INTERIOR BOARD OF LAND APPEALS

Lynn Canal Conservation, Inc.

169 IBLA 1 (April 20, 2006)

LYNN CANAL CONSERVATION, INC.

IBLA 2006-3 Decided April 20, 2006

Appeal from a Decision Record/Finding of No Significant Impact of the Field Manager, Anchorage Field Office, Bureau of Land Management, approving issuance of a special recreation permit for helicopter trips to glaciers and other areas on public lands for commercially-guided recreation. AA-61582.

Set aside and remanded; petition for stay denied as moot.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Permits--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   The determination of whether the public was adequately involved in BLM's National Environmental Policy Act review process assessing the potential environmental impacts of a proposed action depends on a fact-intensive inquiry made on a case-by-case basis.

2. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   When the final EA, upon which the decision record and finding of no significant impact is based, predates the public comment period offered by BLM and neither the decision record nor finding of no significant impact contains any discussion, or even a reference to comments received, the comments have not been considered, and, therefore, the public has not been adequately involved in

the Department's National Environmental Policy Act review process.

Lynn Canal Conservation, Inc., 167 IBLA 136 (2005), clarified as discussed herein.

APPEARANCES: Nancy Berland, Issues Coordinator, Lynn Canal Conservation, Inc., Haines, Alaska, for appellant; Kenneth M. Lord, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Lynn Canal Conservation, Inc. (LCC) has appealed from and petitioned for a stay of the effect of a September 8, 2005, Decision Record/Finding of No Significant Impact (DR/FONSI) of the Field Manager, Anchorage Field Office, Bureau of Land Management (BLM), approving issuance of a new Special Recreation Permit (SRP), AA-61582, to Albert C. Gilliam, d/b/a Alaska Cross Country Guiding and Rafting and Glacier Valley Tours LCC. The five-year permit authorized Gilliam to conduct helicopter trips to glaciers and other areas on public lands in the Upper Tsirku and Takhin River Valleys of the Haines Borough near Haines, Alaska, for the purpose of engaging in commercially-guided glacier/alpine hiking and river rafting. [1/]

Gilliam submitted the SRP application to BLM on April 1, 2005. In response to the application, BLM prepared an Environmental Assessment (EA) (AK-040-05-EA-017), dated May 13, 2005, which addressed the potential environmental impacts of approving issuance of an SRP to Gilliam, pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000). In the DR/FONSI issued on September 8, 2005, the Field Manager stated that the EA "assesses the impacts of the Proposed

[1/] The present SRP is the latest in a series of SRPs, each serialized AA-61582, issued to Gilliam by BLM for various commercial guiding purposes, including big game hunting, hiking, and river rafting on public lands in Alaska. Prior to BLM's September 2005 DR/FONSI, BLM had last approved issuance of a five-year SRP to Gilliam in 2001. Gilliam claims that he has sought to amend that SRP for a number of years in order to incorporate helicopter-assisted, commercially-guided recreation. See Letter to BLM from Gilliam, dated Mar. 31, 2005.

Action and provides a basis for a decision on the proposal (43 CFR 1610.8(b)(1))." [2/] (DR/FONSI at 2.)

The threshold issue in this case is whether, as LCC contends, BLM violated section 102(2)(C) of NEPA and its implementing Council on Environmental Quality (CEQ) regulations (40 CFR Chapter V) by failing to make a diligent effort to provide an opportunity for public participation in the environmental review process leading to issuance of the DR/FONSI.

Appellant argues that its desired outcome on the merits is supported by this Board's decision in Lynn Canal Conservation, Inc. (Lynn Canal I), 167 IBLA 136 (2005), in which, in response to an appeal by LCC, we set aside and remanded a DR/FONSI issued by the Anchorage Field Office that approved two applications for SRPs allowing organizations to conduct helicopter-assisted, commercially-guided alpine skiing trips on glaciers on public lands near Haines, Alaska. In addressing LCC's contention that BLM had failed to satisfy its public participation obligations under section 102(2)(C) of NEPA and its implementing regulations, we found that BLM had neither provided an opportunity for public comment during a scoping process nor offered the draft or final EA for public comment prior to issuance of the DR/FONSI. [3/] In doing so, we expressly ruled, as follows:

> The Board holds that BLM's failure to provide notice of the availability of the draft EA to the general public, including interested and affected members of the public and organizations and allow a period for comment, or alternatively to provide notice of the EA and proposed

---

[2/] That regulation provides that an EA, or an environmental impact statement (EIS), if necessary, may be used to assess the impacts of a proposal, when the action proposed involves lands not covered by a management framework plan or a resource management plan. The lands in question are not covered by either.

[3/] We stated in Lynn Canal I that "'[s]cope' is defined in 40 CFR 1508.25 as consisting 'of the range of actions, alternatives, and impacts to be considered in an environmental impact statement.' 'Scoping' is used more generally to refer to the process used by an agency to communicate and consult with interested parties about the scope of an EA or EIS." 167 IBLA at 141; see 516 Departmental Manual (DM) 3.3 C. (May 27, 2004).

> pending decision with time to provide written comments, violated 40 CFR 1506.6(a), (b), and (d). [4/]

167 IBLA at 145.

We believe this ruling must be viewed in light of the factual circumstances in Lynn Canal I, i.e., BLM's complete failure to provide for public participation. While one could construe that ruling as requiring a finding that BLM has violated the public participation requirements of NEPA anytime it fails to provide a public comment period on a draft or final EA, regardless of public participation opportunities provided during the scoping process, the ruling should not be accorded such a construction. Rather, based on the following analysis, we clarify Lynn Canal I to limit that ruling and its supporting analysis to the facts of that particular case and establish that the question of whether the public was adequately involved in BLM's NEPA process depends on a fact-intensive inquiry made on a case-by-case basis.

Section 102(2)(C) of NEPA and its implementing regulations generally require BLM to encourage and facilitate public involvement in the NEPA process. In discussing NEPA's purpose, 40 CFR 1500.1(b) states that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken," adding that "public scrutiny [is] essential to implementing NEPA." Further, in discussing NEPA's policy, 40 CFR 1500.2 states that "Federal agencies shall to the fullest extent possible * * * [i]mplement procedures to make the NEPA process more useful to decisionmakers and the public," and "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." In preparing environmental assessments, agencies are directed to "involve environmental agencies, applicants, and the public, to the extent practicable * * *." 40 CFR 1501.4(b). Part 1506 of 40 CFR, which is titled "**OTHER REQUIREMENTS OF NEPA**," includes 40 CFR 1506.6, which is titled "**Public involvement**." 40 CFR 1506.6(a) directs Federal agencies to make diligent efforts to involve the public in "implementing their NEPA procedures." 40 CFR 1506.6(b) requires, in relevant part, that Federal agencies "[p]rovide public notice of * * * the availability of environmental documents so as to

---

4/ In headnote 2 at 167 IBLA 136, we stated in more general terms:
"Failure to provide notice of the availability of a draft environmental assessment to the general public, including interested and affected members of the public and organizations, and allow a period for comment, or alternatively to provide notice of the completed EA and proposed pending decision with time to provide written comments, violates 40 CFR 1506.6."

inform those persons and agencies who may be interested or affected." Finally, 40 CFR 1506.6(d) mandates that Federal agencies "[s]olicit appropriate information from the public."

[1] None of the cited CEQ regulations expressly dictates a timetable for public participation in the NEPA process. [5/] Moreover, 40 CFR 1501.4(b) provides agencies significant flexibility when it requires them to involve "environmental agencies, applicants, and the public" in preparing EAs, "to the extent practicable." Nevertheless, certain Federal courts have held that a complete failure to involve the public in the NEPA process constitutes a violation of the CEQ regulations governing the EA and FONSI process. Citizens for Better Forestry v. U.S. Department of Agriculture, 341 F.3d 961, 970 (9th Cir. 2003); [6/] Montana Wilderness Association v. Fry, 310 F. Supp. 2d 1127, 1147-48 (D. Mont. 2004); Wroncy v. BLM, 777 F. Supp. 1546, 1549 (D. Or. 1991).

Where the agency has engaged in some type of public process, the courts have scrutinized that process on a case-by-case basis to determine its adequacy. In Fund for Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003), where the U.S. Fish and Wildlife Service published notice of the availability of a draft EA in the Federal Register affording the public a two-week comment period, which was followed two weeks later by finalization of the EA, and a week later by issuance of the ROD/FONSI, the court found that process to be inadequate under the CEQ

[5/] We note, however, that 40 CFR 1501.4(e)(2) does provide that, "[i]n certain limited circumstances," a Federal agency "shall make the finding of no significant impact available for public review * * * for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin." However, these "circumstances" are where the proposed action "is, or is closely similar to, one which normally requires the preparation of an environmental impact statement," or where the nature of the proposed action "is one without precedent." Id. Neither of those circumstances applied to Lynn Canal I or applies here.

[6/] In Citizens for Better Forestry, the court stated at 341 F.3d at 970:
"Although we have not established a minimum level of public comment and participation required by the regulations governing the EA and FONSI process, we clearly have held that the regulations at issue must mean something. * * * It is evident, therefore, that a complete failure to involve or even inform the public about an agency's preparation of an EA and a FONSI, as was the case here, violates these regulations."

regulations. [7/] 281 F. Supp. 2d at 226-27. In other cases, courts have concluded that the public participation requirements of NEPA have been satisfied even when an agency has not offered a draft or final EA for public comment. For instance, in Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of Army, 398 F.3d 105 (1st Cir. 2005), the First Circuit, in finding compliance with 40 CFR 1501.4(b), expressly stated at page 115:

> Appellees argue that the Corps met the requirement of involving the public "to the extent practicable" in preparing the EA by issuing a public notice of Cape Wind's application, providing a comment period that later extended to over five months, carrying out two public hearings, noting and responding to public comments in the EA and conferring with federal and state environmental agencies. We agree. Nothing in the CEQ regulations requires circulation of a draft EA for public comment, except under certain "limited circumstances." 40 C.F.R. § 1501.4(e)(2).

See Pogliani v. U.S. Army Corps of Engineers, 306 F.3d 1235, 1238-40 (2d Cir. 2002); Sierra Nevada Forest Protection Campaign v. Weingardt, 376 F. Supp. 2d 984, 992 (E.D. Cal. 2005);. Also, in Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1265-66, 1279 (10th Cir. 2004), the court found the public was adequately involved in preparation of the EA when the agency issued public notice of the proposed action and provided a comment period, even though the notice did not describe any alternatives and the record did not indicate that the EA was made available to the public before the agency issued its decision.

A recent judicial pronouncement clearly supports the case-by-case analysis. In Biodiversity Conservation Alliance v. United States Bureau of Land Management, 404 F. Supp. 2d 212 (D.D.C. 2005), BLM issued a news release soliciting comments on a notice of intent to conduct a geophysical exploration project. Thereafter, BLM issued a DR/FONSI based on its EA. Plaintiffs complained that BLM was required to give the public an opportunity to comment on the draft EA. The district court disagreed:

> A plain reading of the CEQ regulations reveals that an agency is *not* expressly required to circulate a draft EA for public comment before

---

[7/] Although in Anderson v. Evans, 314 F.3d 1006, 1016 (9th Cir. 2002), the Ninth Circuit stated that 40 CFR 1506.6 requires that "[t]he public must be given an opportunity to comment on draft EAs and EISs * * *," the adequacy of public participation was not directly before the court in that case.

> adopting its final decision, except in limited circumstances that do not apply here. *See* 40 CFR § 1501.4(e)(2). Instead, in preparing an EA, the regulations only require that "an agency shall involve ... the public, *to the extent practicable*, ..." *Id.* § 1501.4(b) (emphasis added). Determining whether the public was adequately involved is a fact-intensive inquiry made on a case-by-case basis. [Footnote omitted; emphasis added.]

404 F. Supp. 2d at 220.

The fact that BLM did not afford an opportunity for public comment on a draft or final EA in Lynn Canal I was not the controlling rationale for our disposition of the appeal in that case. The facts in Lynn Canal I showed a complete failure to involve the public, which, as demonstrated above, justified setting aside BLM's decision as having been issued contrary to NEPA. We clarify that it was not the intent of the Board to establish a rule requiring that a BLM decision be set aside simply because it did not offer a draft or final EA for public comment, without regard for the adequacy of BLM's efforts to involve the public in earlier aspects of its environmental review process. Rather, as discussed above, the determination of whether the public was adequately involved must proceed on a case-by-case analysis of the facts.

We now examine the facts in this case. BLM received the SRP application on April 1, 2005. There is no evidence in the record that BLM issued a scoping notice to the public concerning the application prior to commencing work on the EA. Nevertheless, LCC received an e-mail from Jake Schlapfer, Recreation Specialist, BLM, dated April 6, 2005, attaching a two-page copy of "the proposed action for Al Gilliams[']s helicopter proposal." He added: "The DRAFT EA and map will be posted on our website very soon." (Statement of Reasons (SOR), Ex. 6.) In an April 21, 2005, e-mail to Schlapfer, LCC stated that it could not get on the BLM website and did not know whether the EA had been posted. It also inquired: "Is there a deadline for submitting comments?" Schlapfer responded by e-mail on the same date, stating that the "[G]illiam EA is ready for posting," but that it could not be viewed on line. He indicated that it was the "same as what LCC has." He added that "[t]here is no plan to open the EA up for an official comment period, however, we certainly welcome any comments you may have." He did not respond to the question of whether there was a deadline for commenting.

On April 26, 2005, LCC e-mailed Schlapfer requesting that he send it a copy of the EA by e-mail or by regular mail because it was "very interested in providing comments on the draft EA." It added:

> We assume the draft EA will include a range of alternatives as required by NEPA. We also assume all comments will be considered prior to decision-making. We request BLM put a public notice in the Chilkat Valley News once the draft EA is available so that other interested parties can comment. This is important because the voters of Haines rejected summer helicopter tours in 1996 by a 55% majority. There is a lot of local interest in this case.

On May 2, 2005, Schlapfer responded, thanking LCC for its interest in the EA and stating that he was working with "our public affairs folks to run an ad[] in the Chilkat Valley News," that BLM would "open the comment period for 30 days," and that he would inform LCC "when the ad[] will run."

BLM completed an EA for the SRP on May 13, 2005. Therein, BLM considered the potential environmental impacts of the proposed action and a no action alternative. BLM described in detail the proposed helicopter operating plan with helicopter landing sites depicted on an "attached map." (EA at 4-6.) BLM proposed mitigation measures for mountain goats, again referencing an attached map. (EA at 15 ("The attached map also depicts flight routes and landing site information important for the protection of goats in their late spring and summer habitats. Flight routes have been recommended to provide minimal impacts to all wildlife and potential recreation users.").)

On May 26, 2005, BLM had a public notice concerning the SRP application published in the Chilkat Valley News Weekly, the local newspaper in Haines, Alaska. That notice, titled "BLM Seeks Public Comment on Helicopter Guiding Proposal," stated: "The Bureau of Land Management is preparing an environmental assessment and seeks public comment on a proposal for helicopter-assisted alpine hiking tours in the Haines area." (Ex. C attached to BLM Answer.) The notice contained a four-sentence explanation of the proposal, stating that (1) commercial helicopter operations would be concentrated in the Tsirku River Valley and based out of the applicant's private property on Nugget Creek; (2) there would be approximately 20 landings per day at proposed landing sites in the Tsirku River Valley, including LeBlondeau and Takhin glaciers; (3) all aircraft would follow flight corridors designated in cooperation with the Haines Borough; and (4) the operating season would be July 1 through September 30. It stated that comments had to be filed by June 15, 2005, "to be considered in the environmental assessment for this proposal." No mention was made of the EA completed on May 13, 2005, or the map showing helicopter flight paths and landing sites. The notice did, however, include Schlapfer's name and telephone number to be contacted for "further information."

According to a Phone Conversation Report, dated May 31, 2005, completed by Schlapfer, he returned a phone call from Nancy Berland with LCC relating to the helicopter proposal. He stated: "She was concerned that comments would not be accurate when people do not have a good idea of what the entire EA looks like. I suggested that the Advertisement in the Chilkat Valley News was intended to invite people to call me in regards to that proposal and find out that information." He noted that she requested a copy of the EA and that he discussed "with her some concerns that BLM specialists and the Haines Borough have had with the proposal. This primarily revolved around trail building * * * and the number of landings in certain areas. She thought those were good concerns. She will prepare a comment letter and send it to us soon."

On June 1, 2005, Schlapfer forwarded to LCC by e-mail a document identified as "Chapter 2-4 gilliam draft.doc." Schlapfer stated: "Keep in mind that this is a DRAFT and that additional alternatives may be developed based on public comment and specialist input." [8/] LCC has attached a copy of the document provided by Schlapfer as part of Exhibit 6 accompanying its SOR. It is an undated, unpaginated copy of all but the first two pages of the May 13, 2005, EA. The missing pages contain introductory sections, including the "Purpose and Need for the Proposed Action." Comparison of the pages provided by LCC with the corresponding pages of the May 13, 2005, EA reveal that they are virtually identical, with two exceptions. The May 13, 2005, EA contains a Section V. B. "List of Preparers." No Section V. B. appears in the June 1 transmittal. The June 1 transmittal contains a sentence in Section III. E. that does not appear in the May 13, 2005, EA ("Mountain goats live and breed on steep high rocky terrain throughout the region").

During the comment period, BLM received numerous written comments, including those filed by LCC on June 14, 2005. [9/] The written comments are included at pages 144 through 210 of the consecutively numbered pages in the case record forwarded to the Board. The most substantive comments were received from LCC and the other person to whom Schlapfer forwarded "Chapter 2-4 gilliam draft.doc." There is no evidence in the record that Schlapfer or any other BLM employee supplied that document or a copy of the May 13, 2005, EA to any other member of the public.

[8/] The case record shows that Schlapfer forwarded the same document (Chapter 2-4 gilliam draft.doc) by e-mail to another person on June 1, 2005, with the same caveat.

[9/] In those comments, LCC specifically complained about the lack of a purpose and need statement in the document forwarded by Schlapfer.

On September 8, 2005, the Anchorage Field Manager issued his DR/FONSI based on the May 13, 2005, EA. No reference is made in the DR/FONSI to any of the comments received by BLM.

[2] As we stated in Lynn Canal I, 167 IBLA at 145, "NEPA is essentially procedural in nature, designed to insure that Federal agencies make fully informed and considered decisions." The CEQ regulations dictate that agencies adopt procedures "[r]equiring the relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions." 40 CFR 1505.1(d). In Chapter 3 of Part 516 of the DM, the Department provided "supplementary instructions for implementing those portions of the CEQ Regulations pertaining to Environmental Assessment[s] (EA)." 516 DM 3.1 (May 27, 2004). One of those instructions states: "Where appropriate, bureaus and offices, when conducting the EA process, shall provide for public participation and shall consider the public comments on the pending plan or program." 516 DM 3.3 B. (May 27, 2004).

The case record shows that helicopter-assisted recreation in the Haines area is a very controversial subject. Nevertheless, BLM proceeded with preparation of an EA without issuing a scoping notice to the public. Despite the fact that it had completed an EA for the proposed action on May 13, 2005, its May 26, 2005, public notice was worded like a scoping notice, clearly implying that the public could provide information that would be considered in the preparation of an EA. In fact, BLM expressly urged that comments be filed by the established comment deadline in order "to be considered in the environmental assessment for this proposal." [10/]

It is not clear from the record whether LCC and the person, each of whom received the "Chapter 2-4 gilliam draft.doc" on June 1, 2005, also received a copy of the map, which is critical to an understanding of the proposal. Moreover, that person and LCC were assured by Schlapfer that the document he provided them was only a "draft" and that additional alternatives might "be developed based on public comment and specialist input." [11/]

[10/] We note that the comment period was less than three weeks, even though Schlapfer had assured LCC that the comment period would be 30 days. In fact, excluding weekends and holidays, the comment period was 13 working days.

[11/] Regardless of Schlapfer's sincerity about the status of the document he forwarded and his comments considering what might take place, the May 13, 2005, EA is the final EA upon which BLM based the DR/FONSI. The record indicates that document

(continued...)

In addition, the record is completely devoid of any evidence of consideration of the comments solicited by BLM. When BLM has provided the opportunity for public comment, 516 DM 3.3 B. (May 27, 2004) instructs that it "consider" such comments. Under the circumstances of this case, we are unwilling to hold that the comments were given any consideration by BLM, despite their appearance in the case record, absent some indication of such in a document dated after the close of the comment period.

This Department has instructed its offices and bureaus that, in implementing the CEQ regulations relating to EAs, it is Departmental policy that, "[w]here appropriate," offices and bureaus "shall provide for public participation and shall consider the public comments." In this case, BLM determined that public involvement was appropriate, ostensibly because of the highly controversial nature of helicopter-assisted recreation. However, having made that determination, its implementation of the public participation process, as set forth in our recitation of the facts in this case, left much to be desired. Moreover, in accordance with the DM, it was required to "consider the public comments." When, as in this case, BLM's final EA, upon which the DR/FONSI is based, predates the public comment period offered by BLM and the DR/FONSI contains no discussion, or even a reference to comments received, the comments have not been considered. Therefore, the public has not been adequately involved in the Department's NEPA review process. In such a situation, the DR/FONSI must be set aside and the case remanded to BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's September 2005 DR/FONSI is set aside, and the case is remanded to BLM for further action consistent with this decision.

Bruce R. Harris
Deputy Chief Administrative Judge

11/ (...continued)
was reviewed by numerous BLM resource specialists during the summer of 2005 and cleared by the Environmental Coordinator and Group Managers for Renewable Resources and Lands, Anchorage Field Office (see NEPA Routing and Tracking Form, dated Aug. 3, 2005, and NEPA Clearance Sheet, dated Sept. 8, 2005), surviving that review process unchanged.

I concur:

_____
H. Barry Holt
Chief Administrative Judge