UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.* Plaintiffs, v. DAVID L. BERNHARDT, in his official capacity as Secretary of the Interior, *et al.* Federal Defendants.	Case No. 1:20-cv-03654-RC The Honorable Rudolph Contreras

FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiffs' renewed motion for a temporary restraining order ("TRO") or preliminary injunction, still fails to establish that there is an emergency necessitating such an extraordinary remedy. Plaintiffs request that the Court enjoin the implementation of the Twin Bridges Bowknot Helium Project ("Project") in Emery County, Utah, because it will result in imminent, irreparable industrialization of the local environment of the Labyrinth Canyon Wilderness Area ("Wilderness Area"). ECF No. 33-1 at 1. But the Court should reject Plaintiffs' request because Plaintiffs are unlikely to succeed on the merits and they have failed to establish imminent, irreparable harm. They have also failed to show that the balance of equities and the public interest favor injunctive relief.

Plaintiffs are unlikely to succeed on the merits of their claims because BLM took a hard look at the impacts of greenhouse gas ("GHG") emissions and water consumption.

Plaintiffs have also failed to show that they will suffer imminent, irreparable harm to their environment or aesthetic interest in the absence of a TRO or preliminary injunction, particularly considering Congress' clear intent to not create protective perimeters or buffer zones around the Wilderness Area or shield the Wilderness Area from nonwilderness activities that can be seen or heard from within the area. *See* 16 U.S.C. § 1232(e). Moreover, Plaintiffs' allegations of imminent, irreparable harm in their opening brief are untethered to the causes of action plead in their amended complaint. Furthermore, injunctive relief would not remedy Plaintiffs' alleged irreparable harms because Twin Bridges would still be able to develop its state leases.

Finally, the balance of the equities and public interest weigh against injunctive relief. This Administration has declared helium as a critical mineral in light of the national and global shortage of helium. The public interest in meeting the Nation's need for domestic sources of mineral weighs heavily against a TRO or preliminary injunction. Furthermore, Congress balanced the interests at stake here and allowed energy development activities outside of the designated Wilderness Area.

In sum, because Plaintiffs have failed to meet the requirements for injunctive relief, the Court should reject their request.

II. BACKGROUND

A. LEGAL BACKGROUND

1. Administrative Procedure Act

The APA requires courts to overturn agency decisions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Thus, the standard of review is narrow and the agency "is accorded great deference." *Oceana, Inc. v. Evans*, No. CIV A. 04-0811 (ESH), 2005 WL 555416, at *7 (D.D.C. Mar. 9, 2005). Judicial review of agency action under the APA should generally be confined to "the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 9 (1977)).

2. National Environmental Policy Act

NEPA requires that federal agencies consider the environmental consequences of major federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4332; 40 C.F.R. §

1501.1. This consideration serves NEPA's dual purpose of informing agency decision makers of the environmental effects of proposed actions and ensuring that relevant information is made available to the public so that it "may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's intent is to focus the attention of agencies and the public on a proposed action so its consequences may be studied before implementation. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

To assist in meeting these goals, NEPA requires preparation of an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332 (2)(C); 40 C.F.R. § 1502.3. The EIS must examine, among other things, "alternatives to the proposed action," and the project's direct, indirect and cumulative impacts. 42 U.S.C. § 4332 (2)(C)(iii); 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. Importantly, not every major Federal action requires an EIS. If an agency prepares an environmental ("EA"), *see id.* § 1508.9, and concludes that project impacts will not be significant, it may issue a Finding of No Significant Impact ("FONSI") and forego preparation of an EIS. *Id.* §§ 1501.3, 1501.4(c), (e), 1508.9. EAs may be "tiered" to broader EISs in order to "eliminate repetitive discussions . . . and to focus on the actual issues ripe for decision at each level of environmental review." *Id.* §§ 1502.20, 1508.28.

In reviewing agency action for NEPA compliance, courts ensure that agencies have taken a "hard look" at the environmental consequences of their decisions. *Sierra Club v. U.S. Dep't of Energy (Sierra Club I)*, 867 F.3d 189, 196 (D.C. Cir. 2017); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340–41 (D.C. Cir. 2002), *as amended* (Aug. 27, 2002). Judicial review of agency NEPA compliance is deferential. *Marsh*, 490 U.S. at 377. The "role of the courts is simply to

ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97-98 (1983); *Sierra Club I*, 867 F.3d at 196.

3. Oil and Gas Leasing on Federal Lands

BLM manages federal lands "under principles of multiple use and sustained yield." *See* 43 U.S.C. § 1732(a). "'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish . . . .'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) (quoting 43 U.S.C. § 1702(c)). Congress has expressly provided for the development of oil and gas resources on public lands. *See* 30 U.S.C. § 181, 30 U.S.C. § 226. "It is the stated public policy of the United States to make public lands, including national forest land, available for mineral leasing in an effort to reduce our energy dependence on foreign sources and to protect our national security." *Park Cnty. Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 620 (10th Cir. 1987), *overruled on other grounds by Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

Generally, oil and gas development on federal lands involves three steps. At each stage, BLM conducts NEPA review. First, BLM develops an area-wide Resource Management ("RMP"), specifying the areas that will be open to development and the stipulations placed on such development. 43 U.S.C. § 1712(a); *WildEarth Guardians v. Bernhardt* (*WEG I*), 368 F. Supp. 3d 41, 54 (D.D.C. 2019). Second, BLM may grant leases for the development of specific sites within an area that is open to leasing, subject to the requirements of the RMP. 43 U.S.C. § 1712(e).1. Leasing decisions occur later in time, in a separate administrative process

requiring additional NEPA review. *WEG I*, 368 F. Supp. 3d at 54; *see also* 30 U.S.C. § 226(a); 43 C.F.R. § 3100. Third and finally, a lessee may file an Application for Permit to Drill ("APD"), which requires BLM review and approval. *WEG I*, 368 F. Supp. 3d at 54; 43 C.F.R. § 3162.3-1(c). Before a lessee may "commenc[e] any 'drilling operations' or 'surface disturbance preliminary thereto,'" BLM must conduct additional NEPA review and approve an APD. *Pennaco Energy v. U.S. Dep't of Interior*, 377 F.3d 1147, 1151-52 (10th Cir. 2004) (quoting 43 C.F.R. § 3162.3-1(c)); 72 Fed. Reg. 10,308, 10,334 (Mar. 7, 2007).

B. FACTUAL AND PROCEDURAL BACKGROUND

1. Twin Bridges Leases in Emery County, Utah

On December 11, 2018, BLM held a competitive oil and gas lease sale, offering 105 parcels for sale, including three parcels located in Emery County, Utah and managed by the Price Field Office ("PFO"). *See* ECF No. 20, Ex. A, Notice of Competitive Lease Sale. In connection with this lease sale, BLM prepared a Determination of NEPA Adequacy ("DNA") to document the NEPA analysis on potential impacts from leasing. *See* ECF No. 20, Ex. B. A DNA "confirms that an action is adequately analyzed in existing NEPA document(s) and is in conformance with the [applicable] land use plan." *Friends of Animals v. Bureau of Land Mgmt.*, No. 2:16-CV-1670-SI, 2018 WL 1612836, at *9 (D. Or. Apr. 2, 2018) (quoting U.S. Dep't of Interior, Bureau of Land Management, National Environmental Policy Act Handbook, H–1790–1 at § 5.1). Here, the DNA was based on four existing NEPA documents:

- Price Field Office Resource Management Plan (RMP) and Final Environmental Impact Statement (EIS) and Record of Decision (ROD);
- Price and Richfield Field Offices September 2018 Lease Sale EA, DOI-BLM-UT-0000-2018-0001-EA;
- Salt Lake Field Office September 2018 Lease Sale EA, DOI-BLM-UT-W010-2018-0018-EA; and
- Price Field Office November 2015 Lease Sale EA, DOI-BLM-UT-G021-2015-0031-EA.

As a result of the December 2018 lease sale, Twin Bridges acquired its Federal oil and gas lease, UTU-93713, effective March 1, 2019. The Federal Lease is located in Section 7, and portions of Sections 5, 6, and 8, Township 26 South, Range 17 East, and includes 1,410 acres. In February 2020, Twin Bridges and BLM entered into a Contract for Extraction and Sale of Federal Helium, under the Helium Privatization Act, 50 U.S.C. § 167. *See* ECF No. 20, Ex. C.

Twin Bridges also acquired two state leases located in Emery County, Utah from the Utah School and Institutional Trust Lands Administration (SITLA), a Utah state agency. These leases are SITLA Lease, ML-53189, which was acquired on July 1, 2015, and is located in Section 2, Township 26 South , Range 16 East, and includes 596 acres, and SITLA Lease, ML-53420, which was acquired on December 1, 2016, and is located in Section 36, Township 25 South, Range 16 East and includes 640 acres.

On March 19, 2019, this Court issued a decision in *WEG I*, remanding certain oil and gas lease sale NEPA documents to the BLM with direction to further analyze GHG emissions expected to result from these leasing decisions and subsequent development of the leased lands. On November 13, 2020, this Court issued another decision in the *WEG v. Bernhardt* litigation ("*WEG II*"), finding Wyoming BLM's new GHG emissions analysis lacking and again remanded for additional NEPA analysis. The December 2018 lease sale in this case was not at issue in *WEG I or WEG II*.

Because of the similarities between the NEPA analyses at issue in *WEG I* and the NEPA documents prepared in connection with other oil and gas lease sales in Utah, including the December 2018 lease sale at issue in this case, BLM Utah decided to prepare a comprehensive GHG EA (DOI-BLM-UT-0000-2021-EA) to evaluate potential impacts expected to result

from 14 lease sales that were held between 2014 and 2018. Although well underway, BLM has not yet finalized this analysis or issued any subsequent decisions.

2. Helium Listed as a Critical Mineral

On December 20, 2017, the President signed Executive Order 13817, articulating "A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals." ECF No. 20, Ex. D. The Executive Order established the Administration's policy to "reduce the Nation's vulnerability to disruptions in the supply of critical minerals, which constitutes a strategic vulnerability for the security and prosperity of the United States." *Id*. It also sets forth the President's policy to effectuate this effort, including "streamlining leasing and permitting processes to expedite exploration, production, [and] processing" of these critical minerals. Following that Order, on May 18, 2018, the Department of Interior issued a Federal Notice, listing the critical minerals subject to the Executive Order, including helium. 83 Fed. Reg. 23,296 (May 18, 2018).

3. Wilderness Designations and Applicable Laws

The Wilderness Act of 1964, was established "[i]n order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States . . . leaving no lands designated for preservation and protection in their natural condition . . . ." 16 U.S.C. § 1131. Under the Wilderness Act, State-owned or privately owned land and mineral interests that are located wholly within a wilderness area were "to be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land . . . ." 16 U.S.C. § 1134.

On March 12, 2019, Congress passed the John D. Dingell, Jr. Conservation, Management, and Recreation Act ("Dingell Act"), 16 U.S.C. § 1132 *et seq*., P. Law 116-0. Section 1231(a)(7) of the Dingell Act designated Labyrinth Canyon as a wilderness area ("Wilderness Area"), comprising approximately 54,642 acres, which is to be managed by the BLM in accordance with the Wilderness Act (16 U.S.C. § 1131 et seq.) subject to valid existing rights. 16 U.S.C. § 1232.

Congress clearly stated that it "does not intend for the designation of the wilderness areas to create protective perimeters or buffer zones around the wilderness areas." 16 U.S.C. § 1232(e). "The fact that nonwilderness activities or uses can be seen or heard from areas within a wilderness area shall not preclude the conduct of those activities or uses outside the boundary of the wilderness area." *Id*.

Two existing roads in the vicinity of the Twin Bridges' federal and state leases, Emery County Road 1025 and Emery County Road 1026 were excluded from the Wilderness Area. The terminus of Emery County Road 1025 (Spur Road 1025) includes a disturbed circular roundabout that was also excluded from the Wilderness Area. *See* Project EA, Ex. K at 2, Twin Bridges Bowknot Helium Project Environmental Assessment, DOI-BLM-UT-G020-2020-0033-EA ("Project EA"). Emery County Road 1026 leads to the Federal Lease location and Emery County Road 1025 comes within approximately less than a ½ mile to SITLA Lease ML-53420. *See* ECF No. 20, Ex. G, at 18, 20.

BLM's Wilderness Manual, 6340, Management of Designated Wilderness Areas, provides that where wilderness boundaries are not specified by law, for unpaved roads, the BLM will include setbacks of 100 feet from the centerline. *See* ECF No. 20, Ex. F, BLM Manual 6340. Therefore, both Emery County Road 1025 and 1026 (including the Spur Road),

with the 100-foot setback on either side of the centerline, are considered exempt from the Wilderness Area.

4. The Twin Bridges Drilling Project and Environmental Analysis

On November 26, 2019 and June 19, 2020, Twin Bridges submitted two separate applications for a permit to drill ("APD") its federal lease for exploratory helium. *See* Second Bankert Decl., Ex. L at ¶ 3. On August 18, 2020, Twin Bridges also submitted applications for various rights of way ("ROW") necessary to access the mineral resources associated with both their federal lease and SITLA leases, including a surface ROW for road improvements, a ROW to construct a well pad, ROWs to install various pipelines for product and water, and underground authorizations to access all three leases.

In consideration of these applications, BLM prepared the Project EA to assess the impacts of the Project, including to the Wilderness Area and reasonable alternatives that might minimize those impacts. The Project EA considers three alternatives: two separate Action Alternatives and a No Action alternative under which the APDs and ROW applications would be denied. *See* Ex. K at 7-10. Both Action Alternatives include: (1) an approval for the construction of a well pad (location would vary depending on the alternative selected), (2) three ROW authorizations for pipelines (one 14 inch gathering pipeline, one 8 inch produced water pipeline, and one 8 inch fluids transfer pipeline) that would run from the well pad location to the proposed helium processing facility on SITLA lands (location of that processing facility would vary depending on which alternative is selected), (3) one ROW for running power and communication infrastructure that would also run from the well pad to the proposed processing plant, (4) a ROW for proposed road improvements to either Spur Road 1025 or County Road 1026 (depending on the alternative selected), and (5) up to three separate

underground authorizations to drill to each of the three leases. *Id*.

On December 23, 2020, BLM issued a FONSI, *see* Ex. Q, and signed the Decision Record, *see* Ex. M, approving Twin Bridge's ROW applications. Under the selected alternative (Alternative A), Twin Bridges will embark on three phases of development. First, the exploratory phase includes road improvement activities, the construction of a well pad, and the drilling and testing of one exploratory well. *See* Decision Record, Ex. M at 2; *see also* Project EA, Ex. K at 7-9. Second, if sufficient quality and quantity of helium-bearing gas are confirmed through its flow testing of the exploratory or delineation well, then Twin Bridges would commence the second phase of work, which includes installing a second delineation well and the additional pipelines (to move water and product, among others), drilling and testing of a second delineation well, and the construction of a helium processing plant, located on SITLA lands. *See* Project EA, Ex. K at 8. Third, Twin Bridges could construct the final phase of the Project that would include the drilling of up to five additional development wells from the same well pad to target the recovery of the helium resources under all three of its mineral leases. *Id*.

Furthermore, there would be no surface disturbing activities within the Wilderness Area because all surface disturbing activities from road improvements, the well pad construction, and pipeline ROWS would take place on Emery County Road 1025, and its Spur Road, which are entirely outside the Wilderness Area. *See* Second Bankert Decl., Ex. L at ¶¶ 5, 7. The only activities that could impact the Wilderness Area are authorizations for up to three underground wellbores from the well pad to Twin Bridges' three leases. BLM has authorized for the first phase of development, an underground wellbore that would provide access to Twin Bridges' SITLA Lease, ML-53420 located on Section 36. *See* Decision Record, Ex. M at 4. Depending

on the results of its well-testing of the helium reserves from that lease, Twin Bridges may request additional authorizations to proceed with the development of its other two leases. BLM has deferred issuing a decision on Twin Bridges' APD. *See* Project EA, Ex. K at 8.

Twin Bridges has applied for a permit from the State of Utah to construct and operate a helium processing plant, which would be located on SITLA lands outside of BLM's jurisdiction. *Id*. at 2.

5. San Rafael Desert Master Leasing Plan

In May 2010, the BLM issued Instruction Memorandum ("IM") 2010-117, Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews. *See* ECF No. 20, Ex. H. IM 2010-117, in part, introduced the Master Leasing Plan ("MLP") concept "as a mechanism for completing the additional planning, analysis, and decision-making that may be necessary for areas meeting the listed criteria." Following IM 2010-117, BLM-Utah identified areas throughout the State that could be appropriate for developing a MLP. The Moab MLP, DOI-BLM-UT-Y010-2010-0001-RMP-EIS was the only MLP that was finalized in Utah.[1] In 2016, the PFO began working on the San Rafael Desert MLP[2] and developed a Reasonably Foreseeable Development Scenario ("RFDS") in preparation for that analysis.[3] While BLM provided a public scoping period for the San Rafael Desert MLP, a draft EA was never completed or released for public comment because in February 2018, BLM issued IM 2018-034, Updating Oil and Gas Leasing Reform- Land Use Planning and Lease Parcel Reviews, which superseded IM 2010-117

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[1] *See* https://eplanning.blm.gov/eplanning-ui/project/61781/510.

[2] *See* https://eplanning.blm.gov/eplanning-ui/project/61781/510.

[3] *See* https://eplanning.blm.gov/public_projects/nepa/61781/93142/112263/SRD_MLP_Reasonably_Foreseeable_Development_Scenario.pdf

and specifically eliminated the use of MLPs. *See* IM 2018-34, EFC No. 20, Ex. I. On July 13, 2018, the BLM published in the Federal Register a Notice of Termination for the San Rafael Desert MLP. 83 Fed. Reg. 32,681-01 (July 13, 2018).[4]

III. STANDARD OF REVIEW

A TRO is "an extraordinary and drastic remedy" that "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted) (setting forth standard for preliminary injunctive relief). A TRO is restricted to its "underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974) (footnote omitted). A TRO may only last fourteen days. *See* Fed. R. Civ. P. 65(b)(2).

As with a preliminary injunction, to obtain a temporary restraining order a plaintiff must demonstrate four elements: (1) a substantial likelihood of success on the merits; (2) that he would suffer irreparable injury if the injunction were not granted; (3) that the balance of the equities tips in his favor; and (4) that the public interest would be furthered by the injunction. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 10 (2008); *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The movant has the burden to show that all four factors are satisfied by clear and convincing evidence. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009).

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[4] *See* https://eplanning.blm.gov/public_projects/nepa/61781/151326/185542/FRN_-_SRD_MLP_Project_Termination_-_2018-15016.pdf

IV. ARGUMENT

A. Plaintiffs have not shown a likelihood of success on the merits

Plaintiffs are unlikely to succeed on the merits because BLM prepared site-specific analysis of the cumulative impacts of the Project in compliance with NEPA and in accordance with the Court's guidance in *WEG I* and *WEG II*. Moreover, Plaintiffs' assertion that BLM failed to reasonably consider impacts from water consumption is without merit. Finally, BLM's well-reasoned decision to forego completion of the San Rafael Desert MLP and comply with existing NEPA processes was neither arbitrary nor capricious, and NEPA analysis was not required to support that decision.

1. Plaintiffs' challenge to BLM's cumulative impacts analysis of GHG emissions is likely to fail on the merits

Relying largely on this Court's prior decisions in *WEG I* and *WEG II* regarding other BLM leases, Plaintiffs complain that BLM's NEPA analysis supporting the December 2018 lease sale is deficient. *See* ECF No. 33-1, 30-32; ECF No. 32, 32-34, ¶¶ 94-97; *see also WEG I*, 368 F. Supp. 3d 41; *WEG II*, No. 16-CV-1724 (RC), 2020 WL 6701317, (D.D.C. Nov. 13, 2020). More specifically, they argue that the NEPA supporting the December 2018 leasing decision failed to adequately analyze the cumulative effects of GHG emissions from the leasing decision. *See* ECF No. 33-1 at 30-31. They claim BLM failed to "disclose past, present, and reasonably foreseeable oil and gas leasing in Utah, the region or nation." *Id.* Plaintiffs' arguments however, are unsound.

As an initial matter and as the Court recognized at the December 22, 2020 hearing, the energy resource and GHG emissions at issue in *WEG I* and *WEG II* cases are distinguishable from those at issue here. In *WEG I* and *WEG II* the plaintiffs argued that the CO_2 emissions from fossil fuel extraction were a significant source of GHG pollution driving climate change.

See WEG II, No. 16-CV-1724 (RC), 2020 WL 6701317, (D.D.C. Nov. 13, 2020). They contended that BLM failed to quantify CO_2e emissions from oil and gas lease sales across the state, region, and nation, and the Court agreed. *Id*. In this case, however, the challenged lease is for helium development, and as BLM explained in the Project EA, helium is not considered a significant contributor of GHG emissions. *See* Project EA, Ex. K at J-7 (stating that GHG emissions from helium development is "substantially lower than those emissions associated with fossil fuel development and should not be directly compared as such"). The Court should therefore reject Plaintiffs' reliance on *WEG I* and *WEG II* to support their allegation that BLM's cumulative impacts analysis is deficient because the deficiencies identified in those cases did not pertain to the environmental impacts of helium extraction.

Even if the Court agrees with Plaintiffs that its decisions in *WEG I* and *WEG II* are applicable in the helium development context, Federal Defendants would still likely prevail on the merits. BLM prepared a more recent site-specific cumulative impacts analysis for the federal lease parcel at issue that comports with the Court's ruling in *WEG I* and *WEG II*.[5] The 1978 NEPA regulations require agencies to examine the cumulative impacts of their decisions, a term defined as

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and

[5] The Council on Environmental Quality recently promulgated new NEPA implementing regulations which are applicable to NEPA processes that begun after September 14, 2020. *See* 40 C.F.R. § 1506.13 (2020). Cumulative impacts, as defined in the previous regulation has been repealed. *Id.* at § 1508.1 (g) (3). The new regulations however, grant agencies discretion to apply the 1978 regulations to ongoing NEPA processes begun before September 14, 2020. *See* 40 C.F.R. § 1506.13. Here, BLM initiated the preparation of the Project EA prior to that date and chose to apply the 1978 regulations to its analysis, including cumulative impacts. *See* Project EA, Ex. K at 1.

> reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

40 C.F.R. § 1508.7. In the D.C. Circuit, a NEPA cumulative impacts analysis involves a discussion of:

> (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions—past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

Grand Canyon Trust, 290 F.3d at 345. In *WEG II*, the Court opined that BLM must consider "reasonably foreseeable BLM lease sales in the state, region, and nation" in its cumulative impacts analysis of GHG emissions. *See WEG II*, 2020 WL 6701317, at *16. Although Federal Defendants disagree that the 1978 regulations require BLM to conduct a traditional cumulative impacts analysis for any GHG-emitting project,[6] the Project EA nevertheless fully comports with the Court's prescriptive order in *WEG II* on conducting a cumulative impacts analysis of GHG emissions.

The Project EA not only provides a qualitative analysis of the Project's impacts, but also specifically quantifies GHG emissions from reasonably foreseeable lease sales in Utah, surrounding states, and the nation. *See* Project EA, Ex. K at 17-28. Regarding cumulative

[6] The effects of GHG emissions do not lend themselves to a traditional NEPA cumulative effects analysis because the geographic scope of any cumulative impacts analysis involving GHG emissions is necessarily global, and because the climate change impacts of GHG emissions are necessarily cumulative in nature. *See* Project EA, Ex. K at 17 (stating that "[s]ince climate change impacts are the result of cumulative global GHG emissions, the effects of GHG emissions are inherently cumulative and impact various regions differently"). To apply a traditional cumulative effects analysis to any GHG-emitting project, an agency would be required to identify all past, present, and reasonably foreseeable GHG-emitting projects worldwide, and this is not possible.

impacts specifically, BLM engaged in an extensive qualitative discussion of climate change impacts by reference to, *inter alia*, Utah's Air Resource Management Strategy, a monitoring report cited by the U.S. Energy Information Administration ("EIA"), and reports of the Intergovernmental Panel on Climate Change. *Id.* at 26. Next, BLM quantified and compared, using data from the U.S. Geological Survey, GHG emissions from extraction and end-use combustion to state, regional, and national emissions. *See* Project EA, Ex. K at 26-27, Table 3-5 (calculating emissions for projects on federal lands from 2005-2014). The Project EA further projected, using data from EIA's 2020 Annual Energy Outlook ("AEO") forecasts, future cumulative and average federal lease sale GHG emissions for 2020-2050 across the state, region and nation. *Id.* at 27, Table 3-6 (also quantifying future emissions from non-federal leases nationwide). Finally, BLM calculated the contribution of the Project's reasonably foreseeable emissions to state, regional, and national emissions. *Id*. at Table 3-7. In all, the Project's total contribution amounted to less than one percent. *Id*.

In sum, Plaintiffs are unlikely to succeed on the merits because BLM's site-specific cumulative impacts analysis complied with NEPA and affirmed that the Project would not have a significant impact on climate change.[7]

2. Plaintiffs' challenge to BLM's analysis of water consumption is likely to fail on the merits

Plaintiffs allege that BLM's December 2018 leasing decision and decision granting ROW authorizations to conduct helium development violated NEPA because they failed to analyze

[7] Without conceding error in the NEPA analysis supporting the December 2018 lease sale, BLM is in the process of finalizing additional NEPA analysis, assessing the potential impacts of GHG emissions associated with fourteen Utah lease sales conducted between 2014-2018, including the December 2018 lease sale, in light of the Court's decisions in *WEG I* and *II*. *See* Bankert Decl., ECF No. 20, Ex. G at ¶ 4.

the cumulative impacts of water consumption. *See* ECF No. 33-1 at 34-38. Specifically, Plaintiffs argue that BLM failed to quantify reasonably foreseeable water usage required to develop the federal lease and other leases in the region. This argument is without merit.

All of the NEPA analyses supporting the DNA for the December 2018 lease sale discussed impacts from water consumption. [8] To start, the DNA explained that leasing itself would not authorize ground disturbances that could affect water resources and that actual analysis of site-specific impacts would be better understood once Twin Bridges submitted its APD. *See* DNA, ECF No. 20, Ex. B at 30-32. The DNA nevertheless discussed, *inter alia*, impacts on groundwater quality, hydrologic conditions, surface water quality, and municipal water sources. *Id*. The underlying NEPA documents supporting the leasing decision provided extensive analysis on water usage.

The EA for the November 2015 lease sale in the PFO, analyzed in detail impacts to surface water and groundwater quality from leasing. *See* November 2015 Oil and Gas Lease Sale, PFO EA, Ex. N at 16-17, 36-37 (analyzing water usage in the context of hydraulic fracturing and produced water handling). BLM explained that groundwater quality is "highly variable, depending on the formation in which the aquifer is located and well location." *Id*. at 17. Groundwater supplies are controlled less by use depletions and more by precipitation conditions. *Id*. In the context of climate change, BLM analyzed the impacts of leasing to water quality, articulating the potential for impacts to groundwater levels and ground water quality, and measures to protect the resource. *Id*. at 42. BLM further explained that there was no

[8] The December 2018 lease sale DNA relied on the November 2015 PFO EA; Ex. N, September 2018 Salt Lake Field Office EA, Ex. O; and September 2018 PFO and Richfield Field Office EA, Ex. P.

evidence of systemic impacts to drinking water resources. *Id*. (noting that impacts to drinking resources from hydraulic fracturing wells). As to cumulative impacts, BLM noted that because there would be minimal activity in the cumulative impacts analysis area, that is groundwater under the project area, there would not be any additional impacts. *Id*. at 54.

In the September 2018 lease sale EA prepared for the Salt Lake Field Office ("SLFO"), BLM discussed high-volume water usage from fracking activities,[9] but noted that "there are no unconventional reservoirs in the SLFO that are being exploited using high-volume water based hydraulic fracturing techniques." *See* September 2018 Competitive Oil and Gas Lease Sale, SLFO EA, Ex. O at 12. BLM also acknowledged that water use in drilling related activities could impact fish habitat, but explained that it was unknown at the leasing stage the amount of water that would be need for development, and that further consultation may be required to assess any impacts. *Id.* at 25, 42-43 (cumulative impacts). BLM further discussed the cumulative impacts of water usage and depletion on BLM sensitive species.

The September 2018 lease sale EA prepared for the PFO and Richfield Field Office ("RFO") similarly analyzed impacts from water usage. Like the previously discussed leasing decisions, BLM recognized that leasing itself would not affect drinking, surface, and groundwater resources. *See* September 2018 Competitive Oil and Gas Lease Sale, PFO and RFO EA, Ex. P at 185-188. BLM nevertheless discussed water usage in its analysis of the RFDs for the lease parcels at issue and as Plaintiffs concede, *see* ECF No. 33-1, 34, the project

[9] BLM discussed other water usage impacts including to wildlife, noting, for example, that "any water depletion in the Upper Colorado River Basin may adversely impact the fish and require consultation on any water depletions which may occur anywhere in the Basin." September 2018 Salt Lake EA, Ex. O at 25.

area in this case, *see* Project EA, Ex. K at 2 (federal lease parcel managed by the PFO). *See* September 2018 PFO and RFO EA, Ex. P at 11-14. BLM quantified the water consumption required for oil and gas drilling, explaining that

> Within the affected area, a typical well drilled to the primary target formation would involve about 294,000 gallons of water. The water is used as a drilling medium, for mixing cement, and for various cleanup operations. Therefore, for the oil and gas wells projected in the proposed action, a total of about 3.2 million gallons of water (10 acre feet) could be used in the next 15 years. The source of this water would be primarily municipalities and private sources.

Id. at 13. BLM also discussed high-volume water usage that would be required in hydraulic fracturing, *id*. at 14, and that air pollutants from development activities could increase acidity in water resources. *Id.* at 26.

In sum, the NEPA supporting the December 2018 DNA analyzed water usage impacts from BLM's leasing decision. Plaintiffs complain however, that more was required. They argue that BLM failed to quantify water usage and discuss such usage on the environment, but as explained above, BLM did that here. Plaintiffs cite *San Juan Citizens All. v. U.S. Bureau of Land Mgmt*., 326 F. Supp. 3d 1227 (D.N.M. 2018), an out-of-Circuit, district court decision, in support of their contention that BLM should have quantified water consumption because "all helium, natural gas, and oil wells require significant amounts of water during road and well pad construction, drilling, and well completion." *See* ECF No. 33-1 at 33-34. This contention is misleading. Where it could (since exact quantities of water usage are unknown until the development stage), BLM's supporting NEPA analyses quantified the amount of water that would be required for drilling at any one time and over the course of an oil and gas project. *See* September 2018 PFO and RFO EA, at 13. Furthermore, *San Juan Citizens Alliance* is distinguishable. In that case, the plaintiffs alleged, *inter alia*, that BLM's leasing decision

failed to consider impacts (including cumulative) to water quantity and groundwater from hydraulic fracturing. *See San Juan Citizens All*., 326 F. Supp. 3d at 1252-55. BLM argued that it was too speculative to quantify impacts from water usage at the leasing stage, but the court disagreed. *Id*. at 1253. Here, the proposed lease parcel would be used for helium extraction, which, as BLM has explained, does not require vast quantities of water as hydraulic fracturing. *See e.g.* September 2018 Salt Lake EA, Ex. O at 12; *see also* Project EA, Ex. K at 6, J-21. Moreover, the NEPA analyses supporting the DNA quantified and addressed the cumulative effects of water usage.

Plaintiffs also argue that the Project EA failed to analyze the cumulative effects of water consumption from development of the federal lease based on the reasonably foreseeable development scenarios identified by BLM. *See* ECF No. 33-1 at 36-37. This argument however, is unsound. As Plaintiffs concede, the Project EA specifically quantified the amount of water consumption required for helium extraction. *See* Project EA, Ex. K at J-21 (4-acre feet annually ("AFY"), including 3 AFY for production and 1 AFY for road improvement). BLM also explained that the City of Green River currently owns several, perfected, state-based water rights,[10] and Twin Bridges plans to obtain the right to use a limited portion of those water rights to meet its needs for the Project. *See* Project EA, Ex. K, 6, J-21. Next, BLM explained that of the 171,872 AFY of water used in Emery County, mining accounted for only 504 AFY. *Id*. The Project would account for less than 1% of total use and all mining use in Emery County. *Id*. BLM also articulated that the Project itself would not deplete any surface or ground

[10] Water Rights 91-336, 91-1902, and 91-102.

water resources or otherwise contribute to cumulative impacts beyond the City of Green River's existing water rights. *See* Project EA, Ex. K, 6, 48, J-21.

Because Plaintiffs have failed to show that the December 2018 leasing decision and Project EA analyses of water usage violated NEPA, Plaintiffs are unlikely to succeed on the merits of their claim.

3. BLM's decision to not prepare a Master Leasing Plan for the San Rafael Desert was neither arbitrary nor capricious

Plaintiffs argue that BLM failed to provide a reasoned explanation for not completing the MLP for the San Rafael Desert. *See* ECF 9-1, 32-35. More specifically, they assert that previous BLM policy, IM 2010-117, required the preparation of a MLP for the San Rafael Desert and that BLM abruptly reversed course by issuing a new policy, IM 2018-34, that eliminated the requirement for the preparation of a MLP as an additional layer of review when issuing a leasing decision. *Id.* Plaintiffs' argument however, is fundamentally flawed.

BLM provided a reasonable explanation for not preparing the San Rafael Desert MLP. In *FCC v. Fox*, the Supreme Court opined that under the APA

> although an agency must ordinarily display awareness that it is changing position, [] and may sometimes need to account for prior factfinding or certain reliance interests created by a prior policy, it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change adequately indicates.

FCC v. Fox TV Stations, Inc., 556 U.S. 502, 502-503 (2009) (internal citation omitted). An agency's change in position is not subject to a heightened standard scrutiny. *Id.* at 519. Here, BLM has satisfied the requirements articulated by the Supreme Court. BLM acknowledged its change in position on the requirement to prepare a MLP—a planning mechanism, and

explained in IM 2018-34 that the MLP process pursuant to IM 2010-117 "created duplicative layers of NEPA review." ECF No. 20, Ex. I, at 3. Indeed, the Project EA explained that information obtained during the typical NEPA review process sufficiently informed its impacts analysis. *See* Project EA, Ex. K at J-16 (stating in response to comments that the agency collected data as necessary to support its analysis). Given that nothing in the Federal Land Policy and Management Act ("FLPMA") or any other statute requires MLPs, BLM's reasonable explanation of why it changed position is sufficient.

IM 2018-34 is not a dramatic departure from previous policy as Plaintiffs suggest. Both memoranda similarly affirm BLM's ongoing obligation under FLPMA to assess whether the governing RMP adequately protects important resource values or whether an RMP amendment or revision is necessary. *Compare* IM 2010-117 *with* IM 2018-34; *see also* 43 U.S.C. § 1712, 1713(a). Thus even in the absence of IM 2010-117, BLM must still ensure that its leasing decisions comply with requirements set out in the governing RMP, which Plaintiffs have not challenged and could not challenge as deficient, and corresponding NEPA processes. *See* IM 2010-117, ECF No. 20, Ex. H, at 4 (stating that the MLP process should be conducted "through the NEPA process"). To the extent Plaintiffs argue that BLM violated NEPA and the APA because IM 2018-34 no longer requires the preparation of a MLP, Plaintiffs have failed to cite to any authority that BLM is required to complete and utilize a planning tool that does not specifically aid its decision-making. *See Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1058 (D.C. Cir. 2017) (acknowledging deference to an agency's technical expertise).

The cases Plaintiffs cite are inapposite. For example, in *American Wild Horse Preserve Campaign v. Perdue*, 873 F. 3d 914 (D.C. Cir 2017), *Friends of Alaska Nat'l. Wildlife Refuges*

v. Bernhardt, 381 F. Supp. 3d 1127 (D. Alaska 2019), the federal agencies in issue reversed decades-long policy and management practice without explanation. In *American Wild Horse Preserve Campaign*, the D.C. Circuit held that the Forest Service's decision to revise the boundary of Wild Horse Territory in the Modoc National Forest, after over two decades, on grounds that the previous boundary was an administrative error "defies the plain text of the official 1991 Forest Plan, repeated official agency statements, and two decades of agency practice." *American Wild Horse Preserve Campaign*, 873 F. 3d at 923 (opining that "[a] central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it"). In *Friends of Alaska* the court determined that the agency failed to acknowledge that it was departing from its longstanding policy and "impermissibly discarded" prior contrary factual findings. Here, IM 2010-117 did not reflect decades-long BLM policy. To the contrary, the MLP was a recent concept articulated only in IM 2010-117. Indeed, prior to the issuance of IM 2018-34 and to date, only one MLP, the Moab MLP in the PFO, has been completed in Utah. *See* Second Bankert Decl., Ex. L at ¶ 9. BLM was also aware that it was adjusting its position because it acknowledged that IM 2018-34 served to supersede IM 2010-117 for the reasons articulated above. *See* ECF No. 20, Ex. I at 1, 3.

Because BLM reasonably explained why it would not complete the San Rafael Desert MLP, Plaintiffs are unlikely to succeed on the merits of their claim.

B. Plaintiffs have failed to establish imminent, irreparable harm

Plaintiffs have failed to demonstrate irreparable harm to their interests in the absence of a TRO or preliminary injunction. "The D.C. Circuit 'has set a high standard for irreparable injury.'" *Cal. Ass'n of Private Postsecondary Schools v. DeVos*, 344 F. Supp. 3d 158, 170 (D.D.C. 2018) (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297); *see also Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("[A] plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.").

Plaintiffs must make two showings by "clear and convincing" evidence to demonstrate irreparable harm sufficient to justify the extraordinary remedy of emergency injunctive relief. *Nat'l Fair Housing All. v. Carson*, 330 F. Supp. 3d 14, 62–63 (D.D.C. 2018). "First, the harm must be 'certain and great,' 'actual and not theoretical,' and so 'imminent that there is a clear and present need for equitable relief to prevent irreparable harm.'" *League of Women Voters v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (quoting *Chaplaincy*, 454 F.3d at 297). Second, Plaintiffs must show that the harm is "beyond remediation." *Carson*, 330 F. Supp. 3d at 62–63 (quoting *League of Women Voters*, 838 F.3d at 8). "As with the likelihood of success on the merits prong, . . . plaintiff[s] bear[] the burden of showing that [they] will suffer irreparable injury." *See Sierra Club v. U.S. Dept. of Energy*, 825 F. Supp. 2d 142, 152 (D.D.C. 2011) (citing *Winter*, 555 U.S. at 22).

1. *Plaintiffs cannot establish actual imminent irreparable harm to the environment or aesthetic interests*

Plaintiffs contend that in the absence of injunctive relief they will suffer irreparable harm from BLM's procedural violation of NEPA and irreversible environmental and aesthetic injuries. *See* ECF No. 9-1 at 35-42. This is false.

a. No irreparable harm to the environment

Plaintiffs argue that the Project will cause imminent surface disturbance resulting in "long-lasting damage" to "soil, vegetation and wilderness value." ECF No. 33-1 at 42-45. But Plaintiffs' contention is misleading.

As an initial matter, Plaintiffs' allegations of imminent, irreparable harm are untethered to the causes of action plead in their amended complaint, *see* ECF No. 32, and the Court should thus deny Plaintiffs' request for injunctive relief on this basis alone. "There must be a relationship between the injury claimed in the motion for injunctive relief and conduct asserted in the underlying complaint. This requires a sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015). Moreover, "[t]he relationship between the preliminary injunction and the underlying complaint is sufficiently strong where the preliminary injunction would grant 'relief of the same character as that which may be granted finally.'" *Id*. Here, Plaintiffs' first, second, fourth and fifth causes of action allege APA and NEPA violations all pertaining to the December 2018 leasing decision. *See* ECF No. 32 at 35-40. In their opening brief however, the irreparable harms Plaintiffs allege all concern helium development activities, not harms from the December 2018 leasing decision. *See* ECF No. 33-1 at 42-49. In their third cause of action, for example, Plaintiffs claim BLM failed to consider the cumulative impacts of water usage, but their opening brief fails to assert any irreparable harm from that alleged deficiency in the Project EA. *See* ECF No. 32 at 37; *see also* ECF No. 33-1 at 25-30. Furthermore, even if the Court finds a relationship between the harms alleged and the December 2018 leasing decision, an injunction (and even a later vacatur of the leasing decision) still would not relieve the alleged

irreparable environmental harm to the naturalness and solitude of the Wilderness Area or Plaintiffs' aesthetic interests, *see* ECF No. 33-1 at 42-49, because Twin Bridges would still be able to develop its SITLA leases. Because Plaintiffs' motion for injunctive relief does not have a nexus to their claims the Court should reject Plaintiffs' motion.

Should the court nonetheless find a nexus, Plaintiffs' assertion of imminent irreparable harm still fails for several reasons. Plaintiffs' assertion that the harms they allege to soil and vegetation are irreparable is belied by the Project EA. The road improvement ROW and well-pad construction would occur within a previously disturbed cherry-stem corridor—Emery County Road 1025, and while BLM acknowledges that these activities, to be conducted during the exploratory phase, will result in soil and vegetation disturbance on BLM managed lands, these disturbances are largely temporary and the area will be remediated. The Project EA acknowledges that of the 529,837.05 acres comprising the Project's analysis area, 43.1 acres of soil and vegetation would be disturbed by the Project during the exploratory phase, and of that figure only 33.1 acres comprise BLM managed lands. *See* Project EA, Ex. K at 29-35 (noting also that the proposed gas plant to be constructed off-site on state lands would disturb 10 acres of soil and vegetation). For activities which have associated surface disturbances and that would be authorized during the exploratory phase, BLM explained that the proposed well-pad would cause 5.4 acres of disturbance and road improvements would disturb 9.9 acres. *Id.*, Table 2-1, 10. BLM anticipates that some, if not all of these ROWs, will be co-located within the Spur Road 1025 ROW, and thus this estimated number of disturbed acreage may be even lower. *See* Second Bankert Decl., Ex. L at ¶ 8. Only 12.3 acres would result in "permanent" disturbance. *See* Project EA, Ex. K at 30.

Contrary to Plaintiffs' assertion, *see* ECF No. 33-1 at 44, permanent does not mean "beyond remediation" but instead refers to long-term disturbance to soil and the vegetative landscape. *See* Project EA, Ex. K at 30, 33 (noting permanent disturbance to 12.3 acres during the exploratory phase and referring to "permanent long term disturbance"). For long-term disturbance, BLM assumed in its analysis of soil resources and vegetation, that "reestablishment of the vegetative landscape" would largely occur within 50 to 100 years. *See id*. BLM also assumed based on observed vegetation and soil regeneration from previous disturbances in the analysis area that similar regeneration would occur for both long-term and temporary disturbances from the Project. *Id*. (stating that soils and vegetation have been "remediated by physical acts and the passage of time").

In consideration of the temporary and long-term disturbances to soil and vegetation BLM and Twin Bridges have established mitigation and remediation measures. Regarding the Wilderness Area specifically, BLM has already set five monuments on the Spur Road 1025 portion of the wilderness boundary, and Twin Bridges has indicated that it will erect fencing and stakes to prevent encroachment in the Wilderness Area. *See* ECF No. 20, Ex, G at ¶ 27; *see also* Project EA, Ex. K at 144. Twin Bridges has also explained the interim and final reclamation measures it plans on taking to restore soil and vegetation. *See id*. G-5-G-6 (using previously removed and stockpiled topsoil and BLM-recommended seed mixture for reclamation).

b. <u>No irreparable harm to the naturalness and solitude of the Wilderness Area</u>

The Project EA belies Plaintiffs' contention of irreparable harm to the naturalness and solitude of the Wilderness Area. Although BLM acknowledged impacts to the naturalness and solitude of the Wilderness Area from the Project, it also explained that remediation measures would alleviate any harm.

The Project EA is clear that development activities would occur within areas of existing disturbance. *See* Project EA, Ex. K at 71-72. Road improvement and well-pad construction within the cherry-stemmed corridor would increase "evidence of human development in the area, and that opportunities for solitude would be indirectly impacted by the presence of trucks and equipment, and noise from construction and drilling at the well-pad. *Id.* These impacts however, would be primarily confined to the life of the project and remediation efforts by Twin Bridges would largely restore the naturalness and solitude of the area. *Id.* (noting that once final reclamation activities for the well-pad are complete, there would be no noise from truck traffic or visual impacts along the boundary of the Wilderness Area).

Twin Bridges has also articulated interim and final reclamation measures to restore naturalness and solitude. Interim reclamation measures for road improvement and well-pad construction sites would include "recontouring . . . areas to match existing undisturbed topography, redistributing stockpiled topsoil, and revegetating with a BLM-recommend seed mixture." *See* Project EA, Ex. K at G-5. Twin Bridges further explained that

> interim reclamation would be completed within 6 months of completion of the well to reestablish vegetation, reduce dust and erosion, and reduce visual impacts. All equipment and debris would be removed from the area proposed for interim reclamation. The well pad would be reduced to the minimum area necessary to safely conduct production operations.

Id. at G-5-G-6. As for final reclamation measures, all surface facilities associated with the well-pad would be removed and Twin Bridges would return disturbed surfaces "to the approximate original contours of the land before being reseeded. *See* Project EA, Ex. K at K-3 (noting also that "[t]opsoil would be distributed on the former well location to blend the appearance of the site with its natural surroundings before reseeding with the BLM-recommended seed mix.").

Finally, harm to naturalness and solitude is a result contemplated by Congress when it passed the Dingell Act, and Plaintiffs are thus not entitled to special protections from such harms. The Dingell Act's legislative history indicates that Congress was aware of the naturalness and solitude of the Wilderness Area, but decided to balance the need to protect those values with ensuring the economic viability of energy development in the area. *See* Subcommittee on Natural Parks, Forests, and Public Lands, H.R. 86, 111th Cong. at 5, 17, 76 (1st Sess. 2009) (hearing testimony on the natural resource values of the Wilderness Area, the impact of pulling 78 leases from energy production and the importance of balancing all interests). Indeed, Congress did not withdraw the cherry-stemmed corridor or the federal lease parcel from energy development activities. In its passage of the Dingell Act Congress was unequivocal that it "does not intend for the designation of the wilderness areas to create protective perimeters or buffer zones around the wilderness areas." 16 U.S.C. § 1232(e)(1). And further provided that "[t]he fact that nonwilderness activities or uses can be seen or heard from areas within a wilderness area shall not preclude the conduct of those activities or uses outside the boundary of the wilderness area." *Id*. at § 1232(e)(2). Plaintiffs are thus not entitled to injunctive relief as a means of preventing intrusions on naturalness and solitude from helium development activities.

c. No actual and imminent aesthetic injuries

Next, Plaintiffs argue that the Project will result in imminent harm, "transform[ing] a wild, untrammeled landscape, degrad[ing] the area's scenery, and destroy[ing] the area's solitude." ECF No. 33-1 at 49. Plaintiffs' contention of imminent aesthetic harm however, is equally unavailing because, as previously discussed "[t]he fact that nonwilderness activities or uses can be seen or heard from areas within a wilderness area shall not preclude the conduct of those activities or uses outside the boundary of the wilderness area." 16 U.S.C. § 1232(e)(2). Moreover, areas adjacent to the Wilderness Area are not "untrammeled" as Plaintiffs suggest. The cherry-stemmed corridor is a previously disturbed area outside of the Wilderness Area that sometimes experiences surface disturbance from activities unrelated to mineral development. *See* ECF No. 20, Ex. G at ¶¶ 14, 20. For example, BLM has observed surface disturbance from Spur Road 1025 as a result of vehicular traffic from recreational visitors in the area, and other evidence of human activity along Spur Road 1025 (a cattle stock tank and an abandoned tank). *Id.* at ¶ 15. Also, contrary to Plaintiffs' contention, an injunction will not protect Plaintiffs' aesthetic interests, since it would not extend to Twin Bridges' development of its SITLA leases.

d. No actual and imminent procedural harm

Plaintiffs have failed to establish that they will suffer imminent procedural harm requiring injunctive relief. "A procedural violation of NEPA is not itself sufficient to establish irreparable injury." *Brady Campaign v. Prevent Gun Violence*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009). Procedural harm arising from a NEPA violation must be coupled with irreparable aesthetic or environment injuries to constitute irreparable harm. *Nat'l Parks Conservation Ass'n v. Semonite*, 282 F. Supp. 3d 284, 290 (D.D.C 2017).

Here, Plaintiffs' assert imminent procedural harm from BLM's alleged NEPA and APA violations. *See* ECF No. 33-1, 42 n.21. Plaintiffs' argument fails however, because they have not successfully established imminent, irreparable harm to their environment and aesthetic interests, and as such any contention of imminent procedural harm necessarily fails. *See Nat'l Parks Conservation Ass'n*, 282 F. Supp. 3d at 290.

2. Plaintiffs cannot show that their alleged harm is beyond remediation

Plaintiffs cannot meet their burden of showing that their alleged harms of loss of soil and vegetation and naturalness and solitude, are beyond remediation. Injury is beyond remediation if it is likely that "'adequate compensatory or other corrective relief will [not] be available at a later date.'" *Sabino Canyon Tours, Inc. v. U.S. Dep't of Agric. Forest Serv.*, 298 F. Supp. 3d 60, 76 (D.D.C. 2018). As previously discussed, BLM has explained that regeneration of soil and vegetation has occurred in the within previously disturbed areas as a result of physical remediation and the passage of time, and that because the impacts of new surface disturbing activities would be similar to previous disturbances to untouched soil and vegetation, the agency assumes that regeneration will occur here. *See* Project EA, Ex. K at 30, 33. Also, Twin Bridges has articulated remediation measures to restore soil, vegetation and naturalness of the Wilderness Area. *See* Project EA, Ex. K at G-5-G-6.

Because Plaintiffs have failed to allege imminent irreparable harm, this Court should deny their request for injunctive relief.

C. The balance of the equities and public interest favor Federal Defendants

The balance of the harms and the public interest do not weigh in favor of the Court taking the extraordinary step of granting Plaintiffs injunctive relief. In considering the extraordinary remedy of a preliminary injunction, "courts must balance the competing claims of injury and

must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotations and citations omitted). And, "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences" that would issue from an injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Where, as here, an injunction is sought against the government, these inquiries largely merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). "[When] an injunction is asked [for] which will adversely affect a public interest . . . the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Weinberger*, 456 U.S. at 312-13 (citation omitted). Thus, a court may deny injunctive relief even when a plaintiff has demonstrated a likelihood of success on the merits and that it would suffer immediate irreparable harm, neither of which are true in this case.

Plaintiffs posit that the balance of harms and the public interest weigh in favor of injunctive relief, particularly in consideration of the alleged irreparable harm to Plaintiffs' environmental and aesthetic interests. *See* ECF No. 33-1, 42-49. But Plaintiffs arguments ring hollow. As Federal Defendants have explained, Plaintiffs have failed to establish imminent, irreparable harm. *See supra* Argument IV(B).

The public interest disfavors the grant of injunctive relief as it would impede one of the fundamental objectives of federal land management that "public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals . . . from the public lands". 43 U.S.C. § 1701(7), (8), (12). Here, due to a national and global shortage of helium, the federal government has listed helium as a critical resource, pursuant to Executive Order 13817. *See* 83 Fed. Reg. 23,296-01 (May 18, 2018). The Executive Order, established the Administration's policy to "reduce the Nation's vulnerability to disruptions in the supply of

critical minerals, which constitutes a strategic vulnerability for the security and prosperity of the United States." Executive Order 13817; *see also* ECF No. 20, Ex. D. It also sets forth the President's policy to effectuate this effort, including "streamlining leasing and permitting processes to expedite exploration, production, [and] processing" of these critical minerals. Injunctive relief therefore would only serve to deny the Nation access to a critical resource. Furthermore, Congress has balanced the various interests at stake and specifically allowed energy development activities outside of the Wilderness Area. *See* 16 U.S.C. § 1232(e)(2).

Accordingly, Plaintiffs have not shown that the balance of the harms or the public interest is in their favor, and the Court should therefore deny their request for injunctive relief.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' renewed Motion for Preliminary Injunction and Motion for Temporary Restraining Order should be denied.

Respectfully submitted this 4th day of January 2021,

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CERTIFICATE OF SERVICE

I, Michelle-Ann C. Williams, hereby certify that on January 4, 2021, I caused the foregoing to be served upon all counsel of record through the Court's electronic service system.

/s/ *Michelle-Ann C. Williams*
MICHELLE-ANN C. WILLIAMS
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