IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01017-REB

ROCKY MOUNTAIN PEACE & JUSTICE CENTER; CANDELAS GLOWS/ROCKY FLATS GLOWS; ROCKY FLATS RIGHT TO KNOW; ROCKY FLATS NEIGHBORHOOD ASSOCIATION; and ENVIRONMENTAL INFORMATION NETWORK (EIN) INC.,

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE SERVICE;
GREG SHEEHAN, in his official capacity as Acting Director, U.S. Fish and Wildlife Service;
RYAN ZINKE, in his official capacity as Secretary of the Interior; and
DAVID LUCAS, in his official capacity as Project Leader, Region 6, U.S. Fish and Wildlife Service;

and

UNITED STATES FEDERAL HIGHWAY ADMININSTRATION;
BRANDYE HENDRICKSON, in her official capacity as Acting Administrator of the United States Federal Highway Administration; and
ELAINE L. CHAO, in her official capacity as Secretary of Transportation,

Defendants.

PLAINTIFFS' MOTION FOR AND MEMORANDUM
IN SUPPORT OF PRELIMINARY INJUNCTION

Pursuant to F.R.C.P. 65(a), 42 U.S.C. §§ 4321-4347, Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)(C) & (D), Plaintiffs seek a Court order vacating the March 23, 2018 decision (the "Decision") by Defendant U.S. FISH AND WILDLIFE SERVICE ("USFWS") to construct hiking, biking and equestrian trails (the "Public Trails") at the Rocky Flats National Wildlife Refuge (the "Refuge"), on lands encompassed within the former Rocky Flats nuclear facility, pending compliance with environmental laws. Plaintiffs also seek to delay the opening of the planned 15 separate access points into the Refuge.

TABLE OF CONTENTS

INTRODUCTION 1
BACKGROUND 5
ARGUMENT 8
I. THE COMMUNITY GROUPS ARE LIKELY TO SUCCEED ON THE MERITS 9
A. USFWS Has Violated the National Environmental Policy Act (NEPA). 9
1. USFWS Violated NEPA by Failing to Analyze the Impact of Placing the Public Trails over Lands Containing Unremediated, Residual Plutonium from the Former Rocky Flats Nuclear Weapons Facility 9
2. USFWS Violated NEPA by Not Preparing a Supplemental EIS for the Public Trails in Light of Significant New Circumstances and Developments that have Occurred Since the 2004 CCP/EIS, Which is "Stale" In Any Event. 12
3. USFWS Cannot Rely on Categorical Exclusions (CEs) Without Analyzing the Extraordinary Circumstances Associated with the Proposed Action 14
4. Even Had USFWS Engaged in an Appropriate Procedural Analysis of the Extraordinary Circumstances in Authorizing this Project, FWS's Reliance on the "Minor Action" CEs Would Be Arbitrary and Capricious Because Extraordinary Circumstances, Such as Those Implicating Health and Safety and Having Controversial Effects, are Clearly Applicable 16
B. FWS is Violating the NWRSAA by Relying on an Expired Compatibility Determination (CD). 20
C. The USFWS Violated the Endangered Species Act by Failing to Reinitiate Section 7 Consultation. 22
II. PLAINTIFFS AND THEIR MEMBERS WILL SUFFER IRREPARABLE HARM IF THE COURT DOES NOT GRANT AN INJUNCTION. 25
A. Plaintiffs' Missions are Denigrated by FWS' Chilling Approach to Public Participation 26
B. The Health of the Community Groups' Members will be Jeopardized by premature construction at the Refuge. 28
C. Plaintiff Will Suffer Irreparable Harm Under the Endangered Species Act 29
III. THE BALANCE OF HARMS FAVORS GRANTING AN INJUNCTION 30
IV. THE PUBLIC INTEREST FAVORS GRANTING AN INJUNCTION 31
V. THE COURT SHOULD NOT IMPOSE A BOND 32
VI. CONCLUSION 32

LIST OF ACRONYMS

APA	Administrative Procedure Act
CCP	Comprehensive Conservation Plan
CD	Compatibility Determination
CDPHE	Colorado Department of Public Health and Environment
CE	Categorical Exclusion
CEQ	Council on Environmental Quality
CH	Critical Habitat
COU	Central Operating Unit
CRA	Comprehensive Risk Assessment
DOE	U.S. Department of Energy
DOI	U.S. Department of the Interior
EA	Environmental Assessment
EAS	Environmental Action Statement
ECOC	Ecological Contaminants of Concern
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FS	Feasibility Study
MUF	Material Unaccounted For
NEPA	National Environmental Policy Act
NWR	National Wildlife Refuge
NWRSAA	National Wildlife Refuge Systems Administration Act

POU	Peripheral Operable Unit
RI	Remedial Investigation
ROD	Record of Decision (used two times above line, once in footnotes)
SEIS	Supplemental Environmental Impact Statement
USFWS	U.S. Fish and Wildlife Service

Pursuant to Rule 7.1, undersigned counsel conferred with the US Department of Justice attorney, Jessica Held, for the past month in an attempt to avoid having to file this motion. The parties have been unable to reach an agreement and this motion is opposed.[1]

INTRODUCTION

Given its unique history as a former nuclear weapons manufacturing site, with an unsavory past involving fugitive plutonium emissions, uncontrolled fires, an FBI raid, and 2,500 pounds of missing plutonium, visitors recreating on Refuge trails or entering one of its access points should be assured that the agencies opening the Refuge have fully complied with environmental laws. Indeed, the Decision to place trails on a contaminated site is precisely the type of significant Federal agency action that Congress expected to be analyzed under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347. Unfortunately, no NEPA analysis has been undertaken since 2004, and even this analysis utterly failed to address the critical decision to place Public Trails on land where plutonium has been detected but left unremediated in the soils. Shockingly, USFWS has not even prepared a simple environmental assessment (EA), the most basic NEPA document, to examine the impacts and alternatives to placing the Public Trails on land containing identified plutonium particles, or whether doing so will have a significant impact on the human environment.

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[1] This Court's Civil Practice Standards contain no page limits for Rule 65 motions. *See* REB Civ. Practice Standard IV, B, 1. The undersigned has endeavored to limit argument where possible. Also, opposing counsel does not object to the length of this memorandum.

The instant action is timely, appropriate and brought as a last resort after this Court dismissed without prejudice Plaintiffs' previous case last summer as unripe to give USFWS an opportunity to make a final decision that complied with NEPA. *Rocky Mnt. Peace & Justice Center v. U.S Fish and Wildlife Service,* Case No. 17-cv-01210-CMA, ECF No. 36, at 15, 2017 WL 4844641 at *6 (D. Colo. Sept. 29, 2017) (case dismissed without prejudice to give agency opportunity to make final decision "after conducting the required compliance reviews").[2]

Despite its opportunity to comply with NEPA, USFWS is moving imminently to open the Public Trails on the Refuge in reliance on a 14-year old environmental impact statement (EIS) (the "2004 CCP/EIS"). That document never addressed the decision to place the Public Trails over the identified plutonium contamination. **Exh. 2.** Rather, the 2004 CCP/EIS states that the issues of soils remediation and plutonium contamination are "outside the scope of the CCP and EIS." **Exh. 3** at 11, 13 ("EIS does not analyze different scenarios for the cleanup…. A cleaned-up site provides the baseline for

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[2] In her opinion, Judge Arguello dismissed the case on ripeness, noting that "Defendants should at least be certain where the trails … will be placed." Case No. 17-cv-01210-CMA, ECF No. 36 at 15. She apparently relied on the June 9, 2017 declaration of Defendant Lucas that USFWS "… has yet to fully examine the site-specific feasibility of where exactly such trails and trail crossings might occur." *Id.*, ECF No. 14-1, ¶ 9. However, in a subsequent scoping report for the Refuge trails, the engineering contractor for the Federal Highway Administration (FWHA) stated that "The site map shown in Figure 2 reflects the trails as planned by US Fish and Wildlife Service (USFWS)…. Revisions and notes shown on the maps came from decisions made at the field visit held June 2, 2017 with USFWS...". Atkins North America, Scoping Report, Rocky Flats National Wildlife Refuge (November, 2017) (**Exh. 1**) at 2 (third ¶) and Fig. 2. In other words, USFWS had apparently already configured the Public Trails for the Refuge five days *before* Mr. Lucas told the Court his agency didn't know where the trails "will be placed." Such a fact was certainly relevant for, and perhaps dispositive of, the Court's decision to give USFWS more time to "conduct[] the required compliance reviews," *id.*, ECF No. 36 at 15, and which led to this 11th hour Motion.

analysis."). Now, with the Public Trails about to be constructed this summer on Refuge soils that contain identified plutonium above background levels, it is far past time for the agency to examine the environmental consequences and alternatives to this significant decision.

NEPA also requires Federal agencies to examine in a supplemental EIS any significant new developments and circumstances that have occurred since 2004, and there have been a host of them, e.g. the 2013 and 2015 floods,[3] adjacent residential development, [4] and post-2014 studies showing an extensive migration of plutonium and an increase in cancer rates in nearby neighborhoods.[5, 6, 7] An up-to-date NEPA analysis is especially needed because an EIS generally becomes "stale" after 5 years. 46 Fed. Reg 18,026, 18,036 (March 23, 1981).

Rather than prepare such a supplement to review these post-2004 changes, developments and information, USFWS relies on "categorical exclusions" ("CEs") that allow agencies to forego NEPA reviews where its proposed actions involve "minor changes" to actions previously analyzed. However, an agency's use of CEs is

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[3] U.S. Fish & Wildlife Service, Flooding Effects, Rocky Mountain Arsenal National Wildlife Refuge Complex (**Exh. 4**), at 2 ("...runoff from outside the [Rocky Flats National Wildlife] Refuge flowing onto the Refuge caused fast moving water and debris of over 2-3 feet in the drainages to impact roads and embankments."). DOE warned of the potential for plutonium migration from on-site "erosion," as contamination in the COU "may be brought to the surface by erosion or slumping of slopes." U.S. Fish & Wildlife Service, "Modified Level III Preacquisition Environmental Contaminants Survey (2006) (**Exh. 5**), at 3.

[4] **Exh. 6**.

[5] Declaration of Randall Stafford ("Stafford Decl."), **Exh. 7**, ¶ 2.

[6] Marco Kaltofen, "Field investigation and laboratory report," **Exh. 8** at 14 (finding an "inhalation hazard" associated with 2010 and 2011 plutonium sampling "surrounding Indiana St.," along the Refuge's eastern border.

[7] Stafford Decl., **Exh. 7**, ¶ 3.

prohibited when, as here, there are specified "extraordinary circumstances" present, such as where the proposed action "may" have an impact to public safety and health, highly controversial environmental effects, highly uncertain and potentially significant effects or involve unique or unknown environmental risks. Since these, and other, circumstances are clearly applicable in this case, USFWS' reliance on CEs is highly improper.

In addition, Plaintiffs seek injunctive relief to protect the threatened Preble's Jumping Mouse ("Jumping Mouse"), which is present in all major drainages of the Refuge, and its designated Critical Habitat ("Jumping Mouse CH") within the Refuge, until the USFWS undertakes its mandatory reinitiation and completion of the consultation required under Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 – 1544. Such Section 7 responsibilities should occur before USFWS commences construction activities or authorizes the public access envisioned in the 2004 CCP/EIS.

As discussed below, USFWS should also be required to issue a new compatibility determination (CD) for the Public Trails under the National Wildlife Refuge Systems Administration Act ("NWRSAA").[8]

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[8] Ironically, the USFWS decision comes in the face of growing public concern about opening the Refuge to unlimited access and seven local school districts have now banned field trips to the Refuge should it be opened. The school districts are:

- Boulder Valley School District - board resolution 3/14/17
- St. Vrain Valley School District - commitment by the superintendent 5/10/17
- Westminster Public Schools - commitment by the superintendent 9/29/17
- Adams 14 School District - board resolution 10/10/17
- Adams 12 School District - commitment by the superintendent 12/6/17

BACKGROUND

Many of the facts surrounding the operation and remediation of Rocky Flats can be found in *Town of Superior v. U.S. Fish and Wildlife Service*, 913 F.Supp.2d 1097, 1098 (D.Colo. 2012). In brief, in 1951, the U.S. government acquired property located in unincorporated Jefferson County, between Denver and Boulder, Colorado, and developed the Rocky Flats nuclear weapons plant. *Id.* In 1975, the government purchased additional lands surrounding the facility from private landowners to create a buffer zone (the "Buffer Zone"), for a total size of about 6,200 acres. *Id*. at 1099. It was owned by the DOE and its predecessors and operated by various contractors. *Id.* In 1989, the U.S. Environmental Protection Agency (EPA) added Rocky Flats to the National Priority List as a Superfund site after an inter-agency raid during a Federal investigation into misconduct in the handling of raw materials, manufacturing processes and disposal of toxic wastes at the site. *Town of Superior*, 913 F.Supp.2d at 1099. *See also* Lipsky Declaration (**Exh. 10**) at ¶¶ 5-6.

In 2001, Congress passed the Rocky Flats National Wildlife Refuge Act ("Rocky Flats Act") to create the Refuge after the Rocky Flats plant site was remediated. *Town of Superior,* 913 F.Supp.2d at 1099. Physical cleanup of the Rocky Flats Plant site was completed in October 2005 at a contract expense of $7.7 billion over the ten-year project.[9] Even after remediation, concerns were raised about the massive amount of

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- Jeffco Public Schools - commitment by the superintendent 2/8/18
- Denver Public Schools - board resolution 4/26/18

Declaration of Susan Elofson-Hurst "(Elofson-Hurst Decl.") (**Exh. 9**), ¶ 6.

[9] U.S. Department of Energy, Legacy Management, "CERCLA/RCRA Fact Sheet,

plutonium that went missing during the years the Rocky Flats Plant was producing nuclear triggers. *See Cook v. Rockwell Int'l Corp.,* 580 F. Supp. 2d 1071, 1145–46 (D. Colo. 2006) ("It is undisputed that the cumulative MUF [material unaccounted for] during Defendants' operation of Rocky Flats is more than 2,600 pounds."). In 2007, EPA removed the peripheral operable unit (the "POU") from the National Priorities List, and DOE transferred jurisdiction over approximately 4,000 acres of the POU to the Department of Interior (the "DOI") to establish the Refuge. *Town of Superior*, 913 F.Supp.2d at 1099.

However, since the issuance of the 2004 CCP/EIS, and the subsequent 2007 transfer of the POU to the DOI, the following developments suggest that plutonium has not been contained in the COU, but has migrated to the Refuge (POU) and beyond.

First, a jury in *Cook v. Rockwell*, No. 09-cv-191-JLK (Feb. 14, 2006, D. Colo), found that plutonium from Rocky Flats' operations had contaminated a wide area of land beyond Rocky Flats' immediate industrial area borders, and that such plutonium would "continue to be present" on these neighboring properties, "indefinitely." **Exh. 12** at ¶¶ A(1-3) and B(1-3). The jury found the plaintiffs would suffer "increased risk of health problems as a result of this exposure." *Id.* at C(1) and D(1).

Second, with respect to the soils within the Refuge itself, the U.S. Department of Energy (DOE) released on or about 2006 a map of the plutonium that had been detected in samples taken at Rocky Flats between 1991 and 2005, entitled "Plutonium-239/240 Activity in Surface Soil." **Exh. 2**. Numerous samples of plutonium above

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Rocky Flats, Colorado Site," p. 2, (2016) (**Exh. 11**).

background were detected in the POU in areas now comprising the Refuge. *Id*. Both the Colorado Department of Public Health and Environment (CDPHE) and USFWS acknowledge that the Refuge's soils *were never remediated*, including those plutonium particles identified in samples taken on the POU as depicted in **Exh. 2**.[10] Such a failure to remediate detected plutonium is troubling.

On March 23, 2018, USFWS released a document entitled "Environmental Action Statement (the "2018 EAS"), purportedly issued "[w]ithin the spirit of NEPA." EAS (**Exh. 13**) at 4. The 2018 EAS is neither an EIS nor an EA (as it contains no analysis of the "environmental impacts of the proposed action and alternatives").[11] 40 C.F.R. § 1508.9(b). It is, however, the agency's final decision document.

The Rocky Mountain Greenway (the "Greenway Trail"), a collaboration between federal, state and local governments announced in 2012, is envisioned as a continuous trail or transportation corridor from the Rocky Mountain Arsenal to Rocky Mountain National Park.[12] The 2018 EAS contains the USFWS determination to route the Greenway Trail section through the Refuge, abandoning the previously planned routes

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[10] *See, e.g.,* CDPHE, "What are the risks to a Rocky Flats National Wildlife Refuge Visitor," https://www.colorado.gov/pacific/cdphe/rocky-flats-risks-to-refuge-visitor ("Because of these very low concentrations, no remediation was required in the refuge portion of the site.") (**Exh. 15** at 2); Corrective Action Decision/Record of Decision (ROD) for Rocky Flats Plant (USDOE), Peripheral Operable Unit…, Sept. 2006 ("No ECOCs [Ecological Contaminants of Concern] were identified in the CRA [Comprehensive Risk Assessment] for the Peripheral OU [Operable Unit]. Therefore, the RI [Remedial Investigation] concluded that no action is required in the Peripheral OU and the Peripheral OU is determined to be acceptable for all uses.") (**Exh. 16** at 49).

[11] In fact, NEPA does not expressly authorize or mention any document called an "environmental action statement."

[12] Adkins and PKM Design Group, "America's Great Outdoors, Rocky Mountain Greenway Feasibility Study, Phase 1: Broomfield to Boulder," p. 1 (2016) (**Exh. 17**).

around the Refuge's perimeter.[13] As depicted in the 2018 EAS, the Greenway Trail traverses portions of the Refuge that contain the detected plutonium samples depicted in **Exh. 2**, which, as previously noted, was not remediated. *See* **Exh. 14** (the proposed Greenway Trail is drawn as a black line on the plutonium sampling map labeled Exhibit 7).

The EAS relies upon, as a supporting document, the 2004 CCP/EIS. **Exh. 13** at 1 and 11**.** Defendant David Lucas found that the decisions made in the 2018 EAS, specifically opening the Refuge to Public Trails with 15 access points, did not require additional NEPA analyses because his decisions fell within categorical exclusions (CEs) covering "minor changes" from previous plans, i.e. the 2004 CCP/EIS. He also determined that the 2018 EAS did not need to address the compatibility determination under the NWRSAA that expired in 2014, or the ESA requirements for activities in the Refuge that might impact the Jumping Mouse in light of the designation of Jumping Mouse critical habitat in 2010.

ARGUMENT

The object of preliminary injunction is to preserve *status quo* pending litigation of the merits. *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975), citing Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2947 (3d ed.). To obtain a preliminary injunction, the moving party must establish: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is

[13] Rocky Flats National Wildlife Refuge: Proposed Trail System: December 2016: available at https://www.fws.gov/uploadedFiles/RFNWR_SS2_ProposedTrail SystemMap.pdf

denied; (3) the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017) (citing *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016)) [ftnt. omitted].

I. THE COMMUNITY GROUPS ARE LIKELY TO SUCCEED ON THE MERITS

Under the Administrative Procedure Act ("APA"), the Court "shall . . . set aside" an agency's decision if it is "arbitrary, capricious . . . or otherwise not in accordance with law" or if it was issued "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (D). As demonstrated herein, USFWS's issuance of the 2018 EAS should be rescinded because it violates NEPA, the NWRSAA, and the ESA and is therefore arbitrary, capricious, and contrary to law.

A. USFWS Has Violated the National Environmental Policy Act (NEPA).

1. USFWS Violated NEPA by Failing to Analyze the Impact of Placing the Public Trails over Lands Containing Unremediated, Residual Plutonium from the Former Rocky Flats Nuclear Weapons Facility.

NEPA requires federal agencies to take a "hard look" at the environmental effects of their proposed actions. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989). Federal agencies must prepare an "environmental impact statement" (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11. The Tenth Circuit has recognized the importance of preparing an EIS before an agency is committed "irretrievably to a given course of action." *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) *overruled*

on other grnds., see also Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). "If *any* 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared *before* agency action is taken." *Grand Canyon Trust v. F.A.A.,* 290 F.3d 339, 340 (D.C. Cir. 2002). The potential presence of even one significant factor is sufficient to require the preparation of an EIS. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005) citing *Nat'l Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 731 (9th Cir. 2001).

The 2018 EAS relies heavily on the 2004 CCP/EIS and states that no further analysis is necessary because of a categorical exclusion that covers "minor changes" to the prior plans. **Exh. 13** at 1. However, the 2004 CCP/EIS never addressed the significant issue of placing Public Trails directly on Refuge lands that are acknowledged to be contaminated with residual plutonium. *Compare* **Exh. 3** *with* **Exh. 13**. Rather, the 2004 CCP/EIS stated that the remediation of the site was an activity "outside the scope of the CCP and EIS."[14] **Exh. 3** at 11. It simply assumed the lands it later obtained would be "clean." *Id.* at 13. By essentially adopting the analysis contained in the 2004 CCP/EIS, the 2018 EAS perpetuates this failure to address the critical issue of the safety of its plans to open the Refuge for Public Trails and recreation, as NEPA requires.

The decision to open the Refuge to Public Trails with 15 access points should be analyzed to determine if its impacts will have significant environmental effects, in light

[14] USFWS anticipated receiving its lands only after EPA pronounced it "clean," **Exh. 3** at 13, meaning that the site met "cleanup standards" developed by the agency and which left residual plutonium, i.e. "hot spots," in place. *See* **Exh. 15** at 2.

of significant evidence that they certainly will. For instance, the declaration from retired meteorologist Gale Biggs notes that "[a]ctivities that are planned for the Refuge beginning in the Summer, 2018, including horseback riding, construction, bicycling, and even hiking, is likely to cause the suspension into the air of residual (unremediated) plutonium particles that can be inhaled immediately and also may migrate downwind for many miles." **Exh. 18** at ¶ 5. Harvey Nichols, emeritus professor of biology at the University of Colorado who conducted studies at Rocky Flats at the behest of DOE, also states in his declaration that "there is a likelihood of visitor inhalation and risk to the public that visit the Refuge… [and] those individual that live or recreate near the Refuge or are simply present within several miles of the Refuge." **Exhibit 19** at ¶ 8.

Significantly, Dr. Mark Johnson, the executive director of the Department of Public Health of Jefferson County, where Rocky Flats is located, who is the highest local government official addressing health and safety issues next to Rocky Flats, calls in his declaration for "a truly independent assessment of all of the studies, tests and research that has been done on Rocky Flats and its surrounding environs." **Exhibit 20**, ¶ 6 (emphasis in original).[15]

NEPA requires a discussion of all significant impacts of a proposed action. 40 CFR § 1502.2. It demands that an environmental assessment be undertaken by the agency to determine if its impacts will have significant environmental effects, even

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[15] Mark Johnson, MD, MPH recognizes the value of the atomic bomb, **Exhibit 20,** ¶ 5, but also "did not trust the U.S. Department of Defense or any of its contractors at Rocky Flats." *Id.* ¶ 3. Rather, he takes a down to earth approach in stating that "I honestly do not know how dangerous it is to live in its shadow. I believe we have the data to tell us the truth, but I do not believe all of it has been analyzed by truly independent sources." *Id.* ¶ 6.

"where the environmental effects are uncertain." *San Juan Citizens' Alliance v. Babbitt* (Blackburn, J.), 228 F.Supp. 2d 1224, 1233, n.1 (D. Colo., 2002). Thus, by failing to analyze the impacts and alternatives to its decision to place trails on the Refuge where, as acknowledged by the USFWS, residual plutonium has been detected and never remediated, the agency has failed to "comply with NEPA 'to the fullest extent possible.'" *Id*. *See also* 42 U.S.C. § 4332.

2. USFWS Violated NEPA by Not Preparing a Supplemental EIS for the Public Trails in Light of Significant New Circumstances and Developments that have Occurred Since the 2004 CCP/EIS, Which is "Stale" In Any Event.

NEPA requires "supplements to [the EIS]" if: (i) "the agency makes substantial changes" in the proposed action or if (ii) there are "significant new circumstances or information." 40 CFR § 1502.9(c)(i)-(ii). To comply with NEPA, an agency must take a "hard look" at any new information and assess whether supplementation might be necessary." *Rags Over the Arkansas River, Inc. v. Bureau of Land Mgmt.,* 77 F. Supp. 3d 1038, 1052 (D. Colo. 2015) (internal citations omitted.).

Also, USFWS's assessment of the need for supplementation should include consideration of whether the existing NEPA analysis may be *too old* to provide a basis for reasoned decisionmaking. Under the Council on Environmental Quality's (CEQ's) guidance[16] on the issue of a "stale" NEPA analyses notes that "EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1509.2

[16] The Tenth Circuit "consider[s] [the CEQ Forty Questions Guidance] persuasive authority offering interpretive guidance" regarding the meaning of NEPA and the implementing regulations." *Mexico ex rel Richardson v. BLM*, 565 F.3d 683, 705 n.25 (10th Cir. 2009).

compel preparation of an EIS supplement." Forty Questions, 46 Fed. Reg 18,026, 18,036 (March 23, 1981). *See also Or. Natural Res. Council Action v. USFS*, 445 F. Supp. 2d 1211, 1232 (D. Or. 2006) (finding this CEQ provision particularly applicable with EAs over 10 years old, citing, *inter alia*, the CEQ language).

One significant change from the 2004 CCP/EIS is the decision to place portions of the Greenway Trail on a 600-plus acre parcel of land on the southwest corner of the Rocky Flats site (the "Section 16 Parcel"). **Exh. 21**. The Section 16 Parcel was obtained by the federal government in 2012 *after* the 2004 CCP/EIS. *Id.* Upon information and belief, the Section 16 Parcel has never been sampled for plutonium, even though plutonium was detected just across the old Rocky Flats boundary line. *See* **Exh. 2**. Even in the absence of contamination, the decision to construct a trail on a new 600-acre parcel of land would almost always require a NEPA analysis. *Conner v. Burford*, 848 F.2d 1441, 1449 (9th Cir. 1988) (An "irrevocable commitment of land to surface-disturbing activity, like drilling or road building … could not be make without an EIS.") (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983).

Other significant changed circumstances and new information since the preparation of the 2004 CCP/EIS are (i) substantial erosion of features on the Refuge caused by destructive precipitation events in 2013 and 2015, (ii) a buildup of new residential neighborhoods and a public school directly bordering the Refuge to the south, (iii) studies showing that plutonium has migrated from the Refuge to offsite locations, and (iv) reports prepared by Metropolitan State University and others indicating higher than expected cancer rates among Rocky Flats' neighbors. *See* discussion and citations at p. 3, *supra.*

Finally, the cleanup standards applied to the entire site, central operable unit (COU) and POU, were not finalized until the 2006 ROD. **Exh. 16**. In assessing these cleanup standards, USFWS undertook in 2006 a Level III Preacquisition Survey where it "collected surface soil and vegetation samples to confirm some of the assumptions that DOE has made in the RI/FS [Remedial Investigation/Feasibility Study]. In particular, the Service wanted to collect samples from future trail locations, confirming extrapolated data that DOE had provided." Level III Survey (**Exh. 5**) at 1. None of this information was available for consideration during the 2004 CCP/EIS process. Thus, the data and assumptions forming the basis of 2004 CCP/EIS are too stale to be acceptable under the rule of reason test. *See Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 442 (5th Cir. 1981) (agency's decision to rely on an existing EIS based on old stale data rather than updated information is bound by the rule of reason.).

These significant changes and new circumstances and information need to be addressed in a supplemental environmental impact statement (SEIS). 40 CFR § 1502.9(c)(i)-(ii). The fact that the 2004 CCP/EIS is now over 18 years old, when EISs over 5 years old are generally considered "stale," should also countenance the agency's preparation of an SEIS. *See* 46 Fed. Reg 18,026, 18,036 (March 23, 1981).

3. USFWS Cannot Rely on Categorical Exclusions (CEs) Without Analyzing the Extraordinary Circumstances Associated with the Proposed Action.

Defendant Lucas, in the 2018 EAS, adopted a categorical exclusion (CE) rather than conducting an EA or EIS under NEPA. **Exh. 13** at 1. Under DOI's regulations, the record must contain an analysis of "extraordinary circumstances" whenever an agency relies on a CE:

> [a]ny action that is normally categorically excluded must be evaluated to determine whether it meets any of the extraordinary circumstances in section 46.215; if it does, further analysis and environmental documents must be prepared for the action.

43 C.F.R. § 46.205.

The record contains no such analysis. Rather, Mr. Lucas, on behalf of the USFWS, merely recited the language of the extraordinary circumstances followed by a single word -- "No." Environmental Action Statement (**Exh. 13**) at 9-10. Such a cursory analysis is a textbook example of arbitrary and capricious decisionmaking under NEPA. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) ("requiring a reasoned basis for agency action..."). *See also Utah Envtl. Congress v. Russell*, 518 F. 3d 817 at n. 4 (10th Cir. 2008) ("[W]e find nothing in the record indicating this exclusion was part of the Forest Service's calculus at the time it wrote the EA.").

As the Ninth Circuit has explained,

> [I]t is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision.

California v. Norton, 311 F.3d 1162, 1176 (9th Cir.2002)). In *Norton*, the court explained that "the fact that the exceptions *may* apply is all that is required to prohibit use of the categorical exclusion." *Id.* at 1177; *see id.* (holding the suspension of offshore oil leases violated NEPA because the agency did not adequately document its reliance on a CE, and failed to explain the inapplicability of extraordinary circumstances exceptions).

In the same vein, in *California ex rel. Lockyer v. U.S. Dept. of Agr.* ("Lockyer"), 575 F.3d 999, 1017 (9th Cir., 2009), the court rejected the Forest Service's "summary statement" that the State Petitions Rule would have no "discernable effects on the various classes of resources listed in the agency's NEPA Policy and Procedures):

> This cursory statement does not even identify those resource conditions that might be affected by the promulgation of the State Petitions Rule. Even if we were to believe that this rule might fall within the categorical exclusion—which we do not—this is an insufficient explanation of why the rule would not fall into one of the exceptions to the categorical exclusion.

Id. at 1018.

Here, USFWS recitation of the word "No" after listing the relevant categorical exclusion does not demonstrate that the issue was part of the agency's calculus at the time of its decision. Accordingly, the Court need not reach the hypothetical question of whether USFWS *could have* lawfully invoked a CE under these facts; rather, the Court should set aside the decision to open the Public Trails due to USFWS's wholesale failure to conduct any contemporaneous analysis (beyond saying "no") of the applicability of "extraordinary circumstances" that may exist in connection with its plans. For that reason alone, the Court should invalidate the agency's decision.

4. Even Had USFWS Engaged in an Appropriate Procedural Analysis of the Extraordinary Circumstances in Authorizing this Project, FWS's Reliance on the "Minor Action" CEs Would Be Arbitrary and Capricious Because Extraordinary Circumstances, Such as Those Implicating Health and Safety and Having Controversial Effects, are Clearly Applicable.

Should the Court reach the question of whether FWS could have lawfully invoked a CE under these circumstances, the inescapable conclusion is that the application of CEs is inappropriate here, and thus an SEIS is required.

An agency may only rely on a CE for "actions which do not individually or cumulatively have a significant effect on the human environment" and if no extraordinary circumstance exists which would force a more involved review. 40 C.F.R. § 1508.4 (requiring procedures for "extraordinary circumstances"). "[T]he fact that the exceptions *may* apply is all that is required to prohibit use of the categorical exclusion." *Lockyer*, 311 F.3d at 1177.

In this case, there are six extraordinary circumstances which *may* apply to the Public Trails, none of which were considered by USFWS. Plaintiffs discuss the applicability of each of these extraordinary circumstances in turn.

First, and perhaps foremost, the decision to open the Refuge to Public Trails may "have significant impacts on public health or safety." 46 C.F.R. § 46.215(a). The history of the site includes "undisputed [evidence] that the cumulative MUF [material unaccounted for] during Defendants' operation of Rocky Flats is more than 2,600 pounds." *Cook v. Rockwell Int'l Corp.,* 580 F. Supp. 2d 1071, 1145–46 (D. Colo. 2006). Moreover, a jury found that plutonium from Rocky Flats' operations had contaminated a wide area of land beyond Rocky Flats' borders, and that such plutonium would "continue to be present" on these neighboring properties "indefinitely." *Cook v. Rockwell International Corporation, etc.*, Civ. 90-cv-181-JLK (Jury Verdict Form, Feb. 14, 2006) at ¶¶ A(1-3) and B(1-3). **Exh. 12**. The jury found the plaintiffs in that case would suffer "increased risk of health problems as a result of this exposure," *id*. at C(1) and D(1), and awarded damages totaling into the hundreds of millions of dollars. *Id*. at

pp. 15, 24-27.[17] It is simply beyond dispute that the decision to open the Refuge to the Public Trails may "have significant impacts on public health or safety."

Second, the Public Trails may "[h]ave highly controversial environmental effects...." 46 C.F.R. § 46.215(c). The agency previously acknowledged the controversial effects of this project. *Town of Superior*, 913 F. Supp. 2d at 1124 ("FWS recognized that the issue of plutonium in the transportation corridor is "controversial" and that there is public concern regarding plutonium contamination."). Moreover, in its Record on Decision on opening up the Refuge, USFWS also acknowledged receiving over 5,000 comments:

> During the Draft CCP/EIS comment period that occurred from February 19, 2004 to April 25, 2004, the Service received over 5,000 comments, received through public hearing testimony, letters, and emails. Comments came from 251 individuals and 34 agencies or organizations. The Service also heard from 933 people through form letters and petitions.

Exh. 22.

Clearly, the decision to expose the public to Rocky Flats' plutonium contamination, and the agency's plans to open the Refuge for the Public Trails and a Visitor Center, is highly controversial.

Third, the Public Trails may "have significant impacts on … refuge lands …" 46 C.F.R. § 46.215(b), and/or may "[h]ave highly uncertain and potentially significant

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[17] A settlement was achieved between the parties in 2016 for $375,000,000. *Cook v. Rockwell International Corporation, etc.*, Civ. 90-cv-181-JLK (Settlement Agreement, May 18, 2016) at p. 4. *See also Cook v. Rockwell Int'l Corp.,* 580 F. Supp. 2d 1071, 1145–46 (D. Colo. 2006) ("It is undisputed that the cumulative MUF [material unaccounted for] during Defendants' operation of Rocky Flats is more than 2,600 pounds.").

environmental effects or involve unique or unknown environmental risks." 46 C.F.R. § 46.215(d). USFWS' decision to place the Public Trails on "refuge lands" may have significant impacts, and the fact that they will be in the vicinity of, and potentially directly over, residual plutonium is the type of "highly uncertain" effect that prevents the agency from relying on a categorical exclusion (CE). Additionally, circumstances have *substantially* changed since the preparation of the 2004 CCP/EIS,[18] and so without undergoing additional NEPA review, USFWS cannot determine the effects of these changes on its decision. Because the decision may have significant impacts and/or potentially significant environmental effects on natural resources such as the Refuge, the agency may not rely on a CE.

Fourth, the citing of the Public Trails may "[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects." 46 C.F.R. § 46.215(e). USFWS's Public Trails decision relies on an outdated 2004 CCP/EIS that does not address the changed circumstances in the intervening 18 years. Its decision reflects the agency's view is that it can rely on an outdated NEPA document for the decisions that will follow, e.g., entering into contracts for construction of the trails that might endanger the construction workers, affixing signs that warn of dangers, and whether or not the public will be allowed off-trail access. The Public Trails decision sets a "precedent for future action" that may, as discussed herein,

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[18] For instance, the Public Trails will traverse the Section 16 Parcel which was not even part of the Refuge until 2012. Also, since the 2004 CCP/EIS, the area immediately surrounding the Rocky Flats sight has changed dramatically, with large neighborhoods and other development being constructed next to the Refuge. **Exh. 6**. Significant changes also include weather events that eroded the site. *See* n.3, *supra*. **Exh. 4**.

have "potentially significant environmental effects." 46 C.F.R. § 46.215(e).

Fifth, the Public Trails may "[h]ave significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species." 46 C.F.R. § 46.215(h). The trails are being constructed in an area containing the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) ("Jumping Mouse"), which is an endangered species on the List of Endangered or Threatened Species and protected by the Endangered Species Act. *See* Section III(D), *infra.* The Public Trails will traverse lands designated as Jumping Mouse critical habitat in 2010. *Id.*

Finally, the Public Trails may "[v]iolate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment." 46 C.F.R. § 46.215(i). As discussed in more detail in Section II(B) *infra*, the Public Trails decision violates 16 U.S.C. § 668dd(d)(3)(A)(i) of the National Wildlife Refuge System Administration Act (NWRSAA), which states that USFWS "shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use and that the use is not inconsistent with public safety."

In short, the reliance on a categorical exclusion to shield the agency's Public Trails decision is prevented by at the six "extraordinary circumstances" discussed above.

B. FWS is Violating the NWRSAA by Relying on an Expired Compatibility Determination (CD).

NWRSAA states that FWS may not "initiate or permit a new use of a refuge or

expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a "compatible use" and that the use is not inconsistent with public safety."[19] When conditions significantly change, or new information becomes available about the effects of an approved use, the FWS must re-evaluate the use CD, including offering the public a robust opportunity to comment.[20, 21, 22]

In 2004, FWS approved four use CDs for the Refuge, including one for trails, the "Multi-Use (Equestrian, Bicycle and Foot access) Trails" (the "Trails CD").[23] These activities were found to be *not a priority use* and 'not a form of wildlife dependent recreation.'" *Id.* As a non-priority use, the Trails were approved with a shorter mandatory re-evaluation horizon in September, 2014. *Id.*

The Trails CD specifically analyzed "[m]ulti-use trails with equestrian and bicycle access [] *limited to those trail segments designated in the Comprehensive Conservation Plan* for Rocky Flats NWR."[24] The map supporting this CD clearly shows different trails than those now proposed. **Exh. 3**, Fig. 7 (p. 4). Significantly, the Trails CD states,"[d]evelopment or opening of additional areas for these uses will require additional evaluation under the National Environmental Policy Act, a new Compatibility

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[19] 16 U.S.C. § 668dd(d)(3)(A)(i).
[20] 16 U.S.C. § 668dd(d)(3)(A)(viii).
[21] Once a comprehensive conservation plan (CCP) is completed, the FWS is required to manage a refuge "in a manner consistent with the plan and shall revise the plan at any time if the Secretary determines that conditions that affect the refuge… have changed significantly." 16 U.S.C. § 668dd(e)(1)(E).
[22] The FWS' CCP process must "ensure an opportunity for *active public involvement* in the … revision of comprehensive conservation plans." 16 U.S.C. § 668dd(e)(4)(A) (emphasis added)
[23] 2004 CCP/EIS (**Exh. 3**), p. 263 (emphasis added).
[24] **Exh. 3**, p. 263, sub (a) (emphasis added).

Determination, and a new Intra-Service Section 7 Consultation." *Id.*

In the 2018 EAS, USFWS states its decision was "covered" by other CDs that are "current," specifically those for "observation and photography" and "environmental education." EAS, **Exh. 13**, at 8, n.2. However, in determining that other current CDs are sufficient, the agency contradicts its Trails CD: "development or opening of additional areas for the uses (trails). . .will require additional evaluation. . .and a new Compatibility Determination. 2004 CCP/EIS (**Exh. 3**), p. 263.

Agencies do not have unbridled discretion to directly contradict prior policy determinations. Because USFWS' recent determination regarding the adequacy of existing CDs contradicts its prior policy, the agency must provide a reasoned justification for why it now contends that a preexisting CD is sufficient for the development or opening of additional areas for uses of trails. *See FCC v. Fox TV Stations, Inc*. 556 U.S. 502, 515-16 (2009) (When a "new policy rests upon factual findings that contradict those which underlay its prior policy … [a] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."). It has failed to do so.

C. The USFWS Violated the Endangered Species Act by Failing to Reinitiate Section 7 Consultation.

The Preble's Meadow Jumping Mouse was listed in 1998 as a "threatened" species under the ESA. 63 Fed.Reg. 26517 (May 13, 1998). Critical habitat for the Jumping Mouse ("Jumping Mouse CH") was designated in 2010 and includes 12.5 miles of streams and riparian habitat in the Refuge. 75 Fed.Reg. 78429, 78476—78476 (Dec. 12, 2010).

In contrast to the configuration analyzed in described in Alternative B of the 2004 CCP/EIS, the 2018 EAS now aligns the Greenway so that significant portions will be located in Jumping Mouse CH in the Rock Creek and Woman Creek drainages, and constructs the Greenway as a paved multipurpose trail instead of a unpaved gravel surface. **Exh. 13** at 3, 7-8. Other changes include the alignment of the Rock Creek Trail in Jumping Mouse CH in the Rock Creek drainage, designation of all or a portion of the Rock Creek Trail, East Woman Creek Loop Trail and Lindsay Ranch Loop for "multiple use," the possible elimination of seasonal closures described in the 2004 CCP/EIS, and the expansion of purpose, size, construction and use of the Multipurpose Facility located on the Greenway route adjacent to the Rock Creek drainage and Jumping Mouse critical habitat. *Id.*

In 2005, the USFWS engaged in informal intra-agency consultation under ESA Section 7 that examined the impacts of the 2004 CCP/EIS on the Jumping Mouse and determined that implementation "may affect but is not likely to adversely affect" the Jumping Mouse. Intra-Service Section 7 Consultation Memorandum dated July 18, 2005 ("2005 Consultation") (**Exh. 23**). In 2018, the USFWS relied upon the 2005 Consultation to comply with its Section 7 consultation obligations regarding both the Jumping Mouse and its Critical Habitat for the revised and expanded Public Trails described in the 2018 EAS. Such reliance is specious because the 2005 Consultation does not analyze the impacts of the material changes to the Public Trails from the 2004 CCP/EIS described in the 2018 EAS, or any impacts to Jumping Mouse CH that was designated in 2010.

Section 402.16 of the USFWS' Regulations implementing the ESA provides:

> "Reinitiation of formal consultation is required and must be requested by the Federal Agency or the Service … (c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) if a new species is listed or critical habitat designated that may be affected by the identified action."

50 C.F.R. § 402.16.

Courts have interpreted the reinitiation requirement of Section 402.16 to apply to both "formal" and "informal" consultations. *Center for Native Ecosystems v. Cables*, 509 F.3d 1310, 1324-25 (10th Cir. 2007) (examining grounds for reinitiation of informal consultation); *Conservation Cong. v. Finley*, 774 F.3d 611, 619 (9th Cir. 2014) ("Contrary to the government's assertion, this requirement [to reinitiate consultation] applies to both formal and informal consultation.") ; *Hawksbill Sea Turtle v. FEMA*, 11 F. Supp. 2d 529, 550 n.31 (D.V.I. 1998) ("given that informal consultation possesses less procedural safety precautions than formal consultation, immunizing conclusions reached after informal consultation from potential reinitiation seems completely illogical.").

As noted previously, the 2018 EAS described the development of a paved multipurpose Greenway and other significant modifications from the 2004 CCP/EIS that were not evaluated in the limited and informal 2005 Consultation.[25] Although the 2018 EAS characterizes many of the modifications from the 2004 CCP/EIS as "minor," such alterations are in fact significantly different from the prior plan and will likely cause

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[25] For example, the 2005 Consultation describes the project as "[t]rails in the Rock Creek drainage will be restricted to pedestrian use and closed seasonally during the months when Preble's are active on the surface. Those portions (12.8 miles) of the proposed trail system open to bicycle and equestrian uses are restricted to existing gravel surface roads (. . .)."

different and additional impacts to the Jumping Mouse and its Critical Habitat than were considered in the 2005 Consultation. Such impacts have the substantial likelihood to have "adverse" effects, that can only be identified and analyzed by a reinitiation of Section 7 consultation. *See Center for Native Ecosystems v. Cables*, 509 F.3d at 1324-25 (Section 402.16(b) and (c) require reinitiation of consultation "when the effects to species that are revealed or caused are different from those effects previously considered." [emphasis omitted]).

Further, the 2010 designation of Jumping Mouse CH is itself an adequate trigger for the reinitiation of the 2005 Consultation. *See, e.g., Cottonwood Envt'l Law Ctr. v. U.S. Forest Serv.,* 789 F.3d 1075, 1088 (9th Cir. 2015) (agency required to reinitiate consultation after designation of critical habitat); *All. for the Wild Rockies v. Christensen*, 663 F. App'x 515, 516 (9th Cir. 2016) (same).

Accordingly, the 2005 Consultation is subject to mandatory reinitiation under 50 C.F.R. § 402.16(c) to determine the impacts of the significant changes to the Public Trails on the Jumping Mouse and its Critical Habitat that were not considered in the 2005 Consultation, and under § 402.16(d) from the subsequent designation of Jumping Mouse Critical Habitat in 2010. Plaintiffs have carried their burden to demonstrate a fair chance of success on the merits for their claims that the USFWS is in violation of 50 C.F.R. §402.16(c) and (d) for its failure to reinitiate the 2005 Consultation.

II. PLAINTIFFS AND THEIR MEMBERS WILL SUFFER IRREPARABLE HARM IF THE COURT DOES NOT GRANT AN INJUNCTION.

Plaintiffs demonstrate irreparable harm because (1) FWS' uninformed decisionmaking denigrates Plaintiffs' organizational goals of protecting the public from

Rocky Flats' migration of plutonium, (2) FWS' proposed actions threaten the Plaintiffs' members' health and wellbeing and (3) the destruction or adverse modifications of Jumping Mouse critical habitat would harm Plaintiffs' interests in the protection and conservation of the species and their ability to observe and enjoy viewing this species.

A. Plaintiffs' Missions are Denigrated by FWS' Chilling Approach to Public Participation

Courts routinely issue preliminary injunctions where, as here, the agency fails to comply with the required NEPA procedure. *Davis v. Mineta*, 302 F.3d 1104, 1114 (10th Cir. 2002). ("In mandating compliance with NEPA's procedural requirements as a means of safeguarding against environmental harms, Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment.")

Plaintiffs must still show that "environmental harm results in irreparable injury to their specific environmental interests," *id*. at 1115, and they do so. Moore Declaration (**Exh. 24**) at ¶16(d) and (e); Elofson-Hurst Declaration (**Exh. 9**) at ¶15; Graham-Reed Declaration (**Exh. 25**) at ¶14. As found by another Tenth Circuit court, "Under the National Environmental Policy Act, an injury results not from the agency's decision, but from the agency's *uninformed* decisionmaking." *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) (emphasis in original). *See also Sierra Club v. U.S. DOE*, 287 F.3d at 1265, citing *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 452.

In a previous Rocky Flats decision, *Sierra Club v. U.S. DOE*, this Court recognized that the environmental plaintiffs had "concrete interests" which were harmed

when DOE failed to conduct a NEPA analysis for the placement of a gravel road at Rocky Flats. "Sierra Club has alleged facts sufficient to show that increased risk of environmental harm emanating from the uninformed decision of DOE to grant the easement affects Sierra Club's "concrete interest." 287 F.3d 1256, 1265 (10th Cir. 2002).

The "bureaucratic momentum" of agency action already underway also has been recognized as an important consideration in finding irreparable injury:

> Thus, the irreparable injury threatened here is not simply whatever ground-disturbing activities are conducted in the relatively short interim before this action is decided, it is the risk that in the event the [agency's NEPA decisions] are overturned and the agency is required to 'redecide' the [ ] issues, the bureaucratic momentum created by Defendants' activities will skew the analysis and decisionmaking of the [agency] towards its original, non-NEPA compliant [ ] decision.

Colorado Wild Inc. v. U.S. Forest Serv., 523 F. Supp. 2d 1213, 1221 (D.Colo. 2007).[26]

Allowing FWS to proceed with construction of the Public Trails before complying with its environmental obligations, particularly in the absence of robust public participation, will harm Plaintiff organization's missions of public education, informed consent, and health protection. *See* Elofson-Hurst Decl., **Exh. 9**, at ¶¶7-8, 15; Graham-Reed Decl., **Exh. 25**, at ¶14. Indeed, FWS actions directly undermine 34 years of organizational activity for Plaintiff Rocky Mountain Peace & Justice Center. **Exh. 24** at ¶¶4-12, 15-16.[27]

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[26] *See also Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) ("The difficulty of stopping a bureaucratic steam roller, once started ... seems to us ... a perfectly proper factor for a district court to take into account ... on a motion for preliminary injunction.").

[27] *See also San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.,* 657 F. Supp. 2d 1233, 1241-42 (D. Colo. 2009 ("Plaintiffs' procedural interest in a proper NEPA analysis is likely to be irreparably harmed if [the industry proponent] were

FWS' "steamroller" approach to proceeding with premature construction, and the chilling effect its restricted "Sharing Sessions" have had on public participation, also harms Plaintiff's member's professional reputations. Lipsky Decl., **Exh. 10**, at ¶¶19-20; Moore Decl., **Exh. 24**, at ¶17.

B. The Health of the Community Groups' Members will be Jeopardized by premature construction at the Refuge.

The Community Groups' members will also suffer enduring impacts to their health and wellbeing through the unprecedented construction at Rocky Flats.

In *Sierra Club v. U.S. Dep't of Agric., Rural Utilities Serv.*, the court issued a preliminary injunction where the proposed action "will emit substantial quantities of air pollutants that endanger human health and the environment and thereby cause irreparable harm." 841 F. Supp. 2d 349, 358 (D.D.C. 2012). Because the adverse human health impacts from inhaling plutonium are irreparable, and because Plaintiffs' members visit or live in areas impacted by previous plutonium events,[28] disturbance of the Refuge soils from this summer's construction and future Trails' usage is likely to result in physical harm to Plaintiffs' members. Lipsky Decl., **Exh. 10** at ¶¶15, 17, 18; Elofson-Hurst Decl.**, Exh. 9** at ¶¶12, 16. It will also result in emotional harm. **Exh. 9** at ¶16(c).

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permitted to go forward with the very actions that threaten the harm NEPA is intended to prevent, including uninformed decisionmaking."); *Save Strawberry Canyon v. Dep't of Energy,* 613 F.Supp.2d 1177, 1187 (N.D. Cal. 2009) ("There is no doubt that the failure to undertake an EIS when required to do so constitutes procedural injury to those affected by the environmental impacts of a project.").

[28] *See e.g. Cook* Jury Verdict Form (**Exh. 12** at 1-2) (federal jury found that Rocky Flats' plutonium had migrated onto neighboring properties, where it will remain "indefinitely" causing an "increased risk of health problems."); Rocky Flat Property Class Area Map (**Exh. 26**).

Finally, as the Supreme Court recognized: "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e*., irreparable." *Amoco Prod. Co. v. Vill. of Gambell,* 480 U.S. 531, 545 (1987).

C. Plaintiff Will Suffer Irreparable Harm Under the Endangered Species Act

To obtain a preliminary injunction for a violation of the ESA, Plaintiffs must demonstrate that irreparable injury is likely in the absence of the injunction. *Winter,* 555 U.S. at 22, 129 S.Ct. 365. Plaintiffs' interests in conserving the Jumping Mouse in the Refuge and adjacent areas, and viewing the Jumping Mouse in areas of the Refuge that may be accessible to the public, would be irreparably harmed by implementation of the Public Trails in violation of the ESA. Stafford Decl., **Exh. 7**, at ¶ 5.

The Plaintiffs' interest in the conservation of the Jumping Mouse would be irreparably harmed if its Critical Habitat is adversely modified by implementation of the Public Trails in violation of ESA Section 7. By definition, "critical habitat" are those geographical areas that contain "those physical or biological features (I) *essential to the conservation of the species* (. . .)." 16 U.S.C. § 1532(5)(A)(I). A major goal of Section 7 consultation is to promote the conservation of the species by preventing the "destruction or adverse modification of critical habitat" 16 U.S.C. § 1536(a)(2).

The Tenth Circuit has recognized that "critical habitat is impaired when features essential to the species' conservation are impaired." *Ctr. For Native Ecosystems v. Cables*, 509 F.3d at 1310, 1321. In this matter, the 2018 EAS description of plans to construct and open public multipurpose trails, the Greenway and other improvements in

Jumping Mouse CH are likely to impair and adversely modify the features determined to be "essential to the conservation of the species." Compromising the Jumping Mouse CH will irreparable harm the Plaintiffs' interest in the conservation of the species in the absence of the requested injunctive relief pending adequate Section 7 consultation. Stafford Decl., **Exh. 7**, at ¶ 4.

III. THE BALANCE OF HARMS FAVORS GRANTING AN INJUNCTION

The Supreme Court has recognized that a preliminary injunction is an appropriate remedy – and all too often the only remedy – in environmental cases. *Amoco Prod. Co. v. Vill. Of Gambell*, *Alaska*, 480 U.S. 531, 545 (1987). Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. *Id*. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment. *Id*.

A preliminary injunction is designed to prevent irreparable injury; its value would be totally eviscerated if the plaintiff had to show that the harm had already occurred before the court could issue the injunction. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 325 (D.C. Cir. 1987).

Plaintiffs seek only to preserve the *status quo* pending completion of the legally required environmental reviews. Defendants' ostensible harm is delay, but this "delay" is one required by the environmental statutes. Mere delay, without something more, is not an adequate basis to tip the balance against an injunction. *All. for the Wild Rockies v. Marten*, 2017 WL 2345656 *3 (D. Mont. May 30, 2017); *All. for the Wild Rockies v. Marten*, 200 F. Supp. 3d 1110, 1112 (D. Mont. 2016) ("The balance of equities tips in

favor of Alliance because it faces permanent damage if logging activity were to proceed and the Forest Service faces only delay."). Thus, it is unclear that Defendants would suffer *any* harm by being required to analyze the impacts of the Trails and Visitor Center, as NEPA demands, or the reinitiation and completion of Section 7 consultation under the ESA, before proceeding with the anticipated construction. Under the ESA, "the equities and public interest factors always tip in favor of the protected species."). *Cottonwood Envtl. Law Ctr.* 789 F.3d at 1091.

Moreover, any potential economic harm to USFWS does not outweigh Plaintiffs' environmental, health, and procedural harms. "[F]inancial concerns alone generally do not outweigh environmental harm." *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004); *see also, Acierno v. New Castle Cnty.,* 40 F.3d 645, 653 (3d Cir. 1994) (recognizing that "[e]conomic loss does not constitute irreparable harm…"). Any monetary damages Defendants may allege cannot outweigh the injuries that Plaintiffs would suffer in the absence of an injunction.

IV. THE PUBLIC INTEREST FAVORS GRANTING AN INJUNCTION

An injunction in this case is vital to protecting the public interest by preventing additional environmental harm and public health impacts from disturbing plutonium-laden soils through premature unauthorized construction. Similarly, "the public has an interest in ensuring that federal agency actions … comply with the requirements of NEPA."[29] As recognized in *Colorado Wild*, "The public has an undeniable interest in the [agency's] compliance with NEPA's environmental review requirements and the

[29] *Sierra Club*, 841 F. Supp. 2d at 360.

informed decision-making that NEPA is designed to promote."[30] Indeed, the refusal of administrative agencies to comply with environmental laws "invokes a public interest of the highest order: the interest in having government officials act in accordance with law."[31]

As summarized by the Ninth Circuit:

> This court has also recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and we have held that suspending such projects until that consideration occurs "comports with the public interest." [*S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009)].).

All. for the Wild Rockies v. Cottrell, 632 F.3d at 1138.

V. THE COURT SHOULD NOT IMPOSE A BOND

If this Court enters an injunction, the Court may waive the bond requirement, or impose a nominal bond under the public interest exception to Rule 65(c). Where, as here, Plaintiffs seek to advance the public interest through the enforcement of environmental laws, courts in this Circuit often waive or require a minimal bond.[32]

VI. CONCLUSION

This Community Groups satisfy the test for a preliminary injunction, and therefore respectfully request this Court to preserve the *status quo*, until a decision on the merits is reached, by: (1) vacating the 2018 EAS, (2) prohibiting the planned opening of 15 separate access points into the Refuge, (3) enjoining any additional work by Defendants

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[30] *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d at 1223 (D. Colo. 2007).
[31] *Seattle Audubon Society v. Evans,* 771 F. Supp. 1081, 1096 (W.D. Wash. 1991).
[32] *See Davis,* 302 F.3d at 1126 ("Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered."); *Colorado Wild,* 523 F. Supp. 2d at 1230-31 (accord).

and/or their agents on the Trails and/or Multipurpose Facility, including construction of the Public Trails or the facilitation thereof.

Respectfully submitted this 31st day of May, 2018.

LAW OFFICES OF RANDALL M. WEINER, P.C.

Original Signature on file at Law Offices of Randall M. Weiner, P.C.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on May 31, 2018, the foregoing, along with all exhibits thereto, will be electronically filed with the Clerk of the Court via the CM/ECF system, which will generate automatic service upon all Parties enrolled to receive such notice, including:

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