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NEPA AND THE ROAN PLATEAU: FORCING THE BUREAU OF LAND MANAGEMENT TO TAKE A HARD LOOK

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Abstract: In 2007, the Bureau of Land Management adopted a resource management plan that essentially made all public land within the Roan Plateau Planning Area available for leasing to private oil and gas entities. Environmental groups alleged that the BLM, in adopting the plan, failed to satisfy the National Environmental Policy Act's procedural requirements. In *Colorado Environmental Coalition v. Salazar*, the district court held that the BLM violated NEPA by failing to adequately consider the plan's cumulative air quality effects. On remand, the court did not offer the agency any instructions in curing the procedural deficiency. The court's lack of guidance on remand is consistent with the Tenth Circuit's refusal to equate NEPA's procedural requirements with the production of hard data. This Comment argues that the Ninth Circuit's application of NEPA better promotes the Act's underlying policies of public awareness and informed decisionmaking without imposing an undue burden on federal agencies.

INTRODUCTION

Visit the Roan Plateau in Garfield County, Colorado, and you will encounter a diverse wildlife population that includes mountain lions, sage grouse, peregrine falcons, and a species of cutthroat trout that has remained genetically pure since the most recent ice age.[1] The hydrocarbon-rich soils of the Roan Plateau produce a variety of rare plant species, some of which cannot be found anywhere else in the world.[2] Paradoxically, the biological and geological characteristics that account for the Roan Plateau's natural beauty have also incentivized humanity's

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[1] Colo. Envtl. Coal. v. Salazar, 875 F. Supp. 2d 1233, 1239 (D. Colo. 2012); Sean Patrick Farrell, *Defending the Not-Quite-Wild*, N.Y. TIMES, Oct. 30, 2009, at B1; Anthony Licata, *An Overview of the Roan Plateau*, FIELD & STREAM (July 20, 2010), http://fieldandstream.com/blogs/finding-deer-hunt/2010/07/overview-roan-plateau; *Roan Plateau*, LANDSCOPE AMERICA, http://www.landscope.org/colorado/places/Roan%20Plateau (last visited Apr. 22, 2013).

[2] *Roan Plateau*, *supra* note 1.

degradation of the environment.[3] In particular, tension exists between preserving an unsullied landscape and extracting the nine trillion cubic feet of recoverable natural gas beneath the Roan Plateau.[4] The natural resources of the Roan Plateau represent up to $1.13 billion in leasing revenue for Colorado and the federal government.[5] Furthermore, energy industry experts project that within the next twenty years, an additional ten thousand to twenty thousand oil wells will be drilled in the area—more wells than in Saudi Arabia and Iran combined.[6]

A significant portion of the drilling will occur on publicly owned land as a result of an amended Resource Management Plan ("RMP") that the Bureau of Land Management ("BLM") promulgated in 2006.[7] The amended RMP was a response to an act of Congress mandating that the BLM make publicly owned lands within the Roan Plateau available to private entities for petroleum exploration and development.[8] Prior to the BLM's amendment to the RMP, approximately sixty percent of the Roan Plateau Planning Area remained unavailable for oil and gas development.[9] The amended RMP made the entire Planning Area available for leasing.[10]

In 2012, in *Colorado Environmental Coalition v. Salazar* the U.S. District Court for the District of Colorado found that the BLM's decision to amend the RMP was arbitrary and capricious, and remanded the matter back to the agency.[11] The court held that a significant defect in the agency's Environmental Impact Statement ("EIS") was a failure to

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[3] *See* Colorado Wildlife Federation, Northwest Colorado's Wildlife Habitat Today: Are We Losing Our Heritage? 2 (2009), http://coloradowildlife.org/ui/images/public/uploads/AreWeLosingOurWildlifeHeritageReport123009sm.pdf.

[4] *Id.*; *see* U.S. Bureau Of Land Mgmt., Roan Plateau Resource Management Plan Amendment: Facts And Figures [hereinafter Facts and Figures], http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/land_use_planning/rmp/roan_plateau/documents.Par.15350.File.dat/AtAGlance.pdf (last visited May 12, 2013) [hereinafter Facts and Figures].

[5] *See* Facts and Figures, *supra* note 4.

[6] U.S. Bureau Of Land Mgmt., Roan Plateau Planning Area Resource Management Plan Amendment & Environmental Impact Statement 3–4 (2006), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/land_use_planning/rmp/roan_plateau/documents/final_eis.Par.67688.File.dat/Volume_I.pdf; Org. of the Petroleum Exporting Countries, Annual Statistical Bulletin 2010/2011 Edition 27 (2011), *available at* http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2010_2011.pdf.

[7] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1242.

[8] *See id.* at 1240; 10 U.S.C. § 7439(b)(1) (2006).

[9] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1241.

[10] *Id.*

[11] *Id.* at 1256.

address the potential effects of the new RMP on ozone levels.[12] When remanding, however, the court offered no instructions for the agency in curing the EIS.[13] Problematically, courts in the Tenth Circuit, including the district court in this case, do not have a basis in case law for imposing stringent requirements on agencies when remanding.[14] Precedent in the nearby Ninth Circuit allows district courts to issue broad guidelines or more stringent requirements on remand.[15] This Comment argues that the Ninth Circuit's application of the National Environmental Policy Act ("NEPA") better promotes the statute's underlying policies of public awareness and informed decisionmaking without imposing excessive burdens on government agencies.[16]

I. Facts and Procedural History

The Roan Plateau Planning Area ("Planning Area") spans more than one-hundred-and-twenty-thousand acres of northwestern Colorado.[17] The federal government owns approximately fifty-eight percent of the Planning Area, which the BLM manages.[18] Steep cliffs separate the Planning Area into two distinct zones.[19] The upper portion of the Planning Area, commonly referred to as the "Roan," is predominantly untainted, moist montane and sub-alpine habitat that has been shaped into distinct drainage basins by various creeks.[20] The lower portion of the Planning Area is slightly larger and is a comparatively arid, semi-desert habitat.[21]

Historically, the Department of Energy ("DOE") kept the Planning Area as a strategic petroleum and oil shale reserve for use in times of war or national emergency.[22] The DOE referred to the upper portion of the Planning Area as Naval Petroleum and Oil Shale Reserve

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[12] *Id.* at 1258–59.

[13] *Id.* at 1259 n.23.

[14] *See infra* notes 53–57 and accompanying text.

[15] *See* Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998).

[16] *See infra* notes 110–125 and accompanying text.

[17] *Colo. Envtl. Coal.*, 875 F. Supp. at 1239.

[18] *Id.*

[19] *Id.*

[20] *Id.* Mountain montane habitats are characterized by rocky cliffs and steep slopes above the natural tree-line. Tayside Biodiversity Partnership, Montane 1, *available at* http://www.angus.gov.uk/biodiversity/pdf/Section%202/Upland/U1.pdf. Such habitats are biologically diverse, and because of the geological features of montane areas, are often undisturbed landscapes. *Id.*

[21] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1239.

[22] *Id.* at 1239–40.

("NOSR") 1, and the lower portion NOSR 3.[23] In the 1980s, the DOE feared that private developers on adjacent lands were draining the oil reserves beneath NOSRs 1 and 3.[24] As a result, the DOE authorized drilling on NOSR 3, producing a large amount of gas through 1996.[25]

By 1997, Congress and the DOE agreed that NOSRs 1 and 3 no longer served a strategic purpose.[26] Congress transferred jurisdiction over the Planning Area from the DOE to the BLM and ordered that (1) the BLM enter into leases with private entities for energy exploration and development; and (2) the BLM manage the Planning Area in accordance with the Federal Land Policy and Management Act of 1976 and other laws applicable to public lands.[27]

In 2000, the BLM announced its intention to amend the controlling RMP to comply with the directives of Congress and facilitate diverse use of the Planning Area.[28] By 2002, the BLM outlined six alternatives for consideration, and four of the alternatives would later become particularly relevant during judicial review.[29] Alternative A was a statutorily mandated "no action" alternative that would leave approximately sixty percent of the Planning Area closed to oil and gas development.[30] Alternative B would have made slightly more than half of the Planning Area available while providing increased environmental protection for certain areas with "exceptional wilderness or wildlife characteristics."[31] Alternative C was the BLM's "preferred alternative" and would make the entire Planning Area available for oil and gas leasing.[32] The BLM removed Alternative F from consideration because it was nearly identical to Alternative A with the exception of a "Special Recreation Management Area" that would have been contingent upon the selection of Alternative A's no leasing component.[33]

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[23] *Id.*

[24] *Id.* at 1240.

[25] *Id.*

[26] *Id.*

[27] 10 U.S.C. § 7439(a)–(c) (2006); *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1240.

[28] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1240.

[29] *Id.*

[30] Bureau of Land Mgmt., Resource Management Plan Amendment And Environmental Impact Statement Draft 2–6 (2004), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/co/programs/land_use_planning/rmp/roan_plateau/documents/draft_eis.Par.94130.File.dat/Chapter_2_Alternatives.pdf (last visited May 5, 2013).

[31] *Id.* at 2–8.

[32] *Id.* at 2–10.

[33] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1239. The "Special Recreation Management Area" would permit some forms of non-motorized recreational use while maintaining the natural features of the landscape. *Id.* at 1241.

Subsequent to the BLM's decision to discard Alternative F, several interested groups proposed the "Community Alternative."[34] This alternative provided a unique combination of full resource exploitation and preservation of the Planning Area's unspoiled landscape.[35] Under this plan, developers would position wells only along the perimeter of the Planning Area and would use directional drilling to extract oil and gas from beneath the entire surface.[36] The BLM declined to consider the Community Alternative.[37] The agency limited its explanation to a statement that the draft RMP and EIS had not developed and analyzed the Community Alternative.[38] The five alternatives that the draft RMP and EIS analyzed already incorporated many of the basic components of the Community Alternative.[39] The proposed RMP also reflected several of these same components.[40]

The BLM officially adopted a variation of Alternative C in June 2007, and the Colorado Environmental Coalition subsequently filed a complaint in the U.S. District Court for the District of Colorado.[41] In considering the alternatives, the court in *Colorado Environmental Coalition v. Salazar* held that the BLM was justified in refusing to consider Alternative F, but that the agency's failure to consider the Community Alternative was arbitrary and capricious.[42] Regarding cumulative impact analyses, the court held that the BLM took a "hard look" at the effects of the project on deer and elk but did not properly consider cumulative air quality impacts and ozone emissions.[43]

II. Legal Background

Under the Administrative Procedure Act ("APA"), courts have the authority to hold unlawful and set aside agency actions that are "arbi-

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[34] Letter from Rock the Earth to Greg Goodenow, Roan Plateau RMPA/DEIS Comment Team (Apr. 15, 2005) (on file with author).

[35] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1249.

[36] *Id.* at 1242. Directional drilling utilizes special drilling equipment that allows developers to extract oil and gas from formations that are not directly beneath the surface well pad. *Directional Drilling*, Earthworks, http://www.earthworksaction.org/issues/detail/directional_drilling (last visited Apr. 22, 2013). Therefore, oil and gas bearing formations under the center of the Planning Area could be accessed by well pads that are stationed along the perimeter of the Planning Area, leaving the majority of the landscape's surface unchanged. *Id.*

[37] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1242.

[38] *Id.*

[39] *Id.* at 1242–43.

[40] *Id.*

[41] *Id.* at 1243.

[42] *Id.* at 1248–50.

[43] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1253–59.

trary, capricious, an abuse of discretion, or otherwise not in accordance with law."[44] A court may only uphold an agency's decision "on the basis articulated by the agency itself."[45] Any proffered *post hoc* rationalizations of agency action or inaction are insufficient to demonstrate proper procedure.[46] To avoid a finding that agency action is arbitrary and capricious, the agency's justifications for its decision must appear in the administrative record itself.[47]

In recognition of humanity's significant effect on the quality of the environment, the National Environmental Policy Act ("NEPA") reflects Congress's intent to promote the general welfare by facilitating coexistence between nature and humans while giving due consideration to the future social and economic needs of the United States.[48] NEPA dictates that all federal agencies create an Environmental Impact Statement ("EIS") before undertaking any proposed major federal action that will significantly affect the environment.[49] An EIS must detail (1) the environmental impact of the proposed action; (2) unavoidable adverse environmental effects of the action; (3) alternatives to the proposed action; (4) the relationship between short-term use of the environment and long-term productivity; and (5) any irreversible or irretrievable commitment of resources associated with the proposed action.[50] In evaluating alternatives to the proposed action, the agency must take a "hard look" at environmental consequences that might flow from a particular action.[51] The Council on Environmental Quality ("CEQ") promulgates regulations to guide agency compliance with NEPA.[52] Emphasizing that public scrutiny of proposed agency actions is essential to implementing NEPA, the CEQ regulations mandate that agencies release "high quality" information to the public before taking action that might significantly affect the environment.[53]

In 2006, in *Ecology Center, Inc. v. U.S. Forest Service*, the Court of Appeals for the Tenth Circuit stated a general rule regarding NEPA's hard

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[44] 5 U.S.C. § 706(2)(a) (2006).

[45] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).

[46] *See* Licon v. Ledezma, 638 F.3d 1303, 1308 (10th Cir. 2011); Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993).

[47] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

[48] 42 U.S.C. § 4331 (2006).

[49] *Id.* § 4332(C)(i)–(v).

[50] *Id.*

[51] Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983).

[52] 40 C.F.R. § 1500.1(a) (2011).

[53] *Id.* § 1500.1(b).

look analysis and the production of hard data.[54] In response to the Ecology Center's contention that the United States Forest Service's ("USFS") EIS was inadequate because it lacked hard data, the court unequivocally stated that the production of hard data is not necessary to satisfy NEPA's hard look requirement.[55] To determine whether the USFS took the requisite hard look before allowing a logging project to begin, the court summarily recounted the procedures required under NEPA.[56] The court concluded that "[b]ecause the Forest Service has conformed with NEPA's procedural requirements, we will not second-guess the wisdom of the ultimate decision."[57]

In 2008, the Tenth Circuit reiterated in *Citizens' Committee to Save Our Canyons v. Krueger* that NEPA's hard look does not necessarily require the production of hard data.[58] In this case, a citizens group argued that the USFS should develop a more detailed analysis of helicopter noise patterns that would result from a helicopter skiing operation in a national forest.[59] Rather than quantifying the potential effects of helicopter noise, the agency's EIS identified several variables that would affect the experience of others in the forest.[60] Variables that the USFS deemed relevant included the number of helicopters in operation, the proximity of the helicopters to other users of the forest, and an individual's idiosyncratic level of noise tolerance.[61] The court held that "while more information could have been collected . . . the EIS provides a sufficient basis for making an informed decision, taking into account how noise impacts might vary by alternative."[62] Consistent with precedent, the Tenth Circuit refused to require the USFS to reduce the

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[54] 451 F.3d 1183, 1190 (10th Cir. 2006), *see* 42 U.S.C. § 4332(C)(i)–(v) (2006).

[55] 451 F.3d at 1190. Ecology Center argued that the USFS failed to provide sufficient data to demonstrate that a commercial logging project was compatible with the Dixie National Forest Plan, which was designed to protect the habitat and population of old growth species. *Id.* at 1185–88. In *Utah Envtl. Cong. v. Richardson*, the Tenth Circuit again divorced NEPA's hard look requirement from an analysis of hard data. *See* 483 F.3d 1127, 1140 (10th Cir. 2007). There, the court found that "the Forest Service took a hard look, analyzed a substantial amount of data, and simply reached a conclusion that UEC thinks is incorrect." *Id.* (internal quotation marks omitted). This language implies that analyzing hard data is an additional step above and beyond taking the hard look required under NEPA. *See id.*

[56] 42 U.S.C. § 4332(2)(C)(i)–(v); *Ecology Ctr.*, 451 F.3d at 1189; 40 C.F.R. § 1502.10 (2011).

[57] *Ecology Ctr.*, 451 F.3d at 1190 (internal quotation marks omitted).

[58] 513 F.3d 1169, 1179 (10th Cir. 2008); *see* 42 U.S.C. § 4332(C)(i)–(v).

[59] 513 F.3d at 1179.

[60] *Id.* at 1181.

[61] *Id.*

[62] *Id.* at 1182.

amount of noise to a numeric value that was either acceptable or unacceptable.[63]

One year later, in *New Mexico ex rel. Richardson v. Bureau of Land Management*, the Tenth Circuit found that the Bureau of Land Management ("BLM") failed to satisfy NEPA's hard look requirement and therefore set aside the agency's decision as arbitrary.[64] New Mexico had challenged the BLM's finding that environmental impacts on the Salt Basin Aquifer would be "minimal."[65] The state feared that waste water from operational natural gas wells would re-enter the ground and eventually contaminate the aquifer.[66] The court began its hard look analysis by considering whether the BLM examined relevant data before determining that the possibility of aquifer contamination was minimal.[67] The court found that the record contained no data supporting the BLM's conclusion.[68] Data actually suggested a non-negligible risk of aquifer contamination, which compounded the lack of support for the BLM's conclusion.[69] The court held that although it does not rule on the correctness of evidence on the record, "where [the evidence] points uniformly in the opposite direction from the agency's determination, we cannot defer to that determination."[70]

The Tenth Circuit's highly deferential analysis of agency decisionmaking and unwavering refusal to require hard data has manifested itself in district court decisions such as *Amigos Bravos v. U.S. Bureau of Land Management*.[71] In that 2011 case, the plaintiffs challenged a decision by the BLM to authorize the sale of oil and gas leases.[72] Although the plaintiffs acknowledged that the BLM had discretion in choosing a specific methodology, they argued that the BLM's EIS was inadequate because it failed to incorporate quantitative ozone modeling.[73] Notwithstanding the plaintiffs' reliance on persuasive precedent from the Court of Appeals for the Ninth Circuit, the district court refused to condition compliance with NEPA's hard look requirement on the pro-

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[63] *Id.*; *see Ecology Ctr.*, 451 F.3d 1183, 1190 (10th Cir. 2006).
[64] 565 F.3d 683, 715 (10th Cir. 2009); *see* 42 U.S.C. § 4332(C)(i)–(v) (2006).
[65] 565 F.3d at 713.
[66] *Id.* at 714.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 715.
[70] *Richardson*, 565 F.3d at 715.
[71] No. 6:09-cv-00037-RB-LFG, 2011 WL 7701433, at *34 (D.N.M. Aug. 3, 2011).
[72] *Id.* at *31.
[73] *Id.* at *32.

duction of hard data.[74] The court held that the BLM had taken the requisite hard look because the agency engaged in modeling of ozone precursors, and the "EIS Cumulative Impacts Analysis . . . indicate[d] the project's emissions *may* have a *potentially* significant impact on . . . ozone levels."[75]

The general rule of the Ninth Circuit's hard look jurisprudence stands in stark contrast to that of the Tenth Circuit.[76] In 1998, in *Neighbors of Cuddy Mountain v. U.S. Forest Service*, the Ninth Circuit stated that to satisfy NEPA, when analyzing cumulative effects of proposed projects an agency must use "some quantified or detailed information."[77] The USFS had issued an EIS that described the effects of future timber sales on old-growth habitat in strictly qualitative terms.[78] In rejecting the EIS, the Ninth Circuit noted that the USFS "failed to even mention the number or percentage of trees meeting the definition of old growth that would be destroyed by the three other proposed timber sales in the . . . area."[79] The EIS's only forward-looking reference to future timber sales in the area noted that proposed sales would affect additional old growth area.[80] The Ninth Circuit supported its requirement of quantitative or detailed data by implicating the policies of informed agency decisionmaking and informing the public of the issues before the agency.[81]

A decade later, in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the plaintiffs challenged the National Highway Traffic Safety Administration's ("NHTSA") final rule on corporate average fuel economy ("CAFE") standards as inconsistent with NEPA, and alleged that the agency failed to take a hard look at the rule's greenhouse gas implications.[82] The NHTSA reasoned that because the final rule would result in a decrease of carbon dioxide emis-

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[74] *Id.* (noting that the court was not bound by the Ninth Circuit and further distinguishing the case as being in the context of a temporary restraining order); *see* 42 U.S.C. § 4332(C)(i)–(v) (2006).

[75] *Id.* at *34 (emphasis added).

[76] *Compare* Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1379 (9th Cir. 1998) (suggesting hard data is required to comply with hard look), *with Ecology Ctr.*, 451 F.3d at 1190 (rejecting argument that hard look requires production of hard data).

[77] 137 F.3d at 1379; *see* 42 U.S.C. § 4332(C)(i)–(v).

[78] *See* 137 F.3d at 1379.

[79] *Id.*

[80] *Id.*

[81] *See id.* ("Without such information, neither the courts nor the public, in reviewing the Forest Service's decisions, can be assured that the Forest Service provided the hard look that it is required to provide.").

[82] 538 F.3d 1172, 1181 (9th Cir. 2008); Average Fuel Economy Standards for Light Trucks Model Years 2008–2011, 71 Fed. Reg. 17566 (Apr. 6, 2006).

sions relative to the existing CAFE standards, the action would have no significant impact on the environment and did not require an EIS.[83] The NHTSA based its position on an Environmental Assessment ("EA") that the agency produced.[84] The Ninth Circuit held that the NHTSA's EA amounted to "vague and conclusory statements" that were uncorroborated by any data, and therefore the EA did not satisfy NEPA's hard look requirement.[85] In the court's view, the NHTSA's EA lacked any real explanation as to why the final rule would not have a significant effect on the environment.[86]

The Ninth Circuit recently recognized that quantitative data is not always available, and in 2012 found that the USFS had taken the requisite hard look despite describing a project's impacts on tree mortality in strictly qualitative terms.[87] The USFS's qualitative description of environmental impacts at issue in *League of Wilderness Defenders—Blue Mountain Biodiversity Project v. U.S. Forest Service* did not preclude compliance with NEPA because the agency explained why it could not provide objective, quantitative data.[88] The Ninth Circuit recognized that quantitative data was not available in this case but, consistent with its own precedent, stated that a hard look must not improperly minimize negative side effects of a project's adverse environmental impacts.[89] The USFS's conclusion that a bark beetle infestation within the Experimental Forest Thinning, Fuel Reduction, and Research Project would likely lead to "larger-than-normal patches of tree mortality" did not understate the project's adverse environmental impacts, and the hard look requirement was satisfied.[90]

III. Analysis

In *Colorado Environmental Coalition v. Salazar*, the U.S. District Court for the District of Colorado held that the Bureau of Land Management ("BLM") did not violate the National Environmental Policy Act ("NEPA") when the agency refused to consider Alternative F of the Re-

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[83] 538 F.3d at 1220.

[84] *Id.* An EA is not required to be as thorough as an EIS. *See* Cal. Trout v. Fed. Energy Regulatory Comm'n, 572 F.3d 1003, 1015–16 (9th Cir. 2009).

[85] *Ctr. for Biological Diversity*, 538 F.3d at 1223–24.

[86] *See id.* at 1225.

[87] League of Wilderness Defenders—Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1076 (9th Cir. 2012).

[88] *Id.*

[89] *See id.* at 1075–76.

[90] *See id.* at 1076.

source Management Plan ("RMP") because the alternative significantly overlapped with other choices under consideration.[91] The BLM's failure to consider the Community Alternative, however, was inconsistent with NEPA's requirement to consider all reasonable alternatives to the proposed agency action.[92] The court held that under NEPA, the BLM was not justified in refusing to consider the Community Alternative because the alternative was sufficiently distinct from other choices under consideration, and the BLM's explanation for its decision amounted to an impermissible *post hoc* rationalization.[93]

After evaluating the BLM's consideration of an adequate range of alternatives, the court moved to its hard look analysis.[94] First, the court held that the BLM's decision to limit the scope of its project analysis to a twenty-year timeframe did not violate NEPA.[95] An e-mail from a BLM staff member addressed to several colleagues described any forecasting beyond twenty years as highly speculative, and this e-mail satisfied NEPA's requirements by "the barest of margins."[96] Furthermore, the court was satisfied that the BLM took a hard look at the potential effects of oil and gas development on elk and mule deer.[97] The court acknowledged that the BLM did not consider the potential effects of increasing private oil development on private lands and how such development might affect migration patterns outside of the Planning Area, but the court found that such effects were outside the scope of the Environmental Impact Statement ("EIS") because they were not associated with the project.[98]

The court then held that the BLM failed to take the requisite hard look at the cumulative impacts of the project on the air quality effects of the amended RMP.[99] The EIS failed to assess the effects of the project in conjunction with the effects of private oil and gas development that would occur outside of the Planning Area.[100] Although the court recognized that the effects of private development *outside* of the Planning Area might be difficult to analyze, the BLM had analyzed the ef-

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[91] 875 F. Supp. 2d 1233, 1248 (D. Colo. 2012); *see* 42 U.S.C. § 4332(C)(i)–(v) (2006).
[92] 875 F. Supp. 2d at 1249–50.
[93] *Id.*
[94] *Id.* at 1250.
[95] *Id.* at 1253.
[96] *Id.* at 1252 n.17.
[97] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1254.
[98] *Id.*
[99] *Id.* at 1256.
[100] *Id.*

fects of private development *within* the Planning Area.[101] The court held that the BLM failed to take a hard look at the RMP because the BLM neglected to articulate why the methodology used to analyze private development within the Planning Area could not be extended to private lands outside of the Planning Area.[102]

Finally, the court considered the BLM's treatment of air quality issues stemming from the project's ozone emissions.[103] The court held that because the EIS contained no evidence supporting the conclusion that the project would not lead to violations of the Clean Air Act's ("CAA") ambient air quality standards, NEPA's hard look requirement was not satisfied.[104] The court remanded the issue to the BLM but stated that the court "does not opine or intend to offer any particular direction as to how the BLM should proceed upon remand."[105] This unqualified deference on remand to the agency exemplifies the difference between the jurisprudence of the Ninth Circuit and the Tenth Circuit.[106]

In *Neighbors of Cuddy Mountain v. U.S. Forest Service*, the Court of Appeals for the Ninth Circuit stated its general rule that federal agencies must provide some quantified or detailed information to satisfy NEPA's hard look requirement.[107] Conversely, the Tenth Circuit unequivocally rejected that premise in *Ecology Center, Inc. v. U.S. Forest Service*.[108] Therefore, as a jurisprudential matter, the district court in *Colorado Environmental Coalition* was justified under Tenth Circuit precedent in giving the BLM such nebulous guidelines on remand.[109]

Considering the policies underlying NEPA as described in the Council on Environmental Quality's ("CEQ") enforcement guidance, the Ninth Circuit's application of NEPA is preferable.[110] Specifically,

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[101] *Id.* Although factors in emissions such as the number of glycol dehydrators and compression engines could be estimated, it would be difficult to estimate factors such as fugitive dust emissions from roadbuilding because the BLM had no control over that process. *Id.*

[102] *Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1256.

[103] *Id.* at 1257.

[104] *See id.* at 1258.

[105] *See id.* at 1259 n.23.

[106] *See infra* notes 107–109 and accompanying text.

[107] 137 F.3d at 1379.

[108] 451 F.3d at 1190.

[109] *See id.*

[110] See 40 C.F.R. § 1500.1(b) (2011) (describing a policy of providing high quality information to public officials and the citizenry); League of Wilderness Defenders—Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1076 (9th Cir. 2012); *Neighbors of Cuddy Mountain*, 137 F.3d at 1379.

the Ninth Circuit's jurisprudence, by initially requiring hard data, goes further in ensuring that the public is informed of the environmental impacts of proposed agency action.[111] Moreover, although the Ninth Circuit imposes more stringent standards concerning NEPA requirements, the court's approach contains enough flexibility to balance NEPA's underlying policies with the interest in not placing unreasonable demands on agencies.[112]

The plaintiffs in *Colorado Environmental Coalition* argued that the record did not contain adequate support for the BLM's conclusion that the selected RMP would not result in a violation of the CAA.[113] The CAA's National Ambient Air Quality Standards promulgate quantified restrictions on levels of atmospheric ozone.[114]

Even if the BLM's conclusion regarding the CAA's ozone standards were correct, assuming that there is no significance beyond merely complying with the standards would be fallacious.[115] Indeed, the EPA regulations for the prevention of significant deterioration of air quality themselves contemplate meaning beyond formulaic compliance with the CAA's standards.[116] Conversely, the Tenth Circuit's interpretation of NEPA permits qualitative descriptions that might fail to account for the degree to which an area will be above or below the CAA's ozone standards.[117] A district court under the Ninth Circuit, beginning from the premise that hard data is required to satisfy NEPA, would have been justified in demanding that the BLM on remand either produce hard data or explain why such data is unavailable.[118] The Ninth Circuit's approach to the hard look requirement better serves the interest in informing the public of the adverse environmental impacts of proposed agency action.[119]

Although the Ninth Circuit imposes more stringent hard look requirements than the Tenth Circuit, the Ninth Circuit will adjust its approach when hard data is unavailable.[120] Where the exigencies of an

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[111] *See supra* notes 107–110 and accompanying text.

[112] *See League of Wilderness*, 689 F.3d at 1075; *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

[113] 875 F. Supp. 2d at 1243.

[114] *See* 40 C.F.R. §§ 50.1, .9, .10 (2011).

[115] *See id.* § 52.21.

[116] *See id.*

[117] *See Ecology Ctr.*, 451 F.3d 1183, 1190; *Amigos Bravos*, 2011 WL 7701433, at *34.

[118] *See League of Wilderness*, 689 F.3d at 1075; *Neighbors of Cuddy Mountain*, 137 F.3d at 1379.

[119] *See League of Wilderness*, 689 F.3d at 1076; *Neighbors of Cuddy Mountain*, 137 F.3d at 1379; 40 C.F.R. § 1500.1 (2011).

[120] *See League of Wilderness*, 689 F.3d at 1076.

analysis compel an agency to provide a description in qualitative terms, the Ninth Circuit will find the hard look requirement to be satisfied if the agency (1) provides a "reasonable justification" for why hard data is unavailable; and (2) does not improperly minimize the adverse environmental effects of the agency action.[121] If the district court in *Colorado Environmental Coalition* had imposed a hard data requirement on the BLM on remand, the BLM probably would have cited difficulty in producing such data as a result of the speculative nature of private development on adjacent parcels of land.[122] Under the Ninth Circuit's approach, if the BLM were to make such an argument, the agency would have to explain why the data is unavailable, and the agency's qualitative analysis could not understate the adverse environmental impacts of the problem.[123] If the Roan Plateau Planning Area project would raise atmospheric ozone levels without violating the CAA, the BLM would have to describe that scenario to the best of its ability.[124] This would mitigate the problems inherent in attempting to foster public awareness by providing qualitative descriptions of compliance with quantitative standards.[125]

Conclusion

On remand, the BLM is unlikely to go beyond the requirements of the district court and produce hard data to support its conclusion that the agency's decision will not lead to a violation of the CAA. The result will be an analysis of the project that largely fails to inform the public of the true environmental effects of oil and gas development on the Roan Plateau. An uninformed public is the logical outgrowth of a court that refuses to demand hard data to demonstrate compliance with NEPA's hard look requirement. The Ninth Circuit's approach to NEPA's hard look requirement is preferable to that of the Tenth Circuit because without imposing draconian requirements on administrative agencies, it does more to further NEPA's policy of promoting public awareness and informed decisionmaking.

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[121] *Id.* at 1075–76.

[122] *See Colo. Envtl. Coal.*, 875 F. Supp. 2d at 1255–56 (mentioning that the BLM made this type of argument to justify its cumulative effects analysis of air quality).

[123] *See League of Wilderness*, 689 F.3d at 1076.

[124] *See id.* at 1075.

[125] *See supra* notes 115–120 and accompanying text.