No. 24-8055
Oral Argument Scheduled: March 18, 2025

(consolidated with *Return to Freedom v. Haaland*, No. 24-8056 & *Friends of Animals v. Bureau of Land Mgmt.*, No. 24-8057)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMERICAN WILD HORSE CAMPAIGN, *et al*.,

Petitioners-Appellants,

v.

TRACY STONE-MANNING,
Director, Bureau of Land Management, *et al.,*

Respondents-Appellees,

and

STATE OF WYOMING and ROCK SPRINGS GRAZING ASSOCIATION,

Intervenors-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF WYOMING IN CASE 2:23-CV-00084-KHR (HON. KELLY H. RANKIN)

PETITIONERS' FINAL OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Petitioners-Appellants American Wild Horse Campaign, Animal Welfare Institute, Western Watersheds Project, Carol Walker, Kimerlee Curyl, and Chad Hanson state that they are nonprofit organizations or individuals. None of them issues stock of any kind, and thus none of them has any parent corporation or publicly held corporation that owns 10% or more of its stock.

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STATEMENT OF RELATED APPEALS

Pursuant to Tenth Circuit Rule 28.2(C)(3), Petitioners identify the following related appeals:

- Prior related appeal: *Am. Wild Horse Pres. Campaign v. Jewell*, No. 15-8033 (Judges Briscoe, Matheson, McKay)

- Pending related, consolidated appeals: *Return to Freedom v. Haaland*, No. 24-8056; *Friends of Animals v. Bureau of Land Mgmt.*, No. 24-8057

GLOSSARY

AML	Appropriate Management Level
APA	Administrative Procedure Act
BLM	Bureau of Land Management
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
HMA	Herd Management Area
NEPA	National Environmental Policy Act
RMP	Resource Management Plan
ROD	Record of Decision
RSGA	Rock Springs Grazing Association
TNEB	Thriving Natural Ecological Balance

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. On August 14, 2024, that court ruled for Respondent-Appellee Bureau of Land Management ("BLM"), Intervenor-Appellee State of Wyoming, and Intervenor-Appellee Rock Springs Grazing Association ("RSGA"), and issued final judgment in their favor. *See* 1-JA-189–261. On August 16, 2024, Petitioners-Appellants American Wild Horse Campaign, Animal Welfare Institute, Western Watersheds Project, Carol Walker, Kimerlee Curyl, and Chad Hanson ("Petitioners") appealed. *See* 1-JA-262–63. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioners are nonprofit organizations and individuals. They submitted standing declarations below, *see* 1-JA-168–84. Although BLM asserted that Petitioners lack standing and their claims are unripe, the district court rejected those arguments as to the issues raised in this appeal. *See* 1-JA-203–13.

STATEMENT OF ISSUES

1. Whether BLM acted in excess of the agency's statutory authority under the Wild Free-Roaming Horses and Burros Act ("Wild Horse Act"), 16 U.S.C. §§ 1331-1340, by permanently eliminating, for the first time in the Act's 53-year history, the protection and management of wild horse herds on public lands based on factors not authorized by Congress?

2. Whether BLM violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, by failing to analyze reasonable alternatives to extirpating these wild horse herds?

STATEMENT OF THE CASE

As with its predecessor case, *Am. Wild Horse Pres. Campaign v. Jewell* ("*AWHPC*"), 847 F.3d 1174 (10th Cir. 2016), this appeal raises an important statutory interpretation issue of first impression. Congress enacted the Wild Horse Act in 1971 (as amended in 1978), instructing that from that date forward all wild horses "shall be protected from capture, branding, harassment, or death," and mandating that "to accomplish this [directive] they are to be considered in the area presently found, as an integral part of the natural system of public lands." 16 U.S.C. § 1331. In delegating BLM authority to achieve this overarching statutory mandate to protect and manage wild horses on all public lands where they roamed in 1971, Congress devised a carefully calibrated statutory scheme.

In Section 3(a) of the Act, Congress specified the "[p]owers" delegated to and the "duties" imposed on BLM in managing wild horses on public lands, making clear BLM "is authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands." 16 U.S.C. § 1333(a). The only limitation Congress placed on its mandate to protect and manage

wild horses on occupied public lands is that BLM "shall manage wild [horses] in a manner that is designed to achieve and maintain a thriving natural ecological balance ["TNEB"]." *Id.* To maintain TNEB, Congress specified that BLM's management activities and forage allocations for wild horses on public lands "shall take into consideration the needs of other wildlife species which inhabit such lands." *Id.* Congress did *not* suggest in Section 3(a) that BLM may—let alone authorize BLM to—eliminate the protection and management of wild horses on public lands to address straying of wild horses onto nearby non-federal lands.

Rather than authorize BLM in Section 3(a) to address straying of wild horses onto private lands by terminating the protection and management of wild horses on nearby public lands, Congress created a very different, much more limited remedy to address straying. In Section 4 of the Act, Congress acknowledged that, due to the statutory mandate to protect and manage wild horses on public lands, routine straying onto non-federal lands was inevitable. *See* 16 U.S.C. § 1334. Hence, Congress created a limited right that non-federal landowners may exercise "[if] wild [horses] stray from public lands onto privately owned land," at which time "the owners of such land may inform [BLM], who shall arrange to have the animals removed." *Id.* Congress designed this limited statutory redress as the *sole* mechanism under the Act to address straying of wild horses onto non-federal lands,

thereby ensuring that the exercise of this right would not subvert the Act's paramount purpose to protect and manage wild horses on public lands.

Ignoring the plain language of Congress's meticulously crafted statutory scheme, BLM issued a decision in 2023 that, for the first time ever, eliminated the protection and management of wild horses on public lands they have roamed since before 1971, in order to prevent them from straying onto nearby private lands. Not only does this action plainly exceed the circumscribed authority Congress granted BLM in Section 3(a) to achieve the Act's chief mandate, but it also unlawfully supplants Congress's deliberate choice to impose a different, far less draconian remedy to address straying in Section 4 of the Act (which does not impinge on the protection and management of wild horses on public lands).

The district court found that BLM did not act "in excess of statutory jurisdiction, authority, limitations, or short of statutory right." 1-JA-260. In reaching that conclusion, however, the court never conducted the requisite inquiry to ascertain whether Congress authorized BLM to take this action that appears nowhere in the Act and undercuts the statute's overarching mandate. Rather, the ruling below bypassed that dispositive question, instead assuming the Act confers BLM this limitless authority to eradicate wild horse herds as BLM sees fit. On the basis of that untested assumption, the court upheld BLM's decision simply because

"the nature of the Checkerboard would invariably involve wild horses traversing between public and private lands," leading the court to find the mere fact of straying (as expressly contemplated and remedied by the Act through other means) "is a sufficient justification for BLM's decision[]." 1-JA-218–19.

Because the district court predicated its affirmance of BLM's decision on the uncritical assumption that Congress sanctioned this action—but, in fact, Congress *never* authorized BLM to terminate wild horse protection and management on public lands to address straying onto non-federal lands—reversal is essential to avoid undermining Congress's clear intent reflected in the Act and to prevent the wholesale eradication of wild horse herds across the West.

STATEMENT OF FACTS

The Petition for Review (1-JA-36–63), and this Court's opinion in *AWHPC*, 847 F.3d at 1177-82, contain detailed background information. Here, Petitioners provide an overview tailored to the questions raised on appeal.

I. STATUTORY AND REGULATORY FRAMEWORK

A. The Wild Free-Roaming Horses and Burros Act

Congress unanimously passed the Wild Horse Act in 1971—more than 100 years after it created the Wyoming Checkerboard ("Checkerboard"), *AWHPC*, 847 F.3d at 1179—because wild horses were "disappearing from the American scene,"

16 U.S.C. § 1331. The Act recognizes that "wild horses are living symbols of the historic and pioneer spirit of the West," and "contribute to the diversity of life forms within the Nation and enrich the lives of the American people." *Id.*; *see also* S. Rep. No. 92-242 (1971) (Wild horses "are living symbols of the rugged independence and tireless energy of our pioneer heritage."). Congress, therefore, declared that wild horses must be considered "in the area where they are presently found, as an integral part of the natural system of the public lands," and it prohibited capturing, branding, harassing, or killing wild horses. 16 U.S.C. § 1331.

Two sections of the Act, Sections 3 and 4, are particularly relevant in this case. Each is discussed below.

1. The Overriding Statutory Mandate to Protect and Manage Wild Horses on Public Lands (16 U.S.C. § 1333)

Section 3 of the Act governs wild horse management on *public* lands. Consistent with its declaration of national policy that wild horses "are to be considered in the area presently found [in 1971], as an integral part of the natural system of public lands," 16 U.S.C. § 1331, Congress defined BLM's "[p]owers and duties" in Section 3(a) of the Act, dictating that BLM "is authorized *and directed to protect and manage wild free-roaming horses and burros as components of the public lands*." *Id.* § 1333(a) (emphasis added); *cf. id.* § 1339 (noting that in

contrast to the directive that BLM protect and manage wild horses on the public lands they occupied in 1971, BLM may not "relocate wild free-roaming horses or burros to areas of the public lands where they do not presently exist").

In unequivocally commanding that BLM protect and manage wild horses on occupied public lands, Congress imposed a single limitation on its mandate that BLM protect and manage wild horses on those lands—i.e., BLM "shall manage wild [horses] in a manner that is designed to achieve and maintain" TNEB on each area of public lands. 16 U.S.C. § 1333(a). To do so, Congress stated that BLM's wild horse forage allocations "shall take into consideration the needs of other wildlife species which inhabit such lands." *Id.* Congress did not suggest BLM could avoid its duty to protect and manage horses on public lands (unless TNEB is shown to be genuinely impossible on an area of public lands), let alone to prevent straying onto nearby non-federal land. Indeed, Section 3(a)—which defines the limits of BLM's authority and requires BLM to protect and manage wild horses on public lands—does not mention private lands or straying at all. *See id.*

Whereas Section 3(a) establishes BLM's overriding mandate to protect and manage wild horses on public lands, Section 3(b) addresses BLM's day-to-day management on those public lands. This provision compels BLM to: (1) "maintain a current inventory" of wild horses on each area of public lands; (2) "determine

appropriate management levels" of wild horses—i.e., the "AML"—each public land area can sustain; and (3) determine the best method of achieving AML in each area (e.g., "removal," "sterilization," or "natural controls on population levels"). 16 U.S.C. § 1333(b)(1). Thus, in contrast to Section 3(a) where Congress did not grant BLM discretion to stop protecting and managing wild horse herds on areas of public land (unless TNEB is unattainable), Congress afforded BLM latitude in Section 3(b) to determine which method(s) to adopt in making decisions aimed at the continued protection and management of wild horses (while ensuring TNEB).[1]

In particular, Section 3(b) allows BLM to protect and manage wild horses by permanently removing "excess" horses from public lands "to achieve AML"

[1] The Act does not define AML. But the Interior Department "interpret[s] the term [] within the context of the statute to mean [the] 'optimum number' of wild horses which results in a [TNEB] and avoids a deterioration of the range." *Animal Prot. Inst.,* 109 IBLA 112, 119 (1989). The AML is the carrying capacity at which BLM has determined there are sufficient habitat components and resources to sustain wild horses and other wildlife without jeopardizing TNEB. *Id.* at 118 (noting that "the term AML has a very particular meaning in the context of actions required to be taken to remove wild horses from the public range"; "[i]t is synonymous with restoring the range to a [TNEB] and protecting the range from deterioration"); *see also* 2-JA-57 (defining AML as "the maximum number of wild horses that would result in a TNEB and avoid deterioration of the range," and noting that to "establish[] or adjust[] AML," BLM must analyze "whether the four essential habitat components (forage, water, cover and space) are present in sufficient amounts to sustain healthy wild horse populations and healthy rangelands over the long-term" and "whether . . . the projected wild horse herd size is sufficient to maintain genetically diverse wild horse populations"); 2-JA-112 (same).

(which frees up forage and other resources for the remaining wild horses and other wildlife), but only after BLM determines that: (1) "an overpopulation [of wild horses] exists on a given area of the public lands," and (2) "action is necessary to remove excess animals." 16 U.S.C. § 1333(b)(2). "Excess animals" are those "which must be removed from an area in order to preserve and maintain a [TNEB] and multiple-use relationship in that area" of public lands." 16 U.S.C. § 1332(f). Hence, Congress made TNEB relevant not only to BLM's paramount duty to protect and manage wild horses on public lands (i.e., requiring BLM to manage wild horses in a manner that ensures TNEB), but also to BLM's decisions to remove excess wild horses from public lands. *See* 16 U.S.C. § 1333(a), (b).

As in Section 3(a), Congress did not mention straying or private lands in Section 3(b), much less authorize BLM to remove any wild horses from public lands to address straying onto nearby non-federal lands. *See, e.g.*, *AWHPC*, 847 F.3d at 1188 ("[N]othing in Section 4 or elsewhere in the Act allows BLM to ignore the duties and responsibilities imposed upon it by Section 3, or to respond to a Section 4 removal request by treating public lands as private lands.").

2. The Limited Right of Landowners to Request Removal of Wild Horses from Private Land (16 U.S.C. § 1334)

Section 4 of the Act exclusively dictates BLM's responsibilities for wild horses that have wandered off public land onto private land. "If wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform [BLM], who shall arrange to have the animals removed." 16 U.S.C. § 1334. This provision evinces Congress's explicit understanding and acknowledgment that wild horses would routinely stray from public to nearby non-federal lands, and this remedy marks the sole statutory mechanism Congress designed to address straying of wild horses.

While Section 4 imposes "a plainly prescribed, ministerial duty to remove the horses" from private land after horses have strayed and a landowner notifies BLM, it "does not require [] BLM to prevent straying in the first instance." *Fallini v. Hodel*, 783 F.2d 1343, 1345-46 (9th Cir. 1986). Nor does this limited remedy grant BLM any authority to preemptively remove wild horses from public lands (let alone permanently eradicate entire herds from those public lands) to prevent straying, even when "there will be a constant influx and outflux of wild horses" between adjacent parcels of public and private land. *AWHPC*, 847 F.3d at 1188.

3. BLM's General Implementation of the Wild Horse Act

Since 1971, BLM has administered the Wild Horse Act. Petitioners summarize the agency's administration relevant to this appeal.

From day one, BLM was tasked with carrying out its overriding statutory duty to protect wild horses on public lands and its duty to respond to straying notifications from non-federal landowners. This task was complicated by the fact that "[m]ost rangeland that is home to wild horse herds is a checkerboard of private and public land ownership." Kenneth P. Pitt, *The Wild Free-Roaming Horses and Burros Act: A Western Melodrama*, 15 ENVTL. L. 503, 524 (1985).

Despite these difficulties, the Supreme Court upheld the constitutionality of the Act against attacks by livestock interests, finding that "Congress determined to preserve and protect the wild free-roaming horses and burros on the public lands of the United States." *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976). The Court held that "the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there." *Id.* at 540-41. Explaining that it "must decline" to "reweigh the evidence and substitute our judgment for that of Congress" in mandating the protection of wild horses on public lands, the Court "note[d] that Congress has provided for periodic review of the administration of the Act." *Id.* at 541 n.10; *see also* 16 U.S.C. § 1340 (requiring

BLM "every twenty-four calendar months" to "submit to Congress . . . such recommendations for legislative or other actions as [it] might deem appropriate").

In 1975, BLM issued regulations to implement the Act. *See* 43 C.F.R. Part 4700 (1975), https://www.loc.gov/item/cfr1975114-T43CIIP4710/. Relevant here, BLM coined the phrase "herd management area" ("HMA")—which does not appear in the statute—to administratively delineate those public lands where BLM protects and manages wild horses under the Act, subject to Congress's limitation to manage wild horses in a manner that ensures TNEB. 43 C.F.R. § 4712.2-1 (1975).[2]

In keeping with the Act, BLM's regulations recognized that the agency must protect and manage wild horses on public lands "utilized by wild [horses] as all or part of their habitat on December 15, 1971," *id.* § 4712.2-2(a), unless such an area of public lands could not be managed to assure TNEB and provide adequate forage and resources for wild horses and other wildlife on those public lands. *See id.* § 4712.2-2(b), (c) (stating that "in designating" HMAs, BLM may consider only

[2] The Wild Horse Act and BLM's regulations recognized a separate category of public lands managed for wild horses called "ranges," which, if designated by BLM, serve "as sanctuaries for [wild horse] protection and preservation," and are "devoted principally but not necessarily exclusively to their welfare." 16 U.S.C. §§ 1333(a), 1332(c). This appeal does *not* involve any wild horse ranges; whereas BLM administers 177 wild horse HMAs, it only administers four designated wild horse "ranges"—none of which is at issue here.

public lands where wild horse herds "can maintain themselves within their established utilization and migratory patterns" and such lands are "capable of being managed as a unit to ensure a sustained yield of forage without jeopardy to the resources"). Like the Act, this provision did not mention straying or private lands.

Next, in 1978, a court invalidated one aspect of BLM's regulations (not at issue here), affirming that "the Act was primarily intended to protect wild horses and burros and keep them on public lands as a symbol of our national heritage." *Roaring Springs Ass'n v. Andrus*, 471 F. Supp. 522, 524 (D. Or. 1978). Noting that "few landowners fence their land" and acknowledging the routine straying of horses onto non-federal land, the court rejected the government's position in the case that could cause "wild horses and burros [to] disappear from the public lands" and would therefore "contravene the policy and purposes of the Act." *Id.* at 525.

In 1986, the Ninth Circuit issued a landmark decision in *Fallini*, holding that "Section 4 is the only provision of the Act that pertains to wild horses straying onto private lands," the Act "clearly contemplates the possibility that wild horses may stray onto private lands," and "Section 4 does not require the BLM to prevent straying in the first instance." 783 F.2d at 1345-46. Further, the court found that "Congress declined to authorize the BLM to fence the wild horses or to use intensive management techniques" to prevent future straying, *id.* at 1346, such as

preemptively removing wild horses or eradicating entire herds from public lands. Importantly, after reviewing the legislative history, the Ninth Circuit concluded that "[p]revention of straying is subservient to the [Act's] fundamental goal of protecting the animals [on public lands] with minimal management effort." *Id.*

Four days after the *Fallini* decision, BLM amended its regulations. Those amendments did two things pertinent here. First, BLM created the term "herd area" that, like HMA, does not appear in the Act. *See* 43 C.F.R. § 4700.0-5(d) (defining "herd area" as "the geographic area identified as having been used by a herd as its habitat in 1971"). Second, in addition to TNEB-focused factors (i.e., the AML "for the herd" and the herd's "habitat requirements"), BLM allowed the consideration, when "delineating" HMAs on public lands, of "the relationships with other uses of the public *and adjacent private lands*." *Id.* § 4710.3-1 (emphasis added).

Although it was unclear how BLM believed private lands might—or even could—be relevant to the protection and management of wild horses on public lands, BLM failed, in the rule's preamble, to point to any statutory provision authorizing the consideration of private lands in decisions regarding the protection and management of wild horses on public lands. Nor did BLM explain how this new factor could supersede the Act's overriding mandate to protect and manage wild horses on public lands. Tellingly, BLM's *proposed* rule did not contain this

new clause. *See* 49 Fed. Reg. 49,252, 49,254 (Dec. 18, 1984) (allowing consideration only of "the relationships with other uses of the public lands"). BLM adopted this new factor only at the last minute, without notice or comment (or any explanation), simply because "[o]ne comment suggested that the effect on nearby private land of management for wild horses and burros should be taken into account in delineating [HMAs]." 51 Fed. Reg. 7,410, 7,411 (Mar. 3, 1986).

Prior to the decision under review, BLM has never eliminated the protection and management of any wild horse herd to prevent straying onto non-federal lands. Although BLM highlighted in district court two instances in which BLM decided to no longer protect and manage wild horse herds, those decisions were based solely on the agency's well-documented inability to manage viable wild horse herds while simultaneously attaining TNEB on those public lands—i.e., the one limitation Congress imposed on BLM's mandatory duty to protect and manage wild horses on public lands, 16 U.S.C. § 1333(a).[3]

[3] *See Am. Wild Horse Campaign v. Bernhardt,* 442 F. Supp. 3d 127, 142 (D.D.C. 2020) ("BLM concluded that the presence of wild horses was inconsistent with achieving and maintaining a thriving ecological balance in the Caliente Complex."); *Colo. Wild Horse v. Jewell*, 130 F. Supp. 3d 205, 210 (D.D.C. 2015) (noting that BLM "deemed [the West Douglas Herd Area] inhospitable to the maintenance of wild-horse populations" because BLM "could not sustain a healthy wild-horse population consistent with BLM's duty to preserve ecological balance and multipurpose land use" on those public lands).

B. The National Environmental Policy Act

NEPA is the nation's "basic national charter for the protection of the environment," 40 C.F.R. § 1500.1, and it is "binding on all Federal agencies," *id.* § 1500.3.[4] In NEPA, Congress declared "a national policy" designed to "encourage productive and enjoyable harmony between man and his environment," and "promote efforts which will prevent or eliminate damage to the environment. . . ." 42 U.S.C. § 4321. At its core, NEPA is intended to "ensure" that federal decisionmakers "have detailed information concerning significant environmental impacts" and "guarantee[] that the relevant information will be made available to the larger [public] audience." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

For major federal actions that will significantly affect the environment, NEPA requires agencies to prepare an Environmental Impact Statement ("EIS") to evaluate the environmental effects of and alternatives to a proposed federal action. 42 U.S.C. § 4332(c). In NEPA, Congress injected environmental considerations "in the agency decision making process itself," to "help public officials make

[4] In 2020, the Council on Environmental Quality amended NEPA's implementing regulations. 2-JA-62. BLM's NEPA analysis here arose under the regulations as previously codified at 40 C.F.R. Part 1500. *Id.* Thus, Petitioners cite throughout to that codification, which is attached for the Court's convenience in an Addendum.

decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.'" *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768-69 (2004) (quoting 40 C.F.R. § 1500.1(c)). Thus, "NEPA's core focus [is] on improving agency decision making," *id.* at 769 n.2, and specifically on ensuring that agencies take a "hard look" at potential impacts and environmentally enhancing alternatives "as part of the agency's process of deciding whether to pursue a particular federal action." *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983).

The alternatives analysis "is the heart" of an EIS. 40 C.F.R. § 1502.14. An EIS must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* Because it is meant to inform federal decisions, the NEPA process "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made." 40 C.F.R. § 1502.2(g).

II. RELEVANT FACTUAL BACKGROUND

Petitioners are organizations and individuals dedicated to the conservation of public lands, the protection of wild horses, and the humane treatment of wild horses in all aspects of BLM's management activities. Petitioners have grave

concerns about BLM's first-ever decision to eradicate longstanding wild horse herds to preemptively avoid straying onto nearby non-federal lands, as well as the insidious precedential effects of this decision. Routine straying of wild horses onto intermingled or adjacent non-federal lands is not unique to these wild horse herds; rather, "[m]ost rangeland that is home to wild horse herds is a checkerboard of private and public land ownership." Pitt, *supra*, at 524.[5]

A. The Wyoming Checkerboard

This Court's *AWHPC* decision contains detailed factual discussion and a map of the Checkerboard, which remain relevant here. *See* 847 F.3d at 1179-82, 1191. The HMAs affected by the decision under review—Great Divide Basin, Salt

[5] *See also, e.g.*, *Friends of Animals v. BLM,* 514 F. Supp. 3d 290, 296 (D.D.C. 2021) (discussing BLM's plan to "remove more than 200 [from] outside the [Pine Nut] HMA"); *Friends of Animals v. BLM*, No. 2:16-cv-1670, 2018 WL 1612836 at *5 (D. Or. Apr. 2, 2018) ("[E]xcess wild horses were present within and outside the boundaries of the Three Fingers HMA."); *Friends of Animals v. BLM*, No. 16-cv-0199, 2017 WL 5247929 at *4 (D. Wyo. Mar. 20, 2017) (BLM would "remove wild horses located outside the Complex."); *Cloud Found. v. BLM*, 802 F. Supp. 2d 1192, 1209 (D. Nev. 2011) (noting that wild horses "adversely impact riparian resources within and outside of the HMAs"); *Colo. Wild Horse*, 130 F. Supp. 3d at 210 (BLM found horses "immediately outside" the East Douglas HMA); *Am. Wild Horse Campaign v. Zinke*, 353 F. Supp. 3d 971, 977-78 (D. Nev. 2018) ("[H]orses . . . migrate[d] outside of designated HMAs, encroaching upon private land to forage for food and water."); *Beaver Cnty. v. U.S. Dep't of Interior*, No. 2:17-cv-00088, 2017 WL 4480750 at *2 (D. Utah Oct. 6, 2017) ("BLM indicated . . . that the number of wild horses spread outside the Sulphur HMA was more than had ever previously been reported.").

Wells Creek, Adobe Town, and White Mountain—are located in southwestern Wyoming. Together, they comprise 2,811,401 acres. *See* 2-JA-108. Roughly 68% of the HMAs (1,920,314 acres) is BLM-administered public lands, while the remaining 32% (891,087 acres) is privately owned. *See* 2-JA109–10. The private inholdings in the HMAs are interspersed with public lands in a checkerboard pattern. The non-checkerboard portions of these HMAs—the large contiguous solid-block public lands located *outside* the Checkerboard—comprise 1,151,604 acres across all four HMAs. *See* 2-JA-109. Thus, the vast majority—***60%***— of the public land affected by BLM's decision lies *outside* the Checkerboard. *Id.*

Intervenor RSGA owns or leases portions of the Checkerboard's private inholdings, ranging from 40% to 93% of the private lands in these HMAs. *See* 3-JA-248. BLM permits RSGA to graze the adjacent public portions of the Checkerboard at rates far below market value for such forage. *See* 3-JA-42.

B. BLM's Prior Management of Wild Horses on These Public Lands

After Congress enacted the Wild Horse Act in 1971, BLM began managing the public lands of all four areas for wild horse use, with "boundary adjustments and realignments to the HMAs" in the years since. 2-JA-23; *see also* 2-JA-10 (depicting "Wild Horse Herd Managements Areas (Established 1971")). In 1979,

RSGA entered into an agreement with wild horse advocacy groups to allow 500 horses to utilize RSGA's private land within the Checkerboard. *See* 5-JA-65.

BLM established wild horse AMLs for these HMAs in the 1990s following "a process that included 5 years of focused, intensive monitoring; evaluation of data; public input; and environmental analysis." 2-JA-23; *see also* 2-JA-14 (setting AML); 2-JA-9 (same). BLM determined the combined AML range of these four HMAs to be 1,481-2,065 horses, *see* 2-JA-109–10, after accounting for resource availability and the resource needs of other wildlife that share these public lands with wild horses. *See* 2-JA-23; 2-JA-14; 2-JA-9.

In 2010, RSGA revoked its consent for wild horses to use its private lands in the Checkerboard and demanded their immediate removal from those lands. 2-JA-71; 5-JA-66. In 2011, RSGA sued to compel BLM to conduct those removals. RSGA and BLM entered into a consent decree to resolve that suit in 2013. 2-JA-26–38. The Consent Decree committed BLM to remove wild horses from the private portions of the Checkerboard pursuant to Section 4 of the Wild Horse Act, remove wild horses from the public portions of the Checkerboard, and "consider the environmental effects of revising" the four HMAs at issue here by reducing or eliminating wild horses from those HMAs. 2-JA-31–32.

C. This Court's *AWHPC* Decision

In 2014, Petitioners challenged BLM's decision, issued pursuant to Section 4 of the Wild Horse Act, to remove wild horses from both the private and public lands of the Checkerboard under the Consent Decree. After the district court mostly upheld BLM's decision, *Am. Wild Horse Pres. Campaign v. Jewell*, No. 14-cv-0152-NDF, 2015 WL 11070090 (D. Wyo. Mar. 3, 2015), Petitioners appealed.

On appeal, this Court unanimously rejected BLM's decision. The panel held that the "practical realities" of managing wild horses in the Checkerboard do not confer "the authority to construe the Act in a manner contrary to its plain and unambiguous terms"—i.e., BLM "must abide by the plain terms of Section 3" if it wishes to remove wild horses from *public* land. *See AWHPC*, 847 F.3d at 1188. Relevant here, this Court stated unequivocally that "nothing in Section 4 or elsewhere in the Act allows BLM to ignore the duties and responsibilities imposed upon it by Section 3, or to respond to a Section 4 removal request by treating public lands as private lands." *Id.* The Court also rejected BLM's reliance on the "consent decree[]," noting that agreements between parties cannot "override the clear and unambiguous language of Sections 3 and 4 of the Act." *Id.* at 1188-89.

In a footnote, the panel acknowledged the difficulty of BLM's management burden in the Checkerboard, and suggested that BLM could consider "amendments

to the areas designated as HMAs, and/or to the AMLs applicable to the HMAs at issue." *Id.* at 1189 n.8. The panel recognized, however, this option "may have little effect," *id.*, including because reducing AML requires "specific evidence and data" to satisfy Section 3's TNEB requirement, *id.* at 1189. Hence, the Court concluded that "the ultimate solution must come from Congress," as it "is in the best position to specifically address the seemingly unworkable requirements Section 3 and 4 place upon BLM in its management of this unique area." *Id.* at 1189 n.8.[6]

After the decision—taking seriously the Court's identified need for interim solutions pending congressional action—Petitioners wrote BLM in hopes of finding mutually agreeable solutions for managing wild horses in and around the Checkerboard. *See* 4-JA-260–65. Specifically, Petitioners urged BLM to "consider and analyze a public-private land exchange to resolve longstanding land

[6] Judge McKay penned a concurrence, agreeing that "BLM's solution to the problem presented by the checkerboard . . . is not in accordance with the statute." 847 F.3d at 1192 (McKay, J., concurring). He also observed that under Section 4, "private landowners have the absolute right to exclude wild horses . . . from their land," and thus admonished that BLM consider "redetermining the HMAs without the non-permissive use of private lands" because RSGA's private "lands with their corresponding forage may not be included in the decision about herd size or . . . [in] the designation of [HMAs]." *Id.* Nowhere did Judge McKay suggest that BLM may exclude *public* lands from these wild horse HMAs—in the Checkerboard or in the large solid-block public lands (totaling more than one million acres) *outside* the Checkerboard—let alone point to *any* statutory provision authorizing such action.

management issues and user conflicts in the [] Checkerboard." 4-JA-260. As Petitioners pointed out, BLM and other land management agencies routinely utilize these exchanges "to consolidate certain lands and reduce user conflicts among the private and public uses of adjacent parcels within a checkerboard land pattern." 4-JA-262 (citing BLM's 2014 Utah Recreational Land Exchange, whereby BLM conveyed more than 33,000 acres of federal public land and acquired more than 25,000 acres of non-federal land). BLM never responded to Petitioners' letter.

Nor, inexplicably, did BLM notify Congress of this Court's decision or the need for legislative intervention, despite the Court's statement that "the ultimate solution must come from Congress," *AWHPC*, 847 F.3d at 1189 n.8. Rather, BLM submitted *two* separate, detailed reports to Congress (in 2018 and 2020)—i.e., through the specific mechanism Congress created in the Wild Horse Act for BLM to periodically "submit to Congress . . . recommendations for legislative or other actions as [it] might deem appropriate," 16 U.S.C. § 1340—but studiously avoided *any* mention of this issue or the need for congressional action to address it.[7]

[7] *See* BLM, Report to Congress (2018), https://www.blm.gov/sites/blm.gov/files/wildhorse_2018ReporttoCongress.pdf; BLM, Report to Congress (2020), https://www.blm.gov/sites/blm.gov/files/WHB-Report-2020-NewCover-051920-508.pdf.

D. The Draft EIS and Proposed RMP Amendments

Rather than seek the legislative fix this Court prescribed or the land swap Petitioners urged, BLM repackaged its unlawful removal decision as a targeted amendment of two Resource Management Plans ("RMPs") aimed at revising the HMAs from the previous case.[8] In 2020, BLM issued a Draft EIS ("DEIS") proposing those revisions, 2-JA-65, which sought to address BLM's purported "obligations under the 2013 Consent Decree." 2-JA-47; *see also* 2-JA-48 ("The need for the [RMP Amendments] is driven by the checkerboard pattern of public and private land ownership within the HMAs . . . and RSGA's withdrawal of consent to maintain wild horses on its privately-controlled lands . . . .").

The DEIS considered three action alternatives, each of which "respond[ed], in part, to the requirements of the Consent Decree" and proposed severe reductions in or the outright elimination of the wild horse herds in all four HMAs. 2-JA-49–50. The agency's "Preferred Alternative" (Alternative D) embodied the then-proposed RMP amendments. "Under this alternative, all checkerboard land would be removed from [all four] HMAs and would revert to [Herd Area] status, and all other lands in three of the HMAs [(i.e., the Great Divide Basin, Salt Wells Creek,

[8] Although BLM initially proposed eliminating the White Mountain HMA, which was not at issue in the prior case, it ultimately abandoned that proposal.

and White Mountain HMAs)] would revert to [Herd Area] status" and be managed for zero wild horses. 2-JA-52. Thus, BLM's Preferred Alternative in the DEIS would authorize the elimination of three HMAs, the reduction of their respective AMLs to zero, and the permanent eradication of these wild horse herds.

The DEIS forthrightly acknowledged that there is "adequate forage, water cover and space to sustain a wild horse herd, and maintain a TNEB within the solid-block portion of the [Great Divide Basin and Salt Wells Creek HMAs]." 2-JA-54. Still, BLM proposed extirpating those herds (and adjusting their AMLs to "zero wild horses") because "it would be very difficult for BLM to prevent [those herds] from continually returning to private lands in the checkerboard." *Id.* In the Adobe Town HMA, where Checkerboard lands make up only 9% of the HMA (half of which are private), 2-JA-56, the DEIS proposed to reduce the AML by 56%. 2-JA-53. BLM admits that the Adobe Town HMA "is currently meeting all land health standards," but rejected the "continuation of wild horse use on the [Rock Spring Field Office] portion of the HMA outside of the checkerboard . . . because wild horses would constantly stray onto private land." 2-JA-53–54.

Notably, despite proposing to go much farther than merely excise RSGA's private land from these HMAs due to RSGA's revocation of consent (to which no one objects), BLM never once pointed in the DEIS to any statutory provision

authorizing BLM to eliminate genetically viable wild horse herds that BLM admits can be managed on public lands in a manner that ensures TNEB.

Petitioners submitted extensive comments. 4-JA-6–55; 4-JA-219–39. Petitioners pointed out that the eradication of wild horse herds in TNEB-compliant areas BLM had managed for horses since 1971—and its concomitant adjustment of AMLs to zero—cannot be justified under the Wild Horse Act. *E.g.*, 4-JA-16–17. Likewise, Petitioners took issue with BLM's NEPA analysis, including the DEIS's failure to examine reasonable alternatives such as land exchanges that would consolidate public and private lands in the Checkerboard and thereby reduce BLM's management burdens. 4-JA-30–31.

E. The Final EIS and Proposed RMP Amendments

In 2022, BLM published its Final EIS ("FEIS"). BLM made one change to its Preferred Alternative; whereas the DEIS proposed eliminating the White Mountain wild horse herd, the FEIS instead retained this herd to be "managed with an AML of 205-300." 2-JA-82. Otherwise, the Preferred Alternative remained the same as the DEIS—i.e., the RMP Amendments authorize the outright elimination of the Great Divide Basin and Salt Wells Creek wild horse herds, and a 33-56% reduction in AML in the Adobe Town HMA despite the fact that Checkerboard lands comprise only 9% of the HMA and private lands are less than 6% of the

HMA. 2-JA-81–82. BLM noted that in those areas of public lands "where wild horses are permanently removed," forage "previously allocated to wild horse use could, in the future, be allocated to wildlife, *livestock* or other ecosystem functions." 2-JA-86 (emphasis added).

Notwithstanding Petitioners urging otherwise, the FEIS did not expand its range of alternatives. Notably, it did not analyze the consolidation of Checkerboard lands to mitigate resource conflicts and reduce BLM's burdens because, according to BLM, it "does not currently have a proposal from a willing party (or group of parties) to a land exchange involving [the Checkerboard]." *Id.* As such, the FEIS says that this alternative "would not respond to the purpose and need for the [Amendments] which is intended to resolve private land conflicts in the near term." *Id.* The FEIS's purpose and need section, however, contains no such temporal restriction, and the FEIS does not explain this incongruity. Nor does the FEIS explain why BLM could not itself initiate land exchange proposals, since it has had ample time to do so. *See* 2-JA-74 (explaining that BLM initiated the RMP amendment process in early 2011); 2-JA-42 (acknowledging, in 2014, multiple requests to consider land exchanges to alleviate management burdens).

Nor did the FEIS grapple with the Wild Horse Act violations commenters identified. Petitioners stressed that BLM may not lawfully eliminate herds (or

reduce their AMLs) from public lands, including solid-block public lands, where BLM can (and does) manage horses while attaining TNEB. 4-JA-14–18. In the FEIS, BLM once again "found that there would be adequate forage, water cover and space to sustain a wild horse herd and maintain a TNEB within the solid-block portion of the [Great Divide Basin and Salt Wells Creek HMAs]." 2-JA-84; *see also* 2-JA-100 (finding that solid-block HMAs under Alternative B "would provide adequate forage for wild horses while maintaining a TNEB"); 2-JA-207–14 (analyzing Alternative B and reaching the same conclusion).

Yet, BLM stated that it did not care "whether existing range conditions reflect a [TNEB]," 2-JA-74, because, for BLM, the only relevant consideration was that "it would be very difficult for BLM to prevent th[ese] herd[s] from continually returning to private lands in the checkerboard." 2-JA-84; *see also* 3-JA-9 ("[T]he Purpose and Need . . . is based on the need to consider [a] change in management due to the removal of private landowner consent, and *is not based on current resource conditions on these HMAs*." (emphasis added)). BLM neither explained how RSGA's withdrawal of consent on its private lands justifies the elimination or reduction of wild horse herds on public lands (including *outside* the Checkerboard), nor pointed to any statutory authority to expel these herds from public lands that BLM acknowledges are achieving TNEB.

F. BLM's ROD and RMP Amendments

After Petitioners filed protests raising the same concerns, including the lack of statutory authority for the proposal, BLM issued its Protest Resolution Report. 3-JA-207. There, BLM stated once again that it did not consider "whether existing range conditions reflect a TNEB as described in the [Wild Horse Act]," because its analysis responded exclusively to the "change in consent for the use of private lands within the checkerboard portion of these HMAs." 3-JA-221. The Report failed yet again to explain why that rationale (i.e., RSGA's revocation of consent on *private* lands) justifies the total elimination of wild horse herds on public lands (including outside of the Checkerboard) that are achieving TNEB.

In May 2023, BLM signed the Record of Decision ("ROD"), adopting the RMP Amendments under the terms proposed in the FEIS's Preferred Alternative. The ROD reaffirmed "that there would be adequate forage, water cover and space to sustain a wild horse herd and maintain a TNEB within the solid-block portion of the [Salt Wells Creek and Great Divide Basin HMAs]." 3-JA-265–66.

Through the ROD and RMP Amendments, BLM ended the longstanding protection and management of the Great Divide Basin and Salt Wells Creek wild horse herds, adjusted their AMLs to zero (while also reducing the AML and HMA boundaries for the Adobe Town herd), and committed to the future removal of

every single horse from Great Divide Basin and Salt Wells Creek (and most from Adobe Town)—even though BLM concedes the public lands in those areas can support (and have long supported) viable wild horse herds while achieving TNEB.

III. PROCEEDINGS BELOW

Petitioners argued below that BLM acted in excess of statutory authority under the Wild Horse Act by adopting the ROD and RMP Amendments—which, to avoid straying onto private lands, decided to eliminate two wild horse herds (and most of a third) from public lands that contain sufficient resources to sustain viable herds and ensure TNEB—in violation of both Congress's overarching mandate to protect and manage wild horses on public lands, and the statute's sole remedy for addressing the impacts of straying onto non-federal lands. Petitioners also argued that BLM failed to analyze a reasonable range of alternatives under NEPA, let alone adequately explain its summary elimination of a land exchange alternative.

Before turning to the merits, the district court largely rejected Respondents' jurisdictional arguments, correctly finding that Petitioners have standing and their claims are ripe for relief. *See* 1-JA-203–13. The one exception is that the court distinguished as unripe claims challenging BLM's forthcoming decision to remove wild horses from these public lands to implement the RMP Amendments, in contrast to claims regarding "whether BLM's process and ultimate decision [in the

RMP Amendments] violates" the Wild Horse Act or NEPA—claims the court found "ripe for adjudication." *Id.* at 20-22.[9]

On the merits, the court upheld BLM's decision, finding that BLM did not act "in excess of statutory jurisdiction, authority, limitations, or short of statutory right." 1-JA-261. But the court never conducted the requisite, threshold inquiry to ascertain whether Congress authorized BLM to take this action. Rather, the ruling below bypassed that dispositive question, instead assuming the Act confers BLM this limitless authority. On that basis, the court held that BLM did not act "arbitrarily and capriciously or otherwise not in accordance with law," 1-JA-218, merely because "the nature of the Checkerboard would invariably involve wild horses traversing between public and private lands," which the court deemed "a sufficient justification for BLM's decisions." 1-JA-218–19. As to NEPA, the court affirmed BLM's refusal to analyze land exchange alternatives that could reduce BLM's management burdens. 1-JA-241–44.

[9] It was reasonable to construe BLM's ROD and RMP Amendments as a removal decision, given BLM's statement in the ROD that "[t]his decision will permanently remove wild horses" from these public lands, 3-JA-264. However, on appeal, Petitioners raise only their *non-removal* claims relating to BLM's decisions in the ROD and RMP Amendments to no longer protect and manage these herds on the public lands they have roamed since before the Act and to zero out their AMLs; hence, Petitioners do not argue here that BLM violated 16 U.S.C. § 1333(b)(2).

SUMMARY OF ARGUMENT

1. The district court's affirmance of BLM's unprecedented decision to permanently eradicate two wild horse herds (and drastically reduce another) to prevent straying onto nearby private land is in serious error. Not only did the court fail to conduct any statutory interpretation analysis to ascertain and enforce the limits on BLM's delegated authority from Congress in the Wild Horse Act, but the plain text of this carefully calibrated statute clearly prohibits BLM from extirpating wild horse herds, such as these, that BLM acknowledges can be managed on public lands in a manner that maintains TNEB on those lands. Because the ruling below ignored Congress's paramount command to protect and manage wild horses on public lands, and instead blindly deferred to BLM's novel view that it can address straying in this manner that finds no support in the Act, this Court must reverse.

2. The district court also erred by affirming BLM's failure under NEPA to consider land exchange alternatives to consolidate all or portions of the Checkerboard to reduce BLM's management burdens. Because BLM's cursory rationales for summarily rejecting land exchange alternatives are arbitrary and capricious, this too warrants reversal.

ARGUMENT

I. STANDARD OF REVIEW

A. The Administrative Procedure Act

Under the Administrative Procedure Act ("APA"), a court "shall" set aside agency actions, findings, or conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "when they are issued in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). An agency action is "arbitrary and capricious" if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. Controlling Principles of Statutory Interpretation

"When the [statutory] language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *United States v. Temple*, 105 U.S. 97, 99 (1881). This principle applies to cases involving "[a]dministrative agencies," which "are creatures of statute"; "[t]hey accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of lndep. Bus. v. Dept. of Labor*, 595 U.S. 109, 117 (2022). "[T]he basic nature and meaning of a

statute does not change when an agency happens to be involved"; "[n]or does it change just because the agency has happened to offer its interpretation." *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2271 (2024).

In its recent *Loper Bright* decision, the Supreme Court "overruled" *Chevron* deference, which previously required courts, at the second step of the analysis, to defer to *any* "permissible" interpretation offered by an agency, if the court finds the statute ambiguous at the first step. *Id.* at 2273. The Court held that deference to agency interpretations of ambiguous statutory provisions "cannot be squared with the APA." *Id.* at 2263. Rather, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Id.* at 2273. This is because a court's interpretive task, regardless of an agency's view, is to "identify and respect [Congress's] delegations of authority" and "police the outer statutory boundaries of those delegations." *Id.* at 2268. In the end, all statutes "do—in fact, must—have a single, best meaning"—"fixed at the time of enactment"—and "[i]n the business of statutory interpretation, if it is not the best [reading], it is not permissible." *Id.* at 2266. There is only one "question that matters: Does the statute authorize the challenged agency action?" *Id.* at 2269.

In practice, *Loper Bright* left untouched the first step of a court's statutory interpretation task—i.e., "to discern whether Congress ha[s] directly spoken to the

precise question at issue." *Id.* at 2264 (quotation marks and citation omitted). If "the statute's language is plain," that is the end of the matter and "the sole function of the courts can only be to enforce it according to its terms." *United States v. Adame-Orozco,* 607 F.3d 647, 652 (10th Cir. 2010) (citations omitted); *see also Lopez v. Garland*, 116 F.4th 1032,1043 (9th Cir. 2024) ("[P]ursuant to *Loper Bright* . . . . [w]e begin, as always, with the plain language of the statute. . . . If the plain language is clear, our inquiry is complete.").

Only if a court deems a statute genuinely ambiguous may it look to extra-statutory interpretive guidance such as an agency's construction of the provision. At most, however, a court owes only "due respect" for an agency's interpretation—not outright deference—and only where the agency's reading has the "'power to persuade.'" *Loper Bright*, 144 S. Ct. at 2267 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Even then, "'[t]he weight of such a judgment" by an agency "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.'" *Id.* at 2259 (quoting *Skidmore*, 323 U.S. at 140).

II. THE PLAIN TEXT OF THE WILD HORSE ACT PRECLUDES BLM'S ACTION, AND BLM'S CONSTRUCTION OF THE ACT IS DUE NO RESPECT

The Wild Horse Act expressly forecloses the action taken here—i.e., BLM's first-ever decision to end protections for and management of wild horses on public lands they roamed in 1971 in order to prevent straying onto private lands, despite BLM's acknowledged ability (and demonstrated history) to manage these herds while maintaining a thriving natural ecological balance on the affected public lands. While BLM may excise RSGA's private lands from these HMAs, Congress did *not* confer on BLM the authority to eliminate the protection and management of wild horses on *public* lands based on factors, such as the prevention of straying, that have nothing to do with maintaining TNEB on the relevant public lands.

Had BLM excised only RSGA's private lands from these HMAs—as Judge McKay urged, *see AWHPC*, 847 F.3d at 1192—Petitioners would not have filed suit. But BLM went *much* farther, deciding instead to eliminate the protection and management of wild horses on the Checkerboard's *public* lands and the large solid-block *public lands outside the Checkerboard*. And BLM took this unprecedented action while flatly acknowledging it made this decision to avoid horses "continually returning to private lands in the checkerboard," even though there is "adequate forage, water cover and space to sustain a wild horse herd, and maintain

a TNEB within the solid-block portion of the [Great Divide Basin and Salt Wells Creek HMAs]." 2-JA-54; *see also* 2-JA-84 (same); 2-JA-100 (same); 2-JA-207–14 (same); 3-JA-265–66 (same). Hence, in BLM's words, this decision had *nothing* to do with TNEB because it "is not based on current resource conditions on these HMAs." 3-JA-13.

A. The Act's Overriding Mandate, Plus Other Provisions of Act, Plainly Foreclose BLM from Extirpating Wild Horse Herds to Prevent Straying onto Non-federal Lands

1. Sections 3(a) and 4 of the Act Prohibit BLM's Action

Because the challenged portion of BLM's decision pertains only to public lands, Petitioners start with Section 3(a). This is the Act's singular provision in which Congress delegated (and sharply limited) BLM's "powers" to manage wild horses on public lands, and imposed specific "duties" on BLM to carry out the Act's paramount mandate "*to protect and manage wild free-roaming horses and burros as components of the public lands*." 16 U.S.C. § 1333(a) (emphasis added); *see also id.* § 1331 (affirming that BLM must "consider[]" wild horses "in the area presently found, as an integral part of the natural system of public lands"). This unequivocal mandate is the linchpin of the Act. *See Fallini*, 783 F.2d at 1346 (9th Cir. 1986) (highlighting the Act's "fundamental goal of protecting the animals" on public lands); *Roaring Springs*, 471 F. Supp. at 525 (explaining that actions

causing "wild horses [to] disappear from the public lands" would "contravene the policy and purposes of the Act"); H.R. Rep. No. 92-681, at 6-7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2159, 2160 ("The Act provides the administrative tools for protection of the animals . . . . This is the paramount responsibility with which [BLM is] charged under the terms of the statute.").

But Congress did not stop there, which alone would have foreclosed actions, such as BLM's here, that are incompatible with the Act's chief mandate to protect and manage wild horses on the public lands they roamed in 1971. Rather, Congress specified one—and *only* one—limitation on the Act's overriding mandate: BLM "shall manage wild [horses] in a manner that is designed to achieve and maintain [TNEB]" on public lands, and, to comply this limitation, BLM's wild horse forage allocations (via AMLs) "shall take into consideration the needs of other wildlife species which inhabit such lands." 16 U.S.C. § 1333(a).

In enumerating this sole exception to BLM's paramount duty to protect and manage wild horses on public lands—thereby restricting the agency's authority *not* to manage wild horses on public lands or to adjust AML based on factors other than resource-related considerations—Congress tellingly did not authorize, or even mention, the prevention of straying onto non-federal land as a relevant factor. This, too, dooms BLM's action under well-established canons of construction. *See, e.g.*,

United States v. Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 469 (2001) (rejecting insertion of a factor that Congress "say[s] not a word about" in a provision where Congress "describes in detail how [other factors] are to be calculated and given effect").

That Congress did not intend the straying of wild horses onto private land to dictate decisions regarding where wild horses must be protected and managed on public land, is also borne out by Section 4 (16 U.S.C. § 1334). There, in the one provision in which Congress chose to address straying, it acknowledged that horses would routinely stray onto non-federal land. *See Fallini*, 783 F.2d at 1345-46 (noting that "Section 4 is the only provision of the Act that pertains to wild horses straying onto private lands," and that "the Act" and its "legislative history" "clearly contemplate[] the possibility that wild horses may stray onto private lands").

Rather than deputize BLM to supplant Congress's paramount wild horse protection mandate by unilaterally closing public lands to wild horses to prevent *future* straying, Congress instead adopted a different, much more modest remedy whereby private landowners may notify BLM *once* horses *have strayed* onto their

land, which BLM must promptly remove. 16 U.S.C. § 1334. That is a far cry from what BLM did here by manufacturing its own preferred, far more drastic remedy to prevent future (not past) straying, at the expense of the specific, sole remedy Congress designed to address straying. *See, e.g.*, *Navajo Nation v. Azar*, 302 F. Supp. 3d 429, 439 (D.D.C. 2018) (finding that a statute "'unambiguously foreclose[s] the agency's statutory interpretation . . . by prescribing a precise course of conduct other than the one chosen by the agency'" (quoting *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011))).

Given Congress's clear textual commitment to address straying in but one specific fashion as set forth in Section 4, it is beyond legitimate dispute that Congress did *not* empower BLM, in Section 3(a), to create a new, distinct remedy to address straying through more draconian means by liquidating wild horse herds from public lands that Congress explicitly identified for their protection and management. It is axiomatic that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions—it does not, one might say, hide elephants [or horses] in mouseholes." *Whitman*, 531 U.S. at 468; *cf. Fallini* 783 F.2d at 1346 ("Congress declined to authorize [] BLM to fence the wild horses or to use intensive management techniques [to prevent straying].")

In light of the centrality in the Act of Congress's overriding mandate that reflects Congress's well-reasoned political decision of national policy to protect and manage wild horses on public lands—and the unbounded nature of the power grab BLM seeks through this decision that would radically transform the Act and subjugate its cardinal mandate despite no legislative approval to do so—it is painfully obvious that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 160 (2000). This is the end of the matter—the Act forecloses BLM from banishing wild horse herds from TNEB-compliant public lands to prevent their future straying onto private lands.

2. The Act's Other Provisions Support This Plain Text Reading

Although Sections 3(a) and 4 of the Wild Horse Act authoritatively shut the door on BLM's misguided attempt to fundamentally rewrite the statute, other provisions lend additional support to Petitioners' plain language reading of the Act.

For instance, Section 1, consistent with Section 3(a), emphasizes Congress's determination of national "policy" that all wild horses "shall be protected from capture, branding, harassment, or death," and that "to accomplish this [directive] *they are to be considered in the area presently found, as an integral part of the natural system of public lands*." 16 U.S.C. § 1331 (emphasis added). This is not a

technical decision Congress entrusted to an agency based on specialized expertise; Congress itself adopted this policy as a *political* determination striking a deliberate balance, by prioritizing wild horse protection and management on public lands (subject only to a TNEB limitation), thereby making the "[p]revention of straying [] subservient to the [Act's] fundamental goal of protecting the animals [on public lands] with minimal management effort." *Fallini*, 783 F.2d at 1346. Neither BLM nor this Court may trample the calculated balance Congress struck.[10]

In addition, although this is not a challenge to a removal decision, *see supra* note 9, Section 3(b) of the Act and this Court's *AWHPC* decision strongly support Petitioners' plain text reading here. As it did in Section 3(a) in placing a TNEB limitation (but no others) on occupied public lands that BLM must protect and manage for wild horses, Congress also directly tied BLM's decisions to remove any wild horses from public lands to TNEB. The Act makes the removal of "excess animals" contingent on BLM first determining that such "action is necessary," 16

[10] That Congress amended the Act in 1978 and 2004—revising *other* aspects of the law but *not* Sections 1, 3(a), and 4, despite extensive straying-based litigation by RSGA, the *Fallini* and *Roaring Springs* plaintiffs, and other private landowners—reinforces that Congress continues to view as proper the careful balance it struck when enacting those provisions. *See* Pub. L. 95-514, 92 Stat. 1803 (Oct. 25, 1978); Pub. L. No. 108-447, 118 Stat. 2809, 3070-71 (Dec. 8, 2004); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.").

U.S.C. § 1333(b)(2), "in order to preserve and maintain a [TNEB] and multiple-use relationship in that area" of public lands. *Id.* § 1332(f); *see also id.* § 1333(b)(2) (noting that the purpose of removal is "to restore a [TNEB] to the range, and protect the range from deterioration"). As with Section 3(a), Section 3(b) does not mention straying. But in contrast to Section 3(a) at issue in this appeal (where Congress circumscribed BLM's discretion by allowing only the consideration of TNEB), Congress infused in Section 3(b) much broader discretion—i.e., Congress left it to BLM, as a matter of technical (rather than policy) judgment, to determine the best method of achieving AML in each area of public lands (e.g., "removal," "sterilization," or "natural controls on population levels"). 16 U.S.C. § 1333(b)(1).

Yet, despite the broader latitude inherent in Section 3(b), this Court held that "nothing in Section 4 or elsewhere in the Act allows BLM to ignore the duties and responsibilities imposed upon it by Section 3, or to respond to a Section 4 removal request by treating public lands as private lands" when removing horses from public lands. *AWHPC*, 847 F.3d at 1188. The "practical realities" of protecting and managing wild horses on these public lands do *not* confer BLM "the authority to construe the Act in a manner contrary to its plain and unambiguous terms." *Id.*

Accordingly, if, as this Court correctly held, the language of Section 4 cannot overtake the statutory requirements of Section 3(b) where BLM retains

some discretion when deciding whether and how to remove excess horses from public lands, Section 4 most certainly *cannot* be read to overthrow the Act's chief, mandatory duty that explicitly "direct[s]" BLM "to protect and manage wild free-roaming horses and burros as components of the public lands," so long as TNEB is attainable, 16 U.S.C. § 1333(a)—as BLM admits is the case here, 2-JA-84. Put simply, if Section 4 is not a lawful basis to remove some (but not all) horses from an area of public lands (as this Court previously held), it most assuredly is not a lawful basis to permanently eradicate *all wild horses* from those same public lands.

In sum, the Act's plain language forecloses BLM from terminating the protection and management of wild horse herds on TNEB-compliant public lands to prevent future straying onto non-federal lands.

B. Even If the Act Is Somehow Ambiguous, BLM's Construction Is Neither the Best Reading Nor Entitled to Any Respect

If the Court were to discern ambiguity in Congress's mandate in Section 3(a) requiring the protection and management of wild horses on public lands occupied in 1971 except when TNEB is unattainable (or in Congress's deliberate decision to address straying only through the specific remedy set forth in Section 4), the Court would be required to "determine the best reading of the statute and resolve the ambiguity." *Loper Bright*, 144 S. Ct. at 2266.

Here, even if the plain language does not expressly foreclose BLM's action (and it does), Petitioners' construction of the Act is easily the best (if not only) reading of the Act's provisions. *See supra* at 37-44. In contrast, BLM's novel construction—applied for the first time in the 53-year history of the Act in issuing this decision to no longer manage these wild horse herds on public lands to prevent straying onto private lands—is indefensible. BLM cannot point to *any* provision in the Act where Congress delegated this specific authority to the agency or empowered it to address straying in this drastic fashion that undercuts the Act's central mandate; that, alone, dooms BLM's reading of the statute. *See MCI Telecomm. Corp. v. Am. Tele. & Tele. Co.,* 512 U.S. 218, 229 (1994) (explaining that courts must not adopt "an agency's interpretation of a statute . . . when it goes beyond the meaning that the statute can bear"); *Bates v. United States*, 581 F.2d 575, 579 (6th Cir. 1978) ("[A] regulation [may not] be used to alter or amend a statute by prescribing requirements which are inconsistent with its language.").[11]

[11] Notably, in contrast to Petitioners, BLM did not (and cannot) mount a serious plain language argument, and instead can prevail *only* if the Court deems the Act ambiguous *and* finds BLM's reading the best of all possible interpretations. In briefing below, rather than point to *any* provision in which Congress conferred on BLM the immense authority it now claims to possess to eradicate wild horse herds to prevent straying, BLM instead generically asserted that the agency's reading of the Act allowing it to undertake this unprecedented action is the best reading

BLM's tortured reading is not only at odds with the statute's text, but there are additional reasons it does not command any respect, let alone "due respect," including because it has zero "'power to persuade.'" *Loper Bright*, 144 S. Ct. at 2267 (quoting *Skidmore*, 323 U.S. at 140).

In an effort to resurrect its counter-textual reading of the Act, BLM pointed in briefing below to a 1986 regulation (and BLM's informal handbook relying on it), as authority to extirpate wild horse herds to prevent future straying. There, BLM purported to allow consideration of not only AMLs and wild horse habitat needs in "delineating" an HMA, but also "the relationships with other uses of the public and adjacent private lands." 43 C.F.R. § 4710.3. The district court skipped the first step of the statutory interpretation analysis (i.e., the plain text inquiry), and relied on this regulation in affirming BLM's decision. *See* 1-JA-220–21. But contrary to the ruling below, BLM's position neither has been "consistent over time" nor is entitled to "persuasive weight," 1-JA-221, for several reasons.

First, despite *counsel's* post hoc arguments in district court, BLM itself *never* asserted in its DEIS, FEIS, or ROD that there is any statutory ambiguity, nor did the agency cite to 43 C.F.R. § 4710.3-1 as legal authority to undertake this

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because it vaguely "harmonizes both Section 3 and Section 4 and . . . allows BLM to comply with each of its statutory obligations." District Court ECF No. 72 at 3.

action (let alone specify what *statutory* provision, although allegedly ambiguous, leaves discretion for this action). This silence is deafening, especially given the repeated calls by Petitioners and others for BLM to explain its legal authority to conduct this unprecedented action, where the Act appears to forbid it. *See* 4-JA-16–17; 4-JA-219–22; 4-JA-248–50; *see also AWHPC*, 847 F.3d at 1188 (rejecting BLM's reading of the Act where "there is no indication in the record that BLM's decision . . . was motivated by what it considered to be an ambiguity in the text of the Act regarding . . . . the duties it imposes on BLM").

Given the brevity and lack of formality underlying BLM's assertions in the DEIS, FEIS, and ROD (without any legal citation) that it may eradicate wild horse herds merely because "it would be very difficult for BLM to prevent [those herds] from continually returning to private lands," 2-JA-84, the agency's silence on those crucial questions is the *opposite* of persuasive and cannot fill any purported gap in the statutory scheme. *See Dep't of the Treasury, IRS v. Fed. Labor Rel. Auth.*, 494 U.S. 922, 933 (1990) (giving "reasonable content to the statute's textual ambiguities" is "not a task [the court] ought to undertake on the agency's behalf").

Second, under *Loper Bright*, the regulation BLM relies upon—and the implicit statutory interpretation contained in the decision under review—command *no* respect. Not only did BLM's ROD fail to cite this regulation, but its issuance of

the regulation itself shows zero "thoroughness evident in its consideration" and no analysis demonstrating "the validity of its reasoning." *Skidmore*, 323 U.S. at 140.

As explained, *see supra* at 14-15, BLM added the clause to 43 C.F.R. § 4710.3-1 regarding the consideration of other uses of public *and private* lands only because "[o]ne comment [on the proposed rule] suggested that the effect on nearby private land of management for wild horses and burros should be taken into account in delineating [HMAs]." 51 Fed. Reg. at 7,411. That is the *entirety* of BLM's explanation for what it now relies upon as a sea change in the Act's implementation; importantly, this sentence fails to identify (or analyze) *any* statutory provision where Congress delegated BLM this supreme authority. *Id.*

And because BLM did *not* include this clause in its proposed rule, 49 Fed. Reg. at 49,254, this aspect of the rule was never subject to notice-and-comment procedures, depriving the public of any opportunity to explain why the Act precludes its adoption. Accordingly, BLM's off-the-cuff, last-minute addition of this clause—that is neither thoroughly nor logically explained—is unpersuasive in clarifying any ambiguity the Act purportedly invites. *See United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (noting that, in assessing persuasiveness, courts must weigh "the merit of its writer's thoroughness, logic, and expertness"); *Young*

v. United Parcel Serv., 575 U.S. 206, 225 (2015) (finding agency's interpretation unpersuasive where it did not "explain the [statutory] basis" for that reading).[12]

Third, BLM's litigating position is inconsistent with BLM's pre-1986 regulatory actions and its decades-long practice. To begin with, BLM's 1975 regulations conspicuously did *not* allow the consideration of private lands in BLM decisions to manage (or not) public lands for the protection of wild horses, instead tying those decisions to TNEB-related habitat factors just as Congress did. *See supra* at 12-13 (quoting 43 C.F.R. §§ 4712.2-2(a)-(c) (1975)). Nor, in BLM's own proposed rule amendments in 1984, did the agency itself suggest that it should (or even may) inject private land considerations into these decisions. This history shows that BLM neither contemporaneously adopted this position close in time to the 1971 Act, nor consistently expressed its current view that the Act authorizes the consideration of straying onto private land in decisions about where BLM must (or must not) protect and manage wild horses on public land.

[12] BLM did not apply *any* technical expertise in the one sentence adopting a single public comment to inject in its regulation the consideration of private lands. In any event, the decision of whether and where to manage wild horses on public lands, and the relevant criteria for that decision, is a *political* (not technical) judgment that Congress itself made rather than delegating it to BLM. *See supra* at 41-42.

Moreover, even assuming that BLM's regulation listing other relevant factors can be read to treat "the relationships with other uses of the public and adjacent private lands" as the sole *dispositive* factor like BLM did here, that is *not* how BLM has acted in practice since 1986. As noted, many of the 177 wild horse HMAs are in near-constant conflict with non-federal landowners who own or lease land (often in checkerboard patterns) in, or directly adjacent to, HMAs that see routine straying of horses. *See supra* at 18 & n.5 (listing examples). Yet, BLM did not point to *any* example in the DEIS, FEIS, or ROD where it has eliminated a wild horse herd on this basis. Nor in briefing did counsel identify a single instance to bolster this action—instead pointing to two situations where, consistent with *Petitioners'* view, BLM decided to no longer manage a wild horse herd because TNEB was unattainable on those public lands (as supported by extensive documentation by the agency). *See supra* at 15 & n.3. It hardly evinces a consistent, uniform application of BLM's position where, as government counsel admits, "there are not examples [] where BLM has converted an HMA to an HA in the way that they've done here . . . ." Oral Arg. Tr. (July 16, 2024) at 36-37.

For these reasons, BLM's reading of the Act lacks the "power to persuade" and does not deserve respect. *Skidmore*, 323 U.S. at 140. While BLM might genuinely view its proposal as "a better regime," it "is not the one that Congress

established." *MCI Telecomm.*, 512 U.S. at 234; *see, e.g.*, *Burrage v. United States,* 571 U.S. 204, 218 (2014) ("The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy.").

Hence, this Court's admonition remains as true as ever—"the ultimate solution must come from Congress"; it "is in the best position to . . . address the seemingly unworkable requirements Section 3 and 4 place upon BLM." *AWHPC*, 847 F.3d at 1189 n.8. Although BLM has inexcusably refused to heed the Court's guidance and notify Congress of this issue, *see supra* at 23 & n.7, BLM must stop cutting corners in defiance of the Act's plain language.

III. BLM's Decision Also Violates NEPA

Even if BLM did not exceed its authority under the Wild Horse Act, it violated NEPA. Despite receiving information since 2011 supporting land exchanges to mitigate straying onto private lands, *see* 2-JA-41–45; 4-JA-260–65, BLM summarily eliminated the consideration of any land exchange alternatives under NEPA, supplying only cursory rationales for their elimination, 2-JA-86. The district court erroneously upheld BLM's summary elimination of land exchanges. *See* 1-JA-241–44.

While agencies "need not examine an infinite number of alternatives in infinite detail," *Allison v. Dep't of Transp.*, 908 F.2d 1024, 1031 (D.C. Cir. 1990),

agencies must examine reasonable mid-range alternatives. For example, in *Union Neighbors United. v. Jewell*, the D.C. Circuit rejected an EIS that "failed to consider a reasonable range of alternatives" where the agency refused to analyze "a realistic mid-range alternative" proposed by commenters. 831 F.3d 564, 577 (D.C. Cir. 2016); *see also Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (explaining that agencies must "provide legitimate consideration to alternatives that fall between the obvious extremes").

Here, the FEIS's stated purpose is simply "to identify and select, consistent with applicable law, a plan for wild horse management, including AML, on the current HMAs that include checkerboard land . . . ." 2-JA-74. In their DEIS comments and by letter in 2017, Petitioners urged BLM to consider land exchange alternatives to consolidate and proportionally allocate the public and private shares of the Checkerboard to larger, contiguous parcels. 4-JA-30–31; 4-JA260–65.

BLM's Land Exchange Handbook acknowledges that "[l]and exchanges are an important tool to consolidate land ownership for more efficient management and to secure important objectives of resource management . . . ." BLM, Land Exchange Handbook H-2210-1 at 1 (2005), https://www.blm.gov/sites/blm.gov/files/h2200-1.pdf. Here, permanent consolidation through "blocking" would reduce drastically the sum length of the borders between public and private lands and thus

substantially decrease straying events. 2-JA-20 ("Blocking land can also refer to creating large blocks of federal and private land in areas of checkerboard landownership."). This would reduce BLM's management burdens by alleviating tension imposed by Sections 3 and 4 of the Wild Horse Act. *See* Land Exchange Handbook at 1-5 ("[E]xchanges represent mutually beneficial adjustments to land ownership patterns for more efficient land use and management.").

For these reasons, land exchanges squarely meet all of the needs BLM identified in the DEIS and FEIS by resolving the "circumstances of the checkerboard with interlocked public lands and private land," rendering RSGA's consent immaterial, and minimizing conflicts among wild horses and private uses, 2-JA-74. Moreover, because land consolidation represents a unique mechanism for addressing BLM's specific needs in the Checkerboard, and offers a more durable solution than term-limited RMPs, an alternative analyzing such an exchange would be highly informative as a mid-range alternative to all-or-nothing management decisions (such as the total elimination of wild horse herds).

Despite the obvious benefits of incrementally "blocking" the Checkerboard through land exchanges, BLM declined to analyze such an alternative for two reasons. BLM first asserts that it did not "have a proposal from a willing party (or group of parties) to a land exchange involving checkerboard lands in the planning

area." 2-JA-86. That is a red herring. BLM's regulations identify the agency's inherent authority to solicit land exchanges. *See* 43 C.F.R. § 2201.1(a) ("Exchanges may be proposed by [BLM] . . . ."). BLM's guidance also expressly recommends "Assembled" land exchanges for "large scale transactions such as those conducted *in checkerboard land ownership areas* to rearrange ownership patterns." Land Exchange Handbook at 1-5 (emphasis added). And, in any event, had BLM explored land exchanges and found there were no genuinely willing partners (it did not), BLM could have considered the feasibility of exercising eminent domain to consolidate lands, as commenters suggested. *See* 5-JA-55.[13]

BLM also asserts that a land exchange alternative will fail to meet the agency's "purpose and need for the plan amendment, which is intended to resolve private land conflicts i*n the near term*." 2-JA-86 (emphasis added). This response is arbitrary for at least two reasons. First, neither the DEIS nor FEIS ties the purpose and need to "near term" solutions; in fact, BLM's own alternatives

[13] BLM's Land Exchange Handbook recommends Assembled Land Exchanges in the precise circumstances BLM says renders them infeasible. *Compare* 2-JA-86 (warning in the FEIS that this "alternative would involve multiple private land owners agreeing on the details of a land exchange with BLM"), *with* Land Exchange Handbook at 1-4 ("Assembled land exchanges can range from those that involve multiple parcels under the same ownership to complex multi-ownership, multi-transaction exchanges with facilitators.").

analysis explicitly envisions "long term" conditions within the HMAs that could be more readily achieved with a more uniform ownership regime. *E.g.*, 2-JA-81–82.

Second, BLM cannot claim that it is surprised by this proposed alternative; Checkerboard land exchanges were proposed to BLM during the scoping period *over ten years before the ROD*, 2-JA-41–45, and then again in 2017 (*six years before the ROD*), 4-JA-260–65. It would turn NEPA on its head for BLM to ignore this obvious solution for a decade and then excuse the agency from examining it in the FEIS and ROD due to BLM's own unwillingness for a decade to explore the feasibility of such alternatives.

A "viable but unexamined alternative renders [an EIS] inadequate." *Muckleshoot Indian Tribe v. U.S. Forest Serv*., 177 F.3d 800, 814 (9th Cir. 1999). Because a land exchange is a viable alternative—and has been for a decade, despite no effort by BLM to explore it—BLM's failure to examine it in its FEIS or provide a reasoned rationale for rejecting it is arbitrary and capricious. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 710-11 (10th Cir. 2009) (rejecting BLM's refusal to consider an alternative under NEPA that BLM arbitrarily deemed "inconsistent" with the purpose of an RMP process, and finding the alternative "would fit well within the scope of the plan objectives").

CONCLUSION

Petitioners respectfully request that the Court, as it did in *AWHPC*, reverse the judgment, and set aside BLM's ROD, RMP Amendments, and FEIS.

STATEMENT OF REASONS SUPPORTING ORAL ARGUMENT REQUEST

Petitioners respectfully request oral argument because this appeal raises an exceptionally important, precedential issue of first impression, which is related to this Court's prior decision in *AWHPC v. Jewell*, 847 F.3d 1174 (10th Cir. 2016). In addition, because the appeal involves complex legal and factual issues, Petitioners believe the Court would benefit from hearing oral argument in this matter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type and volume limitations of Fed. R. App. P. 32(a)(7). The brief contains 12,892 words.

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CERTIFICATE OF SERVICE

I, William S. Eubanks II, hereby certify that on February 3, 2025, I served copies of Petitioners' Final Opening Brief on all counsel of record in this case by way of electronic mail (ECF filing), and I further certify that all parties to this case are registered to receive ECF filings in this matter.

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ADDENDUM

Below, Petitioners include an Addendum containing the now-superseded Council on Environmental Quality regulations (40 C.F.R. Part 1500) that implement the National Environmental Policy Act, which apply to the agency decision under review. *See supra* note 4.

Council on Environmental Quality
Executive Office of the President

REGULATIONS

For Implementing The Procedural Provisions Of The

NATIONAL ENVIRONMENTAL POLICY ACT

Reprint
40 CFR Parts 1500-1508
(2005)

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PART 1500—PURPOSE, POLICY, AND MANDATE

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AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all fed-

eral agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act) except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§1502.2(c)), by means such as setting appropriate page limits (§§1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§1502.2(b)).

(d) Writing environmental impact statements in plain language (§1502.8).

(e) Following a clear format for environmental impact statements (§1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§1502.14 and 1502.15) and reducing emphasis on background material (§1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§1501.7).

(h) Summarizing the environmental impact statement (§1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§1502.4 and 1502.20).

(j) Incorporating by reference (§1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§1502.25).

(l) Requiring comments to be as specific as possible (§1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§1503.4(c)).

(n) Eliminating duplication with state and local procedures, by providing for joint preparation (§1506.2), and with other federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§1506.3).

(o) Combining environmental documents with other documents (§1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§1502.25).

(h) Eliminating duplication with state and local procedures by providing for joint preparation (§1506.2), and with other federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§1506.3).

(i) Combining environmental documents with other documents (§1506.4).

(j) Using accelerated procedures for proposals for legislation (§1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the federal government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study

and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

§1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by §1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-federal entities before federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later federal action.

(2) The federal agency consults early with appropriate state and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The federal agency commences its NEPA process at the earliest possible time.

§1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in §1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by §1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in §1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under §1507.3, the agency shall make the finding of

no significant impact available for public review (including state and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to §1507.3, or

(ii) The nature of the proposed action is one without precedent.

§1501.5 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, state, or local agencies, including at least one federal agency, may act as joint lead agencies to prepare an environmental impact statement (§1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any federal agency, or any state or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency. A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which federal agency shall be the lead agency and which other federal agencies shall be cooperating agencies.

[43 FR 55992, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in §1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b) (3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

§1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§1508.22) in the FEDERAL REGISTER except as provided in §1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected federal, state, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under §1507.3(c). An agency may give notice in accordance with §1506.6.

(2) Determine the scope (§1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in §1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§1502.7).

(2) Set time limits (§1501.8).

(3) Adopt procedures under §1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by §1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a federal agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the federal government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by federal officials in conjunction with other relevant material to plan actions and make decisions.

§1502.2 Implementation.

To achieve the purposes set forth in §1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§1508.11) are to be included in every recommendation or report.

On proposals (§1508.23).

For legislation and (§1508.17).

Other major federal actions (§1508.18).

Significantly (§1508.27).

Affecting (§§1508.3, 1508.8).

The quality of the human environment (§1508.14).

§1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad federal actions such as the adoption of new agency programs or regulations (§1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one

agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§1501.7), tiering (§1502.20), and other methods listed in §§1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable state or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§1501.7).

§1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of §1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in §1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of agencies, organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§1502.11 through 1502.18, in any appropriate format.

§1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the state(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA

under §1506.10). The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The description shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under §1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in §1502.14. It shall include discussions of:

(a) Direct effects and their significance (§1508.8).

(b) Indirect effects and their significance (§1508.8).

(c) Possible conflicts between the proposed action and the objectives of federal, regional, state, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See §1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under §1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under §1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in §1502.18(d) and unchanged statements as provided in §1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate federal, state or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft. If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or

environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement: (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are

important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate state and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed. Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of state and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing state and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under §1506.10.

§1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmen-

tal standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in §1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

(c) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary federal permits, licenses, or entitlements.

(d) When a cooperating agency with jurisdiction by law objects to or expresses reservations about the proposal on grounds of environmental impacts, the agency expressing the objection or reservation shall specify the mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences.

§1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), should be attached to the final statement whether or not the comment is thought to merit individual discussion by the agency in the text of the statement.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write them on errata sheets and attach them to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be circulated (§1502.19). The entire document with a new cover sheet shall be filed as the final statement (§1506.9).

PART 1504—PREDECISION REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Source: 43FR 55998, Nov. 29, 1978 unless otherwise noted.

§1504.1 Purpose.

(a) This part establishes procedures for referring to the Council federal interagency disagreements concerning proposed major federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is "unsatisfactory from the standpoint of public health or welfare or environmental quality," section 309 directs that the matter be referred to the Council (hereafter "environmental referrals").

(c) Under section 102(2)(C) of the Act other federal agencies may make similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

[43 FR 55998, Nov. 29, 1978]

§1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as possible in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

[43 FR 55998, Nov. 29, 1978]

§1504.3 Procedure for referrals and response.

(a) A federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice in the referring agency's comments on the draft environmental impact statement, except when the statement does not contain adequate information to permit an assessment of the matter's environmental acceptability.

(3) Identify any essential information that is lacking and request that it be made available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council not later than twenty-five (25) days after the final environmental impact statement has been made available to the Environmental Protection Agency, commenting agencies, and the public. Except when an extension of this period has been granted by the lead agency, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it, and requesting that no action be taken to implement the matter until the Council acts upon the referral. The letter shall include a copy of the statement referred to in (c)(2) of this section.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any material facts in controversy and incorporate (by reference if appropriate) agreed upon facts,

(ii) Identify any existing environmental requirements or policies which would be violated by the matter,

(iii) Present the reasons why the referring agency believes the matter is environmentally unsatisfactory,

(iv) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason,

(v) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time, and

(vi) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) Not later than twenty-five (25) days after the referral to the Council the lead agency may deliver a response to the Council, and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Interested persons (including the applicant) may deliver their views in writing to the Council. Views in support of the referral should be delivered not later than the referral. Views in support of the response shall be delivered not later than the response.

(f) Not later than twenty-five (25) days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Hold public meetings or hearings to obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) When the referral involves an action required by statute to be determined on the record after opportunity for agency hearing, the referral shall be conducted in a manner consistent with 5 U.S.C. 557(d) (Administrative Procedure Act).

[43 FR 55998, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

PART 1505—NEPA AND AGENCY DECISIONMAKING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55999, Nov. 29, 1978, unless otherwise noted.

§1505.1 Agency decisionmaking procedures.

Agencies shall adopt procedures (§1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment

and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

§1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in §1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for federal, state or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

§1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with state agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and state and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more federal agencies and one or more state or local agencies shall be joint lead agencies. Where state laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, federal agencies shall cooperate in fulfilling these requirements as well as those of federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into state or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved state or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§1506.3 Adoption.

(a) An agency may adopt a federal draft or final environmental impact statement or portion

thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

§1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§1506.5 Agency responsibility.

(a) Information. If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) Environmental assessments. If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) Environmental impact statements. Except as provided in §§1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under §1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to

national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to state and areawide clearinghouses pursuant to OMB Circular A–95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected state's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other federal agencies, including the Council.

§1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The

statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§1503.1 and 1506.10.

(i) A Congressional committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§1506.9 Filing requirements.

Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities (MC2252-A), 1200 Pennsylvania Ave., NW., Washington, DC 20460. Statements shall be filed with EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and §1506.10.

§1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under §1505.2 by a federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this

section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see §1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.
1507.1 Compliance.
1507.2 Agency capability to comply.
1507.3 Agency procedures.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

§1507.1 Compliance.

All agencies of the federal government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by §1507.3 to the requirements of other applicable laws.

§1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying

with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of the Act to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on the human environment. Agencies shall designate a person to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) to insure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) and comment on statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of the Act and of Executive Order 11514, Protection and Enhancement of Environmental Quality, Sec. 2.

§1507.3 Agency procedures.

(a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants. The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations. The Council shall complete its review within 30 days. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are encouraged to publish explanatory guidance for these regulations and their own procedures. Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act.

(b) Agency procedures shall comply with these regulations except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§1501.2(d), 1502.9(c)(3), 1505.1, 1506.6(e), and 1508.4.

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions (§1508.4)).

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(c) Agency procedures may include specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. They are proposed actions which are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Environmental assess-

ments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information. These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

(d) Agency procedures may provide for periods of time other than those presented in §1506.10 when necessary to comply with other specific statutory requirements.

(e) Agency procedures may provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the notice of intent required by §1501.7 may be published at a reasonable time in advance of preparation of the draft statement.

PART 1508—TERMINOLOGY AND INDEX

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

§1508.1 Terminology.

The terminology of this part shall be uniform throughout the federal government.

§1508.2 Act.

"Act" means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*) which is also referred to as "NEPA."

§1508.3 Affecting.

"Affecting" means will or may have an effect on.

§1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§1508.5 Cooperating agency.

"Cooperating agency" means any federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved

in a proposal (or a reasonable alternative) for legislation or other major federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in §1501.6. A state or local agency of similar qualifications or, when the effects are on a reservation, an Indian tribe, may by agreement with the lead agency become a cooperating agency.

§1508.6 Council.

"Council" means the Council on Environmental Quality established by title II of the Act.

§1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§1508.10 Environmental document.

"Environmental document" includes the documents specified in §1508.9 (environmental assessment), §1508.11 (environmental impact statement), §1508.13 (finding of no significant impact), and §1508.22 (notice of intent).

§1508.11 Environmental impact statement.

"Environmental impact statement" means a detailed written statement as required by section 102(2)(C) of the Act.

§1508.12 Federal agency.

"Federal agency" means all agencies of the federal government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations states and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§1508.13 Finding of no significant impact.

"Finding of no significant impact" means a document by a federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement there fore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

§1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§1508.15 Jurisdiction by law.

"Jurisdiction by law" means agency authority to approve, veto, or finance all or part of the proposal.

§1508.16 Lead agency.

"Lead agency" means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§1508.17 Legislation.

"Legislation" includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§1508.18 Major federal action.

"Major federal action" includes actions with effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative

uses of federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§1508.19 Matter.

"Matter" includes for purposes of Part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§1508.20 Mitigation.

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§1508.21 NEPA process.

"NEPA process" means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§1508.22 Notice of intent.

"Notice of intent" means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§1508.24 Referring agency.

"Referring agency" means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§1508.25 Scope.

"Scope" consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) direct; (2) indirect; (3) cumulative.

§1508.26 Special expertise.

"Special expertise" means statutory responsibility, agency mission, or related program experience.

§1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment. [43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, orpolicy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

AMERICAN WILD HORSE CAMPAIGN; ANIMAL WELFARE INSTITUTE; WESTERN WATERSHEDS PROJECT; CAROL WALKER; CHAD HANSON; and KIMERLEE CURYL,

Petitioners,

vs.

TRACY STONE-MANNING, Bureau of Land Management Director, in her official capacity; and DEB HAALAND, Secretary of the Department of the Interior, in her official capacity,

Respondents,

and

STATE OF WYOMING; and ROCK SPRINGS GRAZING ASSOCIATION, a Wyoming corporation,

Respondent-Intervenors.

RETURN TO FREEDOM, a nonprofit organization; FRONT RANGE EQUINE RESCUE, a nonprofit organization; MEG FREDERICK; and ANGELIQUE REA,

Petitioners,

vs.

Civil Nos. 23-CV-84-KHR (Lead)
23-CV-87-KHR (Joined)
23-CV-117-KHR (Joined)

DEB HAALAND, Secretary of the Department of the Interior, in her official capacity; TRACY STONE-MANNING, Bureau of Land Management Director, in her official capacity; and KIMBERLEE FOSTER, Bureau of Land Management Rock Springs Field Office Manager, in her official capacity,

Respondents.

FRIENDS OF ANIMALS, a 501(c)(3) organization,

Petitioner,

vs.

DEB HAALAND, Secretary of the Department of the Interior, in her official capacity; and BUREAU OF LAND MANAGEMENT,

Respondents.

ORDER AFFIRMING AGENCY ACTION

This matter comes before the Court under the Administrative Procedure Act (APA) for judicial review of the actions of the Bureau of Land Management (BLM), a division within the Department of the Interior (DOI), which are contested in three separate actions. The administrative record has been submitted and supplemented (ECF No. 36, 47, 48); the parties have fully briefed the issues and provided exhibits (ECF Nos. 49, 50, 51, 54, 55, 56, 61, 62, 67); and the parties have presented oral arguments on the matter. [ECF No. 76].

Having considered the parties' arguments and reviewed the record, the Court finds the challenged agency actions must be AFFIRMED.

BACKGROUND

This case is yet another in a history as byzantine as the land to which it pertains. For the sake of brevity, the Court incorporates by reference the factual background and legal background of the WHA in its Order Affirming Agency Action and Denying Mandamus Relief in *Rock Springs Grazing Association v. U.S. Department of the Interior et al.*, 23-CV-00048-KHR. Notwithstanding, what follows is a summary of that relevant history and pertinent law.

A. Legal Background

1. The Federal Land Policy and Management Act.

There are three relevant acts of Congress which must be detailed. The first of which being the Federal Land Policy and Management Act (FLPMA). 43 U.S.C. §§ 1701 *et seq.* BLM manages public lands pursuant to FLPMA, which directs the former to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans" developed by the agency. 43 U.S.C. § 1732(a).

Under FLPMA, BLM prepares land use plans—also known as "resource management plans," or "RMPs"—that provide management direction for public lands. 43 C.F.R. § 1601.0-5(n); *see also* 43 U.S.C. § 1712(a). RMPs may be amended for, *inter alia*, "a change in circumstances." 43 C.F.R. § 1610.5-5. Such amendments are "made through an environmental assessment of the proposed change, or an environmental impact statement [EIS], if necessary," and include a public participation requirement. *Id.*; *see also*

43 C.F.R. § 1610.2. Crucially, BLM is required to manage public lands consistent with their respective RMPs. 43 C.F.R. §§ 1610.5-3(a), 4710.1.

2. The Wild Free-Roaming Horses and Burros Act.

Turning to the next pertinent act, in 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 *et seq.* (otherwise known as the "Wild Horses Act" and hereinafter as the "WHA"), with the explicit recognition that "wild free-roaming horses and burros. . . belong to no one individual. They belong to all the American people." S. Rep. No. 92-242 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2149. Seeking to protect a living spirit of the American West, the WHA directs the Secretary of the Interior to provide for the protection and management of these animals. 16 U.S.C. § 1333.

BLM administers the WHA as the Secretary's delegate. In doing so, the WHA provides BLM with "a high degree of discretionary authority" to manage horses. H.R. Rep. No. 92-681, at 6–7 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2159, 2160. The WHA separately requires that BLM's "management activities shall be at the minimal feasible level." 16 U.S.C. § 1333(a). Despite such language, administration of the WHA tends to be a complex and often fact specific endeavor.

For example, the WHA sets forth statutory requirements for managing horses on both public and private lands. These statutory requirements being Sections 3 and 4 of the WHA. *See* 16 U.S.C. §§ 1333–34. Crucially, the obligations imposed upon BLM differ if the land in question is public or private. Sometimes, the result of these two differing

obligations, as seen at the heart of this matter, can be difficult for BLM to navigate—a statutory Scylla and Charybdis.[1]

For public lands, Section 3 of the WHA (16 U.S.C. § 1333) directs the Secretary of the Interior to manage wild horses "to achieve and maintain a thriving natural ecological balance [TNEB] on the public lands." 16 U.S.C. § 1333(a). As the Secretary's delegate, BLM "carries out this function in localized 'herd management areas' [HMAs]." *Fund for Animals v. BLM*, 460 F.3d 13, 15 (D.C. Cir. 2006). BLM establishes HMAs in accordance with broader land-use plans. *Id.* In each HMA, BLM is afforded significant discretion to compute "appropriate management levels" ("AMLs") for wild horse populations they manage. *Id.* at 16. Importantly, BLM may not include any forage or water that exists on private lands in their calculation of an AWL without the landowner's written permission. *See* A.R. RMPA-049480. Separately, "herd areas" ("HAs"), defined as the geographic area used by a "herd as its habitat in 1971" are managed with the objective of limiting wild horse use. 43 C.F.R. §§ 4700.0-5(d), 4710.4. BLM manages such HAs "at the minimum level necessary to attain the objectives identified in approved land use plans." 43 C.F.R. § 4710.4. The "AML of a given HA is typically zero." *Western Rangeland Conservation Ass'n v. Zinke*, 265 F. Supp. 3d 1267, 1274 n.5 (D. Utah 2017).

Section 3 also requires that BLM, if they determine there is an overpopulation of wild horses on public lands and that action is necessary to remove these excess animals, to "immediately remove excess animals from the range so as to achieve [AMLs]." 16 U.S.C.

[1] In more contemporary terms, we call this being "between a rock and a hard place."

§ 1333(b)(2). The WHA gives BLM broad discretion as to how it may manage and remove wild horses from public lands. *See* 16 U.S.C. § 1333(b)(1); *see also American Horse Prot. Ass'n v. Watt*, 694 F.2d 1310, 1317–18 (D.C. Cir. 1982). Such removal actions are conducted after BLM develops and finalizes a "gather plan," which sets forth the number of horses to be gathered and the methods by which they will be gathered. *See* A.R. RMPA-001213.

By contrast, Section 4 of the WHA governs management of horses on private lands. 16 U.S.C. § 1334. Section 4 provides that owners of private land, when faced with wild horses on their lands, "may inform [BLM], who shall arrange to have the animals removed." *Id.* Upon receiving such a request, applicable regulations dictate that BLM must "remove stray wild horses [] from private lands as soon as practicable." 43 C.F.R. § 4720.2-1. As wild horses cannot be removed or destroyed by private persons, such request under Section 4 is the only relief available to non-consenting private landowners. 43 C.F.R. § 4730.1; 16 U.S.C. §§ 1334, 1338.

3. The National Environmental Policy Act.

The last of the three pertinent acts, the National Environmental Policy Act (NEPA) requires federal agencies to prepare an EIS to analyze the environmental impacts of major federal actions expected to "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(C)(ii). NEPA was enacted "to help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Colorado Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1209 (10th Cir. 2006). NEPA establishes the procedures by which

federal agencies must consider the environmental impacts of their actions, but it does not dictate the substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Separately, the Council on Environmental Quality (CEQ) oversees NEPA and promulgates regulations that are binding upon federal agencies. *Colorado Wild*, 435 F.3d at 1209. These regulations provide guidance on the implementation of NEPA. 40 C.F.R. §§ 1500–08; *see Robertson*, 490 U.S. at 355–56.

B. Factual Background

1. The Wyoming Checkerboard.

Over a century ago, in an area originally patented under the Union Pacific Railroad Land Grant in southwest Wyoming, the Rock Springs Grazing Association (RSGA) formed to assemble the land rights to use rangeland resources in an area now called the "Wyoming Checkerboard" (hereinafter the "Checkerboard"). *Rock Springs Grazing Ass'n (RSGA) v. Salazar*, 935 F. Supp. 2d 1179, 1182 (D. Wyo. 2013). The aptly named Checkerboard is a strip of land—roughly 40 miles wide and 80 miles long, totaling 3,200 square miles or about two million acres—which is divided into one-mile square sections of interchanging owners, both public and private lands. *Id.* The Checkerboard is generally described as high desert, with limited forage, limited fences, and sensitive to overuse—a delicate ecological balance. *Id.* at 1182–83. RSGA owns and leases about 1.1 million acres of private land within this area, with such lands being the odd-numbered sections. *Id.* at 1182. Alongside additional private owners, there is a high amount of public land contained within the Checkerboard. Those public lands are managed by the BLM, which does so as the delegate

for the Secretary of the Interior. The ownership may change every square mile, but each parcel shares a unique and important characteristic: wild horses freely roam in and between them.

For over half a century since the enactment of the WHA, RSGA and BLM have fluctuated between cooperation and conflict in how the latter manages the lands and the wild horses which roams upon those lands.[2] Crucially, a consent decree was entered in 1979, whereby BLM, with the consent of RSGA, designated four HMAs for the Rock Springs District of the Checkerboard, with the following AMLs: (1) Great Divide Basin HMA: 415–600 horses; (2) White Mountain HMA: 205–300 horses; (3) Salt Wells Creek HMA: 251–365 horses; and (4) Adobe Town HMA (Rock Springs Field Office portion): 165–235 horses. A.R. RMPA-001228.

Later, in 2003, the State of Wyoming sued BLM to compel the latter to conduct gathers to achieve AMLs for each of the four HMAs. *See American Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174, 1180–81 (10th Cir. 2016). The result was a consent decree between Wyoming and BLM, whereby the latter was required to remove excess horses under Section 3 of the WHA within a limited period and gather horses in each HMA every three years to the lower level of their AMLs. *Id.*

BLM's efforts stalled, prompting RSGA to revoke its consent under Section 4 in 2010. *Id.* In short, litigation between RSGA and BLM resulted in the 2013 Consent Decree (hereinafter the "Consent Decree"). *Id.* Although ultimately approved, three intervenors in

[2] As stated before, for a more searching explanation of the history between RSGA and BLM, refer to the background section of the Court's Order Affirming Agency Action and Denying Mandamus Relief in *Rock Springs Grazing Association et al. v. United States Department of Interior et al.*, 23-CV-00048-KHR.

that action, including Petitioner American Wild Horse Campaign (AWHC), objected to the entry of the Consent Decree in district court. *See RSGA v. Salazar*, 935 F. Supp. 2d at 1181, 1185.

Ultimately being approved by this Court, the Consent Decree included several pertinent provisions. *See id.* at 1192–94 (listing various agreements between parties to Consent Decree). Under the Consent Decree, BLM agreed to remove all wild horses located on RSGA's private lands, including Checkerboard lands except for those in the White Mountain HMA, which would have a set AML of 205–300 wild horses and be subject to excess removal if necessary. *Id.* at 1192. No later than November 30 of each year during the Consent Decree, BLM agreed to report to RSGA on the results of wild horse censuses for various HMAs and provide notice for gathers to remove wild horses. *Id.* at 1193. Paragraph 4 of the Consent Decree also included agreed-upon courses of action based on the results of any census and accompanying projected reproduction rates. *Id.* Meanwhile, paragraph 5 committed BLM to gather and remove wild horses on a set timetable for each HMA over the subsequent years. *Id.*

Lastly, of those pertinent provisions, paragraph 6 of the Consent Decree stipulated that BLM would commit to embarking on amending the RMPs for the Rock Springs and Rawlins Field Offices. *Id.* In doing so, BLM committed to considering several proposed actions. *Id.* The first two being to change the Salt Wells HMA and Divide Basin HMA to Herd Areas, to be managed for zero wild horses and if more than 200 and 100 wild horses were present on each, respectively, they would be re-gathered. *Id.* The third would change the Adobe Town HMA AML to 225–450 wild horses or lower, with gathered wild horses

not to be returned to the Salt Wells area. *Id.* The fourth proposed action would manage the White Mountain HMA as a non-reproducing herd, utilizing fertility control and sterilization methods, to maintain 205 wild horses and initiate gathers if the population exceeded 205. *Id.* The Consent Decree separately contained provisions for modification and termination, with the latter to occur "no later than 10 years after entry of the decree, subject to the right of the parties to negotiate an extension." *Id.* at 1194.

In accordance with the Consent Decree, BLM conducted a gather in 2013, bringing the Salt Wells Creek and Adobe Town HMAs to low AML levels. *American Wild Horse Pres. Campaign*, 847 F.3d at 1181. RSGA and Wyoming objected to BLM leaving any horses on the Checkerboard, and BLM agreed. *Id.* at 1182. Pursuant to its gather plan, BLM then conducted a gather in 2014 that removed 1,263 horses in the Great Divide Basin, Adobe Town, and Salt Wells HMAs. *Id.*

In response to that gather, BLM was sued by wild horse advocates who alleged that BLM's removal during the 2014 gather violated the WHA, FLPMA, NEPA, and BLM's RMPs. *Id.* at 1186. In *American Wild Horse Preservation Campaign (AWHPC) v. Jewell*, several petitioners—some of whom are Petitioners in this action—sought "review of, and relief from, BLM's decision to permanently remove more than 1,200 wild horses from certain areas of the Wyoming Checkerboard[.]" 2015 WL 11070090, at *1 (D. Wyo. Mar. 3, 2015). As is the case here, those petitioners argued that BLM's actions constituted an ongoing violation of the WHA, FLPMA, and NEPA. Ultimately, this Court upheld BLM's actions under the WHA and FLPMA but remanded to BLM under NEPA. *AWHPC v. Jewell*, 2015 WL 11070090, at *11.

Petitioners appealed and the Tenth Circuit reversed this Court's decision. *See American Wild Horse Pres. Campaign v. Jewell*, 847 F.3d 1174 (10th Cir. 2016). In doing so, the Tenth Circuit acknowledged the unique nature of the Checkerboard and the free-roaming nature of wild horses, but in recognizing the complexity of the disputes noted that the need for a workable solution would ultimately need to come from Congress. *Id.* at 1189 n.8. Notwithstanding this recognition, and in overruling this Court's decision, the Tenth Circuit clarified that when BLM scheduled a Section 4 removal of wild horses to meet the demands of RSGA, gathers conducted on the Checkerboard were required to be conducted in accordance with both Sections 3 and 4 of the WHA due to the interlocking public and private lands. *Id.* at 1186. By contrast, to remove wild horses from the Checkerboard to *completely* meet RSGA's demands, the Tenth Circuit further noted that BLM would need to engage in a management plan amendment process under FLPMA, to properly modify HMAs to Herd Areas. *Id.*

2. Rock Springs and Rawlins Field Offices' Resource Management Plans Amendment.

In accordance with the Consent Decree, BLM began a process to "resolve the issues associated with managing wild horses on checkerboard land without the permissive use of private land." A.R. RMPA-001191. In accordance with FLPMA, BLM initiated a planning effort to amend the Rock Springs and Rawlins Field Offices' RMPs for managing wild horses. A.R. RMPA-001181. BLM defined the purpose of the planning effort as "to identify and select, consistent with applicable law, a plan for wild horse management, including AML, on the current HMAs that include checkerboard land." A.R. RMPA-

001193. Separately, BLM defined the need for the amendment as "driven by the checkerboard pattern of public and private land ownership within the HMAs, the requirements of the [WHA], [and] RSGA's withdrawal of consent to maintain wild horses on privately owned lands." *Id.* To meet this purpose and need, and to comply with the WHA and the Tenth Circuit, BLM considered amendments to the RMPs that would allow it to decide which lands within the HMAs should continue to be managed as HMAs. *Id.*

Consistent with FLPMA and NEPA, BLM prepared an EIS. The draft RMP Amendment and EIS were made available for public comment in January 2020. A.R. RMPA-001007. After the public comment period, the proposed RMP Amendment and Final EIS were published in March 2022. A.R. RMPA-001178. Of the four alternatives proposed, BLM selected Alternative D for the proposed RMP Amendment. A.R. RMPA-001202, RMPA-001667.

On May 8, 2023, BLM published its Record of Decision (ROD) enacting the RMP Amendment. A.R. RMPA-001659. BLM explained its bases for selecting Alternative D in meeting its stated purpose and need, as well as the effects upon the environment and interests. A.R. RMPA-001202, RMPA-001677. In brief, the Great Divide Basin and Salt Wells Creek HMAs were entirely reverted to HA status, all areas of the Adobe Town HMA that included Checkerboard lands would also revert to HA status, and there were no changes in either status or AML to the White Mountain HMA. A.R. RMPA-001202, RMPA-001677–79, RMPA-043810. BLM also explained why Alternatives A–C were not selected. *See* A.R. RMPA-001680. As a result, BLM approved the selection of Alternative

D and amended the RMPs. A.R. RMPA-001659. Petitioners were not content with the outcome of this process, thus leading to the instant action.

STANDARD OF REVIEW

Where a statute does not include a private right of action, the APA may provide for judicial review of agency actions. *Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998); 5 U.S.C. § 704. The APA authorizes a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, [] otherwise not in accordance with law" or if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A) (first quotation); 5 U.S.C. § 706(2)(C) (second quotation). "Reviews of agency action in the district courts [under the APA] must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994).

The APA's standard of review is "highly deferential." *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008). A court may not vacate an agency's decision unless that agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Where a court is reviewing scientific judgments and technical analyses within the agency's expertise, deference to agency expertise is especially merited. *Id.* at 824; *see*

also Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983). Nonetheless, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (internal quotation omitted).[3]

DISCUSSION

The road that lay before the Court is long and winding yet ends in finding that BLM has not acted arbitrarily and capriciously or otherwise not in accordance with law. The first step in this journey is to decipher whether Petitioners' claims are ripe for adjudication and if said Petitioners have standing to bring their claims. Faced with that inquiry, the Court finds that some of Petitioners' claims are ripe and that they have standing to bring those claims, but only insofar as their claims allege procedural violations of the WHA, FLPMA, and/or NEPA.

From there begins the Court's foray into the WHA. Petitioners levy a litany of contentions alleging that BLM acted arbitrarily and capriciously or otherwise not in accordance with law as it relates to the WHA. Ultimately, however, the Court finds that

[3] The Supreme Court, in recently issuing *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), reverted to an earlier framework under which to assess agency interpretations. Both prior to and during oral arguments in this matter, Petitioners repeatedly invoked *Loper Bright* in support of their position. *See, e.g.*, [ECF No. 72]. However, *Loper Bright* is of little consequence in this matter. For one, this Court reaches its conclusion without deferring to BLM's interpretation of the WHA, NEPA, or FLPMA—only that its actions were justified by those laws. For another, the Supreme Court in *Loper Bright* noted that while an agency's interpretation of a statute cannot bind a court, it may still be especially informative to the extent it rests on factual premises within that agency's expertise. 144 S. Ct. at 1167 (internal citation omitted). That informativeness would become ever more salient given the unique nature of this regime and management of the Checkerboard. Lastly, insofar as the cases cited throughout this ruling themselves rely upon the old framework overturned by *Loper Bright*, the Supreme Court made clear that it did not find justification to overrule those cases as well. *Id.* at 2273.

each contention fails for either conflating the RMP Amendment with a removal decision, misconstruing BLM's obligations, or contradicted by the record.

Viewing BLM's actions as consistent with their obligations under the WHA, the Court finally turns to whether BLM complied with their separate obligations under FLPMA and NEPA. In so doing, it is determined that BLM both complied with, and were justified in complying with, their obligations under FLPMA and NEPA. Accordingly, the Court concludes that Petitioners fail to advance an actionable violation of the APA and BLM's actions are affirmed.

A. Petitioners Largely Maintain Justiciable Claims.

Federal courts are of limited jurisdiction; only authorized to adjudicate "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *Already v. Nike*, 568 U.S. 85, 90 (2013). Subject matter jurisdiction must exist "not only at the time the complaint is filed, but through all stages of litigation." *Id.* at 91 (cleaned up and citation omitted); *see also* Fed. R. Civ. P. 12(h)(3). A plaintiff seeking review of agency action under the APA bears the burden of satisfying jurisdictional requirements. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–93 (1990). Jurisdictional requirements are often evaluated through the doctrines of standing and ripeness, which may "substantially overlap in many cases" as both involve the question of "whether the harm asserted had matured sufficiently to warrant judicial intervention." *Southern Utah Wilderness All.* (*SUWA*) *v. Palma*, 707 F.3d 1143, 1157 (10th Cir. 2013) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)). The analyses for each are analytically distinct, with standing focusing on "the qualitative

sufficiency of the injury," and ripeness considering "whether this is the correct *time* for the complainant to bring the action." *Id.* (emphasis original; quotation omitted).

Federal Respondents argue that Petitioners fail to meet their burden of satisfying jurisdictional requirements because their claims are not ripe for adjudication, and they do not establish an "injury in fact" for standing purposes. [ECF No. 54, at 31–35]. Each Petitioner retorts that their claims are ripe and that they maintain standing, given the effect of issuing the RMP Amendment and the impending nature of wild horse removal. [ECF No. 61, at 8–17]; [ECF No. 62, at 14–20]; [ECF No. 67, at 9–19]. In addressing these justiciability contentions, the Court begins with analyzing whether Petitioners' claims are ripe for adjudication. From there, the Court views in aggregate whether Petitioners allege sufficient injury in fact required for standing.[4]

1. Ripeness.

When deciding whether an agency's decision is ripe for judicial review, a court considers:

> (1) whether the issues in the case are purely legal; (2) whether the agency action involved is 'final agency action' within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704; (3) whether the action has or will have a direct and immediate impact upon the plaintiff and (4) whether the resolution of the issues will promote effective enforcement and administration by the agency.

SUWA, 707 F.3d at 1158 (quoting *Coalition for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1250 (10th Cir. 2001)). Ripeness turns on "the fitness of the issues for

[4] Petitioners filed a notice regarding BLM's recent Notice of Scoping. [ECF No. 63]. The Court asked for supplemental briefing on the issue and its effect upon the instant matter. [ECF No. 64]. The parties filed additional briefing. [ECF Nos. 68–71]. As the Notice of Scoping is not a final agency action, it renders no effect upon the Court's conclusions.

judicial decision and the hardship to the parties of withholding court consideration." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967)); *see also Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 810–12 (2003). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks and citation omitted). "The doctrine of ripeness prevents courts from entangling themselves in abstract disagreements over administrative policies, while also protecting the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *SUWA*, 707 F.3d at 1158 (cleaned up and citation omitted). "The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 809 (citation omitted).

Federal Respondents argue that Petitioners' claims are not ripe for adjudication, as they seek judicial review of agency actions not yet undertaken. [ECF No. 32–34]. In the former's view, as "[t]he RMP Amendment challenged here does not authorize the gather or removal of any horses, nor does it represent the final step in the agency's decision-making process to remove horses," these actions alone do not ripen Petitioners' claims. *Id.* at 32 (citing 43 C.F.R. § 1601.0-2). Recognizing that the RMP Amendment "is an important and necessary step towards gathers of wild horses on the Checkerboard," Federal Respondents nonetheless argue that it is "not the final decision to gather horses" and that until such gathers are officially authorized, any challenges to such actions have not ripened.

Id. at 32–33 (citing *Ohio Forestry Ass'n*, 523 U.S. at 729–30). In support, Federal Respondents cite to myriad court decisions regarding both land-use plan amendment in general as well as amendments to RMPs governing wild horses in particular. *Id.* at 33 (internal citations omitted).

By contrast, Petitioners reiterate the ripeness of their claims by arguing that it makes wild horse removal either substantially more likely or even inevitable. *See, e.g.*, [ECF No. 62, at 16–20]. Beyond this, they reiterate the impact that resolving such purely legal issues would have upon their interests, including environmental and regulatory. *See, e.g.*, [ECF No. 61, at 11–15]. It is worth noting that Petitioners do not distinguish between their claims which conflate RMP Amendment with removal, those regarding the WHA that do not, and those which are procedural-based claims regarding NEPA and FLPMA.

The Court strikes a balance between the parties. Federal Respondents are correct that claims asserting that BLM has removed wild horses are not ripe. The RMP Amendment is but a step toward possibly conducting future gathers to remove wild horses. Wild horse gathers are likely to be in accordance with the provisions advanced in the RMP Amendment and the Decision itself, but the history of the Checkerboard demonstrates that conducting gathers, let alone planning them, has rarely been a straightforward process. *See Wyoming v. U.S. Dep't of Interior*, 839 F.3d 938, 943 (10th Cir. 2016) (noting that even removal decisions involve several steps, as "determination that an overpopulation exists in a given HMA is not sufficient, standing alone to trigger any duty on the part of the BLM," who "must also determine that action is necessary to remove excess animals"). Past litigants (even current litigants) have repeatedly argued that BLM has historically failed to

conduct gathers in a prompt manner. *See, e.g.*, *American Wild Horse Pres. Campaign*, 847 F.3d at 1180–81. This unpredictable pattern of BLM gather plans, coupled with the fact that future gathers would require further planning and findings, lends more toward considering such gathers "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300 (quotation). For all the Court is aware, BLM may stray (improperly or not) from the RMP Amendment when conducting gathers, but the likelihood of such gathers alone does not warrant abrogating any "protect[ion] [of] agencies from judicial interference until an administrative decision [on the gathers] has been formalized and its effects felt in a concrete way by the challenging parties." *SUWA*, 707 F.3d at 1158.

Federal Respondents are apt to note the decisions of other courts. *See* [ECF No. 54, at 32–34] (internal citations omitted). Regarding land-use plan amendments in general, there is reticence in considering challenges to such amendments as ripe in absence of the action itself being authorized. As the Supreme Court held in *Ohio Forestry Association* on the issue of logging, a land-use plan amendment that made "logging more likely in that it is a logging precondition," yet "in its absence logging could not take place," did not mean that such plan amendment was ripe for review unless and until logging was actually authorized. 523 U.S. at 729–30.

Such reticence extends to the narrow issue of amendments to RMPs governing wild horses, albeit at a lower level of the federal judiciary. In the case of amendments to RMPs governing wild horses, multiple courts have similarly held that such amendments are not ripe for review until they are implemented. *See generally Western Watersheds Project v.*

Haaland, 850 F. App'x 14 (D.C. Cir. 2021); *Friends of Animals v. BLM*, 514 F. Supp. 3d 290 (D.D.C. 2021); *Friends of Animals v. Pendley*, 523 F. Supp. 3d 39 (D.D.C. 2021). In *Western Watersheds Project*, the D.C. Circuit explained that while an RMP amendment was a final agency action for purposes of judicial review under the APA, any challenge to that amendment was not ripe until BLM "began to implement its resource management plan by taking the formal steps required for a roundup" and, therefore, the "statute-of-limitations clock started with the first roundup." 850 F. App'x at 15 (relying on *Ohio Forestry Ass'n*, 523 U.S. at 732–37). The D.C. District Court, in two separate cases (and akin to this action), withheld review of gather plans under certain conditions in which the plans "contemplate future, discrete agency actions—administering contraceptives to horses or removing them through future gathers—over the course of ten years. But when and under what circumstances those actions will occur remains to be determined." *Friends of Animals v. BLM*, 514 F. Supp. 3d at 302 (quotation); *see also Friends of Animals v. Pendley*, 523 F. Supp. 3d at 61 (quoting *id.*). Accordingly, until BLM issues a decision authorizing a gather, Petitioners lack claims which are ripe for adjudication on the removal of wild horses.

Inversely, however, this lack of ripeness does not extend to the issue of whether BLM committed procedural violations in issuing the RMP Amendment. On the questions of whether BLM's process and ultimate decision violates the WHA, FLPMA, or NEPA, Petitioners' claims are ripe for adjudication. A decision is not ripe for review where "there has not been a consummation of the agency's decisionmaking process sufficient to support litigation of the issue [a plaintiff] seeks to raise." *SUWA*, 707 F.3d at 1159. Yet, claims that

an agency violated required procedures, including NEPA, are ripe when issued and "can never get riper." *Ohio Forestry Ass'n*, 523 U.S. at 737; *see also Sierra Club*, 287 F.3d at 1264.

Upon issuance, the RMP Amendment opened the potential for procedural-based challenges. Courts have found that challenges to wild horse land-use plan decisions, such as the RMP Amendment, are ripe as soon as they are issued. *American Wild Horse Pres. Campaign v. Zinke*, 2017 WL 4349012, at *2 (D. Idaho Sept. 29, 2017). Given the implications to the pertinent acts, those procedural-based claims regarding FLPMA and NEPA, as well as those regarding the WHA which do not conflate RMP Amendment with removal, are "purely legal" issues. *SUWA*, 707 F.3d at 1158. Insofar as the RMP Amendment changes the legal classification of certain lands and the corresponding management levels, it is a "final agency action" within the meaning of the APA. 5 U.S.C. §§ 704, 706. There is no "further factual development" which would alter any inquiry into whether BLM violated the WHA, FLPMA, or NEPA in issuing the RMP Amendment. *Sierra Club*, 287 F.3d at 1262. As resolution would affect the environmental and regulatory interests, the action would invariably "have a direct and immediate impact upon" Petitioners. *SUWA*, 707 F.3d at 1158. Lastly, resolution of these issues, in either direction, would "promote effective enforcement and administration by" BLM by clarifying a key dispute. *Id.*

Again, the same rationale does not extend to assuming that the RMP Amendment is self-executing in removal of wild horses. But to this end, the Court concludes that Petitioners largely maintain claims under the APA that are ripe for adjudication, but only

insofar as they allege procedural violations of the WHA, FLPMA, and NEPA. As such, the Court turns to whether Petitioners maintain standing to bring these claims.

2. Petitioners Maintain Standing.

To satisfy the "injury in fact" element of standing, one of the three requirements for Article III standing, a petitioner must identify "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted); *see also Citizens for Const. Integrity v. United States*, 57 F.4th 750, 759 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 94 (2023). "[A] main focus of the standing inquiry is whether plaintiff has suffered a present or imminent injury, as opposed to a mere possibility, or even probability, of future injury." *Morgan v. McCotter*, 365 F.3d 882, 888 (10th Cir. 2004) (citing *Rector v. City & Cnty. of Denver*, 348 F.3d 935, 942–93 (10th Cir. 2003)); *see also Schmier v. U.S. Ct. of Appeals for Ninth Cir.*, 279 F.3d 817, 821 (9th Cir. 2002) (internal quotation marks and citation omitted) ("[T]hat injury must have actually occurred or must occur imminently; hypothetical, speculative or other possible future injuries do not count in the standings calculus.").

Federal Respondents argue that Petitioners fail to demonstrate an injury in fact by the issuance of the RMP Amendment. [ECF No. 54, at 34–35]. Reviewing Petitioners' accompanying declarations to support their standing to bring this case, Federal Respondents argue that such declarations "make clear that all the alleged injuries plainly stem from harms that would be incurred by a future gather" and highlight that "there is no actual or imminent harm from the approval of the planning-level RMP Amendment." *Id.*

As such, they argue, Petitioners cannot satisfy Article III standing requirements "absent such actual or imminent harm." *Id.* at 35.

Like their arguments on ripeness, Petitioners largely argue that the RMP Amendment increases the likelihood of an injury in fact which is actual or imminent. *See, e.g.*, [ECF No. 61, at 8–12]. Most crucially, however, they provide further caselaw in support of their position. *Id.* (internal citations omitted).

As with the issue of ripeness, the Court strikes a balance between the parties. The Court agrees with Federal Respondents that Petitioners fail to establish an actual or imminent harm of wild horse removal for injury-in-fact purposes. Each of Petitioners' provided declarations either articulate that harm would result from future gathers, or any such present harm stems from the potential of future gathers. *See* [ECF No. 49-1, 49-2, 49-3, 49-4, 50-1, 51-1, 51-2]. There are two examples of the former. First is the declaration of Suzanne Roy, which makes clear that any injuries to AHWC arise from *actual* implementation or gathers. [ECF No. 50-2] (emphasis added) ("AWHC maintains that, *if implemented*, the BLM decisions challenged in this case . . . will substantially impair its interests . . . ."). The second comes from the declaration of Carol Walker, listing the harms she *will* allegedly experience due to "roundups." *See* [ECF No. 50-1]. To be fair, both declarations highlight the individuals' fears stemming from further BLM action. Yet, each example demonstrates that the existence of any harm is contingent upon BLM fully conducting a gather—an action which has yet to be undertaken, let alone authorized.

There is one example of the latter articulation of harm—a present harm stemming from the potential for future gathers. It comes from a Friends of Animals declarant, stating

that he suffers "great distress and sadness" because horses "*could* be rounded up and removed permanently from the wild under BLM's RMP Amendment." [ECF No. 50-1] (emphasis added). As with the previous examples, such emotions are not unreasonable. But, again, such present harm derives from *fear* of future gathers, rather than distress and sadness following an action being authorized or undertaken.

However, as with the issue of ripeness, Petitioners maintain standing for the balance of their claims alleging procedural violations of the WHA, FLPMA, and NEPA. FOA aptly notes that plaintiffs do not need to wait for harm to occur before seeking redress. [ECF No. 61, at 8] (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). "[F]uture injury may suffice if the threatened injury is certainly impending or there is a *substantial risk* that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158 (emphasis added). In the case of NEPA, procedural harms "need not be immediate" and plaintiff need only show the violations "created an increased risk of actual, threatened, or imminent environmental harm." *Sierra Club*, 287 F.3d at 1265.

Although the Court will not go as far as FOA, who argues that "BLM's Decision is a final agency action requiring the removal of wild horses," the increased risk of such gathers and the actual legal effects which the RMP Amendment fosters is sufficient for standing. [ECF No. 61, at 9] (quotation). While contingent upon a separate removal decision being issued in the future, such future injury suffices as the RMP Amendment creates "a substantial risk that the harm [of gathers] will occur." *Susan B. Anthony List*, 573 U.S. at 158. As it relates to Petitioners' claims of procedural harms, the inference is the same. BLM's alleged violations of the WHA, FLPMA, and NEPA, Petitioners at least

establish that such violations "created an increased risk of . . . threatened . . . environmental harm" to the wild horses through the increased potential for wild horse gathers. *Sierra Club*, 287 F.3d at 1265. Accordingly, the Court recognizes Petitioners' standing to challenge BLM's actions in issuing the RMP Amendment insofar as they allege procedural violations of the WHA, FLPMA, and NEPA.

B. Whether BLM Violated WHA.

Before delving into the specifics of Petitioners' arguments, the Court begins by resolving certain issues. Petitioners' approach to alleging that BLM violated the WHA is not uniform, but rather advances a litany of alleged violations. However, nearly all of Petitioners' arguments suffer from a ubiquitous defect. Many of Petitioners' arguments rest upon the erroneous assumption that the RMP Amendment itself demands removal of the wild horses.

The RMP Amendment is not self-executing; removal would require a separate decision-making process. *See* 43 C.F.R. § 1601.0-2. Thus, especially considering the preceding analysis, the Court's foray into the WHA itself is necessarily limited to whether BLM has made a procedural error in issuing the RMP Amendment.[5] Under the "highly deferential" standard of review, it becomes readily apparent that Petitioners fail to demonstrate that BLM "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

[5] Those arguments conflating RMP Amendment with a self-executing removal decision could also be dispelled through standing. However, seeking to fully address Petitioners' claims, the Court examines them in detail, nonetheless.

implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Citizens' Comm'n to Save Our Canyons*, 513 F.3d at 1176 (first quotation); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (second quotation).

RSGA's revocation of consent began the instant conundrum. Section 4 of the WHA created an obligation wherein BLM must remove wild horses from the private lands of RSGA, the non-consenting landowner. 16 U.S.C. § 1334. Petitioners here argue that pursuant to Section 3 of the WHA, BLM must make a TNEB finding prior to deciding upon converting HMAs to HAs. *See, e.g.*, [ECF No. 50, at 41–43]. Keeping in mind the unique nature of ownership within the Checkerboard, Sections 3 and 4 seemingly create dueling and competing obligations upon BLM—the aforementioned statutory Scylla and Charybdis.

This view of the WHA, however, denies BLM the crucial discretion it has in managing land use across multiple mandates. As Federal Respondents note, by recognizing the rights of private landowners under the WHA, Congress appears to have provided BLM with broad guidance and left the details of such a regime to the agency. *See In Def. of Animals v. U.S. Dep't of Interior*, 737 F. Supp. 2d 1125, 1133 (E.D. Cal. 2010) ("[A]n agency like BLM has considerable discretion on how to carry out the directives of the [WHA]."). One such example being BLM's authority to establish "ranges" under 16 U.S.C. § 1331(c), which recognized "the multiple-use management concept for the public lands." *Id.* More striking, as the Eastern District of California articulated, "[t]he [WHA] should consequently not be viewed as requiring that the BLM increase the numbers of horses, *or give wild horses priority over other users*." *Id.* at 1135 (emphasis added).

Petitioners seek to kick open the door to invite an issue of statutory interpretation. While not a mistake, doing so was not in their interests. Petitioners' emphasis on Section 3 (albeit misplaced or misconstrued) effectively prioritizes the interests of wild horses over any other use of *public* land and the rights of landowners in *private* land. While they argue that compliance with Section 4 violates Section 3, compliance with *their* view of Section 3 ironically violates Section 4.[6] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation.")

Accompanied by this backdrop, the Court wades into the various alleged WHA violations brought by Petitioners. First is the issue of whether BLM acted arbitrarily and capriciously or otherwise not in accordance with law in adjusting the relevant AMLs. Next are Petitioners' claims that BLM improperly relied upon RSGA's demands and the expired 2013 Consent Decree in reaching its decision. From there, the Court addresses the contentions that BLM was required to make an "excess" determination or to select the minimally feasible management decision. After this point, various miscellaneous arguments alleging WHA violations are briefly addressed.

[6] Each Petitioner quotes 16 U.S.C. § 1331 to argue that BLM's RMP Amendment violates their duty to protect wild horses. While § 1331 does state, in part, that wild horses "shall be protected from capture, branding, harassment, [and] death," Yet, each Petitioner fails to articulate how changing HMA boundaries, converting HMAs to HAs, or lowering AMLs is a decision that means BLM is capturing, branding, harassing, or killing wild horses. Such *legerdemain* is emblematic of the main issue infecting Petitioners' arguments—that the RMP Amendment is the same as a removal decision.

1. AML Adjustments Were Not Arbitrary and Capricious nor in Violation of WHA.

Each Petitioner, in various forms, argues that BLM's AML adjustments were arbitrary and capricious or otherwise not in accordance with law or the WHA, as per 5 U.S.C. § 706(2)(A). RTF argues that BLM acted arbitrarily and capriciously, as the latter allegedly did not follow a legal or scientific process for changing the AMLs. [ECF No. 49, at 32–34]. Referring to BLM's Handbook, RTF continues that a lack of site-specific in-depth analysis demonstrates that BLM acted without following their own process and meeting their own criteria. *Id.* at 33–34. Separately, FOA argues that BLM's AML adjustments were arbitrary and capricious, as BLM allegedly based its actions entirely upon factors not intended by Congress and set an AML below the TNEB. [ECF No. 50, at 41–43]. Similarly, AWHC argues that BLM acted arbitrarily and capriciously and not in accordance with law in issuing its AMLs by failing to consider TNEB in its decision and basing its decision on administrative convenience—a factor not intended by Congress. [ECF No. 51, at 40–44].

Respondents, to the extent they respond to Petitioners' individual arguments, largely take the stance that they are misplaced. As Federal Respondents argue, the Handbook's AML methodology—and thus the corresponding criteria and prerequisites—are not applicable when converting HMAs to HAs. [ECF No. 54, at 47–48]. This stems from the fact that, while *functionally* setting an AML to zero, converting HMAs to HAs vacates the need for an AML analysis. Although the Adobe Town HMA was not converted to an HA, Federal Respondents nonetheless justify this by stating that BLM used the best available

information, given the limited timeframe within which they were to act. *Id.* at 48–49. Yet, in any event, Federal Respondents qualify their position by stating that, while not required, BLM *did* conduct an AML analysis. *Id.* at 69–70.

RTF replies by reiterating "the clear standards expected of the data and science required" for BLM's decision-making—by statute, regulation, or Handbook—contradicts Federal Respondents' position, and that such information was insufficient for the new AMLs. [ECF No. 67, at 33–34]. Both FOA and AWHC largely focus their applicable rebuttals on the issue of AMLs being below the pertinent TNEB. [ECF No. 61, at 21–25]; [ECF No. 62, at 20–26]. To the extent they continue beyond the issue of TNEB, those arguments rely on conflating RMP Amendment with a self-executing removal decision.

Based upon the record, BLM's AML adjustments cannot be considered either arbitrary and capricious or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). While RTF argues that BLM did not follow a legal or scientific process required for changing the AMLs, there is little to suggest that the pertinent process is required in converting HMAs to HAs. [ECF No. 49, at 32–34]. Impugning BLM for not detailing a process and their reason for not undertaking it, when such a process is not required, would be unreasonable. Yet, even then, as Federal Respondents explain, the decision to convert the HMAs to HAs is sufficiently justified. [ECF No. 54, at 43–45]. Reviewing the ROD and the record as a whole, it becomes clear that BLM explained the rationale for its decision, based upon the realities of Checkerboard ownership. *See, e.g.*, A.R. RMPA-001680, RMPA-001202–04. Thus, because the conversion of HMAs to HAs is justified within the record, the functional lowering of the AMLs is justified by extension.

Accordingly, the Court cannot conclude that BLM acted arbitrarily and capriciously or otherwise not in accordance with law by converting the HMAs to HAs, or what Petitioners call AML adjustments.

The Adobe Town HMA, however, constitutes a different story. As it was not converted to an HA, the issue of AML adjustments warrants more attention. RTF's position, that BLM's Adobe Town HMA AML adjustment was arbitrary for relying upon insufficient information, is rebutted as Federal Respondents provide adequate justification. [ECF No. 49, at 34]; [ECF No. 54, at 48–49]. BLM's approach, using the best available information given the time constraints, is a reasonable method for making an AML determination for the Adobe Town HMA. While this would be a perfect opening for RTF to dissect, they fail to provide explicit guidance in reply on this issue. Thus, BLM's Adobe Town HMA AML adjustment cannot be considered arbitrary and capricious or otherwise not in accordance with law.

Insofar as Petitioners raise TNEBs and resource allocations as prerequisites for setting AMLs, Federal Respondents are correct that such contentions are red herrings. [ECF No. 54, at 47–48]. First off, as Federal Respondents argue, "in nearly every instance BLM looks to TNEB and resource allocation to determine an appropriate management level." *Id.* at 48. When converting an HMA to an HA, the inevitable result is that the AML is functionally set to zero. As Federal Respondents argue, "[t]he Handbook's AML methodologies are not meant to apply when BLM is converting an HMA to an HA, which is managed for zero horses" and thus effectively lowering the AML. *Id.* The Court finds no reason to diverge from this reasoning and Petitioners fail to rebut this argument. While

FOA does argue that this "non-binding handbook is not entitled deference because it does not represent BLM's authoritative position," it would be incompatible with changing how an agency manages a piece of land to also require that agency to still manage that land as if it were not changed. [ECF No. 61, at 24] (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019)). Thus, as the nature of the Checkerboard would invariably involve wild horses traversing between public and private lands, this is a sufficient justification for BLM's decisions and contrary to Petitioners' suggestions regarding TNEBs and resource allocations.

Based on the above reasons, the Court concludes that BLM did not act arbitrarily and capriciously or otherwise not in accordance with law in AML adjustments, either within the Adobe Town HMA or by converting the remaining HMAs to HAs. Having been explicitly justified within the record, there is no reason to separately address AWHC's argument that BLM based its decision on administrative convenience. [ECF No. 51, at 40–44]. Content, the Court turns to RSGA's involvement and the 2013 Consent Decree.

2. BLM Did Not Violate the WHA in Abiding by RSGA's Demands and Did Not Rely on the Expired 2013 Consent Decree.

Next, RTF argues that BLM violated the WHA by formulating its decision in accordance with RSGA's demands and did so by relying upon the expired 2013 Consent Decree. [ECF No. 49, at 34–39, 45–46]. In so arguing, RTF reiterates its contentions that BLM violated the WHA by failing to account for a TNEB and, in reaching its decision, had impermissibly done so for administrative convenience. *Id.* at 34–37. In this sense, RTF requests that the Court vacate BLM's decision due to relying "on factors which Congress

has not intended it to consider" as well as "entirely fail[ing] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

First, RTF argues that BLM acted arbitrarily and capriciously by not basing their decisions on whether a TNEB existed in the HMAs, but rather on complying with the 2013 Consent Decree and to RSGA's demands. [ECF No. 49, at 34–37]. As the Court previously explained, BLM did not act arbitrarily and capriciously with respect to whether they determined a TNEB existed in the HMAs. Thus, the Court focuses on the latter half of this contention, or whether BLM acted arbitrarily and capriciously by alleging relying on the 2013 Consent Decree and RSGA's demands as basis for its decision.

Insofar as RTF argues that BLM has improper relied upon the expired 2013 Consent Decree, the record reflects that an alternative explanation may have led to this result. BLM's own regulations and their Wild Horses and Burros Management Handbook ("Handbook"), which were provided as justifications, expressly instruct BLM to consider private lands when determining HMA boundaries. *See* 43 C.F.R. § 4710.3-1; *see also* A.R. RMPA-049414–93 (Handbook); A.R. RMPA-049480 (directing BLM to acquire written permission from private landowners before determining adequate habitat for wild horses within an HMA). The Handbook also delineates the exact ownership pattern and disputes as in the instant action. *See* A.R. RMPA-049421. BLM's interpretation of the WHA is ultimately consistent with its administration from the time the latter was passed—a factor given weight. *Wyoming v. U.S. Dep't of Interior*, 493 F. Supp. 3d 1046, 1074 (D. Wyo. 2020).

From first enactment of the WHA, BLM's interpretation provided for the creation of HAs—a conversion from an HMA "set[ting] an effective AML of zero"—to account for impacts to private lands. 43 C.F.R. § 4710.3-1; *American Wild Horse Campaign v. Bernhardt*, 442 F. Supp. 3d 127, 141–42 (D.D.C. 2020) (quotation). "Persuasive weight is due to an agency's contemporaneous construction of applicable law and subsequent consistent interpretation." *Wyoming v. U.S. Dep't of Interior*, 493 F. Supp. 3d at 1074. BLM's interpretation, contemporaneous with the WHA itself and consistent over time, is given that persuasive weight.

Accounting for these premises, it would be erroneous to conclude that BLM acted arbitrarily and capriciously in accounting for the private lands of a nonconsenting owner and in lowering AMLs. Such decisions were, in part, justified by BLM's longstanding interpretation of the WHA, uncontroverted by the courts. Accordingly, insofar as BLM's Decision corresponds with an expired consent decree or lowers the AMLs, this cannot be considered grounds for reversal under the APA.

As for the second argument by RTF, that BLM improperly relied upon the 2013 Consent Decree as justification for amending the RMP, this contention is similarly unavailing. It is based upon arguing that BLM's interpretation of the Tenth Circuit's decision in *American Wild Horse Preservation Campaign (AWHPC) v. Jewell*, 847 F.3d 1174 (10th Cir. 2016), is erroneous. *See* [ECF No. 49, at 45–46]. On one hand, BLM states that "the Tenth Circuit suggested that the only way to effectively manage the checkerboard would be to follow an RMP amendment process that changed the applicable HMAs to HAs or at the very least, eliminated the private lands from the HMAs and calculations of the

AMLs." A.R. RMPA-059062. On the other hand, RTF quotes the Tenth Circuit in saying that "the ultimate solution must come from Congress." [ECF No. 49, at 46] (quoting *AWHPC*, 847 F.3d at 1189 n.8). RTF uses this to argue that "the Tenth Circuit did *not* pre-sanction the action BLM takes here but instead suggested that Congress may need to change the WHA for BLM to do what it wishes to do." *Id.* (emphasis original).

But following this line of argument, regardless of its veracity, ignores the fact that RTF fails to demonstrate how the Tenth Circuit or BLM's supposed interpretation means that the latter improperly relied upon the Consent Decree in issuing the RMP Amendment. Even if one assumes that the RMP Amendment largely mirrors the Consent Decree, RTF lacks any positive implication that it was an animating consideration. In this sense, RTF's focus on BLM's interpretation of the Tenth Circuit is a red herring. It neither sanctions nor impugns BLM's ultimate decision. Accordingly, the Court cannot rely upon this contention to justify a finding that BLM acted arbitrarily and capriciously, or otherwise not in accordance with law.

3. BLM Was Not Required to Make an "Excess" Determination or Choose the Minimally Feasible Management Decision.

Petitioners separately argue that BLM violated the WHA by failing to make an "excess" determination or by failing to choose the minimally feasible management decision in selecting Alternative D. [ECF No. 49, at 39–44]; [ECF No. 50, at 33–36]; [ECF No. 51, at 30–34]. However, each of these contentions relies upon Petitioners' conflation between the planning-level RMP Amendment and a decision removing the wild horses. Yet, as Federal Respondents point out, Petitioners fail to "offer any explanation for why BLM was

required to make this ["excess"] determination before amending the RMPs, as opposed to when it subsequently authorizes a gather." [ECF No. 54, at 46]. The Court agrees with Federal Respondents. While an "excess" determination is required for a removal decision, Petitioners provide no justification that an "excess" determination is required for the RMP Amendment process, and the cases Petitioners cited in support do not suggest this either. *See Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114, 1120–21 (D. Mont. 2016) (reviewing a gather plan); *Animal Prot. Inst. of Am.*, 109 IBLA 112 (1989) (reviewing "final plans for removal of excess wild horses"); *Colorado Wild Horse and Burro Coal. v. Salazar*, 639 F. Supp. 2d 87, 90, 95–98 (D.D.C. 2009) (challenging gather plan). As such, BLM did not act arbitrarily and capriciously or otherwise not in accordance with law by not making an "excess" determination before issuing the RMP Amendment. 5 U.S.C. § 706(2)(A).

The same may be said of the contention that BLM was required to select the minimally feasible management decision. [ECF No. 49, at 41–44]; 16 U.S.C. § 1333(a) (stating that "[a]ll management activities shall be at the minimal feasible level"). Again, and as Federal Respondents explain, "the RMP Amendment does not itself authorize any management actions." [ECF No. 54, at 49]. As a result, there is no requirement for BLM to explicitly make a "minimal feasible" finding before issuing the RMP Amendment. In reply, RTF posits that "[t]he WHA requires that *all* management actions be at the minimal feasible level of management." [ECF No. 68, at 31] (citing 16 U.S.C. § 1333(a), and 43 C.F.R. §§ 4701.3-1, 4710.4) (emphasis original). However, their argument again relies on conflating the RMP Amendment process with a removal decision, either self-executing or

separate. *See id.* ("First, the WHA is clear that BLM's requirement to remove wild horses from *private lands* (when requested) does not authorize, let alone mandate, their entire removal from *public* lands. . . ."). Thus, insofar as Petitioners argue that BLM violated the WHA by failing to make an "excess" determination or to choose the minimally feasible management decision, these contentions are either unfounded or do not rise to the level of arbitrary and capricious or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Faced with these criticisms, Petitioners do not offer sufficient rebuttal in their replies—or at least one that does not continue to conflate planning with removal.

4. Miscellaneous Arguments Do Not Withstand Scrutiny.

Petitioners' remaining arguments that BLM violated the WHA are addressed separately in a brief manner. These being Petitioners' continued conflation of the RMP Amendment with a removal decision, as well as RTF's stray argument that BLM violated the WHA by failing to monitor and minimize genetic diversity risks in the White Mountain HMA. [ECF No. 49, at 44–45]; [ECF No. 50, at 31–33]; [ECF No. 51, at 34–40]. Both lack merit but warrant attention, nonetheless. The Court begins by directly addressing Petitioners' conflation between RMP Amendment and a removal decision.

i. Petitioners Conflating RMP Amendment with Removal.

As alluded to above, Petitioners tend to conflate RMP Amendment with a separate removal decision by BLM. Yet, both FOA and AWHC advance a separate argument that explicitly relies upon this conflation. [ECF No. 50, at 31–33]; [ECF No. 51, at 34–40]. FOA argues that BLM's decision to eliminate wild horses from public lands violates its duty to protect wild horses. [ECF No. 50, at 31–33]. AWHC makes a parallel argument in

alleging that BLM's decision to eradicate wild horse herds and adjust AMLs violates the plain language of the WHA, rendering the amendments *ultra vires*. [ECF No. 51, at 34–40]. Both FOA and AWHC later reiterate these positions in their replies in arguing that the looming specter of a potential gather implies that the RMP Amendment is functionally the same as a removal decision. [ECF No. 61, at 25–27]; *see* [ECF No. 62, at 16–17].

Separately, FOA goes on to argue that BLM violated the WHA by relying upon a factor not intended by Congress: administrative convenience. [ECF No. 50, at 36–40]. As they argue, BLM's alleged difficulty managing wild horses in the Checkerboard, as well as an alleged desire to create a barrier between the public and private lands, led BLM to authorize itself to remove wild horses—an action which violates the APA. *Id.* at 37–40. Yet, much like their previous argument, the crux of this argument is that the RMP Amendment authorizes the removal of wild horses.

Yet, as Federal Respondents note, the RMP Amendment and a removal decision, such as through a gather, are distinct in both function and effect. *See* [ECF No. 54, at 32–34]. The RMP Amendment is a high-level planning document and is not self-executing. Removal of the wild horses, although more likely due to the RMP Amendment, occurs after a separate administrative process. *See* A.R. RMPA-001213 (explaining removal actions and gather plans). While Petitioners argue that this is an erroneous distinction, the Court takes stock in the fact that a separate administrative process, accompanied by a period for public comment, allows for airing of grievances separate from the RMP Amendment. Separately, while FOA continues to argue that BLM improperly relied upon administrative convenience in creating barriers and authorizing removal of wild horses,

they do so by explicitly arguing that BLM's actions are a thinly veiled removal decision. [ECF No. 50, at 36–40]. The same analysis applies to this argument. Accordingly, insofar as FOA and AWHC argue that BLM violated the WHA for removing wild horses through the RMP Amendment, and as FOA argues that BLM improperly relied on administrative convenience in authorizing removal through the RMP Amendment, these contentions are unwarranted.

ii. Genetic Diversity Risks in the White Mountain HMA.

Idiosyncratic among the Petitioners, RTF separately argues that BLM acted arbitrarily and capriciously by not adequately monitoring and minimizing genetic diversity risks in the White Mountain HMA. [ECF No. 49, at 44–45]. This is because BLM is allegedly "relying on old data about genetic herd health" and because "the data for the White Mountain herd indicate that BLM needs to monitor and management the fragile genetic nature of the herd." *Id.* at 44 (citing A.R. RMPA-001336–37). Without this data, they argue, BLM "does not have the data to conduct a proper analysis under WHA, FLPMA, or NEPA, and is acting arbitrarily and capriciously in this regard without adequately analyzing genetic risks." *Id.* at 44–45.

Federal Respondents wrap their response up with a litany of RTF's miscellaneous arguments. [ECF No. 54, at 50]. They argue that this contention is baseless as "BLM did not change the AML for the White Mountain HMA, which would continue to be managed for an AML of 205-300 wild horses." *Id.* Moreover, they posit that RTF fails to explain "what legal requirement BLM has supposedly violated with respect to the White Mountain HMA." *Id.*

The Court agrees with Federal Respondents in both respects. There is nothing to suggest that the AML for White Mountain HMA was altered, and RTF fails to provide such evidence *See* A.R. RMPA-001209–10 (comparing "no action" alternative to selected Alternative D). As the AML was not changed, there is no reason to conclude that BLM erroneously relied on old data. Separately, without an explicit legal requirement from RTF that BLM supposedly violated, the Court cannot find basis to conclude that BLM acted either arbitrarily and capriciously or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Faced with these obstacles, RTF fails to sufficiently rebut them and maintain their argument.

C. Whether BLM Complied with FLPMA.

Petitioners fail to demonstrate that BLM failed to comply with FLPMA. FLPMA, like NEPA, imposes additional procedural obligations and constraints upon agencies, and particularly in formulating and issuing land-use management plans. *See* 43 U.S.C. §§ 1701 *et seq*. FLPMA requires agencies such as BLM to manage public lands under the principles of multiple use. 43 U.S.C. § 1372(a). It also requires BLM to "take any action necessary to prevent unnecessary or undue degradation of the lands," otherwise known as "UUD." 43 U.S.C. § 1732(b). Lastly, it requires that BLM "shall prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values" and that "[t]his inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." 43 U.S.C. § 1711(a).

Regarding all three aforementioned FLPMA provisions, RTF argues that BLM failed to comply with them in issuing the RMP Amendment. [ECF No. 49, at 47–49].

Federal Respondents retort by first seeking to narrow Petitioners' FLPMA claims to those included in opening briefs and then addressing RTF's individual arguments. [ECF No. 54, at 50–55].

The Court follows Federal Respondents' line of argumentation, starting with the issue of waiver regarding Petitioners' FLPMA claims. From there, the Court turns to analyzing the three FLPMA provisions with which RTF alleges BLM failed to comply—the multiple use principle, UUD, and current inventories.

1. Waiver of FLPMA Claims and Narrowing Petitioners' Claims.

Only RTF's claims under the FLPMA are sustained and considered, for AWHC's failure to raise them in their opening brief. "Ordinarily, a party's failure to address an issue in its opening brief results in that issue being deemed waived." *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019).

Both Petitioners AWHC and RTF brought claims under FLPMA in their Petitions for Review. Yet only RTF included a FLPMA claim in their Opening Brief. Federal Respondents note this in their Response Brief, asking the Court to deem AWHC's FLPMA claim waived. [ECF No. 54, at 50–51].

The Court agrees with Federal Respondents. As AWHC fails to address their FLPMA claim in their Opening Brief, it will be considered waived. *Walker*, 918 F.3d at 1151. Accordingly, in addressing BLM's alleged FLPMA violations, the Court will only rely on RTF's arguments in both its Opening Brief and Reply.

2. RMP Amendment and FLPMA.

As the Court noted in introducing FLPMA, RTF argues that BLM failed to comply with three provisions of FLPMA: (1) the multiple use principle, 43 U.S.C. § 1732(a); (2) UUD, 43 U.S.C. § 1732(b); and (3) the current inventories requirement, 43 U.S.C. § 1711(a). [ECF No. 49, at 47–49]. As they argue, BLM's decision violates the FLPMA—and by extension, the APA—for failing to comply with these explicit requirements. First, that BLM is acting contrary to the principle of "multiple use" if wild horses are removed to satisfy the demands of private landowners. *Id.* at 47. Second, that BLM failed to assess whether its preferred action (Alternative D) will cause "unnecessary or undue degradation" (UUD) of public lands. *Id.* at 48 (citing 43 U.S.C. § 1732(b)). And third, that BLM does not have the required current inventories to amend these RMPs. *Id.* at 49.

Federal Respondents provide the most useful rebuke of RTF's arguments and do so by addressing each individually. [ECF No. 54, at 51–55]. For multiple use, they argue that there is no legal requirement that BLM prioritize certain uses and nonetheless did such an analysis. *Id.* at 51–53. Regarding UUD, they argue that BLM did such an analysis and that there was no indication that their actions would lead to environmental degradation. *Id.* at 53. As they contend regarding current inventories, they qualify the language of 43 U.S.C. § 1711(a) and note that such information is not necessary for RMP Amendment, as it is merely a planning-level determination. *Id.* at 54–55.

While the State of Wyoming and RSGA also provide arguments in response, Federal Respondents' rebuke was far more useful in dispensing with RTF's arguments. [ECF No. 55, at 36–43]; [ECF No. 56, at 38–40]. However, RTF's reply brief largely focuses on

addressing the arguments of RSGA and the State of Wyoming while reiterating the initial positions, rather than those of Federal Respondents. [ECF No. 67, at 23–25]. Nonetheless, the Court addresses each FLPMA provision separately, starting with the multiple use principle.

i. Multiple Use Principle.

FLPMA requires that agencies such as BLM manage public lands by the principle of "multiple use." 43 U.S.C. § 1732(a). "Multiple use" management of the public lands and their various resources should "best meet the present and future needs of the American people; . . . including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources." 43 U.S.C. § 1702(c). Multiple use management, a fundamental purpose of FLPMA, requires land management "that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values. . . ." 43 U.S.C. § 1701(a)(8).

RTF argues in its Opening Brief that BLM violated FLPMA "because it has sacrificed 'multiple use' for private demands." [ECF No. 49, at 47] (citing 43 U.S.C. § 1732(a)). In RTF's view, since BLM amended the RMP to remove wild horses from large portions of public lands because of conflicts with private landowners, the agency acted contrary to the explicit purposes of FLPMA. *Id.*

Federal Respondents provide a forceful rebuttal. In short, they argue that the multiple use principle "does not require BLM to prioritize one type of use, such as wild horse management, over another." [ECF No. 54, at 51–52] (citing *N.M. ex rel. Richardson*

v. BLM, 565 F.3d 683, 710 (10th Cir. 2009)). Notwithstanding this argument, Federal Respondents argue that RTF provides no caselaw in support of the contrary, as well as returning to the record to argue that BLM had adequately explained its decision. *Id.* at 53.

In reply, RTF does not address the multiple use arguments of Federal Respondents. Rather, in seeking to reaffirm its position, RTF merely focuses on rebutting the arguments of Wyoming and RSGA, which are focused elsewhere. [ECF No. 67, at 23–25].

The Court agrees with Federal Respondents. As they note, there is simply nothing in FLPMA which prioritizes one use over another. *N.M. ex rel. Richardson*, 565 F.3d at 710. Although RTF argues that the RMP Amendment simply confers benefit to RSGA at the expense of the public, they provide no caselaw to support that this is contrary to the principle of multiple use. [ECF No. 49, at 47]. Even then, the record clearly demonstrates that BLM adequately explained the basis for its decision in accordance with the principle of multiple use. *See* A.R. RMPA-001677, RMPA-001245–84, RMPA-001680. Faced with these arguments, as raised by Federal Respondents, RTF elected to attack those dissimilar arguments of RSGA and Wyoming and ignoring the force of Federal Respondents' arguments. Accordingly, the Court finds no basis to conclude that BLM violated FLPMA by ignoring the principle of multiple use.

ii. Unnecessary and Undue Degradation.

FLPMA separately requires an agency to "take any action necessary to prevent unnecessary or undue degradation ["UUD"] of the lands." 43 U.S.C. § 1732(b).

RTF argues that BLM failed to analyze whether Alternative D causes any UUD, or "whether any other Alternative would cause *less* degradation of public lands, which [BLM]

is required to do." [ECF No. 49, at 48] (emphasis original) (citing *Sierra Club v. Lujan*, 949 F.2d 362, 369 (10th Cir. 1991)). In RTF's view, BLM "is ignoring its statutory duty" for the sake of RSGA and administrative convenience, and because BLM "did not consider UUD as a factor" for any proposed Alternatives, they have violated FLPMA. *Id.* (citing 43 U.S.C. § 1732(b), and *Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1269 (E.D. Cal. 2006)).

Federal Respondents retort by first arguing that "RTF points to no evidence that the RMP Amendment will actually lead to [UUD] of rangeland" while arguing that BLM had violated FLPMA simply "because the words 'unnecessary or undue degradation' were not used in the ROD or Final EIS." [ECF No. 54, at 53]. Pointing to the record, Respondents argue BLM *did* consider UUD and included this analysis in both the ROD and Final EIS. *Id.* (citing A.R. RMPA-001207, RMPA-001245–84, RMPA-001677–80). Moreover, they assert, BLM ultimately selected Alternative D "with that [UUD] consideration in mind." *Id.*

In reply, RTF mainly targets the arguments of Wyoming and RSGA while reiterating their position that BLM violated and largely ignored FLPMA, or at least that BLM's analysis was deficient. [ECF No. 67, at 24–25]. Again, characterizing the RMP Amendment as "a concession to satisfy RSGA," RTF argues that none of the Respondents "can show where or how BLM analyzed whether changing these public lands from HMAs to HAs would cause any [UUD] of the lands." *Id.* at 23–24.

The Court agrees with the Respondents. Contrary to RTF's assertions, the record implies that BLM did consider and explain UUD, ultimately leading towards its selection

of Alternative D. While FLPMA requires that BLM consider UUD, there is nothing to suggest that it also requires BLM to explicitly delineate every aspect of UUD—let alone use the words "unnecessary and undue degradation." As Federal Respondents aptly note, the record shows that BLM "performed the analysis RTF claims is absent" by analyzing all alternatives "to consider the impacts that [each] would have on the quality of the rangeland" and, when analyzing said impacts, BLM "explicitly considered the impacts to wild horses and math other resources . . . ." [ECF No. 54, at 53] (internal citations omitted). RTF does not rebut this contention (or even address Federal Respondents). Rather, they focus on the arguments of Wyoming and RSGA. Accordingly, the Court finds that BLM conducted the required UUD analysis and did not violate FLPMA in this respect.

iii. Current Inventories.

Lastly, FLPMA requires that public land inventories be prepared and maintained, as well as must "be kept current so as to reflect changes in conditions and to identify new and emerging resources and other values." 43 U.S.C. § 1711(a). However, "[t]he preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands." *Id.*

RTF argues that both the FEIS and ROD shows that BLM decided to amend the RMPs "without having current data (regarding population levels, forage, water, other wildlife resources, etc.) to inform its change in management." [ECF No. 49, at 49]. Thus, they argue, since FLPMA requires these inventories, "BLM should not be permitted to amend its RMPs . . . where it is removing a main natural resource and land use on a vast scale." *Id.*

Federal Respondents raise two rebuttals. First, they cite back to the same statute as RTF, but includes the one sentence the latter omitted, to argue that BLM is not barred from amending RMPs despite failing to maintain current inventories. [ECF No. 54, at 54]. Second, while reiterating their position that the RMP Amendment "is a planning-level determination," additional environment data is "not a necessary consideration at this stage and, if required, will occur before any implementation of the RMP Amendment." *Id.* at 54–55.

RTF does not directly respond to these rebuttals. At best, they reiterate their position that "BLM must base its assessment on current land conditions and resource usages." [ECF No. 67, at 24–25] (citing *Utah v. Andrus*, 486 F. Supp. 995, 1005 n.13 (D. Utah 1979)).

The Court agrees with Respondents. While § 1711(a) requires that public land inventories must be prepared and maintained, as well as must "be kept current," Federal Respondents aptly note the sentence immediately following this provision, stating that "preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands." 43 U.S.C. § 1711(a). RTF does not rebut this argument, but rather just impliedly reiterates its original position.

Accordingly, the Court cannot find that BLM violated FLPMA for failure to maintain current inventories. As a result, RTF fails to establish that BLM did not comply with either of the three pertinent FLPMA provisions in amending the RMP. The Court next turns to the issue of whether BLM complied with NEPA.

D. Whether the RMP Amendment Complied with NEPA.

As with FLPMA, NEPA provides for several additional procedural requirements and obstacles for agencies involved in land-use plan management decisions. *See* 42 U.S.C. §§ 4331 *et seq.* First, NEPA requires agencies to consider alternatives to any project that might have a significant effect on the quality of a human environment. 42 U.S.C. § 4332(C)(iii). However, this secondarily requires that the agency set forth a properly defined statement of purpose and need. 40 C.F.R. § 1502.13 (2012). For both consideration of reasonable alternatives and drafting a statement of purpose and need, the agency is given broad discretion. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1243–44 (10th Cir. 2011).

Second, NEPA requires that agencies to take a "hard look" at the environmental impacts of their decisions before the decision is made, to assure that a decision is the product of reasoned decision-making. 42 U.S.C. § 4332(2)(C). In so doing, the ultimate decision cannot be one that was "predetermined" to be selected. *Wyoming*, 661 F.3d at 1264. Nonetheless, the "hard look" required by an agency may be idiosyncratic and contingent upon the underling circumstances.

These provisions and their sub-requirements form the foundation of the underlying NEPA-based claims. Petitioners' claims that BLM failed to comply with NEPA broadly fall into two categories: (1) that BLM failed to consider all reasonable alternatives, in part because of an allegedly unreasonably narrow purpose and need statement; and (2) that BLM failed to take a "hard look" at relevant data and public comments, and therefore the RMP Amendment was not the product of reasoned decision-making.

In analyzing the merits of Petitioners' NEPA-based claims, the Court starts with whether BLM considered all reasonable alternatives, as per 42 U.S.C. § 4332(C)(iii). This involves the subsidiary inquiries of whether BLM drafted a properly defined statement of purpose and need, as per 40 C.F.R. § 1502.13, the reasonableness of proposed alternatives, and if BLM adequately addressed those alternatives.

From there, the Court continues in discussing whether BLM took the requisite "hard look" at the impacts of their decision, as per 42 U.S.C. § 4332(2)(C). Similarly, this requires subsidiary inquiries, albeit more fact-specific than rule-specific. First being whether Petitioners adequately allege that BLM selected a predetermined decision. The remaining four subsections address whether BLM considered the necessary data, benefits and impacts, the potential for increased livestock grazing, and public comments.

The Court begins with addressing whether BLM considered all reasonable alternatives.

1. Reasonable Alternatives Considered.

Agencies must consider alternatives to any project that might have a significant effect on the quality of the human environment. 42 U.S.C. § 4332(C)(iii). But agencies need not consider every possible alternative to a proposed action, only "reasonable" alternatives. *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1183 (10th Cir. 2013) (citing 40 C.F.R. § 1502.14(a)). A court judges the reasonableness of the alternatives measured against two guideposts: (1) "the agency's statutory mandate" and (2) the "agency's objectives for a particular project." *N.M. ex rel. Richardson*, 565 F.3d at 709. However, NEPA "does not require agencies to analyze the environmental consequences of

alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." *Colorado Env't Coal. v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999) (citation omitted).

Broadly speaking, Petitioners argue that BLM failed to consider all reasonable alternatives, in part because the latter had allegedly crafted an unreasonably narrow purpose and need statement which made its chosen alternative a foregone conclusion. [ECF No. 49, at 54–55]; [ECF No. 50, at 48]. Respondents largely rebuke such an assertion. Federal Respondents in particular first argue that the purpose and need statement of the RMP Amendment was not narrowly defined as to preclude reasonable options. [ECF No. 54, at 56–59]. From there, they continue in addressing each alternative—considered or hypothetical—raised by Petitioners to argue that they did not fail to comply with NEPA in reaching their conclusion. *Id.* at 59–67. The Court bifurcates this inquiry in line with Federal Respondents' argument and starts with analyzing whether the RMP Amendment's purpose and need statement was properly defined.

i. Purpose and Need of RMP Amendment Properly Defined.

A statement of purpose and need must "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. An agency has "considerable discretion to define" the purpose and need of its action. *Wyoming*, 661 F.3d at 1244. "A court may not reject BLM's stated objectives unless they are defined so narrowly as to foreclose reasonable options." *Western Watersheds Project v. BLM*, 721 F.3d 1264, 1276 (10th Cir. 2013) (citing *N.M. ex rel. Richardson*, 565 F.3d at 709)). "In determining whether an agency considered

reasonable alternatives, courts look closely at the objectives identified in an EIS's purpose and needs statement." *Citizens' Comm. to Save Our Canyons*, 297 F.3d at 1030.

Albeit largely intertwined with their predetermination argument, RTF argues that BLM defined the RMP Amendment's objectives in terms so unreasonably narrow that the scope of the project was "primarily serving the wishes of RSGA." [ECF No. 49, at 54–56]. FOA and AWHC do not focus on the purpose and need of the RMP Amendment in their Opening Briefs, but rather upon the range of alleged reasonable alternatives.

Federal Respondents largely fall back upon BLM's "consideration discretion to define" the purpose and need of its actions, as well as the fact-specific nature of a court's inquiry. [ECF No. 54, at 57] (citing *Wyoming*, 661 F.3d at 1244 (quotation), and *Citizens' Comm'n to Save Our Canyons*, 297 F.3d at 1030). Wielding this framework, they plead with the Court to defer to BLM's discretion and recognize the unique nature of the Checkerboard lands and the necessity of abiding by RSGA's demands. In this sense, the purpose and need for RMP Amendment is not unreasonably narrow, but just broad enough to fit the instant issue compromising the regulatory regime.

RTF replies by more explicitly merging their arguments with those that BLM selected a predetermined outcome. Nonetheless, they reiterate their original position but also infer that because the ultimate decision complied with the wishes of RSGA, BLM selected a predetermined outcome, and had done so through an unreasonably narrow statement of purpose and need. [ECF No. 67, at 19–22].

The Court agrees with Federal Respondents that the purpose and need statement for the RMP Amendment was properly defined. While this question is largely intertwined with

the separate issue of whether BLM was predetermined in selecting the outcome, that issue is addressed later. As such, the Court focuses on whether BLM's purpose and need statement was unreasonably narrow.

The RMP Amendment was necessitated and driven by RSGA's revocation of consent following the expiration of the 2013 Consent Decree. The fact that the purpose and need statement may reflect this practical reality does not necessarily mean that it was unreasonably narrow. The nature of the Checkerboard, and the existence of wild horses upon it, is heavily contingent upon the consent of private landowners. RSGA's revocation of consent, after the expiration of the 2013 Consent Decree, creates such a fundamental change to the entire regime that it requires focus.

RTF's reply demonstrates the fatal flaw of their argument: it is backwards. In short, RTF argues that because BLM's ultimate decision complied with RSGA's demands, it must have been preordained and therefore could only have been preordained by an unreasonably narrow statement of purpose and need. Such a line of argumentation infers that the ends not only justified the means but also *defined* them. This is logically unsound. It does not serve to imply that BLM abused its "considerable discretion" in defining their purpose and need, as well as drafting their statement accordingly.

Insofar as RTF attempts to analogize to *National Parks & Conservation Association v. BLM*, 606 F.3d 1058 (9th Cir. 2010), Federal Respondents are correct that the facts of that case are readily distinguishable. [ECF No. 49, at 54–56]; [ECF No. 54, at 58–59]. First, unlike here, the main beneficiary in that case was undoubtedly a private entity. *National Parks & Conservation Ass'n*, 606 F.3d at 1071. Second, and relatedly, the purpose and

need statement of that case was explicitly fashioned to meet the *financial* goals of a private entity, rather than competing users and resources on BLM lands, as here. *Id.*

Ultimately, however, BLM has "considerable discretion" in defining the purpose and need of its action. *Wyoming*, 661 F.3d at 1244. An examination of the record demonstrates that the purpose and need statement is not so narrow "as to foreclose reasonable options." *Western Watersheds Project v. BLM*, 721 F.3d 1264, 1276 (10th Cir. 2013) (citing *N.M. ex rel. Richardson*, 565 F.3d at 709)). While Petitioners disagrees with the current regime, BLM is tasked with juggling multiple, often-competing interests. The options advanced in the FEIS are not so blatantly unreasonable as to warrant this Court to abrogate BLM's considerable discretion in defining the purpose and need of the RMP Amendment. *Id.*; *Citizens' Comm'n to Save Our Canyons*, 297 F.3d at 1030. Accordingly, the Court rejects the assertion that BLM's purpose and need statement was narrowly defined. The separate-yet-related issue of predetermination is addressed later.

ii. Proposed Alternatives Either Considered or Not Reasonable.

"[A]n agency is only required to consider 'reasonable alternatives.'" *Citizens' Comm. to Save Our Canyons*, 297 F.3d at 1030 (quoting 40 C.F.R. § 1502.14). An agency's decision to examine a particular alternative and its discussion of alternatives need only be "sufficient to permit a reasoned choice among the options." *Wyoming*, 661 F.3d at 1243–44 (internal quotation marks and citation omitted). "Once an agency appropriately defines the objectives of an action, NEPA does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective." *Id.* "That is, once an agency establishes the objective of the

proposed action—which it has considerable discretion to define—the agency need not provide a detailed study of alternatives that do not accomplish that purpose or objective, as those alternatives are not 'reasonable.'" *Id.* at 1244 (quoting *Citizens' Comm. to Save Our Canyons*, 297 F.3d at 1031).

Each of Petitioners include either alternatives that were considered by BLM but unreasonable, or those presented by Petitioners as alternatives not considered but reasonable. RTF mentions an alternative considered by BLM, whereby the latter would engage in land swaps to create a larger, contiguous block of public land. [ECF No. 49, at 54–56]. AWHC, also pointing specifically to the land swap alternative, argues that BLM did not consider any reasonable mid-range alternatives. [ECF No. 51, at 44–49]. By contrast, FOA presents three types of alternatives that they argue BLM should have considered: (1) land swaps to create larger parcels of public land; (2) maintaining wild horses on public lands; and (3) any action that would maintain or increase wild horse AMLs while reducing livestock grazing. [ECF No. 50, at 43–55].

Federal Respondents retort by stating that, for each alternative mentioned by Petitioners, it was either considered by BLM and deemed unreasonable, or is unreasonable in itself. [ECF No. 54, at 59–67]. In their view, a land swap was considered but would neither carry out the purpose and need of the RMP Amendment nor reasonable as it involves millions of acres with no willing participants. *Id.* at 61–65. As for the proposed alternative of managing public lands for wild horses, Federal Respondents state that it was considered but rejected as unfeasible. *Id.* at 65–66. As for a proposed alternative that would reduce livestock grazing, Federal Respondents argue that this is explicitly what was

provided in Alternative B and thus cannot constitute a NEPA violation. *Id.* at 66–67. Wyoming largely mirrors the position of Federal Respondents, with the added argument that BLM's considered alternatives were reasonable, contrary to Petitioners' assertions. [ECF No. 55, at 44–50].

In its reply, FOA reiterates their argument that BLM rejected reasonable alternatives and did so by only considering alternatives that served private interests. [ECF No. 61, at 27–32]. Regarding the land swap idea, FOA argues that it was a reasonable alternative as they had multiple years to negotiate one and that it would meet the stated purpose and need. *Id.* at 29–30. Regarding the alternative maintaining wild horses on public but not private lands, FOA argues that BLM failed to consider whether it could do so while also complying with both Sections 3 and 4 of the WHA. *Id.* at 31. As for the alternative maintaining or increasing wild horse AUMs, FOA argues that NEPA requires BLM to consider all reasonable alternatives and not just those explicitly mandated by regulations. *Id.* Separately, AWHC replies by also arguing that BLM rejected the land swap alternative although reasonable and with fewer adverse impacts. [ECF No. 62, at 28–30].

The Court agrees with Respondents. As far as the range of alternatives considered by BLM in issuing the FEIS, those are not unreasonable as to constitute a NEPA violation. Separately, as far as the alternatives proposed by Petitioners, they were considered yet unreasonable. The Court separately examines each alternative below, starting with the land swap.

Contrary to Petitioners' suggestions, the record shows both that BLM considered a land swap and that such an alternative would not be reasonable, hence why it was

eliminated. *See* A.R. RMPA-001205. After being considered, BLM ultimately eliminated the land swap from detailed analysis and adequately explained their reasoning, as is consistent with their NEPA obligations. *Id.* "For those alternatives considered but eliminated from detailed analysis," an agency is "required only to 'briefly discuss the reasons for their having been eliminated'" and "an agency need not independently evaluate alternatives it determines in good faith to be ineffective as a means to achieving the desired ends." *Associates Working for Aurora's Residential Env't v. Colorado Dep't of Transp.*, 153 F.3d 1122, 1130 (10th Cir. 1998) (quoting 40 C.F.R. § 1502.14(a)).

Furthermore, the Court agrees with Federal Respondents that such an alternative seems wholly impractical to BLM's conflicting obligations. A land swap of hundreds of thousands of acres, without a clear and willing participant, would run contrary to BLM's separate obligation to remove wild horses from nonconsenting lands "as soon as practicable." 43 C.F.R. § 4720.2-1. Such an alternative appears impractical and speculative. *Biodiversity Conservation All. v. BLM*, 608 F.3d 709, 714–15 (10th Cir. 2010) (holding that an agency can "eliminate alternatives that are too remote, speculative, impractical, or ineffective"); *see also* A.R. RMPA-000496 (stating that "[a]cquisitions of private lands will only be pursued with willing landowners"). While FOA and AWHC argue that this alternative is reasonable because BLM had several years to negotiate a land swap, that contention is misleading as it would be strange to impugn BLM for both complying with the 2013 Consent Decree while it was still in effect but not negotiating an exchange of the same lands under that Consent Decree. Accordingly, the Court finds no

basis to conclude that BLM violated NEPA for omitting more-detailed analysis of a land swap alternative.

As for the proposed alternative whereby public lands are managed for wild horses, the record similarly demonstrates that BLM considered such an alternative and rejected it as impractical and unresponsive to the needs of the project. A.R. RMPA-001204. The Court disagrees with FOA insofar as such rejection requires detailed analysis. The very nature of the Checkerboard makes continued maintenance of wild horses on public lands—one-square-mile parcels surrounded by private lands—wholly impractical once RSGA's revocation of consent denies management on private land. For that same reason, FOA's argument in reply may be dismissed. The Court agrees that BLM's simple explanation satisfies their obligation. *Associates Working for Aurora's Residential Env't*, 153 F.3d at 1130.

Lastly, as far as FOA argues that BLM did not "seriously consider" an alternative that would maintain or increase wild horse numbers and reduce livestock grazing on public lands, Federal Respondents are apt to point to Alternative B. Alternative B did contemplate maintaining wild horses on the solid-block portions of the HMAs and reducing livestock forage allocation. *See* A.R. RMPA-001199–001200. Albeit not universal, this goes toward the heart of FOA's concern. But to the extent that Petitioners note that the number of livestock AUMs in Alternative B would still be higher than the wild horse AUMs, Federal Respondents are also apt to note that "FOA points to nothing in the statute or regulations that requires BLM to maintain parity between wild horse and livestock AUMs." [ECF No. 50, at 54]; [ECF No. 54, at 67]. Thus, there is nothing in FOA's arguments that establish

BLM completely failed to consider this alternative, regardless of its reasonableness. Accordingly, the Court finds no basis to conclude BLM violated NEPA for failing to consider reasonable alternatives.

2. BLM Took a "Hard Look" at the Impacts of RMP Amendment.

NEPA requires agencies to take a "hard look" at the environmental impacts of their decisions before the decision is made. 42 U.S.C. § 4332(2)(C); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1263 (10th Cir. 2011). An agency takes the requisite "hard look" where its NEPA documents "reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project . . . [and] provide a reviewing court with the necessary factual specificity to conduct its review." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006) (internal citation omitted). Courts apply "a rule of reason standard (essentially an abuse of discretion standard) in deciding whether claimed deficiencies in a FEIS are merely flyspecks, or are significant enough to defeat the goals of informed decisionmaking and informed public comment." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002) (internal citation omitted). In determining whether an agency took the requisite hard look, courts consider "whether the agency 'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1284, 1271 (10th Cir. 2014) (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43). Otherwise, a "court will not second-guess the wisdom of the ultimate decision." *Citizens for Alts. to*

Radioactive Dumping v. U.S. Dep't of Energy, 485 F.3d 1091, 1098 (10th Cir. 2007) (internal citation omitted).

Each of Petitioner argues, directly or indirectly, that BLM failed to take a "hard look" as required by NEPA, by omitting certain information or analyses. In RTF's view, BLM failed to take a "hard look" at potential environmental effects of their decision. [ECF No. 49, at 49–54]. FOA argues that BLM violated NEPA by failing to take a "hard look" at the positive impacts that wild horses have on the environment, as a result of allegedly reaching a predetermined decision, and by failing to take a "hard look" at the impact of reallocating wild horse forage and the foreseeable increase in livestock grazing. [ECF No. 50, at 56–65]. While AWHC, by contrast, does not explicitly contend that BLM failed to take a "hard look" and instead focuses on the issue of reasonable alternatives, they at least highlight BLM alleged failure to respond to public comments. [ECF No. 51, at 44–49].

Each of Respondents take issue with Petitioners' contentions, albeit for different reasons. Federal Respondents argue that BLM did take the required "hard look" at the consequences of the RMP Amendment, and particularly by considering the necessary data before amendment and the benefits of wild horses as well as the impacts to wild horse viewing. [ECF No. 54, at 67–70]. To the extent that Petitioners argue BLM was required to consider increase livestock grazing, Federal Respondents argue that this is beyond the scope of the RMP Amendment. *Id.* at 70–71. As for the issue of public comments, Federal Respondents argue that BLM did consider and respond to them. *Id.* at 71–72. The State of Wyoming, beyond the issue of whether the Decision was "predetermined," argues BLM did not ignore environmental impacts attributable to wild horses, recognized how wild

horses compete with local fauna, and asks the Court to deter to BLM's technical choices about how to approach evaluation of environmental impacts. [ECF No. 55, at 50–54] (citing *Western Watersheds Project*, 76 F.4th at 1302). Lastly, and beyond the issues regarding potential alternatives, RSGA takes the position that all such "hard look" issues generally lack merit. [ECF No. 56, at 45–47].

FOA replies by reiterating their position that BLM failed to take a "hard look" at the positive impacts of wild horses and the impacts of reallocating them. [ECF No. 61, at 32–34]. In particular, they argue that the only "analysis" of such positive impacts is a passing statement in the FEIS and "BLM's failure to offer any support for [this] conclusory statement or update its overall analysis of the alternatives to consider the positive impacts . . . violated NEPA." *Id.* at 33 (citing *Davis v. Mineta*, 302 F.3d 1104, 1122–23 (10th Cir. 2002)). Separately, calling an increase in livestock grazing as "likely" from lowering wild horse AUMs, FOA argues Federal Respondents are wrong to suggest that considering such a result fall outside the scope of RMP Amendment, and that the latter fails to provide any supporting caselaw. *Id.* at 34. RTF, by contrast, narrowly calls into question Respondents' contentions that BLM's analysis was adequate. [ECF No. 67, at 29–31]. Specifically, they argue that BLM lacked adequate data inputs, sufficient for NEPA, to constitute a "hard look," and thus BLM's effects analyses were flawed. *Id.* As with their Opening Brief, AWHC merely reiterates their "reasonable alternatives" argument, albeit with less parallels to a separate "hard look" argument. [ECF No. 62, at 28–30].

The Court finds insufficient evidence to support the contention that BLM failed to take the requisite "hard look" at any of the information alleged by Petitioners. In reaching

this conclusion, the Court analyzes each issue at which Petitioners contend that BLM failed to take a "hard look," starting with whether the agency selected a "predetermined" decision.

i. Petitioners Fail to Adequately Allege BLM Outcome Predetermined.

"[I]f an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously." *Wyoming*, 661 F.3d at 1264 (citation omitted). Courts have a "high" standard for finding that an agency predetermined its results. *Id.* Specifically, the Tenth Circuit has stated:

> [P]redetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis—which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action.

Forest Guardians v. U.S. Fish & Wildlife Serv., 661 F.3d 692, 714 (10th Cir. 2010) (emphasis original).

RTF argues that BLM violated NEPA, in part, for selecting a predetermined outcome in the amendment process which did not consider reasonable and less-impactful alternatives. [ECF No. 49, at 54–56]. In RTF's view, BLM "blatantly created a construct whereby it interprets the expired [2013] Consent Decree and [*AWHPC*, 847 F.3d 1174,] as mandating a specific management solution, and BLM's whole FEIS is built around justifying that alternative." *Id.* at 54. Thus, RTF argues, the reason why BLM did not consider "enough alternatives" beyond Alternative D is because the amendment process's

objectives were narrowly defined to primarily comply with the expectations of RSGA. FOA similarly argues that BLM was predetermined in its selection, pointing to an alleged lack of sufficient evidence and not considering a broad range of potential benefits beyond removal of the wild horses. [ECF No. 50, at 56–61].

Wyoming advances the strongest rebuttal to Petitioners' argument. Although conceding that predetermination is contrary to NEPA, they note that "[c]ourts have a 'high' standard for finding that an agency predetermined its results." [ECF No. 55, at 51] (citing *Wyoming*, 661 F.3d at 1264). Pointing to the several changes made between the DEIS and the FEIS, Wyoming argues that such changes preclude finding the selection as predetermined, because BLM was not "irreversibly and irretrievably committed" to Alternative D. *Id.* at 51–52 (quoting *Forest Guardians*, 611 F.3d at 714).

In reply, FOA recontextualizes their position to argue that, while there were alternatives BLM could have selected, the selection was nonetheless predetermined insofar as all other alternatives still were to the benefit of RSGA. [ECF No. 61, at 28]. RTF takes a similar approach. First attempting to point out contradictions between the Respondents, RTF argues that the selection was predetermined because BLM's alternatives "were not genuine" and BLM analyzing such alternatives was not sufficient enough to be in good faith. [ECF No. 67, at 20].

The Court agrees with Respondents. Skirting the question of whether there were "reasonable and less-impactful alternatives," the Court focuses on whether RTF adequately alleges that BLM was predetermined in selecting the outcome. While both RTF and FOA attempt to recontextualize their position that the selection was predetermined, because the

other alternatives were either disingenuous or not seriously considered, that still fails to meet the "high" threshold. *Wyoming*, 661 F.3d at 1264. "[P]redetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome . . . ." *Forest Guardians*, 661 F.3d at 714 (emphasis original). However, the significant differences between the DEIS and FEIS—including retention of the White Mountain HMA—significantly undermines finding that BLM "irreversibly and irretrievably" committed itself to a certain outcome. *Forest Guardians*, 611 F.3d at 714. Insofar as BLM undertook "an objective, good faith inquiry into the environmental consequences" of the proposed action, while Petitioners argue that they did not consider the impacts of retaining wild horses, this is adequately explained by the fact that retaining wild horses would be contrary to RSGA's intentions. *Id.* (quotation). However, ultimately, the record shows that BLM did consider the environmental impact of removing the wild horses. *See* A.R. RMPA-001254.

Although RTF's and FOA's recontextualized position does not serve to meet their burden. To cast doubt on all other alternatives considered for being "not genuine," as RTF and FOA does, simply because they provide benefit to RSGA is not equivalent to preselecting "a certain outcome." Section 4 of the WHA requires landowner consent. 16 U.S.C. § 1334. The amendment process benefitting RSGA by proffering a series of alternatives that accounts for their revocation of consent is not a predetermined outcome,

but a broad range of outcomes reflecting the same objective.[7] Accordingly, the Court finds that Petitioners fail to satisfy their burden in pleading that BLM predetermined the outcome.

ii. Necessary Data Considered Before RMP Amendment.

Next, RTF's contention that BLM failed to take a "hard look" due to lacking certain data is unavailing. RTF argues that BLM failed to take a "hard look" as the latter lacked data regarding genetic diversity, range conditions, and population numbers. [ECF No. 49, at 49–54]. Lacking this data, they continue, BLM was unable to make a reasoned decision and thus the RMP Amendment, issued in absence of such data, violated NEPA.

Federal Respondents stake their position upon arguing that the RMP Amendment is a programmatic-level decision, without site-specific determinations on how to implement a plan. [ECF No. 54, at 68–70]. Thus, they continue, much of the data RTF asserts is required for evaluation, is not relevant until BLM considers wild horse gathers. *Id.* at 68 (internal citations omitted). Even then, to the extent such data *would* be required, Federal Respondents argue that the FEIS *does* consider genetic diversity of herds and the potential diversity impacts caused by a change in AMLs. *Id.* at 69–70 (internal citations omitted).

In retort, RTF again argues that "BLM is mandated to conduct NEPA review using only current, accurate, relevant, and scientific data," and therefore Federal Respondents concede BLM lacked this information. [ECF No. 67, at 27]. Thus, they argue, failure to consider this requisite information constitutes a failure to take a "hard look." *Id.* at 28–29.

[7] By Petitioners' rationale, a person who has bought a new car made a predetermined selection by buying *any* new car—regardless of make or model.

The Court ultimately agrees with Federal Respondents. While all agency action must be "supported by substantial evidence" and a hard look under NEPA is best characterized as requiring "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," this does not clearly suggest that this *specific data* was required for a programmatic-level decision. *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1241 (10th Cir. 2000) (first quotation); *Center for Biological Diversity v. U.S. Forest Serv.*, 2023 WL 5310633, at *8 (D. Mont. Aug. 17, 2023) (second quotation). Yet, even if required, the FEIS does appear to discuss genetic diversity and potential diversity impacts. *See* A.R. RMPA-001324–25, RMPA-001329, RMPA-001333, RMPA-001337.

Even if RTF is correct that a programmatic-level decision requires a "hard look" at specific data regarding genetic diversity, range conditions, and population numbers, the Court nonetheless turns to the considerations articulated in *Biodiversity Conservation Alliance*. 765 F.3d at 1271. The fact that the FEIS does discuss herd genetic diversity and potential diversity impacts undermines finding that "the agency 'entirely failed to consider an important aspect of the problem.'" *Id.* (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43). Moreover, and in part because RTF focuses on arguing that BLM completely lacked such data, there is no indication that BLM "'offered an explanation for its decision that runs counter to the evidence before the agency.'" *Id.* Similarly, there is nothing to suggest that BLM's decision was "'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* Without these considerations warranting attention, this Court "will not second-guess the wisdom of the ultimate decision." *Citizens for*

Alternatives to Radioactive Dumping, 485 F.3d at 1098. Accordingly, the Court does not find that BLM failed to take a "hard look" in evaluating data regarding genetic diversity, range conditions, and population numbers.

iii. Benefits and Impacts Considered.

The Court turns to addressing together the two concerns of FOA and RTF, who argue that BLM failed to consider the benefits of retaining wild horses as well as the impacts to wild horse viewing. Albeit wielded to conclude that BLM reached a predetermined decision, FOA argues that BLM failed to take a "hard look" at the positive impacts that wild horses have on the environment. [ECF No. 50, at 56–61]. In support, they state that BLM failed to consider, objectively and in good faith, "extensive evidence, including peer reviewed studies, demonstrating that wild horses have a positive impact on the ecosystem, most notably in the way they consume and digest forage." *Id.* at 56. Separately, RTF argues that BLM failed to take a "hard look" at the impacts to wild horse viewing opportunities as a result of shrinking HMA boundaries. [ECF No. 49, at 53].

Federal Respondents address these arguments together. [ECF No. 54, at 70]. For both, they argue that BLM did consider these concerns as part of their "hard look." *Id.* Having taken a "hard look" at these benefits and impacts, Federal Respondents recast Petitioners' arguments as mere disagreement with BLM's ultimate decision. *Id.*

FOA retorts that BLM's evaluation of wild horse benefits comes down to a one-statement change from the DEIS to the FEIS, and thus undermines finding that BLM took a "hard look." [ECF No. 61, at 32–33] (citing A.R. RMPA-001254). RTF does not

separately readdress their viewing impacts argument, but it appears to be subsumed in their broader "hard look" argument. [ECF No. 67, at 25–29].

Neither concern raised by FOA or RTF are grounds for finding that BLM failed to take a "hard look." Starting with the first, while FOA retorts that BLM's "hard look" merely comes down to a single addition from the DEIS to the FEIS, this does not warrant finding a NEPA violation. The single addition in question being a statement that "wild horse fecal matter can contribute some nutrients to the soils." A.R. RMPA-001254. FOA both calls this statement insufficient yet says that the "extensive evidence" they and others submitted in support of retaining wild horses "demonstrate[ed] that wild horses have a positive impact on the ecosystem, *most notably in the way they consume and digest forage*." [ECF No. 50, at 56] (emphasis added) (internal citations omitted). Even if not detailed enough to satisfy FOA, there is nothing in FOA's argument identifying an area where BLM's analysis "undermine[d] informed public comment and informed decisionmaking." *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017). In reality, that one statement hits the very crux of the "extensive evidence" FOA and others submitted.

Insofar as FOA argues that BLM "fail[ed] to offer any support for its conclusory statements or update its overall analysis of the alternatives to consider the positive impacts of wild horses violated NEPA[,] that contention is insignificant. [ECF No. 61, at 33] (citing *Davis v. Mineta*, 302 F.3d 1104, 1122–23 (10th Cir. 2002)). Applying the "rule of reason standard," this claimed deficiency in the FEIS is "merely [a] flyspeck[]" rather than "significant enough to defeat the goals of informed decisionmaking and informed public comment." *Utahns for Better Transp.*, 305 F.3d at 1163. Deferring to BLM, the brevity of

changes from the DEIS is most rationally explained as being fiercely outweighed by the negative impacts of retaining wild horses. Accordingly, the Court does not consider this issue as a failure to take a "hard look."

As for RTF's contention, the District of Colorado has stated that "[f]ailure to adequately evaluate effects on recreational interests in grounds to overturn a NEPA document." *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1199 (D. Colo. 2014) (citing *National Parks & Conservation Ass'n v. Federal Aviation Admin.*, 988 F.2d 1523, 1533 (10th Cir. 1993)). Regardless of that decision's merit, it is functionally irrelevant here. Section 4.2.11 of the FEIS demonstrates that BLM explicitly considered the effects upon wild horse viewing, as a recreational interest, and ultimately recognized that there could be a negative impact to individuals "whose recreational experience would be enhanced by the presence of wild horses." A.R. RMPA-001281. Thus, although RTF disagrees with the ultimate decision, there is nothing to suggest that BLM did not evaluate wild horse viewing as part of their "hard look."

iv. Increased Livestock Grazing Beyond RMP Amendment's Scope.

Insofar as FOA argues that BLM violated NEPA by failing to consider the impact of reallocating wild horse AUMs to livestock grazing, the Court agrees with Federal Respondents that this issue falls beyond the scope of the RMP Amendment. As consistently reiterated by the Court, the RMP Amendment is a mere programmatic-level document, let alone one that orders the removal of wild horses. Nonetheless, RMP Amendment does not increase permitted livestock AUMs and explicitly states that such changes would happen

only "through future decision-making, based on further NEPA analysis including an in-depth review of intensive monitoring data . . . ." A.R. RMPA-001667.

While FOA does retort that a decrease in wild horse AUMs creates a situation where "[i]t is likely that livestock grazing will increase as ranchers capitalize on the removal of wild horses in grazing allotments," the operative word in this argument is "likely." [ECF No. 61, at 33. Although they continue that this is a "foreseeable" result, the RMP Amendment still does not actually increase livestock AUMs. The foreseeability of a livestock AUM increase is contingent upon BLM undertaking future decision-making. Accordingly, FOA's livestock grazing concern does not warrant finding a NEPA violation for failing to take a "hard look."

v. BLM Responded to Public Comments.

RTF's last argument, insofar as BLM allegedly did not respond to public comment, does not warrant finding that the latter failed to take a "hard look." RTF argues that, while "[t]he public has raised questions over whether this decision is consistent with multiple statutes and regulations, and BLM's own guidance manuals," BLM did not do so. [ECF No. 49, at 57]. As a prime example, they state that neither the DEIS nor the FEIS "specifies what 'population management tools' BLM intends to use to manage any of these HMAs," and continues that this is "a prerequisite to understanding the scope of expected effects on the herds in these HMAs." *Id.* Thus, because BLM allegedly has not responded to public comment and anticipating that Respondents will reiterate that this was a programmatic-level decision, RTF argues that BLM is improperly "[k]icking the can down the road." *Id.* at 60.

Federal Respondents start by noting that that "the only example [RTF] points to is that the RMP Amendment does not state the specific management tools BLM will use in the future or 'substantively' respond to comments on this issue." [ECF No. 54, at 71]. As anticipated, they continue with BLM explanation that "[d]ecisions on which specific population growth suppression strategies are utilized in a specific scenario are beyond the scope of" the FEIS and "potential impacts would be discussed in detail in a site specific NEPA analysis." *Id.*; A.R. RMPA-001505 (quotations). Nonetheless, even if required, Federal Respondents note that Appendix B of the FEIS "lists the type of population control techniques that may be implemented in the future" and BLM, in responding to comments on this issue, explained that Appendix B "describes and analyzes effects" of those strategies that are "reasonably foreseeable at the planning stage." [ECF No. 54, at 72] (citing A.R. RMPA-001499).

As with their argument on impacts to wild horse viewing, RTF does not separately readdress this argument but largely subsumes it within a broader "hard look" rebuke. [ECF No. 67, at 25–27].

The Court agrees with Federal Respondents. Without taking another chance to reiterate that this is a programmatic-level decision, even assuming that BLM is required to take a "hard look" that includes addressing public comments specifically on population management methods, the Court defers to BLM's wisdom. *Citizens for Alternatives to Radioactive Dumping*, 485 F.3d at 1098. Appendix B directly rebuts any finding by this Court that BLM "'entirely failed to consider an important aspect of the problem,'" as it lists such strategies and because BLM explained that Appendix B describes and analyzes

the effects of those strategies which are reasonably foreseeable. *Biodiversity Conservation All.*, 765 F.3d at 1271 (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43). Such an explanation does not appear to "'run[] counter to the evidence before the agency,'" nor "so implausible" that it cannot be "ascribed to a difference in view or the product of agency expertise." *Id.* Thus, the Court "will not second-guess the wisdom of the ultimate decision." *Citizens for Alternatives to Radioactive Dumping*, 485 F.3d at 1098. Accordingly, the Court finds no basis to conclude that BLM violated NEPA for failure to take a "hard look."

CONCLUSION

IT IS HEREBY ORDERED that BLM's May 6, 2023, ROD is AFFIRMED. The Court concludes that Petitioners lack an actionable claim under the Administrative Procedures Act. 5 U.S.C. § 706(2)(A).

Dated this 14th day of August, 2024.

Kelly H. Rankin
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

AMERICAN WILD HORSE CAMPAIGN; ANIMAL WELFARE INSTITUTE; WESTERN WATERSHEDS PROJECT; CAROL WALKER; CHAD HANSON; and KIMERLEE CURYL,

Petitioners,

vs.

TRACY STONE-MANNING, Bureau of Land Management Director, in her official capacity; and DEB HAALAND, Secretary of the Department of the Interior, in her official capacity,

Respondents,

and

STATE OF WYOMING; and ROCK SPRINGS GRAZING ASSOCIATION, a Wyoming corporation,

Respondent-Intervenors.

Civil Nos. 23-CV-84-KHR (Lead)
23-CV-87-KHR (Joined)
23-CV-117-KHR (Joined)

RETURN TO FREEDOM, a nonprofit organization; FRONT RANGE EQUINE RESCUE, a nonprofit organization; MEG FREDERICK; and ANGELIQUE REA,

Petitioners,

vs.

DEB HAALAND, Secretary of the Department of the Interior, in her official capacity; TRACY STONE-MANNING, Bureau of Land Management Director, in her official capacity; and KIMBERLEE FOSTER, Bureau of Land Management Rock Springs Field Office Manager, in her official capacity,

Respondents.

FRIENDS OF ANIMALS, a 501(c)(3) organization,

Petitioner,

vs.

DEB HAALAND, Secretary of the Department of the Interior, in her official capacity; and BUREAU OF LAND MANAGEMENT,

Respondents.

JUDGMENT IN A CIVIL ACTION

These joined cases came before the Court under the Administrative Procedure Act (APA) for judicial review of the Bureau of Land Management's (BLM) actions through the Resource Management Plan Amendment and finalized in its May 6, 2023 Record of Decision regarding the Rock Springs and Rawlins Field Offices. The Court entered an Order Affirming Agency Action, which is fully incorporated herein by this reference. In accordance with the findings of fact and conclusions of law set forth in that Order:

IT IS HEREBY ORDERED AND ADJUDGED that Petitioners fail to establish that BLM's actions were arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, nor that they were in excess of statutory jurisdiction, authority, limitations, or short of statutory right. 5 U.S.C. § 706(2)(A), (C). Accordingly, BLM's Resource Management Plan Amendment and corresponding May 6, 2023 Record of Decision is UPHELD AND AFFIRMED.

FINAL JUDGMENT is hereby entered accordingly.

Dated this 14th day of August, 2024.

Kelly H. Rankin
United States District Judge