IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, *et al.*,

Plaintiffs,

v.

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, *et al.*,

Defendants,

and

American Petroleum Institute,

Applicant-Intervenor.

Case No. 1:15-cv-0209-JOB

MEMORANDUM OF APPLICANT-INTERVENOR AMERICAN PETROLEUM INSTITUTE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Jon J. Indall
Joseph E. Manges
Comeau Maldegen Templeman & Indall LLP
Coronado Building
141 East Palace Avenue
Santa Fe, NM 87504-0669
(505) 982-4611

Steven Rosenbaum (*Pro Hac Vice pending*)
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-5568

Attorneys for Applicant-Intervenor
American Petroleum Institute

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Regulations

Other Authorities

Applicant-Intervenor American Petroleum Institute ("API") respectfully submits this Memorandum of Law in opposition to Plaintiffs' Motion for a Preliminary Injunction.

INTRODUCTION

API is the primary national trade association of the oil and natural gas industry, representing more than 625 companies involved in all aspects of that industry, including the exploration, production, shipping, transportation, and refining of crude oil and natural gas. Together with its member companies, API is committed to ensuring a strong, viable U.S. oil and natural gas industry capable of meeting the energy needs of our Nation in an efficient and environmentally responsible manner.[1]

This lawsuit challenges the decisions of the United States Department of the Interior's Bureau of Land Management ("BLM") approving more than 200 Applications for Permits to Drill ("APD") into the Mancos Shale/Gallup Formations ("Mancos Shale") in New Mexico. *See* Supplemental and Amended Petition for Review of Agency Action ("Amended Petition") [Dkt. 13-1] ¶ 1. Plaintiffs claim in their Amended Petition that BLM's approval of the APDs violated three statutes—the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), and the Administrative Procedure Act. *Id.* Plaintiffs sweepingly ask this Court, *inter alia*, to (1) declare BLM's approval of the APDs in violation of NEPA and NHPA, (2) vacate ***all*** APD approvals given to date, (3) "[e]njoin ***all*** future horizontal drilling or hydraulic fracturing in the Mancos Shale" pending compliance with NEPA and NHPA, and (4) "[e]njoin BLM from approving ***any*** pending or future horizontal drilling or hydraulic fracturing in the Mancos Shale previously announced by BLM" pending compliance with NEPA and NHPA. *Id.*, Relief Requested ¶¶ A, B, C & D (emphasis added).

[1] *See* Declaration of Geoffrey Brand, Ph.D. ("Brand Decl.") ¶ 3.

Although Plaintiffs' Amended Petition alleges violations of NEPA, NHPA and the Administrative Procedure Act, the instant motion for a preliminary injunction is based solely on BLM's alleged violations of NEPA. API will demonstrate below that BLM's actions complied with NEPA but will not undertake to demonstrate that BLM's actions also complied with NHPA and the Administrative Procedure Act. Despite the fact that Plaintiffs' motion relies solely on alleged violations of NEPA, the injunction Plaintiffs seek is draconian and extraordinarily broad. Specifically, Plaintiffs seek to enjoin:

> (1) all ground disturbance, construction, drilling, and other associated operations on all APD approvals challenged herein, and (2) future APD approvals targeting the Mancos Shale formation pending resolution on the merits.

See Plaintiffs' Memorandum In Support of Motion for Preliminary Injunction ("Pls' Mem.") [Dkt. 16-1] at 26. In other words, Plaintiffs are asking the Court to order an immediate halt to ***all*** drilling and related activities in the Mancos Shale, whether ongoing or in the future, for an indefinite period time.

Plaintiffs' request for relief, if granted, would wreck devastating injury on API members, including but not limited to existing and would-be future permit holders engaged in oil and gas extraction, and the many service providers to those permit holders. Such a result would also be sharply inimical to the interests of the citizens of New Mexico and the Nation, which derive enormous economic and employment benefits from the activities Plaintiffs seek to enjoin. *See generally* Brand Decl. ¶¶ 6-20 and Section III *infra*.

Moreover, Plaintiffs' motion is devoid of legal merit. Its characterization of BLM's actions is inaccurate, incomplete and misleading. BLM scrupulously adhered to NEPA requirements in approving APDs in the Mancos Shale. BLM looked carefully at the physical and

geological characteristics of the Mancos Shale[2] and subsequently prepared a detailed, site-specific environmental assessment ("EA") for each approved APD. Each of the site-specific EAs supporting the APDs at issue in this case included a finding, in compliance with NEPA, that approval of the APD would not result in significant environmental harm. In so concluding, the EAs explicitly addressed the potential use of hydraulic fracturing. Having done so, all NEPA requirements were satisfied.

Moreover, BLM has conducted extensive studies on the environmental risks and benefits of hydraulic fracturing. Indeed, just two months ago, on March 26, 2015, after years of study and numerous public hearings, BLM issued a Final Rule that regulates all aspects of hydraulic fracturing on Federal and Indian Lands, a fact that Plaintiffs fail to even mention in their motion papers.[3] This Final Rule, which takes effect on June 24, 2015, "applies to ***all*** wells regulated by the BLM" including those within the Mancos Shale.[4]

In sum, hydraulic fracturing has been practiced and studied for decades. BLM's approval of hydraulic fracturing in the Mancos Shale is fully compliant with NEPA. The legal merits and equities both compel the conclusion that Plaintiffs' requested injunction should be denied.

---

[2] "Oil and Gas Resource Development for San Juan Basin, New Mexico, A 20-year, Reasonably Foreseeable Development (RFD) Scenario Supporting the Resource Management Plan for the Farmington Field Office, Bureau of Land Management," Pls' Ex. 1 [Dkt. 16-2] at 5.22-5.33.

[3] "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule," 43 C.F.R. § 3160, *et seq.*, 80 Fed. Reg. 16,128 (Mar. 26, 2015), *as corrected*, 80 Fed. Reg. 16,577 (Mar. 30, 2015).

[4] 80 Fed. Reg. at 16,131 (emphasis added).

THE FACTUAL AND REGULATORY BACKGROUND

A. The Baseline RFDs and the New Final BLM Hydraulic Fracturing Rule.

In 2001, BLM issued a 20-year Reasonably Foreseeable Development Scenario ("RFD") describing the stratigraphy of the Mancos Shale.[5] The study noted that the conventional wells in the area were "approaching depletion" but that, depending on technological progress, "the next advancement in horizontal well technology could be drilling multi-laterals or hydraulic fracturing [of] horizontal wells."[6]

Subsequent improvements in hydraulic fracturing and horizontal drilling technology did indeed reinvigorate the successful extraction of oil and natural gas from sites once thought to be depleted. BLM noted the significance of these developments to oil and gas extraction from the Mancos Shale in a revised RFD published in 2014.[7] That document's Executive Summary states that the Mancos Shale "has become of interest as a major target for future exploration and development," with a potential "1.5 billion barrels of oil recoverable from this play."[8] The first horizontal wells in the Mancos Shale were developed in 2010; by October 2014, that number had increased to 70 with an additional 99 APDs filed in the first seven months of 2014.[9]

The new developments and opportunities presented by hydraulic fracturing in the Mancos Shale paralleled developments and opportunities in other oil and gas producing areas throughout the country. In response to these developments, BLM embarked on an examination of the

---

[5] Pls' Ex. 1 [Dkt. 16-2] at 5.22-5.23.

[6] *Id.* at 8.3.

[7] Pls' Ex. 2 [Dkt. 16-3] at 9.

[8] *Id.* at Executive Summary, *available at* http://www.blm.gov/style/medialib/blm/nm/field_offices/farmington/farmington_planning/ffo_planning_docs/rmpa_mancos.Par.52727.File.dat/SJB%20Mancos%20RFD%20final%20report-10.27.pdf

[9] Pls' Ex. 2 [Dkt. 16-3] at 8-9.

benefits and environmental risks associated with hydraulic fracturing. These efforts, and BLM's conclusions, are catalogued in a Final Rule and associated commentary published in the Federal Register on March 26, 2015.[10] The Final Rule, which applies to all wells operated on BLM land, is based on BLM's own expertise and analysis, numerous public hearings, and a review of public comments received "from more than 1.5 million individuals and groups."[11] This undertaking was prompted by BLM's belief that the increased use of hydraulic fracturing was a topic of public concern and warranted an in-depth look at whether new regulations were needed to ensure that the public's interest was protected:

> The expansion of exploration and production [by hydraulic fracturing] across the United States has significantly increased public awareness of hydraulic fracturing and the potential impacts that it may have on water quality and water consumption, and increased calls for stronger regulation and safety protocols. The BLM's engineers and field managers have decades of experience exercising oversight of these wells during the evolution of this technology. This expertise, together with input from the public, industry, state, academic and other experts discussed below, forms the basis for the decision that new rules are needed and for the requirements contained in this rule.

80 Fed. Reg. at 16,131.

The Final Rule supplements the requirements already imposed under existing regulatory requirements (*see* 43 C.F.R. § 3160, *et seq.*) and other state and federal laws.[12] The Final Rule

---

[10] *See supra* note 3.

[11] *Id.*at 16,128.

[12] *See, e.g.*, 72 Fed. Reg. 10,308, 10,328 (Mar. 7, 2007) (Onshore Oil and Gas Order Number 1: Approval of Operations); U.S. Dep't of Interior, Bureau of Land Mgmt., Onshore Oil and Gas Order Number 2: Drilling Operations on Federal and Indian Oil and Gas Leases (Nov. 18, 1988), *available at* http://www.blm.gov/style/medialib/blm/nm/programs/0/og_docs/onshore_orders.Par.55992.File.dat/ord2.pdf.

API did not agree with BLM as to the need for the new rule, in light of extensive state oversight and regulations and industry standards and best practices. But the new rule has indisputably been issued as a final rule.

"establishes new requirements to ensure wellbore integrity, protect water quality, and enhance public disclosure of chemicals and other details of hydraulic fracturing operations." 80 Fed. Reg. at 16,129. Under the Final Rule, any operator planning to conduct hydraulic fracturing must, in addition to complying with all existing regulatory requirements, do the following, among other things:

> • Submit detailed information about the proposed operation, including wellbore geology, the location of faults and fractures, the depths of all usable water, estimated volume of fluid to be used, and estimated direction and length of fractures, to the BLM with the APD or a Sundry Notice and Report on Wells (Form 3160–5) as a Notice of Intent (NOI) to hydraulically fracture an existing well;
>
> • Design and implement a casing and cementing program that follows best practices and meets performance standards to protect and isolate usable water, defined generally as those waters containing less than 10,000 parts per million of total dissolved solids (TDS);
>
> • Monitor cementing operations during well construction;
>
> • Take remedial action if there are indications of inadequate cementing, and demonstrate to the BLM that the remedial action was successful;
>
> • Perform a successful mechanical integrity test (MIT) prior to the hydraulic fracturing operation;
>
> • Monitor annulus pressure during a hydraulic fracturing operation;
>
> • Manage recovered fluids in rigid enclosed, covered or netted and screened above-ground storage tanks, with very limited exceptions that must be approved on a case-by-case basis;
>
> • Disclose the chemicals used to the BLM and the public, with limited exceptions for material demonstrated through affidavit to be trade secrets;
>
> • Provide documentation of all of the above actions to the BLM.

80 Fed. Reg. at 16,129-30; 43 C.F.R. Part 3160, *et seq.* The benefits of the Final Rule were summarized by BLM as follows:

> the rule will significantly reduce the risks associated with hydraulic fracturing operations on Federal and Indian lands, particularly risks to surface waters and usable groundwater. The operational requirements of the final rule generally conform to industry guidance on hydraulic fracturing and state regulations. The operational requirements should ensure that hydraulic fracturing is conducted in a manner that minimizes any environmental and health risks.

80 Fed. Reg. at 16,203.

B. The APD Approval Process.

Plaintiffs challenge BLM's approval of over 200 APDs granted between April 11, 2011 and April 15, 2015.[13] They contend that all of these APDs violated NEPA because the EAs upon which the approvals were based were "tier[ed] to and incorporate[d] by reference" the 2003 Resource Management Plan and Environmental Impact Statement ("2003 RMP/EIS"). According to Plaintiffs, tiering to the 2003 RMP/EIS violated NEPA because the 2003 RMP/EIS did not specifically "analyze [the effects of] horizontal drilling and hydraulic fracturing."[14]

As explained below, Plaintiffs NEPA argument is incorrect as a matter of law. (*See* Section II, *infra*.) But Plaintiffs' NEPA argument also rests on an inaccurate description of the rigorous process employed by BLM in approving the APDs at issue in this case.

BLM's process for approving APDs is described in the Final Rule.[15] After BLM develops an initial RMP and EIS (as it did here in 2003), BLM may then make designated parcels within the review area available for lease. When a parcel is offered for lease, it is subject to a "second NEPA review—typically through an … [EA]—to address potential impacts that

[13] *See* Susan Harvey Declaration, Pls' Ex. 6 [Dkt. 16-7] at Ex. C.

[14] Pls' Mem. at 5.

[15] *See* 80 Fed. Reg. at 16,133-136; *see also* 43 C.F.R. 3162.3-1 (describing APD approval process).

could be caused by oil and gas development within the nominated area."[16] The NEPA review "conducted at the leasing stage 'tiers' from the RMP/EIS," but, unlike the broader RMP/EIS from which it tiers, the second NEPA review is site-specific.[17] The work done to implement this second, site-specific NEPA review is described in the Federal Register:

> An interdisciplinary team consisting of resource [development] specialists develops the NEPA documentation. The interdisciplinary team visits the site to gather on-the-ground data on potential impacts and mitigation measures. … Specific mitigation measures are developed in the context of the NEPA review and are included in the notice to potential bidders of an oil and gas lease at the lease sale.

80 Fed. Reg. at 16,134. Significantly, NEPA allows BLM, as part of its site-specific environmental review, to assess whether a third round of NEPA review is necessary or appropriate. Third-round review, however, is not mandatory. If BLM's interdisciplinary team is satisfied that site development does not require additional environmental review, it may schedule a lease sale "without any further NEPA analysis":

> If the environmental review concludes with a finding that the proposed lease issuance would result in no significant impacts to the quality of the human environment (FONSI), then the lease parcel can be included in the next scheduled lease sale without any further NEPA analysis.

Id. As discussed in the next section, BLM's analysts concluded that the site-specific APD approvals at issue in this case would ***not*** result in significant impacts to the human environment and, accordingly, that the lease sales could proceed without further NEPA analysis.

[16] 80 Fed. Reg. at 16,134.

[17] The initial RMP/EIS analyses from which site-specific EAs are tiered "generally cover all the Federal land and mineral estate administered by a BLM field office." Consequently, "the [initial EIS] impact analysis is typically done on a broad scale." 80 Fed. Reg. at 16,134.

C. The Challenged APDs

Plaintiffs complain that BLM is approving "individual APDs using boilerplate EAs," Pls' Mem. at 22, but complete copies of the EAs at issue are readily available to the Court on the BLM website,[18] and a review of any one of them reveals that BLM carefully considered the possible environmental impacts associated with the ADPs at issue, including those potentially arising from the use of hydraulic fracturing. Before approving the APDs, BLM found that such approvals would not significantly impact the quality of the human environment.

The EA excerpted in Plaintiffs' Exhibit 11 provides a representative example. It relates to six APDs and four right-of-way grant applications involving three horizontal drilling pads operated by Encana Oil & Gas (USA) Inc. (the "Encana EA").[19] The full Encana EA is available on-line at http://www.blm.gov/nm/st/en/fo/Farmington_Field_Office/ffo_document_library.html.

The Encana EA is anything but "boilerplate." The Encana EA is more than 90 pages long, including a four and one half page list of "Supporting Information," and a 42-page Appendix containing site-specific vicinity maps, project area maps and aerial maps, plat descriptions of the proposed well sites, schematic drawings of proposed pipelines, and photographs of the land where the well pads would be located.[20] Although the Encana EA "tiers" to the 2003 RMP/EIS, it does so only in the most generic sense. The Encana EA merely notes that the proposed development of well sites supports the BLM policy identified in the 2003 RMP/EIS to:

---

[18] *See* U.S. Dep't of Interior, Bureau of Land Mgmt., Farmington Field Office Document Library, *available at* http://www.blm.gov/nm/st/en/fo/Farmington_Field_Office/ffo_document_library.html (last revised Apr. 22, 2015).

[19] Pls' Ex. 11 [Dkt. 16-12] at 1.

[20] *See* Environmental Assessment DOI-BLM-NM-F010-2014-0175, at 48-52 and Appendix A, *available at* http://www.blm.gov/nm/st/en/fo/Farmington_Field_Office/ffo_document_library.html (last revised Apr. 22, 2015).

> encourage development of mineral resources to meet national, regional, and local needs, consistent with national objectives of an adequate supply of minerals are reasonable market prices. At the same time, BLM strives to ensure that mineral development is carried out in a manner that minimizes environmental damage and provides for the rehabilitation of affected lands. (BLM 2003b, 2-2 – 2-3)

Pls' Ex. 11 [Dkt. 16-12] at 2-3. Significantly, after citing the 2003 RMP/EIS for this general policy, the Encana EA then states that "***[a]s required by NEPA, this EA addresses site-specific resources and effects of the proposed action that were not covered within the [2003 RMP/EIS]***." *Id.* at 3 (emphasis added).

Section 1.6.2 of the Encana EA contains a list of the issues analyzed and addressed in the Encana EA. These issues include, *inter alia*, "dust and equipment emissions," the isolation of groundwater resources from drilling and fracturing operations, and the impact of hydraulic fracturing on soil, vegetation, wildlife, traffic patterns, cultural resources, noise levels and public health and safety.[21]

What follows is a lengthy analysis of each of these issues and more. Section 2 of the Encana EA contains a detailed description of the proposed drilling projects, including restrictions the operator must adhere to with respect to waste disposal, the avoidance of harm to cultural sites, the protection of flora, fauna and livestock, the protection of water resources and topsoil, the regulation of air and noise pollution, etc.[22] Section 2 of the EA also describes the specific drilling plan for each well pad (p. 15); provides a timetable for completion of the wells' construction (pp. 15-16); identifies the necessary piping and how that piping will be constructed, monitored and maintained (pp. 16-17); sets forth a plan for interim reclamation of affected land

[21] *See id.* at 5.

[22] *See id. at* 7-14.

areas that are not required for production (pp. 17-18); details the expected production activities over the anticipated lifetime of active production (pp. 18-19); and analyzes the amount of land surface disturbance associated with the construction of access roads, well pads, construction zones and a pipeline corridor (pp. 19-22).[23]

Section 3 of the Encana EA is titled "Affected Environment and Environmental Consequences."[24] As this title suggests, Section 3 analyzes several site-specific environmental parameters that could be effected by approval of the APDs, including the cumulative impacts on air quality (Sections 3.1.1 and 3.1.2); soil resources (Sections 3.2.1 and 3.2.2); groundwater resources (Sections 3.3.1 and 3.3.2); upland vegetation (Sections 3.4.1 and 3.4.2); noxious weeds and invasive species (Sections 3.5.1 and 3.5.2); wildlife (3.6.1 and 3.6.2); "special status species," *i.e.*, protected species (Sections 3.7.1 and 3.7.2); "cultural resources," *e.g.*, important archeological and religious sites (Sections 3.8.1 and 3.8.2); "visual resources," *e.g.*, scenic landscapes (Sections 3.9.1 and 3.9.2); transportation, *e.g.*, road density (Sections 3.10.1 and 3.10.2); livestock (Sections 3.11.1 and 3.11.2); the local economy (Sections 3.12.1 and 3.12.2); public health and safety (Sections 3.13.1 and 3.13.2); and noise levels (Sections 3.13.1 and 3.13.2).[25]

The analyses outlined above look specifically at the effects of hydraulic fracturing. They are not limited to or dependent on the earlier analysis of conventional drilling in the 2003 RMP/EIS. For example, in discussing the potential effects of hydraulic fracturing on groundwater resources, the Encana EA notes that hydraulic fracturing is "a common process in

[23] *See id.* at 15-22.

[24] *See id.* at 24.

[25] *See id.* at 24-47.

the San Juan Basin and applied to nearly all wells drilled."[26] BLM concludes, based on a site-specific analysis of the geology and hydrology presented, that the proposed APDs will not adversely affect groundwater resources in the Mancos Shale:

> The producing zone targeted by the proposed project is well below any underground sources of drinking water. The Mancos Shale formation is also overlain by a continuous confining layer. The geological confining layer is the Lewis Shale formation, which is located above both the Mancos Shale and Mesaverde formations. The Lewis Shale formation provides an impermeable layer that isolates the Mancos Shale and Mesaverde formations from both identified sources of drinking water and surface water. On average, the total depth of the proposed well bores would be about 5,000 feet below the ground surface. Fracking in the Basin Mancos formation is not expected to occur above depths of 4,000 feet below the ground surface. Fracking could possibly extend into the Mesaverde formation overlying the Basin Mancos; however, the formation has not been identified as an underground source of drinking water based on its depth and relatively high levels of total dissolved solids. ***No impacts to surface water or freshwater-bearing groundwater aquifers are expected to occur from fracking of the proposed wells.***[27]

Based on the analyses reflected in the Encana EA, including the Supporting Information listed at pages 48-52, BLM concluded that no further environmental assessments were required before approving the requested APDs. A BLM field officer thus issued a "Finding of No Significant Impact" ("FONSI") attesting to BLM's finding that the requested approvals did not require an EIS:

> [BLM] ha[s] determined that that the proposed action, as described in the EA will not have any significant impact, individually or cumulatively, on the quality of the human environment. ***Because***

[26] *Id.* at 30.

[27] *Id.*

> ***there would not be any significant impact, an environmental impact statement is not required***.[28]

ARGUMENT

I. THE STANDARD OF REVIEW

Plaintiffs concede that BLM's decision to rely upon its EAs, and not to require an additional EIS, must be reviewed under the deferential "arbitrary and capricious" standard embodied in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See* Pls' Mem. at 18 n.35. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency decision is not "arbitrary and capricious" unless the agency:

> relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). "Rather, the agency action under review is 'entitled to a presumption of regularity.'" *Weiss v. Kempthorne*, 580 F. Supp. 2d 184, 188 (D.D.C. 2008) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)).

Moreover, when, as here, the "agency is evaluating scientific data within its technical expertise, an extreme degree of deference to the agency is warranted." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (citation and internal quotation marks omitted). *See also, e.g., Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S.

[28] The FONSI is attached to the Declaration of Jon J. Indall ("Índall Decl.") as Exhibit 1 (emphasis added). It is also available at http://www.blm.gov/nm/st/en/fo/Farmington_Field_Office/ffo_document_library.html.

87, 103 (1983) ("When examining this kind of scientific determination … a reviewing court must generally be at its most deferential."); *Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d 120, 129 (D.C. Cir. 1985) ("When a court considers the sufficiency of an agency's environmental analysis, the court is not to rule on the relative merits of competing scientific opinion.") (citation and internal quotation marks omitted); *Miami-Dade Cnty. v. U.S. EPA*, 529 F.3d 1049, 1065 (11th Cir. 2008) (court "must look at the agency's decision not as the chemist, biologist, or statistician that it is qualified neither by training nor experience to be, but rather as a reviewing court exercising certain minimal standards of rationality" (citations and quotation and alteration marks omitted)). The deference to agency expertise extends to an agency's choice of methodology, to which a court "must defer . . . so long as it bears a rational relationship between the method and that to which it is applied." *Pub. Emps. for Envtl. Responsibility v. U.S. Dep't of the Interior*, 832 F. Supp. 2d 5, 26 (D.D.C. 2011) (citations and quotation and alteration marks omitted).

Thus, in considering Plaintiffs' NEPA claim in this case, the Court's "inquiry is not whether it agrees with [BLM's] actions, or whether it would have proceeded differently had it been standing in [BLM's] shoes . . . ." *Defenders of Wildlife v. BOEMRE*, 871 F. Supp. 2d 1312, 1321 (S.D. Ala. 2012). Instead, the question is whether Plaintiffs have met their burden of showing that BLM's decision to approve the APDs in reliance upon the EAs, without conducting an additional EIS, was arbitrary or capricious. *Id.* at 1321–22; *see also City of Olmsted Falls v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002) ("The party challenging an agency's action as arbitrary and capricious bears the burden of proof." (citations and quotation and alteration marks omitted)). Plaintiffs have not met their burden here.

II. BLM'S DECISION TO APPROVE THE CHALLENGED APDS DID NOT VIOLATE NEPA AND WAS NOT ARBITRARY AND CAPRICIOUS.

BLM has complied with NEPA, and its decisions approving the APDs at issue in this case were not arbitrary and capricious. The law in the 10th Circuit and elsewhere is clear that an agency is not required to conduct an EIS where it conducts an EA and issues a FONSI. That is precisely what occurred in this case. BLM's decision to proceed on the basis it did is a factual determination within the agency's expertise and, accordingly, is reviewed under the deferential arbitrary and capricious standard of review:

> An agency's decision to issue a FONSI and not prepare an EIS is a factual determination which implicates agency expertise and accordingly, is reviewed under the deferential arbitrary and capricious standard of review. In our review, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one.

Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205, 1213 (10th Cir. 2002) (internal quotation marks and citations omitted). *See also* 40 C.F.R. §§ 1501.4(e) (authorizing agencies to issue a FONSI where they determine that an EIS is not required), 1508.13 (defining FONSI); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004) (Army Corps of Engineers' decision not to undertake an EIS did not violate NEPA and was not arbitrary or capricious because the EA—despite plaintiffs' allegations that there was substantial uncertainty as to the consequences of certain actions—sufficiently considered the relevant potential environmental impacts); *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1246-47 (11th Cir. 2012) ("An EIS is not required if the agency makes a finding of no significant impact ('FONSI') that identifies reasons why the proposed action will not have a significant impact on the environment."). BLM has been engaged in regulating and studying hydraulic fracturing for years. It has completed a massive regulatory review of hydraulic

fracturing and issued a Final Rule that regulates the practice on Federal and Indian lands. Its expertise in the matter is undisputed.[29]

Plaintiffs do not deny that BLM issued a FONSI in connection with each of the APDs at issue, but they contend that the EAs were "improperly tier[ed] to a programmatic EIS that simply does not include any analysis of fracking." Pls' Mem. at 17. This argument misses the point. The fact that the 2003 RMP/EIS did not itself analyze hydraulic fracturing does not make BLM's decision not to require an additional EIS "arbitrary and capricious," because BLM determined based on its expert knowledge of hydraulic fracturing and its detailed site-specific EAs that the APDs at issue in this case "will not have any significant impact, individually or cumulatively, on the quality of the human environment."[30] Because the environmental consequences of hydraulic fracturing fall squarely within BLM's area of expertise, this factual finding is entitled to an "extreme degree of deference." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d at 1327.

Moreover, the EAs themselves demonstrate that BLM's "decision was based on a consideration of the relevant factors" and did not constitute "a clear error of judgment." *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d at 1213 (citation and internal quotation marks omitted). The fact that Plaintiffs may disagree with BLM's experts is not a sufficient reason to overturn the agency's factual determination that hydraulic fracturing will not harm the environment affected by the APDs at issue. *See Sierra Club v. U.S. Dep't of Transp.*, 753 F.2d at 129 ("When a court considers the sufficiency of an agency's environmental analysis, the court

[29] *See* 80 Fed. Reg. at 16,131 ("The BLM's engineers and field managers have decades of experience exercising oversight of these wells during the evolution of [hydraulic fracturing] technology.").

[30] *E.g.*, Indall Decl., Ex. 1.

is not to rule on the relative merits of competing scientific opinion.") (citations and internal quotation marks omitted).

Notwithstanding BLM's explicit finding in the EAs that hydraulic fracturing "will not have any significant impact, individually or cumulatively, on the quality of the human environment," Plaintiffs' make the inexplicable argument that BLM approved the APDs at issue "without analyzing *any* of fracking's environmental impacts." Pls' Mem. at 17 (emphasis in original). This remarkable assertion is flatly contradicted by Plaintiffs' own motion papers. *See, e.g.*, Pls' Ex. 11 [Dkt. 16-12] at 30 (EA excerpts containing BLM's description of hydraulic fracturing and its conclusion, based on the geology of the Mancos Shale and the deep placement of the proposed well bores, that "[n]o impacts to surface water or freshwater-bearing groundwater aquifers are expected to occur from fracking of the proposed wells."); Pls' Ex. 14 [Dkt. 16-15] at 22 (EA excerpts containing BLM's conclusion that while approval of the proposed APD could result in "very small direct and indirect increases" in specified air pollutants, "this very small increase in emissions … would not be expected to result in exceeding the [National Ambient Air Quality Standards] for any criteria pollutants in the analysis area."). Thus, contrary to Plaintiffs' claim, BLM indisputably analyzed hydraulic fracturing's environmental impacts in each of the EAs, and did so in a site-specific fashion.

Thus, the core premise of Plaintiffs' NEPA argument—that BLM approved the APDs "without analyzing *any* of fracking's environmental impacts"—is not accurate. Nevertheless, Plaintiffs argue that because the 2003 RMP/EIS did not analyze hydraulic fracturing, "BLM's decision to tier to the 2003 RMP/EIS in lieu of doing [an EIS-level plan amendment] violates NEPA." Pls' Mem. at 19. According to Plaintiffs, a new EIS was necessary because

"[h]orizontal fracking [sic] is a relatively new technology and was not used in the Mancos Shale until recently." Pls' Mem. at 21. Plaintiffs are wrong.

As the United States Supreme Court observed in *Marsh v. Oregon Natural Resources Council*, the case law "make[s] clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized." 490 U.S. 360, 373 (1989). Rather, an agency is required to issue a supplemental EIS only where the new information compels the conclusion that the proposed action "will affec[t] the quality of the human environment in a significant manner or to a significant extent not already considered." *Id.* at 374 (citation and internal quotation marks omitted). The agency's assessment of whether a supplemental EIS is required under this standard is a question of fact committed to the agency's discretion. *Id.* at 377. Thus, "as long as the [agency's] decision not to supplement the [initial EIS] was not 'arbitrary or capricious' it should not be set aside." *Id.* And, as noted, the EAs at issue here explicitly concluded that the proposed drilling would *not* have a significant environmental impact.

The Eleventh Circuit's decision in *Defenders of Wildlife v. Bureau of Ocean Energy Management*, 684 F.3d 1242 (11th Cir. 2012) is instructive. In that case, plaintiffs challenged a decision by the U.S. Department of the Interior's Bureau of Ocean Management ("BOEM") to approve a drilling exploration plan in the Gulf of Mexico in the wake of the *Deepwater Horizon* explosion. As BLM has done here, BOEM had conducted an EA, issued a FONSI and determined that a supplemental EIS was not required. 684 F.3d. at 1248. Plaintiffs there argued that the EA violated NEPA because it was not sufficiently specific and was "too similar" to another EA approving a similar exploration plan in a different area of the Gulf of Mexico. The Eleventh Circuit rejected both arguments, finding that plaintiffs' arguments "simply cannot

overcome our extremely deferential 'arbitrary or capricious' standard of review." 684 F.3d at 1249.

The Plaintiffs there also attacked BOEM's decision to "tier" the EA to two earlier EISs that predated the *Deepwater Horizon* disaster and were allegedly "outdated." 684 F.3d at 1251. According to plaintiffs, tiering to these earlier EISs was improper because BOEM was in the process of conducting a supplemental EIS "to consider new circumstances and information arising … from the *Deepwater Horizon* blow-out and spill." *Id.* (quoting 75 Fed. Reg. 69,122-01 (Nov. 10, 2010)).

The Eleventh Circuit rejected this argument as well. The fact that BOEM was undertaking a new EIS did not preclude it from tiering to the earlier EISs. The Court explained that the EA itself discussed the *Deepwater Horizon* spill and BOEM had reported that the new, supplemental EIS would not alter the conclusions in the earlier EISs. The Court concluded, therefore, that "BOEM's reliance on the [earlier EISs] was not arbitrary and capricious." *Id. See also La. Crawfish Producers Ass'n-W. v. Rowan*, 463 F.3d 352, 358 (5th Cir. 2006) (tiering off an allegedly outdated EIS was not arbitrary or capricious because "it is not necessary for 'the [agency to] update an EIS when portions of it become out-of-date.'" (quoting *Coker v. Skidmore*, 941 F.2d 1306, 1310 (5th Cir.1991)).

A similar result should obtain here. BLM's decision to conduct an EA and issue a FONSI was based on a factual determination that was not arbitrary or capricious. Notwithstanding that BLM is not required by NEPA to do so, in a letter dated December 11, 2014, BLM advised an advocacy group that it intends to prepare a undated RMP/EIS "to address issues relating to oil and gas in the Mancos Shale/Gallup Formation." Pls' Ex. 3 [Dkt. 16-4]. But in that same letter, BLM advised that it did not intend to impose a "moratorium on the

approval of all new APDs" pending completion of the undated RMP/EIS, in part because such a moratorium would unlawfully "curtail the property rights" of existing lessees, and in part because "[o]il and gas development, including [hydraulic fracturing], has been occurring in the San Juan Basin since the late 1940s" and, "[a]s such, many of the concerns and impacts associated with this development are well known." *Id.* Nevertheless, BLM provided assurance that it would "continue to consider APDs on a case-by-case basis, and establish conditions of approval as necessary, to ensure consistency with the current overarching RMP for the area." *Id.*

Thus, the agency's voluntary decision to conduct a supplemental EIS does not preclude it from tiering the EAs to the 2003 RMP/EIS, because the EAs themselves examine the effects of hydraulic fracturing and conclude that there is no reason why operations should not go forward.

In summary, BLM's decision to approve the challenged APDs did not violate NEPA and was not arbitrary or capricious.

III. THE REQUESTED INJUNCTION WOULD IRREPARABLY HARM API MEMBERS AND THE PUBLIC.

Plaintiffs claim the "Federal Defendants" will not suffer harm if the injunction is granted. Pls' Mem. at 13. They also claim that "any monetary interest that Federal Defendants may allege cannot outweigh the injuries that Citizen Groups would suffer in the absence of an injunction." *Id.* at 15.

Plaintiffs' argument concerning the alleged lack of harm to the Federal Defendants overlooks the severe harm the injunction will cause API members and the general public. These harms are important counterweights that must be considered in deciding whether to grant Plaintiffs' request for an injunction against all current and future hydraulic fracturing in the Mancos Shale.

The Tenth Circuit has made clear that an injunction's potential to cause economic harm may weigh heavily in the balance in environmental cases. In *Sierra Club, Inc. v. Bostick*, for example, it squarely rejected the plaintiff's argument that "[e]conomic harm is not irreparable and does not provide an adequate basis for denying injunctive relief." 539 F. App'x 885, 891 (10th Cir. 2013). To the contrary, the Tenth Circuit explained that,

> The Supreme Court has recognized that financial harm can be weighed against environmental harm—and in certain instances outweigh it. [*See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)] ("And on the other side of the balance of harms was the fact that the oil company petitioners had committed approximately $70 million to exploration ... which they would have lost without chance of recovery had exploration been enjoined."). Indeed, we too have recognized the appropriateness of weighing financial harm against environmental harm. [*See Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1231 (10th Cir. 2008)] (concluding that the district court did not abuse its discretion in according greater weight in the balancing of harms to the public's interest in gas production and also certain financial interests, over the threatened environmental injuries).

539 F. App'x. at 892; *see also Vill. of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 767-68 (10th Cir. 2014) (balance of equities tipped in defendants' favor where "[d]efendants have shown that they would suffer immediate and significant harm in the form of construction related delays if an injunction issues now stopping this project. The economic cost alone of stopping construction cannot easily be overlooked—one estimate puts the probable *monthly* cost of delaying the Project at $745,592.").

The injunction requested in this case, if granted, would indisputably cause severe harm to API members and the public. The Nation has a strong interest in robust domestic oil and gas production, not the least because oil, natural gas, and refined petroleum products are critical components of the United States economy, creating and supporting 9.8 million U.S. jobs and 8% of the national economy. Brand Decl. ¶ 8. Petroleum products are used as the primary

transportation fuels for commercial and fleet vehicles and urban mass transit; as fuels for over a quarter of the electricity generated nationwide; for the heating and cooling of tens of millions of homes and commercial customers across the country; as raw materials and feedstock for fertilizer production and chemical manufacturing; and for many other applications. *Id.*

These benefits are especially important to the citizens of New Mexico, where over half of all energy production occurs on federal lands. *Id.* ¶ 16. In 2012, for example, 60% of all natural gas and 51% of all crude oil produced in New Mexico was produced on federal lands. *Id*. That same year, unconventional oil and natural gas production contributed $2.7 billion in value-added economic activity, and approximately $1 billion in state and local taxes, accounting for approximately 21% of the State of New Mexico's budget. *Id.*

In addition, New Mexico receives 48% of revenues collected as federal royalties from oil and gas production on federal lands, which amounted to over $488 million in FY2012. *Id.* ¶ 17. The oil and natural gas industry contributes 95% of revenues paid into the New Mexico Land Grant Permanent Fund. As of June 30, 2013, the Fund's balance was $12.137 billion, and in FY2012, the Fund paid out $658.5 million to 21 New Mexico public entities. *Id*.

A study published by IHS, a leading energy and economic research organization, concluded that unconventional oil and natural gas production supported 23,600 jobs in New Mexico in 2012. *Id.* ¶ 18. Moreover, in 2013, these industry jobs paid an average salary of $72,355, close to double the state average of $40,612. *Id.* By 2035, an additional 58,466 jobs could result from hydraulic fracturing and horizontal drilling in New Mexico. *Id.* All of the foregoing activities, and all of the foregoing public benefits, would be substantially reduced by the relief plaintiffs seek.

API members will themselves suffer substantial and irreparable harm if the injunction is granted. The upstream sector of the oil and gas industry ("operators")—the part of the industry that identifies, accesses, and ultimately produces petroleum resources from hydrocarbon-bearing geologic formations—are the companies that acquire land, devise well design plans, and, assuming successful construction of an economically viable well, reclaim the land and produce and sell the oil and gas over the decades-long life of the well. *Id.* ¶ 9. If the existing APDs are vacated and future APDs are enjoined, these operators will be foreclosed from operating in the Mancos Shale indefinitely. Similarly, an injunction would also harm "service companies"—which, like operators, are technologically advanced companies—that research, develop, and market formulations used as additives to hydraulic fracturing fluids, and are employed by operators usually for weeks or months at a time to move equipment to the well site, operate drilling equipment, cement steel casing into the wellbore, and blend and pump hydraulic fracturing fluids into hydrocarbon-bearing zones, among many other specialized tasks. *Id.* The requested injunction will shutter these service businesses as well.

API expects that many of its members, not just those currently holding BLM permits to develop the New Mexico Mancos Shale, will continue to actively pursue opportunities to explore and develop tight oil and natural gas plays on BLM land in the future in the Mancos Shale formation. *Id.* ¶ 10. Such members would include the dozens of operators who develop shale resources in other parts of the country, but may not currently be operating in New Mexico. *Id.* The requested injunction against future APDs will foreclose these operators from pursuing these opportunities.

The impact on service companies responsible for drilling, constructing, fracturing, and completing the wells that operators ultimately seek to develop would be similar. *Id.* ¶ 11. These

service companies include companies that manufacture and distribute equipment used in upstream development, such as producers of steel casing and cement used in every single well. *Id.*

In addition, a variety of other industries are necessarily affected by oil and gas operations that occur near their places of business. *Id.* ¶ 12. These include restaurants, hotels, real estate, retail, and a host of other products and services required to maintain and support the significant economic and personnel requirements of the oil and gas industry. *Id.*

Together, these vendors to the industry—service companies, equipment makers and distributers, and other support firms—comprise over 475 individual businesses in New Mexico alone. *Id.* ¶ 13. This figure represents just some of the industry vendors in New Mexico. *Id.*

The remedies sought by Plaintiffs in this litigation would thus prevent API's members—operators, service companies, and equipment manufacturers—from moving forward with a wide range of economic activity in and related to the Mancos Shale. *Id.* ¶ 14. Moreover, many other industries that would have provided food, lodging, entertainment, and other goods and services to companies and their employees in the Mancos Shale will be similarly unable to move forward with their businesses. *Id.*

In summary, the requested injunction would irreparably harm API members and the public.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

Dated: May 26, 2015

Respectfully submitted:

/s/ Jon J. Indall

Jon J. Indall
Joseph E. Manges
Comeau Maldegen Templeman & Indall LLP
Coronado Building
141 East Palace Avenue
Santa Fe, NM 87504-0669
(505) 982-4611

Steven Rosenbaum (*Pro Hac Vice pending*)
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-5568

Attorneys for Applicant-Intervenor
American Petroleum Institute