



WILDERNESS WATCH

Keeping Wilderness Wild

March 25, 2019

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Sent via email to: wfoweb@blm.gov and bgaard@blm.gov

Dear Mr. Gaard:

We are commenting on the Purdue Orbital Launch and Loon LLC Balloon Recovery Environmental Assessment (EA) and its associated Minimum Requirements Decision Guide (MRDG). While we applaud the MRDG's apparent emphasis on non-motorized/mechanized retrieval of balloons from wilderness, the recent "emergency" helicopter-assisted recovery of a downed balloon indicates that wilderness-degrading retrievals are more likely to be authorized than wilderness-compatible alternatives. Further, it appears that these prohibited, wilderness-degrading activities are likely to be authorized without NEPA review or public notice / opportunity to comment. Accordingly, we have several concerns with these documents and their conclusions as discussed below.

Introduction

The EA functions both as a post hoc NEPA analysis of a motorized balloon retrieval by Loon LLC as well as a prospective programmatic document looking at impacts from unintended balloon landings in Wilderness. The following points summarize our main concerns:

- A programmatic EA and MRDG are insufficient to consider site-specific wilderness impacts from balloon landings and retrieval efforts in wilderness—this is particularly true of any retrieval that may involve mechanized or motorized means—but the EA implies that site-specific requests for prohibited uses to retrieve balloons will be addressed internally, without further NEPA review or opportunity for public comment. A site-specific NEPA analysis, with public notice and opportunity to comment, should be performed for any prohibited use authorizations in wilderness.
- The EA does not analyze the site-specific action that recently occurred without NEPA review or the opportunity to comment.

The EA purports to analyze the wilderness landing and motorized retrieval of a Loon LLC balloon that already occurred. However, there is no factual or legal analysis in the EA or in the MRDG detailing this event and the actions taken to recover the balloon. There is likewise no disclosure or discussion about why this office declared the landing an emergency and authorized a helicopter intrusion in wilderness without NEPA analysis or an opportunity for public comment. There is no discussion about how BLM will avoid such a scenario in future cases.

- There is no need to allow motorized or mechanized retrieval of balloons or rockets in Wilderness. The EA does not, but should, rigorously explore non-motorized/mechanized retrieval alternatives as part of proactive permitting conditions—it instead focuses solely on launch permitting with only a proposed action (permit launches) and no action (don't permit launches).
- A recreational special use permit does not authorize illegal use in Wilderness, yet that is apparently what would occur.
- Measures to prevent unintentional landing of rockets and balloons in Wilderness or other sensitive areas are not adequately explored or detailed. Further, the probability of a balloon landing in Wilderness or other conservation areas is downplayed even though this office just recently authorized helicopter removal (a prohibited use) of a balloon (a prohibited installation) from wilderness.

The programmatic EA and MRDG are insufficient for authorizing prohibited activities in wilderness

The EA is not a site-specific National Environmental Policy Act (NEPA) analysis and cannot satisfy the agency's obligations to take a hard look at direct, indirect, and cumulative impacts or rigorously explore alternatives to wilderness-degrading activities. The Manual clearly notes that NEPA analysis is required for site-specific (BLM Manual 6340 1.6D3 and 4):

3. NEPA Compliance

In conformance with BLM Handbook H-1790-1, Appendix 5, if any of the “extraordinary circumstances” are applicable to the action being considered, either an EA or an EIS must be prepared for the action. Among these “extraordinary circumstances” are actions that may “have significant impacts on...wilderness areas.” The BLM interprets this language to mean that a categorical exclusion cannot be used to approve any action in a wilderness that would authorize a use listed in 1.6.B.2 of this manual: any commercial enterprise or service; any permanent or temporary road; the use of any motor vehicle, motorized equipment, or motorboat; the landing of any aircraft or the picking up or dropping off of people or material from an aircraft; the use of any other form of mechanical transport; the building or placement of any structure or installation. In addition, a categorical exclusion cannot be used to approve any action in a wilderness that may have a significant impact to wilderness character.

See also High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 641 (2004) (impacts to wilderness constitute an extraordinary circumstance requiring an EA or an EIS). Further, the following section, 4. Public Notification (BLM Manual 6340 1.6D4) states the agency, “must provide

public notice of proposed actions within wilderness areas.” ... “Any substantive comments from the public (e.g. NEPA scoping comments), solicited or not, should be considered during the NEPA process.” ... Even more important, “The notice should include enough information for the recipient to understand the purpose, location, nature, size, and expected implementation date of the proposed action.”

Thus, the current EA can't function as the NEPA analysis for site-specific retrievals of balloons (or rockets) in Wilderness. Nowhere in the EA are the specifics such as the “location, nature, size, and expected implementation date of” site-specific retrievals, because those are not known. Further, we don't know how many times BLM will authorize landings of helicopters to retrieve balloons on a case-by-case basis.

It appears that the Purdue Orbital balloon launch site is the same as the rocket launch site. Unlike the Loon Balloon, which apparently launches at or near the Winnemucca airport, the Purdue rockets and balloons would launch very near sensitive areas including Wilderness.

For these reasons, the cumulative impacts discussion is also insufficient. The EA simply states that “[c]umulative impacts have been analyzed in the DOI-BLM-NV-W030-2017-0016-EA, please refer to the document for analysis.” EA at 17. But that document does not address balloon landings and recovery in wilderness. It does not address the recent landing and helicopter recovery that recently occurred. And, it does not analyze future landings and recovery efforts in the context of compounding motorized intrusions in wilderness. A federal judge in Idaho acknowledge the cumulative impacts from helicopter intrusions noting, “the next helicopter proposal in [the same wilderness] will face a daunting review because it will add to the disruption and intrusion of this [helicopter-assisted] project.” *Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F.Supp.2d 1264, 1270 (D. Id. 2010). Accordingly, the direct and cumulative impact of helicopter intrusions must not be minimized and must not be analyzed in a vacuum.

The programmatic EA and MRDG are insufficient to consider site-specific wilderness impacts from balloon landings and retrieval efforts in wilderness—this is particularly true of any retrieval that may involve mechanized or motorized means—but the EA implies that site-specific requests for prohibited uses to retrieve balloons will be addressed internally, without further NEPA review or opportunity for public comment. A site-specific NEPA analysis, with public notice and opportunity to comment, should be performed for any prohibited use authorizations in wilderness.

The EA is deficient in other ways as well. We are not told how heavy the balloons or rockets are and why the EA suggests a difference in recovering them. We are told rocket recovery would be only by non-motorized and non-mechanized means as per the earlier EA. We are led to believe the Purdue Orbital entity operates both balloons and rockets. Would the rockets be launched from balloons or from the ground? The EA is not clear on this point when reviewing page 5. Further, REC-28, a requirement of the RMP (see EA page 7), states rocket launches will occur only from the rocket launch area, not from the air. Regardless, it would stand to reason the balloons would weigh less than a full rocket payload.

The EA does not analyze the site-specific helicopter-assisted removal action that occurred or use the factual and legal circumstances of that action to craft a reasoned policy for similar actions in the future.

The EA purports to analyze the wilderness landing and motorized retrieval of a Loon LLC balloon that already occurred. However, there is no factual or legal analysis in the EA or in the MRDG detailing this event and the actions taken to recover the balloon.

There is likewise no disclosure or discussion about why this office declared the landing an emergency and authorized a helicopter intrusion in wilderness without NEPA analysis or an opportunity for public comment. There is no discussion about how BLM will avoid such a scenario in future cases.

Why was the balloon landing and retrieval considered an emergency, and why should we not expect a similar finding for future landings? It is highly unlikely that the unintentional landing of equipment in wilderness would satisfy the Wilderness Act's stringent threshold for emergency. Section 1133(c) of the Wilderness Act is clear that, for purposes of authorizing normally prohibited activities such as the use of helicopters, an emergency constitutes situations "involving the health and safety of persons within the area." It does not encompass commercial expediency, aesthetic concerns, or convenience. As one federal judge put it, "[i]t would be a rare case where machinery as intrusive as a helicopter could pass the test of being 'necessary to meet minimum requirements for the administration of the area.'" *Wolf Recovery Found. v. U.S. Forest Serv.*, 692 F.Supp.2d 1264, 1268 (D. Id. 2010). There is no discussion in the EA even attempting to satisfy this high threshold—either for the already completed action or for future actions. Instead, the EA appears to downplay the significance of authorizing motorized intrusions in wilderness by noting that "recovery efforts may temporarily impact the Wilderness characteristic, but no lasting effects are anticipated." EA at 13. And, it appears to circumvent NEPA review of prohibited activities by stating, "[a]s a result of the uniqueness of each balloon landing, [removal] alternatives will be selected on a case-by-case scenario" by the field office without further NEPA review, public notice, or the opportunity to comment.

Similarly, there is no discussion in the EA about why helicopter removal was necessary for the completed action. Why was a non-motorized/mechanized alternative not utilized for removing the balloon? Why couldn't the balloon and materials be removed by foot or horseback? Why would any future balloon landing be different? What are the factors that necessitated helicopter intrusion?

There is no need to allow motorized or mechanized retrieval of balloons or rockets in Wilderness. The EA must rigorously explore wilderness-compatible recovery alternatives.

As discussed above, the accidental landing of a rocket or balloon is not an "emergency" that justifies the use of a helicopter. EA at 6. The Wilderness Act is clear that the use of motorized or mechanized equipment is limited to "emergencies involving the health and safety of persons within the area," not the retrieval of equipment from an unintended landing of a balloon in Wilderness. The BLM Manual also does not allow for motorized or mechanized retrieval of a balloon.

Furthermore, the EA clearly would defer retrieval of the balloon "until lambing season is over" for bighorns, so there can be no conceivable emergency associated with balloon retrieval in

Wilderness. Rather, the EA posits a view that it is more important to not damage a balloon that trespasses into public land rather than protect Wilderness. The public and Wilderness suffer in order to accommodate a private, special interest.

In any case, the EA is inconsistent and unclear on whether mechanized/motorized use would be allowed in any instance for balloon or rocket recovery. The EA states:

When a balloon lands within BRFO Wilderness or Wilderness Study Areas a balloon landing representative (Purdue Orbital or Loon LLC) must immediately contact a BRFO representative prior to any recovery. The proponent and BLM staff will work together to ensure balloons are removed in a safe, timely, and ecologically sound manner. All recovery efforts will be required to adhere to the relevant stipulations attached in appendix A & B.

EA at 6. Appendix A (EA page 28) in point 45 prohibits any motorized or mechanized access in Wilderness. The earlier EA that applies to rocket recovery (EA page 6 references this EA) also requires that recovery be done by non-motorized and non-mechanized means. However, the MRDG and the EA elsewhere allow for the balloon recovery (and possibly rocket recovery for Purdue Orbital?) via motorized or mechanized means on a case-by-case basis. Presumably, such a decision would be made with no more NEPA analysis, no public involvement and no new MRDG.

There is no alternative, like that of the earlier EA, which only permits recovery of balloons and/or rockets by non-motorized and non-mechanized means. The EA and MRDG lack basic information on which to make an informed decision because they do not detail under what circumstances a motorized or mechanized recovery is an emergency. Even if a balloon were to pose a threat to someone in the Wilderness, it seems hardly necessary to retrieve it by motorized or mechanized means.

Since it appears that the Purdue Orbital balloons are somehow associated with rockets, it seems odd that motorized use would be allowed for balloon part of the recovery efforts.¹ Again, there is no emergency involving recovery of rockets or balloons from Wilderness. This raises the question as to why balloons are treated differently than rockets when they are presumably lighter weight than rockets. Why is it that some rocket users required to follow the Wilderness Act when one of their rockets lands in Wilderness yet BLM allows others to violate the law?

According to online information about the loon balloon, the equipment is lightweight (see <https://www.google.com/intl/es419/loon/how/>, <https://loon.co/technology/>) and could be easily removed without motorized equipment or aircraft. Likewise, the balloon itself could be segmented and packed out of the Wilderness.

The information in the EA has balloons measuring 50 by 80 feet. Such a balloon could be folded up or cut into smaller pieces for removal. The proponent must bear the cost of removal by non-motorized and non-mechanized means in Wilderness, regardless of whether the landing was intentional or not. It is simply a cost of doing business on public lands.

¹The other possibility is that Purdue Orbital is allowed motorized use while other rocket users are not. The lack of specificity and clarity in the EA can lead to different interpretations.

For example, suppose a special use recreation permit were granted for a two-day motorcycle rally on public lands. If a large tent for the event were blown by the wind into Wilderness, the group would not be authorized to go and retrieve the tent via motorized means. They would not be authorized to do so even though, in this hypothetical case, it was not intentional.

Special Recreation Permit

BLM cannot grant a recreational use permit to entities where they would be authorized to violate the Wilderness Act in a non-emergency situation. Recovery of a balloon (or possibly a rocket) by prohibited means is not an emergency. If, under some bizarre circumstance, a balloon is a threat to someone in the Wilderness, only BLM is authorized to take action, not a private entity like Purdue Orbital or Loon LLC.

It is also unclear that rocket launches and any associated balloon activities are recreational in nature. They seem to fall under another category of commercial use.

Measures to prevent unintentional landing of rockets and balloons in Wilderness or other sensitive areas

The EA mentions the idea of measures to avoid landing balloons or rockets in Wilderness or other conservation units, but then does not say what they area. Rather, the measures are mainly directed at mitigating damage from the activity, rather than avoid damage. One is delaying retrieval until critical seasons for various species of wildlife have passed. However, there are no measures to mitigate or prevent damage to Wilderness, most likely because of the “level of unpredictability” of a landing in Wilderness. EA at 13. The unpredictability should also apply to wildlife habitat, but at least the EA is honest in showing how unimportant protecting Wilderness is to BLM in spite of congressional direction.

In any case, some of the wildlife protection measures may not be effective if a landing in sensitive habitat does occur. For example, “RM 1: If possible, avoid landing balloons and/or platforms in important Greater sage-grouse (GRSG) General Habitat Management Areas (GHMA), Other Habitat Management Areas (OHMA), bighorn sheep habitat or sensitive raptor nesting habitat.” How do you avoid landing in those areas? Such a vague statement is practically meaningless. Other measures should have been considered. For example, requiring an altitude limit would be one possible measure. Another would be to limit the size of rockets or balloons so they couldn’t go as far astray. Another would be a prohibition on rocket and/or balloon launches except in times of calm to avoid prevailing winds affecting their flight toward Wilderness, other conservation units, or important wildlife habitat.

Nonetheless, the fact that the launch site (see EA map on page 20) is in a National Conservation Area suggests that this activity, rocket launches and landings and balloon launches and landings, is not an appropriate use of the area. The threats to wildlife and Wilderness are too great.

Why does BLM not mitigate damage to Wilderness and wildlife by requiring bonding for the launches with the understanding that BLM would remove any landings in Wilderness by non-motorized and non-mechanized means and critical wildlife habitat by means that are most

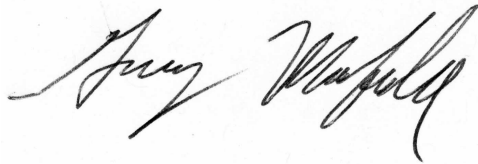
appropriate to protect wildlife? There would be no guarantee that the equipment would be returned in a usable condition. This would ensure that the proponents would take financial responsibility for their actions. Similarly, given the apparent expertise and creativity employed by the proponents, why does BLM not make non-motorized/ mechanized recovery from wilderness a condition of permitting, whether it is BLM or the proponent performing the recovery? If there is risk to wilderness in these activities, BLM should require the proponents to be proactive in ensuring there is a recovery plan that is wilderness-compatible. Such proactive conditions puts the proponent on notice and reserves prohibited uses (such as helicopter and motorized intrusions) for those situations where there truly is a life-threatening emergency.

Summary

The no-action alternative is the only option that protects Wilderness, wildlife and other natural features. That is because the EA failed to look at an action alternative that did not allow for motorized or mechanized retrieval in Wilderness and included meaningful wildlife protection measures.

Rather it seems public lands are being held hostage to the desires of special interests that want to operate with impunity on public land. There is absolutely no need to allow motorized or mechanized access for balloon (or rocket) retrieval in Wilderness. That does not rise to the level of an emergency under any circumstance. The best path is to prohibit these activities. If perchance some balloon stray into Wilderness or wildlife habitat, it is the responsibility of the owner to pay for recovery and cleanup by means that don't violate our nation's environmental laws.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Macfarlane". The signature is written in a cursive, flowing style.

Gary Macfarlane