IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ROCKY MOUNTAIN PEACE & JUSTICE CENTER; CANDELAS GLOWS/ROCKY FLATS GLOWS; ROCKY FLATS RIGHT TO KNOW; ROCKY FLATS NEIGHBORHOOD ASSOCIATION; and ENVIRONMENTAL INFORMATION NETWORK (EIN) INC., Plaintiffs, v. UNITED STATES FISH AND WILDLIFE SERVICE; JAMES KURTH, in his official capacity as Acting Director of the United States Fish and Wildlife Service; and RYAN ZINKE, in his official capacity as Secretary of the Interior, Defendants.	Case No. 1:18-cv-01017-PAB **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs seek the extraordinary remedy of a preliminary injunction preventing the United States Fish and Wildlife Service ("Service") from opening trails to the public on the Rocky Flats National Wildlife Refuge ("Refuge"). In satisfaction of the National Environmental Policy Act ("NEPA"), the Service approved the opening of trails to public use on Rocky Flats in a 2005 Record of Decision ("ROD") for the Final Comprehensive Conservation Plan ("CCP") for the Refuge based on a detailed Environmental Impact Statement ("EIS") completed in 2004. 2005 Record of Decision, 7 (Ex. 1). Before opening the Refuge to unguided trail use by the public as intended under the CCP, in continuing compliance with NEPA, the Service analyzed minor adjustments to certain portions of trails already analyzed in the CCP. The Refuge determined the NEPA analysis conducted under the CCP to be adequate, and that no additional NEPA analysis was required to open trails to the public as envisioned under the CCP. March 23, 2018 Environmental Action Statement ("EAS") (Ex. 2). The Service also consulted

pursuant to Section 7 of the Endangered Species Act ("ESA") to evaluate the potential effects of the actions identified in the EAS on listed species and designated critical habitat and concluded, as to the Preble's meadow jumping mouse, that the actions evaluated were not likely to adversely affect the mouse or its critical habitat. *See* Intra-Service Section 7 Consultation Form (Ex. 3). Despite these efforts, and although opening of the trails to the public is not scheduled to occur until September 15, 2018, Plaintiffs are not satisfied. Decl. of David Lucas, Rocky Flats Nat'l Wildlife Refuge Manager, ¶ 5 (Ex. 4) ("Lucas Decl.").

Plaintiffs cannot meet their heavy burden of establishing, through clear and unequivocal evidence, any of the four requirements for the drastic remedy of a preliminary injunction: (1) a likelihood of success on the merits; (2) irreparable injury; (3) balance of harms; and (4) public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (identifying requirements for injunctive relief).

Plaintiffs will not succeed on the merits of their claims. The Service has met its NEPA and National Wildlife Refuge System Improvement Act ("NWRSAA") obligations by thoroughly analyzing the opening of trails to the public on the Refuge. Plaintiffs' ESA claims also fail for lack standing and because their claims are moot.

Plaintiffs' claims of irreparable injury are equally untenable, because they fail to show that any potential harm is imminent. The trails will not be opened to the public before September 15, 2018. Moreover, Plaintiffs' allegations of potential harm to the public or the Plaintiffs interest in the Preble's meadow jumping mouse from opening the trails, despite extensive evidence to the contrary, is merely speculative.

In contrast, a preliminary injunction would cause substantial harm to the United States. An injunction would prevent the public from accessing the Refuge contrary to the Rocky Flats Act of 2001 and, based on claims that are wholly unsupported, deprive the public of the benefit of its unique natural setting.

FACTUAL BACKGROUND

I. Creation of the Refuge and Development of the CCP

The Refuge was formally established in 2007 after environmental clean-up was undertaken by the Department of Energy ("DOE"). The Refuge includes 5,237 acres of land, much of which was transferred to the Department of the Interior ("DOI") from DOE. Lucas Decl. ¶ 3. The refuge is located sixteen miles northwest of Denver, Colorado and is located within Boulder and Jefferson Counties. *Id.*

DOE produced nuclear weapon components at Rocky Flats for forty years. The vast majority of operations occurred in the approximately 300-acre Industrial Area located near the center of the property. *See* Rocky Flats Nat'l Wildlife Refuge Act of 2001 ("Rocky Flats Act"), Pub. L. No. 107-107, § 3172(a)(1), Dec. 28, 2001, 115 Stat. 1012, 1379. The remainder of the site, sometimes referred to as the "Buffer Zone," generally left undisturbed. *See* Rocky Flats Act, § 3172(a)(2). The facility's forty years of operation resulted in the release of contaminants, including the radionuclide plutonium, into some portions of the Rocky Flats environment. CAD/ROD for Rocky Flats Plant 2006, 2 (Ex. 5). As a result of this contamination, the United States Environmental

Protection Agency ("EPA") proposed the site for inclusion on the National Priorities List in 1984, and finalized that listing in 1989.[1] *Id.* at 23.

Investigation and cleanup at Rocky Flats began in the 1980s and accelerated in 1996 pursuant to the Rocky Flats Cleanup Agreement ("Cleanup Agreement") between DOE, EPA and the Colorado Department of Public Health and the Environment ("CDPHE"). *Id.* The purpose of the Clean-up Agreement was to clean up radioactive and other contamination at Rocky Flats to the standards required by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and other federal and state environmental statutes. *Id.* at 11-14.

In 2001, with the investigation and cleanup of the Rocky Flats site well underway, Congress enacted the Rocky Flats Act, establishing the future use of the site as a National Wildlife Refuge under the management and control of DOI, through the Rocky Flats Act, §§ 3171-3182. Congress based this determination on its finding that Rocky Flats contained rare xeric tallgrass prairie plant communities, had value as open space in the rapidly developing Denver metro area, and provided habitat for many wildlife species, including threatened and endangered species. *Id.* § 3172(a)(3)-(5). Adding the site to the National Wildlife Refuge System was in the national interest, Congress found, because it would promote the preservation and enhancement of these resources for present and future generations. *Id.*

[1] The National Priorities List is a list of contaminated sites in the United States that are priorities for investigation and cleanup as determined by EPA. *See* 42 U.S.C. § 9605(a)(8).

Congress also recognized that some areas of Rocky Flats were still undergoing cleanup, and that it was in the national interest to ensure that this cleanup was completed safely and effectively. Rocky Flats Act § 3172(a)(4). Accordingly, Congress directed that the transfer of administrative jurisdiction from DOE to DOI, and establishment of the new Rocky Flats National Wildlife Refuge, would only occur upon certification by EPA that cleanup and closure of Rocky Flats had been completed successfully. *Id.* § 3175(a). Congress also required that DOE retain jurisdiction and control over lands within Rocky Flats necessary to its response actions (e.g., cleanup activities and post-cleanup monitoring and maintenance). *Id.* § 3175(d) (CCP/EIS) (defining "response actions"). Such DOE-retained lands would not, therefore, be part of the Refuge. Ex. 1 at 3.

In 2004, the Service prepared a draft CCP detailing its vision for management of the future Refuge, which it issued in final form in 2005. *See* Ex. 1. The planning process for the CCP included an EIS (and a public review process) to assess the impacts of conservation and management alternatives for the Refuge.

In September 2006, following twenty years of environmental investigation and cleanup, EPA and CDPHE issued their final cleanup decision for Rocky Flats under CERCLA and the Colorado Hazardous Waste Act. *See* Ex. 5. For purposes of this decision, DOE, EPA and CDPHE divided Rocky Flats into two Operable Units ("OUs"), the 1,308 acre Central OU, which contains the former Industrial Area at the center of the site and buffer area, and the Peripheral OU, which surrounds the Central OU and incorporates the remaining 4,933 acres of the site. 72 Fed. Reg. 29,276, 29,277 (May 25, 2007). The selected remedy for the Central OU required DOE to impose specific

institutional and physical controls, maintain existing engineered cleanup structures and conduct environmental monitoring in the OU. *Id.* Because these were continuing response actions, the agencies anticipated that DOE would retain administrative jurisdiction over the Central OU, as provided in the Rocky Flats Act, in order to meet these obligations. *Id*.

The remedy decision for the Peripheral OU was much different. EPA and CDPHE found that plutonium was present at such low levels that the risk and dose levels from this contamination were far below applicable or relevant and appropriate health-based risk standards for unrestricted use, and at or below the conservative end of CERCLA's cancer risk range. *Id*. Based on these findings, the agencies determined that the Peripheral OU "is already in a state protective of human health and the environment," and that no remedial action was warranted in this area as a result. Ex. 5 at 3. They further concluded that conditions in this operable unit, "are acceptable for unrestricted use and unlimited exposure." *Id.* at 65. EPA subsequently decided to remove the Peripheral OU from the National Priorities List, declaring in its Federal Register notices regarding this decision that "no hazardous substances, pollutants, or contaminants occur in the Peripheral OU above levels that allow for unlimited use and unrestricted exposure"—72 Fed. Reg. 11,313, 11,316 (Mar. 13, 2007)—and that "the Peripheral OU is suitable for all uses." 72 Fed. Reg. at 29,277.

On June 11, 2007, EPA certified to DOE and DOI "that cleanup and closure of Rocky Flats has been completed, except for the operation and maintenance associated with response actions in the Central Operable Unit, and that all response actions in the Central Operable Unit are operating properly and successfully." EPA certification (Ex.

6). As required by the Rocky Flats Act as amended, DOE then transferred administrative jurisdiction over nearly 4,000 acres of the Rocky Flats site to the Service for establishment of the Refuge. July 12, 2007, Service letter accepting transfer and attached DOE Letter of Transfer (Ex. 7).

II. Preble's Meadow Jumping Mouse and ESA Consultation History

The Preble's meadow jumping mouse is a small rodent that lives primarily in heavily vegetated riparian habitats along Colorado's Front Range. 63 Fed. Reg. 26,517-01 (May 13, 1998); Ex. 3 at 2. It was listed as a threatened species in 1998. 63 Fed. Reg. 26,517-01. In 2010, jumping mouse critical habitat was designated on the Refuge. 75 Fed. Reg. 78,430-01 (Dec. 15, 2010); *see also* 50 C.F.R. § 17.95. In total, the Service designated 34,935 acres of critical habitat for the jumping mouse, divided into eleven separate units. 75 Fed. Reg. at 78,450. Unit 6 encompasses approximately 1,108 acres,[2] greater than 99% of which occurs within the Rocky Flats site. *Id.* at 78,453.

The jumping mouse was first discovered on the Refuge in 1991, and the species has been extensively studied and surveyed there. 63 Fed. Reg. at 26,517-20; Preble's Meadow Jumping Mouse Surveys on the Rocky Flats National Wildlife Refuge (2014-2017) (Ex. 8). However, in the last four annual surveys, no jumping mice were detected on the Refuge. Ex. 3 at 3; Ex. 8 at 8. In fact, the species has not been found on the Refuge since 2003. Ex. 8 at 6. Nonetheless, since the jumping mouse was listed in

[2] The Unit 6 designation originally included 1,108 acres of critical habitat, but twelve acres were removed in 2012 as a part of a required land exchange for a transportation corridor located on the eastern boundary of the Refuge. Ex. 8 at 4.

1998, the Service has carefully evaluated all its actions on the Refuge that may affect the species or its habitat. These evaluations have included Section 7 consultations in 2005, when the Service evaluated the potential effects of CCP and determined it was not likely to adversely affect any listed species, including the jumping mouse or its habitat (ECF 7-23); 2011 and 2012, when the Service completed two Biological Opinions to evaluate a land exchange, both of which were upheld by the Tenth Circuit (*WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 682 (10th Cir. 2015)); and 2015, when the Service completed a Biological Opinion to evaluate the effects of a prescribed burn (Ex. 9).

The most recent Section 7 consultation that involved the jumping mouse concluded in March 2018. Ex. 3 (informal consult docs)[3]. In the 2018 consultation, the Service evaluated the potential effects of the actions challenged in this case, e.g., using existing roads and stream crossings on the Refuge to provide a series of multi-use trails, along with the other minor adjustments to the Comprehensive Conservation Plan's management direction and strategies identified in the 2018 EAS.[4] *Id.* at 2-3. The 2018 consultation expressly considered the impact of these actions on the jumping

[3] Exhibit 3 is the Intra-Service Section 7 Consultation Form that the Service completed to document the results of its consultation evaluating the actions identified in the 2018 EAS. The administrative record, when filed, will contain the complete record of this informal consultation.

[4] The Service has stated that "[a]ny further improvements to the refuge's visitor amenities (e.g., whether or not to construct a slightly larger visitor facility than proposed in the CCP; whether or not to construct an additional vault toilet; and/or whether or not to construct additional trail connections to the north and east of the refuge) *may* occur in the future and would be subject to future Section 7 determinations." Ex. 3 at 3-4. In fact, the Refuge is currently conducting a Section 7 consultation to evaluate the effects of proposed stream crossings that will be required to create potential future regional trail connections. Lucas Decl. ¶ 13.

mouse and its critical habitat. Ex. 3 at 2. The Service conducted the 2018 evaluation through informal consultation because the Service determined its actions may affect, but were not likely to adversely affect, the jumping mouse and its critical habitat. Ex. 3 at 2-3. This informal consultation was extensive and considered the long history of jumping mouse studies and surveys on the Refuge. *Id.* (informal consult docs).

STANDARD OF REVIEW

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2948 (2d ed. 1995)). Accordingly, "the right to relief must be clear and unequivocal." *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997) (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

If a plaintiff fails to meet its burden on ***any*** of these four requirements, its request must be denied. *See, e.g.*, *id.* at 23-26 (denying injunction on the public interest and balance of harms requirements alone, even assuming irreparable injury and a NEPA violation); *Sprint Spectrum, L.P. v. State Corp. Comm'n*, 149 F.3d 1058, 1060 (10th Cir. 1998) (failure to establish likelihood of prevailing justifies denial of a preliminary injunction); *Chem. Weapons Working Grp. Inc.*, 111 F.3d at 1489 (plaintiffs' failure on

the balance of harms "obviat[ed]" the need to address the other requirements).

STATUTORY BACKGROUND

I. National Environmental Policy Act

NEPA ensures that federal agencies consider the environmental impacts of proposed major federal actions. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978). That goal is "realized through a set of 'action- forcing' procedures that require that agencies take a 'hard look' at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal citation omitted). NEPA mandates the procedures by which agencies must consider the environmental impacts of their actions, but does not dictate the substantive outcomes. *Id.*

II. National Wildlife Refuge System Administration Act of 1966 and National Wildlife Refuge System Improvement Act of 1997

The primary act by which the National Wildlife Refuges are administered nationwide is the National Wildlife Refuge System Administration Act of 1966 ("Refuge Act"), 16 U.S.C. § 668dd *et seq.*, as amended most recently by the National Wildlife Refuge System Improvement Act of 1997 ("Improvement Act"). The Refuge Act officially denominated refuges nationwide as a public land "system" for the first time. The 1966 legislation designated all "categories of areas that are administered by the Secretary of the Interior for the conservation of fish and wildlife," including refuges, wildlife ranges, game ranges, and waterfowl production areas, as the National Wildlife Refuge System ("System"). 16 U.S.C. § 668dd(a)(1). The passage of the Refuge Act designated the Service as the agency required to administer units of the System.

The Improvement Act of 1997, Pub. L. No. 105-57, Oct. 9, 1997, 111 Stat. 1254, amended the Refuge Act. In amending the Refuge Act, Congress stated that "[t]he mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2). The Improvement Act directs that the Secretary shall

> ensure that the mission of the System . . . and the purposes of each refuge are carried out, except that if a conflict exists between the purposes of a refuge and the mission of the System, the conflict shall be resolved in a manner that first protects the purposes of the refuge, and to the extent practicable, that also achieves the mission of the System.

16 U.S.C. § 668dd(a)(4)(D).

III. Endangered Species Act

The ESA was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The ESA provides that a species is "endangered" if it is "in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. § 1532(6), while a species is "threatened" if it is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id*. § 1532(20). When a species is listed as threatened or endangered, the Service also designates critical habitat for that species. *Id*. § 1533(a)(3).

ESA Section 7(a)(2) requires "[e]ach federal agency . . . in consultation with and with the assistance of" the Service to "insure that any action authorized, funded, or

carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). If an agency determines that its actions may affect a listed species or critical habitat, then the agency must pursue either informal or formal consultation with the Service. 50 C.F.R. §§ 402.13-402.14. Informal consultation "is an optional process that includes all discussions, correspondence, etc." between the acting and consulting agencies to assist the acting agency in determining whether formal consultation is required. 50 C.F.R. § 402.13. "If during informal consultation it is determined by the [acting] agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary." *Id.* In such circumstances, formal consultation is not required. *Id*.; C.F.R. § 402.14(b)(1). When the Service is both the acting and consulting agency, as it is here, it conducts intra-service consultation to evaluate its actions. Additionally, an agency may have to reinitiate a prior consultation under certain circumstances, including if the action at issue is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not previously considered, or if a new species is listed or critical habitat designated that may be affected by the action. 50 C.F.R. § 402.16.

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS

Plaintiffs will not succeed on their claims that the Service has failed to conduct required environmental analysis prior to opening trails on the Refuge to the public.

A. Plaintiffs' Claim That the Service Has Violated NEPA Is Without Merit

Plaintiffs' NEPA claim are not likely to succeed because (1) the Service adequately analyzed the environmental impacts of trail use on the Refuge in the CCP; (2) Plaintiffs fail to show significant new circumstances or information that would warrant a Supplemental EIS; and (3) Plaintiffs fail to show that there are extraordinary circumstances that would preclude the use of a categorical exclusion.

1. <u>The Service Analyzed Environmental Impacts of Trail Use on the Refuge in the CCP</u>

Plaintiffs purport to challenge the Service's decision that the minor adjustments to trail locations on the Refuge prior to opening the trails to the general public do not require additional NEPA analysis than what was conducted prior to issuance of the CCP. Instead, Plaintiffs are attempting to use this lawsuit to challenge the decision in the CCP to allow public trail use on the Refuge. Plaintiffs argue that the Service violated NEPA because the CCP allegedly did not address the placement of trails on Refuge lands that are "contaminated with residual plutonium." Pls.' Mot. for Prelim. Inj. ("Pls.' Br.") at 10 (ECF No. 7).

First, Plaintiffs' argument fails because the time to challenge the CCP has long since passed. Plaintiffs' claims are brought pursuant to the Administrative Procedure Act ("APA"), 5.U.S.C. §§ 702-706. Compl. ¶1 (ECF No. 1). The statue of limitations for APA claims is six-years. 28 U.S.C. § 2401(a). Thus, Plaintiffs challenge to the CPP is eight years too late.

Second, even if Plaintiffs could challenge the CCP, their arguments would fail, because the CCP did fully consider the issue of potential plutonium contamination when deciding to allow trail use on the Refuge. The CCP looked at soil contamination on the area to be retained by DOE and on the lands to be transferred to the Service for the

Refuge, and stated that "[l]ands that would require use restrictions will not be transferred to the Service for the Refuge." Ex. 10 at 27. Indeed, the CCP specified that "the Service will not accept transfer of administrative jurisdiction, or as discussed previously, assume full responsibility for managing the Refuge until the EPA has deemed the cleanup complete." *Id.* at 8. The CCP further states that the cleanup action level was "inclusive of Refuge management activities such as trail building … [and] visitor use … and were designed to be safe for the Refuge worker, Refuge visitors, including children, and the greater community." *Id.* at 27.

On May 25, 2007, the EPA published its notice in the Federal Register that "EPA and the State of Colorado, through the Colorado Department of Public Health and Environment (CDPHE), have determined that the Peripheral OU of Rocky Flat Plant and OU 3 (Offsite Areas) poses no significant threat to public health or the environment and, therefore, no further remedial measures pursuant to CERCLA are appropriate. This partial decision pertains to the surface media (soil, surface water, sediment) and subsurface medial, including groundwater." 72 Fed. Reg. 29,276. EPA further specified that the Peripheral OU, which would become the Refuge, "is suitable for all uses." *Id*. at 29,277. This includes trail use. Thus, the Plaintiffs should not be permitted to challenge the CCP/EIS through this challenge to the Environmental Action Statement.

2. <u>There Are No New Circumstances or Information that Would Warrant a Supplemental EIS</u>

Plaintiffs do not show that there are new circumstances or information that would require the Service to conduct a Supplemental EIS ("SEIS"). An SEIS is only required where "[t]here are significant *new* circumstances or information relevant to

environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. 1502.9(c)(1) (emphasis added); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373 (1998) (decision whether to prepare a SEIS is based on whether "the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered."). Here, the Service has already fully considered the environmental impacts of allowing public trail use on the Refuge.

To begin with, information brought to the Service's attention after the agency issued its ROD and approved the CCP/EIS in February of 2005 cannot be the source of an SEIS claim. "[S]upplementation [of an EIS] is necessary only if 'there remains major federal action to occur.'" *Norton v. S. Utah Wilderness All.,* 542 U.S. 55, 73 (2004) (quoting *Marsh*, 490 U.S. at 374). Once the CCP was approved, "there [was] no ongoing 'major federal action' that could require supplementation." *Id.* (finding that there was no ongoing major federal action after the Bureau of Land Management approved a land use plan). Thus, the supposedly new information referenced in Plaintiffs' complaint cannot be the source of new information upon which an SEIS claim is based.

Plaintiffs are also incorrect that the CCP/EIS is "stale" because it is more than five years old. *See* Pls.' Br. at 12. Under the NWRSAA, a CCP is to be reviewed every 15 years "as may be necessary." 16 U.S.C. § 668(e)(1)(A)(iv) The process of creating a CCP for a wildlife refuge is lengthy process that requires the thorough analyzation of many factors and the careful consideration of comments from the public. Here, the Service took approximately 4 years to complete the CCP/EIS after beginning the

scoping process in 2002, and considered over 5,000 comments. Ex. 1 at 10-11. To arbitrarily consider the CCP/EIS "stale" merely because it is over five years old is contrary to the language of the statute and practicalities of creating CCPs.

Moreover, the supposed "new" information set forth by Plaintiffs' does not warrant a Supplemental EIS. Plaintiffs criticize the Service for determining in the EAS that approximately 1 mile of trail could be constructed to provide access to the historic Caprock Mine located on the "Section 16 Parcel" without additional NEPA analysis. Pls.'s Br. at 13. This land was never part of Rocky Flats, and was never subject to the Clean-Up Agreement. The Service conducted a Phase I environmental assessment of the Section 16 Parcel before acquisition, and concluded that "[o]ur research, sampling, and site visits found no known or observable environmental contaminant[] issues related to the parcel." August 11, 2011 Section 16 Tract Phase I (Ex. 11).

Plaintiffs additionally cite allegedly "(i) substantial erosion of features on the Refuge caused by destructive precipitation events in 2013 and 2015, (ii) a buildup of new residential neighborhoods and a public school directly bordering the Refuge to the South, (iii) studies showing that plutonium has migrated from the Refuge to offsite locations, and (iv) reports … indicating higher than expected cancer rates among Rocky Flats' neighbors." Pls.' Br. at 3. This information is not the type of "new" information that would necessitate the completion of a Supplemental EIS, because the Service already considered similar information. The Service has already considered the potential impacts of erosion on plutonium contamination in the CCP. Ex. 10 at 27. The CCP also considered current and planned surrounding land uses, including proposed residential development. *Id.* at 55-56.

Additionally, the post-2014 studies regarding plutonium migration and cancer rates referenced by Plaintiffs do not provide a basis for showing that circumstances have changed since the issuance of the CCP. The alleged "inhalation hazard" found by Marco Kaltofen in the report cited by Plaintiffs actually refers to "naturally occurring" monazites. ECF No. 7-8 at 14. Plaintiffs do not provide the list of studies cited in Randall Stafford's declaration. *See* ECF No. 7-7.

3. <u>There Are No Extraordinary Circumstances that Would Preclude the Use of a Categorical Exclusion</u>

NEPA regulations define categorical exclusions as "actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4; 10 C.F.R. § 1021.410(a)." Here, the categorical exclusion at issue, documented in the the EAS, concerns minor modifications to the locations of trails that have been approved to be opened on the Refuge under the CCP/EIS. Plaintiffs argue that the Service's EAS not an adequate categorical exclusion, because it does not contain an analysis of "extraordinary circumstances." The Tenth Circuit has held that "[w]hen reviewing an agency's interpretation and application of its categorical exclusions under the arbitrary and capricious standard, courts are deferential." *Citizens' Comm. to Save our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1023 (10th Cir. 2002).

Plaintiffs incorrectly argue that the action subject to the categorical exclusion is the opening of trails on the Refuge to the general public. The opening of the Refuge was decided in the CCP/EIS. The EAS at issue in this case merely concerns the adjustment of certain trail locations that have already been approved and that were previously subject to exhaustive environmental analysis. The six extraordinary circumstances that Plaintiffs allege may apply to the EAS all concern the opening of

trails on the Refuge in general, not the specific changes to the CCP/EIS that are at issue in this case. *See* Pls.' Br. at 17-19.

B. Plaintiffs' Claim That The Service Has Violated the National Wildlife Refuge System Administration Act Is Without Merit

Like Plaintiffs' NEPA claim, their allegation that the Service has violated the Refuge Act by relying on an allegedly expired Compatibility Determination ("CD") has no merit. The CCP is the primary management document for refuges. A CCP requires FWS to examine a full range of alternative approaches to refuge management and, after public review, establishes a framework for managing the refuge for a fifteen year period. *See* 16 U.S.C. § 668dd(e). CDs are a step-down component of a CCP which are written determinations required by the Refuge Act that a particular type of activity (farming, hunting, other recreational uses) will not (in the "sound professional judgment" of the Service) "materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." *Id.* § 668ee(1), *see also, id.* § 668dd(d)(3)(A)(i).

The 2005 CCP for the Refuge relied in part on a CD for "Multi-Use (Equestrian, Bicycle and Foot access) Trails" ("Multi-Use Trails CD"). *See* Ex. 10 at 154. The Multi-Use Trails CD states that "this use is subject to mandatory re-evaluation in 10 years, or on the anniversary of the final Compatibility Determination in 2014." *Id*. Plaintiffs' claim that EAS is arbitrary and capricious because it relies on this expired CD. Pls.' Br. at 20-22. Plaintiffs are incorrect, because the Service does not rely on this CD for the EAS. Instead, the Service relies on CD for "Wildlife Observation and Photography, Including Public Use Facility Development to support those uses" ("Wildlife Observation CD") and

the CD for "Interpretation and Environmental Education" ("Education CD"). Ex. 10 at 151 and 158. Both of these CDs analyze public use of trails on the Refuge, find that the use is compatible with the purposes of the refuge, and are not due for re-evaluation until 2019. *Id*.

C. Plaintiffs Are Not Likely to Succeed on the Merits of their ESA Claims

In their complaint and preliminary injunction motion, Plaintiffs allege the Service failed to initiate or reinitiate ESA Section 7(a)(2) consultation to evaluate the alleged effects of the actions identified in the EAS on the Preble's meadow jumping mouse and its critical habitat. Compl. At 6-7, ¶¶ 106-137; Pls.' Br. at 4, 22, 25. However, Plaintiffs are unlikely to succeed on the merits of these claims because they lack standing and their claims are moot.

1. Plaintiffs Have Failed to Establish Standing to Pursue their ESA Claims

First, Plaintiffs have not shown they have standing. To maintain any suit, a plaintiff must prove it has suffered an actual or imminent injury-in-fact caused by the challenged action that is likely to be redressed by a favorable court order. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). An organization may assert standing on its own behalf or as a representative of its members. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009); *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1396 (10th Cir. 1992). Here, Plaintiffs have made no attempt to demonstrate their own standing to bring their ESA claims, and they have only made a cursory effort to prove standing on behalf of one member of one Plaintiff organization.

In two paragraphs of a five paragraph declaration, Mr. Stafford, a member of the Rocky Mountain Peace and Justice Center, states vaguely that he has an interest in

"the protection and conservation of the bird, animal and other species endemic and resident on the Refuge, including but not limited to the threatened Preble's Meadow Jumping Mouse." ECF 7-7 ¶ 4. He alleges without specifics that he "derive[s] great aesthetic, spiritual and recreational benefits from looking for and seeing such species, studying them, enjoying their presence in their natural environment and knowing that the provisions of the [ESA] are protecting and conserving the Jumping Mouse and its Critical Habitat in the Refuge." ECF 7-7 ¶5. Mr. Stafford also vaguely states that his alleged interests in the protection and conservation of the jumping mouse would be harmed by constructing and opening trails on the refuge, but he does not explain how, when, or why. Mr. Stafford provides no evidence of ever having specifically looked for, seen, studied, or enjoyed the presence of a jumping mouse in any particular location, including on the Refuge, at any time. He also fails to indicate any concrete future plans to engage in these actions in any location, at any time. *Id.*

Simply reciting the elements of standing is insufficient to prove its existence, even at this preliminary stage. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 921 (D.C. Cir. 2015) (affirming dismissal of case for lack of jurisdiction in response to preliminary injunction motion because, "taking all of [plaintiff's] allegations and . . . statements as true, [plaintiff] has alleged nothing more than an abstract injury to its interests that is insufficient to support standing."). Mr. Stafford has not shown an actual interest in the jumping mouse, why such an interest would be imminently harmed because of the Service's actions, or how a Court order could redress any such harm. *See, e.g., Summers*, 555 U.S. at 495-97 (upholding dismissal for lack of standing because declaration lacked required specify); *Lujan*, 504 U.S. at 564-566 (same). As a

result, Plaintiffs have not demonstrated standing to bring their ESA claims, and they are not likely to succeed on their merits.

2. <u>The Service has, in fact, Conducted Section 7 Consultation, and Plaintiffs' ESA Claims are Moot</u>

Along with failing to establish standing, Plaintiffs are simply wrong about the facts. They mistakenly allege the Service failed to consult under ESA Section 7 regarding the potential effects of the actions identified in the 2018 EAS. Compl. ¶¶ 106-137. Instead, Plaintiffs claim the Service improperly relied on its 2005 consultation. Pls.' Mot. at 23, 25; Compl. At 6-7. In actuality, however, the Service conducted a *new* Section consultation in 2018 to evaluate the actions identified in the 2018 EAS, as explained above. *See supra* Factual Background, Section II. Whether due to unawareness or some other reason, Plaintiffs have altogether not acknowledged that the 2018 consultation occurred, and they certainly have not brought any claim to challenge its sufficiency.[5] Plaintiffs' ESA claims merely allege that the Service failed to consult as required under ESA Section 7(a)(2). Compl. ¶¶ 106-137. However, because

[5] Nor could they bring such a claim now, because Plaintiffs have not provided Defendants with the sixty-day notice required by the ESA. *See* 16 U.S.C. § 1540(g)(2). The only notice that Plaintiffs provided of their intent to bring any ESA claims regarding the Service's actions at the Refuge was sent on May 24, 2017, in connection with prior litigation, and that notice complained only about the Service's alleged failure to consult regarding the effects of "the construction and opening of trails and the Multi-purpose building" on the jumping mouse and its habitat. Ex. 12. The 2017 notice did not challenge the sufficiency of the 2018 consultation, nor could it, since the notice letter was sent *before* the 2018 consultation had occurred. *Id*.; *Forest Guardians v. U.S. Bureau of Reclamation*, 462 F. Supp. 2d 1177, 1183 (D.N.M. 2006) (dismissing ESA claims for lack of notice because a notice plaintiffs sent for a prior lawsuit "simply could not put Federal Defendants on notice of alleged violations that would occur almost five years later"); *id*. at 1184-85 (rejecting plaintiffs' attempt to cure defective notice by sending supplemental notice after commencing lawsuit).

the Service *did* in fact consult, Plaintiffs' claims are moot, and Plaintiffs are not likely to succeed on the merits of their ESA allegations. *See, e.g., S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 728-29 (10th Cir. 1997) (denying ESA Section 7(a)(2) failure to consult claim as moot because consultation had occurred); *Wild Fish Conservancy v. Nat'l Park Serv.*, 687 F. App'x 554, 557 (9th Cir. 2017) (same); *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759, 765 (8th Cir. 2004) (same).

II. PLAINTIFFS CANNOT DEMONSTRATE IRREPARABLE INJURY

Because Plaintiffs' claims are not likely to succeed on the merits, the Court may end its inquiry here. *See, e.g. Winter*, 555 U.S. at 22. But even if the Court considers the remaining *Winter* factors, Plaintiffs cannot demonstrate the requisite irreparable harm to warrant emergency relief. *Id*. at 20. An injunction may issue only if it is "needed to guard against any present or imminent risk of likely irreparable harm." *Monsanto Co. v. Geerston Seed Farms,* 561 U.S. 139, 162 (2010). And, importantly, Plaintiffs must show that these irreparable injuries are "likely to occur before the district court rules on the merits." *Greater Yellowstone Coal v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003).

To constitute irreparable injury, "an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citation and internal quotation marks omitted). "[T]he party seeking injunctive relief must [also] show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (quotation omitted). This requires a plaintiff to demonstrate by specific facts that there is a credible threat of immediate and irreparable harm.

A. Plaintiffs Cannot Demonstrate Imminent Harm To Their Health

Plaintiffs fail to establish any non-speculative, imminent, irreparable injury to their health. Many of Plaintiffs' allegations of irreparable injury are based on unsubstantiated fears of inhalation of plutonium. *See, e.g.*, Pls.' Br. at 28. Plaintiffs have not presented any expert scientific evidence or any reasonable expectation that such plutonium contamination will occur from the opening of the trails on the Refuge. Plaintiffs' declarations are based wholly on conjecture and apprehension that contamination might occur.[6] Such unsubstantiated speculation about what *might* occur some day in the future, however, does not clearly and unequivocally establish that the alleged effects on the members of Plaintiffs' organizations are "imminent," that there would be "certain and great" injuries to Plaintiffs' interests, or that the possible effects could not be prevented following resolution of this case.

B. Plaintiffs Cannot Demonstrate Irreparable Injury To Their Organizational Goals

Plaintiffs' claim that the Services' "uninformed decision making denigrates" their organizational goals of protecting the public from the alleged plutonium on Rocky Flats is without merit. Pls.' Br. at 26. However, as discussed above, Plaintiffs fail to show that

[6] Courts have also long held that unfounded fears are insufficient to establish Article III standing, and therefore, are insufficient to establish irreparable harm. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013) (plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm. . . ."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) (plaintiff's "subjective apprehensions" that allegedly unlawful conduct would occur again were not enough to support Article III standing).

that the Service has not thoroughly analyzed the opening of trails on the Refuge to the public. Plaintiffs should not be allowed to use this action to challenge CCP/EIS.

C. Plaintiffs Cannot Demonstrate Any Interest In the Jumping Mouse that Would be Irreparably Harmed

As to their ESA claims, Plaintiffs have not demonstrated any interest in the jumping mouse that could be irreparably harmed by the Service's actions. *See supra* Argument Section I.C. Plaintiffs' allegation that their interest "in viewing the Jumping Mouse in areas of the Refuge that may be accessible to the public" would be irreparably harmed is particularly misguided. Pls.' Br. at 29. Plaintiffs seek this preliminary injunction to prevent the public from accessing the Refuge because Plaintiffs believe it is unsafe. Why then would any members of the Plaintiff organizations go to the Refuge to view the jumping mouse? And, if Plaintiffs' requested injunction is granted and the Refuge's public access points and trails are not opened to the public, how would Plaintiffs' members access the Refuge to view the jumping mouse? In the end, it is Plaintiffs' attempt to prohibit public access to the Refuge that would irreparably harm their members' alleged interest in viewing the jumping mouse there, not Defendants' actions. Additionally, in March 2018, Defendants completed a Section 7(a)(2) consultation on the actions identified in the 2018 EAS and determined they are not likely to adversely affect the jumping mouse or its habitat. *See supra* Factual Background, Section II. Therefore, whenever those actions are ultimately implemented, they will not cause any irreparable harm to the jumping mouse, its habitat, or Plaintiffs' alleged interest in the same.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST FAVORS DENYING PLAINTIFFS' MOTION

Plaintiffs' claims of alleged injuries are outweighed by the harm that would inflicted upon the United States and the public interest where even a temporary preliminary injunction to issue. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941)).

First, the balance of harms weighs against granting Plaintiffs' injunctive relief. There are numerous benefits to public of the opening of trails on the Refuge, and these benefits must be considered against Plaintiffs' alleged harms. The purpose of opening the trails is to provide the public with access to the unique landscape of the Refuge in accordance with the Rocky Flats Act. *See* § 3177(e)(3). In contrast, as discussed above, Plaintiffs have failed to show that they would suffer any irreparable harm from the opening of trails on the Refuge. Second, a preliminary injunction would not be in the public interest. Here, there is no irreparable injury to Plaintiffs as discussed above. Further, the relief Plaintiffs seek includes enjoining "any additional work by Defendants and/or their agents on the Trails and/or Multipurpose Facility including construction of the Public Trails or the facilitation thereof." Pls.' Br. at 32-33. Preventing the Service from conducting "any additional work" is an extremely broad demand. For example, this could include preliminary design work, necessary to come to a final decision as to the construction of trails and a multipurpose facility that are not even the subject of the agency decision at issue, and is not in the public interest.

CONCLUSION

Plaintiffs have failed to establish any of the requirements for emergency injunctive relief, and the Court should deny their motion for preliminary injunction.

Respectfully submitted this 11th day of June 2018,

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/s/ Jessica M. Held

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CERTIFICATE OF SERVICE

I certify that on June 11, 2018, the foregoing will be electronically filed with the Court's electronic filing system, which will generate automatic service upon all Parties enrolled to receive such notice.

/s/ Jessica M. Held

Jessica M. Held