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May 3, 2012

SUBMITTED ELECTRONICALLY

Oil Shale and Tar Sands Resources Draft
Programmatic EIS
Argonne National Laboratory, EVS/240
9700 South Cass Avenue
Argonne, Illinois 60439

Re: WO–300–1310–PP–OSHL — Notice of Availability of the Draft Programmatic Environmental Impact Statement for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming, 77 FR 5833 (February 6, 2012).

Dear Sir or Madam:

The Center for Regulatory Effectiveness (CRE) is pleased to submit these comments to the Bureau of Land Management (BLM) regarding the 2012 Draft Oil Shale and Tar Sands Programmatic Environmental Impact Statement (hereinafter "2012 PEIS"),[1] that proposes to amend land use plans relating to oil shale and has the potential to substantially reduce existing allocations of land already available for oil shale and tar sands development. CRE recommends that BLM take no action as prescribed by Alternative 1, which would leave the current allocation decision from the 2008 Programmatic EIS and Record of Decision (ROD) in place.

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[1] BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, (2012) available at http://ostseis.anl.gov/documents/peis2012/index.cfmhttp://ostseis.anl.gov/documents/peis2012/index.cfm [hereinafter "2012 PEIS"].

BLM should not amend the eight land use plans—as modified by the 2008 ROD—which allocated public lands for leasing and development of oil shale resources. BLM's decision that it is necessary for it to take a "hard look" at whether the lands should be designated for the development of oil shale is based on the premature determination that oil shale development is "not at present a proven commercially-viable energy source."[2] BLM has not provided developers with ample opportunity to develop oil shale commercially. As the Federal Register notice states, "The BLM will decide whether any changes should be made to the existing land use allocation decisions, in light of the nascent character of technology for developing oil shale and tar sands resources."[3] Until the testing and development of oil shale extraction technologies have been completed, any modification to the allocated land use for oil shale would be hasty and conflict with the intent of Congress that "It is the policy of the United States that— (1) United States oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed."[4]

CRE offers the following recommendations to BLM in order for it to fulfill the mandates of the Energy Policy Act of 2005 and to remain committed to pursuing the development of oil shale.

I. BLM's Preferred Alternative is Not a Viable Alternative

A. The United States Oil Shale Reserves Are Five Times Greater Than Saudi Arabian Oil Reserves

A report by the Government Accountability Office states, "The U.S. Geological Survey (USGS) estimates that the Green River Formation contains about 3 trillion barrels of oil, and about half of this may be recoverable, depending on available technology and economic conditions. **This is an amount about equal to the entire world's proven oil reserves**."[5] According to the Department of Energy, the United States could potentially have over 6 trillion barrels of in-place oil shale.[6] The Department of Energy's Office of Naval Petroleum and Oil Shale Reserves estimates that the United States has 1.38 trillion barrels of oil shale that are recoverable.[7] The Rand Corporation offers a more conservative estimate of 800 billion barrels of recoverable oil shale.[8]

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2 77 FR 5833, February 6, 2012.

3 *Id.* at 5834

4 Energy Policy Act of 2005, P.L. 109–58, § 369

5 Government Accountability Office, *ENERGY-WATER NEXUS A Better and Coordinated Understanding of Water Resources Could Help Mitigate the Impacts of Potential Oil Shale Development*, page 1 (October 2010) available at http://www.gao.gov/assets/320/311896.pdf (emphasis added).

6 U.S. Department of Energy, Office of Petroleum Reserves, *Fact Sheet: U.S. Oil Shale Resources*, available at http://www.fossil.energy.gov/programs/reserves/npr/Oil_Shale_Resource_Fact_Sheet.pdf

7 U.S. Department of Energy, Office of Naval Petroleum and Oil Shale, *National Strategic Unconventional Resource Model: A Decision Support System*¸ April 2006, available at http://fossil.energy.gov/programs/reserves/npr/NSURM_Documentation.pdf

8 James T. Bartis *et al.*, *Oil Shale Development in the United States: Prospects and Policy Issues*, Rand Corporation, page IX (2005).

At current US demand for oil, the "800 billion barrels of recoverable resources would last for more than 400 years."[9] And this is the most conservative estimate. Furthermore, since BLM has published the final Programmatic EIS in 2008, the United States Geological Survey (USGS) has upgraded its in-place assessment of oil shale reserves by 50 percent in the Green River Formation in the Piceance Basin of Western Colorado.[10]

BLM's own estimates state the US oil shale reserves are nearly five times greater than the known oil reserves in Saudi Arabia.[11] Given these estimates, BLM needs an extremely compelling justification to scrap oil shale development as it seeks to do so under the Preferred Alternative.

B. The Preferred Alternative Will Eliminate Oil Shale Development in the United States

In the 2012 PEIS,[12] BLM's preferred alternative for oil shale, Alternative 2b, would reduce the amount of land available for oil shale leasing from over 2,017,741 acres to 461,965 acres—greater than a seventy-five percent (75%) reduction in the land available. Specifically, in Colorado, the preferred alternative would reduce available acreage from the current allocation of 360,000 acres to only 35,000 acres—over a ninety percent (90%) reduction.[13]

One of the effects of the reduced acreage for oil shale is that the Preferred Alternative would create a patchwork of isolated plots of land. Accordingly, these isolated plots of lands will either be too small to commercially develop oil shale or will be inaccessible. Thus, this substantial reduction in the amount of land available for commercial oil shale leasing would effectively eliminate commercial oil shale development.

C. There is No Compelling Basis for the 2012 EIS

The alternatives under consideration in the 2012 PEIS, specifically the Preferred Alternative and the No Action Alterative, have already been fully considered in the 2008 PEIS. For instance, the Preferred Alternative in the 2012 PEIS (Alternative 2(b)) was considered as Alternative C in the 2008 PEIS. Nonetheless, after extensive analysis in the 2008 PEIS, BLM determined that the

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9 *Id.*

10 U.S. Geological Survey, *An Assessment of In-Place Oil Shale Resources in the Green River Formation, Piceance Basin, Colorado*, page 1, August 2010, available at http://pubs.usgs.gov/dds/dds-069/dds-069-y/REPORTS/69_Y_CH_1.pdf

11 BLM, *Oil Shale Resources on Public Lands*, available at http://www.blm.gov/wo/st/en/prog/energy/oilshale_2/background.html.

12 BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, (2012) available at http://ostseis.anl.gov/documents/peis2012/index.cfm

13 BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, p 2-27 (2012), available at http://ostseis.anl.gov/documents/peis2012/index.cfm

land use plans that are currently in effect were the most appropriate (the No Action Alternative for the 2012 PEIS).

Importantly, BLM conducted a more thorough analysis in the 2008 PEIS than it has in the 2012 PEIS by working closely with other agencies. For instance, in Section 1.1.1 of the 2008 PEIS, BLM states:

> As part of the development of the PEIS, the BLM circulated an internal draft of the PEIS to its cooperating agencies for review and comment that included a commercial lease development scenario. Most of the cooperating agencies commented that the BLM's analysis did not contain enough information for the specific environmental, cultural, and socioeconomic effects of such development, and that it would be too speculative at this point to support a decision to issue any commercial leases. Therefore, consideration was given whether specific information was lacking on the effects of oil shale and tar sands leasing and development relevant to making an allocation decision.[14]

In addition to circulating internal drafts to cooperating agencies, during the 2008 PEIS "BLM held many informal meetings and discussions with the cooperating agencies." Notably, the cooperating agencies played a substantial part in reaching the final determinations made by BLM in the 2008 PEIS.[15] As provided in the 2008 PEIS, "the BLM worked collaboratively with its cooperating agencies throughout the process to create a balanced commercial leasing program, consistent with the intent of Congress."[16]

BLM justifies its choice to reevaluate the land use plans with the 2012 PEIS by stating, "As part of a settlement agreement entered into by the United States to resolve the lawsuit *and in light of new information that has emerged since the 2008 OSTS PEIS was prepared,* the BLM has decided to take a fresh look at the land allocations analyzed in the 2008 OSTS PEIS and to consider excluding certain lands from future leasing of oil shale and tar sands resources." As discussed below in Section II, the new information and reasons stated by BLM to "Take a Fresh Look" do not justify amending the 2008 land use plans. Moreover, after a thorough NEPA analysis in 2008, BLM concluded:

> This PEIS discloses, under the Proposed Plan Amendment (Alternative B) [the current land use plans that BLM is seeking to change], that the allocation decisions opening areas to future leasing **do nothing more than to remove the**

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[14] BLM, *Propose Oil Shale and Tar Sands Resource Management Plan Amendments to Address Land Use Allocation in Colorado, Utah, and Wyoming and Final Programmatic Environmental Impact Statement*" (2008) p 1-3 available at http://ostseis.anl.gov/documents/fpeis/volumes/OSTS_FPEIS_Vol_1.pdf [hereinafter "2008 PEIS].

[15] *Id.* at 7-11, Comment by the Department of Agriculture, ("In conclusion, based on the programmatic nature of this analysis we believe the documents are thorough and provided sufficient information for the decision being made. It will also provide an excellent document to tier to or reference during subsequent analyses should lease applications be received.")

[16] *Id* at ES-3.

> **administrative barrier** to BLM considering any application to lease. The amendment of the land use plans does not authorize any ground-disturbing activities and is not an irreversible or irretrievable commitment of resources under NEPA. Therefore, the action alternatives presented **would not result in any impacts on the environment or socioeconomic setting of the area under consideration**. These decisions analyzed in the PEIS serve as the first step in the process to establish a commercial oil shale and tar sands program that meets the intent of Congress while taking advantage of the best available information and practices.[17]

As BLM admits, the current land use plans do not pose any threat to the environment or the socioeconomic composition of the affected areas, and only removes the "administrative barrier" to the development of oil shale. Therefore, amending the land use plans without justification would result in the agency action being arbitrary and capricious.

D. Oil Shale Development Will Have Minimal Effects and the No Action Alternative Will Produce No Negative Impacts

As BLM concluded in the 2008 PEIS, the current land use plans do nothing more than "remove the administrative barrier to BLM *considering* any application to lease."[18] It is impossible for the mere consideration of a lease to have any detrimental impact on the environment. Importantly, under the current land use plans, BLM still has further NEPA analysis to undertake during the site-specific leasing stage and the approval of the detailed plans of project development required before an oil shale project can be approved. Importantly, "it is at this final [project development] stage, when the particulars of a project are known, that the BLM requires the most detailed analyses and may condition approval on specific requirements to avoid, minimize, or mitigate adverse impacts on various resources."[19]

BLM specifically intended to have this phased approach to its NEPA analysis. Recognizing that it was working with limited information on oil shale development, BLM decided to defer decisions regarding specific leases to later stages of NEPA analysis.[20] This provided BLM with the opportunity to take a "phased approach—proceeding from this allocation decision [2008 EIS] to a leasing decision and then to an operational permit approval. This allocation decision essentially removes an administrative barrier preventing the BLM from accepting and considering applications to lease oil shale acreage," while still requiring additional NEPA analysis before any actual leasing or development.

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[17] 2008 PEIS, p ES-6 (emphasis added)

[18] 2008 PEIS, p ES-6 (emphasis added)

[19] BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, page 1-2 (2012), available at http://ostseis.anl.gov/documents/peis2012/index.cfm

[20] *Id.*

Furthermore, BLM admits that the current land use plans do "not authorize any ground-disturbing activities…[and] would not result in any impacts on the environment or socioeconomic setting of the area under consideration."[21]

Thus, whereas BLM has already concluded that the 2008 land use plans do not pose any threat to the environment or socioeconomic setting of the affected areas, BLM is not justified to select any alternative other than the No Action Alternative.

E. BLM Is Hindering Oil Shale Development

Despite BLM's clear intention in the 2008 PEIS to "remove the administrative barrier to BLM considering any application to lease," BLM's actions under the 2012 PEIS serve no purpose other than to restore that very same "administrative barrier."[22]

BLM's arbitrary change in oil shale policy as proposed by the Preferred Alternative stands as a substantial impediment to the development of oil shale. One of the largest challenges for the development of oil shale is volatility in the oil markets.[23] While BLM cannot reduce volatility in the oil markets, it can reduce volatility in the regulatory landscape. Regulatory certainty is necessary to motivate oil shale developers to make the massive investments required to bring production of oil shale to commercial levels. BLM has failed to provide oil shale developers with this certainty.

Not even four years after publishing the 2008 PEIS, BLM is now seeking to "take a hard look" at whether it was appropriate to make the land in Colorado, Utah, and Wyoming available for oil shale development. BLM has not provided oil shale developers with ample time to demonstrate whether oil shale is commercially viable. It is only half way through the term for the 10-year leases to conduct research, development, and demonstration; and BLM has precipitously declared that oil shale is not commercially viable by removing blocks of prospective acreage from consideration for oil shale development. Oil shale may not continue to receive the necessary investments unless developers are provided with the regulatory certainty to justify the investments.

The mandates in the Energy Policy Act of 2005 require BLM to continue to pursue and support the development of oil shale. In order to do so, BLM should choose the No Action Alternative, Alternative 1. The Preferred Alternative in the EIS will in effect eliminate oil shale development.

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21 2008 PEIS, p ES-6

22 2008 PEIS, p ES-6.

23 The Congressional Research Service reports, "The recent spike in crude oil price has once again stirred interest in oil shale. As in the past, however, the rapid runup in prices (to a high of $145/barrel) was soon followed by a rapid precipitous drop in prices [to levels as low as $60/barrel]…such volatility discourages the investment in contingent resources such as oil shale." CRS concluded, "While OPEC cuts oil output to prop up prices, the major and super major oil companies continue to use an oil price of $32/barrel for their business planning. In this climate, the development of oil shale seems difficult indeed." CRS Report RL 34748, *Developments in Oil Shale*, at 29, November 17, 2008.

II. The Reasons Stated by BLM to "Take a Fresh Look" Do Not Justify Amending the Land Use Plans

The Bureau of Land Management (BLM) states that the "purpose and need for this proposed planning action is to reassess the appropriate mix of allowable uses with respect to oil and shale and tar sands leasing and potential development." BLM further justifies "tak[ing] a fresh look" for the reasons stated in the April 14, 2011 Notice of intent, [24] further specifying "Chief among these was new information available in 2008, including:

1. A recently completed U.S. Geological Survey (USGS) in-place assessment of oil shale and nahcolite resources in Colorado, Utah, and Wyoming,
2. A March 2010 U.S. Fish and Wildlife Service (USFWS) Notice of Petition Findings, Endangered Wildlife and Plants, 12-month Findings to List the Greater Sage-Grouse as Threatened or Endangered.
3. BLM's updated inventory of lands having wilderness characteristics (LWC) and Areas of Critical Environmental Concern (ACECs)." [25]

As described in greater detail below, not one of three justifications by BLM for "taking a hard look" at the land use plans finalized in the 2008 EIS, justify amending the land use plans.

A. USGS In-Place Assessment Of Oil Shale Resources In Colorado, Utah, And Wyoming

Although USGS has completed its in-place assessment of oil shale since the 2008 PEIS, the findings in the report do not justify amending the 2008 land use plans. In fact, the USGS report does just the opposite and actually justifies devoting additional resources to developing oil shale resources. Specifically, in the report, USGS concluded that there is 1.525 trillion barrels of oil alone in just the Piceance Basin of western Colorado—an upward increase of nearly 50% from the 1989 USGS assessment of 1 trillion barrels of oil.[26]

B. 2010 U.S. Fish and Wildlife and Plants, 12 month Findings to List the Greater-Sage Grouse as Threatened or Endangered

The USFWS did release a finding in 2010 on the Greater-Sage Grouse, but importantly USFWS decided not to list the Greater Sage-Grouse as a threatened or endangered species, because there

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[24] The reasons stated in the April 14, 2011 Notice of Intent mirror the reasons outlined above (which are contained in the 2012 PEIS). Notably, BLM does not cite water issues as being a justification for "taking a hard look" or a "fresh look" at the land use plans finalized in the 2008 PEIS.

[25] 2012 PEIS at 1-5.

[26] USGS in place assessment Fact sheet available at http://pubs.usgs.gov/fs/2009/3012/pdf/FS09-3012.pdf

were "higher priority listings."[27] Moreover, the 2008 EIS thoroughly analyzed the impact of oil shale development on the Greater Sage-Grouse,[28] for which the analysis is nearly identical as that listed in the 2012 Draft PEIS.[29] Thus, absent any new findings or analyses concerning the impact of oil shale development on the Greater Sage-Grouse, BLM is not justified in amending the 2008 land use plans based on the Greater Sage-Grouse.

C. BLM's updated inventory of lands having wilderness characteristics (LWC) and Areas of Critical Environmental Concern (ACECs).

Lands having wilderness characteristics is a designation that takes place during the land use planning process, which is required pursuant to a Secretary Order from December 2010.[30] Clearly, BLM does not intend to amend all existing land use plans as a result of Secretary Order 3310. Nor should Secretary Order 3310 now serve as a basis for amending the land use plans established in the 2008 EIS.

Likewise, ACECs only account for a small proportion of land coincident with land that is designated for oil shale development. Specifically, ACECs comprised only 76,666 acres of the 2,017,714 acres of land available for oil shale leasing. The environmental integrity of the ACECs can be preserved with the additional required NEPA analysis for the leasing and project development phases.

III. BLM Is Defying President Obama's Open Government Directive; Agency Spending Questioned

> Government should be transparent. *Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.*
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> -- President Barak Obama, Memorandum to Heads of Executive Departments and Agencies

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[27] U.S. Fish and Wildlife Service (USFWS) Notice of Petition Findings, Endangered Wildlife and Plants, 12-month Findings to List the Greater Sage-Grouse as Threatened or Endangered.

[28] 2008 Final Oil Shale and Tar Sands Programmatic Environmental Impact Statement, pages 3-148 – 3-149; 4-78 – 4-80, available at http://ostseis.anl.gov/documents/fpeis/volumes/OSTS_FPEIS_Vol_1.pdf

[29] 2012 Draft Oil Shale and Tar Sands Programmatic Environmental Impact Statement, pages 4-124 – 4-126; available at http://ostseis.anl.gov/documents/peis2012/vol/OSTS_VOLUME_2.pdf

[30] Department of the Interior, Secretary Order 3310: Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management, available at http://elips.doi.gov/elips/0/doc/172/Page1.aspx

> *On January 18, 2011, the President issued Executive Order 13563, in which he directed regulatory agencies to base regulations on an "open exchange of information and perspectives" and to promote public participation in Federal rulemaking. The President identified Regulations.gov as the centralized portal for timely public access to regulatory content online.*
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> -- Cass Sunstein, White House Blog, February 21, 2012.

President Obama has made Open Government a hallmark of his Administration. BLM apparently disagrees.

- BLM has not released the public comments submitted on their 2011 Notice of Intent Notice of To Prepare a Programmatic Environmental Impact Statement (EIS); and

- BLM has made no provision for release of comments received in response to their Notice of Availability of the Draft Programmatic Environmental Impact Statement for oil shale which bypasses the Regulations.gov comment portal.

Public access to public comments on a public proceeding is a basic prerequisite of open government.

For decades, federal agencies have made public comments available to the public, first through docket rooms and then, as the internet developed, through online systems developed by each agency. Agency-specific solutions to providing public access to public comments were superseded by Regulations.gov. President Obama has emphasized the importance of the public comment portal and has enhanced its operation.

Despite the Administration's emphasis on use of Regulations.gov to promote public participation and collaboration in agency proceedings, BLM has chosen to bypass the open process in favor of their own comment processing system, a system which excludes the public from reading public comments.

It should be noted that agency-prepared comment summaries are no substitute for the original, unabridged documents. Moreover, public access to the full text of the comments submitted is essential for assessing agency compliance with the third-party provisions of the Data Quality Act (DQA). Although DQA issues are discussed in more detail in the DQA section of these comments, it is noted here that BLM may not rely on any data submitted to the agency which does not comply with the quality requirements established by OMB and BLM.

The public needs access to the full text of the documents the agency uses and relies on in order to exercise their statutory due process rights under the DQA to "seek and obtain" correction of non-compliant information by filing Requests for Correction against third-party data.

Unless BLM makes public comments public, the agency will not have established an administrative record valid for decision-making purposes since the documents in the record which inform BLM's decisions would not be available to the public for inspection and correction.

A. Privacy Concerns Addressed in Federal Register Notice

It has been suggested that concern over **protected personal information (PPI**) could justify an agency withholding public comments from public inspection. Such an assertion is contrary to:

1. Federal policy to make public comments public, *e.g.*, Regulations.gov; and

2. BLM's own *Federal Register* notice statement for draft PEIS. Specifically, BLM stated:

> *Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time.* 77 Fed Reg 5835, col. 3

B. FOIA Is Not a Substitute for Making Comments Public: It Creates Privileged Access for the 1%

It has been suggested that anyone who wants to see public comments could obtain them through a Freedom of Information Act (FOIA) request. FOIA requests can take months or years to process – preventing the comments from being evaluated by stakeholders contemporaneously with the BLM proceedings.

Moreover, given the large volume of comments that BLM is likely to receive in response to the draft PEIS, the expense of a FOIA request may run in the tens of thousands of dollars. Actual costs of a given request would vary based on how many comments a person seeks and whether individuals seeking public access to the public comments know the subtleties of the FOIA process well enough to request what they want and exclude extraneous materials.

If BLM requires the public to use FOIA to access the PEIS comments, the agency would be creating a two-tiered system of public participation in federal proceedings. Unless BLM releases

the full text of the comments to everyone, the agency would be granting privileged access to the full text of public comments to only those persons and organizations who have the resources to make effective use of FOIA while everyone else would have access to only BLM summaries of the material – a situation that is separate and not equal.

C. Regulations.gov Is Used for EIS Comments

Although the PEIS is not in a rulemaking process, the Regulations.gov website is one appropriate mechanism (among others) for collecting and providing public access to comments on Environmental Impact Statements. Federal agencies already use Regulations.gov to process and provide public access to comments received on draft Environmental Impact Statements and other non-rulemaking proceedings. Examples of agencies using Regulations.gov to solicit – and disseminate – public comments on environmental impact statements include:

- NOAA requesting comments on a notice of Intent to Prepare a Draft Environmental Assessment or Environmental Impact Statement, http://www.regulations.gov/#!documentDetail;D=NOAA-NOS-2012-0061-0002.

- The Forest Service requesting comments on a Notice of intent to prepare an environmental impact statement, http://www.regulations.gov/#!documentDetail;D=FS_FRDOC_0001-1291.

- The Coast Guard requesting comments on a Notice of Availability of Final Environmental Impact Statement, http://www.regulations.gov/#!documentDetail;D=USCG-2009-0097-0087.

- BLM's sister agency, the Bureau of Ocean Energy Management, soliciting comments on a Notice of the Availability of an Environmental Assessment, http://www.regulations.gov/#!documentDetail;D=BOEM-2012-0011-0001.

- BLM itself, jointly with a Department of Energy component, requesting comments on a Notice of Intent To Prepare an Environmental Impact Statement, http://www.regulations.gov/#!documentDetail;D=WAPA_FRDOC_0001-0167.

D. The White House Example of Open Government

There are a few informal proceedings in which public comments are not legally required that agencies may choose not to use Regulations.gov. Even in these cases, however, agencies use online dockets to provide public access to public comments with the White House leading by example.

When the White House sought public comments on President Obama's National Policy for the Stewardship of the Ocean, Our Coasts, and the Great Lakes, they created an online docket to speed public access to public comments, http://www.whitehouse.gov/administration/eop/oceans/comments.

E. The Department of Commerce Example of Open Government

Other agencies have followed the White House's leadership in providing public access to public comments, even in those circumstances when no solicitation of comments is required. For example, when a Department of Commerce Internet Policy Task Force prepared a working paper on cyber security, the NIST established an online docket to ensure public access to the full text of the submitted comments, http://www.nist.gov/itl/greenpapercomments.cfm.

IV. The Data Quality Lens for Evaluating the Draft Shale PEIS: OMB's Data Quality Guidelines Receive *Chevron* Deference

The Data (Information) Quality Act (DQA) 44 U.S.C § 3516, note, sets standards for the quality of virtually all information disseminated by federal agencies. Under the law, OMB developed binding, government-wide quality standards and processes for ensuring data quality. OMB's DQA guidelines implementing the Act may be found here, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies.[31]

In addition to the overall guidelines, OMB has also issued specialized data quality guidance implementing the law including the White House's Final Information Quality Bulletin for Peer Review.[32]

Based on OMB's DQA implementation instructions, Departments and agencies developed their own organization-specific implementing documents that were consistent with OMB's directive. The Department of Interior's DQA guidelines may be found here, Interior – Information Quality Guidelines Pursuant to Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001.[33] BLM's agency-specific guidelines are found here, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Bureau of Land Management.[34]

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[31] Available at http://www.gpo.gov/fdsys/pkg/FR-2002-02-22/pdf/R2-59.pdf .
[32] Available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2005/m05-03.pdf
[33] Available at http://www.thecre.com/pdf/20021026_doi-final.pdf .
[34] Available at http://www.thecre.com/pdf/20021026_blm-final.pdf .

Additional background information about the DQA may be found here, A Decade of the Data Quality Act[35] and here, 'Data Quality' Law is Nemesis of Regulation.[36]

A. *The Request for Corrections Process: Empowering Citizen Watchdogs to "Seek and Obtain" Correction of Agency Data*

Unusual among federal statutes, the DQA created an administrative process "allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines." In short, the DQA empowers citizens and non-citizens to "seek and obtain" correction of data used and maintained by the agency which does not comply with OMB and agency quality standards.

CRE notes that BLM's sister agency, the US Fish and Wildlife Service has experience in fulfilling their DQA duties, see, U. S. Fish and Wildlife Service Will Correct Panther Information In Response to Information Quality Act Challenge.[37]

B. *The Data Quality Act Applies to Third-Party Data*

The DQA's quality requirements – and the Request for Correction process – apply to all data used and relied on by agencies in their information disseminations, such as Environmental Impact Statements, as was discussed in the Bureau of National Affairs/Daily Environment article, Advocacy Group Data Submitted to Agencies Must Meet OMB Requirements, Official Says.[38]

There are two key implications of the third-party DQA requirements:

1. The various studies BLM used in the drafting of the PEIS need to comply with the DQA, even if they were originally published prior to the enactment of the law.

   For example, in Table 4.15-2, "Estimated Health Effects Associated with a Hypothetical 1,000,000-bbl/day Oil Shale Industry," the draft PEIS is relying on a 1984 study for some of its key health data. This study is subject to the DQA standards and BLM will need to verify that it currently complies with DQA standards as part of its pre-dissemination review process.

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[35] Available at http://www.thecre.com/pra/wp-content/uploads/2010/12/A-Decade-of-the-Data-Quality-Act.pdf .

[36] Available at http://thecre.com/post/

[37] Available at http://www.fws.gov/informationquality/topics/FY2004/Florida%20Panther/3-21-2005-news.pdf .

[38] Available at http://www.thecre.com/pdf/bna.pdf .

Similarly, the 1973 DOE study that is cited as a source for estimates in Table 4.1.2-1 "Assumptions Associated with an Underground Mine with Surface Retort at Production Levels of 25,000–30,000 bbls of Shale Oil per Day" will also need to be vetted to see if it meets DQA requirements.

2. BLM will not be able to rely on the data, models and assumptions provided to the agency in any comments on the draft PEIS unless those materials are DQA compliant.

Since individuals and watchdog organizations have the statutory right to file petitions seeking correction of the third-party data, BLM has the legal obligation, as was previously explained, to release the full text of all public comments received.

C. DQA Correction of Third-Party Data in Action: The World Health Organization Example

For an example of the ability of watchdogs to effectively use the DQA's Request for Corrections process with respect to third-party data, please see CRE's Request for Correction of Information Contained in A World Health Organization Report.[39] CRE's action resulted in the Department of Health and Human Services informing the Director-General of the World Health Organization that a major WHO report could not be used by the US Government because:

> The consultation process of the development of the WHO/FAO Report and the resulting Report itself would not meet these current U.S. data quality standards, as the process lacked a high degree of transparency, and the data and analytic results contained within the Report were not subject to formal, independent, external peer review among other criteria.[40]

D. The United States Court of Appeals for the D.C. Circuit Determined that OMB's DQA Guidelines are "Binding"

In *Prime Time Int'l Co. v. Vilas.* 599 F.3d 678 (D.C. Cir. 2010), the court ruled[41] that OMB's DQA guidelines were "binding" because they contained a permissible interpretation of the DQA under *Chevron* and thus, agency compliance with the DQA is a non-discretionary duty.[42] In its

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39 Available at http://www.thecre.com/pdf/20030908_correction.pdf .

40 Letter to the Honorable J.W. Lee, M.D., Director-General of the World Health Organization from the Department of Health and Human Services, Office of the Secretary, January 5, 2004, [See, page 2 of HHS's review available at http://www.commercialalert.org/bushadmincomment.pdf .

41 Available at http://thecre.com/pdf/20100414_DQA_Prime.pdf .

42 *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 685 (D.C. Cir. 2010) (holding "because Congress delegated to OMB authority to develop binding guidelines implementing the IQA, we defer to OMB's reasonable construction of the statute") (Citing *United States v. Mead*, 533 U.S. 218, 226–27 (2001)).

ruling, the Court clearly held that the OMB interpretation was entitled to *Chevron*-level deference (as opposed to a lower level of deference under *Skidmore*), because the OMB guidelines have the force of law having been promulgated under a specific Congressional delegation in the DQA.

Thus, the Court held that the OMB guidelines are legally binding, not just internally binding, as might be the case with many Executive orders and agency manuals or handbooks. A detailed legal analysis of the court's opinion may be found here[43] while a news account of the case and its implications may be found here, Industry Sees Ruling Opening Door To Court Review Of Data Quality Suits.[44]

It should be noted that the Department of Justice took great exception to CRE's interpretation of the D.C. Circuit's decision. Justice was sufficiently concerned by CRE's analysis of the opinion that they appealed the ruling. In their appeal, Justice requested that the court "amend its opinion to clarify that the Court did not decide whether the Information Quality Act ("IQA") creates judicially enforceable rights." The Justice Department took the unusual but well-warranted step of including a print-out of CRE's website (found in Exhibit B of DOJ's appeal[45]) even though CRE was not a party to the case. The court rejected DOJ's appeal.

Thus, BLM adherence to the DQA is judicially enforceable. Moreover, OMB and BLM Data Quality Act standards apply to: the draft PEIS; the studies BLM relied on in developing the PEIS; and comments and supporting material received on the draft PEIS that the agency uses or relies on its decision-making process. Accordingly, CRE recommends: (1) BLM should release their pre-dissemination review record for the draft PEIS and (2) BLM should release the full text of all public comments on the draft PEIS.

V. Water Rights Issues Do Not Provide a Basis for Modifying the Land Use Plans

Notably, water rights have not changed between the 2008 PEIS and the current 2012 PEIS. Water rights were thoroughly considered by BLM in the 2008 PEIS, which contributed to BLM's 2008 land use plan allocations. Furthermore, the land use planning stage is not the appropriate point in the environmental planning process to make premature determinations on how water rights could potentially be used. This would be more appropriate in the leasing state or the project development stage.

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[43] Available at http://www.thecre.com/tpsac/wp-content/uploads/2010/06/Prime-Time-Master.pdf .
[44] Available at http://thecre.com/pdf/20100502_DQAJudicialReview.pdf.
[45] Available at http://thecre.com/pdf/20100527_PrimeTime_GovPetfon.pdf

VI. There Are Adequate Water Quantities to Sustain Oil Shale Development

Much of the criticism associated with oil shale focuses on the impacts that oil shale development would have on water supplies.[46] For example, the 2009 lawsuit brought by environmental organizations (that resulted in the settlement requiring BLM to take a fresh look at the EIS) argued, "oil shale development could dry up many streams and rivers – including the Colorado river."[47] The complaint further contended that "commercial oil shale development will impact water supplies, as water dedicated to this use will increase stress on a resource already over taxed by other activities....[And] commercial oil shale development will cumulatively impact water supplies by contributing to global warming."[48] Likewise, reports issued by Western Resource Advocates offer cautionary language about water usage and oil shale development.[49] While extracting oil from oil shale would require significant amounts of water, there is no evidence that the water usage required would be unsustainable or problematic.

Of great importance, in the 2012 Draft PEIS, BLM has not identified the water usage required for the development of oil shale as a justification to revisit the 2008 land use plans.[50]

Accordingly, it would be inappropriate for BLM to modify land use plans based on the quantity of water that is projected for use for oil shale production.

Moreover, both the 2008 Final PEIS and the 2012 use the same assumptions and analyses regarding water usage for oil shale development. For example, both the 2008 PEIS and 2012 Draft PEIS assume (based on a 2005 study by the Rand Corporation) that the in-situ process would require 1-3 bbl of water per barrel of oil shale produced; and that 2.6-4.0 bbl of water per barrel of oil shale produced would be required for a surface mine and surface retort. Likewise, both the 2008 PEIS and 2012 Draft PEIS find that production levels of 50,000 bbl of oil per day would requires 7,050 acre-ft/year of water. Finally, both the 2008 PEIS and 2012 draft PEIS conclude that there will be a water surplus of 340,348 (ac-ft/yr) in 2000 and 268,425 (ac-ft/yr) in 2030 in Colorado.

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[46] *See, e.g.*, Western Resource Advocates, *Water on the Rocks: Oil Shale Water Rights in Colorado*, 2009 available at http://www.westernresourceadvocates.org/land/wotrreport/wotrreport.pdf.

[47] *Legal Complaint, Colorado Environmental Coalition v. Salazar*, p 21.

[48] *Id.*

[49] Western Resource Advocates, Oil Shale 2050: Data, Definitions, and What You Need to Know About Oil Shale in the West, p 21, available at http://www.westernresourceadvocates.org/oilshale2050/WRA-OilShale2050.pdf.

[50] 2012 Draft Oil Shale and Tar Sands Programmatic Environmental Impact Statement, pages 1-5, available at http://ostseis.anl.gov/documents/peis2012/vol/OSTS_VOLUME_2.pdf. The reasons stated in the April 14, 2011 Notice of Intent mirror the reasons outlined in the 2012 PEIS. Notably, BLM does not cite water issues as being a justification for "taking a hard look" or a "fresh look" at the land use plans finalized in the 2008 PEIS.

Just as the 2008 PEIS did, the 2012 Draft PEIS supports the conclusion that oil shale development will not adversely impact water availability. Without any changes in the data or analysis for water use between the 2008 PEIS and 2012 Draft PEIS, water usage for oil shale development cannot serve as a purpose to revisit the land use plans.

Moreover, recent developments in technology suggest that the assumptions used by BLM regarding water usage for oil shale development are incorrect. Red Leaf Resources has recently stated that the company uses less than half barrel of water to produce a barrel of oil. Red Leaf further explains that the amount of water required for oil shale production is unrelated to the technology used to produce the oil shale, but is instead required for dust control and to meet on-site worker demand.[51]

The CRE endorses BLM's position that the quantity of water that will be used for oil shale is not a problem based on the 2008 land use allocations. Accordingly, it would be arbitrary and capricious to amend the 2008 land use plans based on the level of water usage for oil shale development.

VII. Conclusion

In a speech by President Obama on the United States energy security, the President declared, "We've known about the dangers of our oil dependence for decades. . . We cannot keep going from shock when gas prices go up to trance when they go back down -- we go back to doing the same things we've been doing until the next time there's a price spike, and then we're shocked again. We can't rush to propose action when gas prices are high and then hit the snooze button when they fall again…our best opportunities to enhance our energy security can be found in our own backyard."[52]

Oil shale is the answer to enhance the US energy security and most of the world reserves are located in the United States. Nonetheless, oil shale development and investment has suffered from the very same boom-bust cycle as described by President Obama. Historically, when oil prices are high, oil shale is the solution for the United States energy needs. But once the price of oil falls again, oil shale is written off as "not at present a proven commercially-viable source." The United States cannot once again "hit the snooze button" on oil shale. The United States needs a sustained commitment to oil shale development—a commitment provided by Congress in the Energy Policy Act of 2005— in order for it to become economically viable.

As recognized by the BLM,[53] technological advances for the extraction of oil shale lie just over the horizon. Rand Corporation concluded, "Advances in thermally conductive in-situ conversion

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[51] Amy Joi O'Donoghue, *Oil Shale Project Approved*, KSL, April 1, 2012, available at http://www.ksl.com/?nid=960&sid=19773270

[52] President Barack Obama, *Remarks by the President on America's Energy Security*, March 30, 2011, http://www.whitehouse.gov/the-press-office/2011/03/30/remarks-president-americas-energy-security

[53] 76 FR 21003, at 21004, April 14, 2011.

may enable shale-derived oil to be competitive with crude oil prices below $40 per barrel. With a firm commitment to oil shale development, oil shale will occupy a central role in the national energy agenda.

However, by proceeding with Preferred Alternative in the 2012 PEIS, BLM will effectively eliminate oil shale development in the United States. BLM concluded in the 2008 PEIS that the land use plans currently in place "**do nothing more than to remove the administrative barrier** to BLM considering any application to lease….[and] **would not result in any impacts on the environment or socioeconomic** setting of the area under consideration."[54] Nevertheless, BLM has decided to, without justification, revisit the land use plans established in 2008 and to restore the administrative barriers that stand in the way oil shale development. Moreover, BLM concluded that the 2008 PEIS, "create[d] a balanced commercial leasing program, consistent with the intent of Congress." Instead, counter to its own conclusion and Congressional intent under the Energy Policy Act of 2005, the Preferred Alternative in the 2012 PEIS will eliminate oil shale development in the United States.

For the foregoing reasons, CRE recommends that BLM remains firmly committed to the development of oil shale by not reducing the land allocated for oil shale and therefore to not adopt the Preferred Alternative, and instead select the No Action Alternative. CRE also urges BLM to adhere to DQA guidelines in assessing the viability of oil shale development.

CRE is a Washington, DC based regulatory watchdog which works to ensure that federal agencies comply with the "good government" laws including the Data Quality Act, the Paperwork Reduction Act, and the Regulatory Flexibility Act. As previously mentioned, what is at stake in the US oil shale program are reserves about equal to the entire world's proven oil reserves. To ensure that federal and state regulatory agencies, the Congress, and stakeholders are apprised of the most significant events affecting the development of this critical resource, CRE is making available to the aforementioned groups an Interactive Public Docket dedicated to this important subject which is titled BLM Oil Shale, and is described herein. The public is invited to provide comments on CRE work products.

Respectfully Submitted,

Jim Tozzi
Member, Board of Advisors

54 2008 PEIS, p ES-6 (emphasis added).