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 SUMMARY JUDGMENT

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LIST OF ACRONYMS

APA	Administrative Procedure Act
APD	Application for Permit to Drill
BLM	Bureau of Land Management
CEQ	Council on Environmental Quality
CO_2e	carbon dioxide equivalent
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FLPMA	Federal Land Policy and Management Act
gpm	gallons per minute
MLA	Mineral Leasing Act
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
RMP	Resource Management Plan
ROD	Record of Decision

INTRODUCTION

Plaintiffs seek summary judgment on their claims against the Record of Decision (ROD), Environmental Impact Statement (EIS), and related amendment to BLM's Casper Resource Management Plan (RMP), for the Converse County Oil and Gas Development Project ("Converse County Project" or "Project"). The Converse County Project is a massive 5,000-well oil and natural gas development in Wyoming's Powder River Basin. Approved during the final weeks of the Trump administration by Defendants Bureau of Land Management et al. (BLM), the Project is a capstone of the prior administration's push for "energy dominance" in public lands management, and its efforts to relieve the fossil fuel industry from federal environmental safeguards, such as the Migratory Bird Treaty Act.

A chorus of expert agencies raised alarming comments about the Project's impacts—and BLM's failure to properly study or disclose them. Despite predicting that air pollution from the Project would drive regional air quality to unhealthy levels, BLM rebuffed requests from the U.S. Environmental Protection Agency (EPA), National Park Service, and other stakeholders to require routine emission controls, taking the unprecedented and erroneous stance that it "does not have authority" to require such measures. BLM also brushed aside concerns from the EPA and Wyoming State Engineer's Office about numerous errors in its groundwater modeling that led BLM to understate the severity of aquifer drawdowns. Finally, overriding sharp criticism from state and federal wildlife agencies, BLM capitulated to the developers' requests to waive "Timing Limit Stipulations" that ordinarily prohibit drilling near raptor nests during the nesting season to prevent Migratory Bird Treaty Act violations.

These lapses violated BLM's obligations under the National Environmental Policy Act (NEPA), Federal Land Policy and Management Act (FLPMA), and Administrative Procedure

Act (APA). Specifically, BLM violated NEPA in three ways: (1) by failing to take a "hard look" at groundwater impacts; (2) by failing to take a "hard look" at cumulative greenhouse gas emissions; and (3) by failing to consider reasonable alternatives commenters proposed to moderate the Project's impacts. BLM also violated the APA by resting on a legal error: the false claim that it lacks authority to require air quality mitigation measures. Finally, BLM violated the APA and FLPMA by waiving raptor Timing Limit Stipulations without considering—much less complying with—its duty to "prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b).

Accordingly, for the reasons explained below, Plaintiffs Powder River Basin Resource Council and Western Watersheds Project respectfully request that the Court grant their motion for summary judgment; vacate the ROD, EIS, and Casper RMP amendment; and remand to BLM for further proceedings.

FACTUAL BACKGROUND

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. WY_012420. 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 area consists of wide-open sagebrush and rolling grassland terrain, bordered to the south by the Laramie Mountains. *See* WY_012750; WY_012793. The northeastern corner of the Project falls within the Thunder Basin National Grassland, WY_012422, which contains some of the nation's last intact native prairie, O'Toole Decl. ¶ 11 (ECF No. 64-7); Molvar Decl. ¶ 18 (ECF No. 64-6). Although portions of the Project area have been affected by past oil and gas

development, it remains largely undeveloped, offering "a natural setting" and "panoramic landscapes" that support "a variety of outdoor recreational activities," such as wildlife watching, fishing, hunting, and horseback riding. WY_012610; WY_012634–37.

The Project will involve drilling and hydraulic fracturing ("fracking") roughly 5,000 wells, WY_012420, 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 infrastructure. WY_012464. The field will take roughly 10 years to develop, with each well continuing to produce for an estimated 30 years. WY_012420. Five major energy companies—Chesapeake Energy; Devon Energy; EOG Resources; Northwoods Energy; and Occidental Petroleum ("Operator Group")—were listed as partners on the Project. WY_013349.

On January 26, 2018, BLM released for public comment a Draft EIS for the Converse County Project. *See* WY_001183. It studied just 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, consisting principally of water recycling and clustering of wells to reduce surface disturbance. WY_001190–93. Plaintiffs submitted comments on the Draft EIS. WY_003387–410; WY_006329–41.

The action alternatives were nearly identical in their substantial air pollution, which BLM projected would lead to violations of National Ambient Air Quality Standards (NAAQS). *See* WY_012937–42. This prompted the EPA, National Park Service, and other stakeholders to request stronger air quality mitigation to "reduc[e] the possibility of public exposure to unhealthy levels of air pollution" and to protect surrounding National Parks from haze and nitrogen deposition. WY_016206; WY_004228–29; *see also* WY_008673–75 (meeting to discuss air

quality mitigation). Proposed measures included better dust abatement, lower-emitting equipment engines, flaring limits, and centralizing facilities to reduce traffic emissions. WY_012951; WY_012957–59. BLM rebuffed these requests, taking the blanket position that it "does not have authority to require application of [the measures]." WY_012951; WY_012959. The EPA and other commenters also requested that BLM consider an alternative moderating the pace of development, to reduce the severity of air quality impacts and the socioeconomic effects of a boom-and-bust cycle. *See* WY_004209; WY_004183; WY_006331; *see also* WY_011942; WY_013040. BLM declined to even study this alternative. WY_012492.

The Project will also lock in staggering amounts of new greenhouse gas emissions: by year ten, it will result in 69.5 million metric tons of carbon dioxide equivalent annually, WY_012964–65, roughly equivalent to 1.1% of total annual U.S. greenhouse gas emissions and the annual emissions from 1.2 million cars, *see* WY_012535; WY_012964–65. Significant methane emissions will come from venting, flaring, and equipment leaks at well sites. WY_006608; WY_042057–58; WY_013563.[1] Methane is a greenhouse gas roughly "28-36 times as potent as carbon dioxide," making methane "a prime target for near-term [greenhouse gas] reductions." WY_004203. Commenters thus requested that BLM consider requiring simple and proven fixes to cut methane emissions, such as flaring reductions or leak detection and repair. WY_004181; WY_004202–03; WY_004438; WY_004448–49; WY_004864–65; WY_006219. BLM again declined to even study this alternative. WY_012491–92.

[1] Venting and flaring are both processes for disposing of natural gas during production, for economic, operational, or safety reasons. Venting is the direct release of unignited gas. Flaring refers to the burning of gas. *See generally* BLM, *Interior Department Takes Action to Reduce Methane Releases on Public and Tribal Lands* (Nov. 8, 2022), https://www.blm.gov/press-release/interior-department-takes-action-reduce-methane-releases-public-and-tribal-lands.

The EPA and State Engineer's Office (Wyoming's water permitting agency) also raised significant concerns with BLM's modeling of groundwater drawdowns.[2] *See* WY_030509–13; WY_004268; WY_007490–91; WY_005400–01; WY_006247–53; WY_006333–34. The Converse County Project will require an estimated 108 million barrels of water each year, WY_013153—a staggering figure equivalent to all existing county groundwater uses combined, WY_013326. Prior energy development has already contributed to drawdowns of these same aquifers. WY_006575–79; WY_018368–70; WY_004268. The EPA and State Engineer's Office identified a slew of errors in BLM's groundwater model, including an orders-of-magnitude error in an essential parameter (specific storage value), WY_004651, unrealistically low pumping rates, WY_007490–92; WY_008248–49, and unrealistically low inputs for existing groundwater demand, *id*. BLM also failed to update the model after the Operator Group doubled their annual consumption estimate. *Compare* WY_011993 (assuming in model that "Project would consume an estimated 7,000 acre-feet per year") *with* WY_012467 (disclosing in EIS that Project would consume "approximately 14,000 acre-feet . . . per year"). The EPA and State Engineer's Office thus concluded that BLM substantially underestimated drawdowns. *See* WY_004651; WY_007490–92; WY_008248–49.

On April 26, 2019, BLM released a Supplemental Draft EIS to consider a revised Alternative B, that would amend the governing RMP to grant the Project a special exemption from longstanding non-eagle raptor "Timing Limitation Stipulations," under one of five options. *See* WY_008413–94; *infra* pp. 6–10. Plaintiffs submitted comments on the Supplemental Draft EIS. WY_008806–18; WY_008783–86; WY_008778–80. BLM issued the Final EIS on August

[2] "Drawdown" refers to the cone of depression in the water table caused by pumping water out of an aquifer. *See* WY_027057. Drawdowns can dry up existing wells, along with important ecological features like wetlands, seeps, and streams. *See* WY_004651.

10, 2020, again considering only three alternatives: Alternative A (no action); Alternative B (Operator's proposal); and Alternative C (modified proposal). *See generally* WY_012362–469.

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. WY_016735–37. The ROD also approved an amendment to the Casper RMP to exempt the Project from the raptor Timing Limitation Stipulations. WY_016738. Plaintiffs protested the RMP amendment during the allotted period. *See* WY_014375.

II. Raptor Timing Limit Stipulations and Casper RMP Amendment

The Converse County Project area, due to its largely natural and undeveloped character, provides important wildlife habitat to a variety of species, including raptors. WY_012865; WY_012869–70. The Project is located in the Central flyway, a migratory bird superhighway of sorts, and contains over 1,000 identified raptor nests. WY_012868; WY_012870; WY_012872. Over twenty species of raptors may occur in the Project area, including ferruginous hawk, osprey, peregrine falcon, great horned owl, and burrowing owl. WY_012869; WY_012872.

The Migratory Bird Treaty Act provides special protections for raptors and other migratory birds, making it unlawful "by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird" or "nest, or egg of any such bird," unless permitted by federal regulation. 16 U.S.C. § 703(a); *see also* 50 C.F.R. § 10.12 (defining "take"). Executive Order 13,186, entitled "Responsibilities of Federal Agencies to Protect Migratory Birds," also specifies actions federal agencies must take to implement the Act, including "avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources."

Raptors and their habitat are vulnerable to disturbance from human activity such as oil and gas development, particularly during their breeding season. *See* WY_012884; WY_013196;

WY_009508; WY_009567; WY_018441–42. Raptors "display a high degree of fidelity to nest sites and nesting territories." WY_018443. Noise and human activities near these nest sites can "disrupt breeding activities and successes," including by causing birds to flush from or abandon the nest. WY_013196–98; WY_018443. This can harm or kill the unattended eggs or nestlings, including through: (1) increased predation, (2) "ejection of eggs or young from the nest," (3) "premature fledging," (4) missed feedings, and (5) and "overheating, chilling or desiccation." WY_018443; *see* WY_016899–900. Oil and gas development near nests can also result in physical nest destruction, as well as physical harm to vulnerable fledglings. WY_013196; WY_018443. The flushing response "may increase energy expenditure during foraging and decrease energy ingestion," leading to premature mortality. WY_018443. Parents could also be killed or wounded as they move from the nest to forage, *see* WY_013189, through collision and electrocution from power lines, mortality from contact with burners, and harmful contact with toxic substances like oil byproducts in reserve pits. WY_013189–90; WY_013197. Generally, these adverse impacts increase with proximity to nest sites. WY_011526.

"[T]o prevent the 'take' of raptors, their young, and nests" from oil and gas development, federal land managers like BLM "commonly employ spatial and/or temporal nest protections to minimize the potential negative effects of human activities on nesting raptors." WY_009512. BLM's 2007 Casper RMP, which governs the Converse County Project, includes such requirements. WY_021960. To protect nesting raptors, the RMP includes "Timing Limitation Stipulations" prohibiting surface disturbance or occupancy within a 0.5-mile or 0.25-mile buffer of non-eagle raptor nests from February 1 to July 31, or until young birds have fledged. *Id.* BLM may grant exceptions on a case-by-case basis. *Id.*

At the request of the Operator Group, BLM considered five "Options" for amending the Casper RMP to provide the Converse County Project special relief from these timing limits to allow year-round development near raptor nests. *See* WY_008415–16. Option 1 would involve no change; Options 2 and 3 were the Operator Group proposals to water down these protections; Option 4 was BLM's more protective "preferred" alternative; and Option 5 was a more protective alternative from U.S. Fish and Wildlife Service that included a Migratory Bird Conservation Plan. *See* WY_008433–55. A Migratory Bird Conservation Plan—a concept endorsed by expert wildlife agencies, bird conservation groups, and state officials, *see* WY_008313–14; WY_008358–59; WY_008329; WY_011198–206; WY_014384; WY_004642—would have provided a life-of-the-project framework to avoid and minimize raptor impacts with a robust adaptative management strategy. *See* WY_012121–24; WY_004642; WY_008314.

The timing relief proposal generated significant controversy and debate. The U.S. Fish and Wildlife Service wrote BLM that it "do[es] not support requests to waive all discretionary timing limitations for projects such as this, since there would be risk of violating the MBTA," WY_011114, and warned that Option 3 would result in raptor declines, WY_008733. The Wyoming Game and Fish Department opposed BLM's plan, and specifically criticized Option 3. WY_008358. It explained that "the mitigation associated with this option amounts to a few best management practices, which should be implemented in any development scenario." WY_008358; *see also* WY_014373 ("From a biological perspective, the preferred alternative represents a maximum development scenario."); WY_008329 ("Wyoming Game and Fish Department is concerned that the options proposed by the operator group do not provide sufficient mitigation to protect raptors").

Joining these wildlife experts, Wyoming Governor Mead wrote BLM to criticize the decision to allow timing relief without a Migratory Bird Conservation Plan in place, asking BLM to balance "the desire for economic development" with its "responsibility for conserving our wildlife and the habitat upon which it relies." WY_008329. The National Audubon Society and other bird conservation groups also vehemently opposed the RMP amendment due to the excessive harm it would pose to raptors. *See* WY_011198–206; WY_010276–77; WY_008806–18; WY_008769–770; WY_014383; WY_015128–30. Even BLM staff experts questioned the propriety of the proposed timing relief. *See* WY_007807–48 ("Allowing the operators to make final decisions on development during nesting periods is a conflict of interest[.]").[3]

The ROD ultimately adopted a *new* Option 6, which is nearly identical to Option 3. WY_016737; WY_012478 (explaining Options 3 and 6 are "similar"); WY_016649 (changes in Option 6 not "[r]elevant to environmental concerns"). Both grant automatic relief from the timing limits, without approval from BLM, if the operator: (1) considers well-pad locations outside of the buffer and provides a rationale for developing within the buffer; (2) begins operations before the timing limit period and maintains continuous operations until completion; and (3) applies a list of minimal conservation measures. *Compare* WY_012107–09 (Option 3) *with* WY_016729–31 (Option 6). Both also require operator nest surveys to inform a later "Adaptive Management Plan" guiding future requests to waive raptor timing limits. *Id.* Option 6 differs in only a few insignificant ways, including a new cap of 98 instances of timing relief (meaningless because 98 is the total number anticipated, WY_013199), and a new requirement

[3] A former BLM staffer even filed a whistleblower suit alleging he was fired in retaliation for sounding the alarm about the Project's migratory bird impacts. *See* Scott Streater, *Whistleblower case ensnares senior BLM official*, E&E News (Feb. 11, 2022), https://www.eenews.net/articles/whistleblower-case-ensnares-senior-blm-official/.

for an operator-submitted "wildlife report" to assist BLM in identifying poor, remnant, or destroyed nests for which timing limits would not apply. *Compare* WY_012107–09 *with* WY_016729.

The cornerstone of Options 3 and 6 is the continuous-operations requirement, which relies on the "untested" hypotheses that commencing drilling before the nesting period might deter selection of the nest site, and that raptors still nesting near drilling might habituate to continuous operations. WY_008454–55. The Wyoming Game and Fish Department explained to BLM that it "disagree[d] with the broad assumption that a nesting raptor is tolerant of development activity, if the nest site is chosen while development is occurring," WY_008359, and explained that "continuous operations . . . is untested in terms of being an appropriate measure to avoid or minimize impacts to nesting raptors," WY_008358. BLM agreed with that assessment. WY_008455 (continuous operations requirement has "uncertain[] . . . effectiveness in reducing impacts to active nests."). BLM acknowledged that raptors could still occupy nests near ongoing drilling, causing nest disturbance and abandonment; reduced reproductive success; and impacts to bird fitness and survival, among other harms. *Id.*; WY_008463.

The Final EIS thus acknowledged that BLM's chosen Option 6 "could adversely impact or *increase the likelihood of a take of migratory bird species* and populations by causing raptor or other species nest abandonment, reduced reproductive success, the destruction of nests, and displacement from otherwise suitable seasonal habitat." WY_013196 (emphasis added).

The decision to drop this raptor protection despite risk of incidental take coincided with the Trump administration's efforts to weaken Migratory Bird Treaty Act rules to exempt energy companies from "incidental take." In March 2017, President Trump issued Executive Order 13,783, directing immediate review of "regulatory burdens" on oil and gas development. The

Migratory Bird Treaty Act arose as one such target. *See* U.S. Dep't of the Interior, Review of the Department of the Interior Actions that Potentially Burden Domestic Energy 32–33 (Oct. 24, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/interior_energy_actions_report_final.pdf. Two months later, the Solicitor of the Interior published an opinion drastically reinterpreting the Act to allow incidental take of migratory birds, abandoning its longstanding interpretation to the contrary. *See* U.S. Dep't of the Interior, Solicitor Opinion, M-37050, (Dec. 22, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf. This interpretation was soon overturned in federal court as conflicting with the "statute's unambiguous text." *Nat. Res. Def. Council v. U.S. Dep't of the Interior,* 478 F. Supp. 3d 469, 480, 487–88 (S.D.N.Y. 2020). Notwithstanding that ruling, and just days after the Converse County Project ROD was signed, the Trump administration codified M-37050 in a final rule interpreting the Migratory Bird Treaty Act as allowing incidental take. *See* Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134 (Jan. 7, 2021). The Biden administration has since repealed the rule. *See* 86 Fed. Reg. 54,642 (Oct. 4, 2021). The RMP amendment appeared to exploit this short-lived policy change sanctioning incidental take of migratory birds. *See* WY_013196; *see also* WY_014394.

LEGAL STANDARDS

I. Administrative Procedure Act (APA)

Under the APA, a reviewing court "shall" set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency

expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. National Environmental Policy Act (NEPA)[4]

NEPA is our "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1(a). Its purpose, in part, is "to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA requires federal agencies to prepare a "detailed statement" of the environmental effects of any major Federal action "significantly affecting the quality of the human environment." *Id.* § 4332(2)(C). This environmental impact statement (EIS) must consider "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided," and "alternatives to the proposed action." *Id.* § 4332(2)(C)(i)–(iii). The alternatives analysis is "the heart of the [EIS]," and must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. The EIS also must contain a "cumulative impact" analysis addressing "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" by any entity. *Id.* § 1508.7; *see id.* § 1508.25. A reviewing court must ensure the EIS took a "hard look" at the effects of the proposal, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–50 (1989), which means it must be "fully informed" and "well-considered." *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotation marks and citation omitted).

[4] Plaintiffs cite to the 1970 version of NEPA, https://www.govinfo.gov/content/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap55.htm, and the 1978 version of the Council on Environmental Quality (CEQ) NEPA regulations, https://www.govinfo.gov/content/pkg/CFR-2020-title40-vol37/pdf/CFR-2020-title40-vol37-chapV.pdf, pursuant to which the challenged actions were issued, WY_016736.

III. Mineral Leasing Act (MLA)

Under the MLA, 30 U.S.C. §§ 181 et seq., the Secretary of the Interior is responsible for regulating the development of federal minerals to "safeguard[] . . . the public welfare." *Id.* § 187. Specifically, the MLA provides that the Secretary "shall regulate all surface-disturbing 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." *Id.* § 226(g); *see also* 43 C.F.R. § 3101.1-2. The grant of rights in a federal mineral lease is also subject to numerous reservations of authority, including to impose reasonable measures concerning the siting, design, timing, and pace of development to "minimize[] adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources." U.S. Dep't of the Interior, Form 3100-11 §§ 4, 6;[5] *see also* 43 C.F.R. § 3101.1-2.

IV. Federal Land Policy and Management Act (FLPMA)

Oil and gas development must also be managed in accordance with BLM's organic act, FLPMA. 43 U.S.C. §§ 1701–87. In enacting FLPMA, Congress declared it to be the policy of the United States that public lands be managed:

> in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition, that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8). FLPMA mandates that the Secretary of Interior "shall . . . take any action necessary to prevent unnecessary or undue degradation of the [public] lands." *Id.* § 1732(b). This duty is "the heart of FLPMA." *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d

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

30, 33 (D.D.C. 2003). FLPMA further provides that BLM "shall" manage public lands "for multiple use and sustained yield." 43 U.S.C. § 1732(a). The definition of "multiple use" calls for "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).

ARGUMENT

I. BLM VIOLATED NEPA IN MULTIPLE RESPECTS.

A. BLM Failed to Take a Hard Look at Groundwater Drawdowns.

NEPA requires agencies to "take a hard look" at the environmental consequences of their actions, to foster both informed decisionmaking and public disclosure. *See Robertson*, 490 U.S. at 350. One significant consequence of an oil and gas project of this magnitude is groundwater drawdown, given the water-intensive nature of fracking. *See* WY_006441–47; WY_006457–60. The Converse County Project will use an estimated 108 million barrels of water each year during the ten-year drilling phase, WY_013153, as much as all existing groundwater users in the county combined, WY_013326. Because prior energy development has already contributed to aquifer drawdowns, WY_006575–79; WY_018368–70; WY_004268, groundwater availability was one of the chief concerns EPA and other stakeholders raised, *see* WY_030510–13 (EPA letter questioning "aquifers' abilities to sustain" Project); WY_004651; WY_004649–53; WY_008656–57 (EPA concerns over groundwater impacts); WY_004268 (state agency noting landowner reports that existing oil and gas activity has already dried up wells and disputing BLM claim of "negligible" groundwater impacts); WY_007490–91 (State Engineer's Office warning that BLM underestimated drawdowns); WY_005400–01 (landowner water concerns); WY_006247–50; WY_006333–34 (other commenter water concerns).

The EIS failed to take the requisite "hard look" at groundwater impacts. To assess the Project's effect on groundwater supplies, BLM relied on a "Groundwater Model Report" attached to the EIS. WY_011983–2074. It projected over 90-foot drawdowns for groundwater wells spaced 2,000-feet apart, WY_012059, but 22-foot drawdowns for highly dispersed wells, WY_012067, with cones of depression extending 3,500 feet around many wells, WY_012063. However, that Groundwater Model Report was rife with errors described below, resulting in a serious underestimation of drawdowns. By misleading the public and decisionmakers as to the Project's true impacts on groundwater supplies, BLM violated NEPA. *See Eagle County v. Surface Transp.*, 82 F.4th 1152, 1182–84 (D.C. Cir. 2023) (holding that agency violated NEPA's "hard look" mandate by underestimating wildfire risks posed by railway).

1. Specific Storage Value

The first error in BLM's groundwater model was its use of a specific storage value of .001.[6] *See* WY_012023. As EPA explained in comments, this model input was too high "by at least an order of magnitude," resulting in a "substantial underestimation of both the magnitude and extent of drawdown caused by pumping." WY_004651. BLM's only response to EPA was that it derived the specific storage value from the 2014 Powder River Basin Coal Review groundwater model. *See* WY_012179. BLM previously specified that the value came from the "Calibration of the Phase II Groundwater Model for the Powder River Basin Coal Review" ("ESI 2014"). WY_012023; *see also* WY_029768–831 (copy of "ESI 2014"). However, ESI 2014 does not report or otherwise support a specific storage value of .001. Indeed, its table purporting to list

[6] Specific storage describes an aquifer's capacity to release groundwater in response to pumping. *See generally* Chowdhury et al., *Multifactor Analysis of Specific Storage Estimates and Implications for Transient Groundwater Modelling*, 30 HYDROGEOLOGY J. 2183, 2183–84 (2022). A higher value results in a lower drawdown response. *See id.*; *see also* WY_004651.

specific storage values used in the groundwater model is *missing*. *See* WY_029783 ("Specific storage . . . values are listed in Table 2-2"); WY_029810 (empty section labeled "Tables"). In other words, BLM gave no viable explanation for this key model input.

Another record document *does* contain the specific storage values used in the Powder River Basin Coal Review groundwater model—and they are orders of magnitude smaller than .001. The "Task 1B Report for the Powder River Basin Coal Review Current Water Resources Conditions Groundwater Model Report" (2006) indicates that the model assigned a specific storage value between 1.0×10^{-5} (.00001) and 4.9×10^{-6} (.0000049) for the Wasatch and Fort Union aquifers, WY_018363, from which Project wells will pump, WY_012452. A subsequent 2017 update to the Powder River Basin Coal Review groundwater model also assigned a specific storage value of 1×10^{-5} (.00001) for the Wasatch and Fort Union aquifers, specifying that "[a]quifer parameters remained the same as in the [2014] Phase II model" which BLM claimed to reference.[7] This suggests BLM simply misplaced the decimal.

This defective model input had the effect of improperly minimizing the risk of drawdowns from this Project, and rendered BLM's analysis arbitrary and capricious. An agency's "model assumptions must have a rational relationship to the real world" and an agency

[7] *See* BLM, Powder River Basin Coal Review: Hydrological Technical Support Document, Addendum and Supplementary Data for the 2017 PRB Groundwater Model at 4 (June 2017), https://eplanning.blm.gov/public_projects/nepa/64842/150652/184868/Hydrological_TSDAddendumandSupplementary_Data_for_PRB_Groundwater_Model.pdf; ESI, Calibration of the 2017 Groundwater Model for the Powder River Basin at 6, Prepared for BLM (2017), https://eplanning.blm.gov/public_projects/nepa/64842/150651/184867/Calibration_of_2017Groundwater_Model_for_the_PRB.pdf. These government documents, publicly available at https://eplanning.blm.gov/eplanning-ui/project/64842/570, are subject to judicial notice and come within the exceptions to the extra-record evidence rule: "to enable [the Court] to understand the issues clearly" and because BLM's decision "is not adequately explained in the record before the court." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). These records plug the hole in ESI 2014 caused by its missing tables.

must "provide[] a complete analytic defense should the model be challenged." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1053–54 (D.C. Cir. 2001) (per curiam) (cleaned up); *see also Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204–05 (D.C. Cir. 2007) (invalidating agency decision where key aspects of supporting model were unexplained because agencies must "provide a complete analytical defense" of modeling choices). Moreover, "[a]gency action based on a factual premise that is flatly contradicted by the agency's own record" is arbitrary and capricious. *See City of Kansas City v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991); *see also Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 96–97 (D.D.C. 2017) (holding agency was arbitrary and capricious in basing analysis on assumption that was both unexplained and counter to record evidence); *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 812–13 (9th Cir. 2005) (finding NEPA analysis unlawful where it rested on flawed data agency misinterpreted from report, distorting results).

Here, even after challenged, BLM failed to reasonably explain or defend its specific storage value of .001. The agency's only proffered support is a report whose table of specific storage values is *blank*, and the remaining record—including EPA's expert comments and Powder River Basin Coal Review groundwater model reports—confirm BLM's chosen value was wrong by orders of magnitude. As EPA explained, this error alone resulted in a "substantial underestimation" of water drawdowns, WY_004651, violating NEPA's "hard look" mandate.

2. Groundwater Pumping Rate

The second error was BLM's use of unrealistically low pumping rates—for both new and existing wells. The groundwater model assumed that each new Project well would pump at between 81 and 100 gallons per minute (gpm). *See* WY_012063; WY_012047. For existing oil and gas water supply wells, BLM assumed a pumping rate of just 12.6 gpm, WY_012040–42.

However, the State Engineer's Office challenged these estimates with data showing that average appropriated rates for oil and gas supply wells in the Project area had risen to 150 gpm since 2014, WY_007490, that wells permitted since 2018 averaged 180 gpm, WY_008249, and that recently it had seen developers wanting 583 gpm, *id.*; WY_007490. The likely explanation is that today's longer wellbores and fracking methods require substantially more water. *See, e.g.*, WY_004355; WY_006575. Nonetheless, BLM declined to account for this trend or examine how more intense pumping would increase the drawdown around each well.

Agencies have a duty to use realistic modeling inputs, especially when challenged. *See Appalachian Power Co.*, 249 F.3d at 1053–54. They must also be attuned to new data and "deal with newly acquired evidence in some reasonable fashion." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (quoting *Catawba County v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009)); *see also State Farm*, 463 U.S. at 43 (agencies "must examine the relevant data"). Thus, where an agency is presented with better or more recent data, it must either *use* that data or *reasonably explain* its decision not to. *See County of Los Angeles v. Shalala*, 192 F.3d 1005, 1020–23 (D.C. Cir. 1999) (remanding where agency "inadequately explained" decision to rely on outdated dataset that pre-dated known trend); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56–57 (D.C. Cir. 2015) ("agencies do *not* have free rein to use inaccurate data" and ignoring "new and better data" violates the APA); *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1149 (10th Cir. 2016) ("[W]here there is a known and significant change or trend in the data . . . the agency must either take [it] into account, or explain why it relied solely on data pre-dating that change or trend."); *Sierra Club v. EPA*, 671 F.3d 955, 968 (9th Cir. 2012) (finding agency was "arbitrary and capricious in its reliance on old data without meaningful comment on the significance of more current compiled data.").

This is particularly true where another expert challenges the agency's data. *See Pub. Emps. for Env't Resp. v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016) (holding that agency violated NEPA by relying on geophysical "data so roundly criticized by its 'own experts'") (quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011) (holding that agency violated NEPA by giving "short shrift" to facts put forth by other experts)); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (where expert comments "disclose new or conflicting data or opinions . . . [t]here must be good faith, reasoned analysis in response.").

BLM violated these principles here. After the State Engineer's Office presented BLM with better data on current pumping rates, BLM did not modify its analysis, dispute the upward trend, or otherwise "reasonably deal" with the new data in any fashion. *See Portland Cement Ass'n*, 665 F.3d at 187. In fact, BLM failed to even *respond* to this pumping rate comment, itself a violation of NEPA. *See* 40 C.F.R. § 1503.4(a) (agencies "shall respond" to EIS comments by one of five specified means); *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1157 (D.C. Cir. 2012) (failure to address NEPA comment by wildlife expert was arbitrary and capricious); *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 168 (D.C. Cir. 2014) ("agency's failure to respond meaningfully to objections raised by a party" is arbitrary and capricious) (cleaned up). BLM merely acknowledged the comment, without responding, then proceeded to address other critiques of its groundwater model (e.g., assumption of even well distribution). WY_012307.

In sum, BLM failed to account for the upward trend in pumping rates or reasonably explain its failure to do so. By using unrealistically low pumping rates, BLM further distorted the projected groundwater drawdowns, violating its "hard look" duty.

3. Annual Consumption Rate and Recycling Assumption

The third error was the model's input for annual Project groundwater consumption. The model assumed the Project will require 7,000 acre-feet of groundwater per year. *See* WY_011993. However, the Operator Group later *doubled* its projected water consumption to 14,000 acre-feet per year. WY_013153. To avoid updating the model, BLM claimed this "would not increase the use of groundwater as the additional water would be expected to come from water recycling and leasing of existing surface water." WY_012179.

BLM offered no rational basis for that critical assumption, which the record contradicts. As for surface water, the EIS was clear that groundwater would supply the vast majority of Project demand. *See* WY_012451 (suggesting 700 of the 14,000 acre-feet per year will come from surface water); WY_001072 ("Water for the proposed project would primarily be obtained from existing and proposed groundwater supply wells."); WY_013153 ("Water for drilling operations primarily would be from groundwater sources"). Thus, the central assumption driving the "no increase" claim was that the operators would recycle enough water to offset the doubling of demand. This assumption was also unreasonable, for several reasons.

The recycling claim originated in comments from the Operator Group, which declared that groundwater use should not increase despite their higher demand because the "Operator Group anticipates relying on . . . recycling of flowback water." WY_005442; *see also* WY_004355 (similar letter). However, the companies did not match this aspiration with substance, such as recycling statistics or commitments. *See* WY_005442; WY_004355. To the contrary, the very same letter claimed the Operator Group could not achieve a 50% recycling rate by year five of the Project—halfway through the period of intense water demand. Alternative C had proposed "an incremental water recycling plan" requiring that just 10 percent of well pads

recycle water in the first year, continuing incrementally up to 50 percent in years 5 through 10, thus reducing water demand by 40 percent overall. WY_013159. The Operator Group claimed this was "infeasible." *See* WY_005443.

BLM rightly asked the Operator Group to substantiate its claim that groundwater use would not increase where there was no commitment of recycling. WY_011453. The best it could offer was that one member "hopes" to use up to 60% recycled water in a *different* field. *Id.* However, the economic feasibility of water reuse varies considerably by location, based on factors such as recycling infrastructure; the cost of fresh water or wastewater disposal; and the characteristics (quality, quantity, and duration) of produced water. *See* WY_001081; WY_011453. The Operator Group offered no evidence of recycling rates in the Project area itself, conceded one member viewed a 50% recycling rate in the Project area "as aggressive," said it would not commit to recycling any amount of Project water, and again merely said that it expected recycling to increase *in the future.* WY_011453. On that basis, BLM somehow found it reasonable to conclude that water recycling would immediately offset roughly half of the Converse County Project's annual water demand.

That unsupported recycling assumption violated BLM's "hard look" duty. Agencies cannot base their NEPA analysis on this type of tenuous assurance of mitigation. *See Am. Rivers v. FERC*, 895 F.3d 32, 53–54 (D.C. Cir. 2018) (holding agency violated NEPA where it "blithely assumed" mitigation would maintain dissolved oxygen levels without information on "what aeration system will be implemented, or when"); *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1197 (D. Colo. 2014) ("The agency cannot rely on unsupported assumptions that future mitigation technologies will be adopted."). Moreover, agency assumptions must always be "adequately explained and justified." *Am. Pub. Gas Ass'n v.*

Fed. Power Comm'n, 567 F.2d 1016, 1037 (D.C. Cir. 1977); *see also Eagle County*, 82 F.4th at 1183–84 (finding that unsupported assumption regarding wildfire risk violated NEPA); *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 49–50 (D.D.C. 2020) (finding that an "agency's predictive judgment" must have "adequate record or explanation"). BLM violated these principles by assuming, without reasonable explanation, that recycling would completely offset their doubled demand such that groundwater use would not increase. *See* WY_012179; WY_012452 (making claim without support).

Although the Operator Group itself claimed recycling would somehow offset its higher water demand, BLM failed to "independently evaluate" that self-serving statement, as NEPA requires. *See* 40 C.F.R. § 1506.5(a) ("The agency shall independently evaluate the information submitted" by the applicant); *see also Am. Rivers*, 895 F.3d at 50 (agency's NEPA analysis cannot rely on information from applicant "without any interrogation or verification"); *Hammond v. Norton*, 370 F. Supp. 2d 226, 247, 251–52 (D.D.C. 2005) (agencies must independently analyze applicant's "self-serving statements or assumptions"). The record is devoid of any evidence that BLM investigated the companies' sudden recycling ambitions, such as by requesting information on their current recycling rates in the Project area; assessing planned improvements in recycling infrastructure in the Project area; or determining actual recycling rates and trends in the Project area based on its own files. This was readily possible, as every drilling permit application submitted to BLM must contain a "Surface Use Plan of Operations" that details the water supply source (such as surface, ground, or recycled water) and means of wastewater disposal (such as injection or recycling). *See* 43 C.F.R. § 3171.8(e)(5), (7). BLM's failure to use some reasonable means to substantiate its assumption of significant water recycling violated its "hard look" duty. *See Am. Rivers*, 895 F.3d at 50, 54.

This is especially true where the record *contradicts* that assumption. BLM itself questioned the Operator Group's recycling claim given its contradictory assertion that achieving a 50 percent recycling rate by year 5 was infeasible. WY_011453. Moreover, the only reasonable inference from the Operator Group's hope that recycling "will become economic at some point," WY_005442, is that recycling is *not currently* economic or prevalent. Others said this more explicitly: "the recycling of production water in Converse County is not technologically feasible to conduct economically." WY_005401; WY_006215. And, as the Operator Group also conceded, the "timing and volume of recycling cannot be predicted." WY_005442.

In sum, the record does not reasonably support BLM's assumption that nearly half of Project water would come from recycling, rather than groundwater. This error further concealed the magnitude of its drawdown impacts, violating BLM's "hard look" mandate.

4. Existing Groundwater Wells

A further flaw was BLM's use of outdated data on existing groundwater extraction. Although the groundwater model purportedly accounted for withdrawals from existing groundwater wells, WY_011998–99; WY_012027–28; WY_012037, it used outdated data from a 2014 "Water White Paper" that included only 466 wells and failed to account for a sizable demand spike after that date. *See* WY_012037. As the State Engineer's Office wrote to BLM, there was a 46 percent increase (214 new wells) in permitted wells from 2014 to March 2018, the majority for oil and gas supply. WY_007490. Another 35 wells were permitted from March to September 2018 alone, WY_008249, bringing the total increase to 53 percent. The State Engineer's Office thus warned that "the groundwater modeling may have underestimated existing ground water withdrawals." WY_007491; *see also* WY_008249.

BLM was required to "deal with [this] newly acquired evidence in some reasonable fashion." *Portland Cement Ass'n*, 665 F.3d at 187. Instead, in response to the State Engineer's Office, BLM said only that this "measurable increase" in other water uses, along with a larger estimate of Project water consumption, "raise questions about water use and availability." WY_013154. Yet rather than *answer* those questions through reasonable forecasting, as NEPA requires, BLM simply remarked that the State Engineer's Office had authority to take action if existing water users were affected. However, "the existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Sierra Club v. FERC* ("*Sabal Trail*"), 867 F.3d 1357, 1375 (D.C. Cir. 2017); *see also Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1103–04 (9th Cir. 2016) (flaw in NEPA analysis of air impacts not excused by state Clear Air Act oversight). BLM violated its NEPA duty to examine how the spike in other water uses would exacerbate impacts.

For all four reasons, BLM violated NEPA for failing to take a "hard look" at groundwater drawdown impacts. The groundwater model was rife with errors, resulting in a seriously misleading analysis of groundwater drawdowns that undermined NEPA's core purposes of informed public comment and agency decisionmaking on this critical issue.

B. BLM Failed to Take a Hard Look at Cumulative Greenhouse Gas Emissions.

BLM also violated NEPA by failing to adequately analyze the cumulative greenhouse gas emissions of this Project together with other emissions sources. NEPA requires agencies to study the cumulative impact of a proposed action "when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. §§ 1508.7, 1508.8; *see also Sierra Club v. FERC* ("*Freeport*"), 827 F.3d 36, 49 (D.C. Cir. 2016). A proper cumulative effects analysis for greenhouse gas emissions must therefore (a) "quantify the emissions from each . . . past, present,

or reasonably foreseeable" projects "in the region and nation," and (b) "compare those emissions to regional and national emissions, setting forth with reasonable specificity the cumulative effect" when added to the proposed action. *WildEarth Guardians v. Zinke* ("*Guardians I*"), 368 F. Supp. 3d 41, 77 (D.D.C. 2019).

BLM violated these standards here by failing to quantify the greenhouse gas emissions from other reasonably foreseeable future projects, including the future oil and gas projects identified in Table 5.2-1 of the EIS. Instead, the cumulative effects analysis for climate change simply compared the emissions from each Project alternative to *existing* local, state, and national emissions—figures which did not encompass future developments. *See* WY_013292–95.[8] The EIS thus failed to "quantify the emissions from each . . . past, present, or reasonably foreseeable" project "in the region and nation." *Guardians I*, 368 F. Supp. 3d at 77.

The Court's ruling on Plaintiffs' preliminary injunction motion found that BLM's cumulative effects analysis incorporated the reasonably foreseeable future projects in Table 5.2-1 through its assessment of Alternative A, pointing to Table 5.3-7 as purportedly containing that

[8] These local, state, and national emissions totals only encompassed sources in existence as of some historic date (between 2014 to 2020). In fact, most were incomplete even as to existing emissions sources as of that date. For local emissions, BLM relied on: (1) an estimate of the 2020 emissions from federal oil and gas wells in the Casper Field Office, which excluded state and private wells; wells outside sage-grouse habitat; and all other sources (e.g., coal mining, oil and gas processing facilities), WY_013293; and (2) an estimate of 2014 emissions from oil and gas wells in the Casper Field Office, which excludes existing wells drilled after 2014 and all other sources, WY_013293. For statewide emissions, BLM relied on: (1) EPA data on 2017 emissions by large Wyoming facilities, which excludes "[r]oughly half" of total emissions, including from onshore oil and gas production, https://ghgdata.epa.gov/ghgp/main.do (click "What's this?" next to "Facility Type" and see red flag in footer after selecting "Wyoming"); (2) an estimate of the emissions attributable to fossil fuel extraction on Wyoming federal lands in 2014, which excludes state and private projects; all other emissions sources; and existing projects built after 2014; and (3) an estimate of the indirect emissions from oil and gas produced in Wyoming in 2018, which again excludes all other emissions sources. WY_013294. None of these figures was broken down such that the holes could be plugged by reference to a subset of another inventory.

analysis. Mem. Op. at 27–28 (ECF No. 105). This misreads the EIS. First, BLM's analysis of Alternative A only included the subset of new projects that fall within the Converse County Project Area itself. *See* WY_012455; WY_012459–60. It excluded all projects listed in Table 5.2-1 as being "Outside the CCPA," such as Greater Crossbow, Cole Creek, Mary's Draw, Salt Creek, and coalbed methane development in BLM's Buffalo Field Office. *Compare* WY_013275–76 (Table 5.2-1) *with* WY_012459–60 (listing projects included under Alternative A). Alternative A thus excluded the bulk of new activity projected in Table 5.2-1. Second, in addition to being incomplete, BLM never incorporated the results of Alternative A into a discussion of "overall impact" when added to the Project. *Freeport*, 827 F.3d at 49. The cumulative effects discussion simply reported the emissions of Alternatives A and B in isolation, WY_013293, then compared each number individually to the inventories, WY_013293–94. The public was left to guess whether the emissions from Alternatives A and B could or should be added together. *See Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002) (cumulative effects analysis "must give a realistic evaluation of the total impacts"); *Guardians I*, 368 F. Supp. 3d at 69 (possibility of do-it-yourself calculations by interested citizens did not "relieve BLM of its burden to consolidate the available data" itself). In short, Alternative A did not encompass all future projects, and it was also never employed in a true cumulative effects analysis for the Project's greenhouse gas emissions.

Case law confirms that BLM's omission of foreseeable future projects renders its cumulative impacts analysis inadequate. In *Guardians I*, another judge in this district enjoined development of BLM oil and gas leases because the supporting NEPA analysis of cumulative greenhouse gas emissions omitted other "reasonably foreseeable BLM lease sales in the region and nation." 368 F. Supp. 3d at 76–77. In a follow-up decision, *WildEarth Guardians v.*

Bernhardt ("*Guardians II*"), 502 F. Supp. 3d 237 (D.D.C. 2020), the court found BLM's cumulative effects analysis deficient again because it only quantified emissions from future lease sales in Wyoming, omitting those "in neighboring states or the greater region." *Id.* at 249–51. Other courts are in accord. *See 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 emissions of present and foreseeable future fossil fuel developments); *WildEarth Guardians v. U.S. BLM*, 457 F. Supp. 3d 880, 894 (D. Mont. 2020) (similar).

So too here: BLM's failure to account for the cumulative greenhouse gas emissions of all foreseeable future projects, including those in Table 5.2-1, violated NEPA. This omission is particularly troubling given the scale of new fossil fuel developments BLM itself is approving in this region. "[I]f BLM ever hopes to determine the true impact of its projects on climate change, it can do so only by looking at projects in combination with each other, not simply in the context of state and nation-wide emissions. Without doing so, [BLM] . . . cannot determine whether, or how, to alter [its decisions] to lessen cumulative impacts on climate change." *Id.* (cleaned up); *see also Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1217 (9th Cir. 2008) ("climate change is precisely the kind of cumulative impacts analysis that NEPA requires" because of its cumulative nature); *City of Los Angeles v. NHTSA*, 912 F.2d 478, 501 (D.C. Cir. 1990) (Wald, C.J., dissenting) ("If global warming is the result of the cumulative contributions of myriad sources" there is a "danger of losing the forest [through the trees].").

C. BLM Failed to Consider All Reasonable Alternatives.

BLM also violated NEPA by unreasonably eliminating proposed alternatives from detailed study in the Final EIS. An EIS must study "all reasonable alternatives" to the agency's proposed action. 40 C.F.R. § 1502.14(a); 43 C.F.R. § 46.420(c); *see also* 42 U.S.C.

§ 4332(C)(iii). The alternatives analysis is the "heart" of NEPA and "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and . . . options" before the decisionmaker. 40 C.F.R. § 1502.14.

Thus, "[w]here the agency omits an alternative but fails to explain why that alternative is not reasonable, the EIS is inadequate." *High Country Conservation Advocs. v. U.S. Forest Serv.*, 951 F.3d 1217, 1224–25 (10th Cir. 2020); *see also Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575–77 (D.C. Cir. 2016) (finding agency violated NEPA by eliminating reasonable alternative); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) ("The existence of a viable but unexamined alternative renders an [EIS] inadequate."); *DuBois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996) (same). An alternative is "reasonable" if it is "technically and economically practical or feasible and meet[s] the purpose and need of the proposed action." 43 C.F.R. § 46.420(b). Although an agency need only "briefly discuss" its reason for eliminating an alternative as unreasonable, 40 C.F.R. § 1502.14(a), the explanation must be rational. "NEPA and the APA require agencies to act reasonably in eliminating alternatives from detailed study." *High Country Conservation*, 951 F.3d at 1227.

BLM here violated NEPA by declining to consider two proposed alternatives without establishing that those alternatives were not "reasonable."

1. Reduced Rate of Development Alternative

Commenters requested that BLM consider an alternative that would moderate the pace of development, such as by limiting the number of wells each operator could drill every year. *See* WY_004183; WY_004180; WY_006331; WY_004209. They noted that although Alternative C would concentrate development onto fewer well pads, Alternatives B and C entailed the same rate of development and do not meaningfully differ as to air quality impacts. *See* WY_006331;

see also WY_012377. A more steady, controlled pace of development would have reduced the severity of air quality impacts, WY_020275; WY_004209; reduced the strains on community roads, schools, hospitals, and housing; and tempered other socioeconomic effects of a boom-and-bust cycle. *See* WY_011942; WY_013040 (noting benefits of a "well-defined and steady pace of development"); *see also* Katherman Decl. ¶ 24 (ECF No. 64-4) (explaining that "[s]imply slowing down the pace of development would have so many advantages" for the community).

BLM staff also recognized the need to consider this type of alternative saying: "we need to go back to the Operators and ask them how they can control the rate of development through both spatial and temporal means. I do not think as it stands now, there is a reasonable range of alternatives for comparison purposes." WY_000251. In fact, the governing Casper RMP lists "[r]educed rate of development" as an air quality mitigation measure available to BLM, WY_020275, and BLM has studied such an alternative for other Wyoming oil and gas projects. *See, e.g.*, WY_026857 (analyzing limits of 75, 150, or 250 wells / year for Jonah Infill project).

Nonetheless, BLM declined to study a reduced-rate-of-development alternative here on several grounds, all meritless. The first was that BLM supposedly lacks "authority to infringe upon existing lease rights by imposing limits on the pace of development." WY_012492. That is flat wrong. Federal oil and gas leases explicitly reserve to BLM the right to specify "rates of development" and to impose reasonable measures to "minimize[] adverse impacts to the land, air, and water, to cultural, biological, visual, and other Resources." *See* U.S. Dep't of the Interior, Form 3100-11 §§ 4, 6; *see also* Fluid Mineral Leases and Leasing Process, 88 Fed. Reg. 47,684, 47,573 (Jul. 24, 2023) (explaining that BLM has the "right to specify rates of development and production").

BLM's second reason was that a slower rate of development would be inconsistent with "the purpose and need for the agency action." WY_012492. That is also wrong. BLM's stated "purpose and need" was as follows:

> The need for a federal (BLM and USFS) action is to respond to this proposal while allowing the OG to exercise its valid lease right. . . . The purpose of this EIS is to evaluate potential impacts resulting from implementing future plans and applications related to this proposal; to facilitate the decision-making process to approve, approve with modifications, or disapprove the proposed project or project components based on an evaluation of the expected impacts; *and to the extent possible, minimize or avoid environmental impacts*.

WY_012370 (emphasis added). Imposing a slower rate of development would meet this purpose and need by allowing operators to develop their leases—just more slowly—while "avoid[ing] environmental impacts." This alternative was thus consistent with BLM's purpose and need.

BLM's third reason was that this alternative "would not address a known resource conflict." WY_012492. This is nonsensical. At a minimum, BLM acknowledged that "a reduction in the number of wells drilled in a year may result in a reduction in air emissions," *id.*, thus addressing a resource conflict between fossil fuel extraction and air quality.

BLM's fourth reason was that it could apply no limit to the one-third of the Project area underlain by private minerals. *Id*. However, this fact does not prohibit BLM from pacing development of federal oil and gas deposits, which account for two-thirds of the Project area. An agency cannot disregard a less harmful alternative merely because it does not wholly eliminate an impact. *See Union Neighbors United*, 831 F.3d at 575–77 (finding agency was required to consider NEPA alternative that would lessen harm to bats); *Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) (agency cannot "disregard alternatives merely because they do not offer a complete solution to the problem").

BLM's final reason was that "the action alternatives already considered reduced effects by limiting the number of well pads in the CCPA." WY_016758. However, Alternatives B and C were essentially identical in their air quality impacts, as they entailed the same number of wells drilled at the same rate, leading BLM to conclude that they "would vary only slightly" in air emissions. *See* WY_012377; *see also* WY_012961. Neither action alternative considered meaningful reductions to air pollution. Accordingly, the reduced rate of development alternative was significantly distinguishable from the existing alternatives and thus reasonable. *See Union Neighbors United*, 831 F.3d at 577 (rejecting attempt to eliminate alternative on the basis that others "already considered" measures to reduce effects, because "the impacts would be different" under the eliminated alternative); *High Country Conservation*, 951 F.3d at 1226 (rejecting agency's rationale that rejected alternative was "not significantly distinguishable" because "the two alternatives would result in significantly different environmental impacts").

In sum, BLM failed to show that this reduced-rate-of-development alternative was unreasonable, rendering its EIS inadequate. *See* 40 C.F.R. § 1502.14(a); *High Country Conservation*, 951 F.3d at 1227 ("Where the agency omits an alternative but fails to explain why that alternative is not reasonable, the EIS is inadequate.").

2. Greenhouse Gas Reduction Alternative

BLM also unreasonably eliminated an alternative that would have reduced the Project's greenhouse gas emissions. Both action alternatives were identical in their greenhouse gas emissions and resulting climate impacts. WY_012966. Commenters thus requested that BLM consider an alternative requiring simple fixes—such as more efficient flaring or leak detection and repair—to reduce emissions of methane, a potent greenhouse gas. WY_004181, 202–03; WY_004438; WY_004448–49; WY_004864–65; WY_006219; WY_006338. In addition to

reducing greenhouse gas emissions, these measures would reduce ground-level ozone, benefit human health, and prevent royalty losses from wasted oil and gas. *See* WY_004203–04; WY_013296; WY_006610; WY_006623.

BLM eliminated this alternative on the ground that it is "not technically feasible to conduct full carbon-neutral processes," including because "venting and flaring are conducted for safety reasons and cannot be fully avoided." WY_012491–92. Even if true, the infeasibility of eliminating all greenhouse gas emissions does not cast doubt on the feasibility of *reducing* them. As commenters explained, "BLM's 'all or nothing' approach is nonsensical," WY_004183, because "reducing some greenhouse gas emissions is feasible." WY_004438. BLM's own response acknowledged the array of available emissions reduction measures. WY_012491. Likewise, even if BLM cannot eliminate *all* flaring and venting emissions, it can feasibly *reduce* them, such as by limiting flaring to emergency or unavoidable situations, WY_006348, or requiring "high-efficiency" flares, WY_004207.

At bottom, BLM did not establish that this alternative was unreasonable. By restricting its alternatives analysis to choices that had no effect on greenhouse gas emissions, BLM left unexamined an array of feasible and effective options for tackling this climate change concern, subverting the core purpose of NEPA. *See* 40 C.F.R. § 1502.14 (alternatives analysis must "sharply defin[e] the issues" and provide a "clear basis for choice among options"). BLM's failure to consider this alternative or explain why it was unreasonable rendered the EIS inadequate. *See id.*; *High Country Conservation*, 951 F.3d at 1224–25.

II. BLM IMPROPERLY DISCLAIMED AUTHORITY TO REQUIRE AIR QUALITY MITIGATION MEASURES.

Agency action cannot withstand APA review if it is based on an erroneous legal premise, *SEC v. Chenery Corp.* ("*Chenery I*"), 318 U.S. 80, 94 (1943), or reflects an unexplained

departure from a prior position, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016). BLM violated both tenets here by refusing to impose air quality mitigation measures in the Converse County ROD.

BLM's own models forecasted that the Project would worsen air quality across a broad region, WY_012937–38, 48–50, leading the EPA, National Park Service, and others to call on BLM to impose mitigation to "reduc[e] the possibility of public exposure to unhealthy levels of air pollution" and to protect surrounding National Parks from haze and nitrogen deposition. WY_016206; WY_004228–29. Proposed measures included: (1) use of Tier 4 diesel, natural-gas, or bi-fuel engines for drilling and well completion; (2) electrification of compressor and drill rig engines; (3) a lower NOx limit on equipment engines; (4) flaring limits; (5) traffic reduction measures, like centralizing facilities; and (6) better dust abatement. *See* WY_012951, 57–59. These measures would have resulted in significant reductions—up to 90%—of various harmful pollutants. WY_012951. Nonetheless, BLM declined to impose any of them, taking the blanket position that it "does not have authority to require application of [the measures]." WY_012951, 59. This was BLM's rationale for rejecting air quality mitigation across the entire Project, including on federal lands and split-estate lands (64% of the Project area) where its policy on Fee/Fee/Fee wells, PIM 2018-014, does not apply. *See* WY_012421.

As explained below, BLM's disclaimer of authority was doubly arbitrary: once for getting the law wrong, and again for departing without explanation from BLM's longstanding position on its legal authority to impose air quality mitigation. For both reasons, the Converse County ROD must be set aside under the APA, 5 U.S.C. § 706(2)(A).

A. BLM Rested on an Erroneous Legal Premise.

The APA requires agencies to engage in "reasoned decisionmaking." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). It also requires an agency to "defend its actions based on the reasons it gave when it acted." *Id.* at 1909. Thus, if the grounds an agency itself gave when it acted "are inadequate or improper, the court is powerless to affirm the administrative action." *See SEC v. Chenery Corp.* ("*Chenery II*"), 332 U.S. 194, 196 (1947).

Equally well established is the principle that agency action based on an erroneous legal premise cannot withstand APA review. *See Chenery I*, 318 U.S. at 94 (agency decision "may not stand if the agency has misconceived the law"); *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). This is no less true when the agency mistakenly believes the law compels some outcome, but that same outcome *could* have been justified as a matter of discretion. "An agency action, however permissible as an exercise of discretion, cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law.'" *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646 (D.C. Cir. 1998) (*quoting Prill*, 755 F.2d at 947). This is because "discretion must be exercised through the eyes of one who realizes she possesses it." *Transitional Hosps. Corp. v. Shalala*, 222 F.3d 1019, 1021, 1029 (D.C. Cir. 2000) (reversing "because the Secretary mistakenly believed that she lacked [the] discretion" to do what commenters requested); *St. Vincent's Med. Ctr. v. Burwell*, 222 F. Supp. 3d 17, 23 (D.D.C. 2016) (finding it "of no consequence" that the agency could have reached same result as "an exercise of its discretion" because agency believed it lacked discretion).

Applying these principles, the question presented here is whether BLM has authority to condition its approval of oil and gas projects on the implementation of certain technologies or

practices to minimize air pollution. If BLM was wrong in claiming that it lacks such authority, then the ROD rested on a legal error and must be set aside. Again, this is true even if BLM had the discretion but no *obligation* to impose this mitigation. *See Sea-Land Serv.*, 137 F.3d at 646; *Transitional Hosps.*, 222 F.3d at 1029.

The answer is unequivocally yes, particularly since BLM now admits it has such authority—including to impose the specific measures it rejected here on the "no authority" rationale. *Compare* WY_012959 (disclaiming authority to require better dust abatement and reduce truck emissions) *with* Defs.' Resp. to Mot. For Prelim. Inj. at 23 (ECF No. 83) ("BLM has broad authority to impose mitigation measures . . . that would mitigate impacts to air resources."); *id.* at 24 ("BLM has the authority to impose mitigation measures on impacts to air resources from activities on federal lands"); *id.* at 23 ("BLM can and does impose dust abatement measures"); *id.* ("This authority also includes the ability to require mitigation of air impacts from . . . mobile emissions from truck traffic").[9]

The MLA and FLPMA explicitly delegate BLM broad authority to regulate the development of federal oil and gas resources, including to protect air quality. BLM's organic statute, FLPMA, directs that BLM "shall . . . regulate . . . the use, occupancy, and development of the public lands." 43 U.S.C. § 1732(b). The definition of "public lands" includes both federal surface and minerals. *Id.* § 1702(e). BLM must exercise this authority "in a manner that will protect . . . air and atmospheric" values. *Id.* § 1701(a)(8). Likewise, FLPMA requires that BLM land use plans "provide for compliance with . . . State and Federal air . . . pollution standards or implementation plans." *Id.* § 1712(c)(8). FLPMA regulations further provide that every federal

[9] BLM also now acknowledges it may impose flaring limits on oil and gas projects. *Compare* WY_012958–59 (disclaiming power to impose flaring limits) *with* 87 Fed. Reg. 73,588, 73,592–93 (Nov. 30, 2022) (proposed BLM rule imposing flaring limits pursuant to MLA, FLPMA).

"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). FLPMA also directs that BLM "shall . . . , take *any action necessary* to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b) (emphasis added).

Requiring companies extracting publicly-owned oil and gas deposits to employ air quality mitigation measures—such as dust abatement and lower-emitting equipment—falls squarely within BLM's sweeping authority under FLPMA to regulate the "use, occupancy, and development" of public lands and minerals to protect "air and atmospheric" values. *See* 43 U.S.C. §§ 1732(a), 1701(a)(8). It also plainly falls within BLM's authority to ensure compliance with federal and state air quality mitigation measures. *See* 43 C.F.R. § 2920.7(b)(3). It likewise qualifies as "action necessary to prevent unnecessary or undue degradation" of public lands in the same airshed the emissions will pollute. *See* 43 U.S.C. § 1732(b).

The MLA further directs that BLM "shall 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). The term "conservation" under the MLA encompasses environmental protection. *See Copper Valley Mach. Works, Inc. v. Andrus*, 653 F.2d 595, 601 & n.7 (D.C. Cir. 1981); *Hoyl v. Babbitt*, 129 F.3d 1377, 1380 (10th Cir. 1997). 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 encompasses 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 also falls squarely within BLM's MLA authority to conserve surface resources, prevent environmental harm, and protect the public welfare.

Apart from these explicit delegations under the MLA and FLPMA, Congress has also delegated the Secretary of Interior "plenary authority over the administration of public lands, including mineral lands." *Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 336–37 (1963). "The source of that authority derives from 'general statutory provisions,' including the Department's enabling legislation." *Silver State Land, LLC v. Schneider*, 843 F.3d 982, 990 (D.C. Cir. 2016) (quoting *Cameron v. United States*, 252 U.S. 450, 459 (1920)). Under 43 U.S.C. § 2, for example, the Secretary is charged with "perform[ing] all executive duties . . . in anywise respecting such public lands." The Supreme Court has instructed that even if another statute "does not in itself confer" a particular power to the Department of Interior, "in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the [agency]." *Cameron*, 252 U.S. at 461; *Silver State Land*, 843 F.3d at 986 ("[Interior] enjoys plenary authority" absent "specific provision to the contrary") (cleaned up). Defendants identify no statute that removes BLM authority to impose air quality mitigation measures.

The underlying oil and gas leases also give BLM contractual authority to impose the air quality mitigation measures it rejected here. Section 6 of the BLM lease form provides that the lessee "must take reasonable measures deemed necessary by lessor" to "minimize[] adverse impacts to the . . . air . . . [and] visual . . . resources," including "modification to siting or design of facilities." *See* U.S. Dep't of the Interior, Form 3100-11 § 6. Thus, BLM also has contractual authority to require design changes to reduce adverse impacts to air quality.

For all these reasons, BLM was legally wrong in asserting that it "does not have authority to require application" of the proposed air quality mitigation measures. That legal error requires

reversal of the Converse County ROD. *See Chenery I*, 318 U.S. at 94; *Prill*, 755 F.2d at 948; *Sea-Land Serv.*, 137 F.3d at 646; *Transitional Hosps.*, 222 F.3d at 1029.

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

There is an additional ground for rejecting BLM's disclaimer of authority: it is an unexplained departure from the agency's prior interpretation of its statutory authority, as confirmed in longstanding agency guidance and practice. Such an unexplained shift renders the Converse County EIS and ROD arbitrary and capricious. *Encino Motorcars*, 579 U.S. at 222.

First, BLM's prior interpretation of its statutory authority is evidenced by its longstanding practice of imposing air quality measures as permit conditions when approving oil and gas projects. For example, the record here references four other Wyoming oil and gas projects for which BLM imposed air quality mitigation measures similar or identical to those it rejected here. First, BLM's ROD for the Continental Divide-Creston Natural Gas Development Project required the use of Tier IV drill rig engines; water and dust suppressants to minimize particulate matter emissions; carpooling to reduce fugitive dust; and other dust abatement measures to be applied on a case-by-case basis. WY_036510; WY_045084; WY_045103–04; WY_045136. The ROD also explained that "[BLM] is responsible for implementing management actions that ensure compliance with the DEQ's air quality regulations, through the use of Best Management Practices . . . and site-specific requirements to alleviate air quality impacts." WY_045136. BLM's ROD for the Normally Pressured Lance ("NPL") gas project also listed various measures that BLM could impose, including dust abatement requirements; facilities consolidation to reduce emissions from vehicle travel; and use of Tier 3 drill rig engines, electric compression engines, and solar powered equipment to reduce emissions. WY_041819–21. Similarly, BLM's ROD approving the Jonah Infill Drilling Project listed a

variety of air quality-related mitigation measures that BLM could impose, including use of Tier II diesel engines. WY_027916–17. Finally, BLM's ROD for the Pinedale Anticline Oil and Gas Project listed a host of air quality measures that BLM could mandate to reduce project emissions, including replacing diesel-fired drill rig engines with natural-gas; Tier II or better emissions on drill rig engines; centralization of facilities; gas turbines instead of internal combustion for compressors; electric drilling rigs and compression engines; and fugitive dust limitations. WY_022839–42; WY_022869.

BLM had no greater statutory authority over these projects than the Converse County project. The same laws applied in each case. While BLM does claim to have lesser authority over Fee/Fee/Fed wells, *see* WY_011709–25 (PIM 2018-014), BLM disclaimed authority to impose air quality mitigation on *any* Project wells—not just Fee/Fee/Fed. WY_012951; WY_012959. The Converse County Project is comprised of 64% federal and split-estate land for which BLM's Fee/Fee/Fed policy does not apply.[10] In any event, that is no basis to distinguish these prior projects as they *also* involved a mix of federal and non-federal land. *See* WY_036504 (Continental Divide-Creston); WY_041778; WY_041782 (NPL); WY_027891–92 (Jonah Infill); WY_022815 (Pinedale Anticline). Thus, the Court was mistaken in finding that these projects were not appropriate comparators. *See* Mem. Op. at 22.

Second, BLM's prior position is demonstrated in agency planning, guidance, and rulemaking documents dating back to at least 2007. For instance, the 2007 Casper RMP requires

[10] Federal oil and gas can be developed from non-federal lands under two scenarios. First is the "split-estate" scenario, in which the drill site is located on non-federal surface directly over federal minerals. PIM 2018-014 does not apply to split-estate wells. *See* WY_012426. Second is the "Fee/Fee/Fed" scenario, in which the drill site is located on non-federal surface overlying non-federal minerals but the wellbore then reaches horizontally into federal minerals. BLM only disclaims authority to regulate Fee/Fee/Fed wells. *See id.*; WY_011710.

BLM to "[i]mplement management actions within the scope of the BLM's land-management responsibilities to improve air quality as practicable." WY_021944; *see also* WY_021945. An appendix to the Casper RMP also lists as "options for air quality mitigation" some of the very measures BLM rejected in the Converse County EIS, including fugitive dust control measures, electric compressors, centralization of facilities, and traffic reductions. WY_021610–14; *see also* WY_021998. Similarly, BLM Manual 7300, "Air Resources Management Program," provides that BLM is responsible for "[a]ssuring appropriate stipulations and conditions of approval are included in BLM use authorizations to ensure air pollution emission control, protection methods, and ambient air quality levels are addressed." BLM Manual 7300 at .04B5 (Jan. 16, 2009), https://www.blm.gov/sites/blm.gov/files/uploads/mediacenter_blmpolicymanual7300.pdf.

In sum, BLM's disclaimer of authority in the Converse County EIS was a clear deviation from its prior interpretation of the scope of its authority to impose air quality mitigation measures, which the agency neither acknowledged not explained. This "unexplained inconsistency" rendered its decision arbitrary and capricious. *See Encino Motorcars, LLC*, 579 U.S. at 218 (agency interpretation that conflicted with decades-old practice was arbitrary and capricious when agency gave "little explanation" for the change).

C. The Court's Preliminary Injunction Ruling Incorrectly Focused on Whether BLM Had a Duty to Act, Rather than Whether It Had the Authority.

The Court's order denying Plaintiffs' motion for preliminary injunction framed the issue at the heart of this claim as "whether MLA *requires* Defendants to impose air quality mitigation measures on drill operators who extract federal minerals by drilling into *non-federal lands*," and found that Plaintiffs had provided no legal authority to support the contention that BLM was *required* to "mandate these *regulations* on non-federal lands." Mem. Op. at 20 (emphasis added). This framing misconstrues the claim in three fundamental ways.

First, the focus on non-federal lands was misplaced. BLM declined to impose air quality mitigation measures on the entire Project, WY_012951; WY_012959, including wells on federal land and split-estate land together comprising 64 percent of the Project area, WY_012426. The policy on Fee/Fee/Fed wells does not apply to these wells. *See* WY_012426 (confirming BLM's view that its authority to regulate projects on split estate land and federal land is no different); *see also supra* n.10. Because the EIS made a blanket disclaimer of authority *regardless* of well location, the Court must assess whether BLM was correct that it lacks authority even as to wells on federal and split-estate lands.

Second, Plaintiffs' argument is not that Defendants were "require[d]" to impose the suggested air quality mitigation measures. Mem. Op. at 20. They argue that the erroneous claim that BLM had no authority or *discretion* to impose these measures was an unreasoned basis for rejecting them—not that BLM had a *legal duty* to impose them. Because BLM misunderstood the scope of its authority, the ROD must be set aside. *See Chenery I*, 318 U.S. at 94; *Prill*, 755 F.2d at 948; *Sea-Land Serv.*, 137 F.3d at 646; *Transitional Hosps.*, 222 F.3d at 1021, 1029; *St. Vincent's Med. Ctr.*, 222 F. Supp. 3d at 23.

Case law illustrates the point. In *Sea-Land Service*, for example, the D.C. Circuit vacated an agency decision to eliminate a condition from its charter orders based on the mistaken belief that the condition "ran afoul of" of the Shipping Act of 1984. *See* 137 F.3d at 646–47. Although the agency could have eliminated the condition as a matter of discretion, the court reiterated that "agency action, however permissible as an exercise of discretion, cannot be sustained 'where it is based not on the agency's own judgment but on an erroneous view of the law.'" *Id.* at 646 (quoting *Prill*, 755 F.2d at 947). Similarly, in *Transitional Hosps.*, the D.C. Circuit found an agency decision invalid because it was based on the mistaken belief that the agency "lacked . . .

discretion" to include a provision requested by commenters, even though the authorizing statute did not *require* the agency to include that provision. *See* 222 F.3d at 1021, 1025, 1029. Here too, even if the MLA and FLPMA did not require BLM to impose the proposed measures, its failure to recognize that it had discretion to do so requires reversal under the APA.

Finally, the air quality mitigation measures requested here were not "regulations," nor would they require BLM to set or enforce air quality emission standards. Rather, they were permit conditions that would simply have required the Operator Group to employ operational or technological changes to reduce Project emissions—as BLM commonly does for oil and gas projects, *see infra* 38–39. Thus, this Court need not decide whether BLM has authority to "regulate" air quality, only whether it can require design changes to Projects it approves to reduce their emissions. It also does not matter that the EPA, State, and BLM have some overlapping authority to operate in this arena. *See* 42 U.S.C. § 7610(a) (the Clean Air Act "shall not be construed as superseding or limiting the authorities . . . [of] any other Federal officer, department, or agency."); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (although "two [agency] obligations may overlap . . . there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistenc[ies]").

In sum, the sole issue before this Court is whether BLM erred in concluding that it "does not have authority" to impose the proposed air quality mitigation measures. *See* WY_012951; WY_012959. Because the MLA and FLPMA clearly grant such authority, BLM's disclaimer of authority was legal error, requiring reversal under the APA.

III. THE RMP AMENDMENT VIOLATED BLM'S FLPMA DUTY TO AVOID UNNECESSARY AND UNDUE DEGRADATION.

FLPMA provides that the Secretary of Interior "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the [public] lands." 43

U.S.C. § 1732(b) (underscore added). This "UUD" standard is a non-discretionary, substantive duty that is the "heart of FLPMA." *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003). It prohibits BLM from taking action that would result in degradation that is "unnecessary" *or* degradation that is "undue." *See id.* at 41–43 ("FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible . . . operation because the operation though necessary . . . would unduly harm or degrade the public land."). Degradation to public lands includes harm to their wildlife populations. *See* 43 U.S.C. § 1701(a)(8) (public lands to be managed to provide wildlife habitat); *id.* § 1702(c) (listing wildlife as a resource value of public lands); *cf. Kleppe v. New Mexico*, 426 U.S. 529, 540–41 (1976) (federal authority "over public lands necessarily includes the power to regulate and protect the wildlife living there"); 16 U.S.C. § 1331 (recognizing that wildlife are "an integral part of the natural system of the public lands").

FLPMA's implementing regulations generally define UUD to include degradation (a) greater than that would result with application of customary or prudent mitigation measures, or (b) that violates some other law or standard. *See* 43 C.F.R. § 2800.0-5(x) (1989) (withdrawn as "unnecessary" by 70 Fed. Reg. 20,970 (2005)); *id.* § 3809.0-5(k) (1981) (amended by 66 Fed. Reg. 58,460 (2001)); *id.* § 3809.5; *id.* § 3715.0-5; *id.* § 3802.0-5(l). Courts and the Interior Board of Land Appeals have extended these regulatory definitions of UUD to the oil and gas context. *See, e.g.*, *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 76, 78 (D.C. Cir. 2011) (UUD means "something more than the usual effects anticipated from appropriately mitigated development") (cleaned up); *Colorado Env't Coal.*, 165 IBLA 221, 229 (2005), https://www.oha.doi.gov/IBLA/Ibladecisions/165IBLA/165IBLA221.pdf (UUD means activities "conducted in a manner that does not comply with applicable law or regulations, prudent

management and practice, or reasonably available technology").

The Converse County ROD approved, among other things, an amendment to the Casper RMP to exempt the Project from longstanding prohibitions on disturbance near raptor nests during sensitive nesting periods. As explained below, that Casper RMP amendment must be set aside for two reasons. First, it is arbitrary and capricious because BLM failed to consider an important factor: whether the amendment would result in UUD. Second, even if BLM had properly *considered* the issue, the record establishes that the amendment will result in UUD, violating BLM's substantive duty under 43 U.S.C. § 1732(b) to prevent UUD.

A. BLM's Failure to Consider FLPMA's UUD Mandate Was Arbitrary and Capricious.

The Casper RMP amendment must be set aside as arbitrary and capricious because BLM failed to consider an important factor: its statutory duty to avoid UUD. An agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. "A statutorily mandated factor, by definition, is an important aspect of any issue[.]" *Mozilla Corp. v. FCC*, 940 F.3d 1, 60 (D.C. Cir. 2019) (per curiam) (cleaned up). Thus, "'the complete absence of any discussion' of a statutorily mandated factor 'leaves [the court] with no alternative but to conclude that the agency failed to take account of this statutory limit on its authority,' making the agency's reasoning arbitrary and capricious." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (cleaned up) (quoting *United Mine Workers of Am. v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989)).

The grave concerns from commenters should have prompted BLM's serious consideration as to whether dropping raptor timing limits would violate the UUD standard, but the record contains no evidence that BLM even considered this factor. For example, the U.S.

Fish and Wildlife Service warned that it did not support a blanket exemption from timing limits "since there would be risk of violating the [Migratory Bird Treaty Act]." WY_000112. It agreed with BLM that timing relief under Option 3, which BLM adopted with minor changes, would result in "moderate to major" impacts to raptor populations and habitat. WY_008733. The Wyoming Game and Fish Department stressed that it "d[id] not support" this timing relief option, explaining that it "would undermine the BLM's ability to meet conservation obligations and commitments" for raptors. WY_008358–60; *see also* WY_008329 ("The Wyoming Game and Fish Department is concerned that the options proposed by the operator group do not provide sufficient mitigation to protect raptors"); WY_011203 ("we understand that the [D]epartment continues to have grave concerns about adverse impacts to raptors."). These expert opinions—that eliminating an industry-standard wildlife protection would lead to raptor declines and Migratory Bird Treaty Act Violations—clearly implicate the UUD standard. *See Theodore Roosevelt*, 661 F.3d at 76 (UUD means "something more than the usual effects anticipated from appropriately mitigated development.") (cleaned up).

Moreover, commenters specifically argued that eliminating the timing limits would result in UUD. WY_006350 ("Year-round drilling creates unacceptable impacts to sensitive wildlife populations . . . which BLM has an obligation to protect as part of its duties to prevent unnecessary and undue degradation under FLPMA."); WY_000431 ("Comments opposing year-round drilling cited unacceptable impacts to a sensitive wildlife . . . which the BLM has an obligation to protect from unnecessary and undue degradation under FLPMA."); WY_008790 (arguing that BLM must preserve the timing limit stipulations "to comply with its substantive legal requirements under [FLPMA]"); *see also* WY_009759 (arguing that year-round

development would *not* cause UUD); WY_014380–84; WY_014390–95; WY_00008778–80; WY_008815–16 (conservation group comments critical of year-round development proposal).

Nonetheless, there is nothing in record showing that BLM accounted for its statutory duty to avoid UUD. Although BLM analyzed the impacts to raptors, there was no discussion of the UUD standard or whether impacts would exceed the "unnecessary" or "undue" thresholds. *See* WY_013196–207 (no discussion of UUD); WY_012337 (BLM acknowledgement that EIS does not mention "the terms 'unnecessary' or 'undue' degradation"). This "complete absence of any discussion of a statutorily mandated factor leaves [the court] with no alternative but to conclude that the agency failed to take account of this statutory limit on its authority, making the agency's reasoning arbitrary and capricious." *Pub. Citizen*, 374 F.3d at 1216 (cleaned up).

Case law illustrates that agencies must demonstrate some consideration of the statutory limits on their authority to survive APA review. For example, in *Public Citizen*, the D.C. Circuit vacated a decision due to the agency's failure to expressly discuss its obligation under 49 U.S.C. § 31136(a)(4) to "ensure that . . . the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators." 374 F.3d at 1216. Finding "nothing in the agency's extensive deliberations establishing that it considered the statutorily mandated factor," the Court was compelled to conclude that the agency failed to consider this "important aspect of the problem," rendering the decision arbitrary and capricious. *Id.*

Similarly, in *United Mine Workers of America*, the D.C. Circuit found the Secretary failed to consider her duty under 30 U.S.C. § 811(a)(9) to "ensure that the new regulations did not reduce miner protection below the level afforded by [the existing] mandatory standard," even though she did discuss miner safety features, because she did not explicitly discuss the relative protection of the new and old regulations. 870 F.2d at 673; *see also United Steel v. Mine Safety*

& Health Admin., 925 F.3d 1279, 1283, 1287 (D.C. Cir. 2019) (vacating rule because agency "failed to explain adequately how [it] complies with the statutory no-less-protection standard"); *Mozilla Corp.*, 940 F.3d at 62–63 (agency's failure to specifically address statutory purpose of protecting public safety rendered decision arbitrary and capricious).

Likewise, in *Southern Utah Wilderness Alliance v. BLM*, 551 F. Supp. 3d 1226 (D. Utah 2021), a district court dealt with the same issue here: BLM's failure to consider its duty under 43 U.S.C. § 1782(c) to prevent UUD of Wilderness Study Areas. *Id.* at 1242–44. Although "BLM knew of impacts from the . . . project[,]" there was no evidence it considered its duty to avoid UUD to the Wilderness Study Area, making its decision arbitrary and capricious. *Id.* at 1243.

BLM's analysis suffered from the same flaw here: although BLM considered the possible harm to raptors, it never considered whether such harm was "unnecessary" or "undue" and otherwise ignored its UUD duty, rendering the RMP amendment arbitrary and capricious.

B. BLM's Decision to Amend the Casper RMP Violated FLPMA's UUD Mandate.

In addition to being "arbitrary and capricious" as explained above, the RMP amendment was "not in accordance with law," 5 U.S.C. 706(2)(B), because it violated BLM's substantive obligation "to prevent unnecessary or undue degradation of the [public] lands." 43 U.S.C. § 1732(b). Again, UUD means "something more than the usual effects anticipated from appropriately mitigated development," *Theodore Roosevelt*, 661 F.3d at 76 (cleaned up), or conduct "that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology," *Colorado Env't Coal.*, 165 IBLA at 229. Here, BLM's elimination of a crucial raptor protection from the Casper RMP violated its duty to prevent UUD for three discrete reasons: (1) it allows harm to raptors greater than that under customary practice; (2) it allows impacts that violate other laws and standards, including the

Migratory Bird Treaty Act and Executive Order 13,186; and (3) the adopted amendment allows harm that is "unnecessary" to year-round drilling in the Project area.

First, the RMP amendment will result in "something more than the usual effects anticipated from appropriately mitigated development." *Theodore Roosevelt*, 661 F.3d at 76 (cleaned up). The Wyoming oil and gas industry is well accustomed to complying with the seasonal stipulations for non-eagle raptors, which is standard practice across the state and had been mandatory under the Casper RMP for decades. *See* WY_020724 (raptor timing limits already standard management practice as of 2007); WY_004334 (noting buffers are standard practice); WY_018455 (seasonal buffers around nests "regularly" used); WY_044040–41; WY_041843; WY_022873; WY_027918 (other projects uniformly imposing raptor timing limit stipulations). As the Wyoming Game and Fish Department explained, eliminating this timing limit was "unprecedented," WY_014372, and "a significant shift in policy" for oil and gas development, WY_008314. By downgrading standard protections, the amendment also allows far greater harm to raptors and their nesting habitat than normal oil and gas development. This includes "nest abandonment, reduced reproductive success, the destruction of nests, and displacement from otherwise suitable seasonal habitat," WY_013196, resulting in potential "[l]ong-term changes in migratory bird species occurrence and diversity," WY_013198. Although the Operator Group claimed the shift would have environmental benefits, BLM was clear that it "does not agree that drilling during timing stipulations results in an overall environmental benefit." WY_012133.

Importantly, BLM did not replace the protection it eliminated, further establishing that the RMP amendment allows greater harm than under customary practices. Although the RMP amendment requires operators using timing limit relief to comply with a short list of mitigation

measures, such as covering pits, WY_016729–32, these "amount[] to a few best management practices, which should be implemented in any development scenario," WY_008358. Most (if not all) are already legally required so offer no additional protection. *See, e.g.*, 43 C.F.R. § 3160; Onshore Order 7, 58 Fed. Reg. 47,354, 47,364 (Sept. 8, 1993) (already requiring pit covers to deter entry by birds). In any event, the Converse County EIS accounted for these measures and *still* predicted that the RMP amendment would result in "moderate to major" impacts to raptors as compared to the "minor" impacts with adherence to timing limits. WY_008420.[11]

Second, the RMP amendment also violates BLM's duty to prevent UUD by allowing degradation that exceeds federal laws and standards. The most obvious is the Migratory Bird Treaty Act, a strict liability statute making it unlawful "to pursue, hunt, take, capture [or] kill . . . any migratory bird, . . . nest, or egg of any such bird." 16 U.S.C. § 703(a); *see also* 50 C.F.R. § 10.12 (defining "take" to include "wound, kill," and "collect"). Development near raptor nests risks many forms of "take" of birds, nests, or eggs: mothers could abandon their eggs or young; fledging offspring could be killed or wounded; nests could be physically destroyed; and foraging birds could be killed or wounded. WY_012884; WY_018443–44; WY_018455–56; WY_009511–12. BLM acknowledged the RMP amendment could "increase the likelihood of a take," WY_013196, and staff remarked internally that "[t]his is why [the Timing Limit Stipulation] is used in the first place, to avoid unintentional take of migratory birds," WY_007812. The U.S. Fish and Wildlife Service also warned that eliminating the timing limit risks "violating the [Migratory Bird Treaty Act]." WY_000112–13 ("destruction of such nests, or

[11] Neither does the vague commitment for an Adaptive Management Plan offer protection. *See* WY_016739. The ROD makes clear the Plan will only be used to inform any future decision to allow additional timing relief after all 98 instances approved in the ROD are exhausted. *Id.* Because the Converse County Project is only expected to require 98 instances of timing relief, WY_013199, the Plan is unlikely to have bearing on the Project itself.

causing abandonment of a nest could constitute violation of [the Migratory Bird Treaty Act]"); *see also* WY_011130 ("violations of MBTA. . . could occur" with year-round drilling).

Similarly, BLM acknowledged that weakening the timing limits could affect its compliance with other federal standards for migratory bird protection. *See* WY_008455. It contravenes Executive Order 13,186's requirement that federal agencies "avoid[] or minimize[e], to the extent practicable, adverse impacts on migratory bird resources" by instead *removing* "practicable" raptor protections and thereby *increasing* harm to migratory birds. *See* WY_008733 (U.S. Fish and Wildlife Service warning regarding Executive Order 13,186 duties). The RMP amendment also runs afoul of BLM's Sensitive Species Manual, which requires BLM to use its "programs, plans, and management practices to reduce or eliminate threats affecting the status of the species, or improve the condition of the species' habitat on BLM-administered lands." WY_022950. The RMP amendment violates this standard by *increasing* threats to special status raptor species like ferruginous hawks. *See, e.g.*, WY_011524–28; WY_011199, 203. In sum, because the RMP amendment allows degradation in excess of federal laws and standards, it is "undue."

Finally, the degradation from the RMP amendment was "unnecessary" to the development of the Project area, particularly because there were less degrading approaches to year-round drilling. *See Theodore Roosevelt*, 661 F.3d at 76 ("unnecessary degradation" means degradation that is "unnecessary to . . . the development [of] the [oil and gas] permits"); *Colorado Env't Coal.*, 165 IBLA at 229 (UUD results from activity "that does not comply with . . . prudent management and practice" or "reasonably available technology"); *cf. Sierra Club v. Hodel*, 848 F.2d 1068, 1090–91 (10th Cir. 1988) (finding that identical UUD requirement applicable to Wilderness Study Areas, 43 U.S.C. § 1782(c), required BLM "to determine

whether there are less degrading alternatives" and "to impose an alternative it deems less degrading upon the nonfederal actor").

Two obvious less-degrading alternatives were Options 4 and 5 for timing relief. Option 4, originally BLM's "preferred" alternative, would have allowed year-round drilling with only "negligible" or "minor" impacts to nesting raptors, WY_008416; WY_008419; WY_008428; WY_008733, by requiring BLM to approve timing relief, requiring site-specific raptor management plans, and prohibiting drilling once nest activity was registered, *see* WY_008455–56; WY_008481–86; WY_013201. BLM also could have adopted a Migratory Bird Conservation Plan to guide development, as proposed under Option 5, WY_008429; WY_012425, resulting in only "minor" impacts to raptors, WY_008456. The Operator Group spent years finalizing such a plan with the U.S. Fish and Wildlife Service before abandoning it. *See* WY_004151–52; WY_008001–45; WY_016654–55. Year-round drilling was also possible under the existing Casper RMP, which *already* allowed case-by-case exceptions. WY_020219–22; WY_016738. As BLM explained to the Operator Group, it had implemented a year-round development strategy for multiple projects using those exception criteria "without . . . a land use plan amendment." *See* WY_012341; WY_012321. BLM staff thus questioned why the RMP amendment was actually "needed" as "[b]etter planning is all that is needed from the operators." WY_007814. These less harmful alternatives confirm the degradation from the RMP amendment was "unnecessary to . . . the development" of oil and gas in the Project area. *See Theodore Roosevelt*, 661 F.3d at 76.

The reasoning and contrasting facts of *Theodore Roosevelt* lend support to the conclusion that BLM failed to prevent UUD here. That case involved a UUD challenge to another Wyoming oil and gas project (Pinedale Anticline) for which BLM had removed seasonal restrictions

around big game winter range and greater sage-grouse breeding sites. *Id.* at 69–70. The D.C. Circuit found that BLM "did not act arbitrarily or capriciously in determining that" the Record of Decision for the Pinedale Anticline project would "prevent unnecessary or undue degradation" for several key reasons. *Id.* at 76–78. First, BLM replaced the seasonal restrictions with "superior" protections[12] for these species. *Id.* at 71. Second, the Wyoming Game and Fish Department supported the removal of seasonal stipulations because BLM replaced them with "significantly better" protections. *Id.* at 78. Third, the Plaintiff "fail[ed] to provide any other solution that still would permit significant recovery of natural gas" in the Project area. *Id.* at 78.

In contrast with *Theodore Roosevelt*, BLM here did not claim to replace the seasonal stipulations with "significantly better" protections, but rather projected "moderate to major" harm to raptors from the change. WY_008420. BLM here also lacked the backing of state and federal wildlife experts, WY_000112; WY_008733; WY_008358, and disregarded solutions to reduce the harm of year-round development near raptor nests. Unlike raptors, the species at issue in *Theodore Roosevelt* were also not protected by the Migratory Bird Treaty Act, so that case involved no foreseeable "take" in violation of that law. And critically, BLM here did not provide the same sort of explanation—or any explanation—for its conclusion that the Project would not lead to UUD. *See supra* pp. 44–47. In sum, the juxtaposition of this case to *Theodore Roosevelt* further supports the conclusion that BLM violated its UUD duty here.

For all these reasons, the Casper RMP amendment was "not in accordance with law," 5 U.S.C. 706(2)(B), because it violated BLM's duty to prevent UUD, 43 U.S.C. § 1732(b).

[12] These included geographically phased development, consolidation of well pads and facilities, and remote monitoring—all to reduce the "footprint and duration of human presence," *Theodore Roosevelt*, 661 F.3d at 71, 77–78; a wildlife mitigation plan requiring responses to monitored declines, *id.* at 71, and a $36 million fund for on-site and off-site mitigation, *id*.

REMEDY

If the Court finds for Plaintiffs on any of these claims, it should vacate the Converse County EIS, ROD, and RMP amendment and remand to BLM to prepare a revised EIS. Vacatur is the default remedy under the APA, which directs that a reviewing court "shall . . . set aside" unlawful agency action. 5 U.S.C. § 706(2); *see also Eagle County*, 82 F.4th at 1196 ("Vacatur is the normal remedy") (cleaned up); *United Steel*, 925 F.3d at 1287 ("The ordinary practice is to vacate unlawful agency action.").

Although courts have discretion to leave an invalid agency action in place during remand, the D.C. Circuit recently cautioned that "remand without vacatur remains an exceptional remedy" and is appropriate only in "limited circumstances." *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020); *see also United Steel*, 925 F.3d at 1287 (remand without vacatur appropriate only in "rare cases"). Two factors guide this decision: (1) the "seriousness" of the errors "and thus the extent of doubt whether the agency chose correctly"; and (2) the "disruptive consequences of an interim change that may itself be changed." *Allied–Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). "Because vacatur is the default remedy . . . defendants bear the burden to prove that vacatur is unnecessary." *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 156 n.29 (D.D.C. 2022), *vacated as moot*, No. 22-5036, 2023 WL 3144203 (D.C. Cir. Apr. 28, 2023) (quoting *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019)).

This is not the type of rare case that warrants a departure from vacatur. First, the errors here were serious. The EIS suffers from multiple significant flaws, including a seriously misleading analysis of groundwater drawdowns to stressed aquifers; lack of meaningful study of cumulative climate change impacts; and failure to study reasonable alternatives to lessen the

Project's impacts. With an informed look at these issues, BLM may well change course. Indeed, because NEPA is designed to influence agency decisions, these violations should prompt "substantial doubt" that the agency chose correctly. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021).

Case law instructs that any one of these NEPA defects alone would thus warrant vacatur. *See Eagle County*, 82 F.4th at 1196 (vacating rail line decision due to deficiencies in EIS); *Standing Rock Sioux Tribe*, 985 F.3d at 1050–54 (upholding pipeline vacatur due to NEPA violation); *Sabal Trail*, 867 F.3d at 1373–75, 1379 (vacating pipeline approvals due to inadequate EIS analysis of greenhouse gas emissions); *Pub. Emps. for Env't Resp.*, 827 F.3d at 1084 (vacating EIS lacking "hard look" at Cape Wind Project's impacts and requiring agency to fix errors "before Cape Wind may begin construction"); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 751 (9th Cir. 2020) (vacating approval for Liberty oil and gas project due to inadequate NEPA and ESA analysis); *Friends of the Earth v. Haaland*, 583 F. Supp. 3d at 156–162 (vacating oil and gas leases due to inadequate NEPA analysis of cumulative greenhouse gas emissions).

In addition to these NEPA violations, BLM also fundamentally misunderstood the scope of its power to impose air quality mitigation measures. Once that error is corrected, it is foreseeable that BLM would require additional emissions controls to avoid ambient air quality violations. BLM also failed to consider its FLPMA duty to prevent UUD when removing the raptor timing limitation. Once BLM properly considers that statutory limit on its authority, it is unlikely that it could or would reaffirm the RMP amendment, given the likelihood of unlawful "take" of raptors and current Migratory Bird Treaty Act policy on incidental take. These significant errors went to the "heart" of BLM's decision and raise substantial doubt that BLM

chose correctly, favoring vacatur. *See Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 614–15 (D.C. Cir. 2017) ("fail[ure] to address" an important aspect of the problem is a "major shortcoming" warranting vacatur) (cleaned up); *Pub. Citizen*, 374 F.3d at 1216 (agency's failed to consider a statutory limit on its authority alone "require[es] vacatur"); *SecurityPoint Holdings, Inc. v. TSA*, 867 F.3d 180, 185 (D.C. Cir. 2017) ("[T]he court must vacate a decision that 'entirely failed to consider an important aspect of the problem[.]'") (citation omitted); *Sea-Land Serv.*, 137 F.3d at 646–47 (vacating decision because agency misunderstood scope of its authority); *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015) (finding error "substantial" where the Secretary never "provide[d] a reasoned justification of her position").

Second, vacatur would have no unduly disruptive consequences. Vacatur of the RMP amendment will simply return to the prior status quo of case-by-case exceptions to raptor Timing Limit Stipulations. Likewise, vacating the ROD and EIS would not halt the Project from moving forward, so long as BLM performs adequate NEPA study and reconsiders the proposed air quality mitigation measures before approving individual drilling permits (APDs). Thus, this is not a case for which the "egg has been scrambled," and it is too late to reverse course. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110–11 (D.C. Cir. 2014) (quoting *Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002)). For both reasons, the ordinary APA remedy of vacatur is warranted here.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment and hold unlawful and vacate the Converse County Project EIS and ROD and Casper RMP amendment.

Respectfully submitted this 26th day of January 2024.

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