Samantha Ruscavage-Barz, *Pro Hac Vice*
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
TEL: (505) 401-4180
sruscavagebarz@wildearthguardians.org

Alex Freeburg
Freeburg Law, LLC
Box 3442
Jackson, WY 83001
TEL: (307) 200-9720
alex@tetonattorney.com

Attorneys for Petitioner WildEarth Guardians

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WILDEARTH GUARDIANS,	)	
	)	
Petitioner,	)	Case No. 2:16-CV-00166-ABJ
	)	
v.	)	
	)	
SALLY JEWELL,	)	**PETITIONER'S**
U.S. OFFICE OF SURFACE MINING	)	**OPENING BRIEF**
RECLAMATION AND ENFORCEMENT,	)	
and U.S. DEPARTMENT OF THE INTERIOR	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
STATE OF WYOMING and	)	
ANTELOPE COAL LLC,	)	
	)	
Intervenor-Respondents.	)	

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS 4

I. STATUTORY BACKGROUND 4

A. The National Environmental Policy Act. 4

B. The Mining Plan Approval Process. 8

II. THE WEST ANTELOPE II MINE AND THE MINING PLAN APPROVAL 11

STANDARD OF REVIEW 13

ARGUMENT 14

I. WILDEARTH GUARDIANS HAS STANDING 14

II. OSM'S APPROVAL OF THE ANTELOPE MINING PLAN VIOLATED NEPA'S PROCEDURAL REQUIREMENTS 18

A. OSM Failed to Involve the Public in the Decision to Approve the Antelope Mining Plan. 19

1. NEPA's public involvement requirements. 19

2. OSM failed to provide for any public participation in its NEPA process for the Mining Plan. 19

B. OSM Violated NEPA's Procedural Requirements When It Adopted the Leasing EIS Without Independently Assessing Whether the EIS Complied with NEPA. 22

III. OSM VIOLATED NEPA'S SUPPLEMENTAL ANALYSIS REQUIREMENT 25

A. NEPA Requires that OSM Pay Attention to Significant New Information. 26

B. OSM Ignored Significant New Information. 29

1. Promulgation of more stringent air quality standards for two pollutants between 2008 and 2013 required OSM to supplement the EIS's air quality analysis. 31

a. EPA revised the annual $PM_{2.5}$ standard prior to Mining Plan approval. 32

b. EPA promulgated a new one-hour NO_2 standard in 2009. 34

2. OSM failed to use available tools for analyzing mining's GHG emissions and failed to analyze coal combustion impacts from mining. 36

a. GHG emissions from mining. 36

b. OSM failed to use available tools to evaluate severity of direct GHG emissions from mining. 38

c. OSM failed to analyze coal combustion as an indirect impact of mining. 41

CONCLUSION 43

TABLE OF AUTHORITIES

Cases

Baltimore Gas and Electric Co. v. NRDC, 462 U.S. 87 (1983) 4
Border Power Plant Working Group v. DOE, 260 F. Supp. 2d 997 (S.D. Cal. 2003) 41
Calvert Cliffs' Coordinating Comm'n v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) 19
Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162 (10th Cir. 1999) 13, 14
Comm. to Save Rio Hondo v. Lucero, 102 F.3d 445 (10th Cir. 1996) 15, 17
Dept. of Transp. v. Public Citizen, 541 U.S. 752 (2004) 41
Diné Citizens Against Ruining Our Env't v. U.S. OSMRE, 82 F. Supp. 3d 1201 (D. Colo. 2015) 42
Friends of the Clearwater v. Dombeck, 222 F.3d 552 (9th Cir. 2000) 27
Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000) 15
Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) 18
Idaho v. Interstate Commerce Comm'n, 35 F.3d 585 (D.C. Cir. 1994) 23
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 15
Marsh v. ONRC, 490 U.S. 360 (1989) 27, 38
Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) 41
Mid-States Coal. for Progress v. Surf. Trans. Bd., 345 F.3d 520 (8th Cir. 2003) 41
Morris v. U.S. Nuclear Regulatory Comm'n, 598 F.3d 677 (10th Cir. 2010) 14
Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) 14
New Mexico ex rel Richardson v. BLM, 565 F.3d 683 (10th Cir. 2009) 4, 5, 29
Norton v. SUWA, 542 U.S. 55 (2004) 35
Olenhouse v. Commodity Credit Corp, 42 F.3d 1560 (10th Cir. 1994) 13
Or. Nat. Desert Ass'n v. BLM, 625 F.3d 1092 (9th Cir. 2010) 19, 22
Pennaco Energy, Inc. v. USDOI, 377 F.3d 1147 (10th Cir. 2004) 29, 30
Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 4
Rocky Mountain Wild v. Vilsack, 2013 WL 3233573 (D. Colo. June 26, 2013) 14
Sierra Club v. DOE, 287 F.3d 1256 (10th Cir. 2002) 17
SUWA v. Norton, 301 F.3d 1217 (10th Cir. 2002) 28, 30
Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125 (10th Cir. 2006) 13
Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205 (10th Cir. 2002) 14
Utahns For Better Transp. v. USDOT, 305 F.3d 1152 (10th Cir. 2002) 14
Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980) 27, 30, 35
WildEarth Guardians v. Jewell, 738 F.3d 298 (D.C. Cir. 2013) 24, 26, 38
WildEarth Guardians v. Jewell, Case No. 1:16-cv-00605-RJ-SCY 3
WildEarth Guardians v. Jewell, Case No. 2:16-cv-0167-ABJ 3
WildEarth Guardians v. OSMRE, 104 F. Supp. 3d 1208 (D. Colo. 2015) . 3, 20, 25, 32, 42

WildEarth Guardians v. OSMRE, 2015 WL 6442724 (D. Mont. Oct. 23, 2015) ... 3, 20, 25
WildEarth Guardians v. OSMRE, 2016 WL 259285 (D. Mont. Jan. 21, 2016) 3
Wis. v. Weinberger, 745 F.2d 412 (7th Cir. 1984) 28

Statutes

30 U.S.C. § 1256(a) 10
30 U.S.C. § 1273(c) 10
30 U.S.C. § 181 8
30 U.S.C. § 201 8
30 U.S.C. § 207(a) 8
30 U.S.C. §§ 1201-1328 1
30 U.S.C. §§ 181-196 1
30 U.S.C. § 207(c) 9
42 U.S.C. § 4332(2)(D)(iv) 23
42 U.S.C. § 4332(C) 4, 5
42 U.S.C. § 7408 34
42 U.S.C. §§ 4321-4370h 1
5 U.S. C. § 706(2)(A) 13
5 U.S.C. § 702 13
5 U.S.C. § 704 13
5 U.S.C. §§701-706 4

Other Authorities

46 Fed. Reg 18,026 (March 23, 1981) 29
62 Fed. Reg. 38,652 (July 18, 1997) 32
71 Fed. Reg. 61,144 (Oct. 17, 2006) 33
73 Fed. Reg. 61,291 (Oct. 15, 2008) 6
74 Fed. Reg. 34,404 (July 15, 2009) 34
74 Fed. Reg. 66,496 (Dec. 15, 2009) 36
75 Fed. Reg. 6,474 (Feb. 9, 2010) 34
Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 Colum. L. Rev. 167 (Jan. 2014) 40
OSM NEPA Handbook, Chapter 3 § B.1 8
Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies*, 87 Tul. L. Rev. 511 (Feb. 2013) 40

Regulations

30 C.F.R. § 745.13(b) 10, 21, 35
30 C.F.R. § 745.13(i) 10
30 C.F.R. § 746.11(a). 9
30 C.F.R. § 746.13 9
30 C.F.R. § 746.13. 10
30 C.F.R. § 746.13(b) 1
30 C.F.R. § 746.14 9
30 C.F.R. § 746.17(b) 9, 11
30 C.F.R. § 746.18 11
30 C.F.R. § 931.30 10
40 C.F.R. § 1500.1 4
40 C.F.R. § 1500.1(b) 19
40 C.F.R. § 1502.14 5
40 C.F.R. § 1502.9(c) 22
40 C.F.R. § 1502.9(c)(1) 7, 26, 27
40 C.F.R. § 1502.9(c)(4) 7
40 C.F.R. § 1502.16 5
40 C.F.R. § 1503.4(a) 21
40 C.F.R. § 1506.3(a) 6
40 C.F.R. § 1506.3(c) 23
40 C.F.R. § 1506.6(a) 19
40 C.F.R. § 1506.6(b) 19
40 C.F.R. § 1508.13 6
40 C.F.R. § 1508.22 8
40 C.F.R. § 1508.7 5
40 C.F.R. § 1508.8 5
40 C.F.R. § 1508.8(a) 5
40 C.F.R. § 1508.8(b) 41
40 C.F.R. § 1508.8(b) 5
40 C.F.R. § 1508.9 6
40 C.F.R. § 1508.9(b) 6
40 C.F.R. § 50.1 32
40 C.F.R. §§ 1500-1508 39
40 C.F.R. § 1501.4(e) 6
43 C.F.R. § 3425.1-8(a) 8
43 C.F.R. § 3475.1 8
43 C.F.R. § 3475.2 8
43 C.F.R. § 46.120(b) 6

43 C.F.R. § 46.120(c) 7, 22
43 C.F.R. §§ 46.10-46.450 6

GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
AR	Document page numbers in administrative record
BLM	U.S. Bureau of Land Management
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FONSI	Finding of No Significant Impact
GHG	Greenhouse Gas
Guardians	Petitioner WildEarth Guardians
MLA	Mineral Leasing Act
NAAQS	National Ambient Air Quality Standard
NEPA	National Environmental Policy Act
NOx	Nitrogen oxides
OSM	Office of Surface Mining Reclamation and Enforcement
$PM_{2.5}$	Particulate matter less than 2.5 microns in diameter
PM_{10}	Particulate matter less than 10 microns in diameter
ppm	Parts per million
SMCRA	Surface Mining Reclamation and Control Ac

INTRODUCTION

This case seeks to remedy the Federal Respondents' chronic failure to address the potentially significant environmental impacts of coal mining before approving mining plans. The Mineral Leasing Act ("MLA"), 30 U.S.C. §§ 181-196, and the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201-1328, require the Secretary of the Interior to approve mining plans as a prerequisite to the mining of federal coal. Among other requirements, a mining plan must ensure that mining complies with applicable federal laws and regulations and be based on information prepared in compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h; 30 C.F.R. § 746.13(b).

Federal Respondents U.S. Office of Surface Mining Reclamation and Enforcement ("OSM"), an agency within the U.S. Department of the Interior ("Interior"), and Interior Secretary Sally Jewell (collectively, "OSM") have approved a mining plan authorizing federal coal development at the Antelope Mine in Wyoming's Powder River Basin. In approving the Antelope Mining Plan, however, OSM failed to comply with NEPA in two ways. First, OSM violated NEPA's public notice and involvement requirements by failing to ensure that the public was appropriately notified of and involved in the agency's decision to forgo doing any analysis of mining's environmental impacts and instead adopt a five-year old Environmental Impact Statement ("EIS") to support the Mining Plan approval.

Second, OSM violated NEPA when it arbitrarily decided not to prepare supplemental analyses to consider significant new information about mining's impacts to air quality and climate. This new information only became available after completion of the EIS and ROD adopted by OSM. Stated another way, OSM violated NEPA because it approved the Antelope Mining Plan without adequate NEPA documentation based on current conditions. To support its decision to approve the Mining Plan and meet its NEPA obligations, OSM prepared a two-page Statement of NEPA Adoption reporting that mining the federal leases would not have any significant environmental impacts. OSM's ostensible support for this conclusion relied on an EIS prepared in 2008 for the federal coal that would be mined under the challenged Mining Plan approval. However, OSM simply adopted the existing document without performing the required detailed assessment of whether the adopted document met all of NEPA's requirements for a hard look at the direct, indirect, and cumulative impacts of lease development. OSM made the conclusory statement, without any record support, that the existing Leasing EIS was adequate and left it at that.

Coal mining is an intensive industrial activity, with far reaching impacts, that deserves equally intensive environmental scrutiny before garnering federal approval. This scrutiny is vital because coal mining results in air pollution and greenhouse gas emissions that impact air quality—and, by extension, human health—and climate. Coal mining generates air pollution in the form of particulate matter, nitrogen dioxide, and

greenhouse gases. Additionally, environmental impacts related to coal combustion—which result only because coal is mined—can be even more extensive since coal-fired power plants generate significantly higher levels of conventional air pollutants and greenhouse gases.

This case is one in a suite of similar cases that seeks to remedy OSM's ongoing pattern of uninformed decisionmaking for mining plan approvals, a deeply flawed process that significantly threatens public health and the environment throughout the western United States. Two courts have already determined that OSM's mining plan approval process violated NEPA for failing to comply with NEPA's public involvement and hard look requirements, and for failing to provide adequate support for adopting pre-existing environmental analyses. *See WildEarth Guardians v. OSMRE*, 104 F. Supp. 3d 1208 (D. Colo. 2015) ("*WildEarth Guardians I*"); *WildEarth Guardians v. OSMRE*, 2015 WL 6442724 (D. Mont. Oct. 23, 2015)[1] ("*WildEarth Guardians II*"). For the Mining Plan approval challenged here, OSM continues its pattern of rubber-stamping mining plans using existing NEPA documents that the agency has not independently evaluated.[2]

[1] *WildEarth Guardians v. OSMRE*, 2016 WL 259285 (D. Mont. Jan. 21, 2016), accepted in full the Magistrate Judge's finding and recommendations in *WildEarth Guardians II*, with only some minor modifications to the recommended remedy.

[2] Guardians has challenges to two other mining plan approvals on similar grounds pending in the District of Wyoming before this Court, *WildEarth Guardians v. Jewell*, Case No. 2:16-cv-0167-ABJ, and in the District of New Mexico, *WildEarth Guardians v. Jewell*, Case No. 1:16-cv-00605-RJ-SCY.

Accordingly, Petitioner WildEarth Guardians ("Guardians") alleges that Federal Respondents violated NEPA and the Administrative Procedures Act ("APA"), 5 U.S.C. §§701-706, by unlawfully approving the Antelope Mining Plan. Guardians respectfully requests that this Court declare Federal Respondents' approval of the Antelope Mining Plan arbitrary, and order them to comply with NEPA.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

A. The National Environmental Policy Act.

NEPA is the "basic national charter for protection of the environment," and the "centerpiece of environmental regulation in the United States." 40 C.F.R. § 1500.1; *New Mexico ex rel Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009). Congress enacted NEPA to ensure that Federal projects do not proceed until the federal agency analyzes all environmental effects associated with those projects. *See* 42 U.S.C. § 4332(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (stating that NEPA achieves its purpose through "action-forcing procedures . . . requir[ing] that agencies take a *hard look* at environmental consequences.") (citations omitted) (emphasis added). NEPA's hard look should provide an analysis of environmental impacts useful to both decisionmakers and the public. *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983) (describing NEPA's "twin aims" as informing the agency and the public). "By focusing both agency and public attention on the environmental effects of proposed

actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions." *New Mexico ex rel. Richardson*, 565 F.3d at 703; *see also Robertson*, 490 U.S. at 356 (explaining NEPA analysis "generate[s] information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision.") (citation omitted).

Under NEPA, a federal agency must prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.4. In the EIS, the agency must, among other requirements, "rigorously explore and objectively evaluate all reasonable alternatives," analyze and assess all direct, indirect and cumulative effects, and include a discussion of the means to mitigate adverse environmental impacts. 40 C.F.R. §§ 1502.14 and 1502.16.

Direct effects include those that "are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects include effects that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Cumulative effects are "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. "Effects" are synonymous with "impacts." 40 C.F.R. § 1508.8.

If uncertain whether a Federal action may have significant environmental impacts, the agency may prepare an Environmental Assessment ("EA") to determine whether an EIS is necessary. 40 C.F.R. § 1508.9. Although an EA may be less extensive than an EIS, the EA must nonetheless include discussions of alternatives and the direct, indirect, and cumulative environmental impacts of the action. 40 C.F.R. § 1508.9(b). If an agency decides not to prepare an EIS, an EA must provide sufficient evidence to support a Finding of No Significant Impact ("FONSI"). 40 C.F.R. § 1501.4(e). Such evidence must demonstrate that the action "will not have a significant effect on the human environment . . . ." 40 C.F.R. § 1508.13.

The Council on Environmental Quality's ("CEQ's") NEPA regulations provide procedural means for agencies to eliminate duplicative environmental analyses. NEPA allows an agency to adopt an existing draft or final EIS provided that the adopted material "meets the standards for an adequate statement under [NEPA's] regulations." 40 C.F.R. § 1506.3(a). Interior's supplemental NEPA regulations[3] encourage adoption of existing NEPA analyses "[i]f [the] existing NEPA analyses include data and assumptions appropriate for the analysis at hand[.]" 43 C.F.R. § 46.120(b). The regulations further provide that:

[a]n existing environmental analysis prepared pursuant to NEPA and the [CEQ]

[3] In 2008, Interior promulgated regulations to implement NEPA. 73 Fed. Reg. 61,292 (Oct. 15, 2008); 43 C.F.R. §§ 46.10-46.450. Interior and its agencies must use these regulations "in conjunction with and supplementary to" authorities set forth under the NEPA regulations. *Id.*

> regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assess the environmental effects of the proposed action and reasonable alternatives. *The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.*

43 C.F.R. § 46.120(c) (emphasis added). In other words, an agency cannot adopt an existing NEPA document to meet its statutory obligations without evaluating whether conditions have changed or new information has come to light that render prior analysis no longer adequate for evaluating the current environmental impacts of the proposed action.

Even if an agency plans to rely on an existing EIS, an agency may not simply rest on the original document. The agency must gather and evaluate new information that may alter the results of the original environmental analysis, and continue to take a hard look at the environmental effects of its planned actions. Where "significant new circumstances or information relevant to environmental concerns and bearings on" an action or impacts analyzed in an EIS arise(s), an agency "shall" prepare a supplement to the NEPA document. 40 C.F.R. § 1502.9(c)(1). A supplement to an EIS "shall" generally be "prepare[d], circulate[d], and file[d]" in the same fashion as an EIS. 40 C.F.R. § 1502.9(c)(4).

OSM also adopted its own directives to implement NEPA. *See* OSM Handbook on Procedures for Implementing the National Environmental Policy Act ("OSM NEPA

Handbook").[4] These directives emphasize that OSM may adopt NEPA documents produced by other agencies. If OSM does so, the agency must "ensure that the findings of the documents are in full compliance with NEPA and OSM policy." OSM NEPA Handbook, Chapter 3 § B.1. When OSM adopts an EIS, OSM's directives state that the agency should publish a "notice of intent to adopt" in the Federal Register. OSM Handbook, Chapter 3 § B.3.a. A "notice of intent" and the contents thereof are specifically defined at 40 C.F.R. § 1508.22. The directives state that "[a] ROD is prepared for all actions involving an EIS." OSM Handbook, Chapter 3 § B.3.c.

B. The Mining Plan Approval Process.

Under the MLA, the Secretary of the Interior has two primary responsibilities regarding the disposition of federally owned coal. First, the Secretary is authorized to lease federal coal resources, where appropriate. *See* 30 U.S.C. §§ 181, 201. A coal lease must be in the "public interest" and include such "terms and conditions" as the Secretary shall determine necessary. 30 U.S.C. §§ 201, 207(a); *see also* 43 C.F.R. §§ 3425.1-8(a), 3475.1. A coal lease is issued "for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities." 30 U.S.C. § 207(a) and 43 C.F.R. § 3475.2. The U.S. Bureau of Land Management ("BLM"), an agency within the Department of the Interior, is largely responsible for implementing the Secretary's coal leasing responsibilities.

[4] Available at http://www.osmre.gov/lrg/docs/directive490_NEPAHandbook.pdf (last accessed Nov. 8, 2016).

Second, the Secretary authorizes, where appropriate, the mining of federally owned coal through approval of a mining plan. The authority to issue a mining plan is set forth under the MLA, which states that before any entity can take action on a leasehold that "might cause a significant disturbance of the environment, the lessee shall submit for the Secretary's approval an operation and reclamation plan." 30 U.S.C. §207(c). Referred to as a "mining plan" by SMCRA and its implementing regulations, the Secretary "shall approve or disapprove the [mining] plan or require that it be modified." *Id*.; *see also* 30 C.F.R. § 746.14. By delegation, the Assistant Secretary for Land and Minerals ("Assistant Secretary") must approve the mining plan before any mining operations may commence on "lands containing leased Federal coal." 30 C.F.R. § 746.11(a).

Among other requirements, a Mining Plan must, at a minimum, assure compliance with applicable federal laws, regulations, and executive orders, and be based on information prepared in compliance with NEPA. *See* 30 C.F.R. § 746.13. A legally compliant Mining Plan is a prerequisite to an entity's ability to mine leased federal coal. Regulations implementing SMCRA explicitly state that "[n]o person shall conduct surface coal mining and reclamation operations on lands containing leased Federal coal until the Secretary has approved the mining plan." 30 C.F.R. § 746.11(a). To this end, a Mining Plan is "binding on any person conducting mining under the approved mining plan." 30 C.F.R. § 746.17(b).

In addition to an approved mining plan, SMCRA requires that either the Secretary or a federally delegated state surface mining agency approve a surface mining permit application and reclamation plan ("SMCRA permit") before an entity can commence mining. *See* 30 U.S.C. § 1256(a). The SMCRA permit governs surface disturbance for coal mining operations. In SMCRA, Congress authorized the Secretary to delegate administrative and enforcement of SMCRA to states that have a federally approved surface mining program. 30 U.S.C. § 1273(c). In 1982, Interior delegated SMCRA administration and enforcement authority to the State of New Mexico through the New Mexico Energy and Minerals Department. 30 C.F.R. § 931.30.

However, Congress expressly prohibited the Secretary from delegating to the states the duty to approve, disapprove, or modify Mining Plans for federally owned coal. 30 U.S.C. § 1273(c); 30 C.F.R. § 745.13(i). SMCRA also prohibits the Secretary from delegating to states authority to comply with NEPA and other federal laws and regulations other than SMCRA with regard to the regulation of federally owned coal resources. 30 C.F.R. § 745.13(b).

Although the Secretary is charged with approving, disapproving, or modifying a Mining Plan, OSM is charged with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval, disapproval or conditional approval of the mining plan . . . ." 30 C.F.R. § 746.13. Thus OSM plays a critical role in adequately informing the Secretary.

"An approved mining plan shall remain in effect until modified, cancelled or withdrawn . . . ." 30 C.F.R. § 746.17(b). The Secretary must modify a Mining Plan where, among other things, there is "[a]ny change in the mining plan which would affect the conditions of its approval pursuant to Federal law or regulation", "any change which would extend coal mining and reclamation operations onto leased Federal coal lands for the first time", or "[a]ny change which requires the preparation of an environmental impact statement under the National Environmental Policy Act . . . ." 30 C.F.R. §§ 746.18(a), (d)(1), (d)(4), and (d)(5).

II. THE WEST ANTELOPE II MINE AND THE MINING PLAN APPROVAL

The Powder River Basin in northeastern Wyoming and southeastern Montana is the largest source of coal in the United States. AR 4601. In 2006 alone, 42 percent of all coal produced in the United States came from the Powder River Basin. *Id.* Since 2000, Powder River Basin coal production has increased nearly 40 percent, from 360 million tons to a record 494 million tons annually. AR 5627. Hundreds of coal-fired power plants with various generating capacities in 36 states burn coal from the region. AR 4601. The ten most-productive coal mines in the United States are located in the Powder River Basin. AR 5627.

The Antelope Coal Mine is a surface coal mine located in Campbell County, Wyoming. OSM 16534. The mine has been in operation since 1985 and, prior to the approval of the challenged Mining Plan, mining was occurring on six federal leases

containing 1.054 billion tons of federal coal. *Id.* Coal is mined using dragline and truck/shovel mining methods. *Id*.

On November 26, 2013, the Secretary issued the challenged Mining Plan to Antelope Coal, a subsidiary of Cloud Peak Energy, for the mining of federally owned coal at the Antelope Mine in the Powder River Basin of Wyoming. OSM 17373-74. The Assistant Secretary of the Interior for Land and Minerals signed the 2013 Antelope Mining Plan approval, which authorized mining activities at the Antelope Mine related to Federal Coal Leases WYW-163340 and WYW-177903. *Id*. The challenged Mining Plan approval authorized surface mining, a production rate of up to 37 million tons per year, and ultimate recovery of an additional 411 million tons of coal from 4,746 acres within the two federal leases. OSM 16534-35. Under the challenged decision, the life of the mine would be extended for an additional 13 years. *Id*.

On October 28, 2013, OSM issued a "Statement of NEPA Adoption and Compliance" for the Mining Plan approval in which OSM announced that it was adopting a coal leasing EIS prepared by BLM in December of 2008 to satisfy its NEPA obligations. OSM 16542-43. In adopting BLM's 2008 Leasing EIS, OSM did not prepare a ROD, nor did the agency provide notice in the Federal Register of its intent to adopt the EIS without performing any additional environmental analysis of the Mining Plan. OSM did not provide public notice of the availability of the "Statement of NEPA Adoption and Compliance" either before deciding to adopt the 2008 EIS or before

approving the Mining Plan. The Assistant Secretary of the Interior relied on OSM's "Statement of NEPA Adoption and Compliance" when approving the Mining Plan.

STANDARD OF REVIEW

Because NEPA does not include a citizen suit provision, a plaintiff may challenge final agency action that violates NEPA pursuant to the APA. 5 U.S.C. § 702, 704; *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006). OSM's and the Secretary's actions are reviewed under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Agency action is unlawful and should be set aside where it "fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Olenhouse v. Commodity Credit Corp*, 42 F.3d 1560, 1574 (10th Cir. 1994) (internal quotations omitted).

Under the arbitrary and capricious standard, "[the court] must ensure that the agency 'decision was based on a consideration of the relevant factors' and examine 'whether there has been a clear error of judgment.'" *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1167 (10th Cir. 1999) (citations omitted). Agency action will be set aside if:

> [T]he agency [h]as relied on factors which Congress had 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.

Id. (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Under NEPA, an agency action is arbitrary and capricious when it has not "adequately considered and disclosed the environmental impacts of its actions." *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1208 (10th Cir. 2002) (citation omitted). The court applies a "rule of reason" in determining whether deficiencies in NEPA analyses "are significant enough to defeat the goals of informed decisionmaking and informed public comment." *Utahns For Better Transp. v. USDOT*, 305 F.3d 1152, 1163 (10th Cir. 2002); *Colo. Envtl. Coal.*, 185 F.3d at 1174 (holding the rule of reason requires "sufficient discussion of the relevant issues and opposing viewpoints to enable [an agency] to take a hard look at the environmental impacts."). Further, "a court cannot defer when there is no analysis to defer to, and a court cannot accept at face value an agency's unsupported conclusions." *Rocky Mountain Wild v. Vilsack*, 2013 WL 3233573, at *3 n.3 (D. Colo. June 26, 2013). The burden of proof rests with the parties who challenge agency action under the APA. *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691 (10th Cir. 2010).

ARGUMENT

I. WILDEARTH GUARDIANS HAS STANDING

To establish standing, a party must show that it has suffered an injury-in-fact, *i.e.*, a concrete and particularized, actual or imminent invasion of a legally protected interest;

that the injury is fairly traceable to the challenged action of the defendant; and that a favorable decision will likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). A plaintiff's members' "reasonable concerns" of harm caused by pollution from the defendant's activity directly affecting those affiants' recreational, aesthetic, and economic interests establishes injury-in-fact. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183-84 (2000).

In NEPA cases, the Tenth Circuit has refined injury-in-fact into a two-part test: a NEPA plaintiff must show (1) that in making its decision without following NEPA procedures, "the agency created an increased risk of actual, threatened, or imminent environmental harm;" and (2) "that this increased risk of environmental harm injures its concrete interest." *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996). In other words, "[u]nder [NEPA], an injury results not from the action authorized by the agency's decision, but from the agency's *uninformed* decisionmaking." *Id*. at 452.

Guardians satisfied both parts of this test for injury-in-fact. By adopting, without any analysis or public involvement, an EIS that predated, and therefore did not fully analyze the impacts of, revised standards for fine particulate matter ("$PM_{2.5}$") and nitrogen dioxide ("NO_2") emissions, OSM created an increased risk of actual, threatened, or imminent environmental harm to Guardians' members. This increased risk of environmental harm from OSM's uninformed decision injures the concrete recreational and aesthetic interests of Guardians' members who use the areas around the Mine and

from which the Mine and its associated infrastructure are visible. *See* Declaration of Jeremy Nichols ("Nichols Decl.") attached hereto as Exhibit 1. Mr. Nichols details all of his previous visits to areas around and adjacent to the Antelope Mine, Nichols Decl. ¶¶ 15-23, discusses the mining activities and air pollution he observed during these visits, *id*. at ¶¶ 24-25, and states that "[m]ining detracts from my enjoyment of the aesthetics of the area, it disturbs the remoteness of the area, and interferes with my desire to visit the area to view wildlife, rockhound, and camp." *Id*. at ¶ 26. In addition, Mr. Nichols expresses concern for his health when using the areas around and adjacent to the Antelope Mine because of the air pollution he has observed coming from mining operations, often visible as orange clouds from blasting activities at the Mine. *Id*. at ¶¶ 25-26. Mr. Nichols is a member and employee of Guardians and has been since 2008. *Id*. at ¶ 3. OSM's adoption of an EIS that predated the strengthening of air quality standards for $PM_{2.5}$ and NO_2, and OSM's subsequent failure to adequately analyze mining's air quality impacts in the context of these strengthened standards before approving the Antelope Mining Plan poses an actual and imminent threat of harm to Mr. Nichol's concrete recreational and aesthetic interests in areas affected by potentially dangerous levels of air pollution from the Antelope Mine, injuries incurred at the time OSM approved the Antelope Mining Plan without complying with NEPA's requirements. Guardians also suffered concrete harm from the deprivation of its procedural right under NEPA to be provided with notice of OSM's decision to adopt an existing EIS for the Mining Plan approval without

conducting additional analyses or even assessing whether additional analyses under current conditions were necessary. Nichols Decl. ¶ 28. This is sufficient to satisfy the injury-in-fact prong of the standing test.

Guardians has demonstrated causation under the Tenth Circuit's causation standard for NEPA cases. The Tenth Circuit has explained that "in the context of a [NEPA] claim, the injury is the increased risk of environmental harm to concrete interests" and that once a plaintiff establishes injury-in-fact, "to establish causation . . . the plaintiff need only trace the risk of harm to the agency's alleged failure to follow [NEPA] procedures." *Lucero*, 102 F.3d at 451-52. Guardians meets this test. By adopting an EIS without performing any additional analysis of mining's environmental impacts under current air quality standards, OSM failed to fully disclose and analyze the impacts of $PM_{2.5}$ and NO_2 emissions from mining the lease. OSM's violation of NEPA's procedural mandate increased the likelihood of mining's harmful air emissions in areas used by Guardians' members.

A favorable decision from the Court will remand the decision authorizing such damaging action and require OSM to evaluate the environmental impacts of mining and involve the public in its new decision on the Mining Plan. A judicial order requiring compliance with NEPA ensures that the agency's decision is fully informed and redresses plaintiff's injury, thereby satisfying the redressability requirement. *Sierra Club v. DOE,* 287 F.3d 1256, 1265-66 (10th Cir. 2002).

Guardians has organizational standing for the following reasons: its member Mr. Nichols has standing to sue in his own right; the interests at stake are germane to Guardians' purpose (Nichols Decl. ¶ 5); and neither the claim asserted, nor the relief sought requires Mr. Nichols to participate directly in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 342-43 (1977).

Finally, because Guardians seeks to protect its members' recreational and aesthetic interests in areas around and adjacent to the Antelope Mine, including the Thunder Basin National Grassland, Nichols Decl. ¶ 33, Guardians' injuries fall squarely within the "zone of interests" NEPA was designed to protect. *Lucero*, 102 F.3d at 448.

II. OSM'S APPROVAL OF THE ANTELOPE MINING PLAN VIOLATED NEPA'S PROCEDURAL REQUIREMENTS

OSM violated NEPA's procedural requirements. First, OSM failed to provide notice to the public of the availability of its "Statement of NEPA Adoption and Compliance" for the Antelope Mining Plan Modification along with the existing EIS adopted in support of the approval, or to involve the public in its decisionmaking process in any manner. Second, in adopting BLM's Leasing EIS, OSM failed to show on the record that it evaluated the adequacy of the EIS for approval of the Mining Plan Modification. OSM's procedural NEPA violations are part of an ongoing pattern and practice of the agency taking federal action—approving mining plan modifications—without complying with NEPA's public involvement and environmental analysis adoption requirements. OSM does not have the discretion to ignore these mandates.

A. OSM Failed to Involve the Public in the Decision to Approve the Antelope Mining Plan.

1. NEPA's public involvement requirements.

NEPA regulations provide that "public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). "Federal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment," "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures," and provide "public notice of . . . the availability of environmental documents so as to inform those persons . . . who may be interested or affected." 40 C.F.R. §§ 1500.2(d), 1506.6(a), 1506.6(b). "[B]y requiring agencies . . . to place their data and conclusions before the public . . . NEPA relies upon democratic processes to ensure—as the first appellate court to construe the statute in detail put it—that 'the most intelligent, optimally beneficial decision will ultimately be made.'" *Or. Nat. Desert Ass'n. v. BLM*, 625 F.3d 1092, 1099 (9th Cir. 2010) (quoting *Calvert Cliffs' Coordinating Comm'n v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)). This process, in turn, ensures open and honest public discussion "in the service of sound decisionmaking." *Id.* at 1122.

2. OSM failed to provide for any public participation in its NEPA process for the Mining Plan.

OSM failed to satisfy NEPA's public notice and participation requirements in approving the Mining Plan Modification for the Antelope Mine. The agency did not

notify the public, either prior to or immediately following the Assistant Secretary's approval of the Mining Plan, that it had issued a "Statement of NEPA Adoption and Compliance" and that it had adopted BLM's 2008 Leasing EIS in lieu of doing any additional analysis of mining's environmental impacts. Although the Statement of NEPA Adoption averred that both the Leasing EIS and State "will be made publicly available on the OSM Western Region's website," OSM 16543, there is no evidence in the record that OSM followed through with this commitment.

In two recent decisions in the Districts of Colorado and Montana where Guardians challenged OSM mining plan approvals on similar grounds, including failing to ensure the public was appropriately involved in and notified about those approvals, the courts held that OSM's practice of preparing FONSIs and mining plan approvals through a wholly internal process violated NEPA's public involvement requirements. In *WildEarth Guardians I*, 104 F. Supp. 3d at 1224 (citing 43 C.F.R. § 46.305(c)), the court found OSM's practice of "silently plac[ing] hard copies of its completed EAs and FONSIs on a shelf in its high-rise office . . . in Denver" failed to satisfy NEPA's public involvement requirements. Based on similar facts regarding OSM's practice of making mining plan decision documents available in the agency's Denver office, the court in *WildEarth Guardians II*, 2015 WL 6442724 at *7, also rejected this practice as complying with NEPA's public involvement requirements. There, the Court found a "complete lack of notice" where the administrative record "include[ed] no suggestion of public notice by

the Federal Defendants of the FONSI" nor any "indication . . . that the FONSI actually was placed in a reading room in Denver." *Id*. at *7. As these courts have made clear, the requirement that these NEPA documents be made available for public review is meaningless if the public does not know that such documents exist or that the agency has taken final action on the decision analyzed in those documents.

Here, as in *WildEarth Guardians I and II*, OSM made no meaningful efforts to either "[e]ncourage and facilitate public involvement" or "involve . . . the public, to the extent practicable" in any stage of the Mining Plan approval. 40 C.F.R. §§ 1500.2(d), 1501.4(b). This failure is contrary to the basic purpose of public involvement: to prompt a dialogue between OSM and the public and to trigger responsive agency action such as "[s]upplement[ing], improv[ing], or modify[ing] its analyses." 40 C.F.R. § 1503.4(a).

Moreover, OSM cannot discharge NEPA's public participation requirement through the State's public process for the SMCRA permit. Although the Mine's SMCRA permit application was available for public comment, OSM 16541, the availability of State documents for public review does not satisfy OSM's *independent* obligation to inform the public about the potential environmental impacts of mine expansion and solicit meaningful public input as part of the agency's NEPA process. SMCRA explicitly prohibits OSM from delegating NEPA compliance to the State. 30 C.F.R. § 745.13(b). Nor does the record contain any indication that the State's permitting decision put the public on notice that Antelope Mine's proposed expansion was subject to federal

oversight and approval or that OSM was planning to adopt an EIS prepared by a different agency that would serve as the sole basis for OSM's decision to approve the Mining Plan. And involving the public in OSM's NEPA process is one of NEPA's requirements. 40 C.F.R. § 1500.2(d); *see also Or. Nat. Desert Ass'n*, 625 F.3d at 1120 (holding that "public scrutiny is essential to implementing NEPA."). For these reasons, OSM cannot rely on the State's public notice of its permitting process to satisfy the federal agency's NEPA obligations.

B. OSM Violated NEPA's Procedural Requirements When It Adopted the Leasing EIS Without Independently Assessing Whether the EIS Complied with NEPA.

Where a federal agency adopts an EA or EIS under NEPA, the agency is required to provide "appropriate supporting documentation, that [the adopted EA or EIS] adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c). Such supporting documentation "must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." *Id.* In addition, when an agency relies on existing NEPA documents to comply with its obligations under the statute, the agency is required to supplement existing NEPA analyses when "[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)(ii).

Although the Leasing EIS was produced by a federal agency subject to NEPA, OSM may not adopt the EIS without performing its own independent assessment. Attempting "to rely entirely on the environmental judgments of other agencies [is] in fundamental conflict with the basic purpose of NEPA." *Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 595 (D.C. Cir. 1994) (citation and alteration omitted). An agency may adopt another agency's analysis only after "independent[ly] review[ing]" that analysis and explaining how it satisfies the reviewing agency's NEPA obligations. 40 C.F.R. § 1506.3(c); *see also* 42 U.S.C. § 4332(D) (agency remains "responsib[le] for the scope, objectivity, and content of the entire [NEPA] statement").

Here, OSM met none of these criteria when it adopted the Leasing EIS to support the Mining Plan approval. Although OSM states that it "has independently reviewed the EIS and finds that OSM's comments and suggestions have been satisfied, and the EIS complies" with the relevant regulations, the record is devoid of any evidence regarding: (1) OSM's "comments and suggestions" regarding the EIS, (2) OSM's "independent review" of the EIS, or (3) whether there is any new information pertaining to environmental impacts in the five years since BLM completed the EIS. *See generally* OSM 16542-43 (Statement of NEPA Adoption), OSM 16533-38 (OSM's recommendation for mining plan approval). OSM neither cites to pertinent page numbers in the Leasing EIS nor describes the EIS's analyses and conclusions about mining's environmental impacts. Importantly, in the Leasing EIS BLM explicitly recognized that

additional analyses of mining's environmental impacts would occur at the mining plan decision phase when OSM received the proposed mining plan from the lessee. AR 4272. Moreover, in upholding the Leasing EIS, the D.C. Circuit recognized that additional analyses of environmental impacts would occur at the mining plan stage, when OSM authorizes mining through approval of a mining plan. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013).

In *WildEarth Guardians I and II*, OSM produced similar conclusory documents as FONSIs stating the agency had independently reviewed adopted EAs, but pointing to no record evidence demonstrating such a review had occurred. Both courts found that this practice did not comply with NEPA. In *WildEarth Guardians II*, the court recognized that conclusory language about an independent review failed to explain how OSM took a hard look at the environmental impacts of the challenged mining plan:

> The FONSI, without any elaboration or explanation, simply states only the conclusion that it is based on the [leasing] EA, which "has been independently evaluated by OSM and determined to assess the environmental impacts of the proposed action adequately and accurately and to provide sufficient evidence and analysis for this finding of no significant impact." It does not explain, for example, why a six-year-old document can be exclusively relied upon in this regard, particularly when the earlier document expressly stated that it was not analyzing site-specific mining or reclamation plans.
> .....
> Applying the applicable standards, the Court concludes that such conclusory statements do not comply with governing laws and regulations . . . Although the [leasing] EA was attached to the FONSI, there is no indication as to why and how an EA created before the mining plan amendment application was filed properly analyzes its effects. Based on the lack of the required non-delegable environmental analysis in the NEPA documents at issue here . . . OSM failed to

> take a hard look under NEPA at their recommended approval of the [Spring Creek] mining plan amendment.

WildEarth Guardians II, 2015 WL 6442724, at *7 (internal citation to record omitted); *see also WildEarth Guardians I*, 104 F. Supp. 3d at 1226 (finding that "no citations are provided in support of [OSM's] declaration" that it independently reviewed environmental documents adopted for two mining plan approvals*). WildEarth Guardians II*'s analysis and holding are consistent with the Supreme Court's directive that a court should not dig through the record to provide a rationale for an agency decision that the agency has not itself provided. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (recognizing that if the basis for an agency's decision is not discernable from the record, "[t]he reviewing court should not attempt itself to make up for such deficiencies . . . [it] may not supply a reasoned basis for the agency's action that the agency itself has not given.") (citation omitted).

Accordingly, OSM's adoption of the Leasing EIS was arbitrary because OSM failed to perform an independent review of that document on the record to ensure that it complied with NEPA, and failed to follow NEPA's procedure for adoption of preexisting documents.

III. OSM VIOLATED NEPA'S SUPPLEMENTAL ANALYSIS REQUIREMENT

In addition to the NEPA violations discussed above, OSM further violated NEPA because it authorized mining on the federal leases without assessing whether the air

quality or GHG analyses in the 5-year-old EIS needed to be supplemented in light of 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). In the five years between BLM's issuance of the leasing EIS and OSM's adoption of that EIS without further analysis, EPA promulgated a new one-hour standard for short-term exposure to nitrogen dioxide ("NO_2") and strengthened the annual standard for $PM_{2.5}$. Also in the intervening period, a new tool—the social cost of carbon—became available for measuring the environmental and social impacts of GHG emissions from mining and coal combustion. Thus, when authorizing mining on the federal leases through the Mining Plan approval, OSM could not simply rely on the leasing EIS that predated these new developments without assessing *on the record* whether and how these new developments change the conclusions about environmental impacts that BLM reached in the 2008 EIS.[5]

A. NEPA Requires that OSM Pay Attention to Significant New Information.

An agency's NEPA duties do not end when it completes its initial environmental analysis and approves a federal project. NEPA imposes an ongoing obligation for

[5] *Jewell,* 738 F.3d 298, upheld BLM's climate and air quality analyses in the 2008 EIS. Guardians is not attempting, with its challenge to the 2013 Antelope Mining Plan approval, to re-litigate the adequacy of the air quality and climate analyses in the 2008 EIS, and recognizes that the D.C. Circuit has settled these claims. The court's ruling in *Jewell*, however, does not categorically shield from scrutiny OSM's decision to adopt the 2008 EIS without providing an assessment on the record that the analyses and conclusions in that document pertaining to the environmental impacts of mining the leases remain adequate five years later.

agencies to consider and address new information, even after a proposed action has received initial approval. Where "significant new circumstances or information relevant to environmental concerns and bearing on" an action or impacts analyzed in an existing EIS arise, the agency "[s]hall prepare supplements" to the NEPA document. 40 C.F.R. § 1502.9(c)(1).

As the Supreme Court has explained, "[i]t would be incongruous with . . . the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Marsh v. ONRC*, 490 U.S. 360, 371 (1989). Thus,

> [i]f there remains "major Federal action" to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Id. at 374; s*ee also Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 557 (9th Cir. 2000) (recognizing that agencies "must be alert to new information that may alter the results of its original environmental analysis, and continue to take a hard look at the environmental effects of [its] planned action.") (*quoting Marsh,* 490 U.S. at 374). Moreover, OSM "has a *continuing duty* to gather and evaluate new information relevant to the environmental impact of its actions." *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1023 (9th Cir. 1980) (emphasis added). As part of this duty, OSM must

assess "the extent to which the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS." *Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984).

The Tenth Circuit has articulated a two-part test to determine whether an agency violated NEPA's supplemental analysis requirement. First, the court considers whether the agency took a "hard look" at the new information to determine its significance. *SUWA v. Norton*, 301 F.3d 1217, 1238 (10th Cir. 2002), rev'd on other grounds. If an agency concludes that new information is not significant and supplementation is not required, the agency must "provide[] a reasoned explanation" for this conclusion. *Id*. "The relative significance of new information is a factual issue," and the court reviews an agency's assessment of (or lack of assessment of) the significance of new information "under the arbitrary and capricious standard." *Dombeck*, 185 F.3d at 1178. Second, if the court determines that the agency took a hard look at the new information and determined supplementation was not necessary, it then reviews the agency's decision not to prepare a supplemental environmental analysis under the same arbitrary and capricious standard. *SUWA v. Norton*, 301 F.3d at 1238. Where an agency engages in a review of new information, it must adequately document its decision process on the record by "review[ing] the proffered supplemental information, evaluat[ing] the significance—or lack of significance—of the new information, and provid[ing] an explanation for its decision not to supplement the existing analysis." *Dombeck*, 185 F.3d at 1178.

Finally, part of the agency's assessment of the need for supplementation includes consideration of whether the existing NEPA analysis might be too old to provide a basis for reasoned decisionmaking. The Council on Environmental Quality's ("CEQ's") guidance[6] on the issue of stale NEPA analyses notes that "EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1509.2 compel preparation of an EIS supplement." Forty Questions, 46 Fed. Reg 18,026, 18,036 (March 23, 1981). Although the NEPA regulations allow OSM to adopt existing NEPA analyses to avoid duplication of effort, the agency cannot satisfy its NEPA obligation where the adopted document does not include specific information about the environmental impacts of the proposed action, or where the specific conditions underlying the prior analysis have since changed. *Pennaco Energy, Inc. v. USDOI*, 377 F.3d 1147, 1154 (10th Cir. 2004).

B. OSM Ignored Significant New Information.

OSM approved the Antelope Mining Plan, not on the basis of a newly drafted EA or EIS that might have considered the latest information pertaining to air quality and climate, but rather pursuant to a "Statement of NEPA Adoption and Compliance" that purported to determine that the 2008 EIS "adequately describes the potential direct, indirect, and cumulative impacts that may result from the approval of this mining plan."

[6] The Tenth Circuit "consider[s] [the CEQ Forty Questions Guidance] persuasive authority offering interpretive guidance" regarding the meaning of NEPA and the implementing regulations." *New Mexico ex rel. Richardson*, 565 F.3d at 705 n.25. (citation omitted).

OSM 16542. The Statement of NEPA Adoption supporting approval of the Mining Plan is not a new NEPA analysis nor does the Statement include documentation of any efforts by OSM to assess whether supplementation of the 2008 EIS was necessary before approval of the Mining Plan. Although the Tenth Circuit has recognized that an agency may use a non-NEPA document to determine whether supplementation of an existing NEPA document is required, it has also held that the non-NEPA document must thoroughly document the agency's review of new information, evaluation of its significance, and reasoning leading to the decision not to perform supplemental analyses. *Pennaco*, 377 F.3d at 1162; *Dombeck*, 185 F.3d at 1178. OSM's Statement of NEPA Adoption does not meet this standard.

The first step in the Court's review of Guardians' NEPA supplementation claim is to determine whether OSM adequately assessed the significance of new information relating to air quality and GHG impacts. *SUWA v. Norton*, 301 F.3d at 1238; *Dombeck*, 185 F.3d at 1178. However, as discussed in Section II above, OSM did not make any efforts "to gather and evaluate new information relevant to the environmental impact of its actions," *Gribble,* 621 F.2d at 1023, either of its own volition or by providing any public process whereby Guardians could have provided this information to the agency as part of its decisionmaking process. Accordingly, on this ground the Court can remand the Mining Plan decision to the agency to identify whether there is any potentially significant new information or changed circumstances since BLM issued the 2008 EIS

bearing on the impacts of mining the leases. Alternatively, the Court can review the new information pertaining to air quality and climate impacts discussed below to reach a determination that this new information warranted supplementation of the 2008 EIS.

1. Promulgation of more stringent air quality standards for two pollutants between 2008 and 2013 required OSM to supplement the EIS's air quality analysis.

In this case, new and revised air quality standards promulgated between BLM's completion of the 2008 EIS and OSM's approval of the Mining Plan in 2013 constitute significant new information about the affected environment (air quality) that would be impacted by mining the federal leases. The EIS did not consider $PM_{2.5}$ emissions from mining activities. The EIS also predates EPA's promulgation of the new standard for one-hour NO_2 emissions, therefore there is no analysis of mining's impacts to these emissions based on the standards in place in 2008 when BLM completed the EIS. In an analogous challenge to mining plan approvals in *WildEarth Guardians I*, the court held that OSM violated NEPA's supplementation requirement where the agency failed to supplement the existing environmental analyses it relied on with an analysis of mining's air quality impacts under revised standards:

> [A] change in air quality emissions standards would, at a minimum require OSM to consider how the new standards impact its analysis of whether a proposed action 'significantly' affects the quality of the human environment. More stringent standards would arguably make the same action more significant.

WildEarth Guardians I, 104 F. Supp. 3d at 1228. Given this new information, OSM's arbitrary adoption of the 2008 EIS, without assessing the new information to determine whether supplementing the EIS's air quality analysis was necessary, violated NEPA.[7]

a. EPA revised the annual $PM_{2.5}$ standard prior to Mining Plan approval.

Particulate matter is one of six "criteria" pollutants considered harmful to public health and the environment for which the U.S. Environmental Protection Agency ("EPA") has established National Ambient Air Quality Standards ("NAAQS") under the Clean Air Act. *See* 40 C.F.R. § 50.1 *et seq.* (setting forth NAAQS). EPA recognizes two different types of particulate matter ("PM") based on particle size: (1) particulate matter less than 10 microns in diameter, or PM_{10}, and (2) particulate matter less than 2.5 microns in diameter, or $PM_{2.5}$. *See generally*, 52 Fed. Reg. 24,634 (July 1, 1987) (setting NAAQS for PM_{10}); 62 Fed. Reg. 38,652 (July 18, 1997) (setting NAAQS for $PM_{2.5}$).

According to EPA, health effects associated with short-term exposure to $PM_{2.5}$ include "aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions and emergency department visits), changes in lung function and increased respiratory symptoms, as well as new evidence for more subtle indicators of

[7] As discussed in Section II.B above, OSM cannot rely on State permitting documents to satisfy its NEPA obligation. Even if OSM could rely on State permitting documents, these documents do not include the requisite analyses. None of the State permitting documents include any analysis of $PM_{2.5}$ or NO_2 impacts from mining. *See* OSM 5463 (1980 Meteorological and Air Quality Baseline Study); OSM 17401 (2013 State Decision Document for Permit).

cardiovascular health." 71 Fed. Reg. 61,144, 61,152 (Oct. 17, 2006). In 2006, EPA revised the $PM_{2.5}$ NAAQS, limiting 24-hour concentrations to no more than 35 $\mu g/m^3$, and retaining the 15 $\mu g/m^3$ limit for annual concentrations. *Id*. at 61,144. In 2012, EPA proposed lowering the annual standard to 12 $\mu g/m^3$, a proposal which became final in 2013. 78 Fed. Reg. 3,086 (Jan. 15, 2013).

Motor vehicle emissions and combustion processes from coal mining activities generate $PM_{2.5}$ emissions. 71 Fed. Reg. 61,144, 61,146. Therefore, OSM was required to evaluate air quality impacts from future $PM_{2.5}$ emissions caused by mine expansion. Although the 2008 EIS discusses PM_{10} levels from ongoing mining at the Antelope Mine, it lacks *any* discussion of $PM_{2.5}$ levelsfrom either ongoing or future mining. AR 4347-59. Even if the 2008 EIS had analyzed air quality impacts from mining's $PM_{2.5}$ emissions, EPA's strengthening of the annual standard for $PM_{2.5}$ in 2013 represents new information relevant to air quality impacts since BLM issued the EIS in 2008. Thus, OSM cannot rely on the 2008 EIS for analysis of $PM_{2.5}$ for two reasons: 1) the EIS did not analyze the impacts of $PM_{2.5}$ emissions from mining, and 2) EPA changed, *i.e.* strengthened, the annual standard for $PM_{2.5}$ so that even if the EIS had analyzed these emissions under the old standard, NEPA requires that OSM determine whether the revised standard constitutes significant new information requiring supplementation of the 2008 EIS. OSM's failure to do so was arbitrary.

b. EPA promulgated a new one-hour NO_2 standard in 2009.

Nitrogen dioxide ("NO_2") is a criteria pollutant under the Clean Air Act. 42 U.S.C. § 7408. The NO_2 annual standard is 53 parts per billion ("ppb"). On July 15, 2009, EPA proposed to supplement the annual standard with a one-hour NO_2 standard of between 80 and 100 ppb because "recent studies provide scientific evidence that is sufficient to infer a likely causal relationship between short-term NO_2 exposure and adverse effects on the respiratory system." 74 Fed. Reg. 34,404, 34,410 (July 15, 2009). According to EPA, "[e]pidemiologic evidence exists for positive associations of short-term ambient NO_2 concentrations below the current NAAQS with increased numbers of emergency department visits and hospital admissions for respiratory causes, especially asthma." *Id.* at 34,413. EPA promulgated the final one-hour NO_2 standard of 100 ppb on February 9, 2010. 75 Fed. Reg. 6,474 (Feb. 9, 2010).

Overburden blasting at Antelope Mine produces NO_2 emissions in the form of orange clouds. AR 4345. Railroad locomotives used to haul coal form the Mine are also sources of NO_2 emissions. AR 4347. The 2008 EIS predates promulgation of the one-hour NO_2 standard, therefore it included no analysis of the degree to which blasting activities at the mine would affect NO_2 concentrations on an hourly basis. Discussion of NO_2 emissions in the 2008 EIS is limited to an assertion that voluntary mitigation measure would address potentially significant short-term NO_2 impacts; however, the EIS provided no analysis to support this assertion. AR 4364-67. Because OSM must ensure

its mining plan decisions comply with NEPA, 30 C.F.R. § 745.13(b), and the NO_2 discussion in the 2008 was both inadequate and stale by the time OSM adopted it in 2013, OSM was required to analyze the impacts to air quality from one-hour NO_2 emissions prior to approving the Mining Plan.

The court's determination in *WildEarth Guardians Salazar*, 880 F. Supp. 2d 77, 90-91 (D.D.C. 2012), that BLM did not need to supplement the 2008 EIS to analyze impacts under the one-hour NO_2 standard does not provide useful guidance here because that holding was based on a factor not applicable here. There, the court held that supplementation was not required where the one-hour NO_2 standard became final *after* BLM had completed the EIS and issued the Record of Decision authorizing the lease sale, resulting in "no ongoing major Federal Action that could require supplementation." *Id*. at 90 (quoting *Norton v. SUWA*, 542 U.S. 55, 73 (2004)). Here, the one-hour NO_2 standard became final three years *before* OSM took any action on the Antelope Mining Plan. Had the agency complied with its "continuing duty to gather and evaluate new information relevant to the environmental impact of its actions," it would have been aware of this changed circumstance in the intervening years since BLM issued the EIS and could have analyzed the air quality impacts from short-term NO_2 emissions in light of this changed circumstance to inform its decision on the Antelope Mining Plan. *Gribble,* 621 F.2d at 1023. OSM's failure to consider whether the new NO_2 standard

constituted "significant new information" warranting supplementation of the 2008 EIS was arbitrary.

2. OSM failed to use available tools for analyzing mining's GHG emissions and failed to analyze coal combustion impacts from mining.

a. GHG emissions from mining.

Climate change is occurring and currently impacting natural resources, including those under the jurisdiction of the Department of the Interior. AR 4597. This is largely due to the release of greenhouse gases ("GHGs") by humans, including by fossil fuel development.[8] AR 4597-98. "Continued greenhouse gas emissions at or above current rates would cause further warming and induce many changes in the global climate system during the 21st century that would be very likely to be larger than those observed during the 20th century." AR 4599 (quoting report of Intergovernmental Panel on Climate Change ("IPCC")). In the western United States, such changes and impacts will include an increase in the amount and seasonal variability of precipitation; an expansion of some populations of plants, invasive species, and pests; an increase in the frequency, severity, and extent of fires; and an overall reduction in biodiversity and sensitive species, including in particular species relying on high-elevation habitats, for which extinction is probable. AR 4600-01.

[8] Carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride are recognized as GHGs. EPA most recently found that these "six greenhouse gases taken in combination endanger both the public health and the public welfare of current and future generations." 74 Fed. Reg. 66,496 (Dec. 15, 2009).

Carbon dioxide emissions are the leading cause of climate change. AR 5301. Coal-fired power plants release nearly 30 percent of the nation's total GHG inventory and 33 percent of all carbon dioxide released in the U.S., making coal the single-largest source of carbon dioxide in the country. AR 5546. As the largest producer of coal in the U.S., coal mining in the Powder River Basin is linked to more GHG emissions than *any other activity* in the United States. *Id*. According to the BLM, "Wyoming PRB surface coal mines were responsible for about 13.9 percent of the estimated U.S. CO_2 carbon dioxide emissions in 2006." AR 4601.

The leases that will be mined under the challenged Mining Plan have the potential to yield over 400 million tons of coal. OSM 16536. When this coal is burned, it will release between 600 and 800 million tons of carbon dioxide into the atmosphere. AR 5643. In the EIS, BLM recognized that coal mining on the leases "would extend carbon dioxide emissions related to burning coal from Antelope Mine for up to 13 additional years beyond 2018." AR 4606. BLM also determined that coal mining activities on the leases would produce 347,911 tons of GHG emissions annually. AR 4496. BLM then compared these direct, project-level emissions to state-level GHG totals, showing the percent contribution that project-level emissions would have to state-level emissions on an annual basis. AR 4496-97. BLM did not estimate GHG emissions from burning the coal mined from the leases because of "uncertainties about what emission limits will be in place" in the future "where and how the coal in [the leases] would be used after it is

mined." AR 4606. Therefore, the 2008 EIS does not include an assessment of the severity of GHG emissions and their impacts resulting from coal combustion.

b. OSM failed to use available tools to evaluate severity of direct GHG emissions from mining.

In the Leasing EIS, BLM did not go beyond estimating direct GHG emissions from mining to actually analyzing the impacts of these emissions because there were no adequate tools available in 2008 to measure the impacts from mining's incremental GHG emissions. The D.C. Circuit recognized this in *Jewell*, 738 F.3d at 309, when it upheld as adequate BLM's estimation of the amount of GHG emissions generated from mining coal on the Antelope leases. However, the Court's holding was based in part on the recognition that additional analysis of GHG impacts would occur at the subsequent mining plan stage, leaving the door open for consideration of GHG impacts by OSM at the time it received an application to mine the coal from the Antelope leases. *Id*. (noting that "BLM does not authorize mining through the issuance of a coal lease; rather, a mining permit must be obtained from [the State] with oversight from an independent federal agency, the [OSM], and therefore mitigation measures can be imposed at a later stage."). Accordingly, OSM does not get a free pass from complying with NEPA for its mining plan decision simply by adopting an EIS that a court determined complied with NEPA for a different agency decision made five years earlier. *Marsh*, 490 U.S. at 373. Excusing OSM from complying with NEPA's supplementation requirement in its approval of the mining plan simply because the EIS was previously upheld as adequate to

support BLM's leasing decision would render NEPA's supplementation requirement a nullity.

Since BLM's completion of the EIS in 2008, CEQ issued guidance to agencies for considering GHG emissions and climate change in NEPA reviews.[9] The CEQ Climate Guidance recognizes two fundamental obligations for agencies when addressing climate change: "(1) The potential effects of a proposed action on climate change as indicated by assessing GHG emissions; and, (2) The effects of climate change on a proposed action and its environmental impacts." CEQ Climate Guidance at 4. In other words, agencies are to disclose emissions and then consider the effects. Moreover, the CEQ has explicitly rejected the type of GHG analysis that BLM performed in the 2008 EIS. "[A] statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of climate change, and is not an appropriate basis for deciding whether or to what extent to consider climate change impacts under NEPA." CEQ Climate Guidance at 11.

Although current climate models still cannot predict local impacts to climate from a particular GHG emission source, a tool currently exists (and existed in 2013 when OSM

[9] Council on Environmental Quality, Memorandum for Heads of Federal Departments and Agencies, Final Guidance for Federal Department and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866-01 (Aug. 5, 2016), available at: https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf (hereafter "CEQ Climate Guidance"). Notably, the guidance is intended to "facilitate compliance with existing NEPA requirements"; *i.e.*, CEQ's NEPA regulations at 40 C.F.R. §§ 1500-1508. *Id.* at 1.

approved the Mining Plan), for evaluating the environmental costs of project-specific GHG emissions, even where those emissions make up only a small fraction of national or global emissions. The social cost of carbon protocol, created by a working group comprised of several federal agencies and scientists, is one generally accepted approach to evaluating the impacts of a proposed action's GHG emissions. *High Country Conserv. Advocates v. USFS*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014). This protocol, first released in 2010 and updated in May 2013, was available to OSM at the time it was deciding whether to adopt the 2008 EIS and should have been deciding whether additional analyses were necessary to supplement the EIS. The social cost of carbon is "designed to quantify a project's contribution to costs associated with global climate change." *Id*. It is intended to include changes in net agricultural productivity, human health, property damages, and the value of ecosystem services, all of which climate change can degrade.[10] Although the social cost of carbon was initially designed as an analytical tool to assist agencies with rulemaking, EPA has recommended that agencies use the social cost of carbon in NEPA reviews. *High Country*, 52 F. Supp. 3d at 1190.[11]

[10] Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 Colum. L. Rev. 167, 171-73 (Jan. 2014) (describing origins of interagency agreement on the social cost of carbon).

[11] *See also* Sarah E. Light, *NEPA's Footprint: Information Disclosure as a Quasi-Carbon Tax on Agencies*, 87 Tul. L. Rev. 511, 545-46 & n.160 (Feb. 2013) (describing EPA recommendation that State Department, in evaluating impacts of Keystone XL Pipeline, "explore … means to characterize the impact of the GHG emissions, including an estimate of the 'social cost of carbon' associated with potential increases of GHG emissions.").

Therefore, a tool was available in 2013 for OSM to assess the impacts of the GHG emissions from mining the coal on the Antelope leases.

c. OSM failed to analyze coal combustion as an indirect impact of mining.

Finally, OSM violated NEPA by failing to supplement the 2008 EIS with an analysis of coal combustion GHG emissions as an indirect effect of mining. Indirect effects are defined as effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," including "effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b). NEPA requires agencies to consider those effects that have a "reasonably close causal relationship" to the agency action. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *see also Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (reaffirming requirement for reasonably close causal relationship).

Courts have previously held that agencies must consider foreseeable upstream and downstream impacts of energy development. *See e.g., Mid-States Coal. for Progress v. Surf. Trans. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (held that because it was "reasonably foreseeable" that rail line construction would lead to increased coal consumption, the EIS should have analyzed the resultant air pollution as an indirect effect); *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1017 (S.D. Cal. 2003) (held that a NEPA analysis for two new electricity transmission lines should have considered as "indirect effects" air pollution from two upstream power plants); *High*

Country, 52 F. Supp. 3d at 1189–90 (recognizing that for coal leasing decisions the agencies "do not dispute that they are required to analyze the indirect effects of GHG emissions"). More recently, courts have also recognized that OSM must analyze combustion impacts prior to approval of mining plans. *See WildEarth Guardians I*, 104 F. Supp. 3d at 1229–30 (recognizing that "combustion is therefore an indirect effect of the approval of the mining plan modifications"); *Diné Citizens Against Ruining Our Env't v. U.S. OSMRE*, 82 F. Supp. 3d 1201, 1213 (D. Colo. 2015), vacated as moot, (holding that "coal combustion-related impacts of . . . proposed expansion are an 'indirect effect' requiring NEPA analysis."). This obligation is further underscored by the CEQ, providing "where the proposed action involves fossil fuel extraction … the [indirect impacts] associated with the end-use of the fossil fuel being extracted would be the reasonably foreseeable combustion." CEQ Climate Guidance at 16 n.42.

As discussed above, the 2008 EIS did not estimate GHG emissions from coal combustion. Yet courts have recognized that coal combustion is a reasonably foreseeable effect of coal mining. Therefore, OSM was required to supplement the 2008 EIS with an analysis of coal combustion impacts from GHG emissions as part of its compliance with NEPA for the Mining Plan decision. Because OSM did not do this and instead adopted an EIS that did not analyze coal combustion as an indirect effect of mining, OSM violated NEPA's supplementation requirement and also failed to consider a relevant factor and important aspect of the problem. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

CONCLUSION

For the reasons stated above, Guardians respectfully requests that this court (1) declare that Federal Defendants' approval of the Antelope Mining Plan violated NEPA, and (2) vacate Federal Defendants' approval of the Antelope Mining Plan until such a time as they have demonstrated compliance with NEPA.

Respectfully submitted on this 27th day of January 2017,

/s/ Samantha Ruscavage-Barz
Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
TEL: (505) 401-4180
sruscavagebarz@wildearthguardians.org

/s/ Alex Freeburg
Alex Freeburg
Freeburg Law, LLC
Box 3442
Jackson, WY 83001
TEL: (307) 200-9720
alex@tetonattorney.com

Attorneys for Petitioner WildEarth Guardians

CERTIFICATE OF WORD LIMIT COMPLIANCE

Pursuant to Local Rule 83.6(c) and Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, I hereby certify that this Opening Brief contains 10,772 words. I relied on my word processing program, Microsoft Word, to obtain this word count.

/s/ Samantha Ruscavage-Barz

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opening Brief and attached exhibit are being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record, this 27th day of January, 2017.

/s/ Samantha Ruscavage-Barz