



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

(703) 235-3750

ibla@oha.doi.gov

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IBLA 2021-313)	DOI-BLM-CA-C090-2019-0015-RMP-EA
)	
FRIENDS OF THE NORTH COAST)	Land Use
<i>ET AL.</i>)	
)	Implementation Action MA-REC-23 Set
)	Aside and Remanded; Challenge to
)	Implementation Action MA-REC-24
)	Dismissed; Petition for Stay Denied as
)	Moot

ORDER*

On July 23, 2021, Friends of the North Coast, Davenport North Coast Association, and Rural Bonny Doon Association (Appellants) appealed two implementation actions included in the Bureau of Land Management's (BLM) June 2021 Decision Record (DR) approving the Cotoni-Coast Dairies Resource Management Plan Amendment for the California Coastal National Monument. On May 12, 2022, Appellants petitioned to stay the implementation of one of those actions. As explained below, we set aside and remand that implementation action, dismiss Appellants' challenge to the other one, and deny Appellants' petition for stay as moot.

BACKGROUND

I. Factual Background

In 1998, the Trust for Public Land (TPL) purchased the Coast Dairies property from the Coast Dairies Land Company.¹ Later that year, BLM signed a memorandum of

* This Order is binding on the parties but does not constitute Board precedent.

¹ See Cotoni-Coast Dairies, California Coastal National Monument Proposed Resource Management Plan Amendment and Environmental Assessment, Chapter (Ch.) 1 at 1 (Sept. 25, 2020), https://eplanning.blm.gov/public_projects/120855/200302280/20026727/250032929/Cotoni-Coast%20Dairies%20Proposed%20RMPA-EA_chapters.pdf (last visited Aug. 29, 2022) (Proposed RMPA-EA).

understanding with TPL to be a permanent steward of the upland portions of the property.² In 2014, TPL transferred those portions of the property, totaling 5,843 acres, to the United States.³ On January 12, 2017, those portions of the property were added to the California Coastal National Monument by Presidential Proclamation No. 9563 (Proclamation) and re-named the Cotoni-Coast Dairies (C-CD).⁴ The Proclamation instructed that the C-CD be managed by BLM and that it “shall become available for public access upon completion of a management plan.”⁵

To comply with the Proclamation, BLM began preparing an amendment to the California Coastal National Monument Resource Management Plan (CCNM RMP) that would serve as the required management plan for the C-CD.⁶ To analyze the environmental effects of various alternatives for managing the C-CD, BLM prepared a draft environmental assessment (EA),⁷ pursuant to the National Environmental Policy Act (NEPA)⁸ and its implementing regulations.⁹ As relevant here, under both the action alternatives (Alternatives B and C),¹⁰ BLM would create the Warrenella Road Gate

² *Id.*

³ *Id.*; *see id.*, Appendix (App.) A, Locator Map, https://eplanning.blm.gov/public_projects/120855/200302280/20033137/250039336/RMPA%20Appendix%20A%20Figure%2001_Locator%20Map.pdf (last visited Aug. 29, 2022) (map depicting location of those 5,843 acres); *see also* Correction Grant Deed (recorded Oct. 21, 2016), https://eplanning.blm.gov/public_projects/lup/120855/175513/213828/508_Grant_Deed_2016_0041084_10_21_2016.pdf (last visited Aug. 29, 2022).

⁴ Proposed RMPA-EA, Ch. 1 at 1; *see* Proclamation No. 9563, Boundary Enlargement of the California Coastal National Monument, 82 Fed. Reg. 6,131 (Jan. 12, 2017).

⁵ Proclamation No. 9563, 82 Fed. Reg. at 6,136.

⁶ *See* Proposed RMPA-EA, Ch. 1 at 1-2.

⁷ *See* Cotoni-Coast Dairies, California Coastal National Monument Draft Resource Management Plan Amendment and Environmental Assessment (Feb. 2020), https://eplanning.blm.gov/public_projects/lup/120855/20012842/250017635/BLM_Cotoni-Coast_Dairies_Draft_RMPA_and_EA_Chapters_combined.pdf (last visited Aug. 29, 2022) (Draft RMPA-EA).

⁸ 42 U.S.C. §§ 4321-4347 (2018). All citations to the United States Code are to the current (2018) edition.

⁹ *See* 40 C.F.R. Parts 1500-1508 (2019) (Council on Environmental Quality’s (CEQ) NEPA regulations); 43 C.F.R. Part 46 (2019) (Department of the Interior’s NEPA regulations). Because the NEPA process began in 2019, citations to the CEQ regulations and the Department’s NEPA regulation are to the 2019 edition of the Code of Federal Regulations. *See* BLM’s Second Answer at 8 n.31 (filed Aug. 26, 2022).

¹⁰ *See* Draft RMPA-EA, Ch. 2 at 5 (explaining that Alternative A was the no-action alternative).

Parking Area and the Marina Ranch Gate Parking Area to provide the public two, year-round, day-use parking areas.¹¹ However, creation of the Marina Ranch Gate Parking Area would require, among other things, BLM securing an easement for public use from TPL so the public could cross agricultural land owned by TPL to access the planned location for the parking area.¹² This agricultural land is burdened by conservation easement to “preserv[e] and protect[] in perpetuity its agricultural values, use and utility, and to prevent any use . . . that would materially impair or interfere with its agricultural values, use or utility.”¹³ Creation of the Marina Ranch Gate Parking Area would also require BLM making capital improvements to the easement so that it would support the expected vehicle use and meet public safety standards.¹⁴

In February 2020, BLM released the draft RMPA-EA for a 45-day public comment period.¹⁵ Appellants timely commented on the draft RMPA-EA.¹⁶

¹¹ *Id.*, Ch. 2 at 27; *see id.*, Appendix B, Warrenella Road Gate Parking Concept A.2, https://eplanning.blm.gov/public_projects/lup/120855/20012876/250017669/RMPA_Appendix_B_Warrenella_Road_Gate_Parking_Concept_A.2.pdf (last visited Aug. 29, 2022) (map depicting draft design of the Warrenella Road Gate Parking Area); *id.*, Appendix B, Marina Ranch Gate Parking Concept C, https://eplanning.blm.gov/public_projects/120855/200302280/20033147/250039346/RMPA%20Appendix%20B%20Marina%20Ranch%20Gate%20Parking%20Concept%20C.pdf (last visited Aug. 29, 2022) (map one of two depicting draft design of Marina Ranch Gate Parking Area); *id.* Marina Ranch Gate Parking Concept D, https://eplanning.blm.gov/public_projects/lup/120855/20012874/250017667/RMPA_Appendix_B_Marina_Ranch_Gate_Parking_Concept_D.pdf (last visited Aug. 29, 2022) (map two of two depicting draft design of Marina Ranch Gate Parking Area).

¹² Proposed RMPA-EA, Ch. 4 at 71.

¹³ Appellants Friend of the North Coast, et al.’s Motion, in the Alternative, for the Board to Refer Case to an Administrative Law Judge to Resolve Specific Issue of Material Fact (filed Feb. 3, 2022) (Motion to Refer), attached Declaration of Christina Fischer, Bay Area and Central Coast Conservation Director, TPL (Feb. 1, 2022) (Fischer Decl.), Exhibit A, Letter from TPL to BLM at 1 (June 16, 2021) (TPL June 16 Letter).

¹⁴ Proposed RMPA-EA, Ch. 2 at 32.

¹⁵ Proposed RMPA-EA, Ch. 1 at 9.

¹⁶ *See* Draft Resource Management Plan Amendment & Environmental Assessment, Cotoni-Coast Dairies, California Coastal National Monument, Public Comment Summary Report at iii, 35 (June 2020), https://eplanning.blm.gov/public_projects/120855/200302280/20023007/250029211/Cotoni-Coast-Dairies_RMPA_Public-Comments-Report-508.pdf (last visited Aug. 29, 2022).

After considering the comments received on the draft RMPA-EA, BLM developed a fourth alternative (Alternative D), which was incorporated into a proposed RMPA-EA, along with the existing alternatives, and was identified as the “Preferred Alternative.”¹⁷ Under Alternative D, like under Alternatives B and C, BLM would create the Warrenella Road Gate Parking Area and the Marina Ranch Gate Parking Area to provide the public two, year-round, day-use parking areas.¹⁸ BLM also proposed a two-phased approach for implementing public recreation facilities, with implementation of Phase 2 “dependent on effective recreation management under Phase 1.”¹⁹ The Warrenella Road Gate Parking Area and the Marina Ranch Gate Parking Area would both be built during Phase 1²⁰ to, among other things, “disperse visitor use and reduce potential for concentration of impacts at a singular parking area.”²¹

BLM then issued a Finding of No Significant Impact (FONSI), in which BLM found that implementation of Alternative D, as set forth in the proposed RMPA-EA, would not have significant environmental impacts beyond those previously addressed in prior NEPA documents and that an EIS was not required under NEPA.²² BLM then published the proposed RMPA-EA and provided a 30-day protest period.²³ Appellants timely protested the proposed RMPA-EA, but BLM ultimately denied or dismissed their protests.²⁴

¹⁷ Proposed RMPA-EA, Ch. 2 at 7.

¹⁸ *Id.*, Ch. 2 at 7, 31.

¹⁹ *Id.*, Ch. 2 at 7.

²⁰ *See id.*, Ch. 2 at 37.

²¹ *Id.*, Ch. 1 at 13; *id.*, Appendix A, Figure 5D: Cotoni-Coast Dairies Recreation Management Zones w/ Parking and Trail Concepts Alternative D (Phase 1 & 2), https://eplanning.blm.gov/public_projects/120855/200302280/20033131/250039330/RMPA%20Appendix%20A%20Figure%205D_AltD_Trails.pdf (last visited Aug. 29, 2022) (map depicting the relative locations of the two parking areas, with the Warrenella Road Gate Parking Area located in the north end of the C-CD and the Marina Ranch Gate Parking Area located in the south end) (Appendix A, Figure 5D).

²² *See* Finding of No Significant Impact at 5-6 (Aug. 26, 2020), https://eplanning.blm.gov/public_projects/120855/200302280/20026722/250032924/RMPA_FONSI_082620_signed.pdf (last visited Aug. 29, 2022).

²³ Decision Record for the Cotoni-Coast Dairies Resource Management Plan Amendment for the California Coastal National Monument at 6 (June 23, 2021) [https://eplanning.blm.gov/public_projects/120855/200302280/20041619/250047812/Decision%20Record%20for%20C-CD%20RMPA%20\(public\).pdf](https://eplanning.blm.gov/public_projects/120855/200302280/20041619/250047812/Decision%20Record%20for%20C-CD%20RMPA%20(public).pdf) (last visited Aug. 29, 2022) (DR).

²⁴ *See* Land Use Planning Protest Resolution Report for the Cotoni-Coast Dairies California Coastal National Monument Proposed Resource Management Plan Amendment and Environmental Assessment at 2 (June 17, 2021),

In December 2020, while the protests were pending, BLM learned that TPL had reservations about granting the required easement for the Marina Ranch Gate Parking Area.²⁵ BLM then wrote to TPL expressing concern about TPL “reconsidering its support” for the easement and stating that “failure to implement one of the two primary access points identified in the RMPA[] could be detrimental to the viability of the larger RMPA.”²⁶ BLM, TPL, and other stakeholders subsequently communicated about this issue and then participated in a conference call on April 23, 2021.²⁷ After that call, BLM emailed the participants a proposal for a “hybrid alternative” that would include: (1) indemnifying TPL for any losses it might incur as a result of granting an easement to BLM; (2) forgoing improvement of the easement and, thus, limiting use of the easement and associated parking area to dry-season use only; and (3) approving TPL’s alternative Yellow Bank South Gate Parking Area proposal as a year-round parking area.²⁸

On June 4, 2021, TPL and BLM had a discussion during which TPL advised BLM that it would not grant the easement necessary for the Marina Ranch Gate Parking Area.²⁹ On June 16, 2021, TPL sent BLM a letter memorializing that discussion.³⁰ In that letter, TPL stated that it could not “accommodate a plan that facilitates” the Marina Ranch Gate Parking Area, but that it “remain[ed] committed to working together with BLM and potentially other partners to advance the Yellow Bank South Gate alternative.”³¹ TPL concluded by “[r]ecognizing the important role a southern access location plays in opening the Monument” and accordingly “propose[d] moving [the] process forward” in 2021 “in the hopes that parking could be provided as soon as possible.”³²

On June 23, 2021, notwithstanding the fact that TPL would not grant the easement necessary for the Marina Ranch Gate Parking Area, BLM issued the DR approving a modified version of the Preferred Alternative as the Amendment to the

<https://www.blm.gov/sites/default/files/docs/2021-06/Cotoni-Coast%20Dairies%20NM%20PRMPA%20and%20EA%20Protest%20Resolution%20Report%20%28June%2017%2C%202021%29.pdf> (last visited Aug. 29, 2022).

²⁵ DR at 7.

²⁶ Administrative Record, Letter from BLM to TPL at unpaginated (unp.) 2 (Jan. 8, 2021) (BLM’s January 2021 Letter).

²⁷ See TPL June 16 Letter, attached Email from BLM to TPL *et al.* (Apr. 23, 2021).

²⁸ *Id.*

²⁹ See Fischer Decl. ¶ 8.

³⁰ *Id.*; see TPL June 16 Letter at 1.

³¹ TPL June 16 Letter at 3.

³² *Id.*

CCNM RMP and the required management plan for C-CD.³³ BLM also approved a number of implementation actions that allow certain on-the-ground activities to proceed immediately.³⁴ As relevant here, BLM approved Implementation Action (IA) MA-REC-23 and IA MA-REC-24, under which the Warrenella Road Gate Parking Area and Marina Ranch Gate Parking Area would be built, respectively,³⁵ during Phase 1.³⁶ With respect to the Marina Ranch Gate Parking Area, BLM stated that “[d]iscussions [were] ongoing with TPL” and that it “kept the Proposed Marina Ranch Gate [Parking Area] in the RMPA should TPL authorize this road improvement project at a later date.”³⁷

Shortly after BLM issued its DR, TPL reiterated its position that “the southern entrance that is included in the RMPA,” i.e., the Marina Ranch Gate Parking Area, was “not viable,” and that it “does not represent a path forward for a southern access point.”³⁸ TPL instead offered “to draft . . . a formal [o]ffer to [d]edicate additional land to BLM **at no cost**” for the Yellow Bank South Gate Parking alternative “for review and approval by both parties.”³⁹ TPL noted that BLM’s objection to studying this alternative in the proposed RMPA-EA was that BLM did “not have the authority to make decisions regarding private lands,” and stated that given “the fact that TPL owns the . . . land and is willing to convey” it “to BLM at no cost, BLM could readily gain the authority to ‘relocate the Marina Ranch Gate access point’ to the ‘Yellow Bank South Gate alternative’ as TPL proposes.”⁴⁰

³³ DR at 3; *see* Errata Sheet for Cotoni-Coast Dairies Resource Management Plan Decision Record (Aug. 9, 2021), [https://eplanning.blm.gov/public_projects/120855/200302280/20043880/250050071/ERRATA%20to%20DR%20for%20C-CD%20RMPA%20\(signed\).pdf](https://eplanning.blm.gov/public_projects/120855/200302280/20043880/250050071/ERRATA%20to%20DR%20for%20C-CD%20RMPA%20(signed).pdf) (last visited Aug. 29, 2022) (clarifying the goals, objectives, and management actions for five programs that were inadvertently omitted from the signed DR).

³⁴ DR at 5.

³⁵ *Id.* at 20.

³⁶ Proposed RMPA-EA, Ch. 2 at 37; *see* DR at 20.

³⁷ DR at 7.

³⁸ Fischer Decl., Ex. B, Letter from TPL to BLM at 2 (June 29, 2021) (TPL June 29 Letter); *see* Fisher Decl. ¶ 18.

³⁹ TPL June 29 Letter at 2; *see id.*, Attachment B(1), Overview Map (map depicting locations of the planned Marina Ranch Gate Parking Area and the proposed Yellow Bank South Gate Parking Alternative).

⁴⁰ TPL June 29 Letter at 2.

II. Procedural Background

Appellants timely appealed BLM's approval of IA MA-REC-23, i.e., the Warrenella Road Gate Parking Area, and IA MA-REC-24, i.e., the Marina Ranch Gate Parking Area.⁴¹ After the merits were briefed,⁴² Appellants requested that we refer the appeal to an administrative law judge "to address the specific factual issue" of whether TPL had refused to grant BLM the necessary easement for the Marina Ranch Gate Parking Area.⁴³ In support of its motion, Appellants attached a declaration of Christina Fischer, TPL's Bay Area and Central Coast Conservation Director, in which Fischer stated that BLM's representation in the DR that "discussions were ongoing" regarding the possibility of access to facilitate BLM's planned parking area at Marina Ranch Road "create[d] a completely false impression."⁴⁴ Fischer further stated that "[n]egotiations regarding the Marina Ranch Gate access point easement . . . ceased to be 'ongoing' as of TPL's June 16, 2021 letter."⁴⁵

We denied Appellants' request for a hearing because they had not demonstrated the existence of an issue of material fact warranting a hearing given that BLM did not dispute the contents of TPL's June 16, 2021, letter in which TPL indicated it would not grant BLM the requested easement.⁴⁶ In so doing, we noted that "what is in dispute is the *effect* of TPL's letter on BLM's decision," which "will be addressed when we resolve the merits of this appeal."⁴⁷

In May 2022, Appellants filed additional documents concerning changes to IA MA-REC-23, the Warrenella Road Gate Parking Area. Specifically, Appellants alleged that BLM had changed the action by relocating the proposed entrance of the parking lot and reconfiguring the parking lot to, among other things, reduce the number of spaces from

⁴¹ Notice of Appeal of Implementation Decisions for the Cotoni-Coast Dairies Resource Management Plan Amendment for the California Coastal National Monument at 1 (filed with the Board Aug. 5, 2021).

⁴² See Appellants Friends of the North Coast, et al.'s Statement of Reasons (filed Aug. 20, 2021) (SOR); BLM's Answer (filed Dec. 20, 2021); Appellants Friends of the North Coast, et al.'s Reply to Respondent BLM's Answer (filed Feb. 3, 2022).

⁴³ Motion to Refer at 1.

⁴⁴ Fischer Decl. ¶ 15.

⁴⁵ *Id.* ¶ 18.

⁴⁶ Motion for Hearing Denied at 6 (Mar. 18, 2022).

⁴⁷ *Id.* at 6, 7.

69 to 42.⁴⁸ Based upon these changes, Appellants filed a petition to stay IA MA-REC-23,⁴⁹ which is fully briefed.⁵⁰ Appellants also filed a supplemental statement of reasons,⁵¹ to which BLM responded.⁵²

We now turn to the merits of Appellants' appeal. We begin with Appellants' argument that BLM violated NEPA and the regulations implementing NEPA in approving IA MA-REC-23, the Warrenella Road Gate Parking Area.⁵³ Specifically, Appellants contend that TPL's refusal to grant the necessary easement for the Marina Ranch Gate Parking Area was significant new information or changed circumstances requiring a supplemental NEPA analysis before BLM could approve IA MA-REC-23.⁵⁴ We then address Appellants' challenge to IA MA-REC-24, the Marina Ranch Gate Parking Area.⁵⁵

ANALYSIS

I. BLM Violated NEPA and the Regulations Implementing NEPA in Approving IA MA-REC-23

A. NEPA and the Regulations Implementing NEPA Require an Agency to Take a "Hard Look" at New Information or Changed Circumstances

NEPA requires that an EIS be prepared for all "major Federal actions significantly affecting the quality of the human environment."⁵⁶ A threshold question in preparing a NEPA analysis is "whether a proposed project will 'significantly affect' the environment,

⁴⁸ Supplemental Notice of Appeal at 1-2 (filed May 12, 2022); *see* Urgent Petition for Stay of Implementation Action: MA-REC-23 Establishing a Day Use Site (Parking) at Warrenella Road Gate at 9 (filed May 12, 2022) (asserting that the number of proposed parking spaces was reduced from 69 to 42) (Petition).

⁴⁹ Petition at 1; *see* Corrected Urgent Petition for Stay of Implementation Action: MA-REC-23 Establishing a Day Use Site (Parking) at Warrenella Road Gate (filed May 23, 2022) (correcting earlier petition to include an attachment that was inadvertently omitted).

⁵⁰ Response to Appellants' Urgent Petition for Stay (filed June 2, 2022); Appellants' Reply to BLM Opposition to Petition for Stay of Implementation Action: MA-REC-23 Establishing a Day Use Site (Parking) at Warrenella Road Gate (filed June 13, 2022).

⁵¹ Appellants' Supplemental Statement of Reasons for Supplemental Appeal (filed June 2, 2022).

⁵² *See* BLM's Second Answer.

⁵³ *See* SOR at 22-23.

⁵⁴ *Id.*

⁵⁵ *Id.* at 21-22.

⁵⁶ 42 U.S.C. § 4332(2)(C).

thereby triggering the requirement for an EIS.”⁵⁷ As a preliminary step, an agency may prepare an EA to decide whether the environmental impacts of a proposed action are significant enough to warrant preparation of an EIS.⁵⁸ “If the EA leads the agency to conclude that the proposed action will not significantly affect the environment or that any significant impacts can be mitigated to insignificance, the agency may issue a FONSI and forego the further step of preparing an EIS.”⁵⁹

If the agency becomes aware of new information or changed circumstances before issuing a decision, it may need to perform an additional NEPA analysis.⁶⁰ However, new information or changed circumstances do not always require an additional NEPA analysis.⁶¹ What they do require is that an agency take a “hard look” at whether the new

⁵⁷ *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

⁵⁸ *Id.*; see 40 C.F.R. § 1501.4.

⁵⁹ *WildLands Defense*, 188 IBLA 68, 71 (2016).

⁶⁰ See 40 C.F.R. § 1502.9(c)(1)(ii) (“Agencies [s]hall prepare supplements to [an EIS] if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts”); 43 C.F.R. § 46.120 (“The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.”); *Wyoming Wildlife Federation*, 184 IBLA 352, 364 (2014) (recognizing that the regulations “implementing NEPA require a supplemental environmental document when ‘[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts’”) (quoting 40 C.F.R. § 1502.9(c)(1)(ii) (2013)); *Oregon Nat. Res. Council Action v. U.S. Forest Service*, 445 F. Supp. 2d 1211, 1219 (D. Or. 2006) (“Once an agency has prepared an EA and issued a FONSI, an agency must supplement its analysis if there are ‘significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.’” (quoting 40 C.F.R. § 1502.9(c)(1)(ii) (2006))); see also BLM NEPA Handbook H-1790-1 at 29 (Jan. 2008), https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1790-1.pdf (last visited Aug. 29, 2022) (“[I]f new circumstances or information arise that alters the validity of an EA analysis prior to the implementation of the Federal action, prepare a new EA.”).

⁶¹ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989) (“[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.”).

information or changed circumstances require an additional NEPA analysis.⁶² For example, we have ruled, based upon 43 C.F.R. § 46.120, that when an agency is faced with new information or changed circumstances it

must determine, with appropriate supporting documentation, that the existing environmental analyses assess the environmental effects of the proposed action and reasonable alternatives, and the supporting record must include an evaluation of whether new circumstances, new information, or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.^[63]

We have also ruled that if the agency fails to take a “hard look” at the new information or changed circumstances or document its “look” in the record, we will set aside its decision.⁶⁴

B. BLM Failed to Take a “Hard Look” at Whether an Additional NEPA Analysis Was Required Given BLM’s Inability to Build the Marina Ranch Gate Parking Area

As explained above, BLM knew that TPL would not grant the easement necessary for the Marina Ranch Gate Parking Area before it issued the DR. Because BLM prepared the draft and proposed EAs before TPL informed the Bureau that it would not grant the easement, BLM did not consider in those analyses the environmental effects of building the Warrenella Road Gate Parking Area without also building the Marina Ranch Gate Parking Area.⁶⁵ In fact, BLM recognized the importance of concurrently building both

⁶² *Id.* at 374 (ruling that NEPA requires “agencies [to] take a ‘hard look’” at the environmental effects of new information, “even after a proposal has received initial approval”); *NRDC v. FAA*, 564 F.3d 549, 561 (2nd Cir. 2009) (“In determining whether to prepare a supplemental EIS, the agency has an obligation to take a ‘hard look’ at the new circumstances and information.”); *see also Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1238 n.19 (10th Cir. 2002) (stating that the requirement for preparing a supplemental EA is the same as for preparing a supplemental EIS), *rev’d on other grounds*, 542 U.S. 55 (2004).

⁶³ *Montana Trout Unlimited*, 178 IBLA 159, 171 (2009).

⁶⁴ *See id.* (“Given the paucity of supporting documentation in this record, we are unable to determine whether BLM has taken the requisite hard look at new information and, accordingly, set aside BLM’s decision and remand this case for action consistent with this holding.”).

⁶⁵ *See* Draft RMPA-EA, Ch. 2 at 27 (proposing both the Warrenella Road Gate Parking Area and the Marina Ranch Gate Parking Area under the action alternatives (Alternatives

parking areas “to disperse visitor use and reduce potential for concentration of impacts at a singular parking area.”⁶⁶

Given the importance of concurrently building both the Warrenella Road Gate and the Marina Ranch Gate Parking Areas⁶⁷ and the potential environmental impacts of building only the Warrenella Road Gate Parking Area,⁶⁸ BLM’s inability to build the Marina Ranch Gate Parking Area was new information or changed circumstances that imposed a duty on BLM to take a “hard look” at whether an additional NEPA analysis was required.⁶⁹ Yet, there is no evidence that BLM took a “look”—much less a “hard look.” Instead, the evidence shows BLM gave the “false impression”⁷⁰ that the Marina Ranch Gate Parking Area was still going to be built,⁷¹ or there was a possibility of it being built, when it issued the DR and approved IM MA-REC-23.⁷²

B and C)); Proposed RMPA-EA, Ch. 2 at 31 (proposing both the Warrenella Road Gate Parking Area and the Marina Ranch Gate Parking Area under the action alternatives (Alternatives B, C, and D)).

⁶⁶ Proposed RMPA-EA, Ch. 1 at 13.

⁶⁷ See BLM’s January 2021 Letter at unpag. 2 (BLM conceding that the inability to build the Marina Ranch Gate Parking Area “could be detrimental to the viability of the larger RMPA”).

⁶⁸ See Proposed RMPA-EA, Appendix G, Cotoni-Coast Dairies Visitor Use Estimates, July 2020 at 4,

https://eplanning.blm.gov/public_projects/120855/200302280/20026719/250032921/RMPA_Appendix%20G_proposed.pdf (last visited Aug. 29, 2022) (indicating that Warrenella Road Gate Parking Area and the Marina Ranch Gate Parking Area would aid in splitting the anticipated visitors between locations north and south of the town of Davenport); Appendix A, Figure 5D (map depicting the Warrenella Road Gate Parking Area and the Marina Ranch Gate Parking Area in relation to the town of Davenport); see also Proposed RMPA-EA, Ch. 4 at 18 (noting that the “long-term impact on wildlife” will depend, in part, on the “distribution of the trails and parking areas”).

⁶⁹ See *Marsh*, 490 U.S. at 385 (“[R]egardless of its eventual assessment of the significance of th[e] [new] information, the [agency] had a duty to take a hard look at the proffered evidence.”).

⁷⁰ See Fischer Decl. ¶ 15.

⁷¹ See DR at 20 (“Establish a Day Use Site (parking) at Marina Ranch Road, incorporating parking opportunities for equestrian use.”); *id.* at 21 (“Obtain easement for public access across agricultural area adjacent to Marina Ranch Road and make capital improvements necessary to support increased vehicle traffic and meet public safety standards.”).

⁷² *Id.* at 7 (“The BLM’s proposed Marina Ranch Gate access point requires approval of TPL for improvements to a 0.10-mile section of road that traverses their privately-owned agricultural parcel. . . . In December 2020, the BLM learned that TPL was reconsidering

BLM does not address whether it took the necessary “hard look” at new information. Rather, it argues that an additional NEPA analysis was not required.⁷³ In support, BLM states that it has not made any changes to the Marina Ranch Gate Parking Area “requiring supplementation.”⁷⁴ As an initial matter, BLM’s statement that it has not made any changes to the Marina Ranch Gate Parking Area misses the point. The point is not whether changes have been made to the Marina Ranch Gate Parking Area. Instead, the point is that the Marina Ranch Gate Parking Area will not be built and BLM never considered the environmental effects of building the Warrenella Road Gate Parking Area without also building the Marina Ranch Gate Parking Area.

BLM’s argument that a supplemental NEPA analysis was not required similarly misses the point. As explained above, new information or changed circumstances do not always trigger an additional NEPA analysis. Instead, what is required is that an agency take a “hard look” at whether the new information or changed circumstances mandate that an additional NEPA analysis be performed.⁷⁵ Because there is no evidence that BLM took that “hard look,” its argument that a supplemental NEPA analysis was not required is unavailing.

In sum, TPL’s refusal to grant the necessary easement for the Marina Ranch Gate Parking Area meant that parking area would not be built. This was new information or changed circumstances requiring BLM to take a “hard look” at whether an additional NEPA analysis was required before issuing its DR, given that BLM never considered the environmental effects of building the Warrenella Road Gate Parking Area without also building the Marina Ranch Gate Parking Area. Because BLM never took this “hard look,” it failed to comply with NEPA and the regulations implementing NEPA in approving IA MA-REC-23. Based upon this conclusion, there is no need to address Appellants’ remaining challenges to IA MA-REC-23.⁷⁶

their support for this road improvement project. Discussions are ongoing with TPL. Therefore, the BLM has kept the Proposed Marina Ranch Gate access point in the RMPA should TPL authorize this road improvement project at a later date.”).

⁷³ BLM’s Answer at 10-11.

⁷⁴ *Id.* at 11.

⁷⁵ See *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000) (stating that “[w]hen new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require” a supplemental NEPA analysis (quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980))).

⁷⁶ See *Center for Native Ecosystems*, 170 IBLA 331, 351 (2006) (stating that BLM’s failure to comply with one of NEPA’s requirements obviated the need to address the appellant’s remaining arguments).

II. Appellants' Challenge to IA MA-REC-24 Seeks an Advisory Opinion and Must Be Dismissed

Appellants contend that BLM violated the Federal Land Policy and Management Act (FLPMA)⁷⁷ in approving IA MA-REC-24, the Marina Ranch Gate Parking Area.⁷⁸ But as Appellants repeatedly stress, implementation of IA MA-REC-24 is impossible because TPL will not grant the easement necessary for the Marina Ranch Gate Parking Area.⁷⁹ Given that implementation of IA MA-REC-24 is impossible, any opinion we would render as to its lawfulness would be purely advisory. Yet, we are prohibited from issuing such opinions.⁸⁰ Accordingly, we must dismiss Appellants' challenge to IA MA-REC-24.⁸¹

CONCLUSION

Based upon the foregoing, we set aside BLM's approval of IA MA-REC-23 and remand that matter, we dismiss Appellants' challenge to IA MA-REC-24, and we deny Appellants' petition for stay as moot.

Steven J. Lechner
Acting Chief Administrative Judge

I concur: _____
Silvia Riechel Idziorek
Acting Deputy Chief Administrative Judge

⁷⁷ 43 U.S.C. §§ 1701-1787.

⁷⁸ SOR at 21-22.

⁷⁹ See, e.g., SOR at 1, 7-9, 21-22.

⁸⁰ See *Statoil Oil & Gas, LP (On Reconsideration)*, 192 IBLA 241, 253 (2018) (“It is not within the province of the Board to render advisory opinions, since it requires us to address hypothetical questions not properly presented by the appeal.”).

⁸¹ See *Amax Coal Co.*, 131 IBLA 324, 327 (1994) (ruling that when an appeal “constitutes, in essence, a request for an advisory opinion,” it must be dismissed).