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

(703) 235-3750 ibla@oha.doi.gov

October 25, 2024

IBLA 2018-0107	)	UTU-74631
	)	
SOUTHERN UTAH WILDERNESS ALLIANCE and GRAND CANYON TRUST	)	Mine Plan of Operations
	)	
	)	Affirmed in Part;
	)	Supplemental Briefing Ordered

ORDER*

Energy Fuels Resources (USA) Inc. filed a Mine Plan of Operations Modification (Plan Modification) that would allow it to expand its uranium mining operations at the existing Daneros Mine in San Juan County, Utah.[1] In that Plan Modification, Energy Fuels proposed to open two new mine portals and increase its mining activity as conditions in the uranium market allowed.

Mining operations on the public lands require an approved plan of operations that will prevent unnecessary or undue degradation of the land. The Bureau of Land Management (BLM) evaluates such plans according to standards and regulations established under, among other statutes, the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA). BLM approved Energy Fuels' proposal in a February 23, 2018, Decision Record, which was based on an Environmental Assessment (EA) completed in September 2017.[2] Southern Utah Wilderness Alliance and Grand Canyon Trust (together, Appellants) timely appealed that decision.

---

* This Order is binding on the parties but does not constitute Board precedent.
[1] Administrative Record (AR) 2016.11.03.02, Plan of Operations Modification, UTU-74631 (Nov. 2016) (Plan Modification).
[2] AR 2018.02.23.01, Decision Record: Daneros Mine Plan of Operations Modification UTU-74631 (Feb. 23, 2018) (DR); AR 2018.02.23.01, Environmental Assessment: Daneros Mine Plan of Operations Modification, DOI-BLM-UT-Y020-2016-0001-EA at 2-3, 13 (Sept. 2017) (Final EA). The DR and the Final EA have the same document number in the AR that BLM provided. Citations match the page numbers in the original separate documents.

For reasons this Order will explain, we affirm BLM's decision in part. We hold that BLM's analysis of the Plan Modification complied with NEPA. BLM was not required to determine whether the Plan Modification was economically viable or to consider an alternative that would restrict Energy Fuels' expansion project based on BLM's economic forecasting. Factors such as public controversy or scientific uncertainty also did not require preparation of an environmental impact statement for this project. Furthermore, Appellants have not demonstrated that BLM failed to take the hard look necessary to determine whether there would be significant impacts from stormwater or groundwater infiltration from a perched aquifer into the mine.

Under FLPMA, we find error in one aspect of BLM's analysis of the Plan Modification. Specifically, 43 C.F.R. § 3809.401(b)(4) requires a monitoring plan that will detect "potential problems." In the record before us, BLM did not adequately explain why this standard did not require monitoring specifically for potential groundwater infiltration into the mine. We request supplemental briefing from the parties to address the appropriate remedy for this error.

BACKGROUND

I. BLM's role in authorizing mining operations

Among BLM's responsibilities under FLPMA is the management of mining activity on the public lands. FLPMA provides BLM with general authority to promulgate regulations appropriate for the use, occupancy, and development of the public lands in furtherance of FLPMA's multiple-use mandate.[3] FLPMA requires BLM in those regulations to "prevent unnecessary or undue degradation of the lands."[4]

The regulations BLM has promulgated to carry out this responsibility include 43 C.F.R. subpart 3809, which establishes procedures and standards to ensure that mine operators "prevent unnecessary or undue degradation of the land and reclaim disturbed areas."[5] Pursuant to subpart 3809, a covered mine operator must submit a plan of operations and obtain BLM's approval of that plan before they may begin operations.[6] The operator must also obtain BLM's approval to modify operations under an approved plan.[7] The plan must include elements such as a description of operations, a reclamation

[3] 43 U.S.C. § 1732(b); *see id.* § 1701(a)(7) (stating the policy of multiple use and sustained yield). Except as noted below with reference to certain NEPA regulations, citations to statutes and regulations are to those in effect on the date of this Decision.
[4] *Id.* § 1732(b).
[5] 43 C.F.R. § 3809.1(a).
[6] *Id.* § 3809.11(a).
[7] *Id.* §§ 3809.430-.432.

plan, and a monitoring plan, and it must satisfy performance standards that (among other things) will prevent unnecessary or undue degradation.[8] BLM's regulations contemplate that there may be periods of temporary closure, during which an interim management plan must be in effect.[9]

Before BLM can approve a mining plan of operations, it must comply with NEPA. NEPA requires federal agencies to prepare an environmental impact statement before they undertake "major Federal actions significantly affecting the quality of the human environment."[10] To determine whether an action (such as the approval of a mining plan of operations) is subject to this requirement, BLM may prepare an environmental assessment (EA) that discusses the proposed action, the need for the proposal, the environmental impacts of the action and the alternatives considered, and the agency's efforts at consultation.[11] If BLM determines in the EA that the project will not have significant effects that require study in an environmental impact statement, it may issue a "finding of no significant impact" (FONSI) and thus meet its NEPA obligation.

II. BLM's approval of modifications to the Daneros Mine

This appeal arises out of BLM's decision to approve a modification to the operations plan for the Daneros Mine, an underground uranium mine in San Juan County, Utah. Prior to the decision in this case, the Daneros mine comprised about 4.5 acres of surface facilities, supporting the underground mine through twin decline portals in the "Daneros Portal Area."[12] Uranium mining had occurred in the area since the 1950s, and some of the Daneros Mine area was situated on unreclaimed disturbance from prior mines.[13] The Daneros Mine operated from 2009 to 2012 under a plan of operations that allowed production of up to 100,000 tons of uranium ore over seven years.[14] In 2012, mine operations were suspended because uranium prices made mining uneconomical.[15] From then until the time of BLM's decision, the mine was managed for maintenance (as opposed to active mining) under the approved interim management plan.[16]

[8] *Id.* §§ 3809.401(b), 3809.415, 3809.420.
[9] *Id.* §§ 3809.401(b)(5), 3809.424.
[10] 42 U.S.C. § 4332(C).
[11] 43 C.F.R. §§ 46.300, 46.310.
[12] DR at 2.
[13] Final EA at 2-3, 13.
[14] *Id.* at 2.
[15] DR at 2.
[16] *Id.*

In 2013, Energy Fuels filed its proposed Plan Modification, which would modify its existing plan of operations to allow a significant expansion of the mine. The existing Daneros Portal Area included an area for the disposal of development rock, which must be mined to reach the uranium ore but does not itself have sufficient uranium to warrant processing.[17] That area was reaching capacity, and Energy Fuels needed to expand it to continue mining.[18] The key elements of Energy Fuels' proposal were:

- Expanding the development rock area in the Daneros Portal Area from 4.5 to 5.3 acres;
- Rehabilitating the existing Bullseye Portal Area and developing it into part of the Daneros Mine, with a surface disturbance area of 8.1 acres;
- Constructing two portals and surface facilities in a new South Portal Area, with a surface disturbance area of 20.9 acres; and
- Installing 8 additional vent shafts and associated access roads, with a total surface disturbance area of 12 acres.[19]

This activity would allow 5 to 20 years of continued uranium production, with estimated production increasing from 100,000 tons of ore under the existing plan of operations to 500,000 tons under the modified plan.[20]

The expansion of the mine would be conducted in phases. Energy Fuels would expand the Daneros Portal Area first, then it would reclaim the Daneros Portal Area while constructing and operating the Bullseye Portal Area, and then it would reclaim the Bullseye Portal Area as it constructed and operated the South Portal Area.[21] The Bullseye Portal Area in particular was planned as a temporary satellite installation, which would be mostly reclaimed once the underground workings were connected to facilities at the other two portals.[22] Other facilities such as ventilation shafts would also be reclaimed as they were "no longer needed."[23]

BLM evaluated Energy Fuels' proposal for consistency with the applicable resource management plan, which provides for environmentally responsible exploration and development of mineral resources in the area, and with the performance standards for mine operations in 43 C.F.R. § 3809.420.[24] In addition to the need to act on Energy

[17] Final EA at 3-4, 14.
[18] *Id.* at 5.
[19] *Id.* at 4; *see also id.* app. B, fig.2 (map of the three Portal Areas).
[20] *Id.* at 12, 14; *see also* DR at 2.
[21] Final EA at 12, 26-27; *see also* Plan Modification at 3-2, 7-2; DR at 4.
[22] *See* Plan Modification at 3-10.
[23] Final EA at 19; *see also* Plan Modification at 3-13.
[24] Final EA at 5.

Fuels' proposed Plan Modification, BLM also identified a need for uranium to continue producing power at nuclear reactors within the United States.[25] BLM evaluated the proposal in a Draft EA that was made available for public comment in May 2016.[26]

After evaluating public input on the Draft EA, BLM published a Final EA in September 2017. Details from the EA are discussed below as they are relevant to the issues raised by Appellants. Based on its analysis, BLM determined that the Plan Modification would not have a significant impact on the human environment and therefore did not require an environmental impact statement under NEPA.[27] BLM also determined that the Plan Modification would comply with its subpart 3809 regulations, including the regulations to prevent unnecessary or undue degradation.[28] It therefore approved the Plan Modification on February 23, 2018, subject to requirements that it stated in the Decision Record.[29]

Appellants sought review of BLM's Decision Record by the Board. We granted a request by Energy Fuels Resources (USA) Inc. and EFR White Canyon Corp. (together, Energy Fuels) to participate as an intervenor.[30] Appellants filed a Statement of Reasons, BLM and Energy Fuels each filed an answer, and Appellants filed a reply.[31] In their Reply, Appellants abandoned one issue, so we do not consider it here.[32]

---

[25] *Id.* at 2.
[26] *See* AR 2016.06.09.01, Environmental Assessment: Daneros Mine Plan Modification, DOI-BLM-UT-Y020-2016-0001-EA (May 2016) (Draft EA).
[27] *See* AR 2018.02.23.02, Finding of No Significant Impact: Plan of Operations Modification UTU-74631, Daneros Mine at 1 (Feb. 23, 2018) (FONSI).
[28] *See* DR at 5.
[29] *See id.* at 1, 9; *id.* Attachment A, Requirements for the Daneros Mine Plan of Operations Modification (MPOM) at 1-6.
[30] *See* Order, Motion to Intervene Granted (May 1, 2018).
[31] *See* Appellants' Statement of Reasons (filed Aug. 13, 2018) (Appellants' Statement of Reasons); Answer to Statement of Reasons (filed Nov. 14, 2018) (BLM Answer); Intervenors' Answer to Appellants' Statement of Reasons (filed Dec. 10, 2018) (Energy Fuels Answer); Appellants' Reply in Support of Statement of Reasons (filed Jan. 28, 2019) (Appellants' Reply).
[32] *See* Appellants' Reply at 3 (declining to pursue an issue related to the location of facilities with respect to the 100-year floodplain).

ANALYSIS

I. Appellants have not shown error in BLM's analysis under NEPA

An appellant challenging the adequacy of an EA and FONSI has the burden to demonstrate that "the decision is premised on a clear 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."[33] NEPA imposes procedural rather than substantive requirements, and it does not limit BLM's discretion to choose among the alternatives before it.[34] An appellants' disagreement with BLM's ultimate choice is insufficient to demonstrate a NEPA violation.[35] Our task as the reviewing Board is to ensure, under a "rule of reason," that BLM has taken a "hard look" at the potential environmental impacts of the proposal.[36] We look for a level of detail in the EA sufficient for BLM "to determine whether there would be significant environmental impacts from the proposed action."[37]

A. Appellants have not shown that NEPA required BLM to analyze the economic context for the Plan Modification

Appellants make several arguments under NEPA related to the economic context in which the Daneros Mine operates. The existing mine was in "care and maintenance" status from 2012 until BLM's decision in 2018 because it was not economical to mine uranium given its market price.[38] Appellants believe that, to satisfy NEPA, BLM was required to determine whether Energy Fuels could economically recover the full amount of ore that BLM authorized in the Plan Modification.[39]

1. Appellants have not waived arguments related to economic feasibility

BLM urges us to hold that Appellants waived the issue of whether the mine expansion is economically viable by failing to raise it during BLM's decision process.[40] Under our regulations, Appellants may seek our review based only on issues that they

[33] *Kane*, 195 IBLA 17, 20 (2019); *see Great Basin Res. Watch*, 182 IBLA 55, 61 (2012) (quoting *Legal and Safety Employer Research*, 154 IBLA 167, 174 (2001)).
[34] *See, e.g.*, *Kane*, 195 IBLA at 20-21.
[35] *Id.* at 20.
[36] *See, e.g.*, *Confederated Tribes of the Goshute Reservation*, 190 IBLA 396, 402-03 (2017).
[37] *Id.* at 402.
[38] DR at 2; *see also* Final EA at 3.
[39] *See* Appellants' Statement of Reasons at 16-20; Appellants' Reply at 7-12.
[40] *See* BLM Answer at 18.

raised in their "prior participation."[41] To satisfy this requirement, parties must "structure their participation so that it alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration."[42] For example, we held that a Tribe had preserved an argument that BLM failed to engage in meaningful tribal consultation with it by commenting that BLM's "efforts at consultation were deficient," even though the Tribe did not propose its own detailed consultation plan.[43]

The NEPA process here afforded an opportunity for Appellants to raise the same issues upon which their appeal relies. Appellants submitted comments at the scoping stage, on the Draft EA, and as supplemental comments.[44]

It is true that, in those submissions, Appellants did not specifically comment that BLM should consider how much uranium would be economically recoverable. However, they commented on the Draft EA that "the economics of mining, milling, and marketing uranium from the proposed mine expansion will critically influence the extent of the mine expansion's impacts on the environment," and they asked BLM to revise the EA "to address the economics of mining and milling uranium from the proposed mine expansion."[45] BLM responded then, as it does now, that it "is not required to determine the economic viability of the proposed operations, and such a determination is not relevant" to its need to act on the proposed Plan Modification.[46] These comments, and BLM's response, show that BLM was alerted to Appellants' interest in this question and to the possibility that BLM should consider the issue.

---

[41] 43 C.F.R. § 4.410(c)(1); *see Palo Petroleum, Inc.*, 197 IBLA 263, 268 (2021).
[42] *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)) (cleaned up); *see also Simpson*, 199 IBLA 32, 54-55 & n. 166 (2024) (citing *Public Citizen*, among other decisions, and holding that "offer[ing] various observations and concerns" about an issue is insufficient to preserve arguments about "targeted shortcomings" on appeal).
[43] *See Pueblo of San Felipe*, 191 IBLA 53, 63-64 (2017).
[44] *See* AR 2014.03.13.01, Letter from Liz Thomas and Neal Clark to BLM (Mar. 13, 2014) (2014 Comments); AR 2016.08.01.10, Letter from Anne Mariah Tapp, et al., to BLM (Aug. 1, 2016) (2016 Comments); *see also* AR 2016.10.11.01, E-mail from Donald K. Hoffheins (BLM) to Ted McDougall (BLM) (Oct. 11, 2016) (compilation of form letter submissions); AR 2017.01.10.01, Letter from Anne Mariah Tapp, et al., to BLM (Jan. 10, 2017) (supplemental comments related to Bears Ears National Monument).
[45] 2016 Comments at 3.
[46] Final EA, app. H at 12; *see also id.*, app. D, tbl.1 at 20 (responding to a comment from a different party at the scoping stage, and stating that it is "outside the scope of analysis" for BLM "to conduct a market analysis as a condition for responding to the proposal"); BLM Answer at 18 ("BLM did not have a duty under NEPA to independently analyze how much uranium ore in the Daneros Mine is economically recoverable.").

We therefore proceed to address Appellants' three separate arguments based on this issue, but in the end, we do not find that Appellants have demonstrated a NEPA violation.

2. BLM's definition of the purpose and need for its action complied with NEPA.

An environmental assessment must "briefly discuss the need for the proposed action."[47] There were two elements to the purpose and need for BLM's action here. First, BLM identified its own purpose and need: Energy Fuels had sought BLM's approval to modify its plan of operations, and BLM's "primary purpose" was to "ensure that operations meet the performance standards outlined at 43 C.F.R. § 3809.420" (addressing unnecessary or undue degradation).[48] BLM also referred to Energy Fuels' "underlying need . . . to expand its Daneros Mine operations in order to develop and extract a valuable mineral deposit from unpatented mining claims under the authority of the Mining Law of 1872."[49]

Appellants argue that BLM "defined the purpose and need for the project too narrowly" because it did not establish that Energy Fuels needed to expand the mine.[50] If an economic projection were to identify the maximum amount of ore that is economically recoverable, and if that amount were authorized under Energy Fuels' existing plan of operations, then (Appellants argue) there would be no need for the expansion.[51] They claim that such forecasting is required to analyze "whether the Mine expansion is even necessary."[52]

BLM enjoys "considerable discretion" in defining the purpose and need for its action.[53] Where the agency is not designing the project itself, but rather deciding whether to approve or disapprove a proposal by a third party, its purpose and need statement "appropriately reflects the goals and objectives of the applicant and the

[47] *Peterson*, 193 IBLA 255, 267 (2018) (citing 43 C.F.R. § 46.310(a)(2)).
[48] Final EA at 5; *see also* 43 C.F.R. § 3809.411(a)(1) (providing that BLM must assess whether a plan of operations is "complete" and "meets the content requirements of § 3809.401(b)"); *id.* § 3809.432 (establishing the same standard for BLM's review of a plan modification).
[49] Final EA at 5.
[50] Appellants' Statement of Reasons at 17.
[51] *See id.*; Appellants' Reply at 7-9.
[52] Appellants' Reply at 9.
[53] *Peterson*, 193 IBLA at 267 (citing *Bristlecone All.*, 179 IBLA 51, 64 (2010) (applying a similar standard to a statement of purpose and need in an EIS)).

agency's statutory authority to act thereon."[54] We consider whether BLM has properly stated its own purpose and need "against the background of a private need."[55] Put differently, BLM must seek ways to achieve its own goals, "shaped by the application at issue and by the function that the agency plays in the decisional process."[56] The agency may not "determine for the applicant what the goals of the applicant's proposal should be."[57]

Applying those principles here, it was reasonable for BLM to accept Energy Fuels' proposal for a Plan Modification on its face—i.e., as a project that Energy Fuels intends to pursue in phases as market conditions allow. Appellants effectively propose that, under NEPA, BLM could not approve Energy Fuels' plan without first determining whether mining the known uranium ore in the area represented a good business decision. In *Citizens Against Burlington v. Busey*, the D.C. Circuit warned against applying NEPA in such a way that would replace business judgment with agency judgment and extend NEPA beyond "matters environmental."[58] BLM would unduly expand its role in the process and would not give due consideration to "the goals and objectives of the applicant"[59] if it decided for Energy Fuels that the company would not actually pursue those objectives because of market conditions.

Instead, BLM's statement of purpose and need appropriately focused on "the function that the agency plays in the decisional process."[60] Under 43 C.F.R. § 3809.411(a), that function is to determine whether Energy Fuels' proposal complies with applicable law.[61] That function does not limit BLM to considering *only* the applicants' proposal; for example, BLM could choose to examine alternatives that would include additional measures to prevent unnecessary or undue degradation. It would, however, go beyond BLM's proper function in this decisional process to conclude that Energy Fuels' business purposes would be equally well served by mining less ore, and thereby assuming less financial risk, pursuant to its existing operations plan.

As BLM correctly points out, Appellants do not cite any authority suggesting that

---

[54] *Williams*, 196 IBLA 356, 374 (2021) (cleaned up).
[55] *Nat'l Parks & Conservation Ass'n v. BLM*, 586 F.3d 735, 747 (9th Cir. 2009).
[56] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991).
[57] *Id.*
[58] *Id.* at 197 & n.6 (affirming that Congress intended the "free market" to continue to determine airport siting, and noting that an agency has "neither the expertise nor the proper incentive structure" to evaluate an applicant's "business choices").
[59] *Williams*, 196 IBLA at 374.
[60] *Citizens Against Burlington*, 938 F.2d at 199.
[61] *See* 43 C.F.R. § 3809.411 (describing actions BLM will take when it receives a plan of operations).

BLM must independently analyze whether a proposed private or third-party project is economically viable.[62] Instead, Appellants argue more generally that BLM must "ensure that the purpose and need of the project is supported by evidence in the record."[63] The non-precedential cases that Appellants cite discuss, for example, whether future traffic and safety needs would support new highway construction,[64] whether sufficient recreational demand exists for a new park,[65] or whether the U.S. Forest Service would be able to market the timber it harvested.[66] A critical feature of those cases was that, in each of them, the challenged agency effectively decided that there was sufficient demand for the agency's own project and that it therefore would move forward, resulting in environmental impacts. Thus, the courts discussed the record evidence of that demand in evaluating the agency's choice of project alternatives.

Here, in contrast, the agency is not pursuing its own project, and Energy Fuels' plans are explicitly phased to account for the company's judgment about economic viability. When Energy Fuels requested approval of the Plan Modification, it stated that it had "not currently identified sufficient resources to justify the full extent of the proposed mine expansion," and it designed the phased approach to allow for additional mining only to the extent it identified economically viable resources.[67] In the EA, BLM recognized that mining activities might take place "for a minimum of 5 and up to approximately 20 years of continued production, depending on market conditions and additional resource discoveries."[68] BLM also recognized that environmental impacts would be different if Energy Fuels did not develop the later phases of the expansion or if

[62] BLM Answer at 18.
[63] Appellants' Reply at 9.
[64] *See id.* at 8 (citing *Coal. For Advancement of Reg'l Transp. v. Fed. Highway Admin.*, 576 F. App'x 477, 488 (6th Cir. 2014), and *Karst Env't Educ. & Prot., Inc. v. Fed. Highway Admin.*, No. 1:10-CV-00154-R, 2011 U.S. Dist. LEXIS 126925, at *33 (W.D. Ky. Nov. 2, 2011)).
[65] *See id.* (citing *Wild Wilderness v. Allen*, 12 F. Supp. 3d 1309, 1326 (D. Or. 2014)).
[66] *See id.* (citing *Narrows Cons. Coal. v. Grantham*, No. 98-35625, 1999 U.S. App. LEXIS 1517 (9th Cir. Feb. 1, 1999)).
[67] *See* AR 2013.03.01.01, Letter from Energy Fuels to BLM at unpaginated (unp.) 1 (Mar. 1, 2013); Plan Modification at 1-3 ("Projected extensions are forward-looking and subject to change based on geological findings and market conditions.").
[68] Final EA at 4; *see also* Energy Fuels Answer at 6-7 (stating that Energy Fuels will proceed in phases "[i]f conditions allow," and that "the approved action contemplates that less tonnage may be mined over a shorter time" than the maximum BLM has authorized).

it temporarily closed the mine due to market conditions.[69] To evaluate the potential environmental impacts of the proposal, therefore, BLM did not need to decide whether or when the Plan Modification *would* move forward to meet a demonstrated demand, but only whether the Plan Modification *could* move forward consistent with the legal requirements that apply to BLM's approval of such projects.

In short, Energy Fuels asked BLM to authorize the Plan Modification so that, if economic conditions justified additional mining at the levels proposed, Energy Fuels would lawfully be able to do so. It was reasonable for BLM to accept that goal under the circumstances discussed above, evaluate the Plan Modification based on its established regulatory criteria, and leave to Energy Fuels the question whether to run the economic risk of the project. We therefore find no NEPA violation in BLM's statement of purpose and need.

3. BLM was not required to include an alternative based on a forecast of economically recoverable ore

An EA must include a "brief discussion of appropriate alternatives."[70] When an appellant challenges the range of alternatives discussed, it bears the burden "to demonstrate error by showing that BLM's alternatives are not reasonable in light of its stated purpose."[71] An applicant seeking to require the consideration of a specific alternative, as Appellants do here, must demonstrate that "the rejected alternative would not only achieve the intended purpose of the proposed action at less cost to the environment, but also be technically and economically feasible under the particular circumstances presented."[72]

Appellants argue that, because BLM did not analyze the economic context for the Plan Modification, it failed to consider an alternative that would authorize mining only the amount of ore that "was reasonably forecast to be economically recoverable."[73] We reject this argument on the basis of two related NEPA principles.

---

[69] *See* Final EA at 14 (noting that the "need for low-grade ore storage" at the South Portal Area would "be dependent on mining operations and uranium market prices"); *id.* at 25 (discussing temporary closure based on "market conditions"); *cf. id.* at 99-101 (discussing the possible cumulative effects of other uranium development in the event of favorable uranium prices).
[70] *Williams*, 196 IBLA at 376.
[71] *Id.* (quoting *06 Livestock Co.*, 192 IBLA 323, 345 (2018)).
[72] *The Mandan, Hidatsa & Arikara Nation*, 196 IBLA 309, 339-40 (2021).
[73] Appellants' Statement of Reasons at 18; Appellants' Reply at 10.

First, the scope of alternatives that are appropriate for study in an EA is tied to the purpose and need for BLM's decision.[74] Where BLM must decide whether to grant or deny an application, "it should base the scope of review and range of alternatives considered on the needs and purposes defined by the applicant and the agency's statutory authority to act thereon."[75] NEPA does not require BLM to consider alternatives that will not meet its purpose and need.[76] Here, BLM had to decide whether to approve Energy Fuels' application for the Plan Modification, using the regulatory criteria that are appropriate to BLM's function in that process. We held above that BLM reasonably identified that purpose and need, without any obligation to forecast how much ore might be economically recoverable. That holding "largely dispenses" with the argument that an alternative depending on such a forecast was also required.[77]

Second, even within the range of alternatives that would meet the agency's purpose and need, the obligation to consider alternatives in an EA is less demanding than in an EIS.[78] An EA may be limited to "a no action and preferred action alternative."[79] By considering those two alternatives here, BLM identified both "ends of the spectrum" of possible environmental consequences.[80] Additional alternatives would likely consider more mining than the existing operations plan would allow (the no-action alternative), but less mining than the maximum amount authorized under the Plan Modification—which BLM concluded would not have significant impacts. Particularly here, where Energy Fuels might choose to implement a more limited mine expansion based on market conditions, "the nature and consequences" of that potential alternative were "inherent in the discussion of the proposed action."[81] BLM was not required to consider an alternative in which it would make that market-based judgment on Energy Fuels' behalf.

---

[74] *See Williams*, 196 IBLA at 376.
[75] *Mandan Nation*, 196 IBLA at 339.
[76] *Williams*, 196 IBLA at 376.
[77] *Id.*; *cf.* Appellants' Reply at 11 (confirming that Appellants' argument about the scope of alternatives to be considered "flows directly from BLM's unreasonably narrow purpose-and-need statement").
[78] *See, e.g.*, *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) (noting the agreement of three other Federal courts of appeals).
[79] *Pueblo of San Felipe*, 191 IBLA at 73; *see also 06 Livestock Co.*, 192 IBLA at 343-44 (citing, among other cases, *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1021-22 (9th Cir. 2012)).
[80] *N. Plains Res. Council (On Judicial Remand)*, 188 IBLA 19, 33 (2016) (quoting *Ariz. Zoological Soc.*, 167 IBLA 347, 359 (2006)).
[81] *In re Blackeye Again Timber Sale*, 98 IBLA 108, 112 (1987).

4. BLM did not fail to take a hard look at the environmental impacts of the Plan Modification

The foregoing analysis also requires us to reject Appellants' third argument based on economic issues. In an EA, BLM is required to take a "hard look" at potential environmental impacts.[82] Appellants contend that BLM failed to take a "hard look" at the impacts of the Plan Modification because those effects "may be much different if Energy Fuels mines far less ore" than BLM authorized.[83]

We will find that BLM has satisfied the "hard look" requirement if "its conclusion that no significant environmental impact exists is founded on a reasoned evaluation of relevant factors that is documented in the record."[84] Here, BLM concluded that the project it authorized—that is, the full implementation of the Plan Modification as proposed—"will not significantly affect the quality of the human environment."[85] If the project were not fully implemented, the true impacts would be *less* than those that BLM concluded were not significant. In fact, in making its finding of no significant impact, BLM noted the possibility that not all of the impacts it had considered in the EA would ultimately occur if market conditions justified less mining.[86] Appellants' argument, therefore, does not call into question BLM's conclusion that the Plan Modification will not have significant impacts.

B. BLM was not required to prepare an EIS due to the project's context or intensity

Appellants argue that the scope of the Plan Modification required BLM to prepare an EIS.[87] Regulations in place at the time of BLM's decision provided that in considering whether an action may "significantly" affect the human environment (and thus require preparation of an EIS), an agency should consider "both context and intensity."[88] The

[82] *See, e.g.*, *Simpson*, 199 IBLA 32, 38 (2024).
[83] Appellants' Reply at 12; *see also* Appellants' Statement of Reasons at 19.
[84] *Simpson*, 199 IBLA at 38.
[85] FONSI at 1.
[86] *See, e.g.*, Final EA at 14 (noting that the need for low-grade ore storage "would be dependent on mining operations and uranium market prices"); *id.* at 20 ("The quantities and types of equipment at each [portal area] would be subject to change depending on future mine development, market conditions, and other factors.").
[87] Appellants' Statement of Reasons at 25-29; Appellants' Reply at 16-18.
[88] 40 C.F.R. § 1508.27 (2017). The Council on Environmental Quality (CEQ) amended its NEPA regulations in 2020, removing the references to "context" and "intensity" that Appellants cite here. *See* Update to the Regulations Implementing the Procedural

regulations listed factors that "should be considered in evaluating intensity."[89] The presence of a factor is not dispositive; whether the factors require an EIS is a matter of degree.[90] "The regulations require only that BLM consider these factors in determining whether an action would significantly impact the environment, and do not mandate preparation of an EIS based on satisfaction of any one or more of the factors."[91]

Appellants assert that three of those factors are present here and required BLM to prepare an EIS.[92] First, Appellants argue that the Plan Modification is "highly controversial" because the public raised concerns during the scoping process about surface disturbance, uranium production, and increased vehicle traffic, and because the "well-documented, sordid legacy of uranium milling and mining on western public lands" has made it "highly controversial for decades."[93] Appellants are not using the word "controversial" in the same way as the regulation. That intensity factor "does not pertain to the mere existence of opposition to the proposed action, but rather to whether there is a substantial dispute about the size, nature, or effect of the action."[94] BLM relied on the expertise of an interdisciplinary team of technical specialists, both within BLM and from other agencies, to conclude that the Plan Modification was not highly controversial in that sense.[95] Because Appellants do not "point to any data or results" that show "there is a scientific controversy about the effects of this project," they have not shown error in that conclusion.[96]

Second, under the regulations in place at the time of the EA, an action may have significant effects due to its intensity if its effects are "highly uncertain or involve unique or unknown risks."[97] True to the language of the regulation, we have said that "[a]n EIS

Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). The amended regulations applied to "any NEPA process begun after September 14, 2020." *Id.* at 43,372. Our discussion here therefore refers to the provisions in effect in 2017.

[89] 40 C.F.R. § 1508.27(b) (2017).

[90] *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 72 F.4th 1166, 1189 (10th Cir. 2023).

[91] *Mandan Nation*, 196 IBLA at 321; *see also Ctr. for Biological Diversity*, 72 F.4th at 1189 (the agency's decision to rely on an EA "is only improper if the appellants can demonstrate substantively that the agency's conclusion of non-significant effect on the environment represents a clear error of judgment") (cleaned up).

[92] *See* Appellants' Statement of Reasons at 25-28.

[93] *See id.* at 26-27 (citing 40 C.F.R. § 1508.27(b)(4) (2017)).

[94] *Mandan Nation*, 196 IBLA at 321.

[95] *See* FONSI at 4.

[96] *WildLands Defense*, 192 IBLA 383, 394 (2018).

[97] 40 C.F.R. § 1508.27(b)(5) (2017).

is only mandated where the uncertainty is high."[98] Thus, an agency may make a "scientific prediction within the scope of its technical expertise" despite "that quotient of uncertainty which is always present when making predictions about the natural world."[99] Here, BLM found that the effects of the Plan Modification were not highly uncertain because "the potential effects of uranium mining on the human environment are well documented" and are subject to a "mature regulatory framework."[100] Appellants claim that the effects at this site in particular are uncertain because of incomplete data about the perched aquifer and its possible hydrological connection to the mine.[101] We address that issue in more detail later in this Decision, and we conclude there that BLM had a reasonable basis to conclude that the risk of a hydrological connection was minor.[102] Appellants have not demonstrated scientific uncertainty about this conclusion that is greater than BLM has already taken into account.

Third, Appellants argue that the CEQ regulation required BLM to study in an EIS the mine's possible effects on Bears Ears National Monument, Natural Bridges National Monument, and Glen Canyon National Recreation Area.[103] The regulation lists "proximity to . . . park lands" as one of several "[u]nique characteristics" that may make impacts more severe.[104] BLM's interdisciplinary team found that the mine expansion "would have no visual, auditory, or atmospheric impacts on recreational visitors at Natural Bridges National Monument or Bears Ears National Monument" due to screening by the natural landscape.[105] BLM recognized that the Plan Modification would add to traffic volume within Bears Ears National Monument, with possible effects on air quality and traffic accidents, but it concluded that those effects would be "minimal when compared to non-mining related public road use."[106] Even taking the intensity factor into account, Appellants have not demonstrated error in those conclusions.

---

[98] *Oregon Nat. Desert Ass'n*, 185 IBLA 59, 131 (2014) (citing *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009)).
[99] *Ctr. for Biological Diversity*, 588 F.3d at 712.
[100] FONSI at 4.
[101] *See* Appellants' Statement of Reasons at 27-28.
[102] *See* Final EA at 76.
[103] *See* Appellants' Statement of Reasons at 28; Appellants' Reply at 17.
[104] 40 C.F.R. § 1508.27(b)(3) (2017).
[105] Final EA, app. C at C-15 (acronyms omitted); *see also id.* app. C at C-16 (noting that "lighting design features such as shielding devices and use of downcast lights are incorporated into the [Plan Modification] to avoid impacts to dark sky").
[106] *Id.* at 110; *see id.* at 105 (noting that "transportation levels remain minimal in the area," even considering "visitation to state and national parks and monuments" including the Natural Bridges National Monument and the Glen Canyon National Recreation Area).

C. BLM's internal guidance did not require an EIS

Appellants argue that BLM's internal NEPA Handbook, a guidance document, "provides that the agency should prepare an EIS for a mining operation 'where the area to be mined, including any area of disturbance, over the life [of] the mining plan is 640 acres or larger in size.'"[107] In their Reply, they also argue that this provision creates a "presumption" in favor of an EIS, so that if BLM does not prepare an EIS, it must explain why.[108] We do not find that BLM acted contrary to its NEPA Handbook here.

The Handbook states that "[a]pproval of any mining operation where the area to be mined" is greater than 640 acres "normally require[s] preparation of an EIS."[109] The expected area of surface disturbance for the Plan Modification is 46.3 acres.[110] To reach the threshold described in the NEPA Handbook, Appellants include the entire 1,200-acre area in which vent shafts are authorized, arguing that underground mine workings may be constructed throughout that area.[111] The estimated total surface disturbance associated with those vent shafts is only 12 acres. Even if the underground mine workings are included in the "area to be mined," the Handbook does not provide that all such areas exceeding 640 acres must be studied in an EIS. Instead, it explicitly allows BLM to study the impacts of a proposed project in an EA if "it is anticipated that an EIS is not needed based on potential impact significance."[112] Here, BLM found, based on its entire analysis in the EA, that the Plan Modification would not have any significant impacts requiring study in an EIS.[113] Given that finding, BLM was not also explicitly required to explain why its own Handbook did not require an EIS.

D. Appellants have not demonstrated that BLM's consideration of stormwater management violated NEPA

Appellants raise an issue about stormwater control at the expanded mine that we evaluate under NEPA's "hard look" standard. The Plan Modification states that Energy Fuels would build "diversion channels, berms, sediment ponds and other drainage structures designed to manage stormwater in accordance with requirements of the federal Clean Water Act (CWA) and other laws."[114] Appellants argue that the existing

[107] Appellants' Statement of Reasons at 28-29 (quoting BLM Handbook H-1790-1 at 70 (Jan. 30, 2008) (NEPA Handbook)).
[108] Appellants' Reply at 16.
[109] NEPA Handbook at 70.
[110] *See* Final EA at 4, 13.
[111] *See* Appellants' Statement of Reasons at 29.
[112] NEPA Handbook at 70 (internal quotation marks and citation omitted).
[113] *See* FONSI at 1.
[114] *See* Plan Modification at 3-7.

system at the Daneros Mine was ineffective in controlling stormwater from two storms in 2015, and that "[i]t is arbitrary for BLM to conclude that storm-control features that have been proven not to work in the past will ensure that surface-water impacts are insignificant in the future."[115] Appellants claim that BLM was required to determine whether the 2015 storm exceeded the design capacity of the stormwater management system, or whether instead that system failed during a lesser storm event that it was designed to contain.[116]

Appellants' argument is largely based on several documents appended to its Statement of Reasons. Two of the documents were directed to the Utah Division of Water Rights and seek approval to change the course of streams, which was necessary to repair damage from the 2015 storms.[117] A third is the 2016 Annual Compliance Report for the Daneros Mine, directed to BLM, which described repairs and maintenance after the 2015 storms.[118] That report included a March 2016 inspection report indicating that the containment berms and ponds were not controlling runoff; subsequent inspections noted repairs and the annual report stated that the stormwater management system was "maintained and in working order" as of the report date.[119] BLM has submitted the 2015 Annual Compliance Report and associated inspection reports.[120]

Although these documents were not in BLM's administrative record as we received it, this issue is not waived: Appellants raised some other stormwater-related issues in their public comments, and BLM conducted additional analysis in the EA to respond to those issues.[121] We exercise *de novo* authority to decide matters "as fully and finally as might the Secretary," and we are not limited to the record that BLM created.[122] BLM and Energy Fuels have provided their views and analysis of this issue.[123] We therefore will decide this issue based on the parties' submissions, and all the relevant exhibits will

[115] Appellants' Statement of Reasons at 21-22.
[116] *Id.* at 21.
[117] *See* Appellants' Statement of Reasons, Exhibit (Ex.) 3 (Stream Alteration Permit Application Modification 1) at 1 (Dec. 22, 2015); *id.*, Ex. 2 (Stream Alteration Permit Application) (Nov. 2, 2015).
[118] Appellants' Statement of Reasons, Ex. 5 (2016 Annual Compliance Report) (Jan. 23, 2017).
[119] *Id.* at 1, unp. 7-10 (inspection reports).
[120] *See* BLM Answer, Ex. D (2015 Annual Compliance Report) (Jan. 29, 2016).
[121] *See* Final EA, app. H at 9 (Appellants' comment and BLM response). Appellants do not rely on appeal on the issue they raised in their comments. *See* Appellants' Reply at 13 n.4.
[122] *E.g.*, *S. Utah Wilderness All.*, 191 IBLA 37, 45 (2017) (internal quotation marks omitted).
[123] *See* BLM Answer at 19-25; Energy Fuels Answer at 7-8.

become part of the administrative record for our final decision on behalf of the Secretary.

The design and evaluation of a stormwater management system is the kind of technical issue on which BLM ordinarily may rely on the judgment of its experts.[124] To prevail, Appellants must demonstrate that there is an "error in the data, methodology, analysis, or conclusion" of BLM's or Energy Fuels' stormwater management analysis.[125] We conclude that Appellants have not demonstrated such error.

The principal methodology on which BLM relied to conclude that the stormwater management system would be adequate was Energy Fuels' calculations of the likely surface water flow in a 100-year flood event and the size and design of structures needed to contain that flow. The Daneros Mine stormwater management plan was based on two studies, conducted in 2008 and 2013, that analyzed peak flows from a 100-year storm event.[126] The Plan Modification appended a drainage analysis covering stormwater collection, conveyance, and retention, and a separate plan to prevent pollution from stormwater.[127] The drainage analysis in particular includes detailed calculations and cited the source studies to support its design choices for stormwater management features.[128] According to BLM, those plans are "consistent with accepted engineering design protocols and standards to prevent or minimize impacts,"[129] including the requirements of the Utah Division of Water Quality under the CWA as part of the Utah Pollutant Discharge Elimination System.[130]

BLM relied on those analyses to conclude in the EA that the stormwater management measures would be effective up to a 100-year storm event (the design storm event).[131] For storm events exceeding that level, BLM found that "the watershed would very likely dilute and widely disperse any water and sediment potentially discharged from the detention ponds, effectively minimizing adverse effects to surface water quality."[132] Those conclusions were not based on the past performance of the stormwater management system at the Daneros Portal, but on a prospective analysis of

[124] *See, e.g.*, *WildLands Defense*, 192 IBLA at 394.
[125] *Id.*
[126] *See* Plan Modification at 3-7, 3-8, 4-3.
[127] *See id.*, Attachment C (Drainage Report) at 1-1; *id.*, Attachment G (Storm Water Pollution Prevention Plan).
[128] *See id.*, Attachment C (Drainage Report) at sections 2, 3, and 4.
[129] BLM Answer at 24.
[130] *See* Plan Modification, Attachment G (Storm Water Pollution Prevention Plan) at 1; Final EA at 17.
[131] Final EA at 71-72, app. H at 13.
[132] *Id.* at 72.

likely impacts at all three portal sites using accepted engineering standards. BLM thus did not "fail[] to consider" the adequacy of Energy Fuels' proposed stormwater management system,[133] but rather considered that issue at some length.

How do the 2015 storm events potentially fit into this analysis? According to Appellants, there are two possible explanations for the 2015 failure of the stormwater management system: either the storm exceeded the 100-year design event, or the design of the control features was flawed.[134] Appellants claim that it was BLM's responsibility under NEPA to determine which of these explanations was correct.[135] But to prevail on this issue, Appellants bear the burden of showing that BLM's forward-looking, engineering-based analysis was erroneous. If they rely on the experience of the 2015 storms to challenge BLM's analysis to make that showing, the evidence from those storms must demonstrate by a preponderance of the evidence that BLM's expert analysis was flawed.[136]

We reject Appellants' argument because the record before us contains no definitive explanation of why the Daneros Portal stormwater management system failed during the 2015 storms. Appellants believe that rainfall data shows that the June 2015 storm was within the system's design capacity, showing that the design was flawed.[137] But the rainfall data they proffer was collected approximately 19 and 46 kilometers away from the mine, and Appellants present no analysis to rule out the possibility that localized rainfall at the mine could have exceeded the 100-year storm event.[138] Nor have Appellants provided evidence ruling out the possibility that the system was not properly constructed or that a malfunction occurred. Given the multiple potential explanations for the 2015 failure, Appellants have not carried their burden of showing that BLM erred by failing to adopt their design-flaw theory.

This conclusion removes the force from Appellants' other arguments about stormwater management. They claim that BLM was required to analyze the impacts that would occur if the system failed and its "control features are nonfunctional for months at

---

[133] *Kane*, 195 IBLA at 20; *see Great Basin Res. Watch*, 182 IBLA at 61 (quoting *Legal and Safety Employer Research*, 154 IBLA at 174).
[134] *See* Appellants' Statement of Reasons at 21; Appellants' Reply at 13.
[135] *See* Appellants' Statement of Reasons at 20-21.
[136] *WildLands Defense*, 192 IBLA at 394.
[137] *See* Appellants' Reply at 13-14.
[138] These distances were obtained using latitude and longitude data for the Natural Bridges National Monument and Bullfrog Basin weather stations, available at https://hdsc.nws.noaa.gov/pfds/pfds_map_cont.html?bkmrk=ut (last visited Oct. 24, 2024).

a time."[139] BLM considered this an unlikely scenario based on its engineering analysis, however, and Appellants have not established otherwise. Furthermore, the Plan Modification that BLM approved requires Energy Fuels to implement inspection and maintenance requirements "to ensure that stormwater control devices are functioning as designed," including regular inspections, compliance evaluations, and inspections after major storm events.[140] The compliance reports that the parties have introduced into the record suggest that Energy Fuels took those obligations seriously under the plan then in effect, conducting periodic inspections and repairing damage in consultation with Utah after the 2015 storms.[141]

For the same reason, BLM was not required to consider further the possible failure of the stormwater management system after reclamation is complete. Appellants argue that after reclamation, Energy Fuels will no longer have inspection or repair obligations, so the possible impacts of stormwater erosion will be more serious.[142] Reclamation, however, will involve additional changes to the stormwater management system, such as the removal of some drainage channels, re-contouring of disturbed areas, and the addition of topsoil as cover material, which would "minimize the potential for post-mining impacts to surface water."[143] Appellants have not established that further study of the pre-reclamation stormwater management system was necessary for BLM to make an informed judgment about these permanent reclamation measures.

E. Appellants have not demonstrated that BLM's NEPA analysis of potential groundwater infiltration into the mine was inadequate

Relying on both NEPA and FLPMA, Appellants raise several interrelated arguments about the Plan Modification's potential impacts related to groundwater and surface water.[144] According to the Final EA, there is a shallow aquifer perched 200-300 feet above the proposed underground workings for the expanded mine.[145] This aquifer, which sits within a mesa that rises about 800 feet above the Daneros Portal Area, feeds

[139] Appellants' Statement of Reasons at 22.
[140] DR, Attachment A at 5-6 (paragraphs 65-67); *see also* Plan Modification at 5-1 (describing inspection and maintenance plan).
[141] *See* BLM Answer, Ex. D (2015 Annual Compliance Report) at 1, unp. 10-13; Appellants' Statement of Reasons, Ex. 5 (2016 Annual Compliance Report) at 1, unp. 7-8.
[142] Appellants' Statement of Reasons at 22-23.
[143] Final EA at 79; *see id.* at 28, 75.
[144] *See* Appellants' Statement of Reasons at 14-16 (FLPMA argument), 23-25 (NEPA argument).
[145] *See* Final EA at 37; *see also id.* at 75.

the Bullseye Spring and Bullseye Well.[146] There are water rights associated with the spring and the well that are used for livestock watering.[147] BLM acknowledged in the Final EA that mining activities could create fractures or other pathways from the perched aquifer into the underlying mine workings.[148] Appellants argue that such fractures could lead to infiltration of groundwater from the perched aquifer into the underground mine workings that would need to be discharged from the mine and thereby impact surface waters.[149]

Drawing on several sources of information, BLM concluded that the degree of connectivity between the aquifer and the mine workings through bedrock fracturing or faulting was "minor" and that the expanded mining activities "would not impact the water quantity or quality in the shallow, perched aquifer, because of the lower elevation of the portals compared to Bullseye Spring and the Bullseye Well and lack of connection with the strata to be mined."[150] (Appellants have abandoned their separate argument that the expanded mine could affect water quality within the aquifer.[151]) BLM also stated that Energy Fuels' proposed monitoring plan would identify "impacts to the spring or well" that might affect the water right owner.[152] However, BLM noted that "irrespective" of this monitoring, its conclusion based on "geologic and hydrologic factors" was that the revised mine operations are "not expected to affect existing water rights as a result of water drawdown from the upper aquifer."[153]

Energy Fuels argues that the issue of groundwater infiltration into the mine has been waived because Appellants did not raise it in their comments during BLM's environmental review and decision process.[154] We disagree. During the scoping process, Appellant Southern Utah Wilderness Alliance wrote that BLM should consider "water quality and water quantity at nearby seeps and springs and the larger groundwater aquifer."[155] In subsequent comments, Appellants highlighted BLM's statement in the Draft EA that "the Proposed Action is not expected to affect existing water rights as a result of water drawdown from the upper aquifer," commenting that "[t]he Draft EA fails

[146] *See id.* at 50 & app. B, fig.13 (showing a conceptual cross-section of the project area and an inset map showing the locations of the Bullseye Spring and Bullseye Well).
[147] *See id.* at 50.
[148] *See id.* at 75-76.
[149] Appellants' Statement of Reasons at 15-16, 23-25.
[150] *See* Final EA at 76.
[151] Appellants' Reply at 15 n.5.
[152] Final EA at 77.
[153] *Id.*
[154] *See* Energy Fuels Answer at 3.
[155] 2014 Comments at 3.

to provide the data necessary" to support this statement.[156] These comments did not specifically raise the issues that the discharge of infiltrated groundwater from the mine workings might impact surface water or that additional monitoring was required under 43 C.F.R. § 3809.401(b)(4). But the comments, considered together with BLM's discussion in the record of the possible interconnection between mining activities and the perched aquifer, show that BLM was alerted to the need to consider the risk of groundwater infiltration and to give this issue meaningful consideration.

We therefore proceed to consider Appellants' groundwater arguments on the merits, starting with their NEPA claim. First, they claim that BLM's groundwater analysis was inadequate under NEPA because it lacked sufficient geological data, such as a complete delineation of the extent of the perched aquifer, and because BLM did not evaluate possible harm to the aquifer.[157] Appellants cite *City of Dallas v. Hall*, in which the Fifth Circuit held that "reliance on out-of-date or incomplete information [in an EA] may render the analysis of effects speculative and uncertain, warranting the preparation of an EIS."[158] For example, older data might still be reliable, but not if the site had become significantly degraded since that data was collected.[159] If an agency both recognizes that additional data "may be obtainable" and "would be of substantial assistance in the evaluation of the environmental impact," then the agency may be required to obtain that data and evaluate it in an EIS.[160]

At the same time, we have recognized that because an EA is a preliminary study to determine whether a more comprehensive EIS is required, it is "necessarily based on incomplete and uncertain information."[161] Appellants may prevail on this argument only by showing that the data BLM had available prevented it from considering "a substantial environmental question of material significance to the proposed action."[162] The question is whether the "additional or updated information [is] needed before a reasoned decision could be made."[163]

---

[156] 2016 Comments at 12 (quoting Draft EA at 67).
[157] *See* Appellants' Statement of Reasons at 23-24.
[158] 562 F.3d 712, 720 (5th Cir. 2009).
[159] *See id.*
[160] *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732-33 (9th Cir. 2001) (cited in Appellants' Statement of Reasons at 24).
[161] *WildEarth Guardians*, 182 IBLA 100, 105 (2012) (cleaned up).
[162] *Id.* (citing *Sante Fe Nw. Info. Council*, 174 IBLA 93, 107 (2008)).
[163] *City of Dallas*, 562 F.3d at 720; *see also* 40 C.F.R. § 1502.21(b) (requiring consideration of whether obtaining additional information is "essential to a reasoned choice among alternatives" in an EIS); *id.* § 1501.5(j) (applying the same standard to EAs).

The record supports BLM's contention that it had enough information to reasonably evaluate the potential effects of the mine expansion on the perched aquifer. BLM assumed "that the perched water table is continuously present under the area of the project having a surface elevation equal to or greater than 5,900 feet," and that this conservative assumption allowed it "to analyze the upper limit of the potential impacts to groundwater resources in the perched aquifer."[164] BLM made that assumption based on regional geologic data and actual data collected through the drilling of a well in the area.[165] BLM also represents that obtaining more detailed data would require additional drilling.[166] Finally, BLM's conclusion about the potential effects of the project on the aquifer did not depend on the lateral extent of the aquifer, but on the fact that the "degree of hydrologic connectivity between the Mine and the upper aquifer through bedrock fracturing or faulting in the Project Area is minor."[167] BLM also pointed to the lack of infiltrated groundwater in a nearby mine with underground workings located at the same level below the aquifer and a similar distance from the Bullseye Spring as the Daneros Mine.[168] Appellants do not refute the relevance of this data in the record, and thus they have not shown that it was insufficient to support a reasoned decision on this point.

As noted above, Appellants additionally argue that BLM did not take a hard look in the EA at the potential for water from the perched aquifer to infiltrate into the mine, become contaminated there, and then affect surface water as it is discharged from the mine.[169] Because the surface water system in the project area consists only of ephemeral drainages, and because no water is discharged in the ordinary operation of the mine, BLM's analysis of surface water impacts focused on stormwater.[170] Surface water drainage within the area will be directed into detention ponds and cleaned out as necessary.[171] Appellants acknowledge that this system provides an "obvious repository for discharged mine water," but claim that BLM did not consider whether it would have sufficient capacity also to manage infiltrated and contaminated groundwater.[172] But for the reasons discussed above, BLM reasonably concluded that water drawdown from the aquifer into the mine was unlikely based on the available geological and hydrologic data,

[164] BLM Answer at 29; *see also* Final EA, app. B, fig.13 (showing the perched aquifer occupying the full extent of the relevant layer).
[165] *See* Final EA at 52.
[166] *See* BLM Answer at 29.
[167] Final EA at 76.
[168] *Id.*
[169] *See* Appellants' Statement of Reasons at 24-25; Appellants' Reply at 15-16.
[170] *See* Final EA at 71, 79.
[171] *Id.* at 17.
[172] Appellants' Statement of Reasons at 25.

and thus did not require further consideration in an EA under NEPA.[173] Given that conclusion, BLM did not have to separately analyze the possible impacts of an unlikely scenario where infiltrated groundwater would need to be discharged to the surface.

The fact that BLM has required a monitoring and response plan for possible impacts to Bullseye Spring does not change our analysis. Appellants contend that, if uncertainty about impacts to the perched aquifer requires additional monitoring, those potential impacts are also sufficiently serious to require further analysis under NEPA.[174] But under NEPA, the analysis in an EA must only be sufficient "to determine whether there would be *significant environmental impacts* from the proposed action."[175] The use of a monitoring plan to detect potential, but unlikely, problems at Bullseye Spring and Bullseye Well is compatible with BLM's conclusion in the EA that "no impacts are anticipated"[176] on groundwater from the Plan Modification.

II. Appellants have shown an error in BLM's analysis under FLPMA

The contents of an operations plan must be sufficient for BLM to determine that the plan will prevent unnecessary or undue degradation within the meaning of FLPMA.[177] In claiming that BLM erred in making that determination here, Appellants bear the burden of demonstrating that "the project's plan of operations fails to comply with any applicable performance standard or with any other Federal or state law."[178]

A. BLM did not fully justify its determination that Energy Fuels' monitoring plan was sufficient to detect potential problems due to groundwater infiltration

In addition to the NEPA argument discussed in the previous section, Appellants make a different argument related to groundwater monitoring that relies on FLPMA. BLM's regulations implementing FLPMA require a mining plan of operations to include information sufficient for BLM to determine that the plan prevents unnecessary or undue degradation.[179] Appellants contend that the groundwater monitoring provisions of the Plan Modification are inadequate to satisfy the requirements of 43 C.F.R. § 3809.401(b)(4).[180] Under that regulation, an operations plan must include "monitoring

[173] *See* Final EA at 76.
[174] *See* Appellants' Reply at 15.
[175] *Goshute Reservation*, 190 IBLA at 402 (emphasis added).
[176] Final EA at 37.
[177] 43 C.F.R. § 3809.401(b).
[178] *Goshute Reservation*, 190 IBLA at 421; *see Great Basin Res. Watch*, 182 IBLA at 61.
[179] 43 C.F.R. § 3809.401(a), (b).
[180] *See* Appellants' Statement of Reasons at 14-16; Appellants' Reply at 6-7.

plans" to "demonstrate compliance with the approved plan of operations and other Federal or State environmental laws and regulations, to provide early detection of potential problems, and to supply information that will assist in directing corrective actions should they become necessary."[181]

In its Plan Modification, Energy Fuels included a multi-pronged monitoring plan covering surface water, wildlife, air quality, radiation, and other topics.[182] With respect to surface water, Energy Fuels committed to monthly inspections that would focus on stormwater, erosion, and the drainage system.[183] Water quality monitoring would "include periodic sampling of the Bullseye Spring and the Bullseye Well."[184] Although BLM concluded that the degree of hydrologic connectivity between the mine and the perched aquifer "is minor," it still required the sampling as a precaution.[185] In its Decision Record, BLM required flow rate monitoring at Bullseye Spring and Bullseye Well on a quarterly basis, with an annual report to both BLM and the water rights owner, and it provided that Energy Fuels could be responsible for compensating the water rights owner if mining activity impaired or interfered with their rights.[186]

The question Appellants raise is whether § 3809.401(b)(4) required Energy Fuels to include different or additional monitoring in the Plan Modification. BLM could approve the plan only if Energy Fuels had demonstrated that "the proposed operations," taking into account the proposed monitoring requirements, "would not result in unnecessary or undue degradation of public lands."[187] Appellants argue that the existing monitoring requirements do not address the possibility that groundwater from the aquifer could infiltrate the mine, become contaminated, and then require discharge into surface waters, and that Energy Fuels must monitor specifically for such groundwater infiltration.[188] Relying on its findings discussed above for Appellants' related NEPA claim,

[181] 43 C.F.R. § 3809.401(b)(4).
[182] *See* Plan Modification at 5-1 to 5-5 (proposed monitoring plan for issues such as surface water and sediment, wildlife, vegetation, air quality, and radiation).
[183] *Id.* at 5-1.
[184] *Id.* at 5-2 and Attachment T (Water Quality Sampling and Analysis Plan, proposing quarterly monitoring).
[185] *See* Final EA at 76-77.
[186] *See* Decision Record, Attachment A at 5 (paragraph 59); *see also* Plan Modification, Attachment T at 1 ("Currently, the water flow rates at the Bullseye Spring and Bullseye Well are monitored quarterly . . . . The purpose of the quarterly water flow rate monitoring is to ensure the flow rates at these locations are not diminished as a result of mining activities.").
[187] 43 C.F.R. § 3809.401(a).
[188] *See* Appellants' Statement of Reasons at 14-15; Appellants' Reply at 15-16.

BLM responds that "a specific plan to monitor for potential influx of groundwater into the underground mine workings was not necessary."[189]

BLM determined in the EA that there is a low degree of connectivity between the aquifer and the mine.[190] As we discussed above, that determination was sufficient to satisfy NEPA's "hard look" requirement and to support BLM's finding that the proposed action will not have significant impacts.[191] The text of § 3809.401(b)(4), however, uses different language from NEPA, requiring BLM to ensure that the monitoring plan will provide for early detection of "potential problems" that may require corrective action if they develop.[192] The analysis in the EA suggests that groundwater infiltration into the mine may create a "potential problem[]" that could be prevented or minimized with monitoring: BLM acknowledged that mining activities "could potentially cause sufficient disturbance to the bedrock formations that pathways for water flow would be established into the underlying mine workings from the upper perched aquifer via faults and fractures."[193] In 2009 comments on an earlier decision related to the Daneros Mine, the Utah Department of Natural Resources detailed that a variety of discontinuities in the layers of the geological formation "may create discrete flow paths allowing connectivity between otherwise isolated aquifers."[194] BLM also required flow rate monitoring of Bullseye Spring and Bullseye Well partially to hedge against the possibility that groundwater may enter the mine from the perched aquifer.[195] The purpose of that monitoring was precisely "to verify that the actual impacts are not substantially different from the anticipated impacts" and to ensure that Energy Fuels would compensate the water rights owner if necessary.[196]

Taken together, these facts support Appellants' argument that groundwater infiltration was a "potential problem" that could, if undetected, lead to unnecessary or undue degradation of surface water resources upon discharge. Even if there was a low likelihood that groundwater infiltration would occur, BLM's responsibility under FLPMA

---

[189] BLM Answer at 16, 30-31.
[190] *See* Final EA at 76.
[191] *See Goshute Reservation*, 190 IBLA at 402 (describing the standard of review under NEPA).
[192] 43 C.F.R. § 3809.401(b)(4); *see also* Mining Claims Under the General Mining Laws, 65 Fed. Reg. 69,998, 70,042 (Nov. 21, 2000) (requiring monitoring "allows BLM to ensure operations are following the approved plan and to identify the need for any modifications should problems develop").
[193] Final EA at 76.
[194] AR 2009.00.00.03, Letter from Utah Department of Natural Resources to BLM Monticello Field Office at 2 (Apr. 2, 2009) (Utah DNR Letter).
[195] Final EA at 76-77.
[196] *Id.* at 38, 77.

was therefore to explain why fracturing and faulting, leading to groundwater infiltration that would require surface discharge, was not a "potential problem" within the meaning of § 3809.401(b)(4). Alternatively, if BLM concluded that this scenario did present a "potential problem," it could explain why the monitoring plan that it approved would be adequate to provide early detection of that problem and address the risk of unnecessary or undue degradation. BLM erred by approving the Plan Modification without conducting this analysis.

BLM suggests in its Answer that the required flow monitoring at Bullseye Well and Bullseye Spring would detect any groundwater infiltration, while Appellants disagree.[197] This is a judgment that we would ordinarily leave to BLM's experts, but the record before us does not establish that BLM formed any expert judgment on this point at the time of its decision. The record shows that the perched aquifer is part of a hydrological system with the spring and well that could be affected by faults and fractures, which could provide a pathway for water to enter the mine. In addition to the discussion of this issue in the EA,[198] the Plan Modification discusses the connection between the aquifer and the spring and the use of the spring by the existing water rights owner.[199] Most of the attention to this issue in the record relates to the protection of those water rights, on the grounds that vertical movement of water through faults and fractures "could result in diminution of water flows feeding the spring and well."[200] The monitoring program for Bullseye Spring and Bullseye Well was intended to address that specific possibility.[201] However, the same vertical movement of water through faults and fractures could lead to groundwater infiltration from the aquifer into the mine, and the record does not establish that the monitoring program would necessarily detect this result.

BLM points out that the regulation itself does not require "a specific plan to monitor groundwater."[202] That is because § 3809.401(b)(4) provides a non-exhaustive list of examples of monitoring programs, in the context of illustrating the programs "which may be necessary" based on the risks a project may present. It does not preclude BLM from identifying other types of monitoring that may "provide early detection of potential problems."[203] Nor does it preclude BLM from determining, after appropriate analysis, that the monitoring required under the Plan Modification is sufficient to detect groundwater infiltration into the mine. It also does not limit BLM's ability to determine,

---

[197] *Compare* BLM Answer at 16 *with* Appellants' Reply at 7.
[198] *See* Final EA at 37-38, 52, 75-77.
[199] *See* Plan Modification at 8-2 to 8-4.
[200] Utah DNR Letter at 2; *see* Final EA at 76-77; DR, Attachment A at 5 (paragraph 59).
[201] *See* DR, Attachment A at 5 (paragraph 59).
[202] BLM Answer at 16.
[203] 43 C.F.R. § 3809.401(b)(4).

as a threshold matter, that such groundwater infiltration does not constitute a "potential problem" necessitating a monitoring plan because it could be removed or discharged without causing unnecessary or undue degradation. But because the record does not show that BLM made any of these determinations, we conclude that BLM erred.

B. Appellants did not adequately preserve for appeal their FLPMA argument about concurrent reclamation

Finally, Appellants make an argument related to reclamation. One of the standards of performance for a plan of operations in 43 C.F.R. § 3809.420 provides:

> (5) *Concurrent reclamation*. You must initiate and complete reclamation at the earliest economically and technically feasible time on those portions of the disturbed area that you will not disturb further.[204]

Here, BLM studied the project's environmental impacts on the premise that each of the portal areas would be "concurrently reclaimed as they are no longer needed, over the 20-year Mine life."[205] Appellants claim that the Plan Modification violates the concurrent reclamation standard (and therefore FLPMA) because it relies on "ambiguous triggers," with no objective standard for determining when facilities are "no longer needed."[206]

Energy Fuels claims that Appellants failed to preserve this argument for appeal.[207] Applying the standard described above, we agree. BLM stated in the Draft EA that its NEPA process would also fulfill the public participation requirements of FLPMA.[208] It also notified the public that it was considering whether operations under the proposed Plan Modification would be "conducted in a manner that will prevent unnecessary or undue degradation of public lands" and meet the requirements of § 3809.420.[209] Moreover, it discussed the reclamation provisions of the Plan Modification.[210] The Draft EA thus provided an opportunity to comment on FLPMA's concurrent reclamation requirements.

Despite this, none of Appellants' submissions during BLM's review process for the Plan Modification mentioned § 3908.420(a)(5), Appellants' views on concurrent reclamation, the alleged need for more concrete standards, or when reclamation of some areas could feasibly begin. Appellants point out that, in their scoping comments, they

---

[204] *Id.* § 3809.420(a)(5).
[205] Final EA at 26, 27.
[206] Appellants' Statement of Reasons at 13.
[207] *See* Energy Fuels Answer at 3.
[208] *See* Draft EA at 9.
[209] *Id.* at 4; *see also id.* at 6 (noting that the proposed action would be subject to FLPMA)
[210] *See id.* at 25-30.

reiterated the statutory requirement that BLM must "take any action necessary to prevent unnecessary or undue degradation of the lands."[211] This generic reference to a broad statutory requirement, which is implemented through many separate regulatory provisions covering myriad elements of BLM's decision here, did nothing to alert BLM to the need to examine or modify the concurrent reclamation provisions of the Plan Modification.

Appellants attempt to rely on comments by Uranium Watch, a third party that has not appealed here, to satisfy its participation requirement.[212] Some Federal courts conducting review under the Administrative Procedure Act have held that a party may seek review of agency action on the basis of comments made by a different party.[213] Our regulations, which limit this Board to considering issues raised "by *the party* in *its* prior participation," do not allow such piggybacking.[214] Because Appellants' comments do not fulfill the requirement that this issue must have been raised in Appellants' "prior participation" to be preserved for appeal, we do not consider it further.

CONCLUSION

To summarize, Appellants have not demonstrated any error under NEPA in BLM's decision not to prepare an EIS or in its analysis of the likely environmental impacts of the Plan Modification in the EA. Appellants have shown that, based on BLM's analysis in the EA, groundwater infiltration from the perched aquifer into the mine and the potential need for discharge may require additional monitoring under 43 C.F.R. § 3809.401(b)(4). BLM's approval of the monitoring plan without addressing that issue was therefore erroneous. These holdings together constitute our decision on the merits of this appeal.

We defer ordering a remedy for that error, however, on the record before us. In particular, our consideration would benefit from a fuller understanding of (1) the status of the mine expansion and the practical consequences of either a full or partial vacatur of the Plan Modification for Energy Fuels' present operations; (2) the nature of any further proceedings that may be necessary for BLM to address the error we have identified; and (3) any other factual or legal arguments that the parties consider relevant to determining an appropriate remedy.

---

[211] Appellants' Reply at 6 n.1 (citing 2014 Comments at 12-13).
[212] *See id.* (citing *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir. 2007)).
[213] *See, e.g.*, *CTIA – The Wireless Ass'n v. FCC*, 466 F.3d 105, 117 (D.C. Cir. 2006).
[214] 43 C.F.R. § 4.410(c)(1) (emphasis added); *Great Basin Res. Watch*, 185 IBLA 1, 17 (2014).

We therefore order the parties to file supplemental briefs addressing these points. Appellants are directed to file a supplemental brief of no more than 10 pages by December 4, 2024. BLM is directed to file a supplemental brief of no more than 10 pages by January 13, 2024. Energy Fuels may, but is not required to, file a supplemental brief of no more than 10 pages by January 23, 2024.

DAVID GUNTER
Digitally signed by DAVID GUNTER
Date: 2024.10.25 08:22:46 -04'00'

David Gunter
Administrative Judge

I concur:

CLIFFORD STEVENS
Digitally signed by CLIFFORD STEVENS
Date: 2024.10.25 09:46:24 -04'00'

Clifford E. Stevens, Jr.
Administrative Judge