IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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LIST OF EXHIBITS

Exhibit No.	**Description**	**Bates Range**
Exhibit 1	Declaration of Shannon Anderson	N/A
Exhibit 2	Declaration of Maria Katherman	N/A
Exhibit 3	Declaration of Leland Turner	N/A
Exhibit 4	Declaration of Erik Molvar	N/A
Exhibit 5	Declaration of Donal O'Toole	N/A
Exhibit 6	Converse County ROD and Appendix A	PIR-1–88
Exhibit 7	Converse County FEIS	PIR-89–1196
Exhibit 8	Converse County FEIS Appendices A, H	PIR-1197–1676
Exhibit 9	Converse County Project Comment Letters	PIR-1677–2394
Exhibit 10	APD Decision Index	PIR-2395–2406
Exhibit 11	APD and NEPA documents – Part I	PIR-2407–3149
Exhibit 12	APD and NEPA documents – Part II	PIR-3150–3906
Exhibit 13	APD and NEPA documents – Part III	PIR-3907–4479
Exhibit 14	BLM NEPA Handbook (H-1790-1)	PIR-4480–4663
Exhibit 15	BLM Permanent Instruction Memorandum (PIM) 2018-014	PIR-4664–4677
Exhibit 16	Examples of BLM-approved oil and gas projects requiring air quality mitigation measures	PIR-4678–4901
Exhibit 17	U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*	PIR-4902–4903
Exhibit 18	U.S. EPA, *Basic Information About Oil and Natural Gas Air Pollution Standards*	PIR-4904
Exhibit 19	U.S. Gov't Accountability Office, GAO-09-872, Energy Policy Act of 2005: Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act Report (Sept. 2009)	PIR-4905–4976
Exhibit 20	Declaration of Chris Johnson	N/A

LIST OF ACRONYMS

APA	Administrative Procedure Act
APD	Application for Permit to Drill
BLM	Bureau of Land Management
CEQ	Council on Environmental Quality
CX	Categorical Exclusion
DNA	Determination of NEPA Adequacy
DOI	Department of Interior
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FLPMA	Federal Land Policy and Management Act
GHMA	General Habitat Management Areas
MLA	Mineral Leasing Act
PIM	Permanent Instruction Memorandum
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
NPS	National Park Service
PHMA	Priority Habitat Management Areas
PRBRC	Powder River Basin Resource Council
RMP	Resource Management Plan
ROD	Record of Decision
WGFD	Wyoming Game and Fish Department
WWP	Western Watersheds Project

INTRODUCTION

Plaintiffs seek a preliminary injunction prohibiting further development of the Converse County Oil and Gas Development Project ("Converse County Project" or "Project") until this case is decided on the merits. This massive oil and natural gas development in Wyoming's Powder River Basin was approved during the final weeks of the Trump administration. One of the largest fossil fuel developments in state history, the Converse County Project will involve the drilling and fracking of 5,000 wells over a ten-year period, along with a maze of new industrial development, including 2,900 miles of pipeline, 1,970 miles of access roads, 1,500 miles of power lines, and numerous pits, tanks, and processing facilities.

The December 2020 Record of Decision (ROD) approving the Converse County Project did not itself authorize any immediate ground disturbing activities. However, since that time, Defendants Bureau of Land Management *et al.* (BLM) have begun approving Converse County Project Applications for Permit to Drill (APDs) at a rapid pace, authorizing ground clearing, construction, drilling, and fracking that is ongoing now. The irreparable harm from this Project could be substantially completed by the time the Court resolves this case on the merits.

Plaintiffs Powder River Basin Resource Council (PRBRC) and Western Watersheds Project (WWP) thus seek a preliminary injunction to preserve the status quo and opportunity for meaningful relief in this case. They meet the requirements for such relief, first because they are likely to succeed on the merits. As explained below, BLM violated the Administrative Procedure Act (APA) and Federal Land Policy and Management Act (FLPMA) by resting on two erroneous legal premises: first, that BLM lacks authority to impose any surface use restrictions on "Fee/Fee/Fed" wells, which extract federal minerals from adjacent non-federal lands and account for most of the Project; and second, that BLM lacks authority to impose air quality controls on

the Project, a novel position that is irreconcilable with BLM's long history of mandating such controls. As a result of these missteps, the Project is barreling forward without safeguards the U.S. Environmental Protection Agency (EPA) and National Park Service (NPS) urged BLM to adopt. Compounding these violations, BLM rested on a fundamentally deficient Environmental Impact Statement (EIS) that failed to inform the public or decisionmakers of the true effects of this controversial Project. A likelihood of success on any of these claims would warrant relief.

Second, an injunction is necessary to avoid immediate irreparable harm. If allowed to continue, Project operations will irreversibly alter the natural landscape, generate toxic air pollution, destroy wildlife habitat, spoil scenic viewsheds and recreation opportunities, threaten local water supplies, and impair the quality of life for local communities—irreparably harming Plaintiffs' members who live, work, and recreate on the impacted lands. Allowing further Project construction will also eliminate the opportunity for a NEPA analysis to inform its design, siting, and mitigation measures. This damage cannot be undone or compensated for.

Accordingly, Plaintiffs ask the Court for a preliminary injunction: (a) prohibiting BLM from approving new APDs in the Converse County Project area and (b) requiring BLM to suspend or otherwise prohibit further development on existing APD approvals.

LEGAL BACKGROUND

I. Federal Oil and Gas Management

In enacting FLPMA, 43 U.S.C. §§ 1701–87, Congress required that BLM steward federal land and resources to "meet the present and future needs of the American people," including "watershed, wildlife," and "natural scenic" values. *Id.* § 1702(c). FLPMA also directs that BLM manage the public lands "in a manner that will protect the quality" of their "scenic," "ecological, environmental, air and atmospheric, [and] water resource" values. *Id.* § 1701(a)(8).

BLM administers nearly 700 million acres of federal mineral estate under FLPMA as well as the Mineral Leasing Act (MLA), 30 U.S.C. §§ 181–287, and the Mineral Leasing Act for Acquired Lands of 1947 (MLAAL), 30 U.S.C. §§ 351–60. BLM manages federal oil and gas development using a three-stage process: (1) planning, (2) leasing, and (3) drilling.

In the first phase, BLM prepares a Resource Management Plan (RMP) under FLPMA to define the allowable uses and objectives for public lands in the planning area, such as grazing, recreation, and mineral development. *See* 43 U.S.C. § 1712; 43 C.F.R. Part 1600. In the second phase, BLM auctions leases that convey the right to explore and drill for oil and gas during the lease term. *See* 43 C.F.R. §§ 3120.1-2, 3120.5-1 to -3. In the third phase, and before drilling of leased minerals can proceed, BLM must approve an APD. *Id.* § 3162.3-1(c).

An APD must include the operator's surface use plans of operations, detailing locations of well pads, pipelines, roads, and other related facilities and activities. *Id.* § 3162.3-1(d). In addition to restrictions in the lease itself, BLM may subject an APD to any "reasonable measures . . . to minimize adverse impacts to other resource values, land uses or users." *Id.* § 3101.1-2. The conditions attached to an approved APD are typically referred to as "Conditions of Approval."

II. National Environmental Policy Act (NEPA)[1]

NEPA requires federal agencies to prepare a "detailed statement" of the environmental consequences of any major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). This environmental impact statement (EIS) must take a

[1] The Council on Environmental Quality has amended its NEPA regulations twice over the last three years. The 2020 regulations governed any NEPA process initiated after September 14, 2020, until May 19, 2022. *See* 85 Fed. Reg. 43,304 (July 16, 2020). The 2022 regulations govern as of May 20, 2022. *See* 87 Fed. Reg. 23,453 (April 20, 2022). The Converse County ROD and FEIS are subject to the original 1978 regulations, but the 2020 or 2022 amendments govern subsequent APD decisions. Plaintiffs' NEPA claims do not depend on these changes.

"hard look" at the effects of the proposal, including its cumulative effects when added to other past, present, and reasonably foreseeable future projects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–50 (1989); *see also* 40 C.F.R. §§ 1502.16(a)–(b), 1508.7, 1508.8 (1978); 40 C.F.R. § 1508.1(g) (2022).

This assessment must occur "at the earliest possible time," 40 C.F.R. § 1501.2 (1978), and before an "irretrievable and irretrievable commitment of resources" is made. *Sierra Club v. Peterson*, 717 F.2d 1409, 1412 (D.C. Cir. 1983). However, "[a]n agency can meet its NEPA obligations in steps." *Gulf Restoration Network v. Haaland*, 47 F.4th 795, 799 (D.C. Cir. 2022) (cleaned up). Through a process called "tiering," an agency may start by preparing a broad "programmatic EIS" and then "supplement that analysis with narrower EISs analyzing the incremental impacts of specific actions." *Id.* at 800 (cleaned up); 40 C.F.R. § 1508.28 (1978); 40 C.F.R. § 1508.1 (2020, 2022); 40 C.F.R. § 1501.11 (2020, 2022). Although a site-specific EIS can incorporate by reference prior programmatic analysis, *Gulf Restoration*, 47 F.4th at 800, it must also discuss "those localized environmental impacts that were not fully evaluated in the program statement." *Mayo v. Reynolds*, 875 F.3d 11, 23 (D.C. Cir. 2017) (quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1093 (D.C. Cir. 1973)).

If an existing NEPA analysis already fully considered the effects of the proposed action, the agency may prepare a Determination of NEPA Adequacy ("DNA") in lieu of new analysis. *See Friends of Animals v. BLM*, 232 F. Supp. 3d 53, 57 (D.D.C. 2017); 43 C.F.R. § 46.120(c). DNAs are not NEPA analysis but rather documentation of the conclusion that existing NEPA analyses are sufficient. *See Friends of Animals*, 232 F. Supp. 3d at 57.

A "Categorical Exclusion" (CX) is a mechanism to avoid NEPA compliance for actions that do not typically have a significant effect on the environment, individually or cumulatively.

See 40 C.F.R. § 1508.4 (1978); 40 C.F.R. § 1501.4 (2020, 2022). Section 390 of the 2005 Energy Policy Act establishes five CXs specific to oil and gas development. 42 U.S.C. § 15942. Relevant here, CX 3 applies to "[d]rilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA 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.* § 15942(b)(3).

FACTUAL BACKGROUND[2]

I. The Converse County Project

Located in Wyoming's Powder River Basin, the Converse County Project is a massive oil and gas development that will extract federal minerals underlying a 1.5-million-acre expanse (2,344 square miles), an area the size of Delaware. FEIS at 1.1. Although only 17% of the land surface is public (10% federal and 7% state), 64% of the underlying minerals in the Project area are federally owned and managed by BLM. *Id.*

The Project will involve drilling and hydraulic fracturing ("fracking") roughly 5,000 wells, *id.*, making it one of the largest fossil fuel projects ever approved in the state. Developers will also construct approximately 2,900 miles of new pipelines; 1,970 miles of new roads; 1,500 miles of electrical lines; 455 other pads; and additional supporting structures and infrastructure. *Id.* at 2-25, Table 2.4-1. The field will take roughly 10 years to construct, with each well continuing to produce for an estimated 30 years. *Id.* at 1.1. Five major energy companies—Chesapeake Energy; Devon Energy; EOG Resources; Northwoods Energy; and Occidental

[2] Exhibits 6 to 19 contain the Converse County FEIS, ROD, and APD decisions at issue in this motion, along with other relevant agency records. They are Bates Stamped with the prefix PIR-XXXX ("Preliminary Injunction Record"). Exhibits 7 and 8 contain the FEIS and appendices, and given the frequency with which they are cited, Plaintiffs cite those documents as "FEIS at [internal page number]." The remaining exhibits are cited as "Ex. X at PIR-XXXX."

Petroleum Corporation ("Operator Group")—were listed as partners on the Project. *Id.* at 6-2.

The Project area consists of wide-open sagebrush and rolling grassland terrain, bordered to the south by the Laramie Mountains. *See id.* at 3.14-1, 3.15-2. Photographs submitted by Plaintiffs' members provide a glimpse of this serene landscape. Molvar Decl. ¶¶ 16, 18, 19; Katherman Decl. ¶¶ 4, 14, 19; Anderson Decl. ¶¶ 9, 11, 13, 16. Although portions have been affected by past oil and gas development, the Project area remains largely undeveloped and "offers a natural setting" with "natural panoramic landscapes." FEIS at 3.10-1; 4.11-7. It provides opportunities for solitude and "a variety of outdoor recreational activities," such as wildlife watching, fishing, hunting, and horseback riding. *Id.* at 3.10-1, 3.11-78.

The Project area encompasses 152,377 acres of federal public lands and 101,012 acres of state lands. *Id.* at 1.1. In particular, the northeastern corner of the Project falls within the Thunder Basin National Grassland, *id.* at 1-3, which contains some of the nation's last intact native prairie. O'Toole Decl. ¶ 11; Molvar Decl. ¶ 18. The Grassland offers wildlife habitat, livestock grazing, and recreational opportunities. FEIS at 3.10-1 to -2, 3.18-20, -43, -53; Molvar Decl. ¶¶ 12, 16, 18–19; O'Toole Decl. ¶¶ 11–12; Anderson Decl. ¶¶ 8–11, 15. The Sand Hills Management Area, valued for its big game populations, straddles the western boundary. FEIS at 3.5-3, 3.5-6, 4.5-2. The North Platte River, a popular recreation destination and blue-ribbon trout stream, traces the southern edge. *Id.* at 3.10-3.

II. Wildlife Impacts

The Converse County Project area, due to its largely natural and undeveloped character, provides important wildlife habitat to a variety of species. *See generally* FEIS at 3.18-2 to -75. The FEIS acknowledges that oil and gas development harms wildlife and that wildlife populations and viewing opportunities will likely decline due to this Project. *Id.* at 4.10-3 to -4, -

10–11, -15, -19, -27, -29, -38, -45, -62, -67–68, -73, -86. The Wyoming Department of Fish and Game (WDFG) warned that the modest mitigation BLM required will allow "a high level of habitat loss and fragmentation" and "reduce[] carrying capacity." Ex. 9 at PIR-1720. Although some reclamation is ostensibly required on the 10% of the Project area on BLM surface, successful habitat restoration in this type of arid landscape is challenging and could take "up to 50 years." FEIS at 4.18-46; *see also id.* at 4.14-8. Riparian and wetland habitat "may never return" to prior conditions. *Id.* at 4.17-6.

Among the most severely impacted species will be the greater sage-grouse. Sage-grouse were once abundant across the western U.S. and Canada, but loss and fragmentation of their native sagebrush habitats have caused populations to decline precipitously over the last century. *Id.* at 3.18-57 to -59. Populations within the Project area are also declining. *Id.* at 3.18-51. This imperiled species is highly sensitive to human development, including oil and gas activities. *Id.* at 4.18-48 to -55. Nearly the entire Project area provides habitat for greater sage-grouse, including 199,281 acres of priority habitat (PHMA)—habitat deemed most essential to maintaining the species—and 1,287,429 acres of general habitat (GHMA). *Id.* at 3.18-48, -51 to -59. There are also 54 vital sage-grouse breeding sites ("leks") within or immediately adjacent to the Project area. *Id.* at 3.18-48, -51 to -59. BLM allowed development within 0.25 and 0.6 miles of such leks, *id.* at 4.18-67, far closer than the 3 to 11 miles experts recommend, *id.* at 4.18-48. The FEIS thus acknowledges this Project will lead to a "substantial increase in risk to sage-grouse," sage-grouse population declines, and "risk of . . . abandonment" of all 54 leks in and near the Project area. *Id.* at 4.18-67, -73, -65.

Pronghorn, an icon of the American West, will also suffer. Like sage-grouse, pronghorn avoid areas of human disturbance, and fragmentation from roads, wells, pipelines and other

infrastructure can block their migration to intact habitat. *Id.* 3.18-6, 4.18-1, -4 to -7. Pronghorn use the Project area year-round, leading BLM to conclude that the Project would reduce their numbers and decrease opportunities to hunt and view the species. *Id.* 4.10-2, 4.18-12.

The Project area also supports an abundance of migratory birds, including raptor species like ferruginous hawk, red-tailed hawk, and great horned owl. *Id.* at 3.18-24, -27. These birds are protected by the Migratory Bird Treaty Act, which makes it unlawful "by any means or in any manner" to kill "any migratory bird, . . . nest, or egg of any such bird," unless permitted by federal regulation. 16 U.S.C. § 703(a). There are 1,124 raptor nests in or immediately adjacent to the Project area. FEIS at 4.18-22 & 3.18-25 (map). Raptors often use nests for multiple years, produce only one clutch each year, and exhibit high fidelity to their nests, so nest protection is vital. *Id.* at 3.18-39. Nonetheless, BLM granted the Project a controversial exemption to allow year-round development near raptor nests. Ex. 6 at PIR-0006. Loss of nesting sites and raptor population declines are expected as a result. FEIS at 4.18-27, -38, 5-62; *see also* Ex. 9 at PIR-1688 (U.S. Fish and Wildlife Service warning of "moderate to major" impacts); Ex. 9 at PIR-1723 (WDFG warning that "impacts to [raptor] species will [likely] occur.").

III. Air Quality Impacts

BLM's own air quality models predict that the Project will churn out substantial air pollution, driving air quality to unhealthy levels and impairing visibility.

First, the Project's construction, completion, and production activities will result in exceedances of several human health-based National Ambient Air Quality Standards (NAAQS) in the local area, including particulate matter (PM_{10} and $PM_{2.5}$) and nitrogen dioxide (NO_2) standards. FEIS at 4.1-14 to -16. The Project will emit at least 2.6–3.9 parts per billion (ppb) of ozone, although BLM concedes this likely under-predicts ozone impacts. *Id.* at 4.1-19, Table 4.1-

8; *id.*, App. A at 5-12. Multiple commenters, like the EPA, warned ozone impacts "may be greater than reported." *See* Ex. 9 at PIR-1685, -1738–40. Thus, the Project could result in exceedances of the 70 ppb ozone standard in certain areas, *id.* at 4.1-19, *id.* App. A at 5-27, 5-33 & Table 5.4-2, including potentially Converse County itself, which already reached a maximum daily average ozone concentration of 67 ppb in 2017. *See* Ex. 9 at PIR-1740.

These NAAQS exceedances will impact human health and obscure skies. *See* Ex. 9 at PIR-1680. Exposure to PM_{10}, $PM_{2.5}$, NO_2, and ozone ("smog") causes respiratory harms such as aggravated asthma; eye, nose, and throat irritation; heart attacks; and premature death in people with heart or lung disease. Ex. 17 at PIR-4902; Ex. 18 at PIR-4904; Ex. 9 at PIR-1769–70. These pollutants also settle on ground or water, damaging vegetation and crops, and disrupting nutrient balances. FEIS at 3.1-18; Ex. 18 at PIR-4903; Ex. 9 at PIR-1742–43, -1770. $PM_{2.5}$ is also the primary driver of regional haze, which combined with ozone will have aesthetic impacts on the landscape, dulling blue skies and obscuring scenic vistas. FEIS at 3.1-17; Ex. 17 at PIR-4903.

Second, the Project will also emit hazardous air pollutants, including volatile organic compounds (VOCs), from tanks, pumps, compressors, processing plants, and vehicles. *Id.* at 3.1-16, 4.1-1. VOCs have devasting effects on human health, such as damaging liver and kidneys, causing cancer, and increasing risk of premature death. Ex. 9 at PIR-1771–72; Ex. 18 at PIR-4904. There is also research linking oil and gas development to infertility, miscarriage, and other reproductive health risks. *See* Ex. 9 at PIR-1771. Near-field long-term cancer risk from hazardous pollutants emissions would exceed EPA's one-in-one million risk threshold for single well pads, gas plants, and compressor stations. FEIS at 4.1-24 to -25, -37.

Third, the Project will cause excessive nitrogen deposition in the Northern Cheyenne Indian Reservation and sensitive natural areas, such as Mount Rushmore National Memorial,

Badlands and Wind Cave National Parks, Jewel Cave National Monument, and Soldier Creek Wilderness Area. *Id.* at 4.1-30, Table 4.1-14. These deposits have long-term ecological impacts such as "leaching of nutrients from soils, acidification of surface waters, injury to high elevation vegetation, and changes in nutrient cycling and species composition." *Id.* at 3.1-18. And the FEIS admitted its air quality model under-predicted these impacts. *Id.*, App. A at 7-1.

Fourth, the Project will allow staggering amounts of greenhouse gas emissions. By year ten, it will result in 69.5 million metric tons of carbon dioxide equivalent (CO2e) annually. *Id.* 4.1-41 to -42. This is roughly equivalent to 1.1% of total annual U.S. direct greenhouse gas emissions, and the emissions from 1.2 million cars in one year. *See id.* 3.1-32, 4.1-41.

IV. Water Impacts

The Project's substantial water use will further stress an arid landscape already burdened by fossil fuel development. Drilling, fracking, and completing the Project will use an estimated 14,000 acre-feet (108 million barrels) of water per year—nearly the same as all existing Converse County uses combined. *Id.* at 4.16-14. Project water withdrawals are expected to cause groundwater drawdowns and reduce surface and groundwater water quantities for existing users. *Id.* at 4.16-1, -14 to -15. And BLM's model only accounted for half the Project's annual water use—roughly 7,000 acre-feet—thus underestimating such impacts. Ex. 9 at PIR-1683; FEIS, App. H at H-47.

Additionally, the Project poses a significant risk of water contamination. FEIS at 4.16-1; *id.* at 4.16-4, -14 (impacts to surface water quality); *id.* at 4.16-5 to -6, -15 (contamination risk to groundwater); *see also* Ex. 9 at PIR-1683 (EPA warning that BLM's avoidance measures "may not protect existing groundwater wells, surface waters, or groundwater dependent ecosystems"). Sedimentation or spills of fuel, petroleum products, or contaminated production water may harm

water quality in nearby rivers, streams, and other waterbodies. FEIS at 4.16-1, 4.16-14. Groundwater quality may be similarly impacted by spills of hazardous materials. *Id.* at 4.16-5 to -6, -15. The FEIS estimates that there could be three spill incidents per year, *id.* at 4.16-6, -15, but admitted that since this estimate only included production wells, the spill rate could be even higher, *id*. at 4.16-6.

V. Procedural History

On January 26, 2018, BLM circulated a Draft EIS (DEIS) for the Project for a 45-day comment period, with three alternatives: the "no action" Alternative A; the Operator Group's proposed Alternative B; and Alternative C, which would authorize as many wells as the Operator Group's proposal but with additional mitigation, such as water recycling and clustering of wells to reduce surface disturbance. FEIS at ES-2, ES-5 to ES-6, 7-5 to 7-6. On April 26, 2019, BLM released a Supplemental Draft EIS (SDEIS) proposing an amendment to the Casper RMP to grant the Project a controversial exemption from a raptor "Timing Limitation Stipulation" that restricts disturbance near raptor nests during the nesting season. FEIS at 1-5 to -6. Plaintiffs submitted comments on the DEIS and SDEIS. FEIS at 7-4 and App. H, H-110 to H-129.

BLM issued the Final EIS (FEIS) on August 10, 2020, describing it as "a programmatic analysis of proposed oil and gas development in the [Project Area] from which subsequent site-specific NEPA documents for specific permitting actions can be tiered." *Id.* at 4.0-1

On December 23, 2020, then-Secretary of Interior David Bernhardt signed the ROD approving the Converse County Project to proceed under Alternative B, the Operator Group's proposal. Ex. 6 at PIR-0003–5. The ROD also approved an amendment to the Casper RMP to exempt the Project from the raptor Timing Limitation Stipulation. *Id.* at PIR-0006.

VI. Applications for Permit to Drill (APDs)

Since issuing the ROD, BLM issued over 146 APD decisions in the Project area encompassing over 407 wells; it continues to approve new APDs on an ongoing basis. The 146 APD decisions challenged in this case and the 407 wells they encompass are listed in Exhibit 10 hereto, the "APD Decision Index." It appears roughly 300 of these wells have not yet been drilled, *see* Johnson Decl. ¶ 10, Ex. 10 ("Well Status" column), but an APD approval authorizes the operator to commence surface disturbance, construction, and drilling at any time. More APDs have been approved since Plaintiffs amended their complaint, and more yet are pending BLM approval. *See* Johnson Decl. ¶¶ 3–4; *see also* ECF No. 20-3 ¶¶ 18–21; ECF No. 20-8 ¶¶ 13–15; ECF No. 47-1 ¶¶ 7, 10–11.

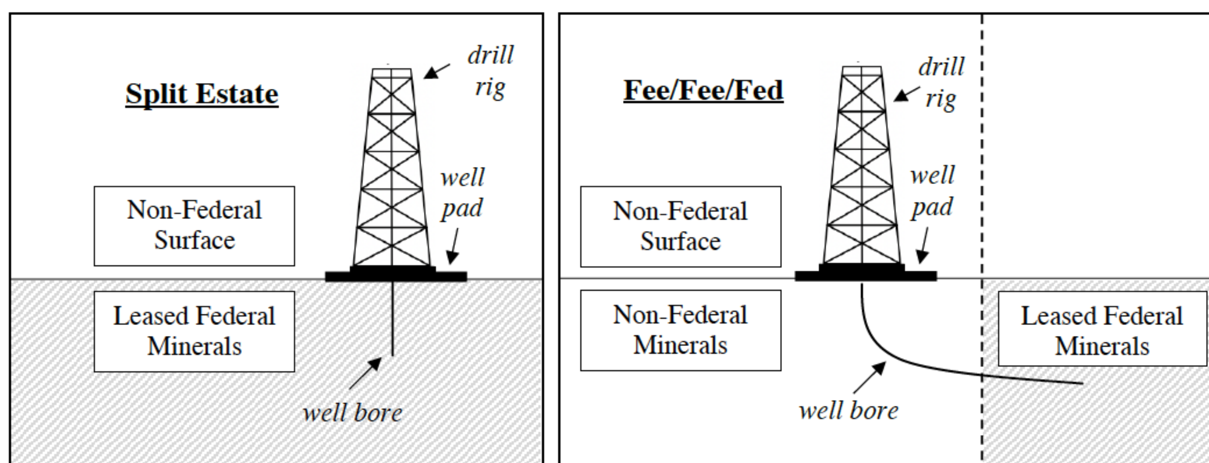
Although the Converse County FEIS stated that "subsequent site-specific NEPA" would be prepared at the APD stage, BLM has almost universally bypassed that step. Attached hereto are the decision and NEPA documents for all 146 APD decisions. *See* Exs. 11–13. These records show that BLM prepared additional site-specific NEPA analysis for only 8 of the 407 wells, and that the remaining 399 were approved with either a CX or a DNA. *Id.*

VII. Fee/Fee/Fed Wells

Federal oil and gas deposits are increasingly being developed from wells located on private lands, under two scenarios illustrated in Figure 1 below. First is the "split estate" scenario, in which the well is drilled on non-federal surface lands directly overlying federal minerals. Second is the "Fee/Fee/Fed" scenario, in which the well is drilled on non-federal surface overlying non-federal minerals but reaches horizontally into federal minerals. The advent of horizontal drilling technology for fracking has resulted in a surge in Fee/Fee/Fed wells.

In a split estate scenario, the mineral estate owner has a common law right to use the surface estate as is reasonably necessary to access and develop the underlying minerals. *See generally* Keith G. Bauerle, *Reaping the Whirlwind: Federal Oil and Gas Development on Private Lands in the Rocky Mountain West*, 83 Denv. U. L. Rev. 1083, 1084 (2006); Wyo. Stat. Ann. § 30-5-402 (codifying as "Wyoming Split Estate Act"). In contrast, because a Fee/Fee/Fed well does not develop minerals underlying the surface, surface access rights do not flow from the mineral estate and must be obtained through other means (typically a "surface use agreement").

Figure 1: Split Estate and Fee/Fee/Fed Development



Although BLM regulates split-estate wells in largely the same fashion as wells on federal surface, during the Trump Administration BLM adopted Permanent Instruction Memorandum ("PIM") 2018-014, which asserts that BLM lacks legal authority to impose any restrictions on the surface operations for Fee/Fee/Fed wells. *See* Ex. 15. PIM 2018-014 asserts that "BLM's jurisdiction extends to surface facilities on entirely non-Federal lands solely to the extent of assuring production accountability for royalties" and that BLM lacks authority "to require mitigation of surface disturbances on non-Federal lands." *Id.* at PIR-4670. It further claims that "BLM does not have authority to require a bond to protect non-Federal surface owner interests . . . for Fee/Fee/Fed wells" or to conduct an "onsite inspection." *Id.* at PIR-4669. PIM 2018-014

also states that a Surface Use Plan of Operations (SUPO) is not required for Fee/Fee/Fed wells, and that if one is submitted, BLM will not enforce its provisions. *Id.*, PIR-4668–69.

BLM anticipated that most of the Project would be developed from Fee/Fee/Fed wells. Ex. 6 at PIR-0004. Confirming this, 293 of the 407 challenged wells involve a Fee/Fee/Fed scenario. *See* Exhibit 10 (APD Decision Index). In accordance with PIM 2018-014, BLM imposed only certain "Recommended Design Features" on these wells but no BLM-mandated mitigation, reclamation, or bonding. Thus, by siting their wells to avoid federal surface or split-estate, Converse County Operators are circumventing critical environmental safeguards that would otherwise apply to their operations, such as:

- Wildlife protections (e.g., seasonal restrictions, nest or breeding ground buffers);
- Air emissions controls (e.g., dust and exhaust reduction measures);
- Water conservation and recycling;
- Site restoration requirements (e.g., native vegetation planting);
- Noxious weed controls;
- Scenic viewshed protections (e.g., requiring camouflaging of above-ground structures);
- Pipeline spill prevention;
- Produced water and hazardous waste storage and disposal limitations;
- Erosion and runoff controls;
- Noise limits and mitigation;
- Project-related traffic restrictions (e.g., use of remote well control).

Compare Ex. 10 at PIR-2476–77 *and* PIR-2499–2500 *with* PIR-2470–75 *and* PIR-2527–35.

PRELIMINARY INJUNCTION STANDARDS

To obtain a preliminary injunction, a party must show: (1) it is "likely to succeed on the merits"; (2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities" is in its "favor"; and (4) "an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). At this stage, a party may rely on "evidence that is less complete than in a trial on the merits" so long as it is "credible." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 173 (D.D.C. 2015) (internal citations omitted).

ARGUMENT[3]

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR APA AND FLPMA CLAIMS AGAINST THE FEE/FEE/FED APD DECISIONS.

Plaintiffs are likely to prevail on their claims against the Fee/Fee/Fed APD decisions. *See* First Am. Compl., Fifth Claim for Relief ¶¶ 144–50. As explained below, these decisions are unlawful for two reasons: first, they rested on BLM's erroneous legal conclusion that it lacks authority to regulate surface operations on Fee/Fee/Fed wells, rendering these decisions arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A), and second, that legal error led BLM to wrongly exempt these wells from routine environmental safeguards, resulting in "unnecessary or undue degradation" in violation of FLPMA, 43 U.S.C. § 1732(b).

A. The Fee/Fee/Fed APD Decisions Rested on an Error of Law, Rendering Them Arbitrary and Capricious in Violation of the APA.

Agency action founded on a mistake of law must be reversed under the APA. *See* 5 U.S.C. § 706(2)(A); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[I]f the [agency] action is based upon a determination of law . . . , [it] may not stand if the agency has misconceived the law."); *Massachusetts v. EPA*, 549 U.S. 497, 532–34 (2007) (setting aside EPA decision premised on misinterpretation of its legal authority); *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985) (agency action that "stands on a faulty legal premise" is arbitrary and capricious). As explained below, Congress has not only authorized but *required* BLM to regulate Fee/Fee/Fed wells, including their surface operations. BLM's erroneous disclaimer of such authority renders its Fee/Fee/Fed permits arbitrary, capricious, and not in accordance with law.

[3] Of the many violations alleged in their First Amended Complaint ¶¶ 121–58 (ECF No. 44), Plaintiffs focus here on their Fee/Fee/Fed, air quality, and NEPA claims to facilitate prompt resolution of this motion. A likelihood of success on any one of these claims would justify relief.

1. The Property Clause and General Statutory Delegations Empower BLM to Regulate the Surface Operations for Fee/Fee/Fed Wells.

BLM's authority over Fee/Fee/Fed wells is grounded in the Property Clause of the U.S. Constitution, which 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, sec. 3, cl. 2. Congress's Property Clause authority is "without limitations" and includes the "powers both of a proprietor and of a legislature over the public domain." *Kleppe v. New Mexico*, 426 U.S. 529, 535, 539, 541 (1976); *see also United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) ("Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein."). The dual nature of this power is key to understanding BLM's broad authority in managing public lands and minerals.

The proprietary power refers to the "the rights incident to ownership." *Light v. United States*, 220 U.S. 523, 536 (1911). Like any property owner, Congress can "prohibit absolutely or fix the terms on which its property may be used," *id.*, and "prescribe the conditions upon which others may obtain rights in [such property]," *Kleppe*, 426 U.S. at 540. Congress has unlimited discretion to fashion such conditions "consistent with its views of public policy." *United States v. City of San Francisco*, 310 U.S. 16, 29–30 (1940). And it may attach conditions to the use of federal property that affect the grantee's conduct on nonfederal property. *See, e.g.*, *id.*; *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21–24 (1952).

The Property Clause also conveys sovereign or legislative power, empowering Congress to "legislat[e] for the protection of the public lands." *Camfield v. U.S.*, 167 U.S. 518, 525–26 (1897). This sovereign power allows Congress to regulate purely private activities on nonfederal property if they affect federal lands. *See Kleppe*, 426 U.S. at 538; *United States v. Alford*, 274

U.S. 264, 267 (1927); *Duncan Energy Co. v. U.S. Forest Serv.*, 50 F.3d 584, 589 (8th Cir. 1995) ("Congress may regulate conduct occurring on or off federal land which affects federal land.").

Congress has delegated its Property Clause authority to the Secretary of Interior, who in turn delegated it to BLM, as relevant here.[4] The Secretary is charged with "perform[ing] all executive duties . . . , in anywise respecting such public lands," 43 U.S.C. § 2, and "the supervision of public business relating to . . . [p]ublic lands, including mines." 43 U.S.C. § 1457. The Secretary is also "authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of [Title 43 dealing with public lands] not otherwise specially provided for." 43 U.S.C. § 1457c.

The Supreme Court has determined that these statutes grant the Secretary "plenary authority over the administration of public lands, including mineral lands." *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 336–37 (1963); *see also Boesche v. Udall*, 373 U.S. 472, 476 (1963); *Knight v. United Land Ass'n*, 142 U.S. 161, 181 (1891); *U.S. ex rel. McLennan v. Wilbur*, 283 U.S. 414, 419 (1931). These statutes are "necessarily general," *Midwest Oil*, 236 U.S. at 474, to give the Secretary latitude in responding to "unexpected contingencies" that occur "in the administration of such large and varied interests," *Knight*, 142 U.S. at 181 (quoting *Williams v. United States*, 138 U.S. 514, 524 (1891)).

Accordingly, a special rule of construction applies when interpreting the Department of Interior's authority. The Supreme Court has instructed that "in the absence of some specific provision to the contrary," authority over matters related to federal lands and minerals falls "wholly and absolutely within the [Secretary's] jurisdiction." *Corp. of the Catholic Bishop of*

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[4] *See* Dep't of Interior, 235 Departmental Manual 1 (Oct. 5, 2009), https://www.doi.gov/sites/doi.gov/files/elips/documents/235-dm-1.pdf; Dep't of Interior, 235 Departmental Manual 3 (May 27, 1983), https://www.doi.gov/sites/doi.gov/files/elips/documents/235-dm-3.pdf.

Nesqually v. Gibbon, 158 U.S. 155, 167 (1895). Even if another statute "does not in itself confer" a particular authority to BLM, "in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the [agency]." *Cameron v. United States*, 252 U.S. 450, 461 (1920); *see also Cosmos Expl. Co. v. Gray Eagle Oil Co.*, 190 U.S. 301, 309 (1903) ("Unless taken away by some affirmative provision of law, the Land Department has jurisdiction over the subject."); *Silver State Land, LLC v. Schneider*, 843 F.3d 982, 986 (D.C. Cir. 2016) ("[Interior] enjoys plenary authority" absent "specific provision to the contrary").

Applying these principles here, BLM's conclusion that it lacks authority over the surface operations for Fee/Fee/Fed wells was erroneous. This authority is squarely within both the proprietary and legislative powers delegated under 43 U.S.C. §§ 2, 1457, and 1457c, and no statute removes that power. Exercising proprietary power over federal minerals, BLM may condition its authorization to extract minerals from Fee/Fee/Fed wells on the private developer's agreement to conduct its surface operations in a particular manner, such as to avoid environmental or health impacts. Nothing prohibits such conditions from reaching non-federal property. *Cf. City of San Francisco*, 310 U.S. at 28–30; *Idaho Power*, 344 U.S. at 21–24.

Exercising its sovereign authority, BLM may also regulate the surface operations on Fee/Fee/Fed wells to avoid threats to off-site public lands, including from air, water, light, and noise pollution; wildlife disruptions; and scenic impairment. *See Kleppe*, 426 U.S. at 538. Courts have affirmed the extraterritorial reach of numerous regulations by federal land management agencies as a proper exercise of Property Clause authority because they aimed to protect adjacent public lands. *See, e.g.*, *United States v. Parker*, 761 F.3d 986, 988 (9th Cir. 2014) (affirming Forest Service jurisdiction to regulate conduct that "affects" its lands); *United States v. Jenks*, 22 F.3d 1513, 1517–18 (10th Cir. 1994) (affirming regulation of private inholdings); *United States*

v. Arbo, 691 F.2d 862, 865 (9th Cir. 1982) (affirming Forest Service authority to inspect a mine located partially on state property); *Minnesota v. Block*, 660 F.2d 1240, 1249–51 (8th Cir. 1981) (upholding regulation of state-owned waters within federal wilderness); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (upholding prohibition against camping, campfires adjacent to Forest Service land); *United States v. Brown*, 552 F.2d 817, 819 (8th Cir. 1977) (affirming prohibition on hunting on nonfederal waters to protect National Park).

In sum, the Property Clause gives Congress proprietary and legislative authority to regulate the extraction of federal minerals through Fee/Fee/Fed wells, and 43 U.S.C. §§ 2, 1457, and 1457c delegate that authority to BLM, through the Secretary of Interior. It is immaterial that these statutes do not explicitly mention Fee/Fee/Fed wells, *see Cameron*, 252 U.S. at 461, or that Congress may not have foreseen this precise scenario, *see Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (cleaned up). Neither does the broad nature of these delegations make them ambiguous for *Chevron* purposes. *See Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("Broad general language is not necessarily ambiguous when congressional objectives require broad terms.").[5]

In concluding that it lacked authority over Fee/Fee/Fed wells, BLM failed to even mention these foundational laws, much less identify any more specific statute in which Congress

[5] Moreover, BLM's interpretation does not qualify for *Chevron* or *Skidmore* deference, because it was adopted informally, lacks thoroughness, and rests on conclusory statements devoid of attention to the statutory text. *See Pub. Citizen, Inc. v. U.S. Dep't of HHS*, 332 F.3d 654, 661–62 (D.C. Cir. 2003); *Grecian Magnesite Mining, Indus. & Shipping Co., SA v. Comm'r*, 926 F.3d 819, 823 (D.C. Cir. 2019). *Chevron* deference is also "reserved for those instances when an agency" claims to be resolving ambiguity, unlike BLM here. *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). In any event, deference would lead to the same result because the statutes are unambiguous and cannot reasonably be read to support BLM's position.

removed its authority over Fee/Fee/Fed wells. PIM 2018-014 merely argued that the MLA and FLPMA do not provide it.[6] This conclusion is both immaterial, because the general delegations grant such power; and wrong, for the reasons explained below. Accordingly, BLM's disclaimer of authority over Fee/Fee/Fed wells was legal error.

2. FLPMA and MLA Confirm BLM Authority Over Fee/Fee/Fed Wells.

Although BLM's power over Fee/Fee/Fed wells exists without any more specific statement to that effect, FLPMA and the MLA also confirm this authority.

FLPMA provides that "the Secretary shall" regulate "the use, occupancy and development of the public lands." 43 U.S.C. § 1732(b). The term "public lands" includes any interest in land owned by the United States, including federal mineral estate. *Id.* § 1702(e). FLPMA further directs that public lands and minerals "shall" be managed for "multiple use and sustained yield," *id.* § 1732(a), which it defines as the "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment." *Id.* § 1702(c). It also directs that the Secretary "shall . . . , take *any action necessary* to prevent unnecessary or undue degradation of the [public] lands." *Id.* § 1732(b) (emphasis added). BLM's narrow interpretation of its authority over Fee/Fee/Fed wells cannot be reconciled with its broad FLPMA authority to regulate the "development" of federal minerals, including to avoid environmental degradation.

The MLA likewise empowers and *requires* BLM to regulate Fee/Fee/Fed wells, including their surface operations. It provides that the Secretary "shall regulate all surface-disturbing

[6] BLM rightly did not argue that the MLA or FLPMA *remove* its authority over Fee/Fee/Fed wells. *See Boesche*, 373 U.S. at 481 (explaining that the MLA sought to "expand, not contract, the Secretary's control"); 43 U.S.C. § 1701, notes § 701(f) ("Nothing in [FLPMA] shall be deemed to repeal any existing law by implication.").

activities conducted pursuant to any lease issued under this chapter, and shall determine reclamation and other actions as required in the interest of conservation of surface resources." 30 U.S.C. § 226(g). The first clause requires BLM to regulate the "surface-disturbing activities" associated with Fee/Fee/Fed wells, because such disturbance is conducted pursuant to the BLM mineral lease. *See* Black's Law Dictionary (11th ed. 2019) (defining "pursuant to" as "[i]n compliance with," "under[,]" "[a]s authorized by[,]" or "[i]n carrying out"). The second clause authorizing BLM to impose reclamation and other requirements for "conservation of surface resources" also extends to Fee/Fee/Fed wells. *Id.* This term encompasses the prevention of "environmental harm." *Hoyl v. Babbitt*, 129 F.3d 1377, 1380 (10th Cir. 1997); *see also Copper Valley Mach. Works, Inc. v. Andrus*, 653 F.2d 595, 601 & n.7 (D.C. Cir. 1981) (same).

Confirming this plain-text reading, Congress did not restrict the terms "surface disturbance" and "surface resources" to the confines of the lease surface, as it did other provisions of this same MLA section. *See* 30 U.S.C. § 226(g), (i), (l) (including qualifiers on other restrictions, such as "within the lease area," "on any lease," and "on the lease," "on the leased premises," and "within the boundaries of the lease"). The omission of this limiting language provides strong evidence that BLM's duty to regulate surface operations and reclamation extends beyond the lease surface. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision").

Further support for Plaintiffs' interpretation is found later in this same section of the MLA, which requires the Secretary to collect a bond sufficient "to ensure . . . reclamation of the lease tract, *and the restoration of any lands or surface waters adversely affected by lease operations*." 30 U.S.C. § 226 (emphasis added); *see also* 43 C.F.R. § 3104.1(a) (regulation

requiring same). These provisions refute PIM 2018-014's claim that bonding and reclamation are not required for off-lease disturbance.

As for mitigation, the MLA regulations confirm BLM may impose "reasonable measures . . . to minimize adverse impacts to other resource values, land uses or users." 43 C.F.R. § 3101.1-2. Leaseholders are required to "conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality," *id.* § 3162.5-1(a), and "exercise due care and diligence to assure that leasehold operations do not result in undue damage to surface or subsurface resources," *id.* § 3162.5-1(b). None of these provisions are limited to impacts or activities on federal lands or the leasehold itself, as are other sections of this same subchapter. *See, e.g.*, *id.* § 3163.1(b)(2) (penalty for unapproved "surface disturbance on Federal or Indian surface"); *id.* § 3162.3-3 (requirements for surface disturbance "on the leasehold"); *id.* § 3104.1(a) (specifying requirement applicable to "the lease area(s)").[7]

BLM's oil and gas lease form[8] further supports Plaintiffs interpretation. Section 6 requires the leaseholder to "conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users." It permits BLM to impose "reasonable measures deemed necessary . . . to accomplish the intent of this section." Section 12 requires the leaseholder to "reclaim the land." In contrast

[7] BLM's treatment of Fee/Fee/Fed wells also contradicts Interior Board of Land Appeals (IBLA) decisions confirming that BLM can impose conditions on private lands activities associated with federal mineral development. *See Cominco American Inc.*, 26 IBLA 329, 335, 339 (1976) (upholding phosphate lease stipulation that applied to private lands, because party that "chooses to receive the benefits of leasing federal land . . . must also assume the burdens, one of which is responsibility for mitigating adverse environmental impacts resulting from the exploitation of federally reserved minerals"); *see also Grindstone Butte Project*, 24 IBLA 49, 52 n. 3 (1976) (upholding BLM reclamation requirement for irrigation right-of-way on private lands).

[8] *Available at* https://www.blm.gov/sites/blm.gov/files/uploads/Services_National-Operations-Center_Eforms_Fluid-and-Solid-Minerals_3100-011.pdf.

with other provisions, these are not limited to the "leased lands" or "leased premises."

In sum, BLM erred in claiming that it lacks authority to regulate the surface operations on Fee/Fee/Fed wells. Plaintiffs are likely to succeed on this APA claim.

B. The Fee/Fee/Fed APD Decisions Violated BLM's FLPMA Duty to Avoid Unnecessary or Undue Degradation.

BLM's failure to impose any mandatory surface use restrictions on Fee/Fee/Fed wells also violated FLPMA's directive that BLM "shall . . . take any action necessary to prevent unnecessary or undue degradation of" public lands. 43 U.S.C. § 1732(b). This duty is "[t]he heart of FLPMA." *Mineral Pol'y Ctr. v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003).

BLM regulations in other programs generally define "unnecessary or undue degradation" to include: (1) impacts greater than those that would result from customary practice or (2) activities that exceed standards set by federal or state law. *See* 43 C.F.R. §§ 2800.0-5(x), 3715.0-5, 3802.0-5(l), 3809.5. These definitions have been applied to the oil and gas context. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76–78 (D.C. Cir. 2011) (unnecessary or undue degradation means "something more than the usual effects anticipated from appropriately mitigated development") (cleaned up); *Colorado Env't Coal.*, 165 IBLA 221, 229 (2005) (unnecessary or undue degradation means "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").

These authorities confirm here that BLM's refusal to regulate the surface operations for Fee/Fee/Fed wells will result in "unnecessary or undue degradation" of public lands. Although located on non-federal lands, Fee/Fee/Fed wells may harm public lands by deteriorating air quality, introducing heavy truck traffic, and degrading scenic viewsheds and soundscapes, facilitating the spread of invasive plant species, and fueling global climate change. *See* FEIS 4.1-

25 to -27 (air quality); *id.* at 4.2-11 (viewsheds); *id.* at 4.14-12 (fugitive dust); *id.* at 4.14-9, 4, 14-4, 4.17-2 (invasive plants). Wildlife on public lands will also be impaired by Fee/Fee/Fed wells near their habitat or as animals encounter them while moving across the landscape. *Cf. Kleppe*, 426 U.S. at 541 (protection of public lands includes wildlife that live there).

Yet despite these impacts, BLM refused to impose any mandatory safeguards on Fee/Fee/Fed wells. As a result, Fee/Fee/Fed wells will result in greater impacts than wells subject to standard mitigation requirements. *See* FEIS 4.16-10 to -11 (without setbacks and rules that govern well casing and cementing, risk of groundwater contamination increases); *id.* at 4.18-19 (reclamation of wildlife habitat less likely on private lands, resulting in greater long-term impacts on wildlife populations); *id.* at 4.18-23 (disturbance to habitats less on federal surface estate and split estate lands within Project area compared to private lands); *id.* at 4.18-33 (greater impacts to riparian habitat from wells on private lands); *id.* at 4.18-73 ("increased potential" for wildlife impacts from development "on private surface estate"); *id.* 4.18-38 (increased potential for impacts to migratory birds and habitat).

In sum, because BLM abdicated its responsibilities over Fee/Fee/Fed wells, they will result in "something more than the usual effects anticipated from appropriately mitigated development." *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 76–78 (cleaned up). This violates BLM's FLPMA duty to avoid unnecessary or undue degradation.

II. PLAINTIFFS ARE LIKELY TO SUCCCEED ON THEIR APA CLAIM CHALLENGING BLM'S DISCLAIMER OF AUTHORITY TO REQUIRE AIR POLLUTION MITIGATION.

Plaintiffs are also likely to succeed on their claim that the ROD and APD decisions are arbitrary and capricious because BLM wrongly concluded that it lacked authority to require air quality mitigation. *See* First Am. Compl., Sixth Claim for Relief ¶¶ 151–58.

BLM acknowledged that the Project will significantly impair local and regional air quality, resulting in violations of human-health based NAAQS, worsening regional haze, and contributing to climate change. *See* FEIS at 4.1-14 to -15 & Table 4.1-5 (NAAQS violations); *id.* at 4.1-25 to -27 & Table 4.1-13 (visibility impacts); *id.* at 4.1-41 to -43 (climate change). EPA thus urged BLM to adopt various measures to "reduc[e] the possibility of public exposure to unhealthy levels of air pollution," Ex. 9 at PIR-1677, and NPS asked it to mitigate "adverse effects in . . . park units due to nitrogen deposition and visibility impacts," FEIS App. H at H-52. Such proposed measures included:

(1) use of Tier 4 diesel engines;
(2) electrification of compressor and drill rig engines;
(3) a lower NO_x limit on equipment engines;
(4) use of natural-gas or bi-fuel drill rig and completion engines;
(5) limits on flaring during operations;
(6) lowering the heater treater temperature or installing isolation on the separator;
(7) traffic reduction measures, like centralized production facilities; and
(8) increased dust abatement.

See FEIS at 4.1-28, 4.1-34 to -36. These mitigation measures would have resulted in significant reductions—up to 90%—of various harmful pollutants. *Id.* at 4.1-28.

Nonetheless, BLM declined to impose any of these mitigation measures, taking the blanket position that it "does not have authority to require"' air mitigation measures other than ones voluntarily agreed to by the Operator Group. FEIS at 4.1-28, -36 to -37; Ex. 6 at PIR-0007. As a result, BLM is approving Converse County APDs with only the minimal air quality measures that operators volunteer. *E.g.*, Ex. 10 at PIR-2470–75, -2457–62. This capitulation of authority fundamentally misreads BLM's legal duties and contradicts longstanding agency practice, rendering BLM's ROD and APD decisions arbitrary and capricious.

C. BLM's Disclaimer of Authority Was Legal Error.

As with Fee/Fee/Fed wells, BLM's position in the Converse County FEIS and ROD that it lacks authority to impose air quality mitigation measures was erroneous. Again, BLM enjoys plenary authority flowing from the Property Clause to prescribe conditions on the use of public lands and minerals, and "[u]nless taken away by some affirmative provision of law, [BLM] has jurisdiction over the subject." *Cosmos Expl.*, 190 U.S. at 308. BLM has not explained where Congress supposedly prohibited it from requiring measures to reduce air quality impacts from the extraction of federal oil and gas. BLM's legal error in failing to address Congress's broad delegations of authority under 43 U.S.C. §§ 2, 1457, and 1457c alone requires reversal.

Indeed, rather than somehow remove such authority, FLPMA expressly requires that BLM "regulate . . . the use [and] . . . development" of federal minerals, 43 U.S.C. § 1732(b), "in a manner" that protects "air and atmospheric" values, *id.* § 1701(a)(8). Likewise, FLPMA requires that RMPs "provide for compliance with applicable pollution control laws, including State and Federal air . . . pollution standards or implementation plans." *Id.* § 1712(c)(8). FLPMA regulations further provide that every federal "land use authorization shall contain terms and conditions which shall . . . [r]equire compliance with [state and federal] air and water quality standards." 43 C.F.R. § 2920.7(b)(3).

Neither does the MLA remove BLM's authority to impose air quality mitigation measures on federal mineral leases and permits. As discussed above, the MLA requires BLM to "regulate all surface-disturbing activities conducted pursuant to any lease issued under this chapter" and "determine reclamation and other actions as required in the interest of conservation of surface resources," 30 U.S.C. § 226(g), which encompasses "prevent[ing] environmental harm." *Hoyl*, 129 F.3d at 1380; *Copper Valley*, 653 F.2d at 601 & n.7 (same). Congress also

instructed BLM to issue rules and regulations governing mineral leases to protect the "interests of the United States" and the "public welfare." 30 U.S.C. § 187. As this Court has recognized, that broad language includes the prevention of environmental harm and the setting of lease terms "to protect air, water quality, and wildlife." *Nat. Res. Def. Council, Inc. v. Berklund*, 458 F. Supp. 925, 936 & n.17 (D.D.C. 1978), *aff'd* 609 F.2d 553 (D.C. Cir. 1979). Requiring air quality mitigation measures such as engine requirements, dust abatement, and facilities consolidation thus falls squarely within BLM's MLA authority to conserve surface resources, prevent environmental harm, and protect the public welfare.

For these reasons, BLM's unexplained and erroneous assertion that it lacks authority to impose air quality mitigation measures on oil and gas developments renders the Converse County ROD and APDs arbitrary and capricious.

D. BLM's Disclaimer of Authority Was an Unexplained Reversal.

Moreover, BLM's disclaimer of authority here is inconsistent with its common practice elsewhere of requiring air quality mitigation measures, including ones that it rejected here. Such unexplained decision making that contradicts past agency practice is arbitrary and capricious. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

Two other recent oil and gas projects approved by BLM in Wyoming underscore this practice. BLM's ROD for the Normally Pressured Lance ("NPL") gas project included specific dust abatement requirements; multi-well pads and operations consolidation to reduce dust and other impacts from vehicle travel; waste capture and recovery; and use of Tier 3 drill rig engines, electric compression engines, and solar powered equipment to reduce impacts to air quality. Ex. 16 at PIR-4728–30. Similarly, BLM's ROD approving the Jonah Infill Drilling Project imposed

a variety of air quality-related mitigation measures, including use of Tier II diesel engines and other requirements to reduce impacts of project air emissions. Ex. 16 at 4795–96.

Other BLM state offices also routinely require measures to mitigate air quality impacts. For instance, BLM's decision approving the La Sal 2 well in Utah required use of Tier II drill rig engines, placed Nox limits on all combustion engines, required dust suppressants, required use of solar power to the extent possible, and required vapor recovery units. Ex. 16 at PIR-4825. And BLM's decision approving the Alta Vista Slaughterville 1H APD in Montana required use of Tier 4 engines. Ex. 16 at PIR-4879.

BLM's position here that it lacks authority to impose routine measures to mitigate air quality impacts is thus an unexplained divergence from its longstanding practice, rendering it arbitrary and capricious in violation of the APA. 5 U.S.C. § 706(2)(A). Such "'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars*, 579 U.S. at 222 (citation omitted); *see also U.S. Aid Funds, Inc. v. King*, 200 F. Supp. 3d 163, 169 (D.D.C. 2016) ("if an agency does undertake an action inconsistent with past practice, it is 'obligated to supply a reasoned analysis for the change'") (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR NEPA CLAIMS.

Plaintiffs are also likely to establish that BLM violated NEPA in at least three key respects detailed here. *See* First Am. Compl., First Claim for Relief ¶¶ 144–50.

E. BLM Failed to Account for the Unregulated Nature of Fee/Fee/Fed Wells.

BLM first violated NEPA by failing to meaningfully account for Fee/Fee/Fed wells in conducting its NEPA analysis. Although BLM disclosed that it would not regulate the surface

operations associated with Fee/Fee/Fed wells, FEIS at 1-7, many sections of the FEIS assumed that BLM-imposed protections would mitigate adverse effects for the entire Project. As a result, BLM failed to fully evaluate how the prevalence of Fee/Fee/Fed wells will affect the overall efficacy of the Project's mitigation measures or its environmental impacts.

For example, BLM's air quality model assumed particulate matter emissions would be substantially reduced due to road watering and other dust control measures, *id.*, App. A at A-24, but these are not required for Fee/Fee/Fed wells. When discussing impacts to the visual landscape, BLM claimed that a variety of mitigation measures (e.g., recontouring of topography during reclamation, down-shielded lighting) would "help maintain a naturalness of the viewshed," *id.* at 4.15-4, ignoring that these measures are not required for Fee/Fee/Fed wells. When discussing impacts to greater sage-grouse, BLM claimed there would be zero acres of surface disturbance within 0.6 miles of leks in priority sage-grouse habitat, FEIS at 4.18-67, ignoring the fact that it would not prohibit Fee/Fee/Fed wells from being developed within that 0.6-mile lek buffer. When discussing impacts from traffic, BLM claimed that a list of mitigation measures would reduce impacts, such as requiring heavy equipment to be used only at night or non-peak times, *id.* at 4.13-7, ignoring that these measures are not mandatory for Fee/Fee/Fed wells. *See also, e.g.*, FEIS at 4.12-1 ("analysis of the impacts to soil resources was based on the assumption that . . . resource protection measures would be implemented for the Project").

BLM's failure to meaningfully consider how its Fee/Fee/Fed policy will exacerbate the impacts of the Converse County Project violated NEPA. *See New York v. Nuclear Regul. Comm'n*, 681 F.3d 471, 473, 478–79 (D.C. Cir. 2012) (finding agency violated NEPA by failing to evaluate increased environmental harm if assumption—there, that permanent nuclear waste storage would be found—did not hold true); *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288,

294 (D.C. Cir. 1988) (EIS must be "fully informed" and "well-considered") (citation omitted); *State Farm*, 463 U.S. at 43 (agencies must consider every "important aspect" of the problem).

F. BLM's Cumulative Effects Analysis Was Inadequate.

Second, BLM violated NEPA by preparing a misleading and incomplete analysis of the cumulative impacts of the Converse County Project. A cumulative effects analysis must include a list of other past, present, and reasonably foreseeable actions impacting the same area; the effects of each of those actions; and "overall impact" they will have when added to the agency's proposal. *See Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016) (citing 40 C.F.R. § 1508.7). BLM's cumulative effects analysis for the Converse County Project was deficient in two ways: (1) it substantially underestimated the scale of *other* oil and gas development in the Project area; and (2) it failed to quantify the greenhouse gas emissions of other cumulative projects in the region and their cumulative climate impacts when added to the Project.

1. BLM underestimated existing and future oil and gas development.

An essential step in any cumulative effects analysis is identifying other past, present, and reasonably foreseeable projects in the same region, as this lays the foundation for the impact analysis that follows. BLM failed at this first step. The Converse County FEIS grossly misstated the scale of existing and future oil and gas development in the same area as the Converse County Project, leading to a substantial underestimation of the cumulative damage to this landscape.

Using January 9, 2015, as an arbitrary cut-off date, BLM claimed that there were just 1,520 existing oil and gas wells on 1,449 existing pads in the Project area, and that another 1,663 non-Project oil and gas wells on 386 new pads would be developed in the "future" (an undefined time period), alongside the Converse County Project. FEIS at 2-16, -19 to -22 & Tables 2.3-1 and 2.3-3; *see also id.* at 5-5 to -7 & Table 5.2-1. BLM assumed 110 new wells would be drilled

per year, based on drilling data from Wyoming Oil and Gas Conservation Commission (WOGCC) for 2008 to 2014. FEIS at 2-21 & Table 2.3-2.

These well numbers were grossly outdated and distorted the reality of oil and gas development in the Project area. As commenters explained, readily-available WOGCC data showed that 3,854 new wells started producing in the Project area between 2016 and 2019 alone, before the FEIS was issued. *See* Ex. 9 at PIR-1809-10, -1827–2394; *see also* FEIS at App. H, H-117 (raising similar issue). Of these, 1,149 wells started producing in 2016 and 2017 alone, before the DEIS was issued. Ex. 9 at PIR-1810. In other words, the existing well count exceeded 5,000 wells—over three times more than the 1,520 wells stated in the FEIS—and new wells were being developed at a rate nearly tenfold the 110 wells per year BLM assumed. Despite being informed of the true facts, BLM never grappled with them and instead just reiterated its choice of a January 2015 cut-off date in approving the Project. *See* Ex. 6 at PIR-0080–81 (responses to comments N35F-22 to -23); FEIS App. H at H-117.

The faulty well numbers undermine BLM's entire cumulative effects analysis—especially since "[o]il and gas activities make up the majority of the cumulative activity." FEIS at 5-41. For example, BLM used its incorrect baseline figures to estimate the cumulative surface disturbance in the Project area from other past, present, and future oil and gas drilling. *See id.* at 5-5 to -7 & Table 5.2.1. That number was central to BLM's analysis of cumulative effects to over a dozen different resources. *See id.* at 5-35 (land use); *id.* at 5-37 to -38 (noise); *id.* at 5-41 to -42 (recreation); *id.* at 5-42 (socioeconomics); *id.* at 5-48 (soil resources); *id.* at 5-49 to -50 (transportation); *id.* at 5-50 to -51 (vegetation); *id.* at 5-54 to -55 (visual); *id.* at 5-55 to -58 (water); *id.* at 5-59 (wetlands); *id.* at 5-61 to -62 (wildlife); *id.* at 5-64 to -65 (big game); *id.* at 5-71 to -72 (sage grouse). Because BLM did not take into account thousands of additional wells in

the Project Area, its cumulative effects analysis for all of these resources substantially understated the actual surface disturbance from oil and gas development. The result is an analysis that failed to consider or disclose to the public the true significance of the cumulative impacts to important natural resources and the community.

BLM also used incorrect "existing" well data to model background air emissions for the oil and gas sector, which it used to calculate possible NAAQS exceedances and other cumulative air quality effects. *See id.* at 5-16 to -23 & Table 5.3-1. Similarly, BLM's analysis of cumulative climate effects compared the incorrect "existing" emissions data (under the no action alternative), to local, regional, and nationwide emissions inventories alongside the Project emission projections. *See id.* at 5-23 to -24. Again, by failing to take into account thousands of additional wells in the Project area, BLM significantly underestimated the possibility and severity of NAAQS exceedances and other cumulative air pollution concerns from the Project, as well as the cumulative contribution to greenhouse gas emissions. Thus, BLM did not analyze and the public was not aware of the true severity of the Project's impacts to human health, visibility, and the climate.

BLM's use of such egregiously inaccurate data for its cumulative effects analysis violated two fundamental tenets of NEPA. First, a NEPA analysis cannot rely on stale or inaccurate data. *See* 40 C.F.R. § 1500.1(b) (1978) (high quality information and accurate scientific analysis are essential to implementing NEPA); *id.* § 1502.24 (1978) (agencies must ensure scientific integrity of analyses). Accurate data is essential to NEPA. *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52, 60–61 (D.D.C. 2009) ("an [EIS] which is incomplete due to the omission of ascertainable facts, or the inclusion of erroneous information, violates the disclosure requirement of 42 U.S.C. § 4332(2)(C)") (quoting *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1192 n.1 (9th Cir.

1989)). The D.C. Circuit has also explained that "[r]eliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1075 (D.C. Cir. 2003).

Courts have thus invalidated NEPA analyses for reliance on inaccurate data and assumptions. For example, in *Greater Yellowstone Coalition v. Kempthorne*, 577 F. Supp. 2d 183 (D.D.C. 2008), this district invalidated a NEPA analysis where the agency disregarded discrepancies between its analysis and monitoring data, which compromised "the validity of the [NPS's] impact conclusions." *Id.* at 198–202. Similarly, in *Environmental Defense Center v. Bureau of Ocean Energy Management*, 36 F.4th 850 (9th Cir. 2022), the court found a NEPA analysis inadequate where it "relied on the incorrect assumption that well stimulation treatments would be infrequent," which "distorted the agencies' consideration of the significance and severity of potential impacts." *Id.* at 874. BLM's violations are even more egregious here, where more accurate well data from WOGCC undermined its assumptions and was readily available.

Second, BLM's reliance on this outdated information violated its separate NEPA duty to consider all "past, present, and reasonably foreseeable future actions" in its cumulative effects analysis. 40 C.F.R. § 1508.7 (1978); *see also Sierra Club*, 827 F.3d at 41. An agency must consider all projects that already exist or "will exist by the time" the agency's proposal is "in operation." *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002). Future projects must also be considered if the agency has sufficient information "to analyze [their] impacts." *See Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 27 (D.D.C. 2016). An agency cannot construct an arbitrary cut-off date to circumvent this requirement. *See, e.g.*, *WildEarth Guardians v. Bernhardt* ("*Guardians II*"), 502 F. Supp. 3d 237, 249 (D.D.C. 2020) (faulting agency for restricting cumulative effects analysis to "lease sales currently undergoing

internal review" without explaining or justifying that cut-off) (cleaned up).

BLM's cumulative effects analysis violated this NEPA requirement by disregarding thousands of wells that already existed in the Converse County Project area and relying on a wildly inaccurate future drilling rate of just 110 wells per year. Although it is possible some fraction of these 3,854 new wells were effectively accounted for as part of the 1,663 "future" wells BLM projected from the ongoing projects listed in Table 5.2-1, *see* FEIS at 5-6 to -7, even if they *all* were, that would still leave over 2,000 wells entirely unaccounted for in BLM's analysis. BLM never explained why it did not consider these numbers as part of its analysis of future wells or how its estimated future drilling rate of 110 wells per year was reasonable in light of the current reality of oil and gas development in the area. *See* Ex. 6 at PIR-0080–81 (Comments N35F-22–23); FEIS, App. H at H-117. BLM's failure to account for such a substantial fraction of non-Project wells violated its duty under NEPA to consider all past, present, and reasonably foreseeable future actions. *Guardians II*, 502 F. Supp. 3d at 250; *see also WildEarth Guardians v. Zinke* ("*Guardians I*"), 368 F. Supp. 3d 41, 77 (D.D.C. 2019) (remanding to BLM to quantify cumulative greenhouse gas emissions and noting that "[t]o the extent other BLM actions in the region … are reasonably foreseeable when [the NEPA decision] is issued, BLM must discuss them as well"); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973–74 (9th Cir. 2006) (holding agency's cumulative impacts analysis insufficient based on failure to discuss other mining projects in the region).

2. BLM failed to quantify cumulative greenhouse gas emissions.

BLM also failed to properly analyze the cumulative greenhouse gas emissions from the Converse County Project. Again, NEPA requires agencies to analyze the effects of "other actions—past, present, and proposed, and reasonably foreseeable that have had or will have

impact in the same area," as well as "the overall impact that can be expected if the individual impacts are allowed to accumulate." *Sierra Club*, 827 F.3d at 49 (cleaned up). An "agency's [analysis] must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." *Grand Canyon Trust*, 290 F.3d at 342. In the context of greenhouse gas emissions, BLM must "quantify the emissions from each . . . decision—past, present, or reasonably foreseeable—and compare those emissions to regional and national emissions, setting forth with reasonable specificity the cumulative effect of the . . . decision at issue." *Guardians I*, 368 F. Supp. 3d at 77.

The Converse County FEIS violated these standards. Although BLM identified other projects in the region, it never quantified their greenhouse gas emissions—in isolation or when added to the Converse County Project. FEIS at 5-6 to -7, Table 5.2-1. Instead, BLM simply compared greenhouse gas emissions *from the Project alone* to existing emission inventories (local, statewide, and national). *Id.* at 5-23 to -27; *see also id.* at 3.1-25, 3.1-30 to -32. Those emissions inventories could not serve as the "quantification" of cumulative greenhouse emissions since they predated the Project by many years, failing to account for projects that had come online in recent years. *See id.* at 5-24 to -25; *id.* 3.1-30 to -32.

Case law confirms the inadequacy of this approach. In *Guardians I*, this district held that BLM's cumulative effects analyses for a suite of oil and gas lease sales were inadequate because each failed to quantify the greenhouse gas emissions from other projects in the region. 368 F. Supp. 3d at 76–77. As the court recognized, 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 the decisions' climate change impacts. *Id.* at 83.

Then, in *Guardians II*, the follow-up to that case, the court again found BLM's

cumulative effects analysis deficient. This time, because BLM simply compared emissions projections for the lease sale to existing emissions inventories. 502 F. Supp. 3d at 249–51. BLM's analysis did "not specifically address any planned or proposed projects in neighboring states or the greater region," and thus failed to evaluate cumulative emissions from "other reasonably foreseeable lease sales." *Id.* at 249–51. *See also WildEarth Guardians v. U.S. BLM*, 457 F. Supp. 3d 880, 894 (D. Mont. 2020) (holding that a cumulative impacts analysis must quantify emissions from other past, present, and future projects, not simply "put the emissions from a single [project] into context with state and national greenhouse-gas emissions"); *Utah Physicians for a Healthy Env't v. U.S. BLM*, 528 F. Supp. 3d 1222, 1234 (D. Utah 2021) (finding cumulative effects analysis insufficient where BLM did not quantify greenhouse gas emissions of present and reasonably foreseeable future fossil fuel developments).

Here, just as in *Guardians I* and *II*, BLM failed to quantify the greenhouse gas emissions attributable to the other existing or future wells in the Converse County Project area. By failing to do this necessary comparison, the Project was inappropriately viewed in a vacuum, robbing the public of the ability to truly assess the cumulative climate change impacts. *See Grand Canyon Trust*, 290 F.3d at 342; *Sierra Club*, 827 F.3d at 49.

G. BLM Improperly Used CXs, DNAs to Avoid Site-Specific Analysis for APDs.

BLM also violated NEPA by failing to conduct site-specific NEPA analyses before approving APDs. Due to the sheer size of the Project area and fact that development locations had not yet been identified, the Converse County FEIS was programmatic in nature and explicitly deferred site-specific NEPA analysis to the APD stage. Yet BLM has skipped that step for nearly every APD, relying improperly on one of two mechanisms: (1) Categorical Exclusion 3 from the Energy Policy Act ("CX3"); or (2) a "Determination of NEPA Adequacy" (DNA) that

tiers back to the generic Converse County FEIS or NEPA documents for different projects. *See* Exs. 10–13. This shell game violates NEPA.

First, BLM's use of CX3 was improper in almost every instance.[9] CX3 applies only to

> [d]rilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA 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.

42 U.S.C. § 15942(b)(3). Yet in almost every case BLM used CX3, the APD involved activity other than well "drilling"—including construction of well pads, roads, pipelines, powerlines, and other supporting facilities. These non-drilling activities are governed by other Categorical Exclusions, none of which BLM claimed was applicable. BLM's practice of using CX3 to approve activity other than drilling violates NEPA. *See* Ex. 19 at PIR-4933 (GAO report) (using "CX3 to approve an activity other than drilling an oil or gas well" violates the statute).

Second, the use of DNAs was improper because no existing NEPA document analyzed the site-specific or incremental effects of these particular APDs.[10] Although BLM could "tier to" its earlier programmatic FEIS, subsequent "site-specific NEPA analyses" were required to analyze "the incremental impacts of each specific [APD]," *W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1237 (D.C. Cir. 2018), and the "localized environmental impacts that were not fully evaluated" earlier, *Mayo*, 875 F.3d at 22–23 (cleaned up). *See also Guardians I*, 368 F. Supp. 3d at 54. BLM failed to do this subsequent site-specific NEPA analysis.

To be clear, the Converse County FEIS lacked such site-specific analysis. The FEIS concedes that BLM was "[u]nabl[e] to perform analyses at the appropriate level to determine specific impacts" and that "detailed consideration" of impacts was deferred. FEIS at 4.0-1; *id.* at

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[9] This claim applies to the following 40 APD decisions: APD-4, -50–54, -56–69, -71, -74–80, -82–85, -88–89, -92, -95–96, -98–99. *See* Ex. 10.

[10] This claim applies to all APD decisions approved with a DNA. *See* Ex. 10.

App. H, H-85 ("Due to the programmatic level of this document, it is not possible to determine impacts at the site-specific level.").[11] For this reason, the FEIS repeatedly claims that site-specific NEPA analysis would occur later. *Id.* at 4.0-1 ("subsequent site-specific NEPA documents" would be prepared that discuss "site-specific effects . . . in detail."); *see also id.* at Abstract ("Construction would begin after . . . site-specific NEPA analysis."); *id.* at App. H, H-5 ("Those details will be determined during site-specific NEPA"); *id.* at App. H, H-30 ("[S]ite-specific impact analyses [for special status species] . . . will be conducted during subsequent NEPA analysis during the APD process."); *id.* at App. H, H-33 ("[S]ubsequent site-specific NEPA review would be required."); *id.* at App. H, H-85 ("[T]his level of impact analysis would be conducted through subsequent NEPA at the site-specific level.").

Neither do the citations to EAs for different projects provide this missing site-specific analysis. First, they do not fall into either of the two situations for which NEPA regulations permit tiering. 40 C.F.R. § 1501.11(c) (2022) (permitting tiering to a programmatic EIS, such as the Converse EIS, or a previous EIS or EA for the *same action*). Second, to tier to a prior NEPA document, BLM was required to "summarize" the contents, which it failed to do. *See id.* Third, "the analysis of *similar* effects for a separate project" will not suffice under NEPA. *S. Fork Band Council of W. Shoshone of Nev. v. U.S. DOI*, 588 F.3d 718, 726 (9th Cir. 2009). Although the prior EAs here discuss the impacts of drilling, they do not disclose the incremental impacts of the APDs at issue, which will vary based on their location, timing, conditions, scope, intensity, and

[11] Many FEIS sections explain that site-specific analysis would not be possible until the location of disturbances was known. *See, e.g.*, FEIS at 4.18-1 ("Specific estimates of indirect impacts from project components are not possible due to the programmatic nature of this EIS."); *id.* at 4.16-13 ("site-specific analysis of effects to particular streams cannot be quantified" because disturbance locations are unknown); *id.* at 4.14-9 ("extent of impacts ESA-listed plants "would depend upon the exact locations of Project components"); *id.* at 4.7-4 (analyzing "noise impacts at specific sensitive receptors" not possible due to "programmatic approach of this analysis").

proximity to other projects, and Fourth, these prior EAs also precede the APDs by many years—most by a decade—and BLM did not account for any new information, such as new wildlife surveys or influx of other nearby wells. In sum, because no existing NEPA document addressed the "localized" and "incremental impacts of the specific" APDs at issue, BLM's reliance on a DNA was improper. *See Mayo,* 875 F.3d at 22–23; *W. Org. of Res. Councils*, 892 F.3d at 1237.

II. INJUNCTIVE RELIEF IS NECESSARY TO AVOID IRREPARABLE HARM[12]

The Converse County Project is underway and its irreparable damage warrants injunctive relief because it is certain, great, actual, and imminent, such "that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016). Dozens of Plaintiffs' members live within the Project area, and many more live, work, and recreate on lands the Project will irreparably impair. *See* Exs. 1 to 5 (member declarations). Unless enjoined, a significant portion of the Project will be constructed before a merits decision is reached,[13] polluting the air they breathe, threatening their water supplies, destroying the landscape's natural character, generating noise and light pollution, and decreasing opportunities for wildlife viewing, quiet solitude, and recreation. These harms cannot be undone or compensated for.

BLM has acknowledged that the Converse County Project will inflict irreparable harm. The FEIS admits the Project will result in a "substantial increase in industrial activity and traffic" in the Project area, FEIS at 4.11-38, including a "web of physical disturbances," *id.* at 4.2-8, such

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[12] The declarations from Plaintiffs' members establish both irreparable harm and injury-in-fact that is traceable to the Project and redressable by this Court, thus confirming standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

[13] The Project is expected to be fully constructed by 2030. Ex. 6 at PIR-0004. Because the record will not be prepared until late 2023, briefing is unlikely to begin until 2024.

as drilling rigs, pump jacks, wells, flaring, tanks, pipelines, powerlines, roads, heavy truck traffic, and round-the-clock noise and lights, *id.* at 2-4, 4.15-2 to -3. This will result in unhealthy air quality, *supra* pp. 8–10; haze and smog, *id.*; degraded "visual aesthetics" of the landscape, FEIS at 4.10-5; decreased wildlife habitat and populations, *id.* at 4.18-4, -10–11, -15, -27, -29, -45, -62, -67–68, -73, -86; fewer opportunities for hiking, hunting, solitude, scenic drives, and wildlife viewing, *id.* at 4.10-5; "diminished recreational and/or tourist experience," *id.* at 4.7-3, 4.11-50, 4.5-3; "volumes of heavy truck traffic" that pose "safety concerns" for residents, *id.* at 4.11-50; round-the-clock flaring and lighting that noticeably deteriorate night skies and stargazing, *id.* at 4.15-4; "intrusive" noise levels that have "substantial impacts" on residents within a 1/3 mile radius of well sites in excess of EPA guidelines, *id.* at 3.7-1, 4.7-3; strains on public services and infrastructure; *id.* at 4.11-49; "increases in crime and social problems," *id.* at 4.11-49; harms to the "lifestyle, quality of life and property values" for local residents, *id.* at 3.11-76, and "dissatisfaction for residents, visitors, and others that value these resources and landscapes," *id.* at 4.11-50, 5-46. Even BLM does not claim the landscape will ever fully recover. *See id.* at 5-51 ("majority" of lands would never be "returned to their preconstruction state"); *id.* at 4.14-7 to -8.

Impacts will be unusually severe for two key reasons. First, as explained above, over half of the Project's surface disturbance is from Fee/Fee/Fed wells which will have essentially no federal oversight, and the entire project lacks the air quality controls EPA implored BLM to adopt. Second, the Project is interspersed between rural homes and ranches, many owned by Plaintiffs' members. These individuals will suffer disruption to their health, safety, daily activities, and well-being. *See id.* at 4.11-50 (conceding Project will likely "diminish[] their quality of life"); *see also* Molvar Decl. Ex 1 (describing impacts of fracking and drilling project

in a nearby community). Such concerns are "heightened by the fact that Converse County does not have a zoning ordinance," meaning "industrial land uses can and do occur in relatively close proximity to residential land uses." FEIS at 3.11-75.

Plaintiffs' members are among those with deep connections to the lands and resources that will be irreversibly harmed if this Project is not enjoined. *See* Anderson Decl. ¶ 10; Molvar Decl. ¶ 12; Katherman Decl. ¶¶ 2, 3, 5; Turner Decl. ¶¶ 3–5; O'Toole Decl. ¶¶ 9–10, 15. For instance, one Plaintiff member has lived on a ranch in the Project area for 30 years, and explains how intensified oil and gas development would impact her daily life, including health impacts, smog and haze, hazardous truck traffic, noise and light pollution, social problems, the "decrease[d] . . . feeling of rural solitude," and the "obvious and intrusive scar on the landscape." Katherman Decl. ¶¶ 7–22. Another member lives just 15 miles from the Project boundary—on land his family homesteaded in 1918—and explains how the project will "take a toll on our health, our air, our water, our wildlife, our livelihoods, and our rural quality of life" and cause "daily stress." Turner Decl. ¶¶ 8, 12, 19.

These and other members regularly use the Project area for hiking, wildlife viewing, birdwatching, spiritual renewal, scenic drives, wildflower spotting, and a sense of solitude. *See* Anderson Decl. ¶¶ 8–16; Molvar Decl. ¶¶ 12, 18–22, 24; O'Toole Decl. ¶¶ 6, 9–14; Katherman Decl. ¶¶ 8, 12–19; Turner Decl. ¶ 18. They will be irreparably harmed by the aesthetic changes; dust, fumes, flares, and noise; scarcity of wildlife; and lost recreational opportunities. *See* Anderson Decl. *Id*. ¶¶ 17–22; Molvar Decl. ¶¶ 19–26; O'Toole Decl. ¶¶ 8, 11–14; Katherman Decl. ¶¶ 8–20; Turner Decl. ¶ 18.

These types of irreparable harm warrant injunctive relief. For example, in *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service*, 657 F. Supp. 2d 1233, 1240 (D. Colo.

2009), the court found drilling just two oil and gas wells would cause irreparable harm from traffic, lights, noise, aesthetic changes, environmental damage. Other courts have found that exposure to harmful air pollutants constitutes irreparable harm. *Sierra Club v. U.S. Dep't of Agric., Rural Utils. Serv.*, 841 F. Supp. 2d 349, 358 (D.D.C. 2012) (enjoining coal plant expansion where it would "emit substantial quantities of air pollutants that endanger human health and the environment"); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, 256 (D.D.C. 1972), *aff'd* 4 ERC 1815 (D.C. Cir. 1972) (finding irreparable harm from air pollution); *State v. BLM*, 286 F. Supp. 3d 1054, 1074 (N.D. Cal. 2018) ("[E]xposure to air pollution . . . will have irreparable consequences for public health."); *United States v. Gear Box Z Inc.*, 526 F. Supp. 3d 522, 528 (D. Ariz. 2021) (finding irreparable harm "obvious" because "[e]missions of harmful pollutants damage human health and the environment").

Courts also frequently enjoin projects to avoid destruction of wildlife habitat, sensitive landscapes, scenic beauty, and other environmental values. *See Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 323–26 (D.C. Cir. 1987) (affirming injunction based on destruction of "wildlife habitat, air and water quality, natural beauty, and other environmental and aesthetic values"); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995–96 (8th Cir. 2011) (finding irreparable harm from light and noise pollution, dust, wildlife impacts, and other environmental harms); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) (enjoining project due to irreparable harm from aesthetic and environmental injuries to public lands visitors); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 220–22 (D.D.C. 2003) (finding irreparable harm from reduced wildlife viewing opportunities for MBTA-protected species); *Citizen's Alert Regarding the Env't v. U.S. DOJ*, No. 19-cv-1702, 1995 WL 748246, at *10 (D.D.C. Dec. 8, 1995) (finding irreparable harm from project that would leave "behind a

blighted landscape"); *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422, 423–24 (D.D.C. 1970) (enjoining oil pipeline due to irreparable environmental damage).

Finally, the timing of correcting BLM's violations is crucial. The more time and resources invested in this Project, the greater the likelihood that compliance with NEPA and FLPMA will prove to be an empty gesture, depriving Plaintiffs of meaningful relief. Either the Operator Group "will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971). For this reason, "[w]hen a procedural violation of NEPA is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury." *Brady Campaign*, 612 F. Supp. 2d at 24; *see also Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding NEPA violation bolstered plaintiffs' case for a preliminary injunction); *Realty Income Tr. v. Eckerd*, 564 F.2d 447, 456–57 (D.C. Cir. 1977) (explaining that NEPA cases warrant preliminary injunctions so project does "not proceed . . . until the possible adverse consequences are known" and "to preserve for the agency the widest freedom of choice").

III. THE BALANCE OF HARMS FAVORS AN INJUNCTION.

The irreparable health and environmental harms described above outweigh any harm to the other parties from an injunction. BLM should face no harm from granting Plaintiffs this temporary relief, aside from a delay in royalties. And while an injunction may cause the Intervenor companies added costs and delay, it will avoid the far greater disruption of shutting down completed projects after a merits determination. Additionally, as the U.S. Supreme Court has recognized, where environmental damage is sufficiently likely, "the balance of harms will

usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (but finding injunction unwarranted because the asserted environmental injury was "not at all probable").

This Court has similarly concluded that financial harm does not outweigh irreparable public health or environmental harm. *See S. Utah Wilderness Alliance v. Allred*, No. 08-cv-2187-RMU, 2009 WL 765882, at *2 (D.D.C. Jan. 17, 2009) (finding "threat of irreparable harm to public land" from oil and gas development outweighed economic harms to lessees); *Citizen's Alert Regarding the Env't*, 1995 WL 748246, at *11 (economic costs of injunction did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated"); *Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 279 (D.D.C. 1985), *aff'd* 835 F.2d 305 (D.C. Cir. 1987) (harm to mineral lessees from prohibiting development outweighed by likelihood of permanent damage to public lands); *see also, e.g.*, *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004) ("financial concerns alone generally do not outweigh environmental harm"); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 786 (11th Cir. 1983) (finding irreparable environmental injury outweighed threatened monetary injury). For these reasons, the balance of harms weighs in Plaintiffs' favor.

IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION.

The requested preliminary injunction is also in the public interest. First, the public has a strong interest in maintaining environmental quality and public health. *Nat'l Wildlife Fed'n v. Andrus*, 440 F. Supp. 1245, 1256 (D.D.C. 1977) (noting public interest in "preservation of the natural environment"); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 528 F. Supp. 2d 625, 633–34 (S.D.W. Va. 2007) (noting public interest in environmental quality and human health). These interests weigh strongly in favor of an injunction here, because absent such relief,

the Project will create a blighted landscape, jeopardize wildlife, pollute the air, threaten water supplies, and alter the health and well-being of countless individuals who live, work, and recreate on this Delaware-sized landscape. The effects will not be confined to the Project area, either, as air pollution will reach other downwind states. FEIS at 4.1-20, -22, -29.

Second, the public has a substantial interest "in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citation omitted); *see also Wilderness Soc'y v. Morton*, 479 F.2d 842, 892–93 (D.C. Cir. 1973) ("scrupulous vindication of [federal law] . . . looms more important in the abiding public interest than the embarkation on any immediate or specific project"); *Sierra Club v. U.S. Dep't of Agric., Rural Utilities Serv.*, 841 F. Supp. 2d 349, 360 (D.D.C. 2012) (noting public interest in "compl[iance] with the requirements of NEPA"); *Brady Campaign*, 612 F. Supp. 2d at 26 ("There is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely."); *Fund for Animals*, 27 F. Supp. 2d at 15 (noting public interest in "meticulous compliance with the law by public officials" and "with NEPA"). Injunctive relief in this case would ensure that BLM complies with FLPMA and NEPA as Congress intended by properly evaluating and mitigating the serious impacts of the Project before further damage occurs.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant their motion for preliminary injunction to maintain the status quo during the pendency of this case.

Respectfully submitted this 13th day of March 2023.

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