UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-15-4378-MWF (JEMx) **Date: September 6, 2016**
Title: Los Padres ForestWatch et al. -*v*- United States Bureau of Land Management et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [17]; FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [21]

Before the Court is Plaintiffs Center for Biological Diversity and Los Padres ForestWatch's Motion for Summary Judgment ("Plaintiffs' Motion"). (Docket No. 17). Also before the Court is Defendants United States Bureau of Land Management (the "Bureau"), Sally Jewel, James G. Kenna, and Neil Kornze's consolidated Cross Motion for Summary Judgment ("Defendants' Motion") and Opposition to Plaintiffs' Motion. (Docket No. 21). Plaintiffs filed a consolidated Opposition to Defendants' Motion and a Reply in support of Plaintiffs' Motion ("Plaintiffs' Reply"). (Docket No. 24). Defendants filed a Reply in support of Defendants' Motion ("Defendants' Reply"). (Docket No. 25).

The Court has considered the papers filed on each Motion, including the Corrected Administrative Record ("AR") (Docket No. 15) and Supplemental Administrative Record (Docket No. 16), and held a hearing on **August 26, 2016**.

The Court rejects Defendants' procedural arguments based on standing, ripeness and waiver. Plaintiffs have alleged sufficiently concrete injuries to merit Article III standing. Plaintiffs' claims are ripe because the alleged injury occurred at the time the inadequate environmental impact statement ("EIS") was promulgated. Finally, in considering these relevant facts before the Bureau at the time of its EIS preparations,

the Bureau's failure to address the environmental impact of fracking was a flaw "so obvious" that Plaintiffs did not need to expressly point it out to preserve their ability to challenge this omission. Defendants' remaining arguments that Plaintiffs did not adequately alert the Bureau to their request for a supplemental EIS or an alternative that would reduce oil and gas activities are not supported in the record.

On the merits, the Court's rulings are as follows:

The Court **GRANTS** Plaintiffs' Motion and **DENIES** Defendants' Motion as to the first and third issues regarding the final EIS and requested supplemental EIS. Plaintiffs are entitled to summary judgment that the Bureau failed to take a "hard look" at the environmental impact of the resource management plan ("RMP") when, under the RMP, 25% of new wells are expected to use hydraulic fracturing. The Bureau is therefore obligated to prepare a supplemental EIS to analyze the environmental consequences flowing from the use of hydraulic fracturing.

The Court **GRANTS** Defendants' Motion and **DENIES** Plaintiffs' Motion as to the second issue on amount of "closed" land. Defendants are entitled to summary judgment that the Bureau did not fail to consider a reasonable range of alternatives given that acreage of "closed" land is only one of several measures available to the Bureau in developing alternatives that mitigate impact on the environment.

I. BACKGROUND

The background facts are largely undisputed:

A. Well Stimulation Technologies and Enhanced Oil Recovery Techniques

Well stimulation technologies ("WST"), such as hydraulic fracturing ("fracking"), and enhanced oil recovery techniques ("EOR") have been used in California for over 50 years. (*Id.* at 12083, 18961). Fracking allows for increased extraction because chemical fluids are injected at high pressure to produce fractures in

the surrounding rock. (*Id.* at 18919, 95646). The fractures create additional pathways and therefore enhance the flow of oil and gas. (*Id.* 18919, 95648).

The use of fracking has increased dramatically in recent years, and this trend is expected to continue. (*Id.* at 18899, 94526, 94416). Fracking raises a number of environmental concerns, including risks of groundwater contamination, seismicity, and chemical leaks. (*Id.* 11605, 18906–08, 11550, 11211). Although the parties disagree as to whether these concerns are well-founded, the Bureau acknowledges that fracking is, at a minimum, a controversial national issue. (*Id.* at 94526, 94416).

B. The Bakersfield RMP and EIS

The Bakersfield Field Office of the Bureau manages 400,000 acres of public lands and an additional 750,000 acres of federal mineral estate (the "Decision Area") within a planning area of 17 million acres of public land in the counties of Kings, San Luis Obispo, Santa Barbara, Tulare, Ventura, Madera, eastern Fresno, and western Kern. (AR at 148, 89223–25).

The Decision Area encompasses numerous sensitive ecological resources and "extraordinary biodiversity." (*Id.* at 18908). Of the 130 federally listed threatened and endangered animal species in California, over one-third can be found in or around the Decision Area. (*Id.* at 89437). Below ground, the Decision Area also encompasses numerous groundwater systems that contribute to the annual water supply used by neighboring areas for agricultural and urban purposes. (*Id.* at 89511, 89509, 45418–19).

In March 2008, the Bureau issued a Notice of Intent regarding its plans to draft a new RMP to replace existing management plans for the Decision Area. (*Id.* 130, 89205). Later that year, the Bureau began the public scoping process to identify issues relevant to the RMP revision. (*Id.* at 148). Plaintiffs along with other environmental organizations submitted joint scoping comments. (*Id.* at 1174).

In September 2011, the Bureau published a Notice of Availability and solicited comments on its draft RMP and EIS. (*Id.* at 380, 2351). The draft EIS described and analyzed five alternatives for the management of public lands and resources in the Decision Area. (*Id.* at 81573). After the required comment period, in August 2012, the Bureau published a Notice of Availability of the Proposed Resource Management Plan ("PRMP") and Final Environmental Impact Statement ("FEIS"). (*Id.* at 389).

Plaintiffs protested in writing to the Bureau that the FEIS failed to address the environmental impact of fracking or other WST/EOR under the PRMP. (*Id.* at 4670).

In August 2013, after issuing the FEIS but before issuing a Record of Decision, the Bureau commissioned an independent assessment of fracking in California by the California Council of Science and Technology. (*Id.* at 17711). The purpose of the study was to "synthesize and assess the available published scientific and engineering information associated with [fracking] in California." (*Id.*). In August 2014, the study yielded a report that examined the use and impacts of fracking in California (the "CCST Report"). (*Id.* at 18867–19660).

In January 2015, the Bureau published a Notice of Availability of the Record of Decision for the PRMP. (*Id.* at 92680). The Record of Decision explained that the Bureau had reviewed the CCST Report but determined that it did not contain significant new information to warrant a supplemental EIS. (*Id.* at 92283–86). The Bureau selected the proposed plan, Alternative B, as described in the FEIS for the PRMP, which would leave 1,011,470 acres of federal mineral estate open to leasing, and close 149,600 acres to fluid mineral leasing. (*Id.* at 92375).

C. Federal Land Policy & Management Act

The Federal Land Policy & Management Act ("FLPMA"), 43 U.S.C. §§ 1701–1785, establishes requirements for land use planning on federal public land. FLPMA requires that the Bureau "develop, maintain, and when appropriate, revise land use plans" to ensure that land management be conducted "on the basis of multiple use and sustained yield." 43 U.S.C. §§ 1701(a)(7), 1712(a).

The process for developing, maintaining, and revising resource management plans is controlled by federal regulations at 43 C.F.R. §§ 1601.0–1610.8. Under FLPMA, if the Bureau wishes to change a resource management plan, it can only do so by formally amending the plan pursuant to 43 C.F.R. § 1610.5-5.

Section 1610.5-5 states, in pertinent part:

> An amendment shall be made through an environmental assessment of the proposed change, or an environmental impact statement, if necessary, public involvement as prescribed in § 1610.2 of this title, interagency coordination and consistency determination as prescribed in § 1610.3 of this title and any other data or analysis that may be appropriate . . . .

Id.

D. National Environmental Policy Act

The National Environmental Policy Act ("NEPA") has two goals: it (1) obligates a federal agency "to consider every significant aspect of the environmental impact of a proposed action"; and (2) "ensures the agency will inform the public that it has indeed considered environmental concerns in its decision[-]making process." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066–67 (9th Cir. 2002) (holding that the agency's EIS should have included an analysis of the likely impact of a particular root fungus on a specific variety of cedar when "the environmental problem was readily apparent at the time the EIS was prepared").

Although NEPA establishes "action-forcing" procedures that require agencies to take a "hard look" at environmental consequences, it does not dictate the substantive results of agency decision-making. *Id.* NEPA requires federal agencies to prepare an

EIS prior to taking "major Federal actions significantly affecting the quality" of the environment. 42 U.S.C. § 4332(2)(C). When an agency produces an EIS, it must "provide full and fair discussion of significant environmental impacts and shall inform decision[-]makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

II. DISCUSSION

A. Summary Judgment and Standard of Review

In deciding motions under Federal Rule of Civil Procedure 56, the Court applies *Anderson*, *Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

When, as here, the Court considers challenges to agency action for failure to adhere to the NEPA, the Court reviews the agency action at issue under the Administrative Procedures Act ("APA"). *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2010). The APA requires that the agency action be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (quoting 5 U.S.C. § 706(2)(A)).

The Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated in part on other grounds as recognized in Califano v. Sanders*, 430 U.S. 99, 105 (1977). "Although [the] inquiry must be thorough, the standard of review is highly deferential; the agency's decision is 'entitled to a presumption of regularity,' and [the Court] may

not substitute [its] judgment for that of the agency." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 415–16). "Where the agency has relied on 'relevant evidence . . . a reasonable mind might accept as adequate to support a conclusion,' its decision is supported by 'substantial evidence.'" *Id.* (quoting *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003)).

The agency's determination is entitled to substantial deference, and Plaintiffs bear the high burden of showing a lack of rational decision-making. Even where the decision under review is "fairly vague," "unpolished," "largely unintelligible," "a jumble of disjointed facts and analyses," and overall "a bit of a mess," it should be upheld if it is "adequately supported by the record" and the Court can "discern the agency's reasoning." *Id.* at 604–05 (reversing the district court's ruling that a biological opinion was arbitrary and capricious because, although scientific data could support multiple conclusions and it was undisputed that the agency could have improved the biological opinion by adding more detail, the proper role of the court is limited to reviewing the decision for irrationality).

Moreover, "when an agency is acting within its expertise to make a scientific determination[,] a reviewing court must generally be at its most deferential." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2010) (internal quotation omitted) (concluding that the U.S. Fish and Wildlife Services did not arbitrarily treat unoccupied areas as occupied in designating critical habitat). The reviewing court is to "defer to the agency's reasonable interpretation and resolution of equivocal or conflicting evidence, so long as it is reasonable." *Central Ariz. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1540 (9th Cir. 1993) (examining reasonableness of EPA rulemaking).

In reviewing agency action under the APA, the scope of the Court's review is "confined to the administrative record" and the Court generally does not engage in fact finding. *Sierra Forest Legacy v. U.S. Forest Serv.*, 652 F. Supp. 2d 1065, 1074 (N.D. Cal. 2009). As there are no disputes of material fact and the parties agree that this

matter can be resolved on the record before the Court, summary judgment is the appropriate vehicle for resolution of this case. (Joint Rule 12(f) Report at 5 (Docket No. 12)).

B. Threshold Issues

Defendants argue that the Court need not reach the merits of this case because Plaintiffs' claims fail at the threshold. Specifically, Defendants contend that (1) Plaintiffs cannot identify an injury in fact as required for Article III standing; (2) Plaintiffs' claims are not ripe; and (3) Plaintiffs waived their right to challenge the PRMP/FEIS. (Defendants' Motion at 10, 14–16).

1. Standing

To have standing under Article III of the Constitution, a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). "An injury in fact" requires that the plaintiff have suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 1548.

Defendants argue that Plaintiffs' injuries are not concrete to support standing. (Defendants' Motion at 11).

In *Spokeo, Inc. v. Robins*, the Supreme Court addressed the "concrete injury" requirement under Article III as applied to a plaintiff seeking statutory damages. --- U.S. ---, 136 S. Ct. 1540, 1549 (2016). The Supreme Court held that the Ninth Circuit had addressed the particularity requirement of injury in fact, but had overlooked the concreteness requirement in determining whether a consumer reporting agency's alleged procedural violations of the Fair Credit Reporting Act ("FCRA") caused concrete injury. *Id.* at 1548. The Supreme Court therefore remanded the action for the

lower court to assess "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.* at 1550.

Spokeo makes clear that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1543. Although Congress' judgment is "instructive and important, . . . Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 1549. Therefore, a plaintiff who merely asserts a "bare procedural violation, divorced from any concrete harm," will not satisfy the concreteness requirement. *Id.* at 1549–50.

In the FCRA context, although Congress "sought to curb the dissemination of false information by adopting procedures designed to decrease that risk," not all procedural violations will present a "material risk of harm." *Id.* For example, "even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate," and therefore, result in no appreciable harm. *Id.* In addition, even inaccurate information, such as "an incorrect zip code, without more, could not work any concrete harm." *Id.*

Here, Plaintiffs have identified concrete harms flowing from the alleged procedural violation. The declarations submitted in support of Plaintiffs' Motion establishes that members of Plaintiffs' organizations visit and enjoy the plants and wildlife in areas within and adjacent to the Decision Area. (Declaration of Ileene Anderson in Support of Plaintiffs' Motion ("Anderson Decl.") ¶ 11 (Docket No. 17-1); Declaration of Jeff Kuyper in Support of Plaintiffs' Motion ("Kuyper Decl.") ¶ 7 (Docket No. 17-2)). Both declarations provide that the Bureau's PRMP "opens hundreds of thousands of acres of federal property to oil and gas extraction, directly in and adjacent to the [public lands] that [the members] work to protect and the areas that [they] visit for professional recreational purposes." (Anderson Decl. ¶ 17; Kuyper Decl. ¶ 13). The oil and gas activities that will occur on these lands include allegedly environmentally harmful techniques like fracking, which will negatively impact the

"land, air quality, water resources, plant life, and wildlife" that these members care about and work to protect. (Anderson Decl. ¶ 21; Kuyper ¶ 16). Far from the examples contemplated in *Spokeo* of an incorrect zip code or failure to provide notice of albeit accurate consumer information, Plaintiffs have alleged concrete harms to their professional and recreational interests flowing from the alleged procedural violation.

Defendants argue that the causal chain is too long and speculative because the "RMP only identifies lands open and closed to future leasing; it does not authorize leasing or development." (Defendants' Motion at 12). Therefore, according to Defendants, the alleged harm is dependent on the Bureau's future approval to lease and allow WST/EOR activities on the land that Plaintiffs' members visit. (Defendants' Reply at 2). Defendants contend that "Plaintiffs' assumptions about [the Bureau's] future leasing and permitting decisions do not constitute a concrete injury" when the Bureau "has absolute authority at the leasing stage to lease or not lease a given parcel." (*Id.* at 3). At the hearing, counsel for Defendants reiterated this argument.

Defendants' argument has been rejected by the Ninth Circuit in *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011). In *Sierra Forest Legacy*, Sierra Forest challenged the process of establishing management guidelines governing 11.5 million acres of federal land in the Sierra Nevada region. *Id.* at 1168. According to Sierra Forest, the guidelines adopted by the U.S. Forest Service violated NEPA by focusing on uncertain long-term benefits at the expense of known near-term harms to certain California wildlife. *Id.* at 1180. Although Sierra Forest's challenge ultimately failed on its merits, the Ninth Circuit recognized Sierra Forest's standing to bring "a facial challenge to a first-level NEPA document." *Id.* The Ninth Circuit held that "a procedural injury is complete after an [PRMP] has been adopted, so long as it is fairly traceable to some action that will affect the plaintiff's interests." *Id.* at 1177–80. Notably, "a procedural NEPA violation is complete ***even before an implementing project is approved***." *Id.* at 1180 (emphasis added). A PRMP, such as the challenged guidelines, "sets logging goals, selects the areas of the forest that are suited to timber production, and determines which probable methods of timber harvest are appropriate [even if it] does not itself authorize the cutting of any trees." *Id.* at 1179 (citation

omitted). "Upon approval of a particular logging project, environmental 'harm is more imminent and more certain.'" *Id.* (citation omitted).

Similarly, here, Plaintiffs need not wait until leasing and permitting occur because the alleged procedural violation is complete even before an implementing project is approved by the Bureau. Defendants argue that the challenged guidelines in *Sierra Forest Legacy* are distinguishable because those guidelines "selected areas suitable for timber production and set logging goals with which all subsequent site-specific projects had to comply." (Defendants' Reply at 3). Accordingly, the guidelines "limited the Forest Services' discretion to prevent certain types of development in the future." (*Id.*).

Here, the PRMP opened certain parcels of the Decision Area to development. It is true that the Bureau retains discretion ultimately to refuse leasing and permitting. However, given that the PRMP permits the Bureau to implement oil and gas projects in these areas deemed "open" to development, "there is ***no real possibility*** that the [Bureau] will then decline to adopt ***any*** [implementing] projects under the [PRMP] governing over [hundreds of thousands of] acres of federal land." *Sierra Forest Legacy*, 646 F.3d at 1179 (emphasis added). Although the discretion exists in theory, there is no meaningful reason to believe that the discretion will be exercised consistently each time in every leasing and permitting decision to avoid the alleged injury identified by Plaintiffs.

"To the extent that the [PRMP] pre-determines the future, it represents a concrete injury that [P]laintiffs must, at some point, have standing to challenge. That point is now, or it is never." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) (rejecting the defendants' argument that the alleged injury is too speculative because "actual, site-specific decisions regarding development are made at a later stage"); *see also Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 972 (9th Cir. 2003) (explaining that environmental plaintiffs "seeking to enforce a procedural requirement . . . can establish standing without meeting all the normal standards for . . . immediacy" and "need only establish the reasonable probability of the

challenged action's threat to [their concrete] interest" (internal citations and quotation marks omitted)).

If the Bureau's action is not subject to challenge because the agency retains "discretion" at the project-specific development stage, "the underlying programmatic authorization would forever escape review." *Idaho Conservation League*, 956 F.2d at 1516. Notwithstanding the fact that the concrete effect of the allegedly deficient FEIS may be seriously mitigated at the project level upon implementation, "the initial plan . . . represent[s] important decisions." *Id.* Bearing in mind the statutory source that defines Plaintiffs' rights and imposes Defendants' duties, the standing analysis "must focus on the likelihood that [Defendants'] action will injure [Plaintiffs] ***in the sense contemplated by Congress***." *Id.* (emphasis in original). Viewed in this light, the alleged procedural violation was harmful for standing purposes.

Similar to the plaintiff in *Idaho Conservation League,* Plaintiffs' complaint "is that the faulty EIS has made possible development that [a closed] designation would have prevented." *Id.* Pursuant to the NEPA, "these are injuries that we must deem ***immediate***, not speculative." *Id.* (emphasis in original). "Indeed, short of assuming that Congress imposed useless procedural safeguards, and that [the open] designation is a superfluous step, we must conclude that the management plan plays some, if not a critical, part in subsequent decisions." *Id.* An agency cannot attempt to cure a procedural violation in its EIS preparations through subsequent, piecemeal reviews at the time of leasing and permitting. To hold otherwise would eviscerate the purpose of requiring the agency to examine the cumulative environmental impacts in a comprehensive manner at the outset of the review process.

Defendants point out that *Sierra Forest Legacy* and *Idaho Conservation League* predate the Supreme Court's decision in *Spokeo*, but Defendants do not argue that these Ninth Circuit cases are no longer good law in light of *Spokeo*. Furthermore, federal courts generally agree that *Spokeo* clarified the meaning of "concreteness" without breaking any new ground. *In re Nickelodeon Consumer Privacy Litig.*, --- F.3d ---, No. 15-1441, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) ("The Supreme Court's recent decision in *Spokeo, Inc. v. Robins* does not alter our prior analysis . . . ."); *Bock*

v. Pressler & Pressler, LLP, --- Fed. App'x ---, No. 15-1056, 2016 WL 4011150, at *1 (3d Cir. July 27, 2016) ("While the Supreme Court did not change the rule for establishing standing in *Spokeo*, it used strong language indicating that a thorough discussion of concreteness is necessary in order for a court to determine whether there has been an injury-in-fact."); *Krakauer v. Dish Network L.L.C.*, No. 1:14-CV-333, 2016 WL 4272367, at *1 (M.D.N.C. Aug. 5, 2016) ("*Spokeo* clarified the meaning of a concrete injury, but it did not fundamentally change the doctrine of standing or jurisdiction."); *Mey v. Got Warranty, Inc.*, No. 5:15–CV–101, --- F. Supp. 3d ---, 2016 WL 3645195, at *2 (N.D. W. Va. June 30, 2016) ("*Spokeo* appears to have broken no new ground.").

In the absence of contrary authority, Defendants have failed to overcome the binding Ninth Circuit holding in *Sierra Forest Legacy* and *Idaho Conservation League*. Therefore, under the reasoning in these cases, Plaintiffs have met their burden of identifying a concrete injury to merit Article III standing.

2. Ripeness

Defendants further contend that this case is not ripe for adjudication. The basis for this claim is essentially the same as for their standing argument: no concrete action affecting Plaintiffs' rights has yet been taken; only when the more project-specific actions occur will the case have sufficiently ripened. (Defendants' Motion at 13–14; Defendants' Reply at 4–5).

In the Ninth Circuit, "a NEPA challenge [is] ripe because the injury occurred 'when the allegedly inadequate EIS was promulgated." *Citizens for Better Forestry*, 341 F.3d at 977 (citation omitted). A party with standing who is injured by a NEPA procedural violation "may complain of that failure at the time the failure takes place, for the claim can never get riper." *Id.* (quoting and adopting the Supreme Court's dicta in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998)).

Defendants argue that the Court should disregard this binding precedent because, unlike the development activities in *Citizens for Better Forestry*, "oil and gas development on federal lands occurs in a three-stage process and no irretrievable or irreversible commitment of resources is made until the leasing stage." (Defendants' Reply at 4).

Defendants' argument, however, is expressly foreclosed by the Ninth Circuit's decision in *Citizens for Better Forestry*. Although the defendant made a similar attempt to distinguish on the basis that the Ninth Circuit cases recognizing ripeness of NEPA claims involved site-specific actions planned or underway, the Ninth Circuit explained that "the imminence or lack thereof of site-specific action is simply a factual coincidence, rather than a basis for legal distinction." 341 F.3d at 977 ("[N]one of the cases relies on that circumstance at all in its ripeness analysis . . . . [W]e reiterate that the planning of site-specific action *vel non* is irrelevant to the ripeness of an action raising a procedural injury."). Defendants' reliance on out-of-circuit case law is unavailing given the controlling authority in the Ninth Circuit.

"The purpose of an EIS is to apprise decision[-]makers of the disruptive environmental effects that may flow from their decisions at a time when they retain a ***maximum range of options***." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 785 (9th Cir. 2006) (emphasis added) ("Because the 1998 EIS was premised on the notion that the leases were valid and granted development rights to Calpine, the 1998 EIS cannot substitute for an EIS evaluating the decision to extend the underlying lease rights as an initial matter. The agencies never took the requisite 'hard look' at whether the Medicine Lake Highlands should be developed for energy at all."). This purpose would not be served if individuals aggrieved by a procedural violation must wait to challenge the FEIS only after decisions to implement the PRMP are made. Plaintiffs' claims ripened at the time the Bureau allegedly failed to inform relevant decision-makers of the harmful environmental effects flowing from the decision to open hundreds of thousands of acres of federal property to oil and gas extraction.

3. Waiver

Finally, Defendants argue that Plaintiffs failed to present their criticisms of the draft RMP during the notice and comment period, and therefore, waived their right to challenge the PRMP. (Defendants' Motion at 14).

A party "challenging an agency's compliance with NEPA must 'structure [its] participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004). Otherwise, the particular objections later raised in litigation are deemed waived. *Id.* (holding that respondents forfeited objections to the analysis of reasonably available alternatives in the environmental assessment when "[n]one of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the [environmental assessment], and none urged [the agency] to consider alternatives").

Defendants argue that Plaintiffs' scoping and comments to the draft EIS made no reference to WST/EOR, and therefore, Plaintiffs failed to alert the Bureau to their concerns. (Reply at 6).

Plaintiffs appear to acknowledge that their scoping and comments to the draft EIS did not express their concerns regarding WST/EOR in particular. (Plaintiffs' Reply at 8). Instead, Plaintiffs argue that they are not barred because the deficiency in analyzing the impacts of WST/EOR was so obvious that there was no need for them to point it out to preserve their ability to challenge the agency action. (*Id.* (citing *Dep't of Transp.*, 541 U.S. at 764–65)).

The Ninth Circuit interprets the "so obvious" standard to require that "the agency have independent knowledge of the issues that concern" Plaintiffs. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011) (holding that the agency's failure to discuss the environmental impact of increased demand arising from a proposed runway construction was a flaw "so obvious" that there was no need for

petitioners to point it out specifically to preserve their ability to challenge the environmental assessment).

Here, Plaintiffs point to two documents as well as litigation pending at the time between the Bureau and Plaintiff Center for Biological Diversity concerning the Bureau's failure to consider the environmental impacts of fracking in a RMP to govern the management of the Southern Mountain Diablo Range and Central Coast of California. (Plaintiffs' Reply at 8–9). Taken together, these documents establish that the Bureau was aware that (1) groundwater quality, seismicity, and harmful chemical releases, among other health and environmental issues, are concerns related to fracking; (2) groundwater quality in California active fields is "poor and brackish"; (3) "well completion reports" are "key" to ensure "safe fracking"; (4) fracking is a "public concern" and a controversial national issue; and (4) an increase in fracking activity in California is anticipated. (AR at 94526, 94416). Furthermore, the documents indicate the Bureau's belief that, although "many previous studies have concluded that there is little or no threat from oilfield fracking to the environment," the Bureau must "seek[] ways to reassure the American public that fracking on BLM land is safe and has begun discussions with interested parties on the practice and regulation of fracking on BLM land." (*Id.* at 94416).

Moreover, although the litigation pending at the time concerned a different decision area in California, at issue was whether the Bureau had acted unreasonably in failing to consider "what impact might result from fracking on the leased land." *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1156 (N.D. Cal. 2013) ("Even [the Bureau] itself has acknowledged that fracking activity in the United States has increased dramatically in recent years. But rather than engaging in this reality by at least considering what impact might result from fracking on the leased lands, whatever its ultimate conclusion, [the Bureau] chose simply to ignore it, asserting that 'these issues are outside the scope of this [environmental assessment] because they are not under the authority or within the jurisdiction of the Bureau."). The district court in that case ultimately concluded that the Bureau had acted unreasonably in preparing its environmental assessment when it failed to consider how

fracking could impact development of certain parcels of land. *Id.* at 1157 ("[T]he emergence of fracking raises potential concerns that were not considered by the 2006 PRMP/FEIS. In fact, the PRMP/FEIS makes no explicit mention of fracking at all.").

In considering these relevant facts before the Bureau, the Bureau's failure to address the environmental impact of ***fracking*** in the FEIS was a flaw "so obvious" that Plaintiffs did not need to expressly point it out to preserve their ability to challenge this omission. The documents and litigation make clear that fracking is a controversial technique that is perceived to raise serious environmental and health concerns. Regardless of the Bureau's ultimate conclusions as to whether these concerns are well-founded, rather than explaining the Bureau's analysis, the Bureau failed to address this issue in the FEIS. This omission is also inconsistent with the Bureau's commitment to "seeking ways to reassure the American public that fracking on BLM land is safe." (AR at 94416). Although the Court concludes that waiver does not bar Plaintiffs' challenge to the omission as to fracking, Plaintiffs have not identified any documents related to other WST/EOR techniques that would indicate the Bureau's awareness or knowledge of their potentially harmful environmental impacts. Therefore, the Court narrows Plaintiffs' challenge regarding the analysis of WST/EOR activities to fracking only.

Defendants also made other waiver challenges to the issues raised in Plaintiffs' Motion, but Defendant does not appear to pursue these arguments in their Reply. For the reasons cited in Plaintiffs' brief regarding their requests that the Bureau not issue any new oil and gas leases in ecologically sensitive areas, close areas of critical environmental concern to future leasing, and draft a supplemental EIS in light of the CCST Report, the Court is satisfied that Plaintiffs had adequately alerted Defendants to their concerns regarding the reasonable alternative analysis and supplemental EIS. (Plaintiffs' Reply at 7–8). Plaintiffs' arguments as to these issues are thus preserved.

The Court therefore turns to the merits of Plaintiffs' three challenges: (1) whether the Bureau failed to take a "hard look" at the environmental impacts of the PRMP as it relates to fracking; (2) whether the Bureau failed to consider a reasonable

range of alternatives in the FEIS; and (3) whether the Bureau was required to prepare a supplemental EIS in light of new information received after the FEIS issued.

C. Alleged NEPA Violations

1. The Bureau violated NEPA by failing to take a "hard look" at the environmental impact of the PRMP in the FEIS and the requested supplemental EIS.

In reviewing the adequacy of an EIS, courts apply a "rule of reason" standard "to determine whether the EIS contains a 'reasonably thorough discussion of the significant aspects of probable environmental consequences.'" *Kern*, 284 F.3d at 1071–72 (citation omitted); *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 801 (9th Cir. 2003) (equating the "rule of reason" standard to an abuse of discretion review). Under this standard, review consists only of ensuring that the agency took a "hard look." *Id.* (citations omitted).

An EIS must include a comprehensive discussion of all substantial environmental impacts and inform the public of any reasonable alternatives that could avoid or minimize these adverse impacts. *See* 40 C.F.R. § 1502.1. A programmatic EIS, as is the case here, "need only provide 'sufficient detail to foster informed decisionmaking,' while a site-specific EIS must include 'data-gathering and analysis of system-wide impacts.'" *High Sierra Hikers Ass'n v. U.S. Dep't of Interior*, 848 F. Supp. 2d 1036, 1049 (N.D. Cal. 2012) (quoting *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006)).

Although the standard for evaluating the requisite "hard look" scope is fact-specific, the Ninth Circuit has established some bright-line rules. "Most importantly, the EIS must provide easily-accessible detailed information about probable environmental consequences and potential mitigation measures." *Id.* (citation omitted). "This information must be conveyed within the EIS in plain language so that the

general public can 'readily understand' the effects of the proposed plan." *Id.* (quoting 40 C.F.R. § 1502.8).

Although an agency must consider "all foreseeable direct and indirect impacts" of its decision and should not "improperly minimize negative side effects," *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1180 (9th Cir. 2011), "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *W. Watersheds Project v. Salazar*, 993 F. Supp. 2d 1126, 1133–34 (C.D. Cal. 2012), *aff'd sub nom. W. Watersheds Project v. Jewell*, 601 F. App'x 586 (9th Cir. 2015).

It is true that, as Defendants argued at the hearing, it may be impractical to require the Bureau to examine the environmental impact of each oil and gas extraction technique that may be used in the lands designated "open" to development under the PRMP. The Court need not reach this issue, however, because the prominent role fracking is expected to play in the future is undisputed in the record.

Here, the PRMP would leave "open" 85% of the Decision Area to WST/EOR such as fracking. (Plaintiffs' Reply at 12). The Bureau was not only aware of the projected growth in the use of fracking but also estimated that 25% of new wells in the Decision Area are expected to be fracked in the future. (Defendants' Motion at 1; Plaintiffs' Motion at 17; Plaintiffs' Reply at 10). Yet aside from these three isolated and passing references to fracking in the PRMP/FEIS, the 1,073-page document makes no mention of fracking at all, let alone a meaningful discussion to inform decision-makers and the public of the attendant environmental concerns unique to fracking:

- "EPA has delegated primacy and permit authority to the State of California for groundwater protection . . . . [I]n addition, the State has federal authority to regulate the hydraulic fracturing process, which involve[s] the subsurface injection of fluids to stimulate oil and gas well production." (AR at 89511

("Chapter 3.9.2 Groundwater"); *id.* at 89540 ("Chapter 3.14.1.1. Fluid Minerals — Oil and Gas")).

- "Hydraulic fracturing. An operation in which a specially blended liquid is pumped down a well and into a formation under pressure high enough to cause the formation to crack open, forming passages through [which] oil can flow to the wellbore." (AR at 89948 ("Glossary")).

- "The higher stabilized prices may result in increased drilling in areas that were previously marginal, such as deep fractured shale and shallow diatomite zones. New surface disturbance associated with exploration and development is estimated to involve between 100 and 265 acres per year. This includes roads, pads, facilities, pipelines, power lines, and all other associated activities expect for running seismic lines, and includes both short-term and long-term impacts. Approximately 25 to 25 percent of the surface disturbance would be short-term and would be reclaimed within two to three years." (AR at 90215 ("Appendix M.2 Mineral Leasing")).

The three excerpts above fall well short of a reasonably thorough discussion of the environmental impact of the PRMP, when, under the PRMP, 25% of new wells in the Decision Area are expected to be fracked in the future. It is undisputed that, during its PRMP/FEIS preparations, the Bureau was aware of the perceived environmental concerns that are unique to fracking. (*Id.* at 94526, 94416). Yet the FEIS says nothing about the concerns of "environmental contamination of under-ground drinking water supplies, seismic activity, harmful chemical releases, and other health issues," even though a "[g]eneral increase in fracking activity [is] anticipated." (*Id.* at 94526, 94416). Therefore, the Bureau acted unreasonably in failing to discuss, let alone take a "hard look" at, the environmental impact of fracking in the FEIS. Indeed, the relevance of fracking to the PRMP/FEIS is further supported by the fact that the Bureau commissioned an independent study of fracking in California before issuing its Record of Decision. (*Id.* at 18887). The resulting CCST Report included over 130 pages discussing the potential direct environmental effects of fracking. (*Id.* at 18873–74).

At the hearing, the Court invited counsel for Defendants to identify other instances in the FEIS that evince the Bureau's consideration of the environmental effects of fracking. Counsel stated that "other instances in [the] record as [a] whole [] do discuss fracking," including multiple studies that discuss "fracking, steam injection, and [other] well stimulation technologies." NEPA, however, requires that the Bureau ***consider and analyze*** the data, and notably absent from the FEIS is any evidence that the Bureau reviewed this information and reached a particular conclusion regarding the environmental effects of fracking. "Post-hoc examination of data to support a pre-determined conclusion is not permissible because '[t]his would frustrate the fundamental purpose of NEPA, which is to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions, early enough so that it can serve as an important contribution to the decision making process.'" *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007) (citation omitted) (holding that the Department of Interior and Forest Service "inappropriately decided to establish a categorical exclusion for hazardous fuels reduction before conducting the data call"). The Bureau's written and oral arguments before the Court that the missing analysis was not relevant or essential are nothing more than post-hoc reasons that cannot be credited in the absence of any supporting discussion in the FEIS.

Defendants argue that its analysis of the environmental impact of fracking is subsumed under its analysis of the impact of ***all*** oil and gas development. (Defendants' Reply at 10). But a "hard look" at the environmental impacts of fracking necessarily requires the Bureau to address the unique risks and concerns associated with fracking. *See Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1157 ("[T]he scale of fracking in shale-area drilling today involves risks and concerns that were not addressed by the PRMP/FEIS' general analysis of oil and drilling development in the area. Because the PRMP/FEIS does not address these concerns that are specific to these "new and significant environmental impacts," further environmental analysis was necessary.").

Defendants also argue that it is premature to require site-specific analysis before leasing and permitting activities begin. (Defendants' Motion at 18 ("BLM did not

discuss the impacts of specific technologies in detail in the FEIS because the agency lacks the site-specific information needed for that analysis at the RMP-stage.")). ***First***, this argument misconstrues Plaintiffs' challenge. Plaintiffs do not seek a site-specific level of analysis; instead, Plaintiffs challenge the Bureau's failure to conduct the programmatic analysis that NEPA requires.

Second, the Bureau "may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later when an [environmental assessment] is prepared for a site-specific program proposed pursuant to the RMP." *Kern*, 284 F.3d at 1072 ("[T]he purpose of an [EIS] is to evaluate the possibilities in light of current ***and contemplated*** plans and to produce an informed estimate of the environmental consequences . . . . Drafting an [EIS] necessarily involves some degree of forecasting." (emphasis in original)). Uncertainty about ***which*** specific parcels and wells will employ fracking in the future does not obviate the necessity to evaluate the ***cumulative*** environmental consequences to the Bureau's decision to open or maintain over one million acres of federal land in central California to oil and gas activities.

"NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done." *See Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n.9 (9th Cir. 1984) ("Reasonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry . . . .'" (citation omitted)). "If it is reasonably possible to analyze the environmental consequences in an EIS for an RMP, the agency is required to perform that analysis." *Kern*, 284 F.3d at 1072. Although the EIS analysis may be more general than a subsequent site-specific analysis, "an earlier EIS analysis will not have been wasted effort, for it will guide the [subsequent environmental assessment] analysis, and, to the extent appropriate, permit "tiering" . . . to avoid wasteful duplication." *Id.* To allow the Bureau to designate the lands as "open" and ask

questions later is the type of environmentally blind decision-making NEPA was enacted to avoid.

The cases that Defendants cite are also distinguishable. *See N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006) (rejecting the plaintiffs' contention that the EIS must undertake "***a parcel by parcel analysis*** of surfaces that will eventually be explored and developed" (emphasis added)); *N. Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886, 890–91 (9th Cir. 1992) (holding that each challenged EIS was adequate under NEPA when each "devote[d] ***several hundreds of pages*** to an evaluation of the impact of any future mining operations on at least a dozen major resources" and "analyze[d] effects such as vehicle noise, the extent of acres of vegetative disturbance, erosion, and the construction of roads" (emphasis added)).

For the reasons discussed above, Plaintiffs are entitled to summary judgment that the Bureau violated NEPA's requirement that the Bureau take a "hard look" at the environmental impacts of the PRMP.

To be clear, the act of commissioning the CCST Report itself does not satisfy the Bureau's obligations to take a "hard look" at the potentially adverse effects of fracking in the FEIS. Furthermore, having commissioned the CCST Report, the Bureau acted unreasonably by (1) refusing to revise the FEIS before it issued its Record of Decision; and (2) further refusing to prepare a supplemental EIS in light of the CCST Report. Although the CCST Report concluded that fracking "does not pose a high seismic hazard in California" because most fracking in California "is shallow and uses a small injection volume," the CCST Report also noted other risks, including "documented cases [in California] of the intentional release of flowback fluids into unlined pits, as well as the accidental release of hazardous chemicals associated with well stimulation." (AR at 19160, 19163). In addition, the CCST Report repeatedly emphasized the need for more conclusive studies and data to determine the risks posed to surface and groundwater. (*Id.* at 19159–61). Moreover, the CCST Report warned about increased risks of, for example, seismicity and water shortages, should fracking practices change in California. (*Id.* at 19158, 19164). The Bureau acted unreasonably in refusing to

acknowledge, let alone analyze, these risks when a quarter of new wells in the Decision Area will be fracked under the PRMP.

Because the Court concludes that the FEIS failed to analyze the environmental concerns unique to fracking, the Bureau will be required to prepare a supplemental EIS to remedy this deficiency. Therefore, the Court need not discuss at length the Bureau's failure to prepare a supplemental EIS in light of the CCST Report. The to-be-drafted supplemental EIS will necessarily take into account the existing evidence before the Bureau.

2. The Bureau analyzed a reasonable range of genuine alternatives as required under NEPA.

NEPA mandates that the Bureau provide a detailed statement regarding the alternatives to a proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii). Consideration of reasonable alternatives is necessary to ensure that the Bureau has before it and takes into account all possible approaches to, and potential environmental impacts of, a particular project. "NEPA's alternatives requirement, therefore, ensures that the 'most intelligent, optimally beneficial decision will ultimately be made.'" *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (citation omitted) (rejecting the plaintiff's challenge that the agency failed to include a particular alternative in the EIS when the agency had incorporated several recommendations from the excluded alternative and explained that the excluded alternative as a whole was inconsistent with the agency's project and statutory mandates).

Under NEPA, "an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative." *Id.* (citation omitted). An agency need not, therefore, discuss alternatives similar to alternatives actually considered, or alternatives which are "infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." *Id.* (citation omitted). "As with the standard employed to evaluate the detail that NEPA requires in discussing a decision's environmental

consequences, the crucial inquiry for the Court "is whether [the] selection and discussion of alternatives fosters informed decision-making and informed public participation." *California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

Abstractly speaking, Plaintiffs criticize the FEIS because it "presume[s] precisely the same amount of oil and gas drilling will occur in the future" and "identifies no alternative that would deviate from continued, business-as-usual oil and gas drilling levels." (Plaintiffs' Motion at 18). At its core, however, Plaintiffs' specific challenge is that the acreage range of "closed" land considered as alternatives to the proposed action was "impermissibly small." (Plaintiffs' Reply at 14). "Across its alternatives, the Bureau limits its choices to closing no more than 15% of the total mineral estate governed by the plan, with a difference of only 35,000 acres, out of over one million, between the largest and smallest alternatives." (*Id.* at 14–15). According to Plaintiffs, the Bureau should have considered an alternative that would have closed substantially more lands.

But the Court is persuaded by the reasons cited by the Bureau for why it excluded alternatives that would have closed substantially more lands:

First, because preexisting leases in the Decision Area convey a right to drill and nearly all anticipated development is expected to occur on existing leases, the closure of land with preexisting leases would not decrease oil and gas development levels. (Defendants' Motion at 21–23).

Second, the Bureau properly considered the mix of tools available in its arsenal to balance the competing priorities of developing federal lands and protecting the environment. Plaintiffs focus solely on the acreage designated as closed without also considering the nature of lands designated as closed or opened and the stipulations imposed on the lands left open in each of the considered alternatives. (Defendants' Reply at 15). Under NEPA, the Bureau was not obligated to consider a reasonable range of closed acreage alone; instead, NEPA obligates the Bureau to analyze a reasonable range of alternatives, which consists of acreage, nature of land, and major

constraints to be imposed on activities on open land, to avoid or minimize the adverse impacts on the environment.

The Bureau has provided the Court with a well-reasoned explanation of why it did not consider closing substantially more acres of land. Furthermore, the Court must be at its most deferential when the agency is acting within its technical expertise. Therefore, under the applicable "rule of reason" standard, the Court concludes that the Bureau did not act unreasonably in not considering an alternative that would have closed substantially more acres of land to oil and gas development.

At the hearing, Plaintiffs' counsel argued that its challenge is aimed more generally at the fact that the Bureau failed to consider alternatives that would reduce the level of oil and gas activity below historical levels. Plaintiffs' argument, however, imposes a greater burden on the Bureau than what is required under NEPA. The Bureau is obligated to examine reasonable alternatives to mitigate or reduce the overall ***environmental impact*** and not specifically the overall oil and gas activity on federal lands. Indeed, the Bureau has a competing statutory duty to manage public lands for multiple uses, including energy development. 43 U.S.C. §§ 1712(c)(1), 1732(a); *id.* § 1701(a)(12) ("[T]he public lands [shall] be managed in a manner [that] recognizes the Nation's need for domestic sources of minerals . . . ."). The Bureau is entitled to exercise its discretion and technical expertise in determining the appropriate level of oil and gas activity that maximizes the Bureau's competing policy objectives. In essence, Plaintiffs' argument is not really an attack on the sufficiency of the FEIS but an attack on the policy choice made by the Bureau to allow the level of oil and gas activity to remain constant.

It is true that the level of oil and gas activities contributes directly to the environmental impact on the Decision Area. But Plaintiffs' argument fails to consider the other decisional criteria within the Bureau's discretion to minimize the overall environmental impact ***even if*** oil and gas activity levels remain unchanged. For example, holding the level of oil and gas activity constant, the environmental impact differs based on the type of drilling, the proximity of the drilling to ecologically

sensitive areas, and other factors subject to restriction by the Bureau. Plaintiffs provide no authority for the proposition that the Bureau is obligated to consider a range of alternatives for each individual factor that contributes to overall environmental impact. Deciding what is "reasonable" in this context is largely a policy issue, and the evidence does not support a finding that the Bureau abused its discretion or acted unreasonably in balancing the need for oil and gas production with the need to protect the environment in the Decision Area.

III. CONCLUSION

For the reasons stated above, Plaintiffs' Motion and Defendants' Motion are **GRANTED *in part*** and **DENIED *in part***.

As discussed at the hearing, the Court will permit the parties to file supplemental briefs on the issue of remedies. On or before **September 14, 2016**, Plaintiffs shall file a supplemental brief of no more than eight pages in support of their argument that they are entitled to injunctive relief. On or before **September 21, 2016**, Defendants shall file their response of no more than eight pages in support of their argument that the Court should remand the action to the Bureau in lieu of entering injunctive relief. After the Court has considered the parties' arguments, a separate Judgment will issue.

IT IS SO ORDERED.