or rutting from wheels or tracks, would increase the likelihood of soil and plant material being carried into streams by surface runoff.”); *id.* at 4-45 (“The use of vehicles and other mechanical equipment could negatively affect native plant communities by bringing the propagules of non-

manual methods.<sup>123</sup> (The EAs also briefly discussed these possible adverse effects of chaining, although not in the context of comparing chaining to manual methods.<sup>124</sup>) The PEIS/PER also disclosed that chaining can harm cultural resources.<sup>125</sup> At the same time,

---

native species into treatment sites and creating sites for weed establishment. In addition, repeated mechanical treatments, or treatments that remove large areas of vegetation, could adversely affect native communities by altering species composition.”); *id.* at 4-47 (“Although the use of mechanical treatments in evergreen shrublands would have some benefit to herbaceous species over the short term, these methods could have adverse effects to native communities over the long term if used inappropriately. . . . In most cases, mechanical treatments would need to be combined with other types of treatments in order to avoid adverse effects to native plant communities.”); *id.* at 4-48 (“Mechanical treatments . . . could increase the cover of annual weeds, such as halogeton and Russian thistle, thereby adversely affecting native plant communities. Because of the extremely low and irregular rainfall of [the Subtropical Desert Ecoregion], it would be difficult to revegetate native species after widespread treatments.” (citations omitted)).

<sup>123</sup> *Id.* at 4-17 (“Manual treatments would have less direct effect on soil than the other proposed treatments. Laborers and vehicles accessing the site could disturb topsoil and/or surface organic matter, providing prime conditions for re-invasion by weedy species; however, the extent of this disturbance should be limited.”); *id.* at 4-49 (“Manual treatments would generally benefit native plant communities on public lands, without the risks of adverse effects to non-target species associated with most of the other treatment methods.”).

<sup>124</sup> See Wire Pass EA, *supra* note 17, at 12 (“There might be an initial increase in invasive species due to disturbance created by the two-way Ely Chain and the tractors carrying the dribbler box.”); Pine Hollow EA, *supra* note 17, at 12 (same).

<sup>125</sup> See PER, *supra* note 70, at 4-107 (“Chaining . . . would damage surface and subsurface cultural resources if the sites were not avoided. Treatments involving surface and shallow subsurface disturbance would likely introduce organic materials to lower soil layers, thereby contaminating surface or shallow subsurface cultural resource sites containing early historic or prehistoric datable organics, such as charcoal, wood, or preserved plant materials. Plant and pollen contamination would lead to incorrect or inaccurate analytical results by researchers studying such remains preserved at sites. Surface and shallow subsurface effects would also include horizontal and vertical displacement of the upper portion of soils in which archaeological resources are contained, compromising depositional context and integrity, and artifact damage or destruction.”); PEIS, *supra* note 69, at 4-252 (“If near-surface cultural resources were encountered, as during . . . chaining, such resources could be damaged or destroyed. The loss of such cultural resource information would be irreversible and irretrievable.”); see also FEIS, *supra* note 22, at 2-21 (noting that chaining has “the potential for irreversible

the PEIS/PER also noted that “[m]anual treatments are expensive and labor intensive, compared to other vegetation management methods,”<sup>126</sup> while “[c]haining is a cost-effective means of incorporating seed into soil, especially in burned areas,” which “provides a variety of seeding depths and microsites,”<sup>127</sup> and can benefit soil and vegetation communities if done right.<sup>128</sup>

In light of these disclosures in the two EISs, we find that SUWA has satisfied of burden of showing that BLM, when preparing the EAs, “failed to consider a substantial environmental question of material significance” regarding whether SUWA’s proposed alternatives can “accomplish the project’s intended purpose, [be] technically and economically feasible, and . . . avoid or minimize adverse environmental impacts.”<sup>129</sup> While this record could perhaps support a finding from BLM that SUWA’s proposed alternatives would be infeasible, ineffective, or otherwise not “appropriate,” BLM has not made such a finding, outside of its unsigned, undated, unfinalized “internal comment

---

impacts on . . . archaeological sites and artifacts.”); *id.* at 3-20 (“[S]urface-disturbing activities – [including] from . . . mechanical vegetation treatments . . . – have the potential to directly and indirectly affect cultural resources. Subsurface excavation or other types of ground-disturbing activities would have the greatest potential to damage cultural resource sites, artifacts, and/or features. Development or maintenance that requires vegetation clearing, grading, and leveling of ground surfaces can also damage or displace surface artifacts and features.”); RMP, *supra* note 25, App’x D at D-14 (noting that chaining “can have immediate and significant adverse effects for cultural resource sites”). *Cf.* PER, *supra* note 70, at 4-17 (discussing impacts from manual methods).

<sup>126</sup> PER, *supra* note 70, at 2-15; *accord id.* at 4-17.

<sup>127</sup> *Id.* at 2-14; *see also id.* at 4-19 (“[Chaining] is effective at . . . preparing sites for seeding . . .”).

<sup>128</sup> *See id.* at 2-14 (“Chaining can be conducted during the appropriate season to benefit soil stability and plant seeding, and reduce the invasion of weeds . . . . Chaining may cause soil disturbance, but the plant debris can be left in place to minimize runoff and erosion, shade the soil surface, and maintain soil moisture and nutrient recycling. . . . Chaining provides a variety of seeding depths and microsites, as well as improves ground cover and forage production. Recent studies have shown improved seedling establishment on chained sites and less downy brome establishment 3 years after fire in chained sagebrush and pinyon-juniper habitats . . . .”); *id.* at 4-17 (similar); *id.* at 4-29 (“Chaining . . . that mulches plant debris can aid in erosion control.”); *see also id.* at 4-11 (listing, as a “Standard Operating Procedure[],” that BLM would “[c]onsider chaining when soils are frozen and plants are brittle to minimize soil disturbance”).

<sup>129</sup> *Kane*, 195 IBLA at 20, 23 (quotation marks omitted).

response document.” In the absence of such a finding, we conclude that BLM did not “study, develop, and describe appropriate alternatives” in the EAs.<sup>130</sup>

*CONCLUSION*

For these reasons, SUWA has satisfied its burden of demonstrating that BLM erred by failing to consider alternatives that would have limited its post-wildfire treatments to native seeds and to manual methods. Because this conclusion requires us to set aside BLM’s decisions authorizing the Wire Pass and Pine Hollow Projects, we need not consider SUWA’s remaining arguments in this appeal. Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,<sup>131</sup> the decisions appealed from are set aside and remanded.

---

Haninah Levine  
Acting Administrative Judge

I concur:

---

Steven J. Lechner  
Deputy Chief Administrative Judge

---

<sup>130</sup> See 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1501.2(c).

<sup>131</sup> 43 C.F.R. § 4.1.

DISTRIBUTION:

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

[kya@suwa.org](mailto:kya@suwa.org)

Landon Newell, Esq.  
Joseph Bushyhead, Esq.  
Southern Utah Wilderness Alliance  
425 East 100 South  
Salt Lake City, UT 84111

[landon@suwa.org](mailto:landon@suwa.org)  
[joe@suwa.org](mailto:joe@suwa.org)

Mark A. Hayes, Esq.  
Cameron B. Johnson, Esq.  
Office of the Regional Solicitor  
U.S. Department of the Interior  
125 South State Street, Room 6201  
Salt Lake City, UT 84131

[mark.hayes@sol.doi.gov](mailto:mark.hayes@sol.doi.gov)  
[cameron.johnson@sol.doi.gov](mailto:cameron.johnson@sol.doi.gov)