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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

U.S. BUREAU OF LAND MANAGEMENT, et al.,

Defendants.

Civ. No. 1:23-cv-00938-JLT-CDB

PLAINTIFFS' RESPONSE TO MOTION FOR VOLUNTARY REMAND

Date Filed: June 22, 2023
Hearing Date: N/A
District Judge: Hon. Jennifer L. Thurston
Magistrate Judge: Hon. Christopher D. Baker

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INTRODUCTION

Plaintiffs oppose federal Defendants' motion to remand the U.S. Bureau of Land Management's ("BLM's") unlawful approval of six permits to drill new oil wells on public land in the San Joaquin Valley, California, to the extent that BLM seeks remand *without vacatur*. The Court should vacate these permits.

BLM's request to remand without vacatur is a thinly veiled attempt to avoid judicial review of its serious errors. BLM acknowledges it has identified "substantial and legitimate issues" with its analysis underlying the drilling permits. BLM Remand Mot. at 7 (ECF 21-1). Plaintiffs agree there are "substantial and legitimate issues" with BLM's permitting of these wells: BLM approved these permits without accounting for how the wells will deteriorate air quality, damage public health, and undermine progress toward life-saving climate goals in a part of the U.S. most burdened by pollution, and it violated multiple federal laws designed to ensure governmental transparency and accountability, and to protect public health and the environment.

Yet BLM's proposed response to these problems is not to withdraw the challenged permits for reconsideration, but rather to leave them in place while it concocts post-hoc rationalizations for its permitting decisions. However, the post-hoc rationalizations BLM seeks to now add to the record cannot lawfully justify the decision *it has already finalized* to issue these drilling permits. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). Furthermore, BLM's attempt to spend the next six months tinkering with its analysis only punts any judicial review into a barely three-month window before the wells will be drilled, needlessly throwing the parties and the Court into a future rushed process to address the merits of this case via a last-minute motion for emergency relief.

BLM's end-run around judicial review is improper, inefficient, and prejudicial. Remand *with* vacatur is the default remedy when an agency has committed legal error, *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018), and there is no reason to deviate from this default remedy here. The Court should accordingly order that these permits be vacated along with their remand.

FACTUAL BACKGROUND

The San Joaquin Valley air basin, where the wells at issue are set to be drilled, is home to our nation's greatest air quality challenges and is in "extreme" nonattainment for ozone pollution—the main ingredient in the smog that blankets the Valley. Decl. of Michelle Ghafar in Sup. of Pls.' Resp. to Mot. for Voluntary Remand ("Ghafar Decl."), Exs. G; H at 1-3, 1-6. This "extreme" nonattainment designation is the worst the Valley can receive. *Id.*, Ex. H at 1-6.

Oil and gas drilling is a significant source of air pollution. The Valley produces 75 percent of California's crude oil and maintains over 83 percent of the state's active wells. *Id.*, Ex. L at 1. At every stage of oil and gas extraction, pollutants are released that exacerbate air quality violations in the Valley air basin, cause adverse health effects to communities, and worsen the consequences of climate change. *Id.*, Ex. J. Ozone is not emitted directly from human activities; rather it is the product of the interaction of two "precursor" pollutants emitted from extraction and burning of petroleum hydrocarbons: nitrogen oxide ("NOx") and volatile organic compounds ("VOCs"). *Id.*, Ex. H at 4-1 to 4-3. By 2035, oil and gas production is projected to be the largest source of NOx in Kern County, accounting for nearly seventy percent of all NOx emissions. *Id.*, Exs. F at 4.3-164; I. One study likewise estimates that VOC emissions from oil and gas extraction in the Valley are equivalent to total transportation emissions in the region. *Id.*, Ex. K at 4971. These air quality problems are expected to worsen in the coming years as the impacts of climate change aggravate dangerous weather patterns, including hotter weather that interacts with NOx and VOC to produce more ozone, and subject communities to worsening drought. *Id.*, Exs. H at 2-2 to 2-3; R at 12; S at 3931; T; U. Oil and gas production and combustion dominate as significant sources of greenhouse gas emissions and are primary drivers of climate change. *Id.*, Ex. X at 5. Continued drilling therefore only creates a reinforcing loop of worsening air quality.

These emissions have real health impacts on the significant communities of color and low-income communities who live in the Valley, which include members of Plaintiffs' organizations. These "environmental justice" communities are statistically the "most affected" by pollution in the state, meaning they experience the most asthma emergency room visits, heart attacks, and low birth-weight infants, and have the highest levels of poverty and unemployment. *Id.*, Exs. Q at 3; V

at 11, 83; AA. Pollution caused by oil and gas drilling is also associated with respiratory and neurological issues, cardiovascular damage, birth defects in babies, cancer, and premature mortality. *Id.*, Exs. O at 6; P. The U.S. Environmental Protection Agency's ("EPA's") National-Scale Air Toxics Assessment indicates that the respiratory hazard index in Kern County is higher than 95 percent of the nation, and the cancer risk is higher than 75 percent of the nation. *Id.*, Ex. Q at 1, 3; *see also* Exs. M, N. This air pollution means Plaintiffs' members "cannot drive through town" without having to cover their nose at some point "due to the foul air," and cannot walk outdoors for exercise and peace of mind "for fear of breathing in the dirty air." Decl. of Tracy McCowan in Sup. of Pls.' Resp. to Mot. for Voluntary Remand, ¶¶ 5–6.

STATUTORY BACKGROUND

I. The Clean Air Act

The Clean Air Act ("CAA") is our nation's law aimed at preventing the unhealthy air currently plaguing the Valley. Its purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

The CAA authorizes EPA, the agency with primary regulatory authority under the Act, to establish National Ambient Air Quality Standards ("NAAQS") for serious pollutants known as "criteria pollutants," including ozone. *Id.* §§ 7407–7410. The CAA requires every region in the U.S. to reach attainment of the NAAQS for all pollutants, and it has set timetables for attainment since the 1970s. *See id.* § 7407(a)–(d)(1)(A). Areas that fail to attain NAAQS standards are designated "nonattainment areas." *Id.* § 7407(d)(1). For ozone, regions are assigned "marginal" to "extreme" classifications depending on the level of pollution. *Id.* § 7511(a)(1). Because ozone is the product of the interaction between NOx and VOC, control of ozone under CAA regulations consists of emissions limitations on those precursors. *See, e.g.*, 40 C.F.R. § 93.153(b)(1). Regions with the worst ozone classifications, like the Valley, are prioritized and have correspondingly more stringent requirements to control pollution, as well as potential penalties for chronic nonattainment. *See* 42 U.S.C. § 7511(d); 57 Fed. Reg. 13,498, 13,524 (Apr. 16, 1992).

Of relevance to this case, the CAA provides that federal activities—which include BLM's

federal permitting of oil and gas wells at issue here—must not:

> (i) cause or contribute to any new violation of any [national ambient air quality] standard in any area;
>
> (ii) increase the frequency or severity of any existing violation of any standard in any area; or
>
> (iii) delay timely attainment of any standard of any required interim emission reductions or other milestones in any area.

42 U.S.C. § 7506(c)(1). This is referred to as the "conformity" requirement. *Id.*

Federal agencies are required to undertake a "conformity determination" for each criteria pollutant caused by a federal action in a nonattainment area where the total direct and indirect emissions caused by the action would equal or exceed the *de minimis* threshold provided in the regulations. 40 C.F.R. § 93.153(b); *see also* Ghafar Decl., Ex. BB at 11–12. For ozone and its precursors NOx and VOCs, these thresholds become more stringent as the severity of the ozone nonattainment classification increases. 40 C.F.R. § 93.153(b)(1). For example, for "extreme" nonattainment areas like the San Joaquin Valley, a conformity determination is required for any federal action that will result in emissions of more than 10 tons per year of NOx and VOCs, whereas in "moderate" nonattainment areas, a conformity determination is required only for actions producing more than 100 tons per year. *Id.*

II. The National Environmental Policy Act

The National Environmental Policy Act ("NEPA") is "our basic national charter for protection of the environment." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (citation omitted).[1] NEPA's goals are to (1) "prevent or eliminate damage to the environment," (2) "stimulate the health and welfare" of all people, and (3) "encourage productive and enjoyable harmony between [hu]man[kind] and [the] environment." 42 U.S.C. § 4321.

[1] The Fiscal Responsibility Act (FRA) amended NEPA on June 3, 2023. Pub. L. No. 118-5, 137 Stat. 10 (2023). However, because Plaintiffs' comments and challenge to BLM's approval of drilling permits began prior to FRA's enactment, and the FRA's changes do not apply to an approval before its effective date, citations are to NEPA before the FRA became law.

To fulfill these purposes, NEPA requires that federal agencies such as BLM take a "hard look" at the environmental effects of their action before the action occurs. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 962 (9th Cir. 2006). This includes evaluating and providing "quantified or detailed information" concerning the "cumulative effects" of the action—"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." *Id.* at 971; 40 C.F.R. § 1508.1(g)(3). "Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.1(g)(3). NEPA also requires an agency to prepare a detailed statement regarding the alternatives to a proposed action to ensure that the agency has considered a reasonable range of approaches to, and potential environmental impacts of, a particular project. *See* 42 U.S.C. § 4332(C)(iii), (E).

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(C). The EIS must, among other things, describe the "environmental impacts of the proposed action," including direct, indirect, and cumulative impacts, and "reasonable alternatives." 40 C.F.R. §§ 1502.14(a), 1502.16(a)(1), 1508.1(g). To help determine whether an EIS is necessary, an agency may first prepare an environmental assessment ("EA"). *Id.* § 1501.5. If the agency determines, after preparing the EA, that the proposed action does not require preparation of an EIS, it must then prepare a finding of no significant impact detailing why the action "will not have a significant effect." *Id.* § 1501.6(a); *see Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008). If the EA indicates that the federal action "may" significantly affect the quality of the human environment, the agency must prepare an EIS. *See, e.g., Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1185–86.

Public participation is integral to NEPA to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA therefore requires agencies to "[p]rovide public notice of . . . opportunities for public involvement, and the availability of environmental documents." 40

C.F.R. § 1506.6(b). NEPA also requires the agency to "notify those who have requested notice on an individual action." *Id.*

III. The Federal Land Policy and Management Act

The Federal Land Policy and Management Act ("FLPMA") governs the management, protection, and development of public lands in BLM's jurisdiction. 43 U.S.C. § 1701(a). Pursuant to FLPMA, BLM manages oil and gas drilling on public lands using a three-stage process. In the first stage, BLM must prepare, with public involvement, a Resource Management Plan ("RMP") for an area. *Id.* § 1712(a); 43 C.F.R. § 1601.0-5(n). The RMP is an agency's "big picture" document that informs the public about proposed oil and gas development on public lands and its associated environmental impacts. In the second stage, BLM makes certain lands in the plan area available through a competitive leasing process, subject to the requirements of the RMP. 43 U.S.C. § 1712(e); 43 C.F.R. § 1610.5-3(a); 43 C.F.R. Part 3120. In the third and final phase, lessees submit applications for permits to drill oil and gas wells to BLM. 43 C.F.R. § 3162.3-1(c). When reviewing drilling permit applications, BLM has the authority to impose "appropriate modifications or conditions," delay action, or deny approval altogether. *Id.* § 3162.3-1(h).

Like NEPA, FLPMA requires public participation. BLM must "give . . . the public adequate notice and an opportunity to comment upon . . . and to participate in . . . the management of[] the public lands." 43 U.S.C. § 1739(e).

IV. The Mineral Leasing Act

The Mineral Leasing Act ("MLA") also requires public participation in the issuance of oil and gas drilling permits, specifying that BLM must provide the public the "terms" of a permit, as well as "maps or a narrative description of the affected lands," at least 30 days before issuing the permit. 30 U.S.C. § 226(f). Such maps must "show the location of all tracts to be leased, and of all leases already issued in the general area." *Id.*

PROCEDURAL BACKGROUND

Plaintiffs' current challenge is the fourth time a court has been asked to step in to stop BLM from authorizing an expansion of oil and gas drilling on public lands in the Bakersfield area without adequately accounting for air pollution, climate, and environmental justice impacts.

In 2015 and again in 2020, community, conservation, and business groups, including several of the Plaintiffs here, successfully challenged BLM's failure to conduct adequate environmental review of oil and gas drilling under NEPA when preparing its overall RMP for the Bakersfield area, including its failure to adequately review cumulative air pollution, greenhouse gas emissions, and environmental justice impacts. *ForestWatch v. U.S. Bureau of Land Mgmt.*, No. CV-15-4378-MWF, 2016 WL 5172009, at *11–12 (C.D. Cal. Sept. 6, 2016); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 2:20-CV-00371 DSF (C.D. Cal., filed Jan. 14, 2020). In 2021, many of the same groups also successfully challenged the most recent Bakersfield oil and gas lease sale BLM issued under the RMP on similar grounds. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 1:21-cv-00475-DAD-SAB (E.D. Cal., filed Mar. 22, 2021).

In 2022, in a settlement of the 2020 and 2021 lawsuits, BLM agreed to redo its inadequate review for the Bakersfield area and issue new environmental documents. Stipulation of Dismissal Pursuant to Compromise Settlement Agreement, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 2:20-cv-00371-DSF (C.D. Cal. July 31, 2022); Stipulation of Dismissal Pursuant to Settlement Agreement, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 1:21-cv-00475-DAD-SAB (E.D. Cal. July 29, 2022). The agency is still studying the cumulative impacts of its oil and gas permitting through reevaluation of the Bakersfield RMP and recent lease sale. As a result, there is currently no completed cumulative environmental review of BLM's permitting decisions in the Valley, including no CAA conformity determination that evaluates or mitigates the cumulative air pollution impacts of the hundreds of new oil and gas wells BLM plans to permit each year. While BLM agreed to pause any new leasing in the Bakersfield area until it completed its new analysis, the agency did not agree to stop issuing drilling permits on existing leases in the meantime.

In this vacuum of adequate review of cumulative impacts, BLM has continued to issue permits to companies to drill for oil and gas. Issuance of each new drilling permit is itself a federal action subject to NEPA, the CAA, and other federal laws. In issuing drilling permits, BLM has never found any number of wells to produce more than *de minimis* emissions, and

therefore has never made a CAA conformity determination, no matter how many wells it approves. Ghafar Decl., ¶ 41. But, as Plaintiffs have explained to BLM in public comments, according to Kern County's own emissions estimates, as few as four or more new wells exceed the *de minimis* threshold of 10 tons per year of NOx, and thus require a conformity determination. *Id.*, Exs. F at Table 4.3-30; D at 46–47;[2] *see also* Decl. of Dr. Ranajit Sahu in Sup. of Pls.' Resp. to Mot. for Voluntary Remand ("Sahu Decl."), ¶ 26.

Because BLM has never substantiated its anomalously low emissions calculations, EPA in its role as CAA oversight agency has repeatedly requested that BLM provide its calculations and data to justify its lack of conformity determination. Ghafar Decl., Ex. E at 1–3 (EPA criticizing the lack of conformity determination in BLM's RMP because "the necessary calculations" were not present to justify BLM's *de minimis* finding); Ex. II at 2 (EPA requesting the opportunity to review EAs on drilling permits "to ensure that air quality analyses are adequate" and "requirements of General Conformity have been met" at permit stage); Ex. JJ at 2 (EPA noting that since its comments on the RMP, EPA still "has not since received notification of the availability and public comment period" for draft EAs for drilling permits); Ex. HH (EPA email thread asking BLM repeatedly to review draft EAs for drilling permits and for "some numbers" and receiving no substantive response); Ex. NN (EPA letter reminding BLM it had "committed" to providing its air calculations but that EPA had still "not yet received this information" as of April 2023). Plaintiffs also have sought to investigate BLM's emissions calculations through requests under the Freedom of Information Act ("FOIA"). *Id.*, Exs. FF; GG (Plaintiffs' FOIA requests to BLM in 2021 and again in 2023 seeking detailed emissions calculations supporting oil and gas permitting decisions, including for the wells at issue). To date, BLM has never provided substantiation supporting its air pollution calculations to EPA or to Plaintiffs. *Id.*, ¶ 40.[3]

[2] In Kern County's environmental analysis for its oil and gas zoning ordinance, the County's per-well emissions estimates are 0.48 tons per year for VOCs and 2.79 tons per year for NOx. Ghafar Decl., Ex. F at Table 4.3-30. These estimates are over five times BLM's estimate for annual VOC emissions (0.553 tons of VOC for six wells, or 0.09 per well) and over 300 times BLM's estimate for annual NOx emissions (0.053 tons of NOx for six wells, or 0.009 per well) for the wells at issue. *Id.*, Ex. B at Table 4.1.

[3] BLM did not respond to either of Plaintiffs' counsel's FOIA requests until Plaintiffs filed this lawsuit and raised a FOIA claim regarding BLM's failure to respond. Although the agency has now begun producing documents in response to the requests, BLM still has not provided the emissions data or calculations

In July 2022, BLM posted on its website that California Resource Production Corporation submitted six applications for permits to drill six new oil wells in the Mount Poso oil field in Kern County. Decl. of Jessica Hann in Sup. of Pls.' Resp. to Mot. for Voluntary Remand ("Hann Decl."), ¶¶ 14–15. BLM's permit notices provided almost no information on the proposed drilling activity, including no information about the "terms" of the drilling or "other [oil and gas] leases already issued in the general area." 30 U.S.C. § 226(f); Hann Decl., ¶¶ 15–17, Ex. A. The agency did not notify EPA or Plaintiffs of the applications or provide a draft EA for review, and it did not inform the public of an opportunity to comment. *See* Hann Decl., ¶¶ 15, 17, 19–20.

Nevertheless, Plaintiffs submitted comments within 30 days of seeing the posted applications. *See id.*, ¶ 18. These comments explained the need for BLM to provide detailed emissions calculations before issuing the permits and to make a CAA conformity determination, and to consider the cumulative air, environmental justice, and climate impacts of these new wells within the context of an area already overburdened by air pollution. Plaintiffs also suggested several alternatives BLM should consider to issuing the permits outright, including an alternative that would provide for an immediate managed decline of fossil fuel production on public lands to prevent catastrophic climate change. Ghafar Decl., Ex. D.

Without responding to EPA's inquiries or Plaintiffs' FOIAs, without providing a draft EA for EPA or the public to review, without providing its emissions calculations or making a CAA conformity determination, and without conducting the missing cumulative impacts analysis of how continued oil and gas drilling on public lands will harm air quality, public health, and contribute to climate change, BLM approved the six permits on May 31, 2023. Hann Decl., ¶¶ 19–20; Ghafar Decl., Exs. A, B, C. BLM issued a final EA the same day, concluding the permits would have no significant environmental impacts and bypassing public review or comment on the EA before its approval. Hann Decl., ¶ 20; Ghafar Decl., Ex. B. These wells can be drilled as soon as California Resource Production Corporation receives approval from California's Geologic Energy Management Division. BLM Remand Mot. at 11; Ghafar Decl., Ex. KK.

Plaintiffs requested. Ghafar Decl., ¶¶ 35–41.

The six wells at issue in this case are the tip of the iceberg. Based on the agency's track record over the past decades, BLM likely will issue hundreds more drilling permits in the coming months and years. Ghafar Decl., Ex. CC at 985. Left unchecked, the agency will continue to hide its decisionmaking from public scrutiny and obscure the larger impacts of its drilling approvals by only considering each permit package in a vacuum, robbed of its full significance in the Valley. BLM's oil and gas permitting scheme represents a death by a thousand cuts that federal law is meant to prevent. Plaintiffs accordingly filed suit on June 22, 2023, to bring judicial scrutiny to bear on BLM's unlawful expansion of oil and gas drilling in this already overburdened airshed.

ARGUMENT

Plaintiffs agree that remand is appropriate for BLM to reconsider its decision to approve the six drilling permits at issue in this case. However, the Court should reach the merits of Plaintiffs' claims and order the normal, default remedy of remand *with* vacatur of the decision.

I. Remand Without Vacatur is Improper, Inefficient, and Prejudicial.

BLM's request to re-work its environmental analysis underlying the drilling permits without withdrawing the permits amounts to an attempt to delay or outright skirt judicial review by adding impermissible post-hoc rationalization to the record. "It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked *when it took the action*." *Dep't of Homeland Sec.*, 140 S. Ct. 1891 at 1907, 1916 (emphasis added) (internal citation and quotation marks omitted) (affirming vacatur where post-hoc rationalizations for decision could not be reviewed by Court and contemporaneous explanations were arbitrary and capricious). Courts therefore routinely deny requests to "delay ongoing litigation to shore up the administrative record or search for post-hoc rationalizations based on new information" and, unless an agency proposes to withdraw its decision, require the agency to "defend against the existing allegations." *Ksanka Kupaqa Xaʾłčin v. U.S. Fish & Wildlife Serv.*, No. CV 19-20-M-DWM, 2019 WL 13450299, at *1 (D. Mont. June 7, 2019); *Rock Creek All. v. U.S. Fish & Wildlife Serv.*, No. CV 01-152-M-DWM (Order filed Mar. 19, 2002) (Ghafar Decl., Ex. LL) (denying agency motion for voluntary remand without vacatur to "revisit" its decision, explaining that "[j]udicial efficiency favors

allowing the agency to withdraw its opinion and re-work it as it sees fit prior to judicial scrutiny" but re-working the decision to add "post hoc reasoning" without withdrawing it was improper); *c.f. N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 1:16-cv-00307-LJO-MJS, 2016 WL 11372492, at *2–3 (E.D. Cal. Sept. 23, 2016) (finding the Court did not have enough information to determine whether federal defendants' motion for voluntary remand without vacatur was "made in good faith for a substantial and legitimate reason" when the EA at issue "appears to be plainly unlawful" and defendants refused to admit as much, and ordering the parties to submit supplemental briefing regarding vacatur); *Harmonia Holdings Group, LLC v. United States*, No. 21-1704C, 2021 WL 12148882, at *1 (Fed. Cl. Nov. 10, 2021) (denying motion for voluntary remand as inappropriate where the defendant sought "to bolster the administrative record").

Remand without vacatur is particularly inappropriate in a case, like this one, that involves claims under NEPA. "NEPA is an action-forcing statute, which serves not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action." *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 156 (D.D.C. 2022) (internal citation and quotation marks). When an agency has violated NEPA, remand *with vacatur* is typically required, "[b]ecause remand without vacatur or injunction would incentivize agencies to rubber stamp a new approval, rather than take a true and informed hard look" at the consequences of their decisions. *WildEarth Guardians v. Bernhardt*, 423 F. Supp. 3d 1083, 1105 (D. Colo. 2019). Indeed, "because NEPA is a purely procedural statute, where an agency's NEPA review suffers from a significant deficiency, refusing to vacate the corresponding agency action would vitiate the statute." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) (internal citation and quotation marks omitted).

BLM concedes here that it needs to reconsider whole swaths of "important" analysis underpinning its permitting decision due to "substantial and legitimate" concerns. BLM Remand Mot. at 7–8. The agency acknowledges that its "cumulative effects and environmental justice analyses would benefit from further consideration." *Id.* at 7. It also admits its emissions methodology is entirely inappropriate for California wells and must be scrapped for a new

approach it is only developing now. *Id.* at 7–8; Decl. of Gabriel Garcia in Sup. of BLM Remand Mot. ("Garcia Decl."), ¶¶ 14–20. But none of these additional analyses can support a permitting decision the agency *has already finalized*. *Dep't of Homeland Sec.*, 140 S. Ct. at 1909, 1916. Rather, any such additional analyses would constitute improper post-hoc rationalizations that the Court cannot consider when reviewing BLM's decision. *Id.*

In these circumstances, delaying this case by six months to allow BLM to add post-hoc rationalizations to its record does little more than prejudice Plaintiffs' interests in efficient resolution of their claims. BLM claims "any prejudice to Plaintiffs stemming from a remand without vacatur is limited to a short delay in litigating the merits." BLM Remand Mot. at 11. BLM hopes its new analysis will be completed no sooner than May 2024, and predicts California Resource Production Corporation's drilling of the wells will begin as soon as August 2024. BLM Remand Mot. at 8; Decl. of Andrew Cochrane in Supp. of BLM Remand Mot., ¶ 5. But BLM's development timeline is based on nothing more than handshake agreements, completely unenforceable by Plaintiffs. Thus, BLM's requested remand would leave deficient permits in place ready to be drilled as soon as California grants its approval, which could happen at any time, Ghafar Decl., Ex. KK, while divesting this Court of jurisdiction while the remand process proceeds, *Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1186 (9th Cir. 2004).[4] This means Plaintiffs will have no recourse to this Court during remand to stop drilling on these unlawful permits. Even assuming BLM completes its review by May 2024, and jurisdiction reverts to this Court at that time, delay in reaching the merits of the case means that Plaintiffs may ultimately need to move the Court this spring for a preliminary injunction—which, unlike vacatur, is a "drastic and extraordinary remedy," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010)—in order for the Court to reach the merits before the wells are drilled in August 2024 and the harm is done. BLM's proposal to delay resolution of Plaintiffs' claims via voluntary remand without vacatur is therefore improper, inefficient, and prejudicial, and should be denied.

[4] *See also Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 69 F.4th 588, 598 (9th Cir. 2023) (concurrence).

II. The Court Should Reach the Merits of Plaintiffs' Claims and Order Remand *with Vacatur*.

Given the problems discussed above regarding BLM's remand request, the most efficient course of action is for the Court to reach the merits of Plaintiffs' claims *now*, and order BLM's permitting decision remanded *with vacatur*. The Ninth Circuit has recently held that a court must first hold an agency decision unlawful before vacating it. *In re Clean Water Act Rulemaking*, 60 F.4th 583, 596 (9th Cir. 2023). As discussed below, upon its review of BLM's motion for remand, this Court can readily hold the permits at issue violate multiple federal laws and vacate them. *See, e.g., Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. CV 21-2507-GW-ASX, 2022 WL 4233648 (C.D. Cal. Sept. 13, 2022) (concluding, in response to BLM's motion for voluntary remand, that BLM's review of a permitting decision under NEPA and FLPMA was insufficient and ordering vacatur of that decision, while dismissing a pending motion for summary judgment as moot).[5]

"[V]acatur of an unlawful agency action normally accompanies a remand." *All. for the Wild Rockies*, 907 F.3d at 1121. Because remand without vacatur is unusual and disfavored, and vacatur is the "ordinary remedy," BLM "bears the burden of demonstrating vacatur is inappropriate." *Nw. Env't Advocates v. U.S. Env't Prot. Agency*, No. 3:12-cv-01751-AC, 2018 WL 6524161, at *3 (D. Or. Dec. 12, 2018); *see also Ctr. for Env't Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, at *13 (N.D. Cal. June 20, 2016) ("[G]iven that vacatur is the presumptive remedy for a . . . violation such as this, it is Defendants' burden to show that vacatur is unwarranted."). The agency's burden to overcome the default of vacatur is met only in "rare circumstances" not present here. *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *All. for the Wild Rockies*, 907 F.3d at 1121.

[5] The Court reviews the merits of Plaintiffs' claims based on the administrative record before the agency, containing "all documents and materials directly or indirectly considered by agency decision-makers." *Blue Mountains Biodiversity Project v. Jeffries*, 72 F.4th 991, 996 (9th Cir. 2023) (internal citation omitted). The parties stipulated that BLM's Decision Record, Environmental Assessment, and Finding of No Significant Impact for the six well approvals, as well as Plaintiffs' comment letter and attachments submitted to BLM regarding the same six well approvals, are part of the administrative record. Order on Stipulation Setting Briefing Schedule (ECF 20). BLM's decision documents and Plaintiffs' comment letter and relevant exhibits are included as attachments to the Ghafar Declaration.

Ultimately, courts leave unlawful agency actions in place only "when equity demands." *Cal. Cmties. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). Judicial weighing of the equities is guided by the two-part standard described in *Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). Specifically, courts consider both (1) the seriousness of the agency's errors and (2) the potential disruptive consequences of vacatur. *Cal. Cmties. Against Toxics*, 688 F.3d at 992 (citing *Allied-Signal*, 988 F.2d at 150–51). Courts "also consider the extent to which either vacating or leaving the decision in place would risk environmental harm." *Nat'l Family Farm Coal. v. Env't Prot. Agency*, 960 F.3d 1120, 1144–45 (9th Cir. 2020) (quoting *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)).

BLM has not met its heavy burden to establish vacatur is unwarranted here. This Court should order remand with vacatur because (1) BLM's errors are serious; (2) there are no serious disruptive consequences from vacating the drilling permits; and (3) leaving the decision in place risks environmental harm.

A. Vacatur is Warranted Because BLM's Multiple Violations of Law Are Serious.

Vacatur is warranted here because BLM committed multiple serious errors of law when approving the six drilling permits at issue in this case. The seriousness of an agency's errors turns on "the extent of doubt whether the agency chose correctly." *Allied-Signal*, 988 F.2d at 150–51; *see, also, e.g.*, *Migrant Clinicians Network v. U.S. EPA*, No. 21-70719, 2023 WL 8613493, at *12–13 (9th Cir. Dec. 13, 2023) (finding "blank check remand without vacatur" inappropriate given seriousness of agency's failures to consider additional key data or to provide evidentiary support for certain claims). Where, as here, an agency's procedural compliance is at issue, the question is not whether the agency could justify the challenged *decision*, but rather whether the agency can justify *its failure to proceed in the manner required by law*. *See, e.g.*, *Standing Rock Sioux Tribe*, 985 F.3d at 1052 ("When an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step.").

Here, BLM cannot justify its failure to (1) make a conformity determination under the CAA; (2) analyze cumulative air, environmental justice, and greenhouse gas impacts under

NEPA; (3) consider a managed decline of oil drilling as a reasonable alternative under NEPA; and (4) comply with public notice and participation requirements under NEPA, FLPMA, and the MLA when approving the drilling permits. This Court should reach the merits of these claims and find that BLM committed serious legal errors warranting vacatur.

1. BLM committed serious error by failing to undertake a Clean Air Act conformity determination.

BLM unlawfully failed to conduct the required CAA conformity determination by improperly relying on unsubstantiated and unreasonably low emissions calculations. Courts review an agency's conformity analysis using the arbitrary and capricious standard. *See Vigil v. Leavitt*, 381 F.3d 826, 833 (9th Cir. 2004); *see also City of Olmsted Falls, OH v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002). An agency's analysis will be considered arbitrary and capricious if it has "entirely failed to consider an important aspect of the problem," or failed to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made." *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) (internal citations omitted). Furthermore, an agency's inconsistent application of the CAA across different states must be deemed arbitrary and capricious unless the agency "set[s] forth the ground for its departure . . . so that [a court could] understand the basis of [its] action." *W. States Petroleum Ass'n v. E.P.A.*, 87 F.3d 280, 284 (9th Cir. 1996).

BLM's refusal to substantiate its emissions calculations to support its finding that a conformity determination was not required, coupled here with its acknowledgment that it employed the wrong methodology, Garcia Decl., ¶¶ 15–16, constitutes a failure to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made." *Nat'l Ass'n of Home Builders*, 340 F.3d at 841. EPA—the agency that administers the CAA and whose interpretations of general conformity review are entitled to deference, *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 322 F. Supp. 3d 1134, 1147 (D. Colo. 2018)—has repeatedly explained to BLM that in order to justify a failure to make a conformity determination, BLM must provide "detailed emission calculations." Ghafar Decl., Ex. E at 2. These details must include, for example, "a breakout of emissions calculated for individual equipment and area

sources, as well as emission estimates for transportation (e.g., number of truck trips for set-up . . . take-down)" and "emission factors and required horsepower (hp) for all equipment." *Id.*, Ex. E at 1; *see also generally* Sahu Decl. (explaining why detailed calculations based on the equipment that will be used are necessary to evaluate and substantiate a conformity review finding).

In the EA for the six wells at issue, however, BLM failed to produce these necessary details. Instead, BLM prepared a short, conclusory table that lists predicted total air emissions estimates for the wells in a maximum year and average year, including for ozone precursors VOC and NOx, across the development, production, mid-stream, and downstream stages. Ghafar Decl., Ex. B at Table 4-1. BLM presented the total maximum year emissions for six wells across all stages as a miniscule 0.553 tons of VOC (or 0.09 tons per well) and 0.053 tons of NOx (or 0.009 tons per well). *Id.* Concluding that these emissions are below *de minimis* thresholds of 10 tons each for VOC and NOx, BLM noted no formal conformity determination was required and ended its analysis there. *Id.*, Ex. B at 30–31. Yet BLM's methodology and reasoning to arrive at these minuscule estimates remain undisclosed. BLM has refused to provide information to EPA or Plaintiffs to justify the source of its numbers, despite months of requests from EPA following its approval, *Id.*, Exs. HH, NN, and multiple FOIA requests from Plaintiffs, *Id.*, Exs. FF, GG. As far as Plaintiffs can tell, these NOx and VOC emissions figures were pulled from thin air.

BLM's unsubstantiated and unreasonably low calculations also represent an unexplained departure from its calculations in other states, further underscoring that BLM's failure to make a conformity determination regarding the wells at issue here was arbitrary and capricious. For example, emissions estimates provided by the BLM field office in San Juan County, New Mexico are considerably more detailed, providing, for example, each type of equipment that will be used and its corresponding emissions rate. *Id.*, Ex. W at 132–35. The New Mexico office's estimates also report considerably greater emissions for the same ozone precursors: close to *five hundred times higher* for Nox and *two hundred times higher* for VOCs than estimates for the Bakersfield area permits at issue.[6] The same is true for BLM's estimates in Adams County, Colorado, where per-well estimates are over *fourteen hundred times higher* for Nox and over *one hundred thirty*

[6] Ghafar Decl., Ex. W at Table 3.4 (4.36 tons per year of NOx and 18.306 tons per year of VOC per well).

times higher for VOCs than estimates for the permits here.[7] BLM now claims that the faulty emissions tool it used for the permits at issue is in fact designed for conditions in New Mexico and Colorado, but fails to explain how a tool designed for states where per-well estimates are hundreds of times larger somehow produced comparatively miniscule emissions for the Bakersfield permits. Garcia Decl., ¶¶ 14–17. BLM's unexplained departure from the norms and estimates of other field offices, which provide the type of detailed emissions calculations lacking here and requested by EPA, again renders its decision arbitrary and capricious and a serious violation of the CAA. *See W. States Petroleum Ass'n*, 87 F.3d at 284 (inconsistent application of CAA arbitrary and capricious unless agency "set[s] forth the ground for its departure . . . so that [a court could] understand the basis of [its] action").

The attached expert declaration of Dr. Ron Sahu—an environmental engineer and frequent consultant to EPA who has more than thirty years of experience regarding air pollution emissions calculations, particularly in Kern County—confirms that had all the missing information been included in BLM's calculations, and the correct methodology employed, the likely emissions associated with the six permitted wells could have exceeded the conformity threshold of 10 tons per year. Sahu Decl., ¶¶ 23, 30, 34, 37. BLM's failure to include the necessary assumptions and calculations to justify its *de minimis* finding, especially in light of the serious possibility that these six wells alone are a major source of air pollution requiring mitigation, renders its failure to make a conformity determination arbitrary and capricious. *Cf. City of Olmsted Falls*, 292 F.3d at 271–73 (upholding conformity determination when EPA had reviewed the determination and agreed with its findings, and permitting agency had adequately disclosed all emissions, and provided its assumptions, data, and calculations).[8]

In addition to failing to justify its minuscule emissions calculations for the six wells at

[7] *Id.*, Ex. EE at Table 3.2 (for three-permit project, total annual emissions of 38.21 tons of NOx (or 12.74 tons per well) and 35.16 tons of VOC (or 11.72 tons per well) (including permitted emissions)).

[8] BLM predicts its revised analysis on remand, which will now use the "more appropriate" EPA MOVES3 model, "will not change its overall conformity analysis." Garcia Decl., ¶ 18. Dr. Sahu explains that BLM's planned use of EPA MOVES3 will not cure the deficiencies in its current approach, because it does not provide the missing detailed emissions calculations (and, in any event, is obsolete as it has been replaced by MOVES4). Sahu Decl., ¶¶ 34–37.

issue, BLM also made no effort to justify its failure to consider the wells cumulatively with other wells permitted in the San Joaquin Valley. Conformity review is critical to ensuring that excess air pollution is mitigated in the already overburdened Valley air basin. Yet BLM has never made a conformity determination for its oil and gas permitting overall in the air basin, even though it plans to issue several hundred drilling permits in the coming years. Ghafar Decl., ¶ 41, Ex. CC at 985. Indeed, as a result of Plaintiffs' lawsuits challenging the Bakerfield RMP and recent lease sale, the agency has been forced back to the drawing board due to its failure to study the cumulative impacts of its permitting decisions. Plaintiffs have therefore explained the need for BLM to consider the emissions from these six wells collectively with other wells it is permitting in the region, so as not to violate the CAA prohibition against breaking a project into segments "to create several smaller projects with the emissions from each compared to the de minimis levels." *Id.*, Ex. BB at 21. BLM nevertheless decided to permit these six wells without any analysis of whether they are segmented from other drilling activities BLM has permitted. BLM thus arbitrarily and capriciously "failed to consider an important aspect of the problem"—how continuing to permit additional wells without mitigation is leading to death by a thousand cuts—in serious violation of the CAA. *Nat'l Ass'n of Home Builders*, 340 F.3d at 841.

2. BLM committed serious error by failing to address cumulative air quality, environmental justice, and greenhouse gas impacts under NEPA.

BLM's failure to comply with NEPA is yet another serious legal violation requiring vacatur of the permits. Given that no finalized cumulative air quality, environmental justice, and greenhouse gas review exists for BLM's oil and gas permitting overall in the Valley following successful legal challenges to the Bakersfield RMP and recent lease sale, it is imperative that BLM undertake this assessment before issuing additional drilling permits that will worsen the Valley's air quality. Yet BLM's EA for the wells at issue made no attempt to take a hard look at their cumulative impacts, in violation of NEPA. Ghafar Decl., Ex. B at 18, 43, 47. The agency now confesses "substantial and legitimate" concerns with its review of cumulative impacts and impacts to environmental justice communities, and it acknowledges that it must "review and potentially expand upon its analysis" to "better reflect the policies of the [Biden] administration."

BLM Remand Mot. at 7, 10; Garcia Decl., ¶ 19. This serious NEPA error warrants vacatur.

NEPA requires agencies to consider the cumulative effects of their proposed actions. 40 C.F.R. § 1508.1(g). For air pollution, this includes quantifying the cumulative air impacts of the project together with other projects in the area and vehicle emissions and "identify[ing] and discuss[ing] the impacts that will be caused by each successive project, including how the combination of those various impacts is expected to affect the environment." *Great Basin Resource Watch v. Bureau of Land Mgmt*., 844 F.3d 1095, 1105 (9th Cir. 2016). For environmental justice impacts, this also includes specifically evaluating whether certain communities are at greater risk, and fully assessing these risks. *California v. Bernhardt*, 472 F. Supp. 3d 573, 620 (N.D. Cal. 2020) (explaining BLM's duty under NEPA to inform "the most impacted communities about the threats to their health" from oil and gas development). Finally, for greenhouse gases, given the "cumulative nature of climate change, considering each individual drilling project in a vacuum deprives the agency and the public of the context necessary to evaluate oil and gas drilling on federal land before irretrievably committing to that drilling." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 83 (D.D.C. 2019). Courts have held that emissions from other geographically proximate or pending fossil fuel projects are sufficiently foreseeable and that their impacts must be analyzed cumulatively. *Id.* at 75–76; *see also Indigenous Env't Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 578–79 (D. Mont. 2018) (agency violated NEPA when it failed to analyze impacts of pipeline project cumulatively with another pending pipeline expansion). And because "global warming is the result of cumulative contributions of myriad sources, any one modest in itself," the failure to cumulatively analyze the impacts of all federal wells, and all wells in the Valley, risks "losing the forest by closing our eyes to the felling of the individual trees." *Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1217.

Here, BLM undertook no evidence-based analysis to aggregate the air pollution emissions from the wells it is approving with emissions from other wells that it, and other agencies, have permitted within the same air basin. Ghafar Decl., Ex. B at 43. Nor was there any mention of environmental justice communities anywhere in the EA for the permits, other than one sentence that "minority or low-income populations" would not be affected. *Id.*, Ex. B at 18. Nor was there

an adequate cumulative impact analysis for greenhouse gases. In Table 4.6 of the EA, BLM provided the greenhouse gas estimates for the six wells *alone* and concluded that the "emissions contemplated in this EA are not expected to substantially affect the rate of change in climate effects."[9] *Id.*, Ex. B at 39. The agency thus failed to adequately consider cumulative impacts to air quality, environmental justice, and greenhouse gases, constituting a serious NEPA error warranting vacatur. *Great Basin Resource Watch*, 844 F.3d at 1105–06; *Bernhardt*, 472 F. Supp. 3d at 620–22; *Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1217.

BLM is incorrect in arguing that because it is "possible" that its revised NEPA analysis will support the same decision on remand to issue the permits, vacatur is not warranted. BLM Remand Mot. at 10. The question is not whether BLM may ultimately grant the same permits. "When an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step." *Standing Rock Sioux Tribe*, 985 F.3d at 1052. In other words, "NEPA violations are serious notwithstanding an agency's argument that it might ultimately be able to justify the challenged action." *Id.* at 1053; *see also Friends of the Earth*, 583 F. Supp. 3d at 158 (explaining that vacatur was warranted due to a NEPA violation and that "[s]uccessful compliance with NEPA—which the Court is sure [the agency] will eventually achieve—is distinct from [the agency's] ability to retroactively justify the decision it did make"). Given the serious NEPA errors here, and BLM's acknowledgement that more is required for its NEPA review of cumulative impacts and environmental justice, vacatur is necessary and appropriate to allow BLM to "take a true and informed hard look" at the consequences of its decision *before* approving the drilling permits. *WildEarth Guardians*, 423 F. Supp. 3d at 1105 (holding vacatur is necessary to remedy NEPA violations).

[9] The EA for the permits at issue incorporates by reference the BLM Specialist Report on Annual Greenhouse Gas Emissions and Climate Trends ("BLM Specialist Report"). Ghafar Decl., Ex. DD. The Specialist Report provides an assessment of greenhouse gas emissions trends and potential climate impacts from energy development projects on BLM-authorized public lands. But the Specialist Report has never undergone public notice and comment—neither at its initial issuance, nor when BLM updated it (as it plans to do annually). The BLM Specialist Report also cannot and does not replace BLM's NEPA analysis and disclosure of the *project*-level emissions that must be completed for these six drilling permits.

3. BLM committed serious error by failing to consider a managed decline as a reasonable alternative under NEPA.

BLM committed an additional serious legal error in violation of NEPA by failing to consider a range of alternatives to approving the drilling permits outright. Specifically, BLM explored only the proposed action and a no action alternative in its EA, unlawfully ignoring an alternative suggested by Plaintiffs for a managed decline of fossil fuel production on public land.

NEPA requires BLM to "'[r]igorously explore and objectively evaluate all reasonable alternatives' that relate to the purposes of the project and briefly discuss the reasons for eliminating any alternatives from detailed study." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013) (quoting 40 C.F.R. § 1502.14(a)). "[C]onsideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process." *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228–29 (9th Cir. 1988).

An overwhelming scientific consensus has concluded that a managed decline of fossil fuel production is necessary to limit global temperature rise to 1.5 degrees Celsius in order to avoid catastrophic damage from climate change throughout the U.S. and the world. Ghafar Decl., Exs. X; Z at 17–19. A managed decline not only halts the approval of new fossil fuel production and infrastructure but also phases out production in many existing fields before their reserves are fully depleted. *Id.*, Exs. Y; Z at 36. Despite extensive record evidence laying out the need for a managed decline alternative that avoids significant impacts from oil drilling to the climate, BLM did not consider or address this alternative in its review of the permits at issue. *Id.*, Ex. B at 7, 18.

Courts have routinely rejected agencies' failure to consider reasonable alternatives that present a middle ground between full and no development. For example, in *Natural Resources Defense Council v. U.S. Forest Service*, the Ninth Circuit rejected an EIS that refused to consider a viable alternative to a forest plan that would have been sufficient to meet market demand projections for timber while providing greater protection for old-growth habitat. 421 F.3d 797, 813–14 (9th Cir. 2005). And in *Wilderness Society v. Wisely*, the court rejected an EA for oil and gas leasing that considered only the proposed action and a no action alternative, holding that

BLM should have considered a "potentially appealing middle-ground compromise between the absolutism of the outright leasing and no action alternatives" that would have reduced environmental impacts. 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007). So too here, BLM acted arbitrarily and capriciously and in violation of NEPA by failing to address or consider Plaintiffs' proffered middle-ground solution to avoid catastrophic climate change, committing a further serious error warranting vacatur.

4. BLM committed serious error by violating the public participation requirements of NEPA, FLPMA, and the MLA.

Finally, BLM's process for issuing drilling permits in the Valley robs the public and communities of any meaningful opportunity to review and engage with permits prior to their approval. The agency routinely fails to provide adequate notice of its drilling decisions, and the information it provides is so bare-bones and devoid of detail as to be meaningless. *See generally* Hann Decl. Most egregiously, the agency consistently issues its environmental review documents simultaneously with its permit approvals, as it did for the six permits here, entirely cutting out public participation as required by NEPA, FLPMA, and the MLA. *Id.*, ¶¶ 10, 20.

"[A] complete failure to involve or even inform the public about an agency's preparation of an EA and a [finding of no significant impact (FONSI)] . . . undermines the very purpose of NEPA." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970–71 (9th Cir. 2003). Similarly, it is a violation of NEPA and FLPMA to "cut[] the interested public out of the discussions . . . at the formulation stage of decisions." *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1072 (D. Idaho 2020) (citing *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1316 (D. Idaho 2008) (cleaned up)).

Recognizing the recurring failures of BLM's permitting system to inform the public of its decisions before they are made, Plaintiffs and EPA specifically requested access to the draft EA for the permits at issue at least 30 days before any approvals. Ghafar Decl., Exs. D at 1; HH; NN. But BLM did not provide notice to Plaintiffs or EPA of the permit application here, let alone a draft EA. Hann Decl., ¶ 19. Instead, BLM included only the one-page application forms for the permits at issue on its website, which included the company name, the well name/number, and the

well location, but no terms of the drilling permits nor the context of oil and gas leases issued in the general area. *Id.*, Ex. A. BLM ultimately released its final permit approval alongside the final EA on the same website, similarly with no notice to Plaintiffs or EPA. *Id.*, ¶¶ 19–20. Upon EPA's repeated requests in the months following the approval, BLM still refused to provide the underlying data or assumptions for its analysis. Ghafar Decl., Exs. HH; NN. BLM's decisionmaking process for the permits at issue are emblematic of the recurring failures in the agency's "challenging" and "complicated" system that render it all but inaccessible to members of the public attempting to participate in its permit approvals. *See generally* Hann Decl.

BLM's failure to provide any notice to Plaintiffs or EPA of its decisionmaking is a serious violation of NEPA, 40 C.F.R. § 1506.6(b), and its failure to provide permit terms or maps, locations, or other information regarding "all [oil and gas] leases already issued in the general area" is a serious violation of the MLA, 30 U.S.C. § 226(f). But most importantly, by failing to provide the draft EA for review and comment before BLM issued its decision, the agency effectively shut out the public, violating the fundamental purpose of both NEPA and FLPMA to make "environmental information available to public officials and citizens *before* decisions are made and *before* actions are taken." *W. Watersheds Project*, 441 F. Supp. 3d at 1070 (emphasis added). Providing for required public notice and comment is a "fundamental procedural prerequisite," and BLM's failure to do so here is a serious error requiring vacatur. *Standing Rock Sioux Tribe*, 985 F.3d at 1052 (noting that courts typically vacate decisions when the agency commits "fundamental flaw" of failing to provide adequate public notice and comment).

B. Vacatur Will Not Have Serious Disruptive Consequences.

BLM makes no effort to argue that vacating the permits will have serious disruptive consequences, and it has accordingly failed to carry its burden to demonstrate that remand without vacatur is warranted. *Ctr. for Env't Health*, 2016 WL 3383954 at *13 ("[G]iven that vacatur is the presumptive remedy . . . it is Defendants' burden to show that vacatur is unwarranted."). Indeed, vacatur of BLM's permitting decision will not "cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error," *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal.

2015), and should be ordered.

BLM complains that vacatur will "unravel months of consideration by the Agency, unchallenged analyses underpinning the EA, public scoping, and other agency processes that contributed to the initial decision," and will force California Resource Production Corporation "to start from scratch." BLM Remand Mot. at 10. To the contrary, it is unnecessary for BLM to "unravel" the parts of its analyses that are "unchallenged"; presumably these portions may be used as part of its new review. Nor will the oil company need "to start from scratch" here, because its permit applications will not be vacated, only BLM's faulty approval decision. But most importantly, any delay needed to fix inadequate NEPA and CAA review is not a "serious and irremediable harm" warranting remand without vacatur, and BLM makes no attempt to argue it is. As Judge O'Neill has explained, "[d]elay (and/or related urgency) cannot on its own constitute the kind of disruptive consequence intended by *Allied-Signal*." *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 882 (E.D. Cal. 2018).

Here, the wells are not drilled or in operation and "relatively little time has passed." *Friends of the Earth*, 583 F. Supp. 3d at 159. "Any delay or inconvenience" to the oil company "is the nature of doing business, especially in an area fraught with bureaucracy and litigation" like oil drilling. *Id.* (citation omitted). In short, vacatur will not result in serious and irremediable harms here. The Court should order the permits vacated along with their remand.

C. Vacatur Will Not Cause Environmental Harm.

Finally, the Court should grant remand with vacatur because setting aside BLM's decision approving the permits will ultimately prevent—not cause—environmental harm.

In rare cases, the equities favor leaving an illegal decision in place pending remand to avoid significant harm to the environment. For instance, in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995), the court chose not to vacate because vacatur would risk potential extinction of a species. Similarly, in *California Communities Against Toxics*, 688 F.3d at 993–94, the court declined to vacate an air quality rule because vacatur could lead to "use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent."

In this case, however, there is no basis for the Court to conclude that remand without vacatur is necessary to prevent environmental harm. Vacating BLM's illegal permits will simply maintain the environmental status quo, as there is currently no drilling at the permitted wells. By contrast, declining to vacate the permits could eventually result in significant harm to the environment and communities in a region that by law cannot handle more pollution.

The Supreme Court has recognized that "the lungs and health of the community's citizens" should be placed "ahead of some 'inconvenience and expense to . . . governmental and private parties.'" *Beame v. Friends of the Earth*, 434 U.S. 1310, 1314 (1977) (denying stay application) (citation omitted). As described above, the San Joaquin Valley is already in extreme nonattainment for ozone NAAQS. These six wells alone, if properly calculated, may constitute a major source of air pollution, exacerbating NAAQS violations in the absence of a proper CAA conformity determination and mitigation. Sahu Decl., ¶¶ 23, 26 (finding BLM's calculations are unreasonably low, and the six wells could exceed the conformity threshold of 10 tons/year). But even if these wells are not a major source of air pollution alone, BLM has never made a CAA conformity determination for its oil and gas drilling decisions overall, and collectively these proliferating wells intensify and prolong the Valley's NAAQS violations—and the resulting harm to residents' health. Allowing BLM to continue to issue new oil and gas permits without a conformity determination and mitigation of impacts will further degrade air quality and have serious and lasting health impacts on the environmental justice communities in the region.

In sum, when, as in this case, leaving an illegal decision in place "risks more potential environmental harm than vacating it," vacatur is the appropriate remedy. *Pollinator Stewardship Council*, 806 F.3d at 532.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court to grant remand *with vacatur* of BLM's decision to approve the six drilling permits.

Respectfully submitted,

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