


RECOMMENDATION MEMORANDUM
for the ASSISTANT SECRETARY – LAND AND MINERALS MANAGEMENT

DATE: March 28, 2017

FROM: Michael D. Nedd, Acting Director - Bureau of Land Management 

SUBJECT: Recommendation to Revoke Secretarial Order 3338, Ending the Programmatic Environmental Impact Statement and Lifting the Coal Leasing Moratorium

For the reasons outlined in this memorandum, the Bureau of Land Management (BLM) recommends that the Secretary revoke Secretarial Order 3338 (S.O. 3338), thereby discontinuing the Programmatic Environmental Impact Statement (PEIS) review of the Federal coal program and lifting the coal leasing moratorium.

I. Background

In January 2016, Secretary Sally Jewell issued S.O. 3338, directing the BLM to conduct a review of the Federal coal program through the preparation of a discretionary PEIS. The Order stated that while the precise issues to be addressed in the PEIS would be determined through the public scoping process, the PEIS was expected to address: how, when and where to lease; fair return; climate impacts of coal production and combustion; socio-economics; exports; and, the energy needs of the nation. *See* S.O. 3338, Discretionary Programmatic Environmental Impact Statement to Modernize the Federal Coal Program, Sec. 4 (Jan. 15, 2016) [hereinafter "S.O. 3338"]. In addition, based on Secretary Jewell's discretionary authority to lease coal¹ and her interest in ensuring that future leasing decisions would benefit from the recommendations that result from the PEIS, she directed the BLM to stop issuing new Federal coal leases during the review, with limited exclusions and exceptions.

Through the public scoping process, the BLM received input from approximately 500 speakers at six public scoping meetings and 214,866 written comments, resulting in a total of 1,118 unique submissions. *See* BUREAU OF LAND MGMT., FEDERAL COAL PROGRAM PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT - SCOPING REPORT, vol. 1, 4-3 (Jan. 11, 2017)[hereinafter "Scoping Report"]. In addition, external groups held three separate workshops on topics related to the PEIS (The Institute for Policy Integrity at the New York University School of Law, *Fair*

¹ Mineral Leasing Act (MLA), 30 U.S.C. § 201(a)(1).

Market Value [FMV] and Alternatives Analysis; Denver University Sturm School of Law, The Wilderness Society and Western Organization of Resource Councils, *Federal Coal Workshop: Leasing and Planning in the Public's Interest*; and Columbia Law School Sabin Center for Climate Change Law, *U.S. Coal in the 21st Century: Markets, Bankruptcy, Finance and Law*). The external groups submitted articles and studies presented during these workshops to the BLM as comments during the scoping process.

The BLM reviewed the input received through this scoping process and prepared a Scoping Report, which was released on January 11, 2017. The Scoping Report advised that modification of the Federal coal program was warranted, and the PEIS should focus on four main areas: Fair Return; Climate Change; Resources Management and Protection; and Program Administration.² See Scoping Report ES-4 - ES-5, 6-1.

A careful review of the Scoping Report shows that a PEIS is not needed to analyze and recommend any potential reforms in the four identified main areas. These topics have been or continue to be addressed through BLM's program review outside of the PEIS process, and completion of the PEIS is not necessary to implement any reforms that the BLM may determine to be appropriate. Each of the four main areas of focus identified in the Scoping Report is addressed below. Without the need for a PEIS process to identify, consider, and carry out any necessary reforms of BLM's coal leasing program and for various other reasons described below, the BLM has determined that a coal leasing moratorium is unnecessary and should be lifted.

II. The Discretionary PEIS is Unnecessary and Should be Discontinued

As stated above, the PEIS is unnecessary and should be discontinued for the following reasons: (1) an environmental impact analysis, which is normally conducted to comply with requirements of the National Environmental Policy Act (NEPA), is neither the best vehicle nor the appropriate vehicle to analyze the need for and potentially recommend reforms to BLM's coal leasing authorities and program, including the four areas of focus outlined in the Scoping Report; (2) all four of the identified areas of focus have been or are continuing to be addressed through BLM's review processes outside of the PEIS process; and, (3) the PEIS process cannot be completed within the allotted timeframe, which began in January 2016 and was to be completed by January 2019.

² The Scoping Report states that there are "three general areas" that need additional analysis and modernization, but then proceeds to discuss four areas throughout the Report. When it refers to three areas it treats climate change and resource protection and management as one area. See Scoping Report ES-4, 6-2. This memorandum will discuss the four areas separately.

A. The Discretionary PEIS is Not Needed to Review the Four Main Areas Identified by the Scoping Report Because These Topics Have Been or Continue to be Addressed through BLM Review Outside of the PEIS, and the PEIS is not Necessary to Implement Any Needed Reforms.

For each of the four main areas identified by the Scoping Report, this memorandum shows why the PEIS is unnecessary by detailing the BLM reviews that have taken place or are continuing to take place outside of the PEIS, the reforms the BLM has already put in place to address concerns raised by the U.S. Department of the Interior Office of Inspector General (OIG), the U.S. Government Accountability Office (GAO), Congress, stakeholders, or the public, and the ways that BLM can review and potentially recommend reforms to the Program outside the PEIS in the near future, if determined to be necessary.

1. “Fair Return”

A central objective identified through the PEIS scoping process is to analyze and recommend reforms to the level of return that the Federal coal program provides to the American public. See Scoping Report 6-7. Return is the monetary revenue generated by the leasing (bonus bids) and production (royalties) of federal coal, as well as the rentals generated from the use of the federal surface. Since 2007, Federal coal leasing and production has generated approximately \$10.68 billion in revenue from bonus bids, royalties and rental payments. These payments are split approximately equally with the Federal Treasury and the states in which the coal was mined. Although the term “fair return” has no true definition in statute or regulation, and, based on the comments received during the scoping period, has different meanings to different people, the Scoping Report describes “fair return” to include the following components: bonus bids set by FMV determinations, royalty rates, rental rates, and performance bonding amounts.³ See Scoping Report ES-6, 4-22 - 4-23, 6-7 - 6-13. Some of the comments received during the scoping process suggested that accounting for certain economic “externalities” associated with the combustion of coal through, for example, the incorporation of a so-called “carbon adder” to the royalty rate charged for federal coal production would better provide the public with “fair return.” A PEIS is not needed to address these issues. As discussed below, the BLM has already addressed a number of these issues in response to OIG and GAO recommendations, and to the extent necessary or desired, remaining issues surrounding “fair return” can be assessed through separate, more targeted processes.

³ Although the Scoping Report identified performance bonding as a component of “fair return,” performance bonding is not part of the fair market value determination of a coal tract. The purpose of performance bonds are to assure that operators fulfill their obligations, and are not an additional source of revenue for the United States.

One of the processes outside the PEIS process that has led to effective reforms of BLM's coal leasing program is the review conducted by the OIG and GAO and their recommendations to BLM. In 2013, the OIG and GAO audited the BLM coal program. The report analyzed each of the Scoping Report's "fair return" components, except for performance bonding. The OIG and GAO published audit reports with a total of 21 recommendations. Eight of the recommendations focused on BLM's determination of FMV for coal tracts applied for under the leasing regulations, and four recommendations focused on BLM coordination with the Department of the Interior Office of Valuation Services (OVS) to review the FMV determinations. See U.S. Dep't of the Interior, Office of Inspector Gen., *Evaluation Report - Coal Management Program*, Report No. CR-EV-BLM-0001-2012 (June 2013); U.S. Gov't Accountability Office, *Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information*, Rep. No. 14-140 (Dec. 2013). The BLM addressed all of the audit recommendations, including the FMV recommendations, through development of new protocols and issuance of policy guidance, a manual (BLM Manual MS-3073), and a handbook (BLM Handbook H-3073-1). See Memorandum from Douglas Glenn, Director, Office of Financial Management, to Jeff Carlson, Director, Energy Audit Unit on Verification Review - Recommendations for the Report titled "Coal Management Program, U.S. Department of the Interior (January 22, 2016) (acknowledging that all 13 OIG recommendations have been resolved and implemented); U.S. Government Accountability Office, *Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide more Public Information*⁴ (containing a list on the GAO website of all of the GAO recommendations that are considered to be closed and implemented).

The changes that the BLM implemented in response to the OIG and GAO recommendations already address the Scoping Report's "fair return" components, and ensure, among other things, that (1) the BLM is receiving at least the estimated FMV for all accepted coal bids,⁵ (2) fair market valuation reports reflect trends in the market and account for the current state of export activity, (3) FMV fully accounts for export potential, and (4) the public is given access to non-sensitive, non-proprietary coal lease sale FMV-related documents.⁶

⁴ See http://www.gao.gov/products/GAO-14-140#summary_recommend (last visited March 1, 2017).

⁵ See BLM Handbook H-3073-1. To ensure that accepted bids comply with the Mineral Leasing Act by meeting or exceeding the BLM's estimate of FMV, the BLM updated the BLM Handbook to require that the Sale Panel, which generally includes the Deputy State Director for Mineral Resources, a minerals appraiser or economist, geologist, and mining engineer, develop a post-sale report that documents all of the factors that were considered by the Sale Panel in its decision to recommend that the bid be accepted or rejected. Also, as part of its analysis, the Sale Panel may review the procedures used in developing the pre-sale analysis and may request reconsideration of the pre-sale analysis, if the property value appears unreasonably derived, unsound, or inadequately explained. *Id.*

⁶ On September 26, 2014, the BLM issued IM 2014-159 entitled, "Publicly Accessible Bureau of Land Management

In reviewing the bonus bids, royalty rates, and rental rates, the GAO and OIG noted only one deficiency, and it was with the bonus bid process. Both reports recommended changes to the minimum acceptable bid determination process through the valuation/appraisal. As a result, BLM revised the necessary BLM Handbook to implement the recommended changes. Neither the GAO nor OIG concluded that the royalty rates, rental rates, or other aspects of the bonus bid were deficient. For instance, neither the GAO nor OIG recommended that the royalty rates or rental rates were too low.

However, to the extent further analysis is determined to be desirable to ensure that fair return is accomplished, these components can be addressed through BLM's discretionary authority to perform program reviews and therefore do not require a PEIS process. To accomplish such a task, a team of BLM experts could work with OVS to analyze royalty rates, rental rates, and bonus bids and make recommendations for any reforms that may be helpful in ensuring that these three revenue streams provide the public a "fair return" for the leasing and production of federal coal. Such an approach would provide analysis based on actual production and could give the BLM the means to put forth potential recommendations per region, whereas the PEIS would analyze national production estimates and be better suited to provide national recommendations. Furthermore, the Department is currently considering reinstating the Royalty Policy Committee (RPC).⁷ The RPC would provide advice to the Secretary on the fair market value of, and on the collection of revenues derived from, the development of energy and mineral resources on Federal and Indian lands.

In addition, in the Scoping Report, BLM proposed to analyze and potentially recommend reforms that would increase royalty rates, rental rates, or bid bonuses to account for carbon-based externalities.⁸ As with the other aspects of "fair return," this suggestion would not require a PEIS to inform BLM's decision making. Moreover, after further consideration of the information gathered and analyzed for the Scoping Report, the BLM believes that the leasing

Websites for Coal Leasing Information," requiring the BLM State Offices to post on their public websites certain public documents related to past and pending coal leasing actions (e.g., NEPA documents, sale information, etc.).

⁷ The RPC was established by charter in 1995 under the Federal Advisory Committee Act. The Committee advised the Secretary of the Interior through the Director of the then-Minerals Management Service about the management of Federal and Indian mineral leases and revenues under the laws governing the Department of the Interior. The RPC was tasked with reviewing and providing comment on revenue management and other mineral and energy-related policies, and providing a forum to convey views representative of mineral lessees, operators, revenue payors, revenue recipients, governmental agencies, and public interest groups. The RPC was terminated on April 2, 2014.

⁸ The phrase "carbon-based externalities" was coined by economists/social scientists in recent years to describe the upstream and/or downstream impacts of the coal life cycle. See, e.g. Paul R. Epstein et al., *Full accounting of the life cycle of coal*, 1219 Ann. N.Y. Acad. Sci. 73-98 (2011).

stage is not the appropriate place to analyze such externalities. The BLM's consideration of carbon-based externalities associated with coal production would need to rely primarily on estimates for carbon dioxide (CO₂) emitted from combustion. There are many uncertainties surrounding such estimates because the emissions vary based on location, source, and combustion technology, and any capture and sequestration of CO₂. For the most accurate accounting for externalities associated with coal combustion, CO₂ emissions should be measured at the source of downstream combustion. Also, these types of externality costs are not ordinarily encompassed within the concept of "return." Rather, as previously stated, "return" is the monetary revenue generated by the leasing and production of federal coal, as well as the rentals generated from the use of the federal surface. Carbon-based externalities are not generated from leasing or production, and there is no statutory indication that Congress intended to consider them when directing the Secretary to ensure a fair return. See 30 U.S.C. §§ 201(a)(1), 207(a).

2. Climate Change

Another central objective identified through the PEIS scoping process is to analyze the effect of the Federal coal program on and alignments with the U.S. climate goals. See Scoping Report 6-13. Currently, the environmental analysis conducted to comply with NEPA for individual leasing actions appropriately analyzes impacts on climate change as required by existing guidance and judicial decisions. In the environmental analysis for each Lease-by-Application (LBA) and lease modification application (LMA), BLM's current practice is to analyze the impacts of the leasing decision on climate change, including the cumulative impacts of the leasing decision associated with Greenhouse Gas (GHG) emissions related to coal mining, transport, and subsequent combustion. Many of the recent NEPA documents have been challenged in federal court. With the exception of the recent West Elk II decision,⁹ federal courts have upheld the NEPA analysis for each of BLM's coal leasing decisions.¹⁰ The BLM will continue to look at climate impacts in its NEPA analysis on a project basis as required by law and policy. The PEIS analysis on climate change would be largely duplicative and unnecessary,

⁹ The West Elk II case is easily distinguishable from the other cases that called into question the adequacy of the agency's NEPA analysis. In West Elk II, the agency used the social cost of carbon protocol in the draft EIS to quantify the project's contribution to costs and benefits associated with global climate change, but then omitted any mention of this tool in the final EIS and omitted a discussion of the costs of the project, while retaining a quantified projection of the benefits associated with the project. See *High Country Conserv'n Advocates v. U.S. Forest Serv.*, 2014 WL 2922751, *9 (D. Colo. June 27, 2014). The court held that the agency's behavior was arbitrary and capricious because it quantified the benefits but claimed that it was impossible to quantify the costs, "when such an analysis was in fact possible" and was included in the draft EIS. *Id.* at *10.

¹⁰ E.g. *Northern Plains Res. Council Inc. v. Bureau of Land Mgmt.*, 2016 U.S. Dist. LEXIS 43947 (D. Mon. 2016); *WildEarth Guardians v. U.S. Forest Serv.*, 2015 U.S. Dist. LEXIS 109690 (D. Wyo. 2015); *WildEarth Guardians v. Salazar*, 2012 U.S. DisL LEXIS 105331 (D.D.C., 2012); *WildEarth Guardians v. Salazar*, 859 F. Supp. 2d 83 (D.D.C 2012).

and would not provide significant additional useful information to the decision maker or the public.

The Scoping Report also discusses potential reforms to mitigate GHG emissions, such as CO₂ and methane. But a PEIS is not needed to consider whether reforms are needed to address these matters.¹¹ For example, with respect to methane, the Scoping Report states that the BLM will consider methods for improving capture of methane from coal production activities. After the Scoping Report was released, the BLM addressed this recommendation by issuing guidance that establishes national procedures to encourage waste mine methane (WMM) capture by the coal lessee in cases where the oil and gas estate is not currently under lease and it would be feasible to do so. The guidance also describes several voluntary best management practices that BLM offices may use to encourage operators to help improve capture of WMM. If necessary, this guidance could be amended based on later program reviews.

Lastly, the Scoping Report states that BLM will consider adopting requirements for the use of compensatory mitigation to offset GHG emissions and climate change impacts associated with Federal coal production and combustion. To be clear, the BLM has not concluded that such mitigation is appropriate or lawful. And in any event a nationwide-scoped PEIS is not needed to make mitigation decisions, which can be made on a lease-by-lease or regional basis.

3. Resource Protection and Management

Although not labeled as central, another objective identified through the PEIS scoping process was to consider options aimed at improving resource protection and management, beyond climate considerations. *See* Scoping Report 6-20 - 6-24. Specifically, the Scoping Report states that this focus area includes developing best management practices for resource protection and improving planning to avoid land use conflicts through the modification and application of unsuitability criteria or through the development of strategic coal leasing plans. This focus area also includes working with the Office of Surface Mining Reclamation and Enforcement (OSMRE) to strengthen requirements for companies bidding on leases, such as prohibiting leasing to self-bonded companies and verifying that applicant companies have been fulfilling reclamation obligations in connection with their other operations. *See* Scoping Report ES-6. However, based on the information gathered and analyzed for the Scoping Report, the BLM believes that such resource protection and management topics are not appropriate to analyze in a

¹¹ As stated earlier, the BLM does not believe the leasing stage is the appropriate place to analyze and attempt to mitigate carbon-based externalities. Any potential impacts and appropriate mitigation can be accurately determined only at a later stage when the coal is actually combusted.

national PEIS, but instead have been and should continue to be addressed through program reviews outside of the PEIS.

The Scoping Report states that, because of concerns expressed by commenters, it will analyze the BLM's process for applying the unsuitability criteria to ensure that the criteria are applied consistently at the land use plan level. During land use planning, the BLM reviews federal lands and assesses whether there are areas unsuitable for all coal mining or for certain stipulated methods of coal mining. Such unsuitability review is reported in detail in the Resource Management Plan NEPA analysis, which generally consists of a report that addresses the 20 criteria of coal unsuitability as defined in 43 CFR 3461.5 and applies these criteria to the known recoverable coal resources areas for the applicable coal fields. Additionally, the BLM regulations at 43 CFR 3461.3-1 allow for application of the unsuitability criteria at both the land use planning and lease specific stages. The BLM's current practice is to take a second look at the area under consideration once a lease application is submitted to determine if any of the unsuitability criteria are triggered based on site-specific information. As this is already ongoing practice, ensuring that this review is completed consistently at both stages can be accomplished without further analysis in a PEIS.

If BLM determines that further analysis is needed on its application of the unsuitability criteria at the land use plan level, the analysis would appropriately be conducted through reviews that have the ability to focus on specific BLM office practices.

The public scoping process has provided the BLM with significant analysis on each of the listed resource protection and management topics. If further analysis is determined to be necessary before BLM can make any needed reforms, this analysis should be addressed through program reviews outside of a PEIS process. To accomplish such a task, a team of BLM and OSMRE experts can work together to analyze each identified area and make recommendations for any reforms that are necessary to avoid, minimize, or mitigate impacts on resources of concern. The BLM and OSMRE could also engage other Federal agencies, and partners in State, local, or tribal governments in the region.

In addition, the resource protection and management topics identified for analysis all pertain to voluntary best management practices, and if reform is determined to be appropriate, it may be implemented through guidance documents outside of the rulemaking process.

4. Program Administration

The last central objective identified through the PEIS scoping process was to analyze and recommend reforms intended to improve the lease process itself. *See* Scoping Report 6-24 - 6-26. Specifically, the Scoping Report stated that the PEIS would analyze and recommend reforms to enable the BLM to work with other agencies to evaluate means for eliminating redundant processes, improve transparency, standardize lease application forms, and develop an electronic platform for application submissions. *See* Scoping Report ES-6, 6-24- 6-26. Based on an assessment of the information gathered and analyzed for the Scoping Report, the BLM believes that such Program Administration areas do not need to be analyzed in a national PEIS. Many of the Program Administration areas have been or continue to be addressed through program review outside of the PEIS, and outstanding areas of concern should be analyzed and developed as part of regional mitigation strategies.

In response to concerns raised by the Department, other Federal agencies, stakeholders, and the public, the BLM is currently analyzing and reforming the Federal coal program outside of the PEIS to ensure that there is increased transparency and improved lease processing efficiency. The previously mentioned 2013 OIG and GAO audits also analyzed components of the leasing process. Of the 21 recommendations included in the OIG and GAO published audit report, 13 of them focused on coal leasing and exports in general, with five on inspection and enforcement, two on transparency to the public, and one on royalty rate reductions. The BLM addressed all of the audit recommendations, including the lease process recommendations, through development of new protocols and issuance of policy guidance, a manual (BLM Manual MS-3073), and a handbook (BLM Handbook H-3073-1).

The Scoping Report states that analysis and potential reforms to improve transparency associated with the Federal coal program may be necessary; however, BLM has now addressed those transparency and public accessibility concerns. Previously, in response to a GAO recommendation to improve transparency associated with the Federal coal program, on September 30, 2014, the BLM issued guidance requiring BLM to maintain on their websites accurate information on past coal lease sales, a national summary of coal lease sales, and information on pending lease sales. In January 2017 BLM enhanced this guidance, directing the BLM Washington and State offices to post on their websites links to up-to-date information regarding existing leases and pending coal lease applications, lease modification applications, exploration licenses and royalty rate reductions. Accordingly, the BLM has put guidance in place to improve transparency associated with the Federal coal leasing process, and if future modification of the guidance is necessary, it can and should happen outside the PEIS process.

In response to public and Congressional concern regarding the process for disposal by exchange

for split estate tracts, the BLM conducted a review of the process outside of the PEIS and issued guidance that provides the BLM authorized officer guidance on selecting a Federal coal tract for disposal through fee coal exchange as provided in 43 CFR Subpart 3436. This includes guidance on the information and consent that is necessary from a surface owner to determine if a split estate tract should be selected for exchange in those instances where a proponent is found to be qualified for a fee coal exchange per 43 CFR 3436.2-1 and has identified a split estate tract they would like to receive in exchange for their private coal interest. If future modification of the guidance is necessary, it can and should happen outside the PEIS process.

The rest of the Program Administration areas identified in the Scoping Report would more appropriately be analyzed and potentially reformed outside of the PEIS, and the Department has already taken steps to make this happen. The PEIS scoping process has provided the BLM with an informal review of the entire program and identified areas within the leasing process that may need improvements. A team of BLM and OSMRE experts has been convened to analyze the current Federal coal leasing program and determine if, and where, improvements are necessary to ensure that the leasing process is efficient and rid of redundancies. Any and all improvements that are determined to be necessary can and will be implemented outside of the PEIS process, as such, the PEIS is not necessary for implementation of these potential reforms.

B. The PEIS is Behind Schedule and Cannot be Completed within the Allotted Timeframe.

The Scoping Report lays out the following milestones for the PEIS:

Milestone	Proposed Date
Scoping Report	January 2017
Draft PEIS	January 2018
Public Comment Period	January – March 2018
Final PEIS	January 2019
Record of Decision	March 2019

This aggressive schedule was developed based on Secretary Jewell's recommendation that the PEIS be completed in three years. However, it is highly unlikely that the PEIS could have been

completed in the allotted timeframe because the process is already roughly one year behind schedule, and, to this point, only the scoping meetings and preparation of the Scoping Report have been funded. The BLM has developed a statement of work for the Department of Energy (DoE) and the National Renewable Energy Laboratory to develop coal market modeling to support the PEIS and supplement future leasing actions. Potential funding for this effort was initially identified by DoE (\$1.5 million), but has not been secured. It is unclear if the DoE funding will be made available in the near future.

The BLM's estimate for the cost of the entire PEIS is approximately \$12 million. About \$4.5 million was requested in the Fiscal Year (FY) 2017 President's Budget for the PEIS; however, Congress did not allocate funding for the PEIS in the FY 2017 budget. In addition, BLM's entire annual coal budget is \$10 million, which is insufficient to fund both its Coal Management program and completion of the PEIS in the next two years.

Because of lack of funding, BLM cannot proceed with the PEIS.

II. The Coal Leasing Moratorium is Unnecessary and Should be Lifted.

The coal leasing moratorium directed by Secretary Jewell has effectively stopped, with limited exceptions, the BLM from making leasing decisions on pending applications and from accepting new applications. However, the leasing moratorium is unnecessary and should be lifted for several reasons: (A) if the PEIS is discontinued, which the BLM believes is necessary as explained above, the moratorium is unnecessary; (B) the economic hardships it is placing on currently producing and future coal operations are considerable, as described more fully below ; (C) other Departmental resource programs have successfully had programmatic reviews without instituting a leasing moratorium; and (D) the GAO and OIG audit reports did not recommend a leasing moratorium while the BLM implemented recommended changes to the Program.

In addition, lifting the coal leasing moratorium would provide assurance that coal will be made available to lease in a timely manner after site-specific environmental analyses (EISs or Environmental Assessments) are completed.

A. The Leasing Moratorium is Unnecessary if the PEIS is Discontinued.

Section 5 of S.O. 3338 states that a pause on leasing, with limited exceptions, will allow future leasing decisions to benefit from the recommendations that result from the PEIS while minimizing any economic hardship during the review. If the PEIS is discontinued, the reason for

creating the moratorium will be gone. Nor is a moratorium needed to make prospective changes to the coal program should additional reforms be deemed useful.

Furthermore, S.O. 3338 presumes a minimal economic hardship, predicated on the extensive recoverable reserves of Federal coal currently under lease. S.O. 3338 notes that the Federal coal reserves currently under lease are estimated to be sufficient to continue production from Federal leases at current levels for 20 years. *See* S.O. 3338, Section 2(a), 5. However, during the scoping period and preparation of the Scoping Report, this 20-year reserve figure was questioned by BLM engineers and the public as being an overly simplistic estimate that does not take into consideration the circumstances of individual mines or leases. The figure represents the sum of the estimated recoverable reserves from all federal leases across the U.S. divided by the annual federal coal production from 2015. *See* Scoping Report 5-14- 5-15. In 2015, federal coal production was at a record low, and the top three mining companies were on the verge of declaring Chapter 11 bankruptcy, and ultimately did the following year. Thus, the gross nature of the data used to determine this average does not accurately project the needs of the coal industry, which has a large number of mines with dwindling reserves. This reality is reflected in the fact that since the moratorium was instituted, a total of seven mines¹² have requested that the BLM continue processing their applications under the S.O. 3338 Sec. 6(a) emergency leasing exclusion. Four of these requests have been verified to meet the criteria for emergency leasing at 43 CFR 3425.1-4 and have continued to be processed as excluded from the moratorium. Three are still under review. In general these mines have requested the emergency exclusion because they are reaching the end of their mineable reserves, the leasing process takes years, and if they reach the end of their mineable reserves with no certainty of future leasing, the mines may face closure.

If S.O. 3338 stays in place, thereby allowing the PEIS and the moratorium to continue, BLM expects that it will receive additional requests for exclusion from the moratorium under the emergency leasing provision. This is especially true as industry becomes aware that the PEIS is behind schedule and cannot be completed within the originally allotted three year timeframe.

B. The Economic Hardships the Moratorium is Placing on Currently Producing and Future Coal Operations are Considerable.

Although Secretary Jewell believed that the public and the coal program would benefit from

¹² The following operators have requested exclusion from the leasing moratorium under the emergency leasing exclusion: BNI Coal, Ltd. (North Dakota), GCC Energy (Colorado), Alton Coal Development (Utah), Falkirk Mining Company (North Dakota), Black Butte Coal Company (Wyoming), Peabody Energy (Wyoming), and Georgea Colliers Inc. (Oklahoma).

imposing the leasing moratorium to ensure that future leasing decisions benefit from the recommendations that result from the PEIS, that benefit is outweighed by the economic hardship placed on the industry.

When the moratorium on leasing began in January 2016, there were 44 lease and lease modification applications pending with the BLM. Of those, only 14 have been exempt or excluded from the moratorium under S.O. 3338, Section 6. The remaining 30 applications are subject to the moratorium. Pursuant to S.O. 3338, Section 5(a)(ii), the NEPA analysis on some of the applications have continued, but no leasing decisions can be made until the moratorium is lifted. The lease-by-applications and lease modification applications subject to the moratorium contain over 1.8 billion tons¹³ of Federal coal that would potentially be produced from 28 mines across the states of Alabama, Arkansas, Colorado, Kentucky, Montana, North Dakota, Oklahoma, Utah and Wyoming, including some of the largest mines in the Western states. While employment data for each individual mine is not immediately available, combined these coal mines employed 25,348 direct staff at the end of 2015. See Energy Information Administration, *Table 6. Coal Production and Numbers of Mines by State and Coal Rank, 2015*, <http://www.eia.gov/coal/annual/pdf/table6.pdf> (last visited March 1, 2017).

When S.O. 3338 was issued, the BLM believed that most of the existing applications that did not fit within a specific exclusion to the moratorium would ultimately not be affected by the leasing moratorium because the NEPA analysis would continue under S.O. 3338, Section 5(a)(ii), and it was unlikely that the BLM would finalize the various NEPA documents before the PEIS January 2019 completion date. However, that is no longer true. Because the PEIS is already roughly one year behind schedule, a greater number of leases are likely to be affected. In addition, during the leasing moratorium the processing of new applications that do not fit within an exclusion have been deferred. The number of new applications affected by this deferment would continue to rise if the PEIS process was to continue and the timeline for the PEIS lengthened.

The applicants are feeling the economic hardship of the leasing moratorium. For example, due to BLM's cost recovery provisions for coal, the applicants are paying for NEPA analysis that may become outdated before any PEIS is completed and that analysis would then likely need to be supplemented after the PEIS is completed, if the PEIS process were to continue. For the applicants that fall under the moratorium, competitive sales and, ultimately, production of the coal are being delayed by the PEIS process. Such applicants may even need to modify mining

¹³ This is a conservative estimate of the tonnages associated with these applications. Four of the applications at the time of the moratorium had unknown quantities of coal and it would require further analysis and/or exploration to estimate the reserves.

plans to ensure that operations continue to meet required levels of production.

C. Other Departmental Resources have Successfully Had Programmatic Reviews Without Instituting Leasing Moratoriums.

The BLM continually assesses its various resource programs to look for ways to improve them and does so without instituting any leasing moratoriums. For example, the BLM recently completed a review of its oil and gas program, and the BLM did not institute a leasing moratorium during the review. In response to OIG and GAO audits and published reports with recommendations, as well as a review by the Secretary's Subcommittee on Royalty Management, the BLM completed five rulemaking efforts related to the federal oil and gas program. During the BLM's reviews and rulemakings, the BLM continued to issue oil and gas leases.

D. The OIG and GAO Audit Reports Did Not Recommend a Moratorium on Leasing While BLM Implemented their Recommended Changes to the Coal Program.

As previously stated, the 2013 GAO and OIG audits of the Federal coal program resulted in 21 total recommendations covering the following four categories: Coal Leasing & Exports, Inspection & Enforcement, Royalty Rate Reductions, and Transparency. While many of these recommendations requested that the BLM make major modifications to the administration of the BLM coal program, none of the recommendations called for a moratorium on the issuance of new coal leases while BLM implemented the requested changes. The BLM was able to address all 21 recommendations and the audits were closed out while the coal program continued to issue new leases and undergo review. See U.S. Dep't of the Interior, Office of Inspector Gen., *Evaluation Report - Coal Management Program*, Report No. CR-EV-BLM-0001-2012 (June 2013); U.S. Gov't Accountability Office, *Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information*, Rep. No. 14-140 (Dec. 2013).

III. Conclusion

For the aforementioned reasons, the BLM recommends that the Secretary revoke S.O. 3338, thereby discontinuing the PEIS and lifting the coal leasing moratorium.