IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-00518-RBJ

WILDEARTH GUARDIANS,

Plaintiff-Appellee,

v.

UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, AL KLEIN, in his official capacity as Western Regional Director of the Office of Surface Mining, Reclamation and Enforcement, Denver Colorado, and S.M.R. JEWELL, in her official capacity as U.S. Secretary of the Interior,

Federal Defendants-Appellant

COLOWYO COAL CO. L.P. and TRAPPER MINING, INC.,

Defendant-Intervenors-Appellant.

NOTICE OF APPEAL

Notice is hereby given that Colowyo Coal Co. L.P., Defendant-Intervenor in the above named case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the District Court's May 8, 2015, Order (ECF No. 78) and Judgment (ECF No. 79) declaring violations of the National Environmental Policy Act (NEPA) and ordering remedies thereto.

Respectfully submitted this 29th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2015 I caused the forgoing document titled **NOTICE OF APPEAL** to be electronically filed with the Clerk of the Court using the CM/ECF system. Notification of such filing will be sent to the following email addresses:

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WILDEARTH GUARDIANS,

Plaintiff,

v.

U.S. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, ERVIN BARCHENGER, Acting Western Regional Director of the Office of Surface Mining Reclamation and Enforcement, Denver, Colorado, and SALLY JEWELL, in her official capacity as U.S. Secretary of the Interior,

Defendants,

COLOWYO COAL CO. L.P., and TRAPPER MINING, INC.,

Defendant-Intervenors

COLOWYO COAL COMPANY'S MOTION FOR STAY PENDING APPEAL

INTRODUCTION

Intervenor-Defendant Colowyo Coal Co. L.P., ("Colowyo") respectfully moves the Court for a stay pending appeal of its Order, Dkt. 78, -- F.Supp.2d. ----, 2015 WL 2207834 (D. Colo. May 8, 2015)("Order"), and Judgment, Dkt. 79, ("Judgment"). The Order and Judgment err as to the scope of the discretion held by Defendant Office of Surface Mining Reclamation and Enforcement ("OSM") under the Surface Mining Control and Reclamation Act ("SMCRA") and Clean Air Act ("CAA"), and OSM's corresponding duties to analyze the indirect and direct

effects under NEPA of a proposed modification to a Mine Plan of Operation, issued in 2007. The Court also improperly restricts OSM's discretion regarding public involvement in NEPA proceedings under applicable law, and failed to correctly apply the equitable doctrine of laches. These errors cause a significant threat of irreparable harm to Colowyo, and both the balance of harms and public interest favor issuance of a stay.

STANDARD OF REVIEW

A stay pending appeal is an exercise of judicial discretion, and "the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009). When reviewing a stay motion, the Courts of Appeal consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (internal quotation marks omitted). The party requesting the stay bears the burden to establish a stay is warranted. *Id.* at 433-34.

In the district court, the "test for obtaining a stay pending appeal is the same as that for an injunction in this circuit." *Desktop Images, Inc. v. Ames*, 930 F. Supp. 1450, 1451 (D. Colo. 1996). The court further explained, "[i]n the granting or denial of injunctions this court has ruled, consistent with the cited opinion, that the true test is whether the movant has made a substantial case on the merits. In other words, has the movant presented a serious and substantial legal question." *Id.* at 1452.

EVENTS SINCE ISSUANCE OF THE ORDER AND JUDGMENT

The Order and Judgment have received significant media and public attention. The

prospect of the potential shutdown of the Colowyo Coal Mine in early September has prompted significant concern and distress among mine employees, Rio Blanco and Moffat Counties where the Mine is located, and Craig, Colorado, where many mine employees live and where the Mine is a significant contributor to the local economy. Declaration of Chris McCourt ("McCourt Decl.") ¶¶ 3-4. These concerns have been heightened by WildEarth Guardians ("Guardians") post-judgment commentary, which highlighted the potential for shutdown and the need to "embrace" the transition away from coal.[1] Employees and area residents have approached Colowyo to inquire whether they should begin the process of selling their homes, and have delayed major purchases that would tie them to the community. McCourt Decl. ¶ 3.

OSM has been working expeditiously to meet the Court's deadline. On May 21, 2015, OSM published a notice in local newspapers announcing a public meeting on the remedial NEPA process on June 10, 2015, and an opportunity to comment through June 15, 2015.[2] An additional notice will be published on June 4, 2015. *Id.* Notice has also been provided on OSM's website.[3] Upon the closure of the public comment period, OSM will have 82 days to consider the comments, prepare the supplemental analysis, provide public notice of the analysis, and reach a decision. Order at *16.

Colowyo has dedicated significant resources to providing any additional information OSM might require to prepare the remedial NEPA analysis. McCourt Decl. ¶ 2. When

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[1] http://www.coloradoindependent.com/153315/environmentalists-are-targeting-colorado-coal-successfully (last visited May 29, 2015).
[2] http://www.theheraldtimes.com/classifieds-may-21-2015/rio-blanco-county/ (last visited May 28, 2015).
[3] http://www.wrcc.osmre.gov/initiatives/colowyoMineSouthTaylor.shtm (last visited May 29, 2015).

approached by members of the public or employees, however, Colowyo has refrained from making any predictions regarding OSM's ability to meet the 120 day deadline for an analysis or decision, or as to OSM's likelihood of prevailing on any challenge to the process or decision. *Id.* ¶ 4. This is informed in part by the fact that no coal combustion analysis of the type ordered by the Court has to date been reviewed or upheld by the district court for the District of Colorado. Moreover, despite the paucity of Guardians' arguments to date on the substantive adequacy of the mine plan in the litigation, Guardians is typically not restrained in its NEPA scoping commentary. For example, on May 22, 2015, Guardians submitted scoping commentary on the supplemental NEPA analysis ordered by the Court in the *High Country Conservation Advocates* litigation. Guardians' comments totaled 87 single-spaced pages, and contended that not only must the Forest Service conduct the climate change analysis ordered by the Court, but that the Forest Service must essentially re-do the entire environmental impact statement for the Colorado Roadless Rule on all subjects pertaining to the North Fork Valley Exception.[4] None of this is to suggest Guardians lacks the right to demand such extensive re-analysis, but the scope of the Order, the likely range and depth of commentary, and the deadline imposed by the Court all combine to make the summer of 2015 one of great trepidation for that part of Northwestern Colorado. McCourt Decl. ¶¶ 3-4. In that context, the safety valve of a potential extension for "very good cause shown" provides little comfort.

ARGUMENT

A. Colowyo has High Likelihood of Success on Appeal

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[4] http://www.wildearthguardians.org/site/DocServer/Comments_of_HCCA_et_al_on_scoping_-_Colorado_Roadless_Ru.pdf?docID=16122 (last visited May 28, 2015).

Many of the issues litigated and determined by the Court in its Order, including standing and waiver, were thoroughly addressed in the briefing on the merits and need not be reiterated in detail in this Motion. Colowyo instead focuses on those issues for which the Order supplies additional or variants of interpretations and arguments raised on the merits, for which additional discussion will illuminate Colowyo's likelihood of success on appeal. There are five such issues: (1) the interpretation of SMCRA, (2) the analysis of but-for causation of coal combustion effects, (3) the inclusion of compliance with National Ambient Air Quality Standards ("NAAQS") in OSM's remedial NEPA analysis, (4) the Court's directives to OSM regarding public participation in the remedial NEPA process, and (5) the Court's application of the laches doctrine. The serious questions regarding standing and waiver are also briefly discussed.

(1) The Court Misinterpreted SMCRA and OSM's Duties Under the Cooperative Agreement with Colorado, Resulting in an Error in the Court's Determination of OSM'S NEPA Duties

Colowyo contended that OSM's Mine Plan of Operation review obligations were constrained by the terms of the previously issued and unchallenged federal coal leases awarded to Colowyo. Specifically, combustion of the mined coal is a necessary and foreseeable consequence of granting a federal coal lease. After the Department of the Interior granted a lease to Colowyo, in exchange for bonus bid payments, OSM was obligated to approve a Mine Plan of Operations revision only if the plan would achieve the maximum economic recovery of coal within the lease tract. 30 U.S.C. § 201(a)(3)(c). Colowyo contended that OSM by law cannot

condition a plan of operation or permit based upon the effects of coal combustion, and therefore OSM has no duty to analyze combustion effects. *DOT v. Public Citizen,* 541 U.S. 752 (2004).[5]

The Court disagreed, acknowledging that *Public Citizen* limits an agency's NEPA duties, but concluding that OSM does have the discretion to condition a permit based on coal combustion effects, pursuant to SMCRA. Specifically, the Court stated on two occasions:

> The portion of the modified plan addressing new land areas is subject to the full standards applicable to new applications for mining ***leases*** under SMCRA. 30 U.S.C. § 1256(d)(2)
>
> . . .
>
> As SMCRA makes clear, any proposed expansion of mining operations beyond the boundaries authorized by an existing permit "shall be subject to the full standards applicable to new applications" for mining ***leases***. 30 U.S.C. § 1256(d)(2).

Order at *2, *14 (emphases added). In the Court's view, because the standards applicable to leases and permit revisions are identical, OSM has the discretion to condition a permit on the basis of coal combustion effects, and the examination of such effects is fully within the scope of OSM's NEPA obligations. *Id.*

The Court misreads SMCRA. Section 1256(d)(2) does not say or refer to "leases," but only to "*applications under this chapter*." (emphasis added). Lease applications are not filed or reviewed under SMCRA Chapter 25 (30 U.S.C. §§ 1251-79). Leases are reviewed and issued

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[5] The same principle applies to any analysis of effects to threatened and endangered ("T&E") species arising from coal combustion. OSM has no obligation to analyze the effects of combustion on T&E species, because it is statutorily commanded to maximize economic recovery of the leased coal and has no authority to restrict the supply of coal to the Craig Station or any other facility. *National Ass'n v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532-35 (2007); *see also* 50 CFR 402.03 ("Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control"). (emphasis added).

under the Mineral Leasing Act, 30 U.S.C. §§ 201-207 ("MLA"). It is clear that the phrase "applications under this chapter" refers to *permit applications*, not lease applications, especially since the focus of Section 1256(d)(2) is to ensure that expansion of permit boundaries are to be examined as if they were a new permit application, rather than under a permit renewal as of right. *Id.* Instead, SMCRA review of permit applications is always conducted *post-leasing*, and is constrained by the rights and obligations conferred by the lease. This includes the right to mine the leased coal. The Court therefore errs in conflating SMCRA review of permit applications with MLA review of lease applications.

Moreover, the Court adopted an overly expansive view of OSM's rights under SMCRA, holding that OSM has essentially plenary authority to review and modify state-issued SMCRA permits pursuant to OSM's reserved authority to oversee state implementation of the SMCRA *program*. Order at *2. But authority to monitor implementation of the program does not imply authority to second guess individual permit decisions. This is made clear in the preamble to the 1983 amendments to the rules for surface coal mining and reclamation operations on Federal lands (intended to "more clearly delineate the roles of the Federal government and the States").

> Where a cooperative agreement is in place, the permit application package will be submitted to OSM and the State. The State will then assume the lead role in the review of the package, which (at the State's option) may or may not include ensuring consultation with involved Federal agencies, including OSM. Where the State has elected not to coordinate the required consultation among Federal agencies, OSM would ensure that affected Federal agencies were consulted and necessary comments or concurrences received. *In particular, the State will be responsible for review and approval of the SMCRA permit application. OSM will continue to be responsible for ensuring compliance with other applicable Federal laws, regulations and orders* <u>*not otherwise covered under the SMCRA review*</u>*. . . .*

48 Fed. Reg. 6912, 6914 (Feb. 16, 1983) (emphasis added); *see also id*. at 6915 ("OSM will receive copies of permit application packages, which include permit applications, not to review

the applications for compliance with SMCRA, *but to facilitate OSM's role in compliance with applicable laws not otherwise covered in the SMCRA review. The State will have the sole responsibility for reviewing permit applications for SMCRA compliance*." (emphasis added)). *See also In Re Permanent Surface Mining Litigation,* 653 F.2d. 514, 517-520 (D.C. Cir. 1981).[6]

Notably, the Department of the Interior is obligated to consider the reasonably foreseeable environmental consequences of leasing and mining during the *leasing* process. 30 U.S.C. § 201(c); 30 U.S.C. § 1273. And to the extent that the environmental effects of a mine are *not* reasonably foreseeable at the time of leasing because more detail regarding the local area and the mine plan need to be developed, these facts can certainly constrain mine plan and permit review and approval. But the *most* foreseeable aspect of an application to lease coal is that the coal, if leased, will be burned, as the Court has previously recognized. Order at *10; *High Country Conservation Advocates v. United States Forest Serv.,* 52 F.Supp.3d 1174, 1194 (D. Colo. 2014). Once the Department of the Interior has issued a lease, which is a binding contract with the lessee, OSM does not have the right to impair that lease based upon consequences of leasing that were completely foreseeable at the time of lease issuance. Studying the consequences of combustion in a NEPA document is not useful to the decision maker at the mining plan approval stage and cannot enhance the quality of decision making because there is no condition that OSM could impose on the mining operation that would affect the combustion.

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[6] Part of the confusion over OSM's role may arise from the discussion in *Diné Citizens Against Ruining Our Env't v. United States Office of Surface Mining Reclamation & Enforcement*, —— F.Supp.3d. ——, No. CV 12–CV–01275–JLK, 2015 WL 99660, decided and submitted after merits briefing was complete. *Diné Citizens* is inapposite on the subject of OSM's rights and duties in the context of Mine Plan of Operations review where there is a state-approved program. On tribal lands, OSM functions as the primary SMCRA permitting authority.

For these reasons, the Secretary has no authority or discretion to condition Colowyo's permit on the basis of combustion effects, and no duty to analyze such effects under *Public Citizen.* The Court's misinterpretations of SMCRA[7] results in an error in the Court's holding regarding OSM's NEPA duties.

(2) The Court Neglected the Element of But-For Causation in Interpreting OSM's Duty to Analyze Coal Combustion Effects

In addition to its misinterpretation of SMCRA, the Court misapplies the test for causation as related to OSM's duty to analyze combustion effects. The Court relies heavily on *Diné Citizens,* 2015 WL 996605, at *6, for its determination that coal combustion is a reasonably foreseeable indirect effect of OSM's mine plan review, and therefore within the range of consequences OSM must analyze under NEPA. Order at *14-15. However, the Court only applies one prong of the two-prong test recognized in *Diné Citizens*. As explained in *Diné Citizens*:

> Accordingly, *Petitioners must demonstrate* <u>*both*</u> that (1) "but for" the proposed expansion, the coal combustion-related impacts would not occur and (2) the coal combustion-related impacts are reasonably foreseeable.

Id. *6. (emphasis added). The Court concludes that because Colowyo's coal is intended for the Craig Station, the destination and quantities of coal to be burned are sufficiently known to be reasonably foreseeable. Order at *15. But the Court never acknowledges, much less analyzes, whether Guardians carried its burden to show but-for causation. As pointed out during oral

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[7] Colowyo takes no position on the potentially similar issue in *Diné Citizens*, in which the Court also held that OSM has broad discretion to condition a mining permit on coal combustion effects. Again, the coal at issue in that litigation is *tribal coal*, which implicates a variety of statutory provisions and doctrines that are distinct from the rights conferred by a federal coal lease competitively issued under the MLA.

argument and not contradicted anywhere in the Administrative Record, the Craig Station is unlike the Four Corners Power Plant at issue in *Diné Citizens* in that it has the ability to receive coal from other coal mines. *See Diné Citizens* at *6 (petitioners established that "it is not economically feasible for the Four Corners Power Plant to secure coal from any other source"). Because Guardians failed to carry their burden to show that a reduction in coal sent from Colowyo will translate into any effect on net combustion at Craig Station, they have failed to show but-for causation, and their Petition as to the failure to consider coal combustion related environmental effects should have been dismissed.

(3) The Court Improperly Directed OSM to Analyze the Effect of the Mine Plan Modification on Compliance with NAAQS

Colowyo had contended that Guardians' allegations that OSM had failed to adequately analyze direct air quality effects, specifically related to compliance with PM 2.5 and ozone NAAQS standards, must fail as a matter of law, because compliance with such standards is regulated under permits contemporaneously issued by the Colorado Department of Public Health and the Environment under the CAA for the coal at issue, and actions taken under the CAA are exempt from NEPA review. The Court disagreed, observing that NEPA has a broader focus, and the Court could imagine circumstances in which NEPA analysis would disclose and inform decision makers about environmental effects not captured under the CAA permits. Order at *13.

This reasoning has logic as far as it goes, but it neither saves Guardians' Petition nor justifies the scope of the Court's remedial directive to OSM. As to the Petition and arguments in briefing, the only direct air quality issues Guardians ever specifically identified was the failure to analyze compliance with the PM 2.5 and Ozone NAAQS, even after over two years of litigation to ruminate on the matter. The fact that someone at some point might theoretically identify a

direct air quality effect of mining that is not encompassed by the Mine's CAA permit is not relevant to the sustainability of Guardians' Petition on this subject, which was limited to the NAAQS for PM 2.5 and Ozone. Consequently, the Court should have dismissed the Petition on this subject.

Equally importantly, while the Court based its holding on the conclusion that NEPA encompasses more than the CAA, it did not limit its remedial NEPA directive to OSM to study those incremental effects. Rather, the Court expressly directed OSM to examine the effect of the permit revision on NAAQS compliance and revisions in air quality standards, Order at *13, the very subject over which OSM has no discretion and which the CAA has exempted from NEPA. The Court's remedial directive is thus materially overbroad, and in error.

(4) The Court Improperly Limited OSM's Discretion to Determine the Appropriate Degree of Public Involvement in NEPA Proceedings

Although the Judgment simply directs OSM to comply with NEPA in the remedial mine plan review, Dkt. 79, the Order is more specific. The Order states:

> the Court expects OSM . . . to provide public notice and an opportunity for public involvement before reaching its decisions.

OSM at *16. This directive appears to be driven by 40 C.F.R. § 1501.4(b), and the Ninth Circuit's gloss on the CEQ regulation, as stated in *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Engineers,* 524 F.3d 938, 953 (9th Cir. 2008) and *Citizens for Better Forestry v. U.S. Dep't of Agric.,* 341 F.3d 961, 970 (9th Cir. 2003). Order at *16. The Tenth Circuit has rejected the proposition that the CEQ regulation requires environmental assessments to be provided to the public prior to the agency's decision. *Greater Yellowstone v. Flowers,* 359 F.3d 1257, 1259 (10th Cir. 2004). Moreover, neither of those Ninth Circuit cases considered an

OSM review of a mine plan revision, and the Department of the Interior has promulgated agency-specific regulations implementing NEPA, which govern OSM's conduct. 46 C.F.R. Part 305. Regarding Environmental Assessments, the regulations state in pertinent parts:

> (a) The bureau must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. **However, the methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.**
>
> **(1)** The bureau must consider comments that are timely received, whether specifically solicited or not.
>
> **(2)** Although **scoping is not required**, the bureau may apply a scoping process to an environmental assessment.
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> (b) **Publication of a "draft" environmental assessment is not required**. Bureaus may seek comments on an environmental assessment if they determine it to be appropriate, such as when the level of public interest or the uncertainty of effects warrants, and may revise environmental assessments based on comments received without need of initiating another comment period.
>
> (c) The bureau **must notify the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed. Comments on a finding of no significant impact do not need to be solicited**, except as required by 40 CFR 1501.4(e)(2).
>
> . . .

46 C.F.R. §§ 305(a)-(c) (emphases added). Under the regulations, which specifically contemplate the requirements of 40 CFR § 1501.4, the methods for affording public involvement are left to the discretion of the Responsible Official, and the Responsible Official has the discretion to limit public involvement to notice of a completed EA/FONSI. *Id.* In directing OSM to "provide public notice and an opportunity for public involvement before reaching its decisions," Order at *16, the Court improperly revised the scope of 46 C.F.R. § 305.

There could be specific circumstances in which the minimum notice allowable under 46 C.F.R. § 305(c) would be an abuse of the Responsible Official's discretion. But the Court made

no findings specific to this case that would sustain a directive to OSM to depart from the provisions of 46 C.F.R. Part 305. Indeed, the facts of OSM's remedial NEPA analysis, which start from a baseline of an already-constructed, long operating, and three-quarters mined-out surface coal mine, would appear to present a textbook circumstance for the application of the minimal notice provisions allowable under 46 C.F.R. §§ 305(a)-(c). In effect, the Court's Order is a repeal-by-implication of the discretion afforded the Responsible Official in 46 C.F.R. §§ 305(a)(second sentence), 305(a)(2)(first clause) and 305(b)(first sentence), and contradicts the Tenth Circuit's interpretation of the CEQ regulations in *Greater Yellowstone*. This was error.

(5) The Court Misapplied the Standard for Laches

The Court concluded that the equitable doctrine of laches was "inapplicable," because OSM itself did not provide notice of OSM's mine plan review process, and because any prejudice to Colowyo was mitigated both by Colowyo's ability to mine coal during the period of delay and during the 120 day window afforded by the Court to perform a new NEPA analysis. Order at *5. On the element of undue delay, even Guardians concedes that the clock on delay commences when a plaintiff "knew (*or should have known*) of the allegedly infringing conduct." Dkt. 64 at 39 (emphasis added) (*quoting Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 949 (10th Cir. 2002)).

The Court did not acknowledge that the knowledge element is satisfied if Guardians should have known it had a claim, and indeed the Court suggested that even formal legal notice of the mine plan review might not have been sufficient: (". . . even if Guardians was aware of the state proceedings, a proposition supported by no evidence in the record, . . . "). Order at *8. Moreover, the failure to examine whether and when Guardians should have known it had a claim

is all the more significant given the Court's recognition that Guardians' Director of Climate and Energy Programs, Jeremy Nichols, knew far more, far earlier, about OSM's NEPA duties than he had averred to the Court. Order at *8 n. 6. Consequently, the Court erred in its examination of the undue delay element of laches.

As to prejudice, the Court noted Colowyo's point that had Guardians sued during the 2007-2008 window, Colowyo would have had the opportunity to mine the previously permitted (and unchallenged) West Pit while any NEPA deficiencies in South Taylor Pit permitting were cured. Order at *8. But the Court then fails to address that fact, simply noting that Colowyo was able to continue coal mining during Guardians' long years of delay. The Court thus noted, but failed to respond to, Colowyo's discussion of prejudice. Finally, the Court appears to be relying on the 120 day delay of vacatur as mitigation for any prejudice that Colowyo may suffer. *Id.* But, as previously described, that arbitrary window exposes Colowyo to substantial risks and costs that Colowyo would not have borne had Guardians timely filed suit when they should have known they had a claim. Consequently, the Court erred in its application of the laches standard, and Colowyo is likely to succeed on the merits of its appeal.

(6) There are Serious Legal Issues Regarding Standing and Waiver

The issues of standing and waiver were thoroughly briefed to the Court, and the Court has rendered its judgment. Colowyo here will not rehash the arguments, but simply observe that they present significant legal issues. As to standing, the Court declined to address whether Guardians needed to establish specific use and enjoyment of the affected area at the time of the challenged decisions, concluding that Mr. Nichols' averments during all periods satisfied Article III injury-in-fact. Order at *6. These jurisdictional issues (as to timing and specificity) are not

clearly delineated in the relevant case law, particularly in the context of a declarant criticized by the Court for "parsing words." Consequently, Guardians' standing will be a significant issue on appeal.

Regarding waiver, the Court concluded that waiver could not be found because events in the state proceedings are "no excuse" for OSM's failures. Order at *8. The Court cited no law for this proposition, and Colowyo respectfully submits that there are serious questions as to potential waiver under the "meaningful participation" standard, where the state and federal authorizations are so closely intertwined. *Public Citizen,* 541 U.S. at 752, 764-65 (*quoting Vermont Yankee Nuclear Power Corp.,* 435 U.S. 519, 553 (1978)). These constitute fair grounds for resolution on appeal, and justify a stay pending appeal.

B. The Court's Errors Cause Irreparable Harm to Colowyo and the Affected Communities

The Court recognized that vacatur of the Mine Plan of Operation would cause immediate and serious harm to Colowyo and the affected communities, which led the Court to defer vacatur for 120 days. Order at *16. Should vacatur be entered, these harms would be irreparable, because Colowyo would have no permitted coal to mine and no recourse against any party for damages arising from the disruption of mining. This constitutes a significant near-term threat of irreparable harm. Moreover, even if vacatur is not ultimately entered, the *in terrorem* effect of the Order and Judgment inflicts unnecessary harm in the interim on the affected communities.

As to Colowyo's employees and the communities, the Court appropriately considered their welfare in selecting the 120 day remedial NEPA window. But the Court may not have fully appreciated the cloud of uncertainty and fear that the Order would precipitate. The Court chastised OSM for "rubber-stamping" the permitting work of the Colorado Division of

Reclamation, Mining, and Safety, but in recent years the coal industry has come to expect extended, multi-year struggles with environmental groups over NEPA compliance. This has led to ever longer lead times for NEPA analyses. In that respect, the short turnarounds for the 2007 and 2009 Colowyo and Trapper EAs are not a realistic benchmark, especially with the additional analytical scope ordered by the Court. These concerns led to OSM's counsel estimating at oral argument that a new EA would likely take a year. Dkt. # 75 at 109, 13:19. The 120 day deadline thus catches OSM between an unrealistically short deadline and a newly broadened scale of analysis, and in turn has minimized Colowyo's (and OSM's) ability to provide employees and the community with any assurances that the deadline will be met with the requisite quality of discussion and response to public comment. McCourt Decl. ¶ 4. The community perceives itself now caught in the jaws of a national policy debate, with nothing approaching a reasonable timeline. *Id.* ¶¶ 3-4. Especially now that OSM has commenced the process of public notice and involvement in the remedial NEPA process, the psychic harms to the community associated with an imminent risk of shutdown can be substantially mitigated by a stay of the Order pending appeal, at little cost.

In addition, the excess scope of the Court-ordered remedial NEPA work creates an imminent and substantial threat to Colowyo's lease rights. By holding that OSM has the discretion to condition a modified Mine Plan of Operation on the basis of combustion effects, and NAAQS compliance over-and-above Colowyo's CAA permit, the Court opens the door for OSM to require revised mining techniques, rates and amounts of mining, and mitigation measures, all of which would impose improper costs on Colowyo. Equally importantly, the Court's directive to analyze combustion and unspecified direct air quality effects places Colowyo

under an *indefinite* threat. With the exception of calculation of greenhouse gas emissions, there are no judicially-vetted templates for OSM to follow in analyzing many combustion effects under NEPA, such as mercury emissions. This virtually guarantees additional litigation and uncertainty related to any analysis OSM ultimately produces. And because the Court directed OSM to conduct this unprecedented post-hoc analysis on an arbitrary 120 day schedule (six months shorter than OSM's counsel estimated at oral argument would be necessary for the kind of analysis the Court was evaluating), the potential for error by OSM is substantial.

Guardians has contended that the costs of remedial NEPA work are not a factor in considering harm or prejudice, and this is correct as to remedial NEPA work *required by law*. But because the Court erred in directing OSM to prepare an *excessive* NEPA analysis, the significant contractor costs, risk of lease impairment, and threat to Colowyo's enormous investment in the facility are all appropriately considered irreparable harms to Colowyo.

Finally, as discussed below, a mine cannot simply freeze in place without consequence. Should vacatur be entered, Colowyo will soon be in noncompliance with a variety of permit requirements regarding maintenance of the South Taylor Pit facilities and environmental standards that are driven by and connected to the Mine Plan of Operation. These include not only ongoing reclamation activities, which even Guardians agreed in oral argument they had no interest in delaying, Dkt. # 75 at 17, 9:20, but also requirements applicable to maintaining the integrity of the South Taylor Pit and its associated effects on hydrology, drainage and dust control. Vacatur of the Mine Plan of Operation creates a significant risk of serial non-compliance with other permits and corresponding environmental harms, which must be considered irreparable harms for purposes of a stay pending appeal.

C. The Balance of Harms Favors a Stay

The balance of harms criterion focuses on the relative harms to the party seeking the stay as against the party that obtained the judgment appealed from. In contrast to the significant threats to Colowyo's lease rights, continued viability of the mine, and the community in which the Colowyo Coal Mine is an important employer and economic contributor, Guardians' harms from a stay are minimal. Despite two years of litigation and access to the full Administrative Record for both the state and federal permitting process, and repeated questioning at oral argument, Guardians to date has been unable to identify a single change they would advocate to the mining or reclamation plans. They have simply failed to identify any concrete harms to their interests resulting from OSM's alleged errors, other than the generalized public interest in NEPA compliance, and consequently there is no basis to conclude that their specific interests would be materially harmed by a stay pending appeal.

Indeed, even on the issue of generalized NEPA compliance, Guardians professes a strong interest in informed decision making and public participation under NEPA. Taking that at face value, Guardians also has an interest in ensuring a correct scope for any remedial NEPA work, as does Colowyo. Consequently, the balance of harms strongly favors a stay pending appeal.

D. A Stay is in the Public Interest

In the Order, the Court stressed NEPA's objectives of public involvement and informed decision-making. Order at *2. These policies are equally implicated where an agency engages in an *overbroad* NEPA analysis as they are in an unduly limited review. An overly narrow review deprives the public and the agency of potentially important information. Conversely, an overbroad scope is confusing and misleading to both the public and decision makers, in that it

burdens all parties with unnecessary material, wastes time and resources, and implies the agency has the discretion to regulate conduct where it does not. This case is a perfect illustration of the negative effects of an overbroad conception of NEPA. For example, Guardians has an avowed concern for coal mines' role in the attainment of NAAQS for PM 2.5 and Ozone. Yet their focus on an overbroad interpretation of NEPA and an overbroad sense of OSM's authority led them to completely ignore the state CAA permit proceedings where emissions of PM 2.5 and ozone precursors are regulated, and exclusively regulated regarding NAAQS attainment. Their view of NEPA on the subject is a dead end, and such misperceptions are promoted every time an agency "conservatively" examines issues that exceed the agency's regulatory authority.

These concerns are compounded by the Court's short timeline before entry of vacatur. The announcement of the Court's Order has resulted in widespread local concern about the potential imminent shutdown of the Colowyo Coal Mine, McCourt Decl. ¶ 3, exacerbated by Guardians' pronouncements that this is an opportunity to "embrace" the transition from coal, i.e., find new jobs.

The enforceability of contracts is another important public interest. The Court has previously emphasized the importance of a thorough analysis of reasonably foreseeable environmental effects prior to leasing federal coal. *High Country Conservation Advocates*, 52 F.Supp.3d at 1193-96. Once a lease is issued, the lessee, the leasing agency, and the general public have a right to rely on the validity of the lease terms. In the context of a coal lease, that includes the expectation among all parties that the federal government will not impose post-hoc conditions on the lease based upon coal combustion, which was the entire purpose of the leasing action.

A stay pending appeal will allow the Tenth Circuit to opine on these issues of great public and environmental import, at the cost of a few months of additional mining at a facility where all the necessary infrastructure and surface disturbance has already occurred. Indeed, the remaining coal at Colowyo is among the *least environmentally impactful* coal that can be mined, because so little additional disturbance is required to access it. Individually and collectively, the public interests justify a stay.

CONCLUSION

For the foregoing reasons, the Court's Order and Judgment, Dkt. 78-79, should be stayed pending appeal.

Respectfully submitted this 29th day of May, 2015.

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ATTORNEYS FOR
COLOWYO COAL COMPANY, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2015 I caused the forgoing document titled COLOWYO COAL COMPANY'S MOTION FOR STAY PENDING APPEAL to be electronically filed with the Clerk of the Court using the CM/ECF system. Notification of such filing will be sent to the following email addresses:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-00518-RBJ

WILDEARTH GUARDIANS,

Plaintiff,

v.

U.S. OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT, ERVIN BARCHENGER, Acting Western Regional Director of the Office of Surface Mining Reclamation and Enforcement, Denver, Colorado, and SALLY JEWELL, in her official capacity as U.S. Secretary of the Interior,

Defendants,

COLOWYO COAL CO. L.P., and TRAPPER MINING, INC.,

Defendant-Intervenors

DECLARATION OF CHRIS MCCOURT IN SUPPORT OF MOTION TO STAY PENDING APPEAL

I, Chris McCourt, state and declare as follows:

1. I am the Mine Manager of the Colowyo Coal Mine in Moffat and Rio Blanco Counties, Colorado, owned by Colowyo Coal Company, L.P. In my capacity as Mine Manager, I am involved in the daily affairs of the Colowyo Coal Mine and supervise mine operations and compliance. As a result, I have personal knowledge of

developments related to the Colowyo Coal Mine since issuance of the Court's Order and Judgment on May 8, 2015.

2. Since issuance of the Order and Judgment, Colowyo has devoted significant staff and financial resources to providing the Office of Surface Mining whatever factual and technical support they may need to comply with the Court's 120 day deadline for completion of a new NEPA process.

3. I have also had numerous communications with employees, elected officials, and residents of Moffat and Rio Blanco Counties and Craig, Colorado regarding the effect of the Order and Judgment on the future of the Colowyo Coal Mine. These individuals and representatives have expressed great concern and fear regarding the potential closure of the Mine. Employees and residents have asked whether they should begin planning to find new jobs or move. Approximately twenty employees and residents have also indicated to me or to Colowyo's Human Resources Department that they would be postponing major purchases, such as homes, that would tie them to the community, until there is some resolution.

4. At the same time, I have not provided any predictions as to whether OSM can meet the deadline, or whether the resulting analysis will be deemed sufficient. My answer has been that we will all do our best, but we will not have much of an idea until close to the 120 day deadline. As much as the adverse decision, the uncertainty regarding the deadline and ultimate result is weighing heavily on the community.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 2015.

s/Chris McCourt
Chris McCourt