IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

POWDER RIVER BASIN RESOURCE COUNCIL, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.*, Defendants and STATE OF WYOMING, *et al.*, Defendant-Intervenors.	Case No. 1:22-cv-2696-TSC

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

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GLOSSARY

APA	Administrative Procedure Act
APD	Application for Permit to Drill
BLM	Bureau of Land Management
CCPA	Converse County Project Area
CEQ	Council on Environmental Quality
CISA	Cumulative Impacts Study Area
CX	Categorical Exclusion
DNA	Determination of NEPA Adequacy
EA	Environmental Assessment
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
FOGRMA	Federal Oil and Gas Royalty Management Act of 1982
IBLA	Interior Board of Land Appeals
MLA	Mineral Leasing Act
NEPA	National Environmental Policy Act
PIM	Permanent Instruction Memorandum
RMP	Resource Management Plan
ROD	Record of Decision

INTRODUCTION

Plaintiffs Powder River Basin Resource Council and Western Watersheds Project ("Plaintiffs") challenge the Bureau of Land Management's ("BLM") approval of a development plan for the Converse County Oil and Gas Project ("Project") and subsequent Applications for Permits to Drill ("APD"). Plaintiffs contend that BLM's approvals violate various statutes, including the Federal Land Policy and Management Act ("FLPMA"), Mineral Leasing Act ("MLA"), and National Environmental Policy Act ("NEPA").

Despite BLM's approval of the Project in December 2020, however, Plaintiffs only now seek a preliminary injunction to halt approval and development of APDs within the Project. As detailed in Defendants' brief in response to Defendant-Intervenors' Motion to Dismiss filed contemporaneously herewith, Plaintiffs lack standing to bring their claims. But even if the Court were to reach the merits on some or all of the claims in Plaintiff's Motion, Plaintiffs have not demonstrated a likelihood of success on any of their claims. *First*, BLM reasonably applied its authority under the MLA and FLPMA to impose requirements on activities on non-federal land within the Project area—that is, land owned by the State of Wyoming and private entities. *Second*, BLM properly accounted for that determination in its environmental analyses. *Third*, BLM's cumulative effects analysis reasonably identified and relied on appropriate data concerning past, present, and reasonably foreseeable future actions. *Fourth*, in approving APDs within the Project area, BLM responsibly relied on prior environmental analyses or statutory categorical exemptions.

But even if Plaintiffs could show they were likely to succeed on any of their claims, Plaintiffs have not shown that they will suffer irreparable harm. Plaintiffs' significant delay between the underlying agency decision to approve the Project and Plaintiffs' challenge belies the claimed irreparable harm and weighs heavily against granting a preliminary injunction. Finally,

the balance of hardships and public policy weigh against granting Plaintiffs' extraordinary request for relief.

I. BACKGROUND

A. Statutory and Regulatory Background

1. Federal Land Policy and Management Act

FLPMA declares it to be the policy of the United States that public lands be managed "in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands." 43 U.S.C. § 1701(a)(12). FLPMA requires that BLM, acting on behalf of the Secretary of the Interior, "manage the public lands under principles of multiple use and sustained yield" unless otherwise directed by law. *Id*. at § 1732(a). The "public lands" under BLM's purview include both the federal surface lands and the federal mineral estate. *Id*. at § 1702(e) (defining "public lands" as "any land *and interest in land* owned by the United States . . . and administered by the Secretary of the Interior through the Bureau of Land Management") (emphasis added).

The multiple use principle "requires balancing various competing uses of land—'including, but not limited to, recreation, range, timber minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values'—to optimally manage the land." *Theodore Roosevelt Conservation P'ship*, 616 F.3d 497, 504 (D.C. Cir. 2010) (quoting 43 U.S.C. § 1702(c)). "The sustained yield principle 'requires BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future.'" *Id*. (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 56 (2004) (citing 43 U.S.C. § 1702(h))).

To achieve those aims, BLM must "develop, maintain, and, when appropriate, revise land use plans," 43 U.S.C. § 1712(a), also known as "resource management plans" or "RMPs." As a

part of this management role, BLM is authorized to issue, among other things, leases and permits, but in doing so, is cautioned to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b).

In the oil and gas context, "the mere act of approving oil and gas development does not constitute unnecessary or undue degradation under FLPMA." *Biodiversity Conservation Alliance*, 174 IBLA 1, 5 (2008). Rather, "something more than the usual effects anticipated from such development, subject to appropriate mitigation, must occur for degradation to be 'unnecessary or undue.'" *Id*. at 5-6; *see also Colorado Env't. Coal.*, 165 IBLA 221, 229 (2005) ("[A]t minimum, an appellant would have to show that a lessee's operations are or were conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology . . . .").

2. Mineral Leasing Act

The MLA, 30 U.S.C. §§ 181, *et seq*., directs the Secretary of the Interior to offer federal oil and gas resources for leasing and development. 30 U.S.C. § 226(a). Section 226 sets forth various grants of authority and conditions for the Secretary in carrying out this responsibility. In particular, it instructs the agency to "regulate all surface-disturbing activities conducted pursuant to any lease issued under [the MLA]" and "determine reclamation and other actions as required in the interest of conservation of surface resources." *Id*. at § 226(g). In other words, Congress delegated broad authority to regulate surface resources to the Department of the Interior for purposes of developing leased federal mineral resources.

To implement this authority, the agency has promulgated various regulations, including those governing oil and gas leasing, 43 C.F.R. §§ 3100, *et seq*., operations, 43 C.F.R. §§ 3160, *et seq*., and production, 43 C.F.R. §§ 3170, *et seq*. *See* 43 C.F.R. § 3100.0-3 (describing the lands

subject to leasing under the MLA); 43 C.F.R. § 3160.0-1 ("The regulations in this part govern operations associated with the exploration, development and production of oil and gas deposits from . . . [l]eases issued or approved by the United States[.]"). BLM largely administers these regulations on the Department's behalf and explains its regulations through its Manual, Handbook, and Instruction Memoranda. *See id*. at § 3160.01-2.

BLM employs a three-stage decision-making process for managing oil and gas leasing and development on the lands it administers. Each stage culminates in a separate agency decision. *First*, BLM issues an RMP assessing the resources in a given area. 43 C.F.R. § 1601.0-5(n). *Second,* BLM identifies parcels eligible for leasing and holds a competitive lease sale. 43 C.F.R. §§ 3120.1-3, 3120.5-1, 3120.5-3. The lease gives the lessee the right to develop the federal minerals subject to any stipulations attached to the lease, including the right to develop the leased federal minerals from an off-lease surface location. *Third*, after leases are issued, a leaseholder may submit to BLM an application for permit to drill, or "APD." 43 C.F.R. § 3162.3-1(c). BLM must approve the APD before any surface disturbance or drilling operations can commence. *Id*. An APD is required whenever a leaseholder seeks to produce minerals from the leased federal mineral estate—regardless of whether the surface facilities are located on federal lands or non-federal lands. *Id*.; *see also* 43 C.F.R. § 9239.0-7 (defining as unlawful trespass the unauthorized extraction of federal minerals under the jurisdiction of the Department of the Interior).

An APD describes specific proposed development activities and must be submitted and approved for each well. *Id*.[1] Although an approved APD is necessary for each well, one well pad may contain multiple wells. This reduces the overall surface disturbance required and the impacts

[1] An APD is technically the application submitted to BLM that must be approved to drill an oil well, but the terms "APD" and "well" are often used interchangeably in industry practice.

to the environment. The contents of an APD are outlined in 43 C.F.R. § 3162.3-1 and Onshore Oil and Gas Order Number 1, 72 Fed. Reg. 10308 (March 7, 2007) ("Onshore Order No. 1"). A complete APD package must include Form 3160-3, a Drilling Plan, a Surface Use Plan of Operations, evidence of bond coverage, and any other information required by law. 43 C.F.R. § 3162.3-1(d).

BLM may require access to APD sites on non-federal property for purposes of conducting on-site inspections and environmental analyses, investigating compliance with applicable laws, and must be granted the same rights of entry as the operator. *See* 43 C.F.R. § 3162.1(b)-(c); Onshore Order No. 1, 72 Fed. Reg. 10,330-31, 10,336; *see also Maralex Res., Inc. v. Barnhardt*, 913 F.3d 1189, 1204 (10th Cir. 2019) ("BLM has the right to conduct unannounced inspections of such sites, but must rely on the operating rights owner or operator to afford them entry to the lease site.").

a. Types of APD Drilling Scenarios

This straightforward RMP-Lease-APD framework is complicated somewhat by the fact that technological advancements in horizontal drilling have made reaching into neighboring mineral estates more feasible. Historically, wells were straight, vertical wellbores, starting from the surface and reaching only directly below the surface. They evolved into slant wells drilled at an angle to reach nearby mineral stratum. While vertical and slant wells still exist, today wells can run vertically and then horizontally within the subsurface—sometimes for miles. As a result, BLM recognizes three general scenarios that often occur in its management of federal surface and mineral resources.[2]

[2] These three scenarios, while illustrative, do not encompass all of the ownership patterns encountered by BLM. BLM necessarily must consider each APD on a case-by-case basis.

First, in a traditional federal fee ownership APD, the well is located on federally managed land and produces the underlying federal minerals. *Second*, in what is commonly referred to as a "Split-Estate" scenario, the surface estate is non-federally owned, but the underlying minerals that are produced are federally owned.[3] *Third*, "Fee/Fee/Fed" wells are those where the surface well is located on non-federal surface estate overlying non-federal minerals, but some portion of the wellbore, after drilling into the non-federal minerals below the surface, traverses laterally and produces federal minerals from the neighboring federal mineral estate.[4]

b. Interior Issues Guidance for the Types of Fee/Fee/Fed Wells

On June 12, 2018, the BLM Deputy Director of Policy and Programs issued Permanent Instruction Memorandum 2018-014 ("PIM 2018-014") to establish policies and procedures for processing Fee/Fee/Fed APDs to ensure compliance with various environmental statutes. PIM 2018-014, ECF No. 64-17.[5] BLM's jurisdiction is limited to federal lands and minerals, *see* 43 U.S.C. § 1702(e), but Fee/Fee/Fed wells involve both federal *and* non-federal minerals and non-federal surface. As such, BLM's regulation of Fee/Fee/Fed wells requires weighing BLM's responsibility to manage the production of federal minerals against the interests of the non-federal owners of the relevant surface estate and non-federal minerals underlying the surface. Weighing

[3] This scenario can occur as a result of certain historical peculiarities in the management of federal land. For example, the Stock Raising Homestead Act of 1916 permitted individuals to claim certain non-irrigable federal land for raising livestock while the Department of the Interior retained ownership of the land's mineral resources. *See* Stock Raising Homestead Act of 1916, 43 U.S.C. §§ 291, *et seq*.

[4] *See* Directional Drilling Into Federal Mineral Estate from Well Pads on Non-Federal Locations, PIM 2018-014, U.S. Dep't of the Interior, Bureau of Land Mgmt., June 12, 2018, *available at* https://www.blm.gov/policy/pim-2018-014, ECF No. 64-17.

[5] PIM 2018-014 superseded an earlier related instruction memorandum. *See* Processing Oil and Gas Application for Permit to Drill for Directional Drilling Into Federal Mineral estates from Multiple-Well Pads on Nonfederal Surface and Mineral Estate Locations, IM 2009-078, U.S. Dep't of the Interior, Bureau of Land Mgmt. Feb. 20, 2009, *available at* https://www.blm.gov/policy/im-2009-078.

these interests, PIM 2018-014 strikes a well-reasoned balance. It directs BLM to focus its environmental analyses of Fee/Fee/Fed wells on the results of the federal action—that is, the APD under consideration—*not* pre-existing activities on private lands or activities separate from the federal action. In other words, BLM focuses its analyses on the effects from the proposed well to be drilled into the federal mineral estate from a particular well pad—rather than the effects from pre-existing wells on that same well pad or wells planned to be drilled into non-federal mineral estates from that same well pad.

PIM 2018-014 provides guidance on how to analyze APDs for three common Fee/Fee/Fed scenarios: (1) where an APD will be located on a pre-existing well pad without resulting in new surface disturbance; (2) where an APD will be located on a pre-existing well pad but additional surface disturbance is anticipated as a result of development of the federal minerals, for example, to expand the size of the well pad; and (3) where an APD proposes development of a new well pad. As the PIM explains, each of these scenarios involves different levels of federal oversight of surface operations.

3. National Environmental Policy Act

NEPA directs government officials to consider the environmental impacts of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). It serves the dual purposes of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public so that they may "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).

When an agency determines that a particular action may have significant environmental impacts, it must prepare an Environmental Impact Statement ("EIS") that analyzes those impacts and informs the decisionmakers and the public of a range of reasonable alternatives aimed at avoiding or minimizing those impacts. 42 U.S.C. § 4322(C); 40 C.F.R. § 1502.1 (1979, 2021).[6] An EIS is not required, however, if the agency prepares an environmental assessment ("EA") and determines "that the proposed action will not have a significant impact on the environment." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 16 (2008); 40 C.F.R. § 1501.5 (2021); 40 C.F.R. § 1508.9 (1979).

But an EIS or an EA is not required for every federal action. Congress may enact—and agencies shall develop within their own regulations—"categories of actions that normally do not have a significant effect on the human environment." 40 C.F.R. § 1501.4(a) (2021); *see also* 40 C.F.R. § 1508.4 (1979). Such "categorical exclusions" or "CXs" serve as efficient mechanisms to ensure NEPA compliance without "requir[ing] preparation of an [EA] or [EIS]." *Id.*; *Pub. Emps. for Env't. Responsibility v. Nat'l Park Serv.*, 605 F. Supp. 3d 28, 56 (D.D.C. 2022). Categorical exclusions are the most common level of NEPA review, applying to an estimated 100,000 agency actions each year. 85 Fed. Reg. 43,304, 43,322 (July 16, 2020).

The Department of the Interior's agency-wide categorical exclusions are codified at 43 C.F.R. § 46.210. In addition, in the 2005 Energy Policy Act, Congress directed that several oil and gas activities shall be subject to a rebuttable presumption that they are categorically excluded from further NEPA analysis. 42 U.S.C. § 15942(a). For example, Congress mandated that the following two activities are categorically excluded: "(2) [d]rilling an oil or gas well at a location

[6] The White House Council on Environmental Quality ("CEQ") first issued its NEPA regulations in November 1978. CEQ revised its NEPA regulations for the first time in September 2020 and again in April 2022. *See* 87 Fed. Reg. 23,453 (April 20, 2022).

or well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well," *id*. at § 15942(b); and "(3) [d]rilling an oil or gas well within a developed field for which an approved land use plan or any [NEPA document] analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well," *id*.

Similarly, a new EIS or EA is not required where an agency determines that an existing environmental analysis "adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c); *Friends of Animals v. U.S. Bureau of Land Mgmt.*, 232 F. Supp. 3d 53, 57 (D.D.C. 2017). In such instances, the agency will "tier" its analysis to the pre-existing environmental analysis. If the federal action falls within the scope of the pre-existing environmental analysis, the agency may issue a Determination of NEPA Adequacy ("DNA") and no further NEPA environmental analysis will be required. The Department of Interior's regulations encourage making proper use of pre-existing environmental analyses for purposes of efficiency and to avoid redundancy. 43 C.F.R. § 46.120(d).

In the oil and gas context, Onshore Order No. 1 expressly provides for the submission of a Master Development Plan to facilitate development and NEPA review of similar APDs. 72 Fed. Reg. at 10335 ("After the Master Development Plan is approved, subsequent APDs can reference the Master Development Plan and be approved using the NEPA analysis for the Master Development Plan, absent substantial deviation from the Master Development Plan previously analyzed or significant new information relevant to environmental effects.").

When necessary, the preparation of an EIS is intended to ensure that the agency understands and takes a hard look at the environmental impacts of its proposed action and alternatives to that action, but it does not demand a particular substantive result. *Sierra Club v.*

Fed. Energy Regulatory Comm'n, 867 F.3d 1357, 1376 (D.C. Cir. 2017); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (recognizing that NEPA "merely prohibits uninformed—rather than unwise—agency action").

4. Administrative Procedure Act

The aforementioned environmental statutes do not provide a private right of action to challenge an agency decision. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Rather, final agency action is reviewed under § 706 of the Administrative Procedure Act (APA). Section 706(2)(A) directs a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. "Such review is 'highly deferential' and 'presumes agency action to be valid.'" *Defs. of Wildlife v. Jewell*, 815 F.3d 1, 9 (D.C. Cir. 2016) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 997 (D.C. Cir. 2008)). An agency action must be upheld where the agency "articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Aut. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In reviewing agency decisions under the APA, the court may not "substitute its judgment for that of the agency." *Id*.

B. Factual Background

1. The Converse County Oil and Gas Project

In December 2007, BLM approved the Casper Resource Management Plan, identifying the allowable public uses on BLM lands throughout the BLM Casper Field Office administrative area,

including oil and gas development. Defs.' Ex. 2.[7] The Casper Field Office administrative area is located in east central Wyoming and includes approximately 8.5 million acres of land in most of Natrona County and all of Converse, Platte, and Goshen counties. *Id.* at 1-1. In the years that followed, consistent with the Casper RMP and BLM's twin mandates of multiple-use and sustained yield, BLM conducted oil and gas leases sales and issued leases to high bidders.

In December 2013, a collection of energy companies that own or operate oil and gas leases in Wyoming submitted to BLM a proposed development plan to conduct drilling operations within the Converse County Project Area ("CCPA"). *See* Converse Cnty. R. of Decision ("ROD"), ECF No. 64-8, PIR-0004; Onshore Order No. 1, 72 Fed. Reg. at. 10335 (describing use of Master Development Plans). The CCPA consists of 1.5 million acres of mixed surface and mineral ownership. *Id*. The overwhelming majority of the surface estate within the CCPA—eighty-three percent—is privately owned. *Id*. Seven percent is owned by the State of Wyoming. *Id*. Only the remaining ten percent is federally owned, and only six percent is managed by the BLM (the remaining four percent pertaining to the United States Forest Service). *Id*. BLM, however, administers roughly sixty-four percent of the underlying mineral estate within the CCPA. *Id*.

The proposed Converse County Oil and Gas Project ("Project") anticipated up to 5,000 oil and natural gas wells on 1,500 multi-well pads within the CCPA over a period of 10 years. *Id*. The Project also anticipated that most of the APDs submitted under the Project would be Fee/Fee/Fed wells located on non-federal surface that drill into federally-administered mineral estate. *Id*.

[7] Defendants' Exhibits 2-5 are all publicly available online using BLM's National NEPA Register website: https://eplanning.blm.gov/eplanning-ui/home. For the Court's convenience, Defendants have attached the relevant cited documents or portions thereof.

On May 16, 2014, BLM initiated the public scoping process and later held three public scoping meetings to solicit input and identify potential environmental issues or concerns associated with the Project. *See* Converse Cnty. Final Env't Impact Statement ("FEIS"), ECF No. 64-9, PIR-0097. Thus began an environmental review and analysis that would last six years and remains ongoing to this day with subsequent APD approvals. Because BLM anticipated early on that the cumulative impacts expected from subsequent APD approvals would be significant, BLM began preparing an EIS. A Draft EIS and a land use plan amendment to the Casper RMP was issued on January 26, 2018. Defs.' Ex. 3; *see also* 83 Fed. Reg. 3767 (Jan. 26, 2018). Following additional public comment, BLM issued a Supplemental Draft EIS on April 26, 2019. Defs.' Ex. 4; *see also* 84 Fed. Reg. 46,171 (April 26, 2019). BLM then issued a Final EIS and RMP Amendment on July 31, 2020. FEIS, ECF No. 64-9; *see also* 85 Fed. Reg. 46,171 (July 31, 2020).[8] The Final EIS considered three alternatives, including the preferred Alternative B and corresponding Conditions of Approval. Alternative B authorized up to 5,000 wells and 1,500 new well pads subject to subsequent APD analysis and approval. The Resource Management Plan Amendment authorized a limited number of exceptions to seasonal timing stipulations in the RMP associated with non-eagle raptor species. Defs.' Ex. 5; *see also* ROD, ECF No. 64-8, PIR-0007; FEIS, ECF No. 64-9, PIR-0091-92. Known as "timing stipulation relief," these exceptions would allow continued drilling on a well pad during the active nesting season subject to an Adaptive Management Plan.

On December 23, 2020, the Secretary of the Interior signed the Converse County Record of Decision ("ROD"), adopting Alternative B and authorizing the Casper RMP Amendment. The

[8] The chronology outlined herein can be found on BLM's eplanning website, available at https://eplanning.blm.gov/eplanning-ui/project/66551/570 (last visited April 14, 2023).

ROD "applie[d] only to the BLM-administered lands within the CCPA (federal surface and/or federal minerals." ROD, ECF No. 64-8, PIR-0004-5. The ROD did not approve any APDs.

Since approval of the ROD, BLM has analyzed and, when appropriate, approved APDs submitted pursuant to the Project ROD. To date, as part of the Project, BLM has approved approximately 16 federal APDs; 148 Split Estate APDs; and 322 Fee/Fee/Fed APDs. Defs.' Ex. 1, ¶ 4.

Plaintiffs did not submit comments to the BLM on approved APDs as provided by Onshore Order No. 1, *see* 72 Fed. Reg. at 10333-34; seek state director administrative review of approved APDs, *see* 43 C.F.R. § 3165.3; or appeal approved APDs to the Interior Board of Land Appeals ("IBLA"), *see* 43 C.F.R. Part 4; 72 Fed. Reg. at 10325.

C. Procedural Background

Nearly two years after issuance of the ROD, on September 7, 2022, Plaintiffs filed suit in the instant matter. Plaintiffs challenge two separate types of agency decisions: the Converse County ROD and the resulting APD approvals.

With respect to the ROD, Plaintiffs allege that BLM's adoption of the FEIS and RMP amendment (1) violated NEPA by failing to take a hard look at various environmental issues, Am. Compl. ¶¶ 121-26, ECF No. 44; (2) violated FLPMA for failing to protect greater sage-grouse in accordance with the Casper RMP, *id*. ¶¶ 133-37; (3) violated FLPMA for failing to prevent unnecessary or undue degradation to raptors and their habitat, *id*. ¶¶ 138-43; and (4) violated the MLA and FLPMA for failing to mitigate project air emissions, *id*. ¶¶ 151-58.

Plaintiffs allege that BLM's subsequent decisions approving APDs under the Project also (1) violated FLPMA with respect to greater sage-grouse *id*. ¶¶ 133-37; (2) violated FLPMA with respect to raptors and their habitat, *id*. ¶¶ 138-43; (3) violated the MLA and FLPMA for failing to

mitigate project air emissions, *id*. ¶¶ 151-58; and unique to the APDs (i.e., not the ROD), that they (4) violated NEPA by improperly relying on CXs and DNAs, *id*. ¶¶ 127-32, and (5) violated the MLA and FLPMA by failing to regulate surface operations on Fee/Fee/Fed wells, *id*. ¶¶ 144-50.

On December 14, 2022, Plaintiffs filed their Amended Complaint. Plaintiffs Amended Complaint challenges over 400 APDs, including APDs that BLM had approved since the filing of the Complaint.[9] On March 13, 2023, Plaintiffs filed the present Motion seeking to enjoin the ROD and future approval and development of APDs within the Project. Mot., ECF No. 64.

II. LEGAL STANDARD

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. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citation omitted); *see also Winter*, 555 U.S. at 24 (same). It is "never awarded as [a matter] of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citation omitted).

To obtain a preliminary injunction, a plaintiff must, at a minimum, show four elements: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of an injunction; (3) that the balance of equities tips in plaintiff's favor; and (4) that the injunction is in the public interest. *Winter*, 555 U.S. at 20; *see also Natural Res. Def. Council v. Kempthorne*, 525 F.Supp.2d 115, 119 (D.D.C. 2007). The final two factors "merge when the Government is the opposing party" because the government is acting for the public's benefit. *Nken v. Holder*, 556 U.S. 418, 435 (2009). A deficiency in any one of the required elements precludes extraordinary relief. *Winter*, 555 U.S. at 24.

[9] Plaintiffs' Appendix A attached to its Amended Complaint lists 407 APDs. Plaintiffs, however, have listed several duplicate entries and previously approved APDs that have expired. The total number of distinct, unexpired APDs challenged by Plaintiffs appears to be 401.

III. ARGUMENT

Plaintiffs' Motion for Preliminary Injunction seeks to enjoin BLM from approving new APDs within the Project area under the ROD and to enjoin existing APDs where drilling and production has not yet commenced. Mot. 1-2, ECF No. 64. In support, Plaintiffs argue that BLM violated the FLPMA, the MLA, and the APA in determining the scope of its authority over (1) Fee/Fee/Fed wells; and (2) enforcement of air quality standards. Plaintiffs also argue that BLM violated NEPA and the APA by (3) allegedly conducting a flawed environmental effects analysis; and (4) relying on Categorical Exclusions and DNAs in approving APDs. Plaintiffs have not, however, shown a likelihood of success on any of their claims.

A. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits of their FLPMA and MLA Claims

1. BLM's Application of Its Authority to Regulate Non-Federal Surface was Not Arbitrary and Capricious

Plaintiffs' FLPMA and MLA claims are not likely to succeed because Plaintiffs have not shown that BLM is *required* to regulate all surface operations on Fee/Fee/Fed wells or impose air quality mitigation measures. Wherever the outer boundaries of BLM's jurisdiction may fall, BLM has reasonably exercised its discretion and applied its authority within constitutional, statutory, and regulatory limits.

The Property Clause of the Constitution declares that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Defendants do not dispute that this authority is expansive—expansive enough to permit Congress to delegate authority to BLM to regulate certain activities on non-federal land to protect federal property. *See Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976) ("[T]he power granted by the Property Clause is broad enough

to reach beyond territorial limits."); *see also Camfield v. United States*, 167 U.S. 518, 525, 528 (1897) (holding that Congress had the power to "protect[] the public lands from nuisances erected upon adjoining [private] property" and the extent of such power "is measured by the exigencies of the particular case"); *United States v. Richard*, 636 F.2d 236, 240 (8th Cir. 1980) ("[F]ederal regulation may exceed federal boundaries when necessary for the protection of human life or wildlife or government forest land or objectives."); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (recognizing that the United States may "regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters").

Under the MLA, the Secretary of the Interior has authority "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish," 30 U.S.C. § 189, the promotion and protection of oil and gas resources belonging to the public. The Secretary "has a responsibility to insure that these resources are not physically wasted and that their extraction accords with prudent principles of conservation." *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961). Because federal minerals are involved, the MLA gives the Secretary a wide range of authority to ensure those federal minerals are responsibly extracted and waste is avoided. *See, e.g.*, 30 U.S.C § 187 (requiring that each lease contain provisions "for reasonable diligence, skill, and care in the operation of said property," "for the prevention of undue waste," and "for the protection of the interests of the United States"). That grant of authority is amplified by the Federal Oil and Gas Royalty Management Act of 1982 ("FOGRMA"). 30 U.S.C. §§ 1701(b)(2) (declaring the FOGRMA's purpose is, in part, to implement and maintain a royalty management system for oil and gas leases on all land and interests in land owned by the United States); 1711(a) (granting the Secretary authority to establish inspection, collection and other systems to ensure payments owed to the United States are accurately determined and collected).

The Secretary has promulgated various rules to carry out that authority, including in areas of oil and gas leasing, 43 C.F.R. Part 3100, oil and gas operations, 43 C.F.R. Part 3160, and oil and gas production, 43 C.F.R. Part 3170.

These authorities do not end the moment federal minerals cross the subsurface boundary between the federal mineral estate and non-federal mineral estate through a horizontal Fee/Fee/Fed well bore. To the contrary, BLM has interpreted the MLA as granting it authority to apply at least two types of regulations to operations on non-federal lands: regulations governing "downhole" activities or operations (e.g. well drilling, casing, cementing, verification, testing, reporting, and plugging); and regulations relating to production accountability (i.e. those that prevent waste or loss of federal oil and gas and ensure accurate measuring and collecting of royalties). PIM 2018-014. This necessarily includes the right to enter and inspect wells on private land for these purposes and to conduct preceding environmental analyses. *See* 43 C.F.R. § 3162.1(b)-(c); Onshore Order No. 1, 72 Fed. Reg. 10,330-31, 10,336; *see also Maralex Res., Inc.*, 913 F.3d at 1204.

Through their lawsuit, Plaintiffs seek to force BLM to apply a third category of regulations to non-federal lands: regulation of surface-disturbing activities. Plaintiffs premise their argument on the MLA's directive that the Secretary "shall regulate all surface-disturbing activities conducted pursuant to any lease issued under this Act." 30 U.S.C. § 226(g). The statute provides broad discretion to the Secretary in regulating surface-disturbing activities but, like many statutes, leaves it to the discretion of the Secretary to strike the right balance. For example, the financing requirement in § 226(g) applies not only to "the lease tract," but also to "the restoration of *any* lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease." *Id*. (emphasis added). This suggests that BLM has at least

some authority to regulate non-federal surface reclamation after conclusion of "on lease" operations.

Turning to BLM's jurisdictional regulations, they reflect a need to assert federal oversight to meet BLM's objectives as the oil and gas process moves from leasing to production. *Compare* 43 C.F.R. § 3100.0-3 (extending BLM's authority for oil and gas leasing to include oil and gas in public domain lands); *with* 43 C.F.R. § 3170.2 (establishing the scope of BLM's jurisdiction over oil and gas production to include "[a]ll Federal onshore . . . oil and gas leases").

But neither the relevant statutes nor BLM's jurisdictional regulations provide a clear mandate to regulate all aspects of operations and activities on non-federal lands. At most, those statutes and regulations are ambiguous on this point. In the absence of clear statutory or regulatory direction, BLM, through PIM 2018-014, has determined as a policy matter, that its own regulations permit regulation of downhole activities and production accountability activities regardless of ownership patterns because regulation of those activities is necessary for BLM to achieve its objectives in responsibly managing development of federal oil and gas.

This is a reasonable application of the scope of BLM's jurisdictional regulations. PIM 2018-014 recognized that "BLM's jurisdiction extends to surface facilities on entirely non-Federal lands" in accepted areas of regulation like "production accountability." ECF No. 64-17, PIR-4665. But the PIM also observed that at some point, "BLM's regulatory jurisdiction is limited," and therefore, BLM must "carefully examine" BLM activities that affect non-federal lands. *Id*. at PIR-4664. BLM undertook that careful review here, noting that the federal action necessitating the environmental analyses—here, the approval of the APD into the federal mineral estate—should drive the scope of BLM's regulation of operators' activities, not other pre-existing disturbance. So, while BLM cannot demand entry upon private lands at will or prohibit certain activities on

private land, BLM concluded that once an operator seeks to drill into a federal mineral estate, BLM can require an APD and condition approval on being able to access the surface facilities as necessary to complete environmental analyses, control downhole drilling, or ensure production accountability and prevention of waste of the federal minerals. *Id*. at PIR-4666, PIR-4673. This way, BLM respects the private landowner's rights to privacy and to be free from unwanted government interference, but still maintains its robust authority to regulate those surface activities necessary for producing and accounting for oil and gas resources from the federal mineral estate.

The Court should defer to BLM's interpretation and its ultimate policy choice. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2414-18 (2019) (outlining when deference to agency interpretation of its own regulations is proper under *Auer v. Robbins*, 519 U.S. 452 (1997)); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)) (recognizing that courts give "controlling weight" to the agency's interpretation of its own ambiguous regulations "unless it is plainly erroneous or inconsistent with the regulation.").

Plaintiffs argue that BLM is *required* to push its potential regulatory authority under the Property Clause to its maximum. But this argument fails. The statutory regimes in statutes like FLPMA and MLA make evident that Congress delegated certain aspects of its Property Clause authority. But although Congress may, for example, dispose of federal lands however it chooses, it limited the Secretary's authority to do so, subject to enumerated constraints and procedures delineated in FLPMA and MLA. *E.g.*, 43 U.S.C. § 1713(a) (outlining criteria and processes required for the Secretary to sell public lands); 30 U.S.C. § 226-3 (prohibiting the Secretary from leasing federal lands that satisfy certain criteria).

But even with respect to those aspects of Property Clause authority that Congress has actually delegated to the Secretary, the Court need not wrestle with the outer limits of what BLM's

statutory authority *might* be.[10] What matters here is whether BLM reasonably exercised *its* discretion by choosing to regulate (or not) in areas approaching those outer limits. Beginning with the MLA, for example, BLM might conclude that regulation of certain activities on non-federal surface is necessary to ensure safe, responsible, and profitable production of federal oil and gas. But such power would be derived from BLM's authority to take actions necessary for the management of the federal resource at issue—not for protection of the non-federal lands for their own sake. BLM, consistent with PIM 2018-014, has concluded that currently only regulations related to downhole activities and production accountability activities are "necessary" to satisfy its obligations under the MLA to responsibly manage the production of federal oil and gas resources and prevent waste where the surface facilities are on wholly non-federal land.

Plaintiffs also argue that BLM is required to regulate surface-disturbing activities on non-federal lands under FLPMA because, in their view, such action is "necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b). But again, the Court should defer to BLM's policy determination in PIM 2018-014. Although FLPMA may permit BLM to take actions "necessary" to protect lands under its management, like the MLA, FLPMA does not clearly delineate the scope of BLM's authority to manage activities on non-federal land that might have an effect on BLM lands. Indeed, Plaintiffs do not point to *any* FLPMA statutory provision or regulation that clearly authorizes BLM to take actions on non-federal land. Given this absence

[10] As noted in Defendants' Response to Defendant-Intervenors' Motion for Partial Judgment on the Pleadings filed contemporaneously herewith, the question of whether and to what extent BLM is *permitted* to regulate surface disturbance activities on non-federal lands is not properly before the Court. The only question presented by Plaintiffs and ripe for adjudication is whether BLM is *required* to regulate such activities.

of clear authority, the Court should defer to BLM's decision, as a policy matter, to apply its authority over non-federal surface as expounded in PIM 2018-014.[11]

At best, Plaintiffs have established—and Defendants agree—that under the Property Clause Congress *could* delegate authority to BLM to manage surface-disturbing activities on wholly non-federal land. But Plaintiffs have not identified any clear statutory or regulatory authority *requiring* BLM to manage surface-disturbing activities on non-federal land in the precise manner they suggest. Nor have they established that regulation of surface-disturbing activities—as opposed to downhole activities and accountability production activities—is necessary for BLM to achieve its obligations to responsibly manage federal minerals and lands under the MLA and FLPMA. Accordingly, they have not demonstrated a likelihood of success on their claim that BLM's application of its authority in PIM 2018-014 was arbitrary and capricious.

2. BLM's Determination of the Scope of Its Authority to Impose Air Quality Mitigation Measures was Not Arbitrary and Capricious

Plaintiffs' air quality mitigation claim fares even worse. In short, Plaintiffs conflate the BLM's authority to mitigate environmental impacts to air resources with BLM's authority to regulate air quality under the MLA and FLPMA. With respect to the latter, Courts in this district have twice considered and rejected nearly identical arguments. *See WildEarth Guardians v. Bureau of Land Mgmt.*, 8 F. Supp. 3d 17, 37-38 (D.D.C. 2014); *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 94 (D.D.C. 2012), *aff'd sub nom. WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013).

[11] If a particular operation threatened such dire and unusual harm to federal lands, as that in *Camfield*, *Richard*, and *Lindsey*, discussed *supra*, BLM could seek judicial relief as did the federal land managers in those cases.

Under the Clean Air Act, the U.S. Environmental Protection Agency ("EPA"), not BLM, has authority to regulate air quality. *See* 42 U.S.C. § 7601. The Clean Air Act requires each state to submit to the EPA a plan for the implementation, maintenance, and enforcement of air quality standards. *Id*. at § 7410; *see also* 40 C.F.R. Part 51. Wyoming's plan is promulgated at 40 C.F.R. § 52.2620 and authority for Clean Air Act permitting has been delegated to the Air Quality Division of the Wyoming Department of Environmental Quality. *See also* Wyo. Stat. Ann. § 35-11-204 (directing the Wyoming Department of Environmental Quality to promulgate rules regarding matters such as permitting, air pollution controls, compliance, and emissions levels).[12] As the IBLA has recognized, "BLM properly may rely on the State, which is subject to oversight by the EPA, to ensure permitted activities do not exceed or violate any State or Federal air quality standard under the CAA, 42 U.S.C. §§ 7401-7671q (2006)." *Powder River Basin Res. Council*, 183 IBLA 83, 95 (2012) (citing *Wyoming Outdoor Council*, 176 IBLA 15, 27 (2008)).

FLPMA requires BLM to develop land use plans that "provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans." 43 U.S.C. § 1712(c)(8). BLM's regulations similarly provide that its land use authorizations must "[r]equire compliance with air and water quality standards established pursuant to applicable Federal or State law." 43 C.F.R. § 2920.7(b)(3). But nothing in FLPMA's statutory text or its implementing regulations authorize what Plaintiffs' demand here: that BLM impose air quality mitigation measures to ensure oil and gas wells in fact satisfy this standard. This is the responsibility of the well operator, and enforcement of compliance with the

[12] The Air Quality Division of the Wyoming Department of Environmental Quality's rules on air quality can be found on the Wyoming Administration Rules website at tit. 20-chs. 1-14 Wyo. Code R., *available at* https://rules.wyo.gov/Search.aspx?mode=1 (last visited April 18, 2023).

applicable air quality standards is left to the Wyoming Department of Environmental Quality and the EPA. *See, e.g.* 183 IBLA 83, 95 (2012); *see also* ROD, ECF No. 64-8, PIR-0020.

"[N]either the FLPMA nor the implementing regulations require[] BLM to analyze whether and to what degree the [approval of APDs] would comply with national [air quality] standards." *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d at 94. "Instead, applicable regulations require only that BLM draft land use authorizations . . . such that they '[r]equire compliance with air and water quality standards established pursuant to applicable Federal or State law.'" *WildEarth Guardians v. Bureau of Land Mgmt.*, 8 F. Supp. 3d at 38 (quoting 43 C.F.R. § 2920.7(b)(3)). Here, BLM "includ[ed] clauses in the . . . leases requiring compliance with air and water quality standards." *Id*. This is all that FLPMA requires.

To avoid "unnecessary or undue degradation of the lands," 43 U.S.C. § 1732(b), BLM has broad authority to impose mitigation measures, including measures that would mitigate impacts to air resources. As just one example, BLM can and does impose dust abatement measures. This authority also includes the ability to require mitigation of air impacts from emissions sources that are beyond EPA's or WDEQ's air quality regulatory purview, like mobile emissions from truck traffic. And, as alluded to above, BLM also has the authority to regulate operations on Fee/Fee/Fed wells for purposes of securing drilling safety and preventing waste, efforts which can also contribute to the reduction of impacts to air resources. Contrary to Plaintiffs' allegations, BLM required such measures and incorporated them into its Conditions of Approval or deferred them to the APD permitting process stage. ROD, ECF No. 64-8, PIR-0008.

Plaintiffs incorrectly argue Defendants "reversed course" compared to other BLM projects like the Normally Pressured Lance Project. Plaintiffs' comparison is inapt. The Normally Pressured Lance Project involved different highly deviated slant and directional wells, measures

that were not subject to EPA or Wyoming Department of Environmental Quality permitting, was located in an EPA-designated ozone non-attainment area, and in stark contrast to the Converse County Project, was almost entirely located on BLM-managed land and minerals where BLM has broad authority require mitigation measures.

BLM has the authority to impose mitigation measures on impacts to air resources from activities on federal lands and reasonably exercised that authority here. But BLM does not have unfettered authority to impose air *quality* mitigation measures on non-federal land. That is within the purview of the EPA and the Wyoming Department of Environmental Quality pursuant to their authority under the Clean Air Act and the State's implementation plan to regulate emissions for purposes of air quality and human health and welfare.

B. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits of their NEPA Claims

a. BLM Appropriately Analyzed Environmental Impacts

Under NEPA, an EIS must examine, among other things, "the environmental impact of the proposed action." 42 U.S.C. § 4332(C)(i); 40 C.F.R. § 1502.16(a)(1). Environmental impacts include direct effects, indirect effects, and "[c]umulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions." 40 C.F.R. § 1508.1(g). Plaintiffs contend BLM's environmental impacts analysis was deficient in three ways—none of which are likely to succeed to on the merits.

First, Plaintiffs argue that BLM failed to consider how the prevalence of Fee/Fee/Fed wells within the Project, and BLM's corresponding limited authority to impose mitigation measures, would affect various environmental impacts. Mem. in Supp. of Mot. 28-30, ECF No. 64-1. Plaintiffs are incorrect. BLM was well aware of its limited authority to impose various measures

on non-federal land not otherwise required by law and thoroughly reflected that fact in the FEIS. *E.g.*, FEIS, ECF No. 64-9, PIR-1075 ("The BLM's ability to require application of mitigation measures is limited by the extent of the agency's authority as it relates to the surface and fluid mineral estate ownership patterns within the CCPA."). Moreover, the FEIS analyzed and took into consideration mitigation design features the well operators pledged to implement, including for air quality, *id*. at PIR-1093; visual resources, *id*. at PIR-1096; and greater sage-grouse, *id*. BLM incorporated those design features into its Conditions of Approval, thus making them binding on the operators. ROD, ECF No. 64-8, PIR-0006-0015. Beyond those required design features, BLM also encouraged adoption and implementation of additional proposed mitigation measures. *Id*. at PIR-0015-0020; FEIS, ECF No. 64-9, PIR-1097-104.

Second, Plaintiffs contend that BLM inappropriately premised its cumulative effects analysis on outdated well figures and rates of well drilling in the Project area. The Converse County Project Area and surrounding region in the State of Wyoming is one of the most—if not the most—dynamic and productive energy-generating areas in the country, *see* Mem. in Supp. of Mot. 1, 5, ECF No. 64-1, and essential to U.S. energy security. This includes not just other oil and gas projects, but wind projects, FEIS, ECF No. 64-9, PIR-1007-08, and mining projects, *id*. at PIR-1001-04. As of December 31, 2015, the BLM Buffalo Field Office NEPA register alone had approximately 110 active oil and gas projects that were within the Cumulative Impact Study Area. *Id*. at Table 5.2-1, PIR-1002-03.

Relying on timely compiled data and information in a NEPA analysis is important for ensuring the agency decisionmaker and the public are meaningfully informed of the impacts of an agency decision. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 372 (1989). Therefore, BLM must prepare a supplemental EIS when "[t]here are significant new circumstances or information

relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(d)(1)(ii). But agencies are not required to constantly update their analysis from one day to the next simply because new data is available. "To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Marsh*, 490 U.S. at 373. Thus, "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 v. Salazar*, 605 F. Supp. 2d 263, 273 (D.D.C. 2009) (alteration in original) (internal quotation and citation omitted), *aff'd* 616 F.3d 497 (D.C. Cir. 2010).

Given the robust nature of development within the project area, BLM explained that a cut-off date for known projects was necessary to avoid continual reanalysis. Converse Cnty. FEIS Apps. A and H ("Apps. A and H"), ECF No. 64-10, PIR-1548, F03-02. BLM's decision to use a cut-off date of December 31, 2015 reflected the first full year of available data after the completion of scoping in 2014. It "was carefully considered, based on reason, and therefore neither arbitrary nor capricious." *Theodore Roosevelt Conservation P'ship*, 605 F. Supp. 2d at 273.

Even with this temporal limitation, moreover, BLM's analysis was reasonable and did not undercount reasonably foreseeable projects in the Converse County Project Area or the greater Cumulative Impacts Study Area. In the first instance, Plaintiffs' argument is premised on a misreading of data. As previously clarified in response to Plaintiffs' comment N11-45, Plaintiffs are relying on an overestimation of APDs even though "not all of these . . . resulted in wells that have been drilled, will be drilled, or are within . . . the cumulative impact study area." Apps. A and H, ECF No. 64-10, PIR-1615. In addition, as the January 2018 Draft EIS explained, as of January 9, 2015, there were approximately 1,520 wells (1,280 on single well pads and 240 wells

on 86 multi-well pads) drilled and in operation within the CCPA. Defs.' Ex. 3, 2-15. BLM must prepare a supplemental EIS when "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise. 40 C.F.R. § 1502.9(d)(1)(ii). On April 26, 2019, BLM issued a Supplemental Draft EIS focused on new information and analyses regarding the non-eagle raptor RMP amendment. Defs.' Ex. 4, ES-1. The Supplemental Draft EIS provides that as of March 22, 2019, there were 1,828 wells within the CCPA. *Id*. at ES-2. The addition of only 308 wells over four years within the Project area was well below the estimated 1,663 new wells that remained to be drilled in the CCPA under the no action alternative. FEIS, ECF No. 64-9, PIR-0098. The trends observed in the Supplemental Draft EIS and the moderate increase in wells within the CCPA confirmed the reasonableness of BLM's prior baseline estimates.

Third, Plaintiffs claim that BLM failed to appropriately consider the greenhouse gas emissions from the Project alongside greenhouse gas emissions from other projects. But this argument is largely duplicative of the arguments addressed above, in that it seeks to discount BLM's reasonable reliance on appropriate mechanisms, here emission inventories. In any event, Plaintiffs again are incorrect—the FEIS plainly details BLM's greenhouse gas cumulative effects analysis, including placing the anticipated greenhouse gas emissions from the project in the context of local, state, and national emissions.

When conducting a cumulative impact analysis, "the agency 'must assess the impact the proposed project will have in conjunction with other projects in the same and surrounding areas . . . and must include past, present, and reasonably foreseeable future actions of any agency or person.'" *WildEarth Guardians v. Bureau of Land Mgmt.*, 8 F. Supp. 3d at 31 (quoting *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 503). BLM reasonably quantified and analyzed the

cumulative effects of greenhouse gas emissions from the Project at the appropriate local, state, and national levels. FEIS, ECF No. 64-9, PIR-0255-0263, 1020-26; *see also* 81 Fed Reg. 51866 (Aug. 5, 2016) (recommending use of projected GHG emissions and quantification of direct and indirect GHG emissions based on available data). For example, BLM calculated that CO2e levels anticipated from the Project would represent approximately 47 percent of the 135.3 MMT CO2e (2018), from all Wyoming oil and gas production if it were 100 percent combusted. FEIS, ECF No. 64-0, PIR-1021. BLM's reliance on available data—whether in the form of baseline development numbers or emissions inventories—was reasonable and Plaintiffs have not shown that they are likely to establish otherwise.

b. BLM Appropriately Relied on Categorical Exclusions and Determinations of NEPA Adequacy

BLM appropriately invoked Categorical Exclusions where applicable, and it reasonably concluded in other instances—by signing Determinations of NEPA Adequacy—that pre-existing NEPA analysis already fully disclosed the impacts associated with certain APDs. Categorical Exclusions are, "[b]y definition, . . . categories of actions that have been predetermined not to involve significant environmental impacts, and therefore require no further agency analysis absent extraordinary circumstances." *Nat'l Trust for Historic Preservation v. Dole*, 828 F.2d 776, 781 (D.C. Cir. 1987). Since multiple wells can be drilled from a single well pad, Congress has declared that wells drilled on the same site within five years are categorically excluded from further NEPA analysis. 42 U.S.C. § 15942(b)(2) ("Categorical Exclusion 2"). Congress has also excluded from review instances where a well is drilled within five years of an RMP, EIS, or EA that analyzed oil and gas drilling as a reasonably foreseeable activity. *Id*. at § 15942(b)(3) ("Categorical Exclusion 3").

Similarly, whenever BLM determines that a federal action has been properly analyzed in a prior EIS or EA, BLM may prepare a Determination of NEPA Adequacy or "DNA." *Friends of Animals v. Bureau of Land Mgmt.*, 232 F. Supp. 3d 53, 57 (D.D.C. 2017). Interior's regulations provide that a prior NEPA analysis "may be used in its entirety if . . . it adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c).

Onshore Order No. 1 and its allowance of Master Development Plans, also encourages reliance on prior environmental analyses for the approval of APDs. 72 Fed. Reg. at 10335. In addition, PIM 2018-014 expressly instructs BLM to rely on categorical exclusions and DNAs when available.

Here, BLM appropriately relied on DNAs and Categorical Exclusions 2 and 3 in approving APDs in accordance with the Project. Plaintiffs' assertions to the contrary fall well short of showing a likelihood of success on their NEPA claim. Critically, Plaintiffs' argument that BLM inappropriately relied on a categorical exclusion is based on a misunderstanding of how the exclusion applies. Plaintiffs allege that BLM relied on Categorical Exclusion 3 to exclude actions other than drilling—like the construction of well pads and roads—from NEPA analysis. Mem. in Supp. of Mot. 37, ECF No. 64-1; *e.g.* ECF No. 64-12, PIR-2395; ECF No. 64-13, PIR-2478-91 (NEPA No. DOI-BLM-WY-P060-2021-0030-CX relying on Categorical Exclusion 3). But Plaintiffs' examples involve Fee/Fee/Fed wells and BLM's NEPA analysis of direct impacts for such APDs is limited to the activities that BLM is considering—that is, the drilling for, and the production of, federal minerals from the Fee/Fee/Fed well. To put another way, upon tapping into the neighboring federal minerals, BLM's jurisdiction is alerted and thus, the possibility for NEPA analysis and a categorical exclusion from that NEPA analysis arises. And here, BLM appropriately determined that the APDs at issue were being drilled within five years of the Converse County

Project ROD which identified such activity as reasonably foreseeable. *See* FEIS, ECF No. 64-9, PIR-0997-1001. The same holds true for Plaintiffs' critique of Categorical Exclusion 2.

Plaintiffs' DNA argument suffers from the same fatal flaw. Plaintiffs argue that although BLM was entitled to tier APDs to the Converse County FEIS, because the Converse County FEIS deferred site-specific impacts to the local level, BLM was required to conduct subsequent site-specific environmental review at the APD level for all APDs. But BLM *did* perform this site-specific analysis for all APDs, with the appropriate scope of analysis depending on the location of the proposed well. BLM is not required to conduct this analysis for Fee/Fee/Fed wells other than with respect to activities directly incident to the production of federal minerals. The Converse County FEIS adequately assessed the environmental effects of the proposed production of federal minerals, and therefore, the APDs could rely entirely on the FEIS's NEPA analysis.

Because BLM's obligation to conduct a NEPA analysis is triggered by the "major Federal action[] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C)—here, the approval of production of federal minerals—and not other ancillary activities, BLM may rely on categorical exclusions and DNAs when determining whether to conduct additional NEPA analysis of the triggering action. Plaintiffs have not demonstrated a likelihood of success on their claim that BLM's reliance was in error.

C. Plaintiffs Have Not Demonstrated Imminent, Irreparable Harm

Plaintiffs must show a "likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief." *Winter*, 555 U.S. at 21. The standard for showing irreparable harm in this Circuit is "particularly high." *Save Jobs USA v. U.S. Dep't of Homeland Security*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015); *see also Church v. Biden*, 573 F. Supp. 3d 118, 138 (D.D.C. 2021) (recognizing that a movant's burden is "considerable"). Courts in this Circuit explore

several factors when evaluating whether an alleged harm is "irreparable." The alleged injury must be "*certain, great and actual*—not theoretical—and *imminent*." *Church*, 573 F. Supp. 3d at 138 (quoting *Power Mobility Coal v. Leavitt*, 404 F.Supp.2d 190, 204 (D.D.C. 2005)); *Mexichem Specialty Resins, Inc. v. Env't. Protection Agency*, 787 F.3d 544, 554 (D.C. Cir. 2015) (same). The alleged harm must also "be truly irreparable, in the sense that it is 'beyond remediation.'" *Save Jobs USA*, 105 F. Supp. 3d at 112 (quoting *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 44 (D.D.C. 2014)). And "the movant [must] substantiate the claim that irreparable injury is likely to occur." *Id*. (quoting *Wis. Gas Co. v. Fed. Energy Reg. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). Finally, the movant "must show that the alleged harm will directly result from the action which the movant seeks to enjoin." *Wis. Gas Co.*, 758 F.2d at 674.

As an initial matter, Plaintiffs' delay in seeking relief cuts against any finding of irreparable harm. *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) ("An unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm."). Here, Plaintiffs waited nearly two years after the challenged agency action to raise even the *possibility* of seeking preliminary injunctive relief. The Secretary signed the ROD on December 23, 2020, and BLM began approving APDs under the ROD as early as March 1, 2021. Defs.' Ex. 1, ¶ 4. Plaintiffs, however, did not file their Complaint until September 7, 2022, ECF No. 1, and by their own admission, did not even raise the issue of potentially seeking a preliminary injunction until December 8, 2022, ECF No. 74-1, ¶ 6. Courts within this Circuit have repeatedly found delays far shorter than two years indicative of a failure to demonstrate irreparable harm. *See, e.g.*, *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (concluding that a delay of over two months "militates against a finding of irreparable harm"); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (holding that

a delay of forty-four days before bringing action for injunctive relief "bolstered" the "conclusion that an injunction should not issue"). A "substantial delay" of nearly two years "stands in stark contrast to the high bar Plaintiffs must clear to show irreparable harm." *Dallas Safari Club v. Bernhardt*, 453 F. Supp. 3d 391, 401 (D.D.C. 2020).

Delay aside, Plaintiffs have failed to demonstrate that they will suffer irreparable harm. *First*, ninety percent of the surface area in the CCPA consists of state- or privately-owned surface and Plaintiffs have not demonstrated that surface disturbance on such lands will impair their enjoyment of *federal* lands. Plaintiffs lack standing to allege harms that are purely to state- or privately-owned lands. *See Friends of the Earth, Inc. v. Laidlaw Env't. Servs., Inc.* 528 U.S. 167, 181 (2000) (reaffirming that Article III requires "particularized" injury "to the plaintiff").

Second, the FEIS anticipated that only 3,160 acres or roughly six percent of the surface disturbance would occur on federal lands and the ROD requires strict remediation and reclamation efforts on BLM leased lands in accordance with the Conditions of Approval. FEIS, ECF No. 64-9, PIR-0852; ROD, ECF No. 64-8, PIR-0008-0015. This Court has found nearly identical circumstances insufficient to establish irreparable harm. *S. Utah Wilderness Alliance v. Bernhardt*, 512 F. Supp. 3d 13, 22 (D.D.C. 2021) ("Given the relatively limited scope of the ground disturbing work, the required mitigation and reclamation measures, and the unclear future of the project, the Court is not convinced that Plaintiffs have established irreparable harm."); *see also Natural Res. Defense Council v. Kempthorne*, 525 F. Supp. 2d 115 (D.D.C. 2007).

Third, Plaintiffs isolate statements from the 1,108-page FEIS to imply that a litany of harms will occur. But Plaintiffs ignore language in the FEIS demonstrating the vast majority of these impacts are temporary or subject to mitigation, and by definition not irreparable. *See, e.g.*, FEIS, ECF No. 64-9, PIR-0701 (observing that "indirect effects such as visual disturbances from well

pad construction and temporary pipelines could be avoided over the long term if their causes are removed").

Plaintiffs imply that irreparable harm is self-evident because "[e]ven BLM does not claim the landscape will ever fully recover." Mem. in Supp. of Mot. 40, ECF No. 64-1. But again, Plaintiffs ignore the fact that the "majority" of lands referred to in the FEIS are non-federal lands. FEIS, ECF No. 64-9, PIR-1047 ("[T]he majority of cumulative development likely would occur on private lands. Reclamation on private lands is not required to meet BLM or USFS standards, resulting in the majority of vegetation communities not being returned to their preconstruction state . . . .").

Finally, Plaintiffs have not demonstrated irreparable harm because Plaintiffs have not established that their alleged harms would be the result of Defendants' actions as opposed to other oil and gas wells occurring on private and state lands in the area regardless of Defendants' approval of future APDs. Many of the Fee/Fee/Fed APDs are designed to reduce environmental impacts by drilling multiple well-bores from one well pad. Even if Plaintiffs could enjoin the approval of additional APDs under the ROD, Plaintiffs have not shown that they would not still suffer the same alleged harms from pre-existing oil and gas wells drilled on non-federal lands that tap into non-federal mineral resources.

D. The Balance of the Hardships & the Public Interest Weigh in Defendants' Favor

In determining whether to grant 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 quotation and citations omitted). The court must also "pay particular regard for the public consequences" that would flow 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 merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

In this case, an injunction would impair BLM's discretion to manage federal minerals and significantly curtail the royalty payments generated from production of federal oil and gas and paid to the federal government. Plaintiffs have not shown that the balance of equities and harm to the public interest weighs in their favor and the Court should therefore deny their request for injunctive relief.

CONCLUSION

Plaintiffs have failed to satisfy their burden necessary to impose the extraordinary remedy of a preliminary injunction. Plaintiffs have not shown a likelihood of success on the merits, delayed for years in bringing their preliminary injunction motion and otherwise have not shown irreparable harm will result absent an injunction, and have not demonstrated the balance of hardships and public interest weigh in their favor. Accordingly, Plaintiffs' Motion must be denied.

Respectfully submitted April 24, 2023.

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