IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE; THE WILDERNESS SOCIETY; and NATURAL RESOURCES DEFENSE COUNCIL, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF LAND MANAGEMENT; JUAN PALMA, Utah State Director; JERRY KENCZKA, Assistant Vernal Field Office Manager; and KENT HOFFMAN, Deputy State Director, Defendants, and GASCO ENERGY, INC., Intervenor-Defendant.	**MEMORANDUM DECISION AND ORDER** Case No. 2:13-cv-01060-EJF Magistrate Judge Evelyn J. Furse

Plaintiffs Southern Utah Wilderness Alliance, The Wilderness Society, and Natural Resources Defense Council (collectively, "SUWA") challenge Defendants United States Department of the Interior, United States Bureau of Land Management, Juan Palma, Jerry Kenczka, and Kent Hoffman's (collectively, the "BLM") final environmental assessment ("EA"), decision record, and finding of no significant impact ("DR/FONSI") for Intervenor-Defendant Gasco Energy's ("Gasco") Sixteen-Well Project. (3d Am. Compl. for Declaratory & Injunctive Relief ("3d Am. Compl.") ¶¶ 1–2, 18, 20, ECF No. 76.) SUWA alleges the BLM violated the National Environmental Policy Act ("NEPA") by failing to take a "hard look" at the

environmental impacts of the Sixteen-Well Project in the EA, failing to consider alternatives that included appropriate mitigation measures, and failing to properly discuss or disclose incomplete or unavailable information. (*Id.* ¶¶ 101–118.) Having carefully considered the parties' briefing, case record, and oral argument, the Court finds the BLM acted arbitrarily and capriciously by finding no significant impact from the proposed action on this record. Therefore, the Court REMANDS the DR/FONSI to require the BLM to reconsider its finding of no significant impact after considering updating its air quality analysis with Uinta Basin data and explaining its choice, considering noise impacts and explaining the impact or lack thereof, and revising or explaining why the BLM did not use the Greater Uinta Basin Technical Support Document's forecast of reasonably foreseeable wells to conduct its cumulative impacts analysis. The Court finds the BLM did not err in its choice of alternatives to present.

I. FACTUAL BACKGROUND

In February 2006, the BLM published a notice of intent to prepare an environmental impact statement regarding Gasco's Uinta Basin Natural Gas Development Project ("Gasco project"). (BLM Notice of Intent, Feb. 10, 2006, GASCOEIS0000065, ECF No. 98.) The Gasco project includes approximately 206,826 acres, (BLM Record of Decision, June 2012, GASCOEIS0015291, ECF No. 98), bound by the Green River on the east, Monument Butte oil field on the north, Ashley National Forest on the west, and Nine Mile Canyon on the south. (3d Am. Compl. ¶ 29, ECF No. 76.) SUWA submitted comments in response to the BLM's notice of intent. (SUWA et al. Comments, Mar. 13, 2006, GASCOEIS0000455, ECF No. 98.)

In October 2010, the BLM released a draft environmental impact statement analyzing Gasco's proposed action and four alternatives. (BLM Notice of Availability, Oct. 1, 2010, GASCOEIS0002648-2650, ECF No. 98.) The BLM preferred the proposed action. (*Id.* at

GASCOEIS0002649.) SUWA and many others, including the Environmental Protection Agency ("EPA"), submitted comments identifying perceived inadequacies in the draft environmental impact statement. (SUWA et al. Comments, Dec. 29, 2010, GASCOEIS2762, ECF No. 98; EPA Comments, Jan. 7, 2011, GASCOEIS3100, ECF No. 98.) In March 2012, the BLM released the final environmental impact statement ("Gasco EIS") analyzing a new alternative that the BLM preferred. (Gasco Final Envtl. Impact Statement, Mar. 16, 2012, GASCOEIS0003202, ECF No. 98.) The preferred alternative allows Gasco to drill up to 1,298 new gas wells from up to 575 new well pads, build 198 miles of roads and 316 miles of pipelines, expand two existing compressor facilities by approximately 18,200 horsepower, and construct a new evaporative facility with up to twelve evaporative basins. (*Id.* at GASCOEIS0003258-59.) Shortly after the release of the Gasco EIS, SUWA sent the BLM letters regarding the agency's failure to consider three recently released guidance documents and other environmental issues. (SUWA et al. Comments, Apr. 16, 2012, GASCOEIS0014343, ECF No. 98.) Specifically, the letter took issue with the use of data from Canyonlands National Park to estimate air quality impacts in the Uinta Basin, (*id.* at GASCOEIS0014356), and criticized the BLM's failure to use the BLM's latest growth projections from the Greater Uinta Basin Technical Support Document, which issued in March 2012, (*id.* at GASCOEIS0014361).

The BLM issued the record of decision approving its preferred alternative for the Uinta Basin project ("ROD") in June 2012. (BLM R. of Decision, June 2012, GASCOEIS0015286, GASCOEIS0015291, ECF No. 98.) Although the BLM made no substantive changes to its preferred alternative, (*id.*), the ROD requires Gasco to obtain additional approval before starting any surface-disturbing activities, thus triggering another round of NEPA analysis. (BLM R. of Decision, June 2012, GASCOEIS0015295, ECF No. 98.)

Gasco subsequently applied for permission to drill sixteen new gas wells from three existing well pads that it would expand and install 26,587 feet of surface gas gathering pipeline infrastructure within the project area (the "Sixteen-Well Project"). (Gasco Proposal, July 2014, Gasco 16 Wells AR 0004674, ECF No. 98.) In spring 2014, the BLM released a draft environmental assessment regarding Gasco's proposal for public comment. (Draft Envtl. Assessment, Gasco 16 Wells AR 0001540, ECF No. 98.) The draft environmental assessment analyzed the proposed action and a no-action alternative. (*Id*. at Gasco 16 Wells AR 0001554.) SUWA submitted comments identifying problems with the draft environmental assessment, including its prior criticisms of the Gasco EIS because the draft environmental assessment relies on analysis in that document. (SUWA Comments, Apr. 29, 2014, Gasco 16 Wells AR 0001578, ECF No. 98.)

In July 2014, the BLM released the EA and issued a DR/FONSI approving the Sixteen-Well Project without making significant changes to the draft environmental assessment. (Final Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004671, 0004712-16, ECF No. 98.) SUWA requested the BLM's Utah State Director review the EA and the DR/FONSI, raising a number of issues it had identified in its comments. (SUWA Request for Review, Aug. 8, 2014, Gasco 16 Wells AR 0005408, ECF No. 98.) In August 2014, Mr. Kent Hoffman, the Deputy State Director, affirmed the EA and the DR/FONSI. (State Dir. Decision, Aug. 22, 2016, Gasco 16 Wells AR 0005384, ECF No. 98.)

II. PROCEDURAL HISTORY

SUWA filed its Complaint at the end of 2013, alleging violations of NEPA and the Fair Land Policy and Management Act ("FLPMA") relating to an environmental assessment, decision record, and finding of no significant impact regarding Gasco's proposal to drill six oil wells from

six existing well pads. (ECF No. 2.) In early 2014, Gasco filed a Motion to Intervene, (ECF No. 10), which the Court granted, (ECF No. 17). SUWA then amended its Complaint twice, once in February 2014, (ECF No. 18), and again in November 2014, (ECF No. 31). The first amendment added NEPA and FLPMA claims relating to the Gasco EIS and the ROD. (ECF No. 18.) The second amendment added NEPA and FLPMA claims relating to the Sixteen-Well EA and DR/FONSI. (ECF No. 31.) The BLM and Gasco filed Motions to Dismiss SUWA's Second Amended Complaint in January 2015. (ECF No. 41, 42.) On July 17, 2015, this Court issued a Memorandum Decision and Order granting in part and denying in part the BLM and Gasco's Motions to Dismiss. (ECF No. 71.) Specifically, the Court dismissed all claims relating to the EA, the Gasco EIS, the ROD, and the Six-Well Environmental Assessment and Decision Record/Finding of No Significant Impact with prejudice. (Mem. Decision & Order Granting in Part & Denying in Part Defs.' & Intervenor-Defs.' Mots. to Dismiss 19, ECF No. 71.) The Court also dismissed the FLPMA claims concerning the Sixteen-Well DR/FONSI without prejudice but denied the Motions to Dismiss with respect to the NEPA claims relating to the Sixteen-Well DR/FONSI. (*Id.*) At the hearing on the Motions to Dismiss, the BLM acknowledged

> that when subsequent NEPA analyses for site-specific projects rely on a broad, programmatic environmental impact statement, such as this EIS, a plaintiff may challenge those portions of the environmental impact statement and the process leading up to the statement in addition to challenging the NEPA analysis done for the site-specific project.

(*Id.* at 11.) Thus, SUWA can challenge the ROD to the extent the DR/FONSI relies on the EIS in reaching its conclusion.

On July 30, 2015, SUWA filed a Third Amended Complaint challenging the BLM's DR/FONSI for the Sixteen-Well Project under NEPA for the convenience of the parties but without waiving "any issues on claims raised in the second amended complaint for appeal." (3d

Am. Compl., ECF No. 74.) On August 6, 2015, SUWA filed an errata to the Third Amended Complaint. (ECF No. 76.) Both the BLM and Gasco each answered the Third Amended Complaint on August 13, 2015. (ECF Nos. 82, 83.) SUWA filed its opening brief seeking review of agency action on January 22, 2016, (ECF No. 92), the BLM and Gasco each filed an opposition brief on March 11, 2016, (ECF Nos. 105, 106), and SUWA filed a reply brief on April 22, 2016, (ECF No. 110). The Court heard oral argument on June 1, 2016. (ECF No. 111.)

III. STANDARD OF REVIEW

Because NEPA does not provide for a private cause of action, plaintiffs must bring suit under the Administrative Procedure Act ("APA"). *Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998). The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" they find "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action qualifies as arbitrary and capricious

> if the 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. Co., 463 U.S. 29, 43 (1983); *Wild Earth Guardians v. U.S. Fish & Wildlife Serv.*, 784 F.3d 677, 682-83 (10th Cir. 2015) (citing same standard in reviewing an environmental assessment).

When reviewing an agency's factual determinations during the NEPA process, absent a clear error of judgment, the court need only ask "whether the agency took a 'hard look' at information relevant to the decision." *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009). "In considering whether the agency took a 'hard look,' we

consider only the agency's reasoning at the time of decisionmaking, excluding post-hoc rationalization concocted by counsel in briefs or argument." *Id.* "Deficiencies in an EIS [and hence an EA] that are mere 'flyspecks' and do not defeat NEPA's goals of informed decisionmaking and informed public comment will not lead to reversal." *Id.* "A presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action." *Id*.

IV. DISCUSSION

NEPA requires federal agencies to prepare a "detailed statement" for "major Federal actions significantly affecting the quality of the human environment," also known as an environmental impact statement. 42 U.S.C. § 4332(C). An environmental impact statement serves two purposes:

> First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."

Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 (2004) (alteration in original) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). However, an agency can prepare a less detailed environmental assessment first to help it determine whether it must prepare an environmental impact statement. Silverton Snowmobile Club v. U.S. Forest Service, 433 F.3d 772, 780 (10th Cir. 2006). An environmental assessment includes information on the environmental impacts of a proposed action and an analysis of possible alternatives but in a "concise public document." See 40 C.F.R. § 1508.9. An environmental assessment serves a few purposes: "(1) Briefly provid[ing] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid[ing] an

agency's compliance with [NEPA] when no environmental impact statement is necessary. (3) Facilitat[ing] preparation of a statement when one is necessary." 40 C.F.R. § 1508.9(a). If the agency finds no significant impact will occur from the proposed action, it need not prepare an environmental impact statement. *Silverton*, 433 F.3d at 780; 40 C.F.R. § 1508.9(a)(1).

"[T]o eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision," NEPA regulations also encourage agencies to "tier" environmental assessments and environmental impact statements to previous environmental impact statements. 40 C.F.R. § 1502.20. "Tiering" means the agency may incorporate by reference general discussions from a prior, broader environmental impact statement into the current environmental assessment so that the agency can concentrate solely on the issues specific to the current environmental assessment. *Id.*; 40 C.F.R. § 1508.28.

SUWA alleges the BLM failed to take a hard look at three distinct issues relating to the Sixteen-Well Project in issuing the DR/FONSI. (Pls.' Opening Br. ("Opening") 7, ECF No. 92.) First, SUWA argues the "BLM failed to take a hard look at the direct effects of this project on air pollution because BLM used improper data [from Canyonlands National Park instead of the Uinta Basin] in its air quality modeling." (*Id.*) Second, SUWA argues the "BLM failed to take a hard look at the potential impacts to recreation on the Green River from the noise of development and operations resulting from the 16-Well project." (*Id.* at 8.) Third, SUWA argues the "BLM failed to take a hard look at the cumulative impacts from the 16-Well project and other activities on ozone pollution." (*Id.*)

SUWA also argues the BLM violated NEPA by failing to consider two of SUWA's proposed alternatives to the Sixteen-Well Project. (*Id.* at 9.)

A. The BLM Acted Arbitrarily and Capriciously in Making its Finding of No Significant Impact Without Considering Whether to Analyze More Accurate Data from the Uinta Basin.

In preparing the EA, the BLM tiered the air quality analysis to the Gasco EIS. (Final 16-Well Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004680, ECF No. 98.) The Gasco EIS used weather data from Canyonlands National Park ("Canyonlands") to analyze how pollutants from the Sixteen-Well Project, in addition to all the pollutants from the larger Gasco project, would react in the atmosphere. (*See id*. at Gasco 16 Well AR0004706; Gasco Final EIS, App. P, GASCOEIS0005176, ECF No. 98.) Canyonlands sits nearly one hundred miles south of the Uinta Basin. (Gasco Final EIS, GASCOEIS0003297, ECF No. 98.) SUWA's comments to the Gasco EIS and the draft environmental assessment explained that relying on the Canyonlands meteorological data for the Uinta Basin would yield inaccurate results because the Uinta Basin has "unique atmospheric and meteorological conditions," such as cold temperatures and stagnant air. (SUWA et al. Comments, April 16, 2012, GASCOEIS0014710, ECF No. 98; SUWA Comments, April 29, 2014, Gasco 16 Wells AR 0001585-86, ECF No. 98.)

In January 2011, the EPA commented on the draft environmental impact statement, specifically stating "[t]o provide more representative near-field results, meteorological data should be used from stations within the Uinta Basin, such as the Vernal Airport or the Redwash or Ouray monitoring sites." (EPA Comments, Jan. 7, 2011, GASCOEIS0003109, ECF No. 98.) The BLM did not change the source of its data prior to issuing the Gasco ROD, however. (BLM R. of Decision, June 2012, GASCOEIS0015303-04, ECF No. 98.) Instead the BLM responded that "[t]he best available, approved meteorological data w[as] used on the modeling effort for the air quality analysis at the time of the analysis." (Gasco Final Envtl. Impact Statement, Public Comment Summary, GASCOEIS0005176, ECF No. 98.) When SUWA reasserted its concern in

its comments to the draft environmental assessment in April 2014, the BLM referenced its 2012 response. (Final 16-Well Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004706, ECF No. 98.)

In defense of its action, the BLM notes that "although there were monitors closer to the project area than Canyonlands National Park, those data points had been operated for shorter periods of time and, therefore, did not provide sufficient data on which to base on accurate 'near field' analysis." (Federal Defs.' Opp'n Brief ("Federal Opp'n") 20, ECF No. 105.) Gasco offers support for the B LM decision from a technical support document in the draft environmental impact statement, in which the BLM acknowledged that it had data available from near the Sixteen-Well Project but that data suffered from "several drawbacks." (Gasco Opp'n 19-20, ECF No. 106 (citing GASCOEIS0004142-43).) Additionally, the BLM found Canyonlands' meteorological conditions "sufficiently similar" to the Uinta Basin's for analytical purposes. (Federal Opp'n 20, ECF No. 105 (citing GASCOEIS0004142-43, ECF No. 110-2).) The BLM and Gasco both argue that NEPA entitles the BLM to rely on its own technical expertise in determining the appropriate data to use under the circumstances and grants such a choice deference. (Federal Opp'n 21, ECF No. 105; Gasco Opp'n 20-21, ECF No. 106.)

While agencies may rely on their own technical expertise, *see Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (holding "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts"), such deference does not absolve the BLM of its obligation to update the analysis in light of significant new information, *id*. at 374. Agencies must "take a 'hard look' at the environmental effects of [their] planned action, even after a proposal has received initial approval." *Marsh*, 490 U.S. at 374. As further evidence of this obligation, an agency must prepare a supplemental

environmental impact statement if "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise. 40 C.F.R. § 1502.9(c)(1)(ii); *Wyoming v. U.S. Dept. of Agric.*, 661 F.3d 1209, 1257 (10th Cir. 2011). When reviewing a decision not to supplement, "courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information." *Marsh*, 490 U.S. at 378. While SUWA does not request a supplemental environmental impact statement, the law in this area should have informed the BLM's decision to update the air quality model at this stage.

Upon examining the record, the Court finds the BLM failed to take a hard look at the new meteorological data from the Uinta Basin. The BLM's explanation for failing to update the air quality analysis with Uinta Basin data in the Gasco EIS states that the Canyonlands data was the best available meteorological data "at the time of the analysis." (Gasco Final Envtl. Impact Statement, Public Comment Summary, Mar. 16, 2012, GASCOEIS0005176, ECF No. 98.) The BLM prepared the near-field analysis in April 2008 and revised the analysis in April 2010. (Gasco Final Envtl. Impact Statement, Near-Field Analysis, Mar. 16, 2012, GASCOEIS0004128, ECF No. 98.) The BLM acknowledged the need to update its ozone models after completion of the Gasco EIS in an internal response to the EPA's comments and questions on the draft environmental impact statement. (BLM's Responses to EPA Comments, Mar. 29, 2011, embedded in GASCOEIS0022837, ECF No. 98.) The ROD reflects this commitment with respect to "project specific ozone impacts." (BLM R. of Decision, June 2012, GASCOEIS0015307, ECF No. 98.)

The BLM issued the Gasco ROD in June 2012 and the final Sixteen-Well DR/FONSI in July 2014. (BLM R. of Decision, June 18, 2012, GASCOEIS0015290, ECF No. 98; Final 16-Wells Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004712-16, ECF No. 98.) The DR/FONSI gives no explanation of why the more localized data is not now ripe for analysis, some four years after the last updated modeling. Nor does the DR/FONSI explain why the BLM chose not to update its model with the more site specific data. Instead, the BLM merely referenced its response to the EPA's comments on the draft environmental impact statement. (Final 16-Wells Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004706, ECF No. 98.)

The Court notes the potential for the air quality analysis to go un-updated indefinitely. The BLM completed the EIS for the entire Gasco Uinta Basin Project in 2012 and issued the ROD, which did not constitute a final agency action because it required additional approval prior to any surface disturbing activities. (BLM R. of Decision, June 2012, GASCOEIS0015295, ECF No. 98.) Therefore, SUWA could not challenge the ROD. (Mem. Decision & Order 10-11, July 17, 2015, ECF No.71.) Since that time Gasco has, as anticipated, sought piecemeal approval to proceed with small portions of its project, like this Sixteen-Well Project.

At oral argument the BLM admitted that at some point in the future it would have to reconsider its use of the Canyonlands data, just not here. If that position were correct, one can imagine years passing, multiple subprojects receiving approval, and every one referring to the analysis that in 2010 the BLM lacked Uinta Basin data and the Canyonlands data is close enough. Each subproject would of course be too small to warrant the effort to input new data, produce new results, and analyze them.[1]

[1] The BLM described the time and money such an effort would entail at oral argument.

However, the law requires more. Each time new, site specific data becomes available, and a new project is proposed, the BLM must take a hard look at it, determine its significance, and explain its decision regarding the data's significance. *Marsh*, 490 U.S. at 385 ("It is also clear that, regardless of its eventual assessment of the significance of this information, the Corps had a duty to take a hard look at the proffered evidence.") Additionally, NEPA regulations reflect a preference to engage in environmental analyses at "the earliest possible time." *N.M.ex rel. Richardson,* 565 F.3d at 707 (quoting 40 C.F.R. § 1501.2).

The BLM failed to explain its decision to delay updating its analysis in the EA. By solely referring to its answer in the Gasco EIS we do not know why the data collected in the interim does not solve the inadequacies in the data available in 2010. We do not know why the BLM decided it did not need to reconsider its use of the Canyonlands data in considering the EA. Without this analysis, the Court cannot find the BLM satisfied its obligation to take a hard look at new data. An environmental assessment must contain enough factual specificity to allow the Court to review the agency's decision. *Silverton*, 433 F. 3d at 782. Therefore, the Court REMANDS this case for the BLM to consider the most recent Uinta Basin data prior to making a decision about the impact of the proposed action and explain its decision to use or ignore the new data.

B. The BLM Acted Arbitrarily and Capriciously in Finding No Significant Impact Without Any Analysis of Noise Impacts to Green River Recreation.

Next, SUWA argues the BLM failed to a take a hard look at noise impacts to Green River recreationists from the Sixteen-Well Project. Of the sixteen proposed wells, five fall within half a mile of the Green River on a single well pad, seven lie slightly more than half a mile from the Green River on a second well pad, and Gasco has already drilled the remaining four on a third well pad a little over one mile from the Green River. (Gasco 16-Wells Draft Envtl. Assessment,

Mar. 2013, Gasco 16 Wells AR 0001575-77, ECF No. 98; Br. in Response to the Court's Req., ECF No. 112.) The BLM argues the presence of a 200-foot hill between the well pad and the Green River obstructs both the recreationists' view of the well pad and the noise impact during construction without reference to any other document or study. (Federal Opp'n 23, ECF No. 105 (citing 16-Well EA AR 582).)

SUWA alleges the BLM failed to follow any scientific protocol for assessing noise impacts from drilling the wells and failed to consider the opinions of SUWA's acoustics engineering expert on how to conduct a proper noise impact study. (Opening 19, ECF No. 92.) As a result, SUWA argues the BLM failed to a take a hard look at noise impacts by failing to employ the best available scientific information. (*Id.* at 20.) SUWA also argues "[t]here is no record evidence that BLM used any scientific methodology to conduct [the noise impact] analysis." (*Id*.) SUWA also argues the BLM ignored conflicting record evidence regarding the noise impact from the Sixteen-Well Project on Green River recreation. (Opening 20-24, ECF No. 92; Reply 13-15, ECF No. 110.) Additionally, SUWA argues the BLM did not take a hard look at the five wells within half a mile of the Green River. (Reply 15-16, ECF No. 110.) SUWA contends the BLM's explanation that the 200-foot hill obstructs recreationists' view of the drilling site and partially blocks the noise does not account for noises traveling further in a river canyon than in open areas. (*Id.* at 15-16.)

> "A disagreement among experts or in the methodologies employed is generally not sufficient to invalidate an EA…. Courts are not in a position to decide the propriety of competing methodologies…. but instead, should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors."

Silverton, 433 F.3d at 782 (quoting *Comm. to Preserve Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993)). Even considering the less stringent

requirements for analyzing and resolving record conflicts in environmental assessments, the Court holds the BLM committed reversible error by failing to provide any analysis of noise impacts on Green River recreation.

The BLM responded to the study submitted by SUWA by stating that the Interdisciplinary team found "Recreation" issues present, "but not affected to a degree that detailed analysis is required." (Final 16-Well Envtl. Assessment, July 2014, Gasco 16 Well AR 0004707 (Response 12), 0004703, 0004700, ECF No. 98.) The BLM responded similarly to SUWA's other comments concerning noise impacts. (Final 16-Well Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004706-07 (Responses 9-12), ECF No. 98).

The Regulations define an environmental assessment as a "concise public document" designed to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9. The BLM must take a hard look at the potential environmental consequences of the proposed action. *Silverton*, 433 F.3d at 782. The "documents prepared as part of NEPA's 'hard look' requirement 'must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide a reviewing court with the necessary factual specificity to conduct its review.'" *Id.* (quoting *Boomer Lake,* 4 F.3d at 1553). The repeated notation that the Interdisciplinary Team did not find the Sixteen-Well Project would affect recreation does not provide the Court with the necessary factual specificity to conduct its review. The parties' briefs prove somewhat more enlightening on this point, but the court cannot "accept [] counsel's post-hoc rationalizations for agency action." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1060 (10th Cir. 2014). Therefore, the Court holds the

BLM acted arbitrarily in concluding without apparent basis that the project would have no significant sound impacts on recreation.

C. The BLM Acted Arbitrarily and Capriciously in Finding No Significant Impact on Ozone Pollution When it Failed to Take a Hard Look at the Cumulative Impacts of the Sixteen-Well Project on Ozone Pollution Because It Fails to Explain Why It Ignored Its Greater Uinta Basin Technical Support Document Forecast for Future Oil and Gas Wells.

Furthermore, SUWA argues the BLM failed to consider the cumulative impacts of the Sixteen-Well Project on ozone pollution adequately by "rel[ying] on outdated material for its ozone analysis which understated potential impacts." (Opening 24, ECF No. 92.) The Regulations define "cumulative impacts" as impacts "on the environment which result[] 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." 40 C.F.R. § 1508.7. Moreover, "[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* Agencies must provide an adequate discussion of cumulative impacts in environmental assessments as well as environmental impact statements. *See Davis v. Mineta*, 302 F.3d 1104, 1125-26 (10th Cir. 2002) (reversing agency's finding of no significant impact in part because the environmental assessment failed to disclose an adequate basis to conclude the cumulative impacts of proposed project would have no significant impact). The EA tiers to the March 2012 Greater Natural Buttes Environmental Impact Statement ("GNBEIS") for its cumulative impacts analysis, which considered 21, 293 new oil and gas wells along with 4,144 past and present wells in the Uinta Basin. (Environmental Assessment, July 2014, Gasco 16 Well AR0004693; GNBEIS, March 2012, Gasco6Wells004315, ECF No. 98.)

At the same time, the BLM published the Greater Uinta Basin Oil and Gas Cumulative Impacts Technical Support Document (the "Uinta Basin Technical Support Document"), in which the BLM projected 28, 417 foreseeable new oil and gas wells in the Uinta Basin. (Greater Uinta BasinTechnical Support Document, March 2012, Gasco 16 Wells AR 0002664, ECF No. 98.) SUWA argues the BLM should have relied on the Uinta Basin Technical Support Document for estimates of reasonably foreseeable wells that will be developed because the BLM intended that document to guide NEPA analyses within the Uinta Basin. (Opening 27, ECF No. 92.) Moreover, SUWA contends that even if the BLM had good reason to reject its own development forecast, the BLM should have explained why in the EA. (*Id.* at 27-28.)

In response, the BLM argues SUWA's request for it to conduct a new cumulative impacts analysis based on the Uinta Basin Technical Support Document violates the rule of reason, because, as the BLM explained in the EA, current science does not allow for accurate modeling to determine ozone emissions of a project as small as the Sixteen-Well Project. (Federal Opp'n 27, ECF No. 105.) The BLM cites to *Theodore Roosevelt Conservation P'ship v. Salazar*, where the plaintiffs challenged the BLM's record of decision for the Atlantic Rim Project in the Great Divide Resource Area. (*Id.* at 28 (citing 616 F.3d 497, 504-06 (D.C. Cir. 2010).) One of the plaintiffs' main arguments challenged the Atlantic Rim Project's conformity with the Great Divide Resource Management Plan issued in 1990, eleven years before the approval process for the Atlantic Rim Project began. *Theodore Roosevelt,* 616 F.3d. at 508. In 2002, the BLM published a notice of intent to revise the Great Divide Resource Management Plan but did not make the revision available for public comment until January 2008, ten months after the BLM completed the Atlantic Rim Project record of decision. *Id.* Plaintiff thus argued "the Atlantic

Rim Project improperly precommitted the [Resource Management Plan] revision to approve at least as much new development as the Atlantic Rim Project had already approved." *Id.*

The court pointed out that plaintiffs had failed to demonstrate that the record of decision had a 1,440 well cap and that the environmental impact from drilling the additional wells would exceed the impact contemplated by the Great Divide Resource Management Plan, citing a 2004 analysis that found about 3,700 acres of long-term surface disturbance still unallocated under the Great Divide Resource Management Plan. *Id.* Therefore, the court concluded the BLM reasonably decided "that the existing Great Divide [Resource Management Plan] encompassed the development proposed by the Atlantic Rim Project," and the BLM decision did not violate the NEPA prohibition on precommitting resources." *Id.* at 510.

The BLM argues that even more compelling reasons exist for rejecting SUWA's cumulative impacts argument here than in *Theodore Roosevelt*. (Federal Opp'n 28, ECF No. 105.) While *Theodore Roosevelt* upheld the BLM's NEPA analysis despite substantially more wells drilled than expected, the BLM argues it merely authored a document projecting that more wells may be drilled than anticipated in the GNBEIS. *Id.* Moreover, like the plaintiffs in *Theodore Roosevelt*, the BLM contends SUWA has not offered any evidence suggesting that the greater number of anticipated wells in the Uinta Basin Technical Support Document would have a greater environmental impact than the GNBEIS determined. (*Id.*) Finally, the BLM emphasizes the vast uncertainty surrounding projecting oil and gas wells to be drilled in the future and that it "need only furnish such information as appears to be reasonably necessary under the circumstances for evaluation of the project." (*Id.* at 29 (citing *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1176 (10th Cir. 2002).)

SUWA disagrees with the BLM's reliance on *Theodore Roosevelt*, arguing that while development had exceeded predicted forecasts there, record evidence indicated surface impacts still fell below the level anticipated in the Great Divide Resource Management Plan. (Reply 19, ECF No. 110.) SUWA contends the present case bears more similarity to *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2010), where the Ninth Circuit held the BLM violated NEPA by failing to address concerns raised by its own experts and sister agencies. (*Id.* at 20.) Because the BLM failed to respond or consider comments from its experts and sister agencies that conflicted with its conclusions, the Ninth Circuit held the BLM violated NEPA's goals of "mak[ing] available to the public high quality information, including accurate scientific analysis, expert agency comments and public scrutiny, before decisions are made and actions are taken." *Kraayenbrink*, 632 F.3d at 492-93 (quoting *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003)). Thus, SUWA argues the BLM acted arbitrarily and capriciously in finding of no significant impact after tiering the cumulative impacts analysis to the GNBEIS instead of the Uinta Basin Technical Support Document without disclosing its reasoning or attempting to reconcile the differences. (Reply 20, ECF No. 110.)

SUWA also takes issue with the BLM and Gasco's claim that even if the BLM erred by using the GNBEIS forecast, the Court should not reverse the BLM's decision because SUWA has not demonstrated any resulting prejudice. SUWA contends NEPA, as procedural statute, does not require it to prove a different outcome. (*Id.* at 20-21.) But even if it must show prejudice, SUWA argues the Tenth Circuit has found a failure to analyze environmental impacts thoroughly in a public NEPA document prejudicial, citing *N.M. ex rel. Richardson*. (*Id.* at 21.) Lastly, SUWA argues the BLM and Gasco misconstrue the nature of a cumulative impacts analysis, because regardless of the small scope and difficulty of modeling ozone impacts from the Sixteen-

Well Project, the Regulations require the BLM to take into account all 28,417 wells the BLM predicted for development in the Uinta Basin in the cumulative impacts analysis. (*Id.* at 22-23.)

The record indicates the BLM published both the Uinta Basin Technical Support Document and the GNBEIS in March 2012, more than two years prior to the EA. (GNBEIS, March 2012, Gasco 6Wells003903, ECF No. 98; Uinta Basin Technical Support Document, March 2012, Gasco 16 Wells AR 0002651, ECF No. 98.) Thus, the Court can only conclude the BLM had access to both documents when it prepared the EA. Hence, the Court finds the BLM's argument that "the 'rule of reason' cannot require BLM to prepare an entirely new cumulative impacts analysis merely because one BLM document projects that more wells may be drilled at some uncertain future time than was earlier reported," (Federal Opp'n 29, ECF No. 105.), has no merit. Because the BLM published both documents at the same time, it could have conducted its cumulative impacts analysis using either one.

The BLM and Gasco do not deny that the Uinta Basin Technical Support Document forecasted 7,000 more wells in the Uinta Basin than the GNBEIS forecasted. Instead, the BLM points out the EA stated current science does not allow for accurate modeling of ozone emissions from the Sixteen-Well Project. (Federal Opp'n 27, ECF No. 105; Final 16-Well Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004693, ECF No. 98.) However, cumulative impacts encompass not only the impacts of a proposed action but rather the total environmental impact of the proposed action "when *added* to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (emphasis added). The Uinta Basin Technical Support Document states its purpose as "updat[ing] oil and gas development assumptions to facilitate cumulative impacts analyses in future [Vernal Field Office] NEPA projects." (Greater Uinta Basin Technical Support Document, March 2012, Gasco 16 Wells AR 0002656, ECF No. 98)

The Uinta Basin Technical Support Document also specifically limits its scope to reasonably foreseeable projects, which BLM NEPA Handbook H-1790-1 defines as "those for which there are existing decisions, funding, formal proposals." (*Id.*) Thus, all future well projects forecasted in the Uinta Basin Technical Support Document constitute reasonably foreseeable actions that the BLM must take into account in its cumulative impacts analysis. NEPA requires agencies to take a hard look at environmental impacts of proposed actions using the "best available scientific information." *Custer Cty*, 256 F.3d at 1034 (citing *Colo. Envtl.. Coalition*, 185 F.3d at 1171-72). The BLM gives no explanation as to why it rejected the Uinta Basin Technical Support Document's wells forecasts in favor of the GNBEIS's more conservative forecasts.

The choice to forsake the Uinta Basin Technical Support Document appears even more arbitrary in light of the Uinta Basin Technical Support Document's designation as the "template" for cumulative impacts analyses. (Greater Uinta Basin Technical Support Document, March 2012, Gasco 16 Well AR 0002656, ECF No. 98.) While the GNBFEIS's forecasts apply through 2018, (Gasco6Wells004485, ECF No. 98), the BLM stated during the hearing that the Uinta Basin Technical Support Document's forecasts apply at least through 2027, which partly explains why the Uinta Basin Technical Support Document's projections come in higher. Nevertheless, because the Uinta Basin Technical Support Document serves as the BLM's own forecast of reasonably foreseeable wells in the Uinta Basin, which it had available to it when beginning this environmental assessment, the BLM must explain why it chose not to rely on this forecast. Therefore, the Court concludes the BLM arbitrarily and capriciously made a finding of no significant impact when it failed to take a hard look at cumulative impacts on ozone pollution by relying on the GNBEIS instead of the Uinta Basin Technical Support Document's forecast for reasonably foreseeable wells without explanation.

Theodore Roosevelt does not support a contrary conclusion. While the project there proposed to drill many more wells than the draft environmental impact statement for the resource management plan projected, the final environmental impact statement and record of decision for the resource management plan did not include a hard cap on the actual number of wells drilled. *Theodore Roosevelt*, 616 F.3d at 509. Hence, the court concluded the resource management plan actually covered the project at issue, so that the BLM's decision did not violate NEPA's prohibition on precommitting resources. *Id.* at 509-10. SUWA raises a different issue here, namely the BLM's failure to use the projections of the Uinta Basin Technical Support Document that the BLM itself designated as a "template" for NEPA analyses in the Uinta Basin (Greater Uinta Basin Technical Support Document, March 2012, Gasco 16 Wells AR 0002656, ECF No. 98) or explain why it chose to use to the GNBEIS instead.

Kraayenbrink, gives more guidance in resolving this issue. Like the BLM in *Kraayenbrink,* 632 F.3d at 492-93, the BLM here ignored projections of reasonably foreseeable wells in a document drafted by its own experts for use in environmental assessments in the Uinta Basin and relied on projections in a different document without explaining why.

Because the BLM made its finding of no significant impact without utilizing the wells projections its own experts produced in the Uinta Basin Technical Support Document—projections the document stated should serve as guideposts for future NEPA analyses—or explaining why it chose not to rely on these projections, the Court concludes the BLM acted arbitrarily and capriciously.

The BLM and Gasco also argue that even if the BLM erred by arbitrarily relying on the GNBEIS, its decision constitutes harmless error because SUWA fails to show any resulting prejudice from the BLM's decision. (Federal Opp'n 28, ECF No. 105; Gasco Opp'n 26-27, ECF

No. 106.) The BLM and Gasco contend that SUWA has failed to show how taking into account a larger number of reasonably foreseeable wells would alter the BLM's cumulative impacts analysis or resolve the technical limitations in modeling the Sixteen-Well Project's small, incremental contributions to ozone pollution. (Federal Opp'n 28, ECF No. 105; Gasco Opp'n 26-27, ECF No. 106.) The BLM again cites to *Theodore Roosevelt*, where the court upheld the BLM's decision to approve the Atlantic Rim Project in part because the plaintiffs failed to demonstrate that the environmental impact from drilling the additional wells in the project would exceed the impact contemplated by the resource management plan. *Theodore Roosevelt*, 616 F.3d at 509; *see also Hillsdale Envtl.. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1165 (10th Cir. 2012) ("[E]ven if an agency violates the APA, its error does not require reversal unless a plaintiff demonstrates prejudice resulting from the error.") (quoting *Prairie Band Pottawatomie Nation v. Fed Highway Admin.*, 684 F.3d 1002, 1008 (10th Cir. 2012)).

As SUWA points out, however, NEPA regulations require the BLM to perform a cumulative impacts analysis that accurately accounts for the environmental impact of all reasonably foreseeable actions, not merely the incremental impact from the Sixteen-Well Project. (Reply 23, ECF No. 110 (citing 40 C.F.R. § 1508.7).) Contrary to the BLM and Gasco's arguments, the Tenth Circuit has held that an agency's "failure to thoroughly analyze the environmental impacts of [a proposed action] in a public NEPA document" constitutes reversible error. *New Mexico ex rel. Richardson*, 565 F.3d at 708. In *New Mexico ex rel. Richardson*, the State of New Mexico and a coalition of environmental groups ("NMWA") challenged the BLM's environmental impact statement regarding amending a resource management plan for oil and gas development in the Otero Mesa. *Id.* at 689, 694-95. Rather than selecting among the alternatives

analyzed in the draft environmental impact statement, the final environmental impact statement adopted a modified version of a described alternative appearing in the draft environmental impact statement. *Id.* at 692. In response to the New Mexico Governor's suggested modifications to the final environmental impact statement, the BLM released a supplemental final environmental impact statement that explained its reasoning for adopting the modified alternative without further environmental analysis of the new alternative and declined to entertain a public comment period on the Governor's recommendations. *Id.* at 693-94. On appeal, the BLM argued that any error in its decision not to conduct further analysis in the supplemental environmental impact statement on the modified alternative was harmless because the public had access to the supplemental environmental impact statement and submitted comments on it, thus satisfying the purposes of the NEPA. *Id.* at 708. The Tenth Circuit rejected the BLM's argument, holding that "[a] public comment period is beneficial only to the extent the public has meaningful information on which to comment," and "[i]nformed public input can hardly be said to occur when major impacts of the adopted alternative were never disclosed." *Id.*

Based on the Tenth Circuit's reasoning in *New Mexico ex rel. Richardson*, the Court concludes the BLM's finding of no significant impact based in part on its choice to use the GNBEIS's wells forecast prejudiced the public. While the public had an opportunity to comment on the draft environmental assessment, the BLM's failure to include data that it deemed more accurate in either the draft or final EA deprived the public of the opportunity to present "informed public input" regarding the BLM's cumulative impacts analysis. The public did not know that BLM had a projection showing a much higher number of future oil and gas wells in the area. SUWA specifically pointed out the BLM's failure to update its prediction for reasonably foreseeable wells in its comments to the draft environmental assessment. (SUWA

Comments, April 29, 2014, Gasco 16 Wells AR 0001587, ECF No. 98.) However, the BLM did not respond to SUWA's comment regarding the Uinta Basin's Technical Support Document's updated forecast for future wells in the final EA but merely reasserted its position that potential impacts to ozone pollution from the Sixteen-Well Project "cannot be accurately modeled." (Final 16-Well Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004693, ECF No. 98.) Without an explanation of its choice, the Court can only assume the BLM made an arbitrary and capricious decision, given the BLM's own conclusion that the Uinta Basin Technical Support Document contained more accurate data. Therefore, the Court concludes the BLM committed harmful error by failing to explain why it chose to rely on the GNBEIS forecast instead of the Uinta Basin Technical Support Document forecast.

IV. The BLM Adequately Considered and Rejected SUWA's Proposed Alternatives.

Lastly, SUWA argues the BLM erred by failing to analyze two alternatives to the Sixteen-Well Project proposed by its air quality expert. (Opening 31, ECF No. 92.) SUWA's first alternative asks the BLM to "conduct an EIS and develop an alternative that includes mitigation measures that will ensure the proposed development will not contribute to these significant [ozone] impacts." (*See* Williams Comments, Gasco 16 Well AR 0001599, ECF No. 98.) SUWA's second alternative asks the BLM to consider "in detail, an alternative in the EA pursuant to NEPA that would constrain [ozone] impacts to within the 60-70ppb range recognized by the CASAC." (*See id.* at 0001601.)

In dismissing these alternatives, the BLM argues SUWA's first alternative does not provide enough specificity to warrant consideration, and SUWA's second alternative remains impossible because the BLM reasonably found determining ozone emissions from a project as small in scale as the Sixteen-Well Project technically infeasible. (Federal Opp'n 31, ECF No.

105.) Additionally, Gasco argues the BLM already addressed SUWA's first alternative through the Gasco EIS's adaptive management strategy, and SUWA's second alternative falls outside the BLM's jurisdiction. (Gasco Opp'n 39-41, ECF No. 106.)

NEPA regulations require agencies to "[r]igorously 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." 40 C.F.R. § 1502.14(a). Reasonable alternatives are "non-speculative" and are "bounded by some notion of feasibility." *Utahns for Better Transp.*, 305 F.3d at 1172. When evaluating the adequacy of an agency's alternatives analysis, courts employ the "rule of reason" to ensure environmental impact statements contain sufficient discussion of the relevant issues and opposing views to enable agencies to take a hard look at the environmental impacts of the proposed action and its alternatives and to make a reasoned decision. *Wyoming v. U.S. Dept. of Agric.*, 661 F.3d 1209, 1243-44 (10th Cir. 2011.) The Tenth Circuit employs two "guideposts" in judging the reasonableness of alternatives: whether the agency actions fall within the agency's statutory mandate and whether the actions meet the agency's objectives for a particular project. *New Mexico ex rel. Richardson*, 565 F.3d at 709.

NEPA requires both environmental impact statements and environmental assessments to "incorporate a range of reasonable alternatives, but the *depth* of discussion and analysis required is different depending on whether the document is an EIS or an EA." *W. Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1274 (10th Cir. 2013) (emphasis in original). While the Regulations require an environmental impact statement to "'[r]igorously explore . . . all reasonable alternatives' and '[d]evote substantial treatment to each alternative' with 'detail,'" an environmental assessment need only include "'brief discussions of the need for the proposal of

alternatives . . . and of the environmental impacts.'" *Id.* (citing 40 C.F.R. §§ 1502.14(a)-(b), 1508.9(b)). Unquestionably, the requirements for an alternatives analysis in an environmental assessment are more lenient than those in an environmental impact statement. *Id*. at 1275.

SUWA interprets its air quality expert's first alternative as asking the BLM to "analyze an alternative to the 16-Well Project that would not contribute to further exceedances of the federal standard limiting ozone pollution." (Opening 31, ECF No. 92.) The BLM contends, however, that SUWA fails to provide any detail regarding this alternative, such as the type of mitigation measures that would accomplish this request or how the BLM would measure emissions from such an alternative. (Federal Opp'n 31, ECF No. 105.) In reviewing an agency's choice of alternatives to consider in an environmental assessment, courts hold that "[a]n agency need not analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, . . . impractical or ineffective." *Airport Neighbors All., Inc. v. United States*, 90 F.3d 426, 432 (10th Cir. 1996) (quoting *City of Aurora v. Hunt*, 749 F.2d 1457,1467 (10th Cir. 1984)). While the BLM did not directly analyze SUWA's first alternative in the EA, it explained in response to SUWA's comments that because the EPA does not currently classify the Uinta Basin as a nonattainment area, no state or federal implementation plans exist to regulate emission levels in the Uinta Basin. (Final 16-Well Envtl. Assessment, July 2014, Gasco 16 Wells AR 0004705, 4709 (Responses 5, 22), ECF No. 98.) Because SUWA provides no additional details regarding its first alternative, the Court finds the BLM's analysis sufficient for purposes of an environmental assessment.

Moreover, "an agency need not consider an alternative unless it is significantly distinguishable from the alternatives already considered." *New Mexico ex rel. Richardson*, 565 F.3d at 708-09. As Gasco points out, the EA tiers to the Gasco EIS, which contains an adaptive

management plan. That plan requires the BLM and Gasco "[r]efine the air quality modeling predictions," "[d]evelop a Uinta Basin ozone action plan," and "[i]mplement a regional ozone action plan." (Gasco EIS, March 2012, GASCOEIS0003456, 3877-3880 ECF No. 98.) The EA response to the comments states that the EA "incorporates the best available mitigation measures as well as strategies for response to future ozone [National Ambient Air Quality Standards] exceedance episodes, nonattainment, or modeling data." (Gasco 16 Well AR 0004705 (Response 4, 5), ECF No. 98.) Specifically, the adaptive management plan states the BLM will work with the EPA to implement emission control strategies to ensure compliance with the National Ambient Air Quality Standards for ozone and identifies fourteen potential mitigation measures that it will undertake under certain conditions, including designation of nonattainment. (Gasco EIS, GASCOEIS0003878.) In light of the adaptive management plan designed to address future National Ambient Air Quality Standards exceedances, the Court concludes the BLM need not independently analyze SUWA's substantially similar first alternative. *See New Mexico ex rel. Richardson*, 565 F.3d at 708-09.

In response to SUWA's second alternative, the BLM states "[t]here is no requirement that any BLM authorization constrain impacts within a 60-70 ppb range for ozone. This is below the current National Ambient Air Quality Standard for ozone." (Final 16-Well Envtl. Assessment, July 2014, Gasco 16 Well AR 0004709 (Response 21), ECF No. 98.) SUWA argues that while the BLM may not have an independent obligation to manage air quality to the standards of the EPA's Clean Air Scientific Advisory Committee, the BLM "does have an obligation to 'rigorously explore and objectively evaluate' reasonable, feasible alternatives." (Opening 34, ECF No. 92 (citing *N.M. ex rel. Richardson*, 565 F.3d at 708-11).)

In its Opposition, the BLM reasserted its position that it cannot accurately model ozone emissions from a project as small in scale as the Sixteen-Well Project, so that imposing an emissions requirement of sixty to seventy parts per billion remains technically infeasible as well. (Federal Opp'n 31, ECF No. 105.) SUWA contends that its alternatives do not ask the BLM to model ozone pollution but merely to reduce it. (Reply 25, ECF No. 110.) Furthermore, SUWA argues the BLM's new justification in its Opposition constitutes a post-hoc rationalization and asks the Court to ignore it because the BLM never asserted this justification in the EA. *Id.*

While the Court agrees with SUWA that the BLM's proffered justification in its opposition constitutes a post-hoc rationalization that the Court should not consider, *see N.M. ex rel. Richardson*, 565 F.3d at 704 ("In considering whether the agency took a 'hard look,' we consider only the agency's reasoning at the time of decisionmaking, excluding post-hoc rationalization concocted by counsel in briefs or argument."), the Court finds the BLM adequately considered SUWA's second alternative in its response to SUWA's comments to the draft environmental assessment. As explained above, NEPA regulations do not require agencies to provide the same level of analysis of alternatives in an environmental assessment as in an environmental impact statement. *W. Watersheds Projects*, 721 F.3d at 1274. Thus, contrary to SUWA's argument, the BLM need not conduct a "full analysis" of SUWA's second alternative in the EA. (*See* Opening 34, ECF No. 92.) That the BLM addressed its reasoning for rejecting SUWA's second alternative, namely that it did not have an obligation to reduce ozone pollution to below federal standards, suffices to meet the "brief discussion" requirement for environmental assessments. *See* 40 C.F.R. § 1508.9.

Gasco further argues that NEPA does not grant the BLM authority to regulate emissions to a level below the federal standard. (Gasco Opp'n 41, ECF No. 106.) SUWA responds that

FLPMA, not NEPA, gives the BLM such authority. (Reply 27-28, ECF No. 110.) Regardless of whether the BLM has authority to implement SUWA's second alternative, the Court holds the BLM met its obligation under NEPA by considering and rejecting the alternative in the EA.

CONCLUSION

For the foregoing reasons, the Court REMANDS the DR/FONSI for the BLM to reconsider its decision after it updates its air quality analysis with Uinta Basin data or explain why it will not, to consider noise impacts on recreation and explain its decision regarding these impacts, and to consider using and/or explain why the BLM chose not to use the Uinta Basin Technical Support Document's forecast of reasonably foreseeable oil and gas wells for its cumulative impacts analysis. The Court finds the BLM's alternatives sufficient.

DATED this October 3, 2016.

BY THE COURT:

Evelyn J. Furse
United States Magistrate Judge