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. 1:17-cv-01210-CMA **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 constructing trails and a multipurpose facility on the Rocky Flats National Wildlife Refuge ("Refuge").[1] In satisfaction of the National Environmental Policy Act ("NEPA"), the Service approved construction and operation of trails and a multipurpose facility for visitors 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. Decl. of David Lucas, Rocky Flats Nat'l Wildlife Refuge Manager, ¶¶

[1] Plaintiffs may also be seeking cancelation of the guided public tours by Service staff currently held on the Refuge. *See* Pls.' Mem. in Supp. of Mot. for Prelim. Inj. 3 (ECF No. 6-1) ("Pls.' Br."), Pls.' Proposed Order (ECF No. 13-4). However, neither their Amended Complaint (ECF No. 11), nor Motion for Preliminary Injunction (ECF No. 6) seek such relief. Further, their Memorandum in Support also contains no argument in support of such a request for the cancelation of these tours. Indeed, Plaintiffs' Amended Complaint admits that such tours have been provided by the Service since 2015. Am. Compl. ¶ 60. Thus, to the extent Plaintiffs seek to enjoin the guided public tours currently provided on the Refuge, their request has no has no merit.

3, 4, 5 (Ex. 1) ("Lucas Decl."). In continuing compliance with NEPA, the Service will issue final decisions regarding the building of trails and the multi-purpose facility on the Refuge prior to ground breaking for their construction, but only after completing any additional environmental review that the Service determines is required by law. Lucas Decl. ¶¶ 9, 13. Despite these efforts, and although construction of trails and the visitor center is not occurring, Plaintiffs are not satisfied.

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 its claims, because they are not ripe. The Service has not yet issued its final decision as to the construction of trails and the multipurpose facility, and will conduct any required environmental review prior to doing so. Lucas Decl. ¶¶ 9, 13.

Plaintiffs' claims of irreparable injury are equally untenable, because they fail to show that any potential harm is imminent. No ground breaking activities will occur in 2017, and ground breaking would likely not occur until the summer of 2018, at the earliest. Lucas Decl. ¶¶ 9, 13.

In contrast to Plaintiffs' lack of cognizable injuries, a preliminary injunction would cause greater harm to the United States, because it would delay the issuance of final decisions regarding the construction of trails and the multipurpose facility on the Refuge, preventing the public from accessing the Refuge contrary to the Rocky Flats Act of 2001

and benefiting from its unique natural setting based on claims that are wholly unsupported.

FACTUAL BACKGROUND

The Refuge was formally established in 2007 after clean-up occurred by the Department of Energy ("DOE"), and 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 County. *Id.* DOE produced nuclear weapon components at Rocky Flats for forty years, with the vast majority of these operations occurring in the approximately 300-acre Industrial Area located near the center of the property. *See* Rocky Flats Natl' Wildlife Refuge Act of 2001 ("Rocky Flats Act"), Pub. L. No. 107-107, § 3172(a)(1), 115 Stat. 1012, 1379. The remainder of the site, sometimes referred to as the "Buffer Zone," was 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 portions of the Rocky Flats environment. CAD/ROD for Rocky Flats Plant 2006, 2 (Ex. 2). 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.[2] *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

[2] 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).

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 human health and other 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 Service. Pub. L. No. 107-107, §§ 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.*

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. 2005 Record of Decision, 1 (Ex. 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. 3. 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. 2. 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 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. 2 at 3. They further concluded that conditions in this operable unit, "are acceptable for unrestricted use and unlimited exposure." Ex. 2 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. 4). 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. 5).

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).

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 constructing trails and a multipurpose facility on the Refuge, because their claims are not ripe. In deciding whether an agency's decision is ripe for judicial review, a court must consider: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n v. Sierra Club*, 523

U.S. 726, 733 (1998). In the Tenth Circuit, "A vital aspect of the requirement that issues be fit for review is that the suit challenge 'final agency action.'" *Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric.,* 197 F.3d 448, 450 (10th Cir.1999).

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

Plaintiffs argue that the Service violated NEPA when it allegedly failed to conduct any environmental analysis prior to constructing trails and the multipurpose facility on Rocky Flats. Pls.' Br. 6-7. DOI regulations require that that the Service "apply the procedural requirements of NEPA when the proposal is developed to the point that: (1) The [Service] has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal; and (2) The effects of the proposed action can be meaningfully evaluated." 43 C.F.R. § 46.100(b). Plaintiffs' arguments must fail, because they are not ripe. First, the Service has not yet issued final decisions regarding the construction of the trails and multipurpose facility, and will conduct any required environmental reviews prior to issuing those decisions. Lucas Decl. ¶¶ 9, 13. Thus, postponing review would not cause hardship to the Plaintiffs, because there will be no groundbreaking until the Service issues those decisions. *Id.* Second, judicial review here would interfere with the Service's planning process, because it would deprive the Service of coming to a final decision as to the construction of trails and the multipurpose facility on the Refuge, as well as their determination as to what, if any, environmental review is required in addition to that already contained in the 2005 CCP/EIS. *See* Lucas Decl. ¶ 11 (describing public engagement process thus far). Third, the Court would benefit from learning what decision the Service ultimately makes so that it may judge whether or not the Service has conducted sufficient NEPA review.

Plaintiffs' argument also relies heavily on their erroneous assertion that this case is similar to *Sierra Club v. United States DOE*, 255 F.Supp.2d 1177 (D.Colo. 2002). In *Sierra Club,* the DOE issued a final decision granting a right-of-way easement over a portion of Rocky Flats to access a mine pursuant to a categorical exclusion, and in doing so, determined that granting the easement did not require preparation of an EA or EIS, in part because the easement and mine were not connected actions. 255 F.Supp.2d at 1182-83. 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). The court held that DOE's failure to consider and evaluate the mine's impacts on the environment at the time the easement was issued was arbitrary and capricious. *Sierra Club*, 255 F.Supp.2d at 1186. In contrast, here the Service has not even made a final decision as to the ultimate construction of trails and the multipurpose facility, and what environmental review may be required. It is premature to determine whether the Service should have conducted an EA or EIS, because unlike the DOE in *Sierra Club*, the Service has not yet issued final decisions.

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 National Wildlife Refuge System Administration Act ("Refuge Act") by relying on an allegedly expired Compatibility Determination ("CD") is premature and based on the false premise that the Service will begin construction of multi-use trails without issuing a decision that has been based on the appropriate environmental reviews. Pls.' Br. 9-10. 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. 6. 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 the Service is in violation of this CD through its construction of multi-use trails is not ripe, because the Service is not yet constructing any multi-use trails and will not construct any multi-use trails until it issues a final decision. Lucas Decl. ¶¶ 9, 13.

C. Plaintiffs' Claim That The Service Has Violated EO11990 Is Without Merit

Plaintiffs' claim that the Service has violated EO11990 is likewise without merit, because it is also unripe. Under EO11990, federal agencies are to avoid new construction in wetlands unless: (1) there is "no practicable alternative" to the construction, and (2) the federal action includes "all practicable measures to minimize harm to wetlands." Exec. Order No. 11990 § 2(a), 42 Fed. Reg. 26,961 (May 24, 1977) ("EO 11990"). In evaluating "practicable" alternatives, EO11990 expressly allows for balancing of various factors including "economic, environmental and other pertinent factors." *Id.* An agency is not required to select the alternative with the least impact to wetlands. *See, e.g.*, *City of Dania*

Beach v. FAA, 628 F.3d 581, 591 (D.C. Cir. 2011). There is no set way for agencies to demonstrate compliance with EO11990, "so long as the project's consistency with the Executive Order can be reasonably inferred from the record." *Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1330 (S.D. Cal. 1998). Here, Plaintiffs' claim that the Service has violated EO11990 is not ripe, because the Service has not yet issued a final decision as to the construction of the trails and multipurpose facility. Lucas Decl. ¶¶ 9, 13. Thus, the Court would be unable to make the determination as to whether or not the Service demonstrated compliance with EO11990.

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. 12-13. Plaintiffs have not presented any expert scientific evidence or any reasonable expectation that such plutonium contamination will occur from the construction of trails or the multipurpose facility on the Refuge. Plaintiffs' declarations are based wholly on conjecture and apprehension that contamination might occur.[3] Furthermore, the trails and multipurpose facility are not under construction, and no construction will be undertaken until the Service issues final decisions. Lucas Decl. ¶¶ 9, 13. Specifically, no ground breaking activities will occur in 2017 and would likely not occur until the summer of 2018 at the earliest. *Id.* Thus, Plaintiffs can only speculate that future ground breaking activities undertaken during construction of the trails and multipurpose facility might result in "health impacts from inhaling plutonium." Pls.' Br. 13. Such unsubstantiated speculation about what *might* occur some day in the future, however, does not clearly and unequivocally establish that the alleged

[3] 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).

effects on the members of Plaintiffs' organizations are "imminent," that there would be "certain and great" injuries to Plaintiffs' interests, or that the possible construction 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 migration of plutonium from Rocky Flats is without merit. Pls.' Br. 10. First, Plaintiffs rely on *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) to argue that under NEPA, an injury results from uninformed decision making. *Id.* at 10-11. However, under *Davis*, Plaintiffs still must show that "environmental harm results in irreparable injury to their specific environmental interests." 305 F.3d at 1115. As discussed above, Plaintiffs cannot show this, because the Service has yet to issue a final decision.[4] Second, Plaintiffs argue that the Service's receipt of funding for the multipurpose facility and trails predetermine the Service's decision. Pls.' Am. Errata 3-4 (ECF No. 13). NEPA regulations require that "[a]gencies shall not commit resources prejudicing selection of alternatives before making a final decision." 40 C.F.R § 1502.2(f); *see also* 40 C.F.R. § 1506.1(a). The Tenth Circuit has concluded that "predetermination 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

[4] *Davis* also does not support Plaintiff's request for an injunction here because even after the Tenth Circuit's findings of predetermination and other NEPA violations, it remanded the matter only "for entry of a preliminary injunction barring further road construction pending resolution of this case on the merits." 302 F.3d at 1126. Notably, the remand did not require an injunction against further planning and design as Plaintiff seeks here, only construction.

certain outcome." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010). The evidentiary standard to prove predetermination is high. *See id*.

Here, the Service has not committed itself to an outcome independent of the NEPA process. The financial and public engagement documents on which Plaintiffs base their predetermination argument fail to establish irreversible and irrevocable commitments to a particular NEPA outcome. Lucas Decl. ¶¶ 7, 8, 10, 11. To the extent the documents may suggest that the Service had a preference for a Build alternative rather than a No Build alternative, it is not a violation of NEPA. There is nothing unlawful in an agency having a preference among the alternatives in a NEPA process; in fact, the NEPA regulations require identification of a preferred alternative. 40 C.F.R. § 1502.14(e). Nor does NEPA require "subjective impartiality" of an agency undertaking a NEPA analysis. *Forest Guardians*, 611 F.3d at 712 ("An agency can have a preferred alternative in mind when it conducts a NEPA analysis") (citing 40 C.F.R. § 1502.14(e)). Consequently, it is not unlawful for an agency to anticipate the possible outcome of the NEPA process. *Id*. at 715 ("We would not hold . . . that predetermination was present simply because the agency's planning, or internal or external negotiations, seriously contemplated, or took into account, the possibility that a particular environmental outcome would be the result of its NEPA review of environmental effects.").

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 construction of trails and a multipurpose facility on the Refuge, and these benefits must be considered against Plaintiffs' alleged harms. The purpose of constructing the trails and a multipurpose facility 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). Importantly, it cannot be forgotten that there is significant public support for the construction of trails and a multipurpose facility on the Refuge. Lucas Decl. ¶ 12. 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 receipt of, or expenditure of federal funding, for the Trails and Multipurpose Facility, until the Court has ruled on the merits of Plaintiffs' claims." ECF No. 13-4. Preventing the Service from spending money on activities, such as preliminary design work, necessary to come to a final decision as to the construction of trails and the multipurpose facility is not in the public interest. Moreover, Plaintiffs' contention that the public interest favors an injunction to enforce compliance with NEPA is without merit, because as discussed above, the Service will issue a final decision regarding the construction of the trails and multipurpose facility after it conducts what it determines to be the proper environmental review. *Cf.* Pls.' Br. 13.

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 9th day of June 2017,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division

/s/ Jessica M. Held

JESSICA M. HELD
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
601 D Street, NW, Room 3144
Washington, D.C. 20004
(202) 305-0575 (phone)
(202) 305-0506 (fax)
Jessica.Held@usdoj.gov

Attorney for Federal Defendants

CERTIFICATE OF SERVICE

I certify that on June 9, 2017, 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