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

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, et al.,

Plaintiffs,

vs.

SALLY JEWELL, et al.,

Defendants,

and

WPX ENERGY PRODUCTION, LLC, ENCANA OIL & GAS (USA) INC., BP AMERICA PRODUCTION COMPANY, CONOCOPHILLIPS COMPANY, and BURLINGTON RESOURCES OIL & GAS COMPANY LP,

Intervenors.

Case No. 1:15-cv-209-JB-SCY

OPERATORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Intervenor-Defendants WPX Energy Production, LLC (WPX), Encana Oil & Gas (USA) Inc. (Encana), BP America Production Company (BPAPC), ConocoPhillips Company (COP), and Burlington Resources Oil & Gas Company LP (Burlington), jointly referred to as the "Operators," oppose Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 16).[1]

INTRODUCTION

Despite Plaintiffs' rhetoric, this case is not about "the imminent destruction of the Greater Chaco Landscape in the San Juan Basin of northwestern New Mexico." Plaintiffs' Memorandum (Memo), Dkt. 16-1, at 1. Nor is it about an agency's approval of oil and gas operations without environmental study. The wells at issue in this case are at least 10 miles away from the boundaries of the Chaco Culture National Historical Park. The Bureau of Land Management (BLM) studied the impacts of oil and gas drilling in this area in a 2003 comprehensive environmental impact statement (EIS)—which this Court upheld in 2008 in a case brought by Plaintiff San Juan Citizens Alliance[2]—and in site-specific environmental assessments (EAs) for each of the wells.

Relying on BLM's extensive environmental analysis, WPX and Encana began drilling these wells in 2011 and have invested hundreds of millions of dollars in developing the oil and associated gas from the Mancos Shale. Four years later, Plaintiffs have asked the Court to stop further drilling while the Court considers the merits of their claims. Plaintiffs do so despite acknowledging in their comments on the 2003 EIS that horizontal drilling reduces environmental impacts. What this case is about, then, is Plaintiffs' continued efforts to oppose oil and gas

[1] The Court has not yet acted on Operators' Unopposed Motion to Intervene (Dkt. 17). The Operators offer this provisional Response in Opposition, in keeping with the schedule set in this case, to be considered in the event the Court grants the Operators' Unopposed Motion.
[2] *San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270 (D.N.M. 2008).

drilling regardless of the BLM's environmental studies, regardless of the Operators' large investments, and regardless of the national interest in achieving energy independence.

Plaintiffs are specifically asking this Court to enjoin "all ground disturbance, construction, drilling, and other associated operations on all APD [application for permit to drill] approvals" as well as any "further approvals" of Mancos Shale APDs. Dkt. 16-1 (Memo) at 6. If granted, an injunction would halt the Operators' current drilling programs, delaying the drilling and completion of up to 38 wells[3] scheduled for 2015, possibly delaying wells planned for 2016, and resulting in immediate and substantial financial and other harm to the Operators, their contractors, and the communities in the San Juan region of New Mexico that rely on oil and gas development as an important economic base.[4] By contrast, the Plaintiffs' alleged harms have either already been analyzed in environmental studies under the National Environmental Policy Act (NEPA), or are highly remote and speculative, and cannot be attributed to the 38 wells and associated development activities that Plaintiffs seek to enjoin. Plaintiffs cannot show harm, let alone irreparable harm, from the ongoing drilling operations.

The EIS that BLM issued in 2003 discussed the cumulative, regional impacts of drilling up to 9,942 wells in the management area encompassing the Mancos Shale. Significantly, only about 3,600 of those wells have been drilled to date, and the impacts of drilling the Mancos Shale wells fall well within that EIS. In addition to the prior EIS, BLM has prepared site-

[3] This number includes 27 wells planned by WPX, up to seven wells by Encana, and four wells by BP. McQueen Aff., ¶¶ 6.e, 15 (Ex. 1); Lawlor Aff., ¶ 15 (Ex. 2); DeMahy Aff., ¶ 5 (Ex. 3). COP does not plan to drill any of its own wells in 2015. *See* Noah Aff. (Ex. 4).

[4] The scope of Plaintiffs' requested relief extends to "associated operations," Dkt. 16 (Memo) at 1, which could encompass existing operations on producing wells. However, counsel for the Operators sought clarification from counsel for Plaintiffs, and Mr. Kyle Tisdel has represented that Plaintiffs do not seek an injunction preventing Operators from continuing to operate existing producing wells.

specific environmental assessments discussing the impacts of the wells Plaintiffs are now challenging. Thus, not only do Plaintiffs fail to show the requisite harm to obtain a preliminary injunction, they cannot show a likelihood of success on the merits. The Court should deny the requested injunction.

FACTUAL BACKGROUND

Federal lands in the San Juan Basin of New Mexico overlay a number of productive oil and gas geologic formations that are being developed today using primarily horizontal wells. As reflected on the chart attached to Mr. McQueen's Affidavit (Ex. 1) as Exhibit A, these productive geologic formations range from the shallower Fruitland and Pictured Cliffs to the deeper Mesaverde, Mancos, Gallup, and Dakota formations.

In April 2003, BLM issued a Proposed Resource Management Plan and Final Environmental Impact Statement (RMP/EIS), which describes, among other things, the management direction for oil and gas development and environmental impacts of that direction for the approximately two million acres of public surface estate and approximately three million acres of subsurface minerals within the Farmington Field Office boundaries.[5] The RMP/EIS explained that hydrocarbon development in the San Juan Basin, which underlies the planning area, began in the 1940s and, as of 2003, there were approximately 18,000 active wells in the New Mexico portion of the basin.[6]

Based on a 20-year Reasonable Foreseeable Development Scenario (RFDS) prepared in 2001 by the New Mexico Institute of Mining and Technology to estimate oil and gas production

[5] *See* RMP/EIS at 1-2 (Ex. 5, excerpts). The BLM issued the Record of Decision for the RMP/EIS in September 2003 (Ex. 6).
[6] RMP/EIS at 3-9 (Ex. 5).

in the planning area,[7] the RMP/EIS evaluated the environmental impacts of various alternative levels of oil and gas development under the plan.[8] The alternative BLM selected provided for the drilling and development of 9,942 new wells.[9] The RFDS provided a well-count estimate by considering projections for development of the primary subsurface hydrocarbon formations of the San Juan Basin over the planning period.[10] However, the RMP/EIS did not specify any target formations for the 9,942 wells, nor did it find that the relevant impacts were dependent upon the particular formation under development.

Rather, the RMP/EIS described the impacts to 22 resource categories from the total development of 9,942 wells, including 18,577 acres of surface disturbance, 7,000 acre-feet of water usage (supplied by legal water rights holders), 805 miles of new roads, impacts to 1,896 cultural resource sites, and increases in air emissions.[11] It also analyzed the cumulative impacts of this oil and gas development along with other past, present, and reasonably foreseeable actions in the planning area. Plaintiff San Juan Citizens Alliance challenged the RMP/EIS. This Court rejected all of Plaintiff's criticisms and held that the RMP/EIS fully complied with NEPA and the National Historic Preservation Act. *San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270 (D.N.M. 2008).

As of December 2014, only 3,612 of the 9,942 wells analyzed in the RMP/EIS had been drilled.[12] Thus, the impacts of current oil and gas development are well within the impacts considered in the 2003 RMP/EIS. Plaintiffs have challenged 96 environmental assessments

[7] Excerpts of the 2001 RFDS are attached as Exhibit 7.
[8] RMP/EIS, Chapter 4 (Ex. 5).
[9] *Id.* at 4-105.
[10] *See* 2001 RFDS at 9.1 (Ex. 7).
[11] RMP/EIS at 2-250 to 2-253, 4-105 to 4-120 (Ex. 7).
[12] *See* BLM Dec. 11, 2014 Letter to Mike Eisenfeld (Ex. 8).

(EAs) issued between 2011 and 2015 that approved 239 APDs for oil and gas wells in the planning area.[13] These EAs "tiered"[14] to the RMP/EIS and provided detailed discussions of the site-specific impacts of the proposed wells and associated facilities, including impacts associated with hydraulic fracturing, as well as mitigation measures to minimize those impacts.[15]

Most of the wells at issue in this case have been drilled by WPX and Encana, with working interests in some of the WPX wells held by COP and BP.[16] As the Operators explain, recent drilling in the Mancos Shale is not by nature different from the drilling that has occurred in the same area for several decades. Hydraulic fracturing has been occurring in vertical wells in this area for many years.[17] Recent technological developments have allowed the Operators to

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[13] Dkt. 13-1 (Supp. Petition), Appendix 1. Plaintiffs' list of challenged EAs, Appendix 1 to Plaintiffs' Supplemental and Amended Petition (Dkt. 13-1), is different from the list of EAs in Exhibit C to Susan Harvey's Declaration (Dkt. 16-7). Thus, it is difficult for the Operators to determine exactly what actions are at issue. Unless otherwise noted, the figures (well counts, surface disturbance, etc.) in the Operators' affidavits and this brief are based on the EAs listed in Appendix 1 of Plaintiffs' Supplemental Petition.

[14] NEPA regulations issued by the Council on Environmental Quality (CEQ) explain tiering as follows:

> Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

40 C.F.R. § 1502.20.

[15] *See, e.g.*, EA 2015-0036 (Ex. 9, included in its entirety with the exception of Appendix D, the surface reclamation plan).

[16] McQueen Aff., ¶ 6 (Ex. 1), Lawlor Aff., ¶ 7 (Ex. 2), DeMahy Aff., ¶¶ 5, 7 (Ex. 3), and Noah Aff., ¶ 6 (Ex. 4).

[17] Lawlor Aff., ¶ 5 (Ex. 2).

begin horizontal drilling in the Mancos Shale.[18] However, the impacts of horizontal drilling do not materially change the nature of impacts associated with development. Moreover, horizontal drilling in most instances actually *decreases* the overall impacts as compared to vertical drilling because one horizontal well can generally replace four vertical wells, which results in less surface disturbance, more efficient recovery of the oil resource, fewer truck trips, and less air emissions.[19] Plaintiff San Juan Citizens specifically noted the reduced impacts of horizontal drilling in its comments on the 2003 RMP/EIS.[20]

On February 25, 2014, BLM issued a Notice of Intent to prepare an amendment to the RMP "in order to analyze the impacts of additional development in what was previously considered a fully developed oil and gas play within the San Juan Basin in northwestern New Mexico." 79 Fed. Reg. 10,548, 10,548 (Feb. 25, 2014). Thus, BLM is in the process of preparing an EIS to consider the impacts of this additional development, including the recent shift to horizontal drilling, that BLM thought may exceed the 9,942 wells in the 2003 RMP/EIS.

ARGUMENT

The Court is familiar with the well-established requirements for a preliminary injunction. A preliminary injunction is an "extraordinary and drastic remedy" that is never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 676 (2008); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). "Because a preliminary injunction is an extraordinary remedy, the [movant's] right to relief must be clear and unequivocal." *Wilderness Workshop v. U.S. BLM*, 531 F.3d 1220, 1224 (10th Cir. 2008) (alteration in original). The Tenth Circuit recently restated the four

[18] *Id*.
[19] McQueen Aff., ¶¶ 18-20 (Ex. 1); Lawlor Aff., ¶ 5 (Ex. 2).
[20] RMP/EIS, App. P at P-48, P-123 (Ex. 5).

elements that a plaintiff must show to obtain preliminary injunctive relief: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015), *cert. granted*, 135 S. Ct. 1173, 190 L. Ed. 2d 929 (2015). Failure to prove just one of the four factors requires the court to deny the preliminary injunction. *See Winter*, 555 U.S. at 23-24 (reversing injunction based on balance of harms). Here, injunctive relief is not appropriate because Plaintiffs cannot satisfy *any*, let alone all, of the factors.

I. Plaintiffs Are Not Likely to Succeed on the Merits.

A preliminary injunction is improper unless Plaintiffs can establish they are "likely to succeed on the merits." *Winter*, 555 U.S. at 20.[21] Plaintiffs have not met their burden. BLM properly tiered to the RMP/EIS, thoroughly disclosed the site-specific impacts of the APDs in the project-specific EAs, fully analyzed cumulative impacts through the RMP/EIS and the tiered EAs, and did not engage in improper segmentation. In addition, a moratorium on drilling is neither appropriate nor required during the RMP amendment process because the current drilling is fully covered by and within the scope of the impact analysis of the existing RMP/EIS.

[21] Plaintiffs contend that they need not demonstrate a likelihood of success because, prior to *Winter*, the Tenth Circuit articulated a modified standard based on a lesser showing that "a fair ground for litigation of one or more of [its] claims" exists if the other factors tip strongly in favor of an injunction. Dkt. No. 16-1 (Memo) at 18 (internal quotations omitted). Although a few district courts have applied this modified standard after *Winter*, the Tenth Circuit has expressed doubt as to whether this standard can survive the clear language of *Winter*, without directly deciding the issue. *See Warner v. Gross*, 776 F.3d at 728 n.5; *Vill. of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 769 n.1 (10th Cir. 2014). Regardless of the standard applied, Plaintiffs cannot satisfy their burden.

A. Standard of Review.

Challenges to agency compliance with NEPA are brought under the Administrative Procedure Act (APA). *Biodiversity Cons. Alliance v. Jiron*, 762 F.3d 1036, 1059 (10th Cir. 2014). Under the APA, 5 U.S.C. § 706(2)(A), the plaintiff has the burden of establishing that the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) (citation omitted). The court's review is narrow and limited to the administrative record and the grounds for decision invoked by the agency. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). "A presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action." *Citizens' Comm.*, 513 F.3d at 1176 (citation omitted). As long as an agency considers relevant factors and can articulate a "rational connection between the facts found and the choices made," then its decision will be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

B. BLM has Fully Satisfied its NEPA Obligations in Approving the APDs.

1. BLM Properly Tiered to the 2003 RMP/EIS.

Plaintiffs' NEPA arguments are founded on the false premise that the APDs at issue authorize wells beyond those analyzed in the 2003 RMP/EIS. Plaintiffs appear to believe that the RMP/EIS considered and disclosed impacts of wells confined to specific geologic formations, and thus created a cap on the number of wells that can be drilled in specific geologic formations such as the Mancos Shale. That is not the case. Plaintiffs are confusing the RFDS, which considered potential development by formation merely to derive the total well estimate, and the RMP/EIS, which discloses impacts of that total well estimate without reference or regard

to the target formation. Nothing in the RMP/EIS creates a cap on the number of wells drilled into the Mancos Shale formation, the Fruitland Coal formation, or any other oil and gas producing formation underlying the area. *See Theodore Roosevelt Conservation P'ship v. Salazar ("TRCP")*, 616 F.3d 497, 509 (D.C. Cir. 2012) (reasonably foreseeable development scenarios in RMPs do not impose a cap on the number of wells that can be drilled in the plan area).

Rather, the 2003 RMP/EIS analyzed the impacts of a total of 9,942 new oil and gas wells drilled on federal lands in the San Juan Basin without allocating impacts to wells on a geologic formation basis. The analysis included 22 different resource categories, including air quality, water quality, and surface disturbance.[22] As of December 2014, only 3,612 of those wells had been drilled.[23] Thus, Plaintiffs have not demonstrated—and cannot demonstrate—that the impacts of the wells that have been or are being drilled under the APDs at issue have exceeded the level of impacts described for 9,942 wells in the RMP/EIS. In its response to comments on the RMP/EIS, BLM explained that it was possible that new technologies will be developed within the 20-year period covered by the plan and "[t]heir use would not be precluded merely because they are not specifically identified in the RMP/EIS."[24] Accordingly, BLM can appropriately tier to the broad impact analysis in the RMP/EIS when preparing site-specific EAs for the APDs.[25] *See TRCP*, 616 F.3d at 509 (proposed action was covered by existing RMP/EIS, despite plaintiffs' claims that the number of wells in the planning area had "vastly" exceeded the

[22] RMP/EIS at Chapter 4 (Ex. 5).
[23] BLM Dec. 11, 2014 Letter to Mike Eisenfeld (Ex. 8).
[24] RMP/EIS at App. P, P-63 (Ex. 5).
[25] *See, e.g.*, EA 2014-0272 at 35 (Ex. 10, excerpts) ("The proposed action falls within the development that was assessed in the 2003 RMP EIS cumulative impacts analysis.").

number projected in the RMP, where plaintiffs did not cite evidence that those wells had exceeded the impacts contemplated in the RMP/EIS); *see also* 40 C.F.R. § 1502.20 and 43 C.F.R. § 46.120(d) (encouraging tiering).

Hydraulic fracturing is not new; it been used in the San Juan Basin for over 60 years.[26] The process has been applied to nearly all of the wells drilled in the Basin.[27] While multi-stage and multi-zone hydraulic fracturing in horizontal wells has become a more common approach to development of the geologic formations in the San Juan Basin, the basic nature of oil and gas development has not changed.[28] Indeed, advances in technology, such as increased horizontal drilling, were anticipated and encouraged in the RMP/EIS because horizontal drilling can allow for multi-well pads, resulting in less surface impacts.[29] In fact, in its comments on the 2003 RMP/EIS, Plaintiff San Juan Citizens encouraged the use of horizontal drilling, because it would decrease noise, air pollution, and surface disturbance from roads and pads.[30] As San Juan Citizens stated, one horizontal well can generally avoid the surface disturbance and other impacts associated with four vertical wells.[31] Thus, the wells at issue are squarely within the scope of the RMP/EIS's impact analysis, and BLM properly tiered to that analysis.

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[26] EA 2015-0036 at 26 (Ex. 9).
[27] *Id*.
[28] Lawlor Aff. ¶ 5 (Ex. 2).
[29] RMP/EIS at 2-238 (Ex. 5).
[30] *Id.*, Appendix P at P-123.
[31] *Id*. at P-48; *see also* McQueen Aff., ¶ 19 (Ex. 1); Lawlor Aff., ¶ 5 (Ex. 2). Plaintiffs rely on the declaration of Susan Harvey (Dkt. 16-7) to argue that horizontal drilling causes more impacts. Dkt. 16-1, at 9. Ms. Harvey's declaration simply gives her own reading of the 2003 RMP/EIS and the site-specific EAs. It does not assist the Court. The attached affidavits of Mr. McQueen (Ex. 1, ¶¶ 18-20) and Mr. Lawlor (Ex. 2, ¶ 5) also explain why Ms. Harvey's declaration is incorrect.

2. BLM Prepared Thorough Site-Specific EAs.

Contrary to Plaintiffs' claim that BLM has prepared "boilerplate" EAs for the wells currently being drilled, Dkt. No. 16-1 (Memo) at 1, 22, 24, BLM conducted a detailed site-specific review for each of the APDs at issue.[32] The EAs described the affected environment specific to the area of the proposed wells and analyzed how the proposed action would impact that environment. They incorporated extensive mitigation measures to address those impacts, including closed-loop drilling (eliminating the need for production pits and protecting surface water quality), adherence to noise standards, erosion-control requirements, restoration requirements, control and eradication of invasive plants, migratory bird nest avoidance requirements, dust suppression, waste control requirements, and emission controls on compressors.[33] The fact that some of the EAs contain similar language is not surprising, given that the proposed actions and general locations are similar, nor is it a violation of NEPA.[34] *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt.*, 684 F.3d 1242, 1249 (11th Cir. 2012) ("NEPA does not prohibit an agency from creating an EA that resembles another EA in a similar environment.").

Where new information was available, such as the 2014 Air Resources Technical Report that provides more recent air quality data and modeling, BLM appropriately included that information to provide a thorough discussion of impacts.[35] *Id.* at 1251 (upholding a tiered EA

[32] *See, e.g.*, EA 2015-0036 (Ex. 9); EA 2014-0272 (Ex. 10).
[33] *See, e.g.*, EA 2015-0036 (Ex. 9); EA 2014-0272 (Ex. 10).
[34] Plaintiffs assert that the EAs are "virtually identical" (Dkt. 16-1 (Memo) at 25), but a comparison of EA 2015-0036 (Ex. 9) and EA 2014-0272 (Ex. 10) shows otherwise.
[35] Plaintiffs claim that BLM cannot "tier" to the Air Resources Technical Report because it is a non-NEPA document. Dkt. 16-1 (Memo) at 22-23. But BLM did not tier to the Air Resources Technical Report; it incorporated the information in the report by reference, which is a practice

that considered new information related to risk of oil spills); *Arkansas Wildlife Fed. v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1102 (2005) (upholding a tiered EA that provided updated information); *Amigos Bravos*, 2011 WL 7701433 at *17 (upholding leasing EA that tiered to the 2003 RMP/EIS and considered updated air modeling information). Eliminating the ability to tier to a program-level EIS merely because new information is available would render the concept of tiering meaningless, since new information is continually being generated. *See TRCP*, 616 F.3d at 512 ("NEPA does not limit tiering to analyses still on the scientific cutting edge.").

Plaintiffs' argument that BLM did not analyze any impacts associated with hydraulic fracturing (*see* Dkt. 16-1 (Memo) at 5, 17) is without merit. The EAs do more than merely describe this well-completion technique; they disclose the impacts on the relevant environmental resources, such as air quality (including criteria pollutants, hazardous air pollutants, and greenhouse gases), water quality, soils, vegetation, cultural resources, and wildlife.[36] Plaintiffs fail to identify any particular impact from the 239 APDs at issue that BLM did not address in the RMP/EIS's analysis of 9,942 wells or the EAs that tier to that analysis. *Cf. Powder River Basin Res. Council v. U.S. BLM*, 37 F. Supp. 3d 59, 88 (D.D.C. 2014) (rejecting plaintiffs' NEPA argument regarding soil resources where they "failed to identify any impact to soil resources that BLM did not adequately analyze").

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encouraged by both the CEQ and DOI NEPA regulations. 40 C.F.R. § 1502.21; 43 C.F.R. § 46.135. In fact, this Court has rejected a similar "tiering" argument made by Plaintiff San Juan Citizen Alliance with respect to an updated air analysis that BLM incorporated by reference for lease sale EAs tiered to the 2003 RMP/EIS. *Amigos Bravos v. U.S. BLM*, 2011 WL 7701433 at *17 (D.N.M. Aug. 3, 2011).

[36] *See, e.g.*, EA 2014-0272 (Ex. 10).

3. BLM Properly Analyzed Cumulative Impacts.

Plaintiffs' cumulative impact arguments suffer from the same deficiency as their other arguments: they depend on the false assumption that BLM has to distinguish wells drilled into one geologic formation from wells drilled into another formation when describing impacts to the surface environment. Further, Plaintiffs offer no evidence suggesting that drilling into the deeper Mancos Shale formation affects air quality, water, cultural resources, or other relevant factors differently than horizontal drilling and fracturing into the shallower Fruitland formation or any other formation.[37] That the individual EAs do not specifically discuss wells drilled into the Mancos Shale formation, or provide estimates of the combined effects of those other Mancos Shale wells, is beside the point. What is important is that the individual EAs, when combined with the RMP/EIS to which they are tiered, disclose the cumulative impacts of the proposed actions when combined with other past, future, and reasonably foreseeable future actions.

Cumulative impacts to air quality of 9,942 wells, when combined with other actions in the area, were described in the RMP/EIS. The site-specific EAs confirmed that the assumptions about the level of development in the RMP/EIS were still accurate, provided updated information (*e.g.*, with respect to climate change), and, for those EAs issued after February 2014, incorporated the Air Resources Technical Report by reference. They described the various mitigation measures and other steps taken to reduce impacts to air quality. "Although the purpose of the cumulative-impact analysis is to provide sufficient detail to assist the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts, . . . plaintiffs do not articulate how the EA fails to equip BLM with the requisite quantum of

[37] *See* McQueen Aff., ¶ 9 (Ex. 1) (pointing out that the current drilling is not by nature different than previous vertical or other horizontal drilling).

available information to meet this purpose." *Shasta Res. Council v. U.S. Dep't of Interior*, 629 F. Supp. 2d 1045, 1062-63 (E.D. Cal. 2009) (internal quotations and citations omitted).

With respect to cultural resources, Plaintiffs once again overlook the analysis in the RMP/EIS. That analysis estimated the cumulative impacts to cultural resources of drilling 9,942 wells, along with other management actions under the plans, recognizing that up to 1,896 cultural resources could be affected.[38] It also noted that each project-level decision will require site-specific inventories. Each EA included an on-the-ground inventory of the entire project area. Plaintiffs have not shown how the cumulative impacts to cultural resources from the 239 wells at issue have exceeded or will exceed the cumulative impacts estimated in the RMP/EIS, especially when the EAs demonstrate that impacts to cultural resources will be avoided. *See Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029, 1059 (N.D. Cal. 2013) ("[A]n agency need not consider cumulative impacts when it has determined that the current action has no incremental impact."). Plaintiffs also reference the Chaco Culture National Historical Park, but fail to explain how any of the challenged wells could adversely affect the Park. The closest well is over 10 miles from the Park boundaries.[39] The EAs and RMP/EIS together fully disclose potential direct, indirect, and cumulative impacts to cultural resources.

Plaintiffs' assertion (Dkt. 16-1 (Memo) at 23-24) that the majority of the EAs do not discuss cumulative impacts to local communities, or focus only on economic benefits, ignores the fact that cumulative impacts to communities are evaluated through the discussion of impacts to various environmental resources, such as air and water quality. *See Border Power Plant Working Group v. U.S. DOE*, 260 F. Supp. 2d 997, 1020 n.15 (S.D. Cal. 2003) ("[A]n evaluation

[38] RMP/EIS at 2-252 (Ex. 5)
[39] *See* McQueen Aff., ¶ 10 (Ex. 1); Lawlor Aff., ¶ 9 (Ex. 2).

of whether the actions affect air quality necessarily involves an evaluation of the health impacts of the actions resulting from air pollution."). The RMP/EIS describes the cumulative impact to communities of drilling 9,942 wells through its discussion of impacts to air quality, water quality, environmental justice, noise, social and economic conditions, and lands and access.[40] The tiered EAs provide site-specific analyses of impacts to communities though these resources.

Plaintiffs' reliance on *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983), is misplaced. In that case, the agency touted the benefits of bulk cargo activities as a "selling point" for a channel deepening without disclosing *any* of the environmental impacts of those activities. Here, cumulative impacts to communities, both beneficial and adverse, were disclosed through the RMP/EIS and site-specific EAs. Likewise, *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014), does not apply here because the agency there quantified the social cost of carbon in a draft EIS, but then eliminated that information in the final EIS, touting only the economic benefits. In its environmental review of the challenged wells, BLM did not withhold discussion of any adverse impacts.

C. NEPA Does Not Require a Moratorium on Development.

Plaintiffs argue that BLM must impose a moratorium on wells drilling into the Mancos Shale formation until it completes the RMP amendment currently underway. Dkt. 16-1 (Memo) at 6. This position is inconsistent with long-standing NEPA regulations, case law, and policy. The CEQ regulations recognize that an agency's actions may be limited while it prepares a required EIS, but only when those actions are not covered by an existing program EIS. 40 C.F.R. § 1506.1(c); *see also* BLM, NEPA Handbook, H-1790-1 at 3 (2008) (recognizing that

[40] *See* RMP/EIS, Chapter 4 (Ex. 5).

the limits of 40 C.F.R. § 1506.1 do not apply to permits for oil and gas wells that are within the existing land use plan); *TRCP*, 616 F.3d at 509-10 (finding no improper precommitment of resources under 40 C.F.R. § 1506.1 by approval of oil and gas development during the RMP amendment process where development was covered by the existing RMP); *see also* BLM, Land Use Planning Handbook, H-1601-1 at 47 (2005) (explaining that any decision to voluntarily defer certain actions when amending or revising a land use plan must not lead to an area-wide moratorium during that process).

Because almost 10,000 wells were analyzed under the current land use plan, and only about 3,600 wells have been drilled, the continued approval of additional APDs does not exceed the limits of the current plan. Therefore, BLM is not required to stay drilling into the Mancos Shale formation or any other formation pending the RMP amendment process. *See ONRC Action v. U.S. BLM*, 150 F.3d 1132, 1140 (9th Cir. 1998) (BLM had no duty under NEPA or the Federal Land Policy and Management Act to impose a moratorium on timber sales covered by an existing plan during the plan revision process).

D. BLM Has Not Improperly Segmented its Environmental Review.

Plaintiffs argue that BLM is improperly segmenting its environmental review by preparing site-specific EAs for the wells. Dkt. 16-1 (Memo) at 24. Once again, Plaintiffs ignore the 2003 RMP/EIS to which the EAs are tiered, and mistakenly characterize the analysis in the RMP/EIS as being limited to a specific geologic formation. There can be no segmentation where, as here, the agency has analyzed in an EIS the collective impact of the actions that have purportedly been segmented. *See Wilderness Workshop*, 531 F.3d at 1228 (the purpose of the segmentation prohibition is "to prevent an agency from dividing a project into multiple actions,

each of which individually has an insignificant environmental impact, but which collectively have a substantial impact") (citation omitted).

II. Plaintiffs Fail to Prove Irreparable Harm.

Plaintiffs have not shown, and cannot show, that without an injunction, they will suffer irreparable harm. They must prove that the harm is concrete, not merely speculative, or theoretical. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). And they must show that such harm is "likely," not merely a "possibility." *Winter*, 555 U.S. at 20, 22. Indeed, the case law that Plaintiffs themselves cite explicitly rejects a presumption of harm in NEPA cases based on the Supreme Court's holding in *Winter*. *See San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Serv.*, 657 F. Supp. 2d 1233, 1240 (D. Colo. 2009) (declining to rely on presumption of harm in a NEPA case). Finally, the party seeking the preliminary injunction must show that the irreparable harm "is of such imminence that there is a clear and present need for equitable relief." *Heideman*, 348 F.3d at 1189 (citation omitted).

Plaintiffs first claim that any "impacts to the natural environment" amount to irreparable harm sufficient to obtain a preliminary injunction. Dkt. 16-1 (Memo) at 8. If this view were correct, preliminary injunctions would be issued as a matter of course in NEPA cases, but that is not what the cases say. The Tenth Circuit has held that the sole fact that plaintiffs allege NEPA violations and environmental impacts is not sufficient to prove imminent irreparable harm. *See Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (even in a NEPA case, plaintiffs must make a specific showing of harm to their specific interests).

As discussed above, the operations being challenged have been studied in environmental analyses and are subject to mitigation measures that minimize environmental impacts of oil and

gas development generally and hydraulic fracturing specifically, including closed-loop drilling systems, casing and cementing requirements, emissions standards for compressors, noise limitations, erosion-control requirements and reclamation standards, monitoring for cultural and paleontological resources and cessation of activity when a discovery is made, and wildlife protection measures, not to mention use of multi-well pads that minimize surface disturbance, truck trips, and other impacts.[41] Moreover, the Operators must abide by the BLM's new hydraulic fracturing rules, which require rigorous reporting, monitoring, and performance standards to protect surface and groundwater. 80 Fed. Reg. 16128, 16129 (Mar. 26, 2015). Further, the Operators have not proposed any wells that would encroach on Chaco Culture National Historical Park, which is over 10 miles away.[42]

Plaintiffs next allege adverse effects to the health and wellbeing of their members. Dkt. 16-1 (Memo) at 10. These alleged effects are highly speculative and cannot be fairly linked to development of the Mancos Shale formation, let alone the 38 wells planned to be drilled in 2015.[43] There is absolutely no evidence that the drilling of about 156 wells in the Mancos Shale formation since 2011 is causing the alleged adverse public health effects, or that issuing an injunction to prevent the drilling of up to 38 more wells in 2015 is necessary to prevent human health effects.[44] *Heideman*, 348 F.3d at 1189 (plaintiff has burden to show irreparable harm "is of such imminence that there is a clear and present need for equitable relief"). As the 2003

[41] McQueen Aff., ¶ 17 (Ex. 1); Lawlor Aff., ¶ 16 (Ex. 2).
[42] McQueen Aff., ¶ 10 (Ex. 1); Lawlor Aff., ¶ 9 (Ex. 2).
[43] In the San Juan Basin, no National Ambient Air Quality Standards are being exceeded, and concentrations of Hazardous Air Pollutants are less than in urban centers such as Albuquerque. EA 2015-0036, at 19-21 (Ex. 9).
[44] The generalized allegations of human health effects in Adam Law's declaration, *see* Dkt. No. 16-11, Pl. Ex. 10, do not show that the actions challenged here are causing health concerns to their members. He provides no causative link.

RMP/EIS states, as of 2003 there were some 18,000 active wells in the New Mexico portion of the San Juan Basin, and the RMP authorized almost another 10,000 wells—about 3,600 of which have been drilled. There is no rational basis to claim that about 200 wells in the Mancos Shale are the cause of any health effects.

Plaintiffs then resort to the argument that alleging a NEPA violation is by itself enough to obtain injunctive relief. Dkt. 16-1 (Memo) at 11-13. Such a presumption of irreparable harm in a NEPA case was explicitly rejected by the Supreme Court in *Winter*, 555 U.S. at 20. Other courts have specifically held that "there is no presumption of irreparable harm in procedural violations of environmental statutes." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009). Rather, it is the Plaintiffs' burden to show that the alleged procedural violation will result in "imminent" irreparable injury to their substantive interests.[45] *Heideman*, 348 F.3d at 1189. They do not.

III. The Balance of Harms Weighs Against an Injunction.

Not only do Plaintiffs fail to prove irreparable injury, but they also fail to show that the balance of harms supports an injunction. Plaintiffs must demonstrate that their alleged injuries

[45] The cases Plaintiffs cite do not support their contention that a procedural violation alone is enough to demonstrate irreparable harm. In *San Luis Valley*, the court expressly rejected a presumption of irreparable harm, but found the procedural violation *coupled with* substantive irreparable harm to the environment was sufficient. 657 F. Supp. 2d at 1241-42. In *Save Strawberry Canyon v. U.S. DOE*, the court mistakenly relied on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), to find that a NEPA violation constitutes "procedural injury," failing to recognize that *Lujan* was an Article III standing case, and did not set the standard for injunctive relief, a distinction recognized in other cases. 613 F. Supp. 2d 1177, 1187 (N.D. Cal. 2009); *see also Native Songbird Care & Cons. v. LaHood*, 2013 WL 3355657, at *12 (N.D. Cal. July 2, 2013) (unpublished) (discussing distinction between procedural injury for standing and injunctive purposes).

outweigh any injuries that might be suffered by BLM and the Operators if an injunction is granted. *Winter*, 555 U.S. at 24. The balance of harms alone is sufficient reason to deny a preliminary injunction. *See, e.g., id*. at 25-26 (finding national security interest in Navy training exercises outweighed irreparable environmental injury).

Plaintiffs' discussion of the balance of harms completely ignores the harm to the Operators from granting an injunction. *See* Dkt. 16-1 (Memo) at 13-15. Instead, Plaintiffs argue that because they have alleged environmental injury, they are entitled to a presumption that the balance of harms tips in their favor, and their burden is lessened because of the strength of their arguments on the merits.[46] But even the case Plaintiffs cite provides that an injunction is only *favored*, not presumed, in instances where Plaintiffs have established that actual injury is "*sufficiently likely*." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987) (emphasis added). As discussed above, Plaintiffs cannot demonstrate that the harm they allege is sufficiently likely if an injunction does not issue. And where other concerns are sufficiently weighty, an injunction may not be warranted. *See Winter*, 555 U.S. at 24-26; *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 42-43 (D.D.C. 2013) (holding generalized allegation of environmental harm of pipeline project did not outweigh harm to pipeline company and federal agencies of enjoining project where record showed pipeline company "committed major resources" to the project); *S. Utah Wilderness Alliance v. Thompson*, 811 F. Supp. 635, 641-42 (D. Utah 1993) (holding economic threats to grazing permittees outweighed the environmental and recreational interest of the plaintiffs in protecting coyotes).

[46] Plaintiffs cannot have it both ways—arguing that the strength of their merits' claims gives them a lesser burden on the equities and at the same time arguing that the strength of the equities entitles them to a lesser burden on the merits.

Here, an injunction will have real and immediate impacts on the Operators, their employees and contractors, and the surrounding communities. WPX anticipates drilling 27 wells in 2015, and an injunction will result in loss of value of several long-term contracts (*e.g.*, WPX is in year one of a three-year contract with a drill rig company that costs $29,500 per day regardless of whether the rig is drilling).[47] The decommissioning of WPX's two active drill rigs and eventual start-up alone will cost approximately one million dollars.[48] A lengthy injunction would also delay WPX from recouping its multi-million dollar investment in Mancos Shale wells and would also put in jeopardy leases which are currently in their primary term and which require a consistent, uninterrupted drilling schedule if they are to be held by production.[49] Encana's harms are similar and include the inability to drill up to seven wells planned for 2015, the inability realize a return on millions of dollars in investment, and impacts to contractors and service providers.[50] BP would be unable to drill four currently planned wells, and its non-operating interest in other Mancos Shale wells could be adversely affected.[51] And finally, COP's working interest in a significant number of Mancos Shale wells and farm-out agreements with time limits for development would be placed at risk.[52] Together, the Operators could stand to lose tens of millions of dollars if an injunction shuts down the current drilling program for 2015 and into 2016. Thus, in this instance, where Plaintiffs' harms are remote and speculative, and the harm to the Operators will be immediate and substantial, the balance of harms weighs against an injunction.

[47] McQueen Aff., ¶ 22 (Ex. 1).
[48] *Id*. ¶ 14.
[49] *Id*. ¶¶ 13, 16, 22.
[50] Lawlor Aff., ¶ 18 (Ex. 2).
[51] DeMahy Aff., ¶¶ 5, 7-8 (Ex. 3).
[52] Noah Aff., ¶¶ 6-7 (Ex. 4).

IV. The Public Interest Favors Continued Operations Under Validly Issued Permits.

The public interest weighs against granting a preliminary injunction. BLM's authorization of interim development is consistent with NEPA, its implementing regulations, and BLM guidance. *See* Section I.C, *supra*. The Project also furthers national goals of energy independence. The Mineral Policy Act of 1970 directs the Secretary of the Interior to "foster and encourage private enterprise in . . . the development of economically sound and stable . . . industries, [and in] the orderly and economic development of domestic mineral resources . . . to help assure satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a. Exploration and development of oil and gas in the project area is also consistent with the National Energy Policy, Executive Order 13212, which states, "The increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people." Development of the Mancos Shale meets these purposes by developing an important oil and gas resource that will contribute to the energy independence and domestic security of the country.

Mancos drilling also provides a significant benefit to the federal government, as well as state and local governments. Together, WPX and Encana estimate that they pay over two million dollars per month to the federal government in royalties, half of which is returned to the State of New Mexico.[53] Another $500,000 is paid to the State directly as royalties on State leases, and two million in taxes is paid to the State (which pays a portion to the local governments) per month. [54] Indian allottees also benefit through production royalties ranging

[53] McQueen Aff., ¶ 11 (Ex. 1); Lawlor Aff., ¶ 11 (Ex. 2).
[54] McQueen Aff., ¶¶ 11, 12 (Ex. 1); Lawlor Aff., ¶ 13 (Ex. 2).

from $175,000 to $225,000 per month,[55] income that helps improve the quality of life of local tribal members.[56]

Further, the NEPA analyses demonstrate that BLM appropriately balanced competing public interests in environmental values with responsible mineral development by approving interim development subject to extensive mitigation to minimize the potential impact of hydraulic fracturing associated with horizontal drilling. *See* Section II, *supra*.

V. Any Preliminary Injunction Requires A Bond.

The law requires that Plaintiffs post a bond if an injunction issues. Fed. R. Civ. P. 65(c). While some courts have found a minimal or no bond is necessary in NEPA cases, such a result is not automatic and must be based on a fact-specific analysis of the likelihood of success, the relative harms at issue, and Plaintiffs' ability to post a bond. *Id.*; *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d at 1126 ("So long as a district court does not set such a high bond that it serves to thwart citizen actions, it does not abuse its discretion."). In fact, courts have required environmental groups to post bonds before issuing preliminary injunctions. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 297 F.R.D. 633 (N.D. Ala. 2014) (requiring a $300,000 bond before the court would enjoin the Army Corps of Engineers from issuing permits that allowed surface coal mining operations purportedly in violation of NEPA); *Save Our Sonoran, Inc.*, 408 F.3d at 1126 (affirming a $50,000 bond before court would enjoin activities allegedly authorized in violation of NEPA and the Clean Water Act).

Plaintiffs have not demonstrated that no, or a nominal, bond is appropriate because: (1) they have not presented a strong case that they will succeed on the merits; (2) the Operators

[55] McQueen Aff., ¶ 11 (Ex. 1); Lawlor Aff., ¶ 11 (Ex. 2).
[56] *See* Hesuse Decl., ¶¶ 2, 4 (Ex. 11).

could suffer substantial economic harm from an injunction amounting to tens of millions of dollars, the amount depending on the scope and duration of any preliminary injunction granted; and (3) Plaintiffs have not shown that imposition of a bond reasonably calculated to cover the harm of an injunction would cause undue hardship or pose a barrier to judicial review. In fact, the Plaintiffs in this case have considerable financial means. In 2014, the Natural Resources Defense Council boasted $129 million in income and $119.5 million in expenses, with $233 million in assets.[57] WildEarth Guardians had total income of over $3.24 million and total expenses of $2.64 million in 2013.[58] This plaintiff group fails to show why imposition of more than a nominal bond would pose a barrier to judicial review here given the substantial assets of the organizations.

Given the inevitable financial harm of a preliminary injunction and the inability of the Plaintiffs to show undue hardship, a bond of no less than $10 million dollars should be required if a preliminary injunction is issued. In light of the Plaintiffs' assets, such a bond would not thwart judicial review.

CONCLUSION

For the reasons set forth above, Plaintiffs have failed to demonstrate that a preliminary injunction is warranted. The Court should deny Plaintiffs' Motion for Preliminary Injunction.

[57] The Natural Resources Defense Council 2014 Annual Report is *available at* http://www.nrdc.org/about/annual/nrdc_annual_report-2014.pdf (last visited May 26, 2015).
[58] The WildEarth Guardians 2013 Annual Report is *available at* http://bluetoad.com/publication/?i=214876#{"issue_id":214876,"page":22} (last visited May 26, 2015).

DATED this 26th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2015, I caused a true and correct copy of the foregoing Operators' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, to be served by CM/ECF upon the addressee(s) listed below:

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