IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS, *Petitioner*,	§	
v.	§	**No. 1:16-CV-00605-RJ**
S.M.R. JEWELL, in her official capacity as U.S. Secretary of the Interior, U.S. DEPARTMENT OF THE INTERIOR, and U.S. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, *Federal Respondents*,	§	
and	§	
NEW MEXICO COAL RESOURCES, *Intervenor-Respondent.*	§	

OPINION AND ORDER AFFIRMING AGENCY ACTIONS

BEFORE THE COURT is Petitioner WildEarth Guardians' ("Petitioner") Amended Petition for Review of Agency Action (Doc. 75), Petitioner's Opening Brief (Doc. 80), Federal Respondents S.M.R. Jewell, in her official capacity as U.S. Secretary of the Interior, U.S. Department of the Interior, and U.S. Office of Surface Mining Reclamation and Enforcement's (collectively, "Federal Respondents") Response to Petitioner's Opening Brief (Doc. 81), Intervenor-Respondent New Mexico Coal Resources' ("Intervenor") Response Brief (Doc. 82), and Petitioner's Reply Brief (Doc. 83). After due consideration of the administrative record, the Parties' written submissions, and the applicable law, Petitioner's Amended Petition for Review of Agency Action shall be **DENIED** and the agency actions shall be **AFFIRMED**.

I. BACKGROUND

This case is originally before the Court on Petitioner's challenges to the approval of mining plans for the El Segundo Mine in McKinley County, New Mexico. (Doc. 80). On May 16, 2014, the Secretary of the Interior approved the mining plan modification for the El Segundo Mine. (Doc. 59

at 2). Petitioner alleges that the U.S. Office of Surface Mining Reclamation and Enforcement ("OSMRE") failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231-4370h and 30 C.F.R. § 746.13(b), in two ways. (Doc. 80 at 8). First, Petitioner claims OSMRE 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 the mining's environmental impacts and adopting an existing Environmental Assessment ("EA") to support the mining plan approval. (*Id.*). Second, Petitioner claims OSMRE failed to take a hard look at the mining plan's environmental impacts. (*Id.*).

Specifically, Petitioner alleges that in the course of adopting the EA and making the Finding of No Significant Impact ("FONSI"), OSMRE: (1) failed to provide for public participation in issuing the FONSI; (2) failed to independently assess whether the EA complied with NEPA; (3) failed to take a sufficiently hard look at the environmental effects of coal combustion and transport from the mine; and (4) failed to take a hard look at the air quality impacts of operations at the mine. (Docs. 1, 80). Judicial review of NEPA claims are governed by the Administrative Procedure Act ("APA"). Petitioner seeks review of Federal Respondents' actions under the arbitrary and capricious standard of the APA, 5 U.S.C. § 706.

Federal Respondents disagree and assert "OSMRE ensured compliance with applicable law, including [NEPA's] public participation requirements." (Doc. 81 at 8). Further, Federal Respondents contend "OSMRE properly confined its review and analysis to the mining plan approval at issue, and reasonably relied upon the [EA] prepared by the Bureau of Land Management ("BLM") for the leasing decision." (*Id.*). Notably, the BLM issued the EA just a few months prior to the approval of the mining plan "and OSMRE had been a cooperating agency in completing that EA." (*Id.*). Federal Respondents argue "the EA takes a hard look at direct, indirect, and cumulative impacts of mining the coal at issue here, and it appropriately analyzed impacts relating to air quality

and greenhouse gas emissions." (*Id.*). Therefore, Federal Respondents urge the Court to deny Petitioner's NEPA claims. (*Id.*).

Intervenor argues that Petitioner does not have standing to bring this action because the aesthetic injuries claimed by one of its members are not specific to federal coal. (Doc. 82 at 5). Intervenor contends that Petitioner's argument regarding whether the EA takes a hard enough look at what effects approving the mining plan will have on global climate change bears no relationship to any of the local aesthetic or recreational injuries on which Petitioner relies in attempting to establish standing. (*Id.* at 10). Alternatively, Intervenor argues that any procedural defects in OSMRE's NEPA process were harmless. (*Id.* at 16). Because Petitioner has not suffered prejudice from the alleged violations, Intervenor concludes that Petitioner's claims should be dismissed. (*Id.*).

A. Procedural History

Petitioner's claims against Federal Respondents were first asserted in the United States District Court for the District of Colorado, along with challenges to other mine plan decisions regarding other mines in various states. (Doc. 1). On November 16, 2015, Intervenor filed its Motion to Intervene. (Doc. 16). On February 18, 2016, the U.S. District Court for the District of Colorado granted Intervenor's Motion to Intervene. (Doc. 55). The U.S. District Court for the District of Colorado severed the claims related to the El Segundo Mine and transferred them to this Court on June 17, 2016. (Doc. 59).

On July 8, 2016, Petitioner filed its Amended Petition for Review. (Doc. 75). On July 22, 2016, Federal Respondents and Intervenor filed their Responses to Petitioner's Amended Petition for Review. (Docs. 76, 77). On November 11, 2016, Petitioner filed its Opening Brief. (Doc. 80). On December 9, 2016, Federal Respondents filed their Response to Petitioner's Opening Brief. (Doc. 81). On December 16, 2016, Intervenor filed its Response to Petitioner's Opening Brief. (Doc. 82). On January 6, 2017, Petitioner filed its Reply. (Doc. 83).

B. The El Segundo Mine

Petitioner challenges a mining plan approval for 640 acres of a federal coal lease to be included within the El Segundo Mine in McKinley County, New Mexico. El_Segundo_00004 ("AR").[1] El Segundo is a privately owned, multiple seam surface coal mine located approximately 35 miles north of Milan. AR 3671. The mine has been in operation since 2008. *Id.* The mining plan does not incorporate any federal surface land acres. AR 4. Approximately 357 people are employed at the mine. *Id.*

Mining at the El Segundo Mine occurs in six mining areas accessed by a network of haul roads. AR 3671. Coal is mined using a dragline and transported 150 miles via the Burlington Northern Santa Fe ("BNSF") Railway to coal-fired power plants in Arizona. *Id.*, AR 3722. Without the federal coal lease, total coal production for the life of the mine is estimated to be 133.84 million tons by 2027. AR 3671–72. Addition of federal coal from the mining plan approval raises the cumulative total of coal production to 143.05 million tons and extends the life of the mine by two years. AR 3673.

Approval by the Secretary of the Interior of a mining plan modification is one of the legal prerequisites to mining federally-owned coal. 30 U.S.C. §§ 207(c); 30 C.F.R. § 746.14. Approval of the mining plan by the Secretary of the Interior follows approval of a federal coal lease handled by the BLM and approval of a permit to engage in surface coal mining and reclamation operations handled by the appropriate state agency. (Doc. 59 at 2). On September 4, 2013, New Mexico's Energy, Minerals, and Natural Resources Department ("EMNRD") approved the permit application under the New Mexico State program, the federal lands program (30 C.F.R. Chapter VII, Subchapter D), and the New Mexico cooperative agreement (30 C.F.R. § 931.30). AR 11.

[1] Federal Defendants have produced the Administrative Record ("AR"), which has been Bates stamped El_Segundo_00001 through El_Segundo_03906, with copies provided to the Court and all counsel of record. When referring to the AR, the Court will cite to the Bates stamped pages.

The BLM's Farmington Field Office, in coordination and consultation with the respective BLM State Office, handled the coal lease for the El Segundo Mine. 43 C.F.R. § 3425.1-1. The BLM consulted with other federal agencies for compliance with the requirements of other applicable federal laws. AR 11. On March 12, 2014, the BLM recommended approval of the mining plan pertaining to Section 34, Township 17N, Range 9W, of the El Segundo Mine Lease ("Section 34 Lease"). AR 32. In this area, the surface estate is privately owned and the mineral estate is federally owned. AR 32, 40. The lease pertains to 640 acres surrounded by private lands and the El Segundo Coal Mine. AR 37.

On May 28, 2013, BLM issued the EA with OSMRE as a cooperating agency to "describe the environmental impacts of leasing the land and subsequently mining the federal coal reserves." AR 3670. On November 19, 2013, BLM issued a revised EA for public comment. AR 3154. Petitioner commented on the draft EA on December 18, 2013. AR 3906. BLM issued the final EA in January 2014. AR 3658. On April 30, 2014, OSMRE issued a FONSI for the 2014 El Segundo Mining Plan that determined mining the lease would not have any significant environmental impacts. AR 18–19. On May 16, 2014, the Secretary approved and issued a mining plan modification for the mining of federally owned coal from Federal Lease NMNM 126813 at the El Segundo mine. AR 243–44. The Secretary's decision to approve the mining plan relied on OSMRE's recommendation for approval. AR 9–13.

II. STANDING

Whether Petitioner has standing to bring these challenges to agency action is a threshold issue. The exercise of judicial power is limited by the Constitution to cases and controversies. *WildEarth Guardians v. U.S. E.P.A.*, 759 F.3d 1196, 1204–05 (10th Cir. 2014). The standing doctrine restricts judicial power to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of the law. *Id.* (quoting *Summers v. Earth Island Inst.*,

555 U.S. 488, 492 (2009)). Petitioner has the burden of establishing the following Article III standing elements:

> (1) Petitioner has suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not conjectural or hypothetical[;]"
>
> (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the respondent and not the result of "the independent action of some third party not before the court[;]" and
>
> (3) it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (internal citations and quotation marks omitted).

The Supreme Court of the United States makes clear that petitioners bear the burden of showing that they have standing for each type of relief sought. *Summers*, 555 U.S. at 493. In the United States Court of Appeals for the Tenth Circuit, a petitioner must "com[e] forward with evidence of specific facts which prove standing." *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821 (10th Cir. 1999). In *Summers v. Earth Island Institute*, the organizations at issue pointed "to their members' recreational interest in the National Forests" to assert standing. 555 U.S. at 494. The Supreme Court reasoned that "[w]hile generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice." (*Id.*).

Where, as here, Petitioner is a citizen environmental group suing to protect the interests of their members from climate change and accompanying environmental harms, Petitioner must demonstrate members would have standing to sue in their own right:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect [through the action] are germane to the organization's purpose; and (c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit.

WildEarth Guardians v. Jewell, 738 F.3d 298, 305 (10th Cir. 2013) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)); *Amigos Bravos v. BLM*, 816 F. Supp. 2d 1118, 1124 (D.N.M. 2011).

Petitioner's claims relating to public participation and notice assert procedural violations. (Doc. 81 at 16–24). Where a petitioner is asserting procedural rights under NEPA, requirements for redressability are relaxed. *Massachusetts v. U.S. E.P.A.*, 549 U.S. 497, 518 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant."); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) (concluding that the redressability prong is relaxed).

Nevertheless, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. As stated by the Supreme Court:

> [D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.

Id. at 496 (internal quotation marks and citations omitted). Thus, while a procedural right "can loosen the strictures of the redressability prong of our standing inquiry," it does not loosen a plaintiff's burden to show a concrete and particularized injury-in-fact. *Id.*

Where the injury claimed is one of process rather than result, requirements for Article III standing are somewhat relaxed or at least conceptually expanded. *Lujan*, 504 U.S. at 572 n. 7. First, for an injury in fact Petitioner "need not establish with certainty that adherence to the procedures would necessarily change the agency's ultimate decision." *Utah v. Babbitt*, 137 F.3d 1193, 1216 n. 37 (10th Cir. 1998). It suffices that the procedures "are designed to protect some threatened concrete interest of [the person] that is the ultimate basis of standing." *S. Utah Wilderness Alliance v. OSMRE*, 620 F.3d 1227, 1234 (10th Cir. 2010) (emphasis and internal quotation marks omitted).

Where petitioners properly allege a procedural violation affecting a concrete interest, "the injury results not from the agency's decision, but from the agency's informed decisionmaking." *Id.* at 1234 (emphasis and internal quotation marks omitted). Therefore, Petitioner must show that the compliance with the procedural requirements could have protected its concrete interests. *WildEarth Guardians v. U.S. E.P.A.*, 759 F.3d at 1205. Similarly, to establish redressability Petitioner must show that the injury—lack of an informed decision—could be redressed by requiring the agency to make a more informed decision. *Id.*

Here, Petitioner will have associational standing if one of its members has standing under Article III. *Hunt*, 432 U.S. at 333. In support of standing, Petitioner submits a declaration by one of its members, Michael Eisenfeld. (Doc. 80-2). Mr. Eisenfeld is a 19-year resident of Farmington, New Mexico where he lives with his wife and two children. (*Id.* at 1). Farmington is located about 120 miles north of the El Segundo Mine in McKinley County, New Mexico. (*Id.* at 2). Mr. Eisenfeld states that he uses and enjoys the area where the El Segundo Mine is located. (*Id.*). Further, Mr. Eisenfeld asserts that he recreates around the mine and that he will be harmed if mining of the federal coal is allowed because: (1) the sights, sounds, and other effects of activities at the mine generally detract from his ability to enjoy recreating in the area; and (2) the burning of coal from the mine results in visible emissions that Mr. Eisenfeld finds offensive to observe and worrisome to the extent they might affect his health. (*Id.* at 4). Mr. Eisenfeld's declaration offers examples and photographs documenting observations he has made regarding the impact of the mining operations on aesthetics and scenic beauty. (*Id.* at 5–6).

Intervenor argues that Petitioner "has failed to demonstrate standing because the injuries alleged are not specific to federal coal" and are indistinguishable from the impacts associated with simultaneous mining of the private coal reserves. (Doc. 82 at 1). Federal coal represents less than 7% of the total coal to be extracted at the mine. (*Id.* at 12). Because the sights and sounds of mining activities that Mr. Eisenfeld complains of result "almost entirely from accessing and extracting

privately-owned coal from within the Mine's boundaries," Intervenor contends "that the action at issue—mining the federal coal—does not perceptibly *cause* the alleged injury." (*Id.*) (emphasis in original).

In this case, Petitioner alleges procedural failures in OSMRE's consideration of the federal lease. (Doc. 75). The Court finds that Petitioner has produced evidence of personal injury to one of its member's enjoyment and use of the federal land at issue. Specifically, Mr. Eisenfeld acknowledges that "much of the land above the El Segundo coal mine is privately owned" but "there are a number of parcels of public land around the mine from which the mine and dust clouds [from] mining operations are visible, particularly lands west of the mine." (80-2 at 4). Further, Mr. Eisenfeld asserts his enjoyment from recreating in areas around and adjacent to the mine "would be enhanced considerably if the El Segundo coal mine was not on the landscape; if mine operations were otherwise curtailed so as to limit the sights, sounds, and smells of mining activities; or if mining would not expand onto the federal lease[.]" (*Id.* at 6).

Intervenor construes standing too narrowly for NEPA purposes. *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d at 1235 ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury."). Petitioner's injury is neither conjectural nor hypothetical and is fairly traceable to Federal Respondents' action. Further, even though Petitioner asserts more than one theory in support of its claims, Petitioner does not seek more than one form of relief.[2] Petitioner's alleged injuries would be redressed by the Court declaring Federal Respondents' approval of the El Segundo mining plan arbitrary and ordering them to comply with NEPA. As such, the Court finds Petitioner has standing.

[2] This is consistent with the notion that a plaintiff must demonstrate standing for each form of relief sought. *Summers*, 555 U.S. at 493.

III. STANDARD OF REVIEW

Because NEPA does not create a private right of action, the Court reviews the challenge to the final agency actions under the APA. 5 U.S.C. § 551, *et seq.*; *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1165 (10th Cir. 2012); *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 719 (10th Cir. 2009). In APA actions, the court's review is based on the agency's administrative record. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883–84 (1990). Judicial review of agency compliance with NEPA is deferential. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). "A presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge such action." *Hillsdale Envtl. Loss Prevention, Inc.*, 702 F.3d at 1165 (internal quotation marks and citations omitted); *W. Watershed Project v. BLM*, 721 F.3d 1264, 1273 (10th Cir. 2013).

By law, this Court may only set aside an agency's decision if, after a review of the entire administrative record, the Court finds that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's decision is arbitrary and capricious if the agency (1) entirely failed to consider an important aspect of the problem, (2) 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, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment. *N.M. ex rel. Richardson*, 565 F.3d at 704 (internal quotation marks and citations omitted). Decisions that do not defeat NEPA's goals of informed decision-making and informed public comment will be affirmed. *Id.*

Petitioner bears the burden of proof on the question of whether the agency's decision was arbitrary or capricious. *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) (explaining that the agency's decision is presumed valid). This Court cannot substitute its own judgment for the agency's judgment. *Vt. Yankee Nuclear Power Corp. v. Natural*

Res. Def. Council, 435 U.S. 519, 555 (1978). "[D]eference to the agency is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise." *Wyo. v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1246 (10th Cir. 2011) (quoting *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691 (10th Cir. 2010)).

In a NEPA case, a court determines whether the agency took a "hard look" at information "relevant to the decision." *Biodiversity Conservation Alliance v. U.S. Forest Serv.*, 765 F.3d 1264, 1267 (10th Cir. 2014) (quoting *N.M. ex rel. Richardson*, 565 F.3d at 704). In doing so, a court asks whether the agency "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.* at 1271. When reviewing a FONSI, a court "must determine whether the agency acted arbitrarily and capriciously in concluding that the proposed action 'will not have a significant effect on the human environment.'" *Utah Envtl. Cong. v. Russell*, 518 F.3d 817, 824 (10th Cir. 2008) (quoting *Davis*, 302 F.3d at 1112).

IV. DISCUSSION

Petitioner argues that OSMRE failed to comply with NEPA in two ways: (1) OSMRE 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 adopting an existing EA to support the mining plan approval; and (2) OSMRE failed to take a hard look at the mining plan's environmental impacts. (Doc. 80 at 8). Specifically, Petitioner alleges that in the course of adopting the EA and FONSI, OSMRE filed to provide for public participation in issuing the FONSI, failed to independently assess whether the EA complied with NEPA, failed to take a sufficiently hard look at the environmental effects of coal combustion and transport from the mine, and failed to take a hard look at the air quality impacts of

operations at the mine. (*Id.*). With these failures, Petitioner concludes that the requirements of NEPA have not been satisfied. (*Id.*).

Federal Respondents contend that OSMRE ensured compliance with applicable law, including NEPA's public participation requirements, in making its recommendation to approve the mining plan. (Doc. 81 at 8). In addition, Federal Respondents assert OSMRE properly confined its review and analysis to the mining plan approval at issue and reasonably relied upon the EA prepared by the BLM for the leasing decision. (*Id.*). Finally, Federal Respondents argue that the EA takes a hard look at direct, indirect, and cumulative impacts of mining the coal at issue and it appropriately analyzed impacts relating to air quality and greenhouse gas ("GHG") emissions. (*Id.*). Intervenor's contentions essentially echo those set forth by Federal Respondents. (Doc. 82).

A. The Mineral Leasing Act

The BLM leases federal coal under authority of the Mineral Leasing Act ("MLA") and those decisions must comply with NEPA. 30 U.S.C. § 181, *et seq*. The MLA, which governs the leasing of public lands for developing deposits of federally owned coal, provides that "[p]rior to taking any action on a leasehold which might cause a significant disturbance of the environment, the lessee shall submit for the Secretary's approval an operation and reclamation plan. The Secretary shall approve or disapprove the plan or require that it be modified." 30 U.S.C. § 207(c). The MLA authorizes the Secretary to lease federal coal deposits. 30 U.S.C. § 181. The MLA provides that the Secretary shall, on request of a qualified applicant or on his own initiative, "offer [coal] lands for leasing," and "award leases thereon by competitive bidding." 30 U.S.C. § 201(a)(1). The MLA also requires secretarial approval of a mining plan before the environment is disturbed. *Id.* at § 207(c).

B. Permitting

OSMRE is tasked with implementing and enforcing the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). Following lease acquisition, an applicant must obtain a permit under SMCRA. 30 U.S.C. § 1201, *et seq*. SMCRA is "a comprehensive statute designed to

'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 268 (1981) (quoting 30 U.S.C. § 1202(a)). Pursuant to SMCRA, a state may assume primary jurisdiction over regulation of surface coal mining within its borders by obtaining the Secretary's approval of its proposed program. 30 U.S.C. § 1253. However, the Secretary may not delegate to the state her responsibility to approve mining plans. *Id*; 30 C.F.R. § 745.13(i). The Secretary likewise cannot delegate her duty to comply with NEPA. 30 C.F.R. § 745.13(b).

Once a state program is approved and state law becomes operative for the regulation of surface coal mining operations within the state, SMCRA provides OSMRE with certain oversight and enforcement authorities to ensure the effectiveness of the state program. 30 U.S.C. § 1271. Yet, the state's authority does not automatically extend to federal lands within that state. 30 U.S.C. § 1253(a) (excluding federal lands from State programs). Instead, SMCRA requires the Secretary to promulgate and implement a "Federal lands program" for surface coal mining and reclamation on federal lands. 30 U.S.C. § 1273. SMCRA requires that the Federal lands program incorporate the requirements of any state program if the federal lands are located in a state with an approved program. 30 U.S.C. § 1273(b). In addition, SMCRA allows the Secretary to enter into cooperative agreements with primacy states for the regulation of surface coal mining and reclamation operations on federal lands. 30 U.S.C. § 1273(c).

New Mexico's state program for surface coal mining operations within the state was approved in 1982. 30 C.F.R. § 931.10. Therefore, New Mexico state law governs the issuance of surface mining permits in the state. N.M. Stat. Ann. §§ 69-25A-1, *et seq*. New Mexico exercises its authority through its agency, the Mining and Minerals Division ("MMD") of the EMNRD. New Mexico has also entered into a state-federal cooperative agreement with OSMRE in which New Mexico has been delegated broad authority to regulate surface coal mining and reclamation operations on federal lands within that state, including the authority to review permit applications and

issue permits on leased federal coal. 30 C.F.R. § 931.30 (codifying the OSMRE-New Mexico cooperative agreement).

Thus, to conduct surface coal mining operations with respect to federally-leased coal in New Mexico, operators must obtain permits from MMD. 30 U.S.C. §§ 1253, 1273; 30 C.F.R. § 931.30 (delegating authority to New Mexico to issue mining permits on federal lands). Again, this delegation of authority cannot delegate the Secretary's duty "to approve mining plans on Federal lands." 30 U.S.C. § 1273(c); 30 C.F.R. § 745.13(i). In addition to a surface mining permit from MMD, operators in New Mexico may be required to obtain other environmental permits such as a permit related to air quality emissions under the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401–7671q, from the New Mexico Environment Department Air Quality Bureau ("NMAQB"), which is subject to oversight by the U.S. Environmental Protection Agency ("EPA").

C. Mining Plan Recommendation and Approval

Because authority to approve mining plans rests solely with the Secretary of the Interior, a surface mining applicant must submit a Permit Application Package ("PAP") to both OSMRE and the state regulatory authority, EMNRD. 30 C.F.R. § 931.30, Art. VII ¶ 11. Pursuant to the respective cooperative agreements, New Mexico, as the SMCRA permitting authority, assumes the primary responsibility for the analysis, review, and approval or disapproval of the permit application component of the PAP. 30 C.F.R. § 931.30, Art. VII ¶ 12. This agreement provides that the Secretary of the Interior "concurrently carry out its responsibilities" under the MLA that cannot be delegated to the state. *Id.*

The MLA requires secretarial approval of a mining plan before significant disturbance to the environment can occur. 30 U.S.C. § 207(c). SMCRA makes clear that this MLA requirement may not be delegated to the states. 30 U.S.C. § 1273(c). Therefore, operators must obtain the Secretary's approval of mining plans before commencing operations on a federal leasehold. 30 C.F.R.

§ 746.11(a) ("No person shall conduct surface coal mining and reclamation operations on lands containing leased Federal coal until the Secretary has approved the mining plan.").

OSMRE makes recommendations to the Secretary of the Interior as to whether mining plans should be approved, disapproved, or conditionally approved contingent upon modifications. 30 C.F.R. § 746.13. At a minimum, a mining plan must be compliant with the applicable requirements of federal laws, regulations, and executive orders, with the information contained therein prepared in compliance with NEPA. *Id.* The Secretary heavily relies on OSMRE in ensuring she is adequately informed before approving a mining plan; however, her independent judgment is still required and no surface mining or reclamation operations may begin without her approval. 30 C.F.R. § 746.11(a); *S. Utah Wilderness Alliance v. OSMRE*, 620 F.3d 1227, 1243 (10th Cir. 2010). "An approved mining plan shall remain in effect until modified, cancelled or withdrawn and shall be binding on any person conducting mining under the approved mining plan." 30 C.F.R. § 746.17(b). If a lessee seeks to extend coal mining and reclamation operations onto previously unmined federal lands, a mining plan modification is required. 30 C.F.R. § 746.18(d). 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).

D. National Environmental Policy Act

NEPA is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It establishes "a 'national policy [to] encourage productive and enjoyable harmony between man and his environment,' and was intended to reduce or eliminate environmental damage and promote 'the understanding of the ecological systems and national resources important to' the United States." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756–57 (2004) (quoting 42 U.S.C. § 4321). NEPA is a declaration of a "broad national commitment to protecting and promoting environmental quality." *Id.* at 347.

NEPA is a procedural statute that provides the necessary process to ensure federal agencies take a hard look at the environmental consequences of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). NEPA requires government agencies to "consider every significant aspect of the environmental impact of a proposed action." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). NEPA also requires that relevant information be made available to the public so that they "may also play a role in both the decision making process and the implementation of that decision." *Robertson*, 490 U.S. at 349.

NEPA's intent is to focus the attention of agencies and the public on a proposed action so its consequences may be studied before implementation. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Marsh*, 490 U.S. at 371. The Council of Environmental Quality ("CEQ") regulations allow the preparation of an EA, a more limited document than an Environmental Impact Statement ("EIS"), if the agency makes a finding of no significant impact. 40 C.F.R. § 1501.4(e). The EA is to be a concise public document that briefly provides "sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI]." 40 C.F.R. § 1508.9(a). A FONSI should briefly describe why the action will not have a significant effect on the human environment and must include the EA or a summary of it and must note any other related documents. 40 C.F.R. § 1508.13; *Public Citizen*, 541 U.S. at 757–58. An EA and associated FONSI must be made available to the affected public. 40 C.F.R. §§ 2502.4(e)(1), 1506.6(b); 43 C.F.R. § 46.305(c). An agency may adopt an EA prepared by another agency. 43 C.F.R. § 46.320. In addition, an agency with jurisdiction by law or with special expertise can be designated a cooperating agency. 40 C.F.R. §§ 1501.6, 1508.15 & 1508.26.

"NEPA does not work by mandating that agencies achieve particular substantive environmental results." *Marsh*, 490 U.S. at 376. "[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'" *Strycker's Bay Neighborhood Council, Inc. v.*

Karlen, 444 U.S. 223, 227–28 (1980) (per curiam) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)). A court's deference is "most pronounced in cases where, as here, the challenged decision involves 'technical or scientific matters within the agency's area of expertise.'" *W. Watersheds Project*, 721 F.3d 1264, 1273 (10th Cir. 2013) (quoting *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006)). This includes the agency's exercise of expertise in making the "factual determination" to issue a FONSI and not prepare an EIS. *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002).

E. Whether OSMRE's Approval of the El Segundo Mining Plan Violated NEPA's Procedural Requirements

First, Petitioner argues that OSMRE's approval of the El Segundo mining plan violated NEPA's procedural requirements. (Doc. 80 at 20). Petitioner claims OSMRE failed to (1) provide notice to the public of the availability of its FONSI for the El Segundo mining plan along with the existing EA adopted in support of the approval or (2) involve the public in its decision-making process in any manner. (*Id.*). In addition, Petitioner contends OSMRE failed to show on the record that it evaluated the adequacy of the EA for approval of the mining plan when OSMRE adopted the EA prepared by the BLM. (*Id.*). Petitioner concludes that these procedural violations do not comply "with NEPA's public involvement and environmental analysis adoption requirements." (*Id.* at 21).

NEPA procedures ensure that the agency will "inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas & Elec. Co.*, 462 U.S. at 97. CEQ regulations require public involvement to the extent practicable in preparing an EA. 40 C.F.R. § 1501.4(b). The Department of Interior's regulations require that a bureau or office within the Department "notify the public of the availability of an [EA] and any associated [FONSI] once they have been completed." 43 C.F.R. §§ 46.30, 46.305(c).

On September 6, 2013, New Mexico, acting through MMD, issued a permit to mine coal to the lease applicant, Peabody Natural Resources Company ("PNRC"), after public notice and an

opportunity to participate in the SMCRA permitting process. AR 246–51. MMD issued public notice for four consecutive weeks in two different local newspapers. AR 247, AR 3021–22, AR 3028, AR 3031–33. In addition, MMD mailed letters to permit area landowners, posted public notices at locations throughout the nearby community, and provided notice on a local radio station. AR 247–48, AR 3034. MMD also sent notices to local, state, tribal, and federal agencies, including OSMRE. *Id.* Following a public comment period, MMD issued the permit contingent upon BLM issuing the lease. AR 250–51.

On March 1, 2014, BLM approved the lease after completing an EA in January 2014. AR 20–132, AR 238. BLM and OSMRE entered into a memorandum of understanding whereby OSMRE acted as a cooperating agency in preparing the EA. AR 229–33; 43 C.F.R. § 46.305(d) ("Bureaus may allow cooperating agencies... to participate in developing environmental assessments."). In the memorandum, BLM acknowledged OSMRE's jurisdiction by law and special expertise applicable to preparation of the EA. AR 230. As a cooperating agency, OSMRE provided information, comments, and technical expertise to BLM regarding the EA, including the data and analyses supporting the EA. AR 231.

Notably, "[p]ublication of a 'draft' environmental assessment is not required. Bureaus may seek comments on an environmental assessment if they determine it to be appropriate... and may revise environmental assessments based on comments received without need of initiating another comment period." 43 C.F.R. § 46.305(b). Here, the federal agencies notified the public of the availability of the draft EA and solicited comments. AR 37–38. The Federal Register notice announced a public hearing to be held on February 8, 2013, and an opportunity to comment by March 22, 2013. AR 3656–57. The public hearing informed the public about the leasing decision, and the EA included a comment-response matrix that listed all the comments received and explained how those comments had been addressed in the final EA. *Id.*, AR 197–215.

Importantly, Petitioner availed itself of this public process by submitting extensive comments on the draft EA and the federal agencies addressed those comments in the final EA. AR 197–215. Although OSMRE had been a cooperating agency in the preparation of the EA completed just a few months prior, OSMRE still conducted an independent review of the EA. AR 18–19, AR 3904–3905 ("OSMRE has independently reviewed the EA and finds that the EA complies with 43 CFR § 46, Subpart D, the relevant provisions of the [CEQ] regulations and other program requirements."). On April 2, 2014, OSMRE independently analyzed the effects of the proposed operation on threatened and endangered species, pursuant to the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531, *et seq*., and the applicable regulations at 30 C.F.R. §§ 746.13(c) & 816.97, and made a "no effect" determination. AR 227–29; 43 C.F.R. § 46.320(b) ("When appropriate, the Responsible Official may augment the environmental assessment to be consistent with the bureau's proposed action.").

On April 30, 2014, OSMRE made an independent FONSI associated with the mining plan. AR 18–19. OSMRE based its FONSI on the EA for the leasing decision as well as BLM's separate FONSI for the leasing decision. AR 18–19, AR 3860–68. By reviewing the leasing EA's adequacy as applied to the mining plan, in addition to actively participating as a cooperating agency in the preparation of the EA, OSMRE's adoption of the EA for the leasing decision complies with 43 C.F.R. § 46.320(a), which provides that "[a] Responsible Official may adopt an environmental assessment prepared by another agency, entity, or person if the Responsible Official: (1) [i]ndependently reviews the [EA]; and (2) finds that the [EA] complies with [the relevant law]." *See also* 43 C.F.R. § 46.320(c) ("In adopting or augmenting the [EA], the Responsible Official will cite the original [EA]."). In addition, OSMRE independently reviewed the Resources Recovery and Protection Plan, the PAP, and EMNRD's written findings on the PAP. AR 18–19. Based on its independent review, OSMRE concluded that these documents "adequately and accurately assess[ed] the environmental impacts of the proposed mining plan," and adopted the leasing EA. *Id.*

Furthermore, OSMRE considered the relevant significance factors with regard to context and intensity of the impacts described in the EA. AR 18; 40 C.F.R. § 1508.27. In addition, OSMRE determined that the public had been afforded adequate opportunity to provide input through the completion of the EA and the submission of the PAP to EMNRD during the issuance of the state mining permit revision. AR 19. OSMRE also determined that its public involvement requirements for EAs had been met because the EA was subject to public review and comment prior to the issuance of the final EA. *Id.*; 43 C.F.R. § 46.320(d) ("The Responsible Official must ensure that its bureau's public involvement requirements have been met before it adopts another agency's [EA]."); 43 C.F.R. 46.305.

OSMRE's Western Regional Office completed a recommendation to approve the mining plan, which it forwarded to the OSMRE Director. AR 19–13. The OSMRE Director reviewed and signed OSMRE's final recommendation for the mining plan and forwarded it to the Assistant Secretary's office for final decision. AR 7–8. On May 16, 2014, the Deputy Assistant Secretary for Land and Minerals Management issued a final decision approving the mining plan. AR 3887–88. OSMRE subsequently made the relevant documents available to the public on its website. AR 19; 43 C.F.R. § 46.305(c) ("The bureau must notify the public of the availability of an environmental assessment and any associated [FONSI] once they have been completed. Comments on a [FONSI] do not need to be solicited[.]").

Federal Respondents argue that "[n]othing more is required by OSMRE in the way of public participation, pursuant to the regulations." (Doc. 81 at 21). The Court agrees that public participation was afforded during the preparation of the EA and NEPA regulations allow OSMRE to adopt the EA following an independent review of the EA's adequacy. 43 C.F.R. § 46.320(a). In this case, OSMRE actively participated in the EA process as a cooperating agency in close temporal proximity to the mining plan recommendation, conducted an independent review of the EA prior to

making the mining plan recommendation, and found the EA issued by the BLM to be adequate. AR 18–19.

Because public participation requirements were met by the BLM in issuing the EA, as confirmed by OSMRE's finding that opportunities for public comment during the EA's preparation and the SMCRA permitting processes were sufficient, NEPA regulations did not require OSMRE to allow for additional public involvement before adopting the EA. 43 C.F.R. § 46.320(d). Because OSMRE followed the relevant law related to public participation and notice with regard to a cooperating agency adopting an EA issued just months before the mining plan recommendation, the Court finds that the agency was not arbitrary and capricious in determining that the public was given adequate opportunity to participate in the mining plan decision process.

Moreover, Petitioner cannot show prejudice resulting from any alleged error related to public participation and notice. The APA's judicial review provisions direct courts to take "due account" of "the rule of prejudicial error." 5 U.S.C. § 706. In the instant case, Petitioner had actual notice of the BLM's draft EA as demonstrated by the fact that Petitioner commented on it. (Doc. 81 at 23). Because Petitioner had notice of the relevant facts and participated in the comment period for the EA adopted by OSMRE, Petitioner has not suffered prejudice as a result of any alleged procedural error. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (errors in administrative proceedings do not require reversal "unless Plaintiffs can show they were prejudiced"). Therefore, the Court denies Petitioner's request to set aside the challenged decision.

F. Whether OSMRE's Approval of the El Segundo Mining Plan Violated NEPA's Hard Look Requirements

Next, Petitioner argues that OSMRE's approval of the El Segundo mining plan violated NEPA's hard look requirements. (Doc. 80 at 28). Specifically, Petitioner contends OSMRE failed to analyze coal transport and combustion as indirect impacts of mining at the El Segundo Mine. (*Id.*). Further, Petitioner claims OSMRE failed to take a hard look at the air quality impacts of coal mining

at the El Segundo Mine. (*Id.* at 32). Lastly, Petitioner asserts that the EA fails to take a hard look at impacts from the lease's GHG emissions. (*Id.* at 38).

If an agency decides that an EIS is not necessary based on an EA, the agency must issue a FONSI to briefly present the reasons why the proposed agency action will not have a significant impact on the environment. *Public Citizen*, 541 U.S. at 757–58. When reviewing a FONSI, a court "must determine whether the agency acted arbitrarily and capriciously in concluding that the proposed action 'will not have a significant effect on the human environment.'" *Utah Envtl. Cong.*, 518 F.3d at 824 (quoting *Davis*, 302 F.3d at 1112).

Petitioner argues that OSMRE failed to perform any analysis of the impacts to air quality and GHG levels from coal combustion. (Doc. 80 at 24). Yet, the EA that OSMRE helped develop as a cooperating agency and adopted after independent review as well as the EA's attached Appendix D extensively discuss air quality and climate change. AR 49–53 (description of air and climate resources of the affected environment); AR 83–84 (discussing emissions from combustion engines and transportation issues); AR 85–88 (description of environmental impacts on air and climate resources from the mining plan and no action alternative); AR 112–16 (responses to Petitioner's comments); AR 176–96 (Appendix D—Air Quality Resources: Impact Assessment Methods and Results). NEPA regulations provide that:

> When available, the Responsible Official should use existing NEPA analyses for assessing the impacts of a proposed action and any alternatives. Procedures for adoption or incorporation by reference of such analyses must be followed where applicable. . . . Responsible Officials should make the best use of existing NEPA documents. . . to avoid redundancy and unnecessary paperwork.

43 C.F.R. § 46.120.

The EA discusses the impacts from combustion of coal from the Section 34 Lease and how the use of coal from this 640 acre tract depends on factors such as demand, price, quality, and transportation. AR 113. Further, the EA explains how a private rail spur connects the El Segundo mine south to the main BNSF Railway near Grants, New Mexico. *Id.* The EA recognizes the

difficulty of projecting how much coal from the El Segundo mine or the Section 34 Lease in particular will be burned at any given time in the future. *Id.* In addition, the EA provides information about current contracts with different generating stations and power plants, the terms of the contracts, and the amount purchased annually. *Id.* Based on this information, the EA calculates the pollutant emissions from combustion of coal originating at the Section 34 Lease based upon EPA emission information for these plants. AR 113–14. The EA also calculates the total tons of CO_2 emissions expected from the Section 34 Lease and analyzes these emissions in the context of annual global and national emission levels. AR 114. Finally, the EA estimates criteria pollutant emissions relating to combustion of coal from the 640-acre parcel at issue. *Id.*

Moreover, the approach employed in the EA for evaluating GHG emissions comports with the recommendations found in CEQ's Final Guidance for Federal Departments and Agencies on Consideration of GHG Emissions and the Effects of Climate Change in NEPA Reviews. 81 Fed. Reg. 51,866–67 (Aug. 5, 2016). The guidance "[r]ecommends that agencies use projected GHG emissions. . . as a proxy for assessing potential climate change effects when preparing a NEPA analysis for a proposed agency action[.]" (Doc. 81-2 at 4). NEPA created the CEQ, which has promulgated regulations and interpretive guidance documents to provide direction on NEPA to agencies. 42 U.S.C. § 4332(2)(C). The CEQ's interpretive guidance documents have been recognized by the Tenth Circuit as persuasive authority "regarding the meaning of NEPA and the implementing regulations." *Wyo. v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1260 (10th Cir. 2011). Therefore, CEQ's guidance recommending the use of a proxy is entitled to deference.

While Petitioner urges that Federal Respondents should have adopted the "social cost of carbon" method for evaluating GHG emissions (Doc. 80 at 31–32), CEQ's regulations discourage the use of cost-benefit analyses in situations involving qualitative considerations. 40 C.F.R. § 1502.23. Consistent with these regulations, CEQ guidance specifically states that agencies need not use the social cost of carbon method to evaluate GHG emissions. (Doc. 81-2 at 33 n. 86). Thus, Federal

Respondents' choice of methodology for assessing impacts relating to GHG emissions has a rational basis and is not arbitrary and capricious. *See Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1171 (10th Cir. 2002).

The Court also rejects Petitioner's arguments concerning air quality. The EA provides a detailed analysis of air quality emissions from mining operations in the Section 34 Lease and reasonably concludes that they result in relatively small emissions levels compared to the emissions from the entire El Segundo Mine. AR 176–96, 187. According to the EA, the nearest ambient air[3] boundary typically ranges from 1,000 to 1,600 meters away. *Id.* As indicated by the EA, the predicted contributions of ambient air impacts due to mining activities attributable to the Section 34 Lease are minimal, and therefore, will not exceed applicable National Ambient Air Quality Standards ("NAAQS") for particulate matter or NO_2. *Id.* Similarly, the EA explains that tailpipe and blasting emissions for mining operations on the Section 34 Lease will not approach or exceed applicable NAAQS for CO, SO_2 and volatile organic compounds as precursors to ozone. *Id.* Therefore, the EA concludes that "qualitative analyses of expected ambient air impacts from mining operations in Section 34 demonstrate El Segundo's ability to comply with the NAAQS. . . will not be jeopardized." *Id.*

The analysis of air quality and GHG levels from coal combustion in the EA supports OSMRE's decision to issue a FONSI. Likewise, the duty of the State of New Mexico to ensure compliance with the CAA and requirements of New Mexico's regulations governing surface mining support OSMRE's decision to issue a FONSI. *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1527 (10th Cir. 1992) (upholding agency's decision concerning the lack of significance as reasoned "in light of the decision to issue the permit" with a specific condition to eliminate concern about potentially significant impacts). State regulations require a permit applicant to include in its

[3] Ambient air is defined by 40 C.F.R. Part 50.1(e) as "the portion of the atmosphere, external to buildings to which the general public has access."

application an air pollution control plan and also require an air permit. *See* 19.8.9.904 NMAC. In addition, state regulations impose nineteen performance standards for dust control. *See* 19.8.20.2050 NMAC; AR 455–58. Accordingly, ample evidence supports OSMRE's finding of non-significance, and the assumption that state regulations will be enforced correctly bolsters the reasonableness of the FONSI. In sum, the EA adopted by OSMRE takes a hard look at direct, indirect and cumulative impacts of mining the federal coal at issue and it appropriately analyzes impacts relating to air quality and GHG emissions. As such, Petitioner's NEPA claims shall be **DENIED**.

V. CONCLUSION

The NEPA process "involves an almost endless series of judgment calls, and the line-drawing decisions necessitated by the NEPA process are vested in the agencies, not the courts." *Jewell*, 738 F.3d at 312 (internal citations and quotation marks omitted). The analysis and assessments set forth in the EA and the FONSI are sufficient to satisfy NEPA. The Federal Respondents' decisions to authorize the Section 34 Lease are not arbitrary, capricious or contrary to law and must be affirmed in their entirety. Accordingly, the relief sought by Petitioner shall be **DENIED**.

It is therefore **ORDERED** that the Amended Petition for Review of Agency Action filed in the above-captioned case is hereby **DENIED**. (Doc. 75).

It is further **ORDERED** that the agency actions are **AFFIRMED**.

It is so **ORDERED**.

SIGNED this 16th day of February 2017.

ROBERT A. JUNELL
Senior United States District Judge