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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.*, Federal Defendants.	Case No. 1:15-cv-00209-JB-SCY FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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[1] Because their exhibits exceed fifty pages, Federal Defendants have conferred with Plaintiffs per Local Rule 10.5. Plaintiffs have consented to the additional pages.

[2] Federal Defendants attach one Environmental Assessment in its entirety to give this Court necessary context for the challenged BLM decisions at issue here. Per Local Rule 10.5, Federal Defendants provide only relevant excerpts of the other documents attached as exhibits.

INTRODUCTION

Plaintiffs justify their request for emergency relief on the grounds that the Bureau of Land Management's ("BLM") latest 265 Applications for Permit to Drill ("APD") approvals for the San Juan Basin in northwestern New Mexico authorize "full field development" of the Mancos Shale utilizing unprecedented horizontal drilling and hydraulic fracturing ("fracking") techniques. But because the parade of horribles they predict are premised on a series of misconceptions and mischaracterizations, they can demonstrate neither the imminent, irreparable harm nor the likelihood of success on the merits necessary to secure an injunction.

Plaintiffs present horizontal drilling and fracking as new developments in the San Juan Basin that threaten imminent, unforeseen harm. In fact, wells have been fracked in the San Juan Basin since the 1950s and directional drilling, including horizontal drilling, has been in use since the early 2000s. And while horizontal drilling and fracking do cause some impacts that are different in kind and degree from conventional drilling, those differences are adequately addressed in the BLM's existing environmental analyses. Nor has BLM approved "full field development" of the Mancos Shale. Over a five-year period addressed in the First Amended Complaints—from 2010 to May 22, 2015—BLM has approved 265 wells in the Mancos Shale, far short of the 3,930 total wells that could eventually be developed in the formation and well within the 9,942 oil and gas wells forecast for the entire Basin. Plaintiffs' insistence that something novel is happening in the Mancos Shale is significantly overstated. What Plaintiffs are actually challenging here is BLM's routine review of APDs in a region where mineral development and fracking have been ongoing for over 50 years. And that is not the sort of imminent action that merits injunctive relief.

Plaintiffs are unlikely to succeed on the merits of their claims because, as directed by the

Tenth Circuit, BLM properly tiered its analysis of impacts for each APD to the analysis in the Final Environmental Impact Statement ("FEIS") for the 2003 Resource Management Plan ("RMP"). The FEIS and RMP considered all impacts likely to result from drilling 9,942 wells in the Basin. Because the majority of those impacts are the same for the standard drilling procedures that were prevalent in the San Juan Basin in 2003 as for wells that are being drilling in the Mancos Shale today, BLM did not expend resources re-analyzing them. BLM instead tiered to that analysis and used the environmental assessments ("EAs") for each APD to consider additional impacts that could be caused by horizontal drilling and fracking. After considering new data and taking into account the unique features of the Mancos Shale, BLM reasonably concluded that the 265 challenged APDs would not significantly impact the environment beyond the impacts analyzed in the 2003 PRMP/FEIS. Plaintiffs are, therefore, unlikely to succeed on the merits of their National Environmental Policy Act ("NEPA") claims.

But even if Plaintiffs could show that BLM's NEPA analysis was inadequate as to the 265 APDs at issue here, they are not entitled to the preliminary injunction they seek. As a threshold matter, the injunction must be denied, at least in part, because this Court lacks jurisdiction over whatever decisions BLM may make with respect to APDs it may receive in the future. Those APDs will be processed in due time, and will be the subject of additional NEPA analysis. Until that process is completed and final authorizations are issued, any grievance Plaintiffs may have with those future APDs is necessarily unripe and non-justiciable. Plaintiffs cannot preemptively halt an administrative process simply because they fear they may not agree with BLM's eventual decisions.

Turning to the APDs that are properly before the Court, Plaintiffs still are not entitled to an injunction because they cannot demonstrate that their alleged harms outweigh the injury an

injunction would cause to the BLM's and the public's interest in oil and gas development in the San Juan Basin. Oil and gas development is vital to New Mexico's economy, generating thousands of jobs and substantial revenues that in turn fund schools, hospitals, and other government services. This Court should not allow Plaintiffs to stymie local and state economies based on misconceived notions about horizontal drilling and fracking in the San Juan Basin.

BACKGROUND

I. Oil and Gas Development in the San Juan Basin and the 2003 RMP

The San Juan Basin in northwestern New Mexico is one of the largest natural gas fields in the nation, and has been in production for more than 60 years. [3] Ex. E (2003 RMP with ROD) at 1. Since that time, over 30,000 oil and gas wells have been drilled in the Basin and 23,000 wells are currently producing. Ex. A (Barr Decl.) ¶ 20. Through its Farmington, New Mexico Field Office ("FFO"), BLM manages 3,860 active oil and gas leases in the San Juan Basin. *Id.* ¶ 27. Since the 1950s, nearly every well in the San Juan Basin has been fracture stimulated. *Id.* ¶ 38. The Mancos Shale/Gallup Sandstone formation (hereinafter "Mancos Shale") is a geologic layer within the San Juan Basin. Ex. D (2003 PRMP/FEIS) at 3-6.

In August 2000, BLM began the process of revising the RMP for the San Juan Basin to address the uses of approximately 1,415,200 acres of public land and 3,020,693 acres of federal minerals in the Basin. *See* Notice of Intent, 65 Fed. Reg. 52,781-02 (Aug. 30, 2000). As part of this process, in 2001 BLM issued a Reasonably Foreseeable Development Scenario (RFDS) that forecast the scope of oil and gas development in the San Juan Basin over the next 20 years. Ex. C (2001 RFDS). The RFDS noted that "there is considerable interest in developing the Mancos Shale as a gas reservoir over a large part of the basin where it has not been previously

[3] While the San Juan Basin extends into southern Colorado, Federal Defendants use the term in this brief to refer to the portion of the Basin in northwestern New Mexico.

developed," and predicted that during the 20-year development window, 2,108 Mancos gas wells would be drilled on federal lands in the San Juan Basin. *Id*. at 5.23.

After public comment, in 2003 BLM issued a Proposed RMP and Final EIS ("PRMP/FEIS"). *See* 68 Fed. Reg. 16545 (Apr. 4, 2003). The PRMP/FEIS evaluated four alternatives along 20 different resources and uses, including surface disturbance, air quality, visual resources, cultural resources, recreation, social and economic conditions, and species impact. Ex. D 4-1-4-120. The PRMP/FEIS proposed selection of a specific alternative that analyzed the cumulative impacts resulting from the development of 9,942 new oil and gas wells (including 2,108 Mancos gas wells) with associated long-term surface disturbance of about 16,106 acres. *Id*. 4-105-4-120; Ex. E. The RMP, issued in December 2003, adopted the proposed alternative. Ex. E. Since then, only 3,860 wells have been drilled in the FFO planning area, or about 39 percent of the 9,942 wells predicted and analyzed in the 2003 PRMP/FEIS. Ex. A ¶ 27. Similarly, only 185 wells have been drilled in the Mancos Shale, or about 9 percent of the 2,108 wells predicted and analyzed in the PRMP/FEIS. *Id*.

II. The Decision to Amend the 2003 RMP/EIS

On February 25, 2014, the BLM FFO began scoping for the preparation of an amendment to the 2003 RMP/EIS to analyze development of the Mancos Shale. Notice of Intent to Prepare a Resource Management Plan, 79 Fed. Reg. 10,548 (Feb. 25, 2014). New developments in horizontal drilling and multi-stage hydraulic fracturing had made accessing the Mancos Shale formation more economically feasible. Based on these developments, industry projected that full field development of the Mancos Shale might result in more than 20,000 oil and gas wells, substantially exceeding the 9,942 wells projected in the 2003 RMP/FEIS. Recognizing that this would represent a new development requiring a new NEPA analysis, FFO undertook the first

step in amending the Farmington RMP: preparation of a new RFDS to better predict the potential for oil and gas development ("2014 RFDS"). Ex. A ¶ 33; Ex. F (2014 RFDS).

The findings of the 2014 RFDS did not bear out industry's predictions; it forecast an additional 1,930 oil wells and 2,000 gas wells in the Mancos Shale, most of which would be horizontally drilled. Ex. F, Exec. Summ. Even aggregated with development that has already occurred within the Basin, this would not exceed the 9,942 wells predicted in the 2001 RFDS. *Id*. ¶¶ 47-48. Nonetheless, FFO decided to press forward with the RMP amendment, with particular focus on development of unleased lands and lands with wilderness characteristics. FFO expects to have a draft EIS ready for public comment by the end of 2015. *Id*. ¶¶ 34.

III. The 2011-15 Mancos Shale EAs

While the process of amending the RMP continues, FFO has moved forward with the process of approving APDs in the Mancos Shale, because the total number of additional wells it has reviewed and approved to date will not exceed the number analyzed and approved in the RMP. The 265 Mancos Shale APDs being challenged represent a total long-term surface disturbance of 5,642 acres. BLM has prepared EAs for each of these wells, or cluster of wells, that are tiered to the 2003 RMP/EIS, but include additional analysis of site-specific impacts, including impacts unique to horizontal drilling and fracking.[4] *See, e.g.*, Ex. I (2015-0066); 2015-0036; Ex. A ¶¶ 57-69.

STANDARDS OF REVIEW

I. Preliminary Injunctions Are Extraordinary Remedies

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v.*

[4] All EAs are at http://www.blm.gov/nm/st/en/fo/Farmington_Field_Office/ffo_document_library.html.

Armstrong, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2948, 129-30 (2d ed. 1995)) (emphasis in original). "Because a preliminary injunction is an extraordinary remedy, 'the right to relief must be clear and unequivocal.'" *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997) (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991)). The movant's "requirement for substantial proof is much higher" for a motion for a preliminary injunction than it is for a motion for summary judgment. *Mazurek*, 520 U.S. at 972.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). If a plaintiff fails to meet its burden on any of these four requirements, its request must be denied. *See, e.g.*, *id.* at 23-24 (denying injunctive relief on the public interest and balance of harms requirements alone, even assuming irreparable injury to endangered species and a violation of NEPA); *Chem. Weapons Working Grp.*, 111 F.3d at 1489 (holding that the plaintiffs' failure on the balance of harms "obviat[ed]" the need to address the other requirements); *Sprint Spectrum, L.P. v. State Corp. Comm'n of Kan.*, 149 F.3d 1058, 1060 (10th Cir. 1998). There is no presumption that an injunction automatically follows the violation of an environmental statute. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).[5]

[5] The Tenth Circuit's relaxed "serious questions" standard, *see* Pl. Br. at 6, did not survive *Winter*, which requires nothing less than a likelihood of success on the merits. 129 S. Ct. at 375-76 (stating that any lesser standards are "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). Even if the serious questions standard were still viable, it would be inapplicable here, where BLM is implementing projects in the public interest. *See Heideman v. Salt Lake City*, 348 F.3d 1182,1189 (10th Cir. 2003) ("Where . . . a preliminary injunction 'seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' the less rigorous fair-ground-for-litigation standard should not be applied.") (citation omitted).

II. Review under the Administrative Procedure Act ("APA")

NEPA does not provide a private right of action, so plaintiffs seeking to challenge an agency action on NEPA grounds must invoke the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. The APA provides a right of action and waives sovereign immunity for any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." *Id.* § 702. Moreover, because judicial review in this case "is sought . . . under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990).

A reviewing court must affirm an agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). The scope of judicial review under this standard is narrow and deferential:

> A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." The agency must articulate a "rational connection between the facts found and the choice made." . . . [W]e will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) (citations omitted); *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986) ("The court may not set aside agency action . . . unless there is no rational basis for the action.").

A deferential approach is particularly appropriate where, as here, the challenged decision implicates substantial agency expertise. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts even if, as an

original matter, a court might find contrary views more persuasive." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). "Because analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to 'the informed discretion of the responsible federal agencies.'" *Id.* at 377 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims

Plaintiffs argue that they are likely to succeed on the merits of their claims under NEPA because (1) BLM improperly tiered the APD EAs to the 2003 RMP; (2) BLM failed to consider the cumulative impacts of fracking in the Mancos Shale; and (3) BLM improperly segmented its APD approvals to avoid acknowledging the total environmental impacts of fracking in the Mancos Shale. Pls.' Mot. 17-26. But their arguments are premised on an initial fallacy—that development in the Mancos Shale is substantially different from development in other formations in the San Juan Basin because it involves horizontal drilling and fracking. Based on this false assumption, Plaintiffs overstate the potential impacts of the 265 approved APDs at issue here, and unfairly disregard BLM's analysis of reasonably anticipated environmental impacts in both the 2003 PRMP/FEIS and the more recent APD EAs. Fracking has been used in the San Juan Basin since the 1950s and "is a common process" that is "applied to nearly all wells drilled" in the Basin. *See, e.g.*, Ex. I at 6. While new technological innovations have recently made horizontal drilling and fracking economically feasible in the Mancos Shale, one particular geologic layer within the Basin, similar technologies have long been used in other formations in the Basin. Ex. A ¶¶ 38-39.

While Plaintiffs may object to BLM's ultimate decision to approve APDs seeking to frack in the Mancos Shale, NEPA imposes only procedural requirements. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009); *Marsh*, 490 U.S. at 371. Here, BLM

followed those requirements by preparing EAs for each APD to determine whether the proposed drilling is likely to significantly affect the quality of the human environment. *New Mexico ex rel. Richardson*, 565 F.3d at 704 (citing 42 U.S.C. § 4332(2)(C)). In each EA, BLM took a hard look at the impacts of horizontal drilling and fracking in the Mancos Shale and found that the proposed wells would not have a significant impact on the environment. *See* 40 C.F.R. § 1508.13; *New Mexico ex rel. Richardson*, 565 F.3d at 704 ("When called upon to review factual determinations made by an agency as part of its NEPA process, short of a 'clear error of judgment' we ask only whether the agency took a 'hard look' at information relevant to the decision."). Because "[a] presumption of validity attaches to the agency action[,] the burden of proof rests with" Plaintiffs. *Id*. (quoting *Citizens Comm'n to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008)). Plaintiffs have not met that burden here where BLM made an informed and reasonable decision to approve the challenged APDs.

A. Plaintiffs' Claims Against APDs for Completed Wells are Moot

This Court lacks jurisdiction over APDs for wells which have already been drilled and fracked because those claims are moot. The environmental harms that Plaintiffs allege here are caused by the drilling and fracking of the wells and associated ground disturbance. Pls.' Mot. 9-11. Once a well has been drilled and fracked, those alleged harms have occurred and are no longer redressable by this Court. *Park Cnty. Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 614-15 (10th Cir. 1987), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992) (finding APD challenge moot when well drilled and abandoned); *Jackson v. Denver Producing & Refining*, 96 F.2d 457, 461 (10th Cir. 1938) ("It may be conceded that all questions touching the drilling of those wells are moot" when the drilling has already occurred). Accordingly, Plaintiffs cannot obtain any injunction

with respect to the wells identified at Ex. A ¶ 31

B. This Court Lacks Jurisdiction Over Plaintiffs' Claims Against Future APD Approvals

This Court lacks jurisdiction to enjoin BLM from approving APDs in the future because those claims are not yet ripe. The APA provides for judicial review of "final agency actions." 5 U.S.C. § 704; *Lujan*, 497 U.S. at 882. Until BLM prepares NEPA analysis for an APD and issues a record of decision, there has been no final agency action and there is nothing for this Court to review. Plaintiffs' presumption that BLM will fail to comply with NEPA in its future APD approvals is pure speculation and cannot be the basis for a claim. *Id*. at 894 ("[W]e intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect.")

C. BLM Adequately Analyzed the Impacts of Fracking in the EAs

Plaintiffs allege that BLM improperly tiered the discussion of fracking in the APD EAs to the 2003 PRMP/FEIS because that document does not contemplate fracking. Pls.' Mot. 18. Tiering—that is, incorporating by reference a detailed discussion in a programmatic or plan-level NEPA document in a later site-specific NEPA document to avoid repetition—is "unquestionably appropriate" in the oil and gas context, where BLM develops an RMP for all mineral development in a region and only later considers site-specific project proposals. *New Mexico ex rel. Richardson*, 565 F.3d at 716 n.40; *see also* 40 C.F.R. §§ 1502.20, 1508.28. Here, BLM properly tiered its APD EAs to the 2003 PRMP/FEIS and RMP for two reasons. First, because fracking has been used in the San Juan Basin since the 1950s, the 2003 RMP necessarily anticipated the continued use of fracking in the future. *See, e.g.*, Ex. I at 5-6. Second, although the 2003 RMP admittedly focused more on the drilling procedures then prevalent in the San Juan Basin and not directional drilling, many categories of impacts of those drilling procedures are

generally no different from the impacts of the horizontal drilling and fracking. Thus, BLM properly relied on the portions of the RMP for which the impacts are the same in order to avoid the "unnecessar[y] expendi[ture] [of] resources" required to re-analyze impacts already considered. *Amigos Bravos v. BLM*, Nos. 09-cv-00037, 09-cv-00414, 2011 WL 7701433, at *15 (D.N.M. Aug. 3, 2011).

Regarding the first point, fracking has been used in the San Juan Basin since the 1950s and is "applied to nearly all wells drilled" there. Ex. I at 5-6. While the 2003 PRMP/FEIS and RMP did not specifically discuss fracking at any length, that is because fracking was, and continues to be, so common that BLM did not see the need to specifically mention it. *See* Ex. D at 3-96 (noting that well production costs will include fracturing), Glossary-5 (defining hydraulic fracturing), App. G at G-18 (example APD condition of approval requiring reporting on fracturing), App. L at L-2 (discussing hydraulic fracturing in the context of coalbed methane development); Ex. E at 7-5 (defining hydraulic fracturing). Any mention of drilling, whether conventional or directional, in the PRMP/FEIS and RMP presumed that the resulting well would be stimulated using hydraulic fracturing. Ex. A ¶ 39. Therefore, the PRMP/FEIS and RMP took those impacts into account in considering the direct, indirect, and cumulative effects of mineral development throughout the Basin, including the Mancos Shale. *See* Ex. D at 3-12 (noting that Mancos Shale formation produces oil and has the potential to produce natural gas). Accordingly, it was appropriate for BLM to tier to that discussion in the APD EAs.

As to the second point, even if the PRMP/FEIS and RMP's impacts analysis were limited to the impacts of standard drilling and operating procedures then prevalent in the San Juan Basin, it would still be appropriate for BLM to tier to those documents because, for many resources, the impacts of those procedures are the same as those caused by horizontal drilling and fracking.

Thus, the PRMP/FEIS's extensive discussions of the impacts of drilling on soils, minerals, vegetation, fisheries and wildlife, wilderness, rangeland, visual resources, cultural resources, paleontology, recreation, noise, social and economic conditions, and environmental justice remain equally valid for horizontally drilled and fracked wells as for those that are vertically drilled.[6] Ex. A ¶¶ 48-50; Ex. D at 4-1-120 (complete impacts discussion), 4-105-120 (impacts of preferred alternative D). Rather than waste resources on re-analyzing impacts thoroughly discussed at the RMP-stage, BLM reasonably tiered to that analysis and focused its efforts on considering impacts not discussed in the PRMP/FEIS and RMP. *See, e.g.*, Ex. H (2015-0036) at 2-3 (While EA "tiers into and incorporates by reference the information and analysis contained in the [PRMP/FEIS]," it separately "addresses site-specific resources and effects of the proposed action that were not specifically covered within the PRMP/FEIS."); *Amigos Bravos*, 2011 WL 7701433, at *15 (upholding tiering oil and gas leases to San Juan Basin RMP).

To that end, in the APD EAs, BLM took a hard look at potential additional groundwater and air quality impacts caused by horizontal drilling and fracking in the Mancos Shale. As to groundwater, BLM describes how fracking works and concludes that fracking will not impact surface water or groundwater aquifers because "the proposed project is well below any underground sources of drinking water." *See, e.g.*, Ex. H at 26-27. As BLM explains,

> 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. . . . Fracking could possibly extend into the Mesaverde formation overlying the Basin

[6] Plaintiffs argue that BLM could not have tiered to the 2001 RFDS because that is not a "document prepared pursuant to NEPA." Pls.' Mot. 20. While BLM does not purport to tier directly to the RFDS, the PRMP/FEIS incorporates the RFDS's findings by reference, and BLM properly relies on those findings when it tiers to the RMP. 40 C.F.R. § 1502.21("Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action."); Ex. D at 4-2 ("The estimates of long-term disturbance resulting from oil and gas development used for impact analysis are based on assumptions from the FFO and the RFDS developed by NM Tech.").

> 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 (TDS).

Id.; *cf. Ctr. for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140 (N.D. Cal. 2013) (finding BLM violated NEPA when it failed to analyze the effect of fracking on water supplies). Likewise, for air quality impacts, BLM took into account "[n]ew information about greenhouse gases" that "has emerged since the [PRMP/FEIS] was prepared," as well as the 2014 Air Resources Technical Report for BLM Oil and Gas Development in New Mexico, Kansas, Oklahoma, and Texas, which expressly discusses the impacts of horizontal drilling and fracking on air quality. *See, e.g.*, 2014-0175 at 24; Ex. G (2014 Air Resources Technical Report) at 7 (noting that "VOCs may be emitted from hydraulically fractured oil and gas wells during fracturing and re-fracturing"), 55 (noting that "flaring emissions for the U.S. are on the rise . . . because of the significant increase in fracking for shale oil production"). BLM estimated the criteria pollutant emissions likely to be produced by each proposed well at each stage of the drilling and production process, taking into account the length of time necessary to horizontally drill the well and the fact that the well would be fracked. Ex. A ¶¶ 50, 60-62; *See, e.g.*, 2014-0175 at 26-27 (estimated emissions); Ex. H at 12 ("Horizontal drilling typically takes approximately 30 days per well."). By tiering to the PRMP/FEIS and RMP where possible, and analyzing additional impacts relevant to horizontal drilling and fracking in the APD EAs, BLM has met its obligation under NEPA to both take a hard look at the reasonably foreseeable environmental impacts of each proposed well and to "eliminate repetitive discussions of the same issues" at each stage of NEPA review. 40 C.F.R. § 1502.20.

This case differs from *Center for Biological Diversity v. BLM* ("*CBD*"), cited by Plaintiffs, in which the district court for the Northern District of California found BLM's NEPA

analysis of fracking in the Monterey Shale lacking. Pls.' Mot. 19. There, BLM tiered an EA for four leases to an earlier RFDS and PRMP/FEIS that predicted a total of 15-20 wells in the portion of central California managed by the Hollister Field Office. *CBD*, 937 F. Supp. 2d at 1148. Based on this projection, the EA assumed that only one exploratory well would likely be drilled on the leased lands. *Id*. at 1155. The Court held that the EA unreasonably underestimated the scale of drilling activity in the Monterey Shale in light of recent innovations in horizontal drilling and fracking technologies and that BLM could not rely on the earlier PRMP/FEIS to cure the deficiency because that document also failed to address drilling on this scale. *Id*. at 1157. Here, in contrast, BLM, if anything, overestimated the scale of drilling in its 2003 PRMP/FEIS and RMP. It forecasted 9,942 wells, the vast majority of which would likely be fracked based on longstanding practice in the San Juan Basin—far above the total number of wells to date and the total number anticipated by the 2014 RFDS. Ex. D at 4-5, 4-7, 4-10; Ex. A ¶¶ 47-48. In addition, in *Center for Biological Diversity*, BLM argued that it lacked jurisdiction over fracking and therefore need not have considered it in its NEPA analysis. *CBD*, 937 F. Supp. 2d at 1157. Here, in contrast, BLM has never denied having jurisdiction over fracking and considered it both implicitly in the PRMP/FEIS as well as explicitly in the EAs for each approved APD in the Mancos Shale.

To the extent Plaintiffs suggest that BLM cannot approve APDs for the Mancos Shale until the RMP amendment is complete, they misconstrue the requirements of NEPA as well as BLM's obligations to timely process APDs. The 2003 RMP remains in effect during the amendment process, and BLM may continue to take actions, such as the approval of APDs, under it. 43 C.F.R. § 46.160 ("During the preparation of a program or plan NEPA document," BLM may "undertake any major Federal action . . . when that action is within the scope of, and

analyzed in, an existing NEPA document supporting the current plan or program, so long as there is adequate NEPA documentation to support the individual action.); *see also Biodiversity Assocs. v. U.S. Forest Serv. Dep't of Agric.*, 226 F. Supp. 2d 1270, 1308 (D. Wyo. 2002) ("[P]rogram actions can continue while the plan is being revised." (citations omitted)); *ONRC Action v. BLM*, 150 F.3d 1132, 1140 (9th Cir. 1998) (calling argument that "outdated" RMPs cannot be existing program plans under NEPA "unfounded" and explaining that "program actions can continue while the [RMP] is being revised"); *Theodore Roosevelt Conservation P'ship v. Salazar*, 605 F. Supp. 2d 263, 280 (D.D.C. 2009) ("BLM does not have a duty to halt development while revising the RMP."), *aff'd* 616 F.3d 497 (D.C. Cir. 2010); *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 842-44 (9th Cir. 2007) (upholding district court injunction allowing some coal bed methane development to continue during revision of EIS). The fact that the RMP is being amended also in no way undermines the RMP's validity and reliability. The RMP amendment is an addition to the 2003 RMP, not a replacement of it. The RMP amendment process is intended to address potential future full field development of the Mancos Shale, a scenario that has only recently become reasonably foreseeable but is still years away from coming to pass. 79 Fed. Reg. 10,548. Current development in the Mancos Shale is still well within the 9,942 wells anticipated and analyzed by the 2003 PRMP/FEIS and RMP. Despite Plaintiffs' cries to the contrary, full field development of the Mancos Shale—estimated to be 1,930 oil wells and 2,000 gas wells—remains many years away. Ex. A ¶¶ 31, 55-56 (rate of APD approval stagnant).

There is also no requirement under NEPA that impacts shared among different projects must be analyzed at the planning stage rather than at the site-specific proposal stage. *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1217 (10th Cir. 1997) (finding that "plan-level concerns"

may be considered at the time of a site-specific action); *Biodiversity Associates*, 226 F. Supp. 2d at 1308 (finding "[t]imber sale analysis can address the issues of fragmentation, sensitive species, and wildlife viability apart from the forest plan"). BLM may consider the impacts of horizontal drilling and fracking either in the EA for each APD that seeks to use those techniques or in a programmatic plan-level document. Until the RMP amendment is complete, BLM will continue to analyze the impacts of horizontal drilling and fracking in the Mancos Shale at the APD-stage while also tiering to the relevant analysis in the 2003 PRMP/FEIS and RMP.[7]

D. BLM Reasonably Analyzed Cumulative Impacts in the APD EAs and the 2003 PRMP/FEIS

Plaintiffs next accuse BLM of failing to consider the cumulative impact of all of the wells drilled or expected to be drilled in the Mancos Shale. This allegation is nonsensical on its face: Plaintiffs would have BLM arbitrarily limit its cumulative impacts analysis to wells accessing a particular geologic formation, ignoring the thousands of other wells in the San Juan Basin, most of which also utilize directional drilling and fracking. Ex. A ¶¶38-39. Cumulative impacts are the impacts that result "from the incremental impact of the action when added to past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. They therefore include all 9,942 foreseeable future wells in the San Juan Basin, not merely the 3,650 wells anticipated by the 2014 RFDS to access the Mancos Shale. Ex. F, Exec. Summary. Rather than artificially constrain its analysis, thereby generating inaccurate conclusions and potentially underestimating total cumulative impacts, BLM properly tiered the cumulative impacts analysis of its APD EAs to the

[7] It bears noting that BLM may not simply decline to process APDs while an RMP amendment process is ongoing. BLM has a legal duty to approve or deny an APD, or notify the operator that it is deferring action, within 30 days of submission under the 2007 Onshore Oil and Gas Order No. 1. *See* 72 Fed. Reg. 10,328 (Mar. 7, 2007) (codified at 43 C.F.R. pt. 3160); *see also id*. at 10,334; 43 C.F.R. § 3162.3-1(h). If BLM defers action, it must provide a schedule of the relevant federal actions, such as NEPA analysis, that must occur before a decision can be made or a list of actions that the operator must take to enable BLM to make a decision. 72 Fed. Reg. 10,334 . Within 10 days of the operator taking all required actions, BLM must issue a decision. *Id*.

PRMP/FEIS, which discussed the cumulative impacts of all 9,942 oil and gas wells reasonably foreseeable in the Basin on soil, water quality, air quality, vegetation, wetlands, wildlife, wilderness, rangelands, visual resources, cultural resources, recreation, and environmental justice, among other things.[8] *See* Ex. D at 4-5 (9,942 wells under preferred alternative), 4-121-129 (cumulative impacts analysis), Ex. E at 3; *see also Amigos Bravos*, 2011 WL 7701433 at *15 (upholding tiering to 2003 San Juan Basin RMP for cumulative impacts analysis); *Colo. Envtl. Coal. v. BLM*, 932 F. Supp. 1247 (D. Colo. 1996) (Plaintiffs were not likely to succeed on merits of NEPA claim, including allegation of failure to consider cumulative impacts, when BLM properly tiered its APD EA to the RMP).

To the extent that new developments in horizontal drilling and fracking technologies are anticipated to alter the cumulative impacts as analyzed in the PRMP/FEIS, BLM provided a supplemental analysis of cumulative impacts in each APD EA. For example, in its discussion of air quality, which Plaintiffs challenge in particular as inadequate, BLM took a hard look at new data, including data on greenhouse gases and horizontal drilling and fracking. *See, e.g.*, Ex. H at 19, 23; *see also* Ex. G[9] at 7, 55. While the Air Resources Technical Report noted that fracking can result in increased VOC emissions due to flaring, BLM noted that "most VOC emissions for one horizontal well result from venting from oil storage tanks" and that "[o]il storage tanks would be subject to current EPA regulations regarding the capture or flaring of VOC emissions." 2014-0175 at 27. Likewise, because BLM's total emissions estimates in each EA were based on the time it takes to drill the proposed well, they necessarily took into account the fact that

[8] Because BLM has currently approved 3,860 wells in the San Juan Basin, well within the number of wells forecasted in the PRMP/FEIS and RMP, the PRMP/FEIS's cumulative impacts analysis remains reliable.

[9] The EAs incorporate the 2014 Air Resources Technical Report by reference. *See, e.g.*, Ex. I at 21; 40 C.F.R. § 1502.21 ("Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action.").

horizontal drilling tends to take longer than vertical drilling and therefore causes more total emissions. Ex. A ¶¶ 60-62; Ex. I at 24 (estimating emissions based on 25 days to drill well).

BLM concluded that the proposed wells, when combined with other projects in the San Juan Basin, "would not be expected to result in exceeding the NAAQS for any criteria pollutants." *Id*. at 23. Given that the 265 Mancos Shale APDs at issue in this case are far outnumbered by 23,000 oil and gas wells currently active in the San Juan Basin, and that electricity generation stations and vehicular traffic significantly contribute to emissions in the area, BLM's determination that these wells would not have a significant additional cumulative impact on air quality in the region was reasonable. *See* 2015-0045 at 22; Ex. I at 25-26.

In addition to air quality, Plaintiffs also criticize the APD EAs' cumulative impacts analysis for cultural resources and local communities. As to cultural resources, Plaintiffs allege that the EAs do not include any analysis of cumulative impacts. This assertion overlooks the extensive discussion of cumulative impacts in the PRMP/FEIS, tiered to by each APD, which remains valid because horizontal drilling and fracking will not have any greater impact on cultural resources than the standard operating procedures that were prevalent in the San Juan Basin when BLM issued the RMP in 2003. *See, e.g.*, Ex. I at 32-33; *see also Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1238-39 (9th Cir. 1989) (upholding timber sale EAs that tiered to the cumulative impacts discussion in the EIS for Timber Management Plan). The PRMP/FEIS identified 1,895 archaeological sites that could be affected by the preferred alternative and the RMP noted that 79 sites in the Basin had been designated as Areas of Critical Environmental Concern ("ACEC") due to important historic and cultural resources. Ex. E at 2-37; Ex. D at 4-116, 4-128. ACECs receive special protections from oil and gas development, including noise mitigation and limits on vehicle access. *Id*. The RMP also provides for mitigation measures

which are included in each APD as conditions of approval to address discoveries of previously unidentified cultural resources: if an operator discovers cultural resources, it must immediately suspend operations and report the discovery to BLM. Ex. E at 2-38; Ex. D at 4-134-35. If an operator damages cultural resources, it must pay for the development of a "data recovery program" and is subject to civil and criminal penalties. Ex. E at 2-39.

The challenged APD EAs have thus far found that proposed wells would not cause additional adverse cumulative impacts to cultural resources beyond those considered in the PRMP/FEIS because "significant cultural sites [are] avoided."[10] *See, e.g.*, 2015-0036 at 36. Plaintiffs argue that this explanation is insufficient because BLM "has unlawfully limited its impact analysis only to cultural resources within each APD footprint." Pls.' Mot. 23. This allegation completely overlooks both the thorough analysis of cumulative impacts conducted at the RMP-stage and properly tiered to by each APD EA, as well as the fact that cumulative impacts are premised on an initial direct impact, the effect of which is exacerbated when combined with other past, present, and reasonably foreseeable future impacts. *See* 40 C.F.R. § 1508.7. If the proposed action has no incremental impact, a cumulative impacts analysis is not required. *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1140 (9th Cir. 2006); *Ctr. for Biological Diversity v. BLM*, No. 09-cv-8011, 2011 WL 4551175, at *12 (D. Ariz. Sept. 30, 2011) (finding BLM not required to perform cumulative effects analysis for

[10] Declarant Mike Eisenfeld's accusation that BLM has "failed to conduct archaeological surveys and inventories" is false. Pls.' Mot. Ex. 4 ¶ 13. The RMP identified 79 Areas of Critical Concern with important cultural sites, encompassing 78,700 acres in the FFO area that receive special protection from oil and gas development and other activities. Ex. E at 2-37, App'x C. In addition, as part of the APD review process, BLM conducts an archaeological survey of the Area of Potential Effect, which includes the well footprint, as well as a 100 foot buffer on all sides. BLM Handbook 8100-1, App'x 9, *available at* http://www.blm.gov/style/medialib/blm/nm/programs/more/cultural_resources/cultural_docs.Par.77051.File.dat/H-8100-1_manual_final_V_8-21_.pdf. *See, e.g.*, Ex. I at 32. Pursuant to the Archaeological Resources Protection Act and National Historic Preservation Act, BLM does not release these surveys to the public to avoid the risk of harm to those sites. 16 U.S.C. § 470hh(a); 36 C.F.R. § 800.11(c)(1).

impacts to California condor when BLM reasonably determined its own actions would not affect condor population). To the extent BLM has found that each challenged APD has no impact on cultural resources, it need not conduct a cumulative impacts analysis as part of the EA for that APD.[11]

As to local communities, Plaintiffs allege that BLM either failed to consider cumulative effects altogether or inappropriately limited its analysis to the benefits of drilling without disclosing the costs. Plaintiffs once again overlook the extensive discussion of socioeconomic impacts in the PRMP/FEIS, including impacts on recreation, noise, employment opportunities, and the economy, as well as environmental justice concerns. Ex. D at 4-119-20 (impacts of preferred alternative); 4-129 (cumulative impacts). The PRMP/FEIS concluded that while oil and gas development in the San Juan Basin could displace some grazing, it would provide significant economic benefits to the region. *Id*. at 4-129. It predicted that non-federal development spurred by oil and gas could generate 560 jobs annually and that direct and indirect expenditures could add $98,600,000 to the local economy annually. *Id*. Because development of oil and gas resources in the Mancos Shale does not cause socioeconomic impacts different from those caused by the development of oil and gas resources in other formations, the PRMP/FEIS's analysis remains valid and BLM properly tiered to it in the APD EAs. Ex. A ¶ 49.

More recent APD EAs have made use of the new data that became available in September 2014 after BLM's completion of the Socioeconomic Baseline Assessment Report

[11] *New Mexico ex rel. Richardson v. BLM*, 459 F. Supp. 2d 1102 (D.N.M. 2006), is inapposite. *See* Pls.' Mot. 23. That case held that BLM should not wait to conduct Section 106 consultation under the National Historic Preservation Act until the APD stage in situations where there may be "landscape-level" cultural resources, such as mountains, mesas, or canyons, that can only be protected by the total preclusion of oil and gas development in that area. 459 F. Supp. 2d at 1125. Not only have Plaintiffs not made any Section 106 NHPA claims in their motion for preliminary injunction, they have also not identified any landscape-level cultural resources that BLM has overlooked in its RMP and EAs. *See* Pls.' Mot. 23.

prepared for the RMP amendment.[12] *See, e.g.*, Ex. I at 34-39. Those EAs have come to the same conclusions as the PRMP/FEIS: because "the oil and gas is the dominant force in the [local] economy, . . . [o]verall, the positive effects of oil and gas development . . . are expected to outweigh any changes in jobs, expenditures, or revenues resulting from any other actions expected or likely in the region. . . . The proposed project would contribute to this positive cumulative impact." *Id*. at 38. While APD EAs that predated the new report relied solely on the PRMP/FEIS data and analysis, "an agency's reliance on outdated data is not arbitrary or capricious, 'particularly given the many months required to conduct full [analysis] with the new data.'" *Theodore Roosevelt Conservation P'ship*, 605 F. Supp. 2d at 273 (quoting *Vill. of Bensenville v. FAA*, 457 F.3d 52, 71 (D.C. Cir. 2006)). Because there was no indication that the data used by the PRMP/FEIS was inaccurate or inadequate—indeed, BLM's findings based on the new data were in line with those based on the old data—BLM properly relied on the old data until it completed the new report. *Id*.

Plaintiffs' final accusation that BLM improperly failed to disclose the socioeconomic costs of the proposed wells overlooks the PRMP/FEIS's acknowledgement of those impacts. The PRMP/FEIS recognized that "widespread oil and gas development" would "detract[] from high quality dispersed recreation", could "displace some grazing" in the San Juan Basin, and could potentially conflict with "other land uses, such as residential, throughout the planning area," which in turn affects area residents, "including low income and minority groups." EX. D at 4-128-129. Likewise, the APD EAs acknowledged that there could be possible negative effects based on "changes in jobs, expenditures, or revenues resulting from other actions expected for

[12] Mancos-Gallup Resource Management Plan Amendment and Environmental Impact Statement: Socioeconomic Baseline Assessment Report (Aug. 2014), *available at* http://www.blm.gov/style/medialib/blm/nm/field_offices/farmington/farmington_planning/ffo_planning_docs/rmpa_mancos/reports.Par.21357.File.dat/FFO_SEbaseline_20140904_newcover.pdf.

likely in the region." Ex. I at 38. However, they concluded that the overall cumulative impact on socioeconomics would be positive because "the positive effects of oil and gas development . . . are expected to outweigh" and negative impacts. *Id.*

Similarly, in the EAs' sections on public health and safety, BLM acknowledged that the proposed wells could have "low to moderate" direct and indirect short-term adverse impacts because the projects would likely cause an increase in traffic, an increase in dust which could cause poor visibility, and degradation of local roads due to increased use. Ex. I at 38. BLM also noted that facility failures could potentially endanger the public and that "[a]s a result of the proposed project, the public could be exposed to hazardous materials." *Id.* at 38-39. The agency concluded that while any given proposed well "would contribute minimally to the cumulative public safety impacts in the region," cumulatively oil and gas development contributes to transportation issues and creates additional risks such as wildfires, oil and gas leaks and explosions, and hazardous waste. *Id.* at 39. Unlike the agencies in the two cases cited by Plaintiffs, which failed to disclose the costs of a proposed action, BLM's treatment of socioeconomic and public health and safety concerns shows that BLM properly acknowledges adverse impacts, and their cumulative effects, when they are present. *Cf. High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (finding Forest Service violated NEPA by stating that an analysis of costs was "impossible," but failing to explain why it had rejected available methodologies for such an analysis); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (finding if agency chooses to discuss speculative benefits in an EIS, it must also disclose any relevant costs).

E. BLM Did Not Unlawfully Segment Its APD Approvals

Plaintiffs also argue that BLM unlawfully segmented its APD approvals to avoid having

to fully analyze environmental impacts under NEPA. Pls.' Mot. 24-26. This allegation appears to misunderstand the tiered process through which BLM analyzes environmental impacts and to conflate the NEPA analysis appropriate for the planning stage with that appropriate for the site-specific stage. BLM has not attempted to hide the full scope of mineral development in the San Juan Basin. Rather, it properly addressed those impacts at the planning stage by preparing a PRMP/FEIS and RMP predicting that 9,942 wells could be drilled in the Basin between 2003 and 2023, and analyzing the cumulative environmental impacts of all 9,942 wells taken together. The number of federally-approved wells in the Basin remains far below 9,942, even taking into account the potential for future full field development of the Mancos Shale. Ex. F (3,930 wells anticipated in Mancos Shale); Ex. A ¶ 27 (currently 3,860 wells in the Basin). Thus, to the extent Plaintiffs' are alleging that a programmatic, region-wide EIS is required here, it has already been completed and has been appropriately tiered to by every APD EA. *See New Mexico ex rel. Richardson*, 565 F.3d at 716 n.40 (calling tiering "unquestionably appropriate" in oil and gas context). And to the extent Plaintiffs believe that a programmatic EIS is necessary to address potential future full field development of the Mancos Shale in particular, an RMP amendment, and the attendant NEPA analysis, is already underway.

Plaintiffs' apparent insistence that all Mancos Shale APDs should be assessed in a single comprehensive EIS is also contrary to NEPA's implementing regulations. Because the APDs are not "connected," "cumulative," or "similar" actions, NEPA does not require BLM to consider them in a single EIS. 40 C.F.R. § 1508.25(a). While the APDs may be superficially similar in that they all proposed drilling into the Mancos Shale, they involve different locations, different numbers of wells, and different drilling techniques, and were submitted by different companies at different times. Rather than being interdependent parts of a larger plan, BLM's decision on

one APD typically has no effect on its decision on another.[13] *See Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1304 (9th Cir. 2003) (finding two forest restoration projects neither cumulative nor similar actions under NEPA because the timber sales proceeded on separate schedules and had independent utility); *San Juan Citizens' Alliance v. Salazar*, No. 00-cv-00379, 2009 WL 824410, at *12 (D. Colo. Mar. 30, 2009) (finding oil and gas development throughout San Juan Basin not connected, cumulative, or similar action requiring one comprehensive EIS).

However, even if the APDs were cumulative actions under NEPA, however, there are valid practical reasons for not considering them in a single EIS. *San Juan Citizens' Alliance*, 2009 WL 824410, at *12 ("'[P]ractical considerations' may necessitate restricting a statement's scope." (citing *Kleppe*, 427 U.S. at 412)). Given that APDs apply to different locations and different projects, and are submitted at different times, it would be infeasible to consider site-specific impacts of disparate APDs together. "The determination of the region, if any, with respect to which a comprehensive [EIS] is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility." *Kleppe*, 427 U.S. at 412. Because "resol[ution] of these issues requires a high level of technical expertise," it "is properly left to the informed discretion of" the agency. *Id*. Thus, the Court should defer to BLM's reasonable determination not to consider all Mancos Shale APDs in a single EIS.

II. Plaintiffs Cannot Demonstrate Irreparable Injury

Because Plaintiffs' NEPA claims are without merit, the Court may deny Plaintiffs' motion on that basis alone. *See, e.g., Winter*, 555 U.S. at 23; *Sprint Spectrum*, 149 F.3d at 1060. However, even if Plaintiffs could establish a likelihood of success on the merits, they cannot

[13] Where appropriate, BLM does consider small numbers of APDs together in a single EA if, for example, the APDs are submitted by the same company and propose drilling on a single well pad. *See, e.g.*, Ex. I.

meet their burden on the other requirements, including irreparable injury. To constitute irreparable injury, "an injury must be certain, great, actual and not theoretical." *Heideman*, 348 F.3d at 1189 (citation and internal quotation marks omitted). Injury that is merely speculative does not constitute irreparable harm sufficient to warrant granting a preliminary injunction. *Id.* Plaintiffs cannot meet their burden here because their evidence of injury is overstated, and they have not shown that actual impacts will exceed those provided for in the 2003 RMP/EIS.

It is not enough that Plaintiffs show *some* impact from current and potential development of the Mancos Shale; they must show that the impact is likely to exceed the impacts analyzed and anticipated in the 2003 RMP/FEIS. Once again, Plaintiffs' fundamental error is to assert that in approving these 265 APD/EAs at issue here, BLM is writing on a clean slate. It is not; rather, these APD/EAs appropriately tiered to the 2003 RMP/FEIS, which provided for 9,942 oil and gas wells *and associated impacts* in the San Juan Basin, without any specifics as to which formations would be drilled. *See* Ex. D 4-105; Ex. A ¶ 26. Since the RMP/FEIS was published there have been approximately 3,860 wells drilled in the San Juan Basin on federal lands, *see* Ex. A ¶ 27, a mere 39 percent of the "capacity" provided for in the 2003 RMP. Thus, whatever impacts may be associated with horizontal fracking in the Mancos Shale, Plaintiffs have not shown that those impacts are likely to imminently exceed those addressed in 2003.

Plaintiffs' assertions of injury are also undermined by their delay in seeking relief. Although Plaintiffs contend that they will be irreparably harmed if this Court does not enjoin BLM's approval of APDs, they have waited nearly five years to file suit after BLM began approving the APDs at issue here, and another two months before filing their motion for emergency injunctive relief. "Delay of this nature undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable

injury." *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984) (citation omitted).

Plaintiffs' characterization of the injury is also overstated and inconsistent with the narrow scope of this litigation. Plaintiffs specifically challenge 265 APD approvals, yet they attempt to justify their request for an injunction in large part by pointing to harms from APD approvals that they anticipate BLM will issue at some point in the future. *See* Pls.' Mot. 11 (describing injuries anticipated as a result of full field development in the Mancos Shale). Any such future approvals are necessarily speculative, unripe, and non-justiciable, and cannot serve as a basis for emergency injunctive relief. In weighing the Plaintiffs' alleged injuries, this Court must focus instead on the potential impacts resulting from development associated with the 265 APD approvals. As to those, 91 wells have already been drilled and fracked, and are now in production. Only 174 wells remain to be drilled or fracked, and thus only those wells threaten to harm Plaintiffs' alleged interests. Ex. A ¶ 31. Plaintiffs' references to "full field development" and their characterization of the attendant consequences are therefore irrelevant here.

But even if it were appropriate to consider "full field development" of the Mancos Shale for purposes of assessing irreparable injury, Plaintiffs assertions of injury are still overstated in numerous ways. For example, Plaintiffs' calculation of surface disturbance from horizontal drilling in the Harvey Declaration fails to "back out" reclaimed lands from the calculation, and also fails to account for the fact that fewer well pads and associated roads and pipeline miles are required to accomplish extraction, which limits surface disturbance. Ex. A ¶¶ 43-47. Similarly, while the Harvey Declaration asserts that increased emissions will occur because directional wells take longer to drill, Pls.' Mot. Ex. 6 (Harvey Decl.) ¶¶ 42-49, the EAs disclosed these impacts and concluded that the emissions caused by construction are a minuscule fraction of total annual emissions for the region and are not forecast to cause any exceedance of the National

Ambient Air Quality Standards. Ex. H at 20, 22; Ex. I at 22, 24. Further, actual drilling time in the field (and accordingly, emissions caused by drilling) is more like 12 days, suggesting that Harvey's estimate is substantially overstated. Ex. A ¶ 66. Taken together, Plaintiffs have failed to carry their burden on irreparable harm.

III. The Balance of Harms and Public Interest Weigh Heavily Against a Preliminary Injunction.

Plaintiffs' claims of alleged injuries are also outweighed by the harm that would be inflicted upon the United States and the public interest if a temporary preliminary injunction were to issue. "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger*, 456 U.S. at 312 (citation omitted). Where, as here, a plaintiff shows only "*de minimis* or non-existent" harm, "there is no danger to the public interest" in denying injunctive relief. *Christie-Spencer Corp. v. Hausman Realty Co.*, 118 F. Supp. 2d 408, 423 (S.D.N.Y. 2000). Moreover, "[t]he Supreme Court has recognized that financial harm can be weighed against environmental harm—and in certain instances outweigh it." *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 892 (10th Cir. 2013) (citing *Amoco Prod. Co.*, 480 U.S. at 545). In similar cases, the Tenth Circuit has upheld district court denials of preliminary injunctions when the district court found that the public interest in oil and gas production either equaled or outweighed Plaintiffs' alleged harms. *See id.*; *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1231 (10th Cir. 2008).

Granting the motion in this case would do substantial harm to the public interest because the public depends heavily on the economic benefits provided by oil and gas development of the kind at issue here. The local economy is heavily dependent on oil and gas revenues, with oil and gas-related companies making up four of the top ten tax payers in San Juan County. Oil and gas production contributed over $24 million in ad valorem taxes and $23 million in county tax

payments to San Juan County in FY12—more than 22 percent of total taxable business activities. Ex. B (Mallory Decl.) ¶ 5. More generally, oil and gas development in the San Juan Basin generated $5.2 billion in federal royalties between 2003 and 2013. Statewide, the oil and gas industry provided 31.5 percent of New Mexico's General Fund, which funds schools, hospitals, and other government services. In FY14, the New Mexico State Land Office reported a record $726 million in revenue from oil and gas royalties alone for the state's public schools, universities, and hospitals, and oil and gas development is the basis for 68,800 jobs in the state, or nearly 9 percent of total employment. Ex. B ¶ 6-8. Granting Plaintiffs' requested injunctive relief places this vital jobs-and-revenue stream at risk, which would damage the public fisc and create substantial economic uncertainty in the region.

An injunction would also disserve the public interest because it would have a detrimental effect on the orderly administration of federal energy policy. As other courts have observed, "[t]he development of domestic energy resources is of paramount interest and [that interest] will be harmed (at least to some extent) if that development is delayed." *See Natural Res. Def. Council v. Kempthorne*, 525 F. Supp.2d 115, 127 (D.D.C. 2007); *see also* Ex. B ¶ 9 (describing BLM's efforts to reduce American dependence on foreign oil and to create energy independence through the responsible development of oil and gas resources). Moreover, no bond or other measure could fully compensate the public for the impairment that would be caused by a disruption of the 265 projects at issue here. Under such circumstances, the public interest would best be served by an order denying any injunctive relief until it is able to make a final determination on the merits. *See Yakus v. United States*, 321 U.S. 414, 440 (1944). This holds true even in cases where "the postponement [of injunctive relief] may be burdensome to the

plaintiff." *Id*. And, as noted above, any burden on the Plaintiffs in this case would be minimal, as evidenced by Plaintiffs' delay of five years before filing this lawsuit, and its delay of two additional months before seeking preliminary injunctive relief.

Finally, BLM agrees that the public has an interest in ensuring compliance with the law by its public officials. *See* Pls.' Mot. 16. It cannot be denied, however, that BLM has made every reasonable effort to ensure adequate NEPA compliance here. It prepared a comprehensive RMP/EIS in 2003; it prepared APD-specific EAs to further supplement the 2003 analysis upon each new authorization; and it undertook a new long-term RMP amendment process to ensure that full-field development of the Mancos Shale—should that ever occur—will be fully analyzed in a programmatic NEPA document to the extent it causes environmental impacts beyond the scope of the 2003 RMP/EIS. In sum, BLM has undertaken a good faith and thorough consideration of the potential environmental impacts of managing public lands for the development of oil and gas, and it has taken the steps necessary to ensure that it continues to comply with NEPA in the future. Accordingly, even if this Court were to find that the BLM's 2003 RMP/EIS and APD-specific EAs potentially reflect some level of non-compliance with NEPA, that non-compliance would be minimal. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 206 (4th Cir. 2005) (finding that the defendant agency's EIS, while deficient, was "not contemptuous of NEPA's important mandate[,]" and determining on that basis that the agency was entitled to presumption that it would complete its corrective NEPA analysis in good faith). The public interest therefore does not weigh in favor of a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion.

Respectfully submitted on this 26th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2015 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Fling to all counsel of record.

/s/ Clare M. Boronow
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