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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

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

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INTRODUCTION

Antelope Coal LLC (Antelope) operates the Antelope Mine in the Powder River Basin and has since 1985. In 2005, Antelope applied to lease a tract of federal coal adjacent to its current mine, known as a maintenance tract. In 2008, the Bureau of Land Management (BLM) completed an over 700-page Environmental Impact Statement (EIS) that analyzed the environmental impacts associated with leasing maintenance tracts, to the Antelope Mine in Campbell County, Wyoming. The Office of Surface Mining Reclamation and Enforcement (OSM), among other state and federal agencies, served as a cooperating agency. After completing its comprehensive environmental review, BLM decided to lease the maintenance tract.

WildEarth Guardians, the petitioner here, challenged the leasing decision in the United States District Court for the District of Columbia, arguing that the EIS did not sufficiently analyze the environmental impacts of leasing the maintenance tract. *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 84-95 (D.D.C. 2012). The D.C. district court rejected all of WildEarth Guardians' arguments challenging the EIS and upheld the leasing decision. *Salazar*, 880 F. Supp. at 84-95. The District of Columbia Circuit affirmed, and Antelope and OSM began the next step in the process—amending the mine plan to incorporate the maintenance tract. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013). As it developed the mine plan amendment, OSM found that the EIS still adequately analyzed the environmental impacts associated with mining the maintenance tract. Accordingly, OSM adopted the EIS to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h. In this case, WildEarth Guardians

challenges the adequacy of the EIS again, but under the guise of a challenge to the mine plan amendment.

WildEarth Guardians asserts that OSM violated NEPA when it approved the mine plan amendment for the Antelope Mine. Specifically, WildEarth Guardians argues that OSM did not solicit public input when it adopted the existing EIS. But NEPA does not require an agency that adopts an existing EIS to provide public notice or to solicit public input on the decision.

WildEarth Guardians also asserts that OSM violated NEPA when it did not supplement the EIS prior to issuing the mine plan amendment. Specifically, WildEarth Guardians alleges that OSM should have sought more information about the mine's impacts on air quality and climate and then prepared a supplemental EIS. While, in certain circumstances, NEPA does require agencies to prepare a supplemental EIS, none of those circumstances are present here. NEPA did not require OSM to supplement the EIS because, when OSM issued the mine plan amendment, it determined that the mine's impacts on air quality and climate were the same or less severe than they were when BLM prepared the EIS.

Accordingly, this Court should deny WildEarth Guardian's Petition for Review challenging the mine plan amendment.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY FRAMEWORK

The Mineral Leasing Act, 30 U.S.C. §§ 181-96, and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-328, prescribe the process for leasing federal land for

surface coal mining in the Powder River Basin. First, an applicant must nominate land for BLM to open for leasing. 43 C.F.R. § 3425.1. BLM evaluates this application and determines whether or not to lease the nominated land. *Id.* As part of this process, BLM prepares either an EIS or a less formal environmental analysis to analyze the environmental impacts of mining on the nominated land. *Id.* §§ 3425.3-3425.4. If BLM decides to lease the land nominated by an applicant, it conducts a competitive lease sale. *Id.* § 3422.

Next, a successful bidder prepares a mining plan and submits the plan to OSM. 30 U.S.C. § 207(c); 30 C.F.R. § 746.11(a). The mining plan must assure compliance with federal law, including the Surface Mining Control and Reclamation Act. 30 C.F.R. § 746.13. OSM then recommends to the Secretary of the Interior whether to approve or disapprove the mining plan. *Id.* As part of this process, OSM must also comply with NEPA and must base its recommendation to the Secretary of the Interior on information that the agency prepared in compliance with NEPA. *Id.* In Wyoming, the mine must also obtain two permits from the State Department of Environmental Quality (DEQ). The mine must obtain a permit to mine from the Land Quality Division and an air quality permit from the Air Quality Division. (OSM 016726, 016729, 017376).¹ The air quality permit requires the mine to use specific technology to prevent emissions and limits the emission of pollutants from the mine. Wyo. Stat. Ann. § 35-11-206. Once the Secretary of the Interior approves the mining plan, the applicant can mine under the terms of the plan. 30 C.F.R. § 746.17(b).

¹ Citations to (OSM) in this brief refer to the administrative record before the Office of Surface Mining Reclamation and Enforcement.

II. ANTELOPE COAL MINE

A. The Lease by Application

In 2005, Antelope applied to lease a maintenance tract of federal coal adjacent to the existing Antelope Mine. (OSM 016614). If approved, the maintenance tract would allow the mine to operate for thirteen years beyond the mine's current projected lifespan. (OSM 016631). BLM processed Antelope's application and began preparing an EIS that analyzed the environmental consequences of a mine plan amendment. BLM cooperated with OSM, the United States Forest Service, the Wyoming Department of Environmental Quality, and the Converse County Board of Commissioners in developing the EIS. (OSM 016617). This process took nearly three years. (*See* OSM 016614, 016591). In 2008, BLM published a draft EIS, solicited public comments, and held a public hearing in Douglas, Wyoming. (OSM 016614). Four people presented statements at the hearing and BLM received fourteen comments on the draft EIS, including lengthy comments from environmental groups such as WildEarth Guardians, Defenders of Wildlife, and the Powder River Basin Resource Council. (OSM 016614; OSM 017232-324).

BLM then published a final EIS, which spanned two volumes and over 700 pages. (OSM 016589-7325). In the EIS, nearly 100 pages set forth the comments sent to BLM and BLM's responses, as well a summary of the public hearing. (OSM 017232-325). The EIS evaluated the potential environmental consequences of leasing a maintenance tract to the Antelope Mine, as well as other alternatives. It also examined the potential effects that mining might have on the area's topography, mineral resources, air quality, water quality, soils, vegetation, wildlife, land use for recreation, cultural resources, visual resources,

noise, transportation, socioeconomics, and cumulative impacts on climate, among other concerns. The EIS **expressly** provided that OSM would likely rely upon the EIS when making decisions later in the process. (OSM 016616).

In particular, the EIS thoroughly examined the effects of particulate and nitrogen oxide emissions on air quality. (OSM 016722-42, 016903-13). It also examined the relationship between allowing the development of the proposed maintenance tract and climate change. (OSM 016870-72, 016971682).

The EIS considered the short-term impacts of nitrogen dioxide in the air. (OSM 016737, 017073-102). It considered three different agencies' recommendations and requirements for worker and public safety. (OSM 016737). And the EIS described how mines in the region, in collaboration with DEQ, developed studies and practices to mitigate the impact of short-term nitrogen dioxide emissions. (OSM 017085-86). When the agencies developed the EIS, no federal ambient air quality standard for short-term nitrogen dioxide existed. *Primary Ambient Air Quality Standards for Nitrogen Dioxide*, 75 Fed. Reg. 6474, 6474 (Feb. 9, 2010). But the EIS discussed the potential for impacts from short-term exposure to nitrogen dioxide in detail. (OSM 016736-39). The EIS noted that, through thirty years of operating, there were "no reported events of public exposure to [nitrogen dioxide] from blasting activities at the Antelope Mine." (OSM 016738). Finally, the EIS concluded that any nitrogen dioxide emissions that did exist would not increase but would merely be extended for another thirteen years. (*Id.*).

The EIS discussed the impacts of particulate matter. While the EIS does not discuss particulate matter smaller than 2.5 microns (PM_{2.5}) in detail, it does exhaustively discuss

particulate matter smaller than 10 microns (PM_{10}). (OSM 016719-34). A federal ambient air quality standard for $PM_{2.5}$ existed in 2008, and the EPA strengthened it in January 2013. *National Ambient Air Quality Standards for Particulate Matter*, 78 Fed. Reg. 3086, 3086 (Jan. 15, 2013). Mining operations emit $PM_{2.5}$ from motor vehicle emissions and combustion processes. By contrast, numerous sources from coal mining emit PM_{10} , especially from wind blowing dust, so it is a more significant concern. (OSM 016719-34). The EIS noted that the mine must comply with Wyoming air quality standards, including Wyoming's $PM_{2.5}$ standards, and that the mine would need to amend its air permit to continue operating. (OSM 016726, 016729). Thus, the air quality permitting process, not the EIS, addresses any concerns about $PM_{2.5}$.

The EIS exhaustively discussed the relationship between the maintenance tract and climate change. (OSM 016971-82). Specifically, the EIS analyzed "the impacts of mining the coal" and included "a discussion of emissions and by-products that are generated when the coal is burned to produce electricity." (OSM 016971). The EIS generally found that the mine would continue to operate for eleven to thirteen years. (OSM 016972). It also generally discussed the causes of climate change and impacts that climate change would have on the planet. (OSM 016972-75). It specifically attempted to discern the impacts that climate change might have on the West. (OSM 016975-76). However, as WildEarth Guardians concedes in its brief, "current climate models still cannot predict local impacts to climate from a particular [greenhouse gas] emission source." (Br. of Appellant at 39). Nor could they in 2008.

The EIS concluded that the mine accounted for approximately one percent of America's carbon dioxide emissions. (OSM 016980). It found that the mine's contribution to the country's carbon dioxide emissions would remain "at about this level" until it ran out of coal. (*Id.*). Importantly, the EIS found that **not** leasing the maintenance tract would have no effect on the amount of coal burned in the United States. (OSM 016981). The EIS analyzed the demand for coal in the United States and assumed that about half of the nation's electricity needs would be met by coal combustion throughout the life of the mine. (OSM 016980 & tbl. 4-36). Because "multiple other sources of coal" could supply the demand for coal, the EIS found that roughly the same amount of coal would be burned regardless whether Antelope continued operating for another 13 years. (OSM 016981). The EIS also analyzed the potential release of coalbed natural gas, finding that leasing the maintenance tract would allow "a large portion of the [gas] that [is] currently present on the tract [to] be recovered prior to mining." (OSM 016982).

BLM asserted in the EIS that "[t]he most detailed analysis prior to mine development would occur after the lease is issued." (OSM 016636). But BLM did not state that there would be further **NEPA** analysis. Rather, the EIS stated that the "most detailed analysis prior to mine development would occur after the lease is issued, when the lessee files an application for a surface mining permit and mining plan approval, supported by extensive proposed mining and reclamation plans, to the WDEQ/LQD." (*Id.*) Thus, it anticipated that the "most detailed analysis" would occur when the mine applied for a surface mining permit from the DEQ's land quality division. (*Id.*). Moreover, it also expressly anticipated that OSM would use the EIS to make decisions related to approval

of the mining plan. (OSM 016617) (OSM [will] use this analysis to make decisions related to mining the federal coal in this tract.)).

B. The Lease by Application Litigation

After BLM decided to lease the tracts, WildEarth Guardians challenged the adequacy of the EIS. *Salazar*, 880 F. Supp. 2d at 84-95; *Jewell*, 738 F.3d at 308-12. Before the District Court for the District of Columbia, WildEarth Guardians argued that the EIS was inadequate because it failed to discuss the impacts of the mine on greenhouse gases and climate change, ozone, nitrogen dioxide, and particulate matter smaller than 10 microns (PM₁₀). (Compl. at 21-23, *Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012), No. 10-01174). The D.C. district court disagreed. *Salazar*, 880 F. Supp. 2d at 83-92. It held that the EIS could not analyze the local impacts of climate change because those impacts were “diffuse” and impossible to discern. *Id.* at 84-85. Moreover, the D.C. district court held that the EIS correctly analyzed the supply and demand factors of the coal market, holding that “there is evidence that even if the [maintenance] tracts lay fallow the national energy portfolio would remain unchanged.” *Id.* at 85. The court rejected WildEarth Guardians’ attempt to link the maintenance tracts to global climate change, holding that “[t]he causal chain proffered by [WildEarth Guardians] is ultimately too attenuated” to require analysis. *Id.* at 86.

The D.C. district court also rejected WildEarth Guardians’ claims about non-climate-change-related impacts. *Id.* at 86-91. Regarding ozone, WildEarth Guardians argued that the EIS completely failed “to analyze ozone emissions from the proposed action.” *Id.* at 88. The court held that that “contention is belied by the record,” noting that

the EIS discussed ozone precursors, the potential health risks from ground-level ozone, and background ozone levels in the area. *Id.*

With respect to PM₁₀, WildEarth Guardians argued that the EIS did not take a sufficiently hard look at the pollutant. *Id.* Again, the D.C. district court held, that “contention is belied by the record.” *Id.* The EIS discussed the environmental and health impacts of PM₁₀, discussed the impacts that could be expected to occur from permitting mining, and “openly acknowledged that there was one exceedance of PM₁₀ standards in the area in 2005.” *Id.* at 88-89. The EIS’s analysis was “a far cry from conclusory.” *Id.* at 90 (quotations omitted).

With respect to nitrogen dioxide, the court held that the EIS “in fact analyzed the impacts of [nitrogen dioxide] emissions í in great detail.” *Id.* The D.C. district court explicitly held that “EPA’s promulgation of the 1-hour [nitrogen dioxide] standard does not reflect the sort of new circumstances or information” which would have required the agencies to supplement the EIS. *Id.* (quotations omitted). It found that the EIS adequately analyzed the potential impacts from nitrogen dioxide emissions. *Id.* at 91.

The D.C. district court also rejected several other arguments by the plaintiffs. *Id.* at 91-95. Finally, the court dismissed the remaining claims, stating that it had “considered the remaining arguments tendered by Plaintiffs and concluded that they [were] without merit.” *Id.* at 95. The court granted summary judgment to BLM. *Id.*

WildEarth Guardians appealed. *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013). The Court of Appeals for the District of Columbia Circuit affirmed on all grounds. *Id.* at 308-12. The D.C. Circuit panel agreed that the EIS analyzed greenhouse

gases consistently with draft guidance available at the time from the Council on Environmental Quality which stated that it is difficult to “isolate or understand” links between specific actions with worsening impacts from climate change. *Id.* at 309. While “mitigation measures” might be imposed at the mine plan stage, the panel agreed that “projection about future [greenhouse gas] emissions” would be speculative. *Id.* Moreover, the panel opinion noted that the EIS “does address a full range of alternatives” with respect to greenhouse gas emissions. *Id.* at 311. It did not discuss short-term emissions of nitrogen dioxide or emissions of particulate matter. *See id.* (discussing local impacts to air quality).

C. The Mine Plan Amendment

After the D.C. Circuit court affirmed BLM’s decision to lease the land, OSM developed a mine plan amendment authorizing Antelope to mine the maintenance tract. (OSM 017373-75). A mine plan provides enforceable standards for operating and reclaiming the mine. 30 U.S.C. § 207(c); 30 C.F.R. § 746.11. Thus, the mine plan must take into account, for example, the technology the mine will employ to control sediment, the ecology of the land, and what kind of sediment the mine will use to reclaim land after it is mined. (*See, e.g.*, OSM 000656-742, 000513-17, 000782-97).

Here, the mine plan relied on the state permitting process to satisfy those concerns. (OSM 017374). The mine plan requires the mine to comply with the terms of its state permit. (*Id.*). DEQ collected and analyzed over sixteen thousand pages of detailed information as it considered the mine permit amendment and sent this information to OSM. (OSM 000001-016528). The type of information that DEQ analyzed when it considered the amendment to Antelope’s permit included Antelope’s plan to reclaim the surface area,

(OSM 000082-93), how DEQ set the mine's bond amount, (OSM 0001526269), how the mine would control sediment, (OSM 000656-742), and an analysis of the overburden that the mine would have to move. (OSM 000943-1498). DEQ did not address the question whether the coal would be mined at all, as the decision to lease the coal had already been made and adjudicated. *See Jewell*, 738 F.3d at 311. Rather, DEQ and OSM used their regulatory authority to ensure that any coal would be mined responsibly and that the land would be reclaimed responsibly. OSM had access to all of the information DEQ collected as it considered the mine's federal mine plan. (OSM 000001-016528).

The Surface Mining Control and Reclamation Act's implementing regulations require OSM to recommend to the Secretary of the Interior whether to approve an amended mine plan. 30 C.F.R. § 746.13. OSM's recommendation must be based on the information that the mine provided to DEQ and information prepared in accordance with NEPA. *Id.* Thus, before OSM could recommend that the Secretary of the Interior approve the amended mine plan, it had to adopt the EIS. In October 2013, the agency issued a Statement of NEPA Adoption and Compliance. (OSM 016542-43). This Statement provided that OSM independently reviewed the EIS, determined that the EIS "adequately address[ed] the impact of the proposed mining plan modification," and adopted the entire EIS. (*Id.*). The Secretary of the Interior then approved the amended mine plan in November 2013, more than eight years after Antelope applied to lease the maintenance tract. (OSM 17373-74).

STANDARD OF REVIEW

NEPA does not have a citizen suit provision, so this Court reviews OSM's final NEPA action under the Administrative Procedure Act. 5 U.S.C. §§ 702, 704; *New Mexico*

ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 704 (10th Cir. 2009). Under the Administrative Procedure Act, a reviewing court shall ðhold unlawful and set aside agency action, findings, and conclusions found to be í arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.ö 5 U.S.C. § 706(2)(A). Agency actions are presumed valid. *Morris v. U.S. Nuclear Regulatory Comm’n*, 598 F.3d 677, 691 (10th Cir. 2010). Parties challenging agency actions have the burden of proof to show that an action was arbitrary or capricious. *Id.*

An agency action can be arbitrary or capricious when the agency ðntirely 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.ö *Utah Envtl. Congress v. Russell*, 518 F.3d 817, 823-24 (10th Cir. 2008) (quoting *Utah Envtl. Congress v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006)). A reviewing court asks whether the agency considered the relevant factors and whether this agency made a ðclear error of judgment.ö *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1167 (10th Cir. 1999).

When reviewing whether an agency acted arbitrarily or capriciously under NEPA, the court asks ðwhether claimed deficiencies in a [final environmental impact statement] are merely flyspecks, or are significant enough to defeat the goals of informed decisionmaking and informed public comment.ö *Utahns for Better Transp. v. U.S. Dep’t of Trans.*, 305 F.3d 1152, 1163 (10th Cir. 2002). The reviewing court must ðsimply í ensure that the agency has adequately considered and disclosed the environmental impact

of its actions.ö *Id.* (quoting *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1208 (10th Cir. 2002)).

ARGUMENT

I. The Office of Surface Mining complied with NEPA when it approved the Antelope Mine Plan.

WildEarth Guardians advances two arguments that OSM did not comply with NEPA's procedural requirements. First, WildEarth Guardians argues that OSM was required to notify the public that it was adopting the EIS. (Br. of Appellant at 19-20). Next, WildEarth Guardians argues that OSM did not properly analyze the adequacy of the EIS. (Br. of Appellant at 22-25). These arguments are without merit. NEPA does not require public notice and outreach at every possible step of a decision. Further, OSM followed its internal procedures for analyzing the adequacy of an EIS. Therefore, OSM complied with NEPA when it approved the Antelope mine plan.

NEPA requires federal agencies considering a major federal action that will significantly affect the quality of the human environment to prepare an EIS before taking the action. 42 U.S.C. § 4332(C). Agencies must take a "hard look" at the consequences of proposed actions and consider alternatives to the action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Agencies must explore and evaluate alternatives to their proposed action including the no-action alternative, identify which alternative is preferable, and identify how the consequences of the alternative actions could be mitigated. 40 C.F.R. § 1502.14.

NEPA's implementing regulations expressly allow agencies to adopt NEPA documents prepared by other agencies, as long as the document continues to meet the standards for an adequate statement. 40 C.F.R. § 1506.3(a); 43 C.F.R. § 46.120(b). When determining whether to adopt an EIS prepared by another agency, the adopting agency must evaluate whether any new facts or changes in the action would result in significantly different environmental effects. 43 C.F.R. § 46.120(c). If the adopting agency discovers significant new information, it must prepare a supplemental NEPA document to analyze the new information. 40 C.F.R. § 1502.9(c)(1).

OSM has prepared a handbook to provide guidance concerning [NEPA's] legal requirements [that] does not create, add to, or otherwise modify any legal requirement. United States Department of the Interior, Office of Surface Mining Reclamation & Enforcement, *Handbook on Procedures for Implementing the National Environmental Policy Act* [hereinafter OSM Handbook] § 1, 1-1 (March 1989).² If OSM has determined that a preexisting EIS meets NEPA requirements, the Handbook suggests that the agency official responsible for the NEPA process state that "After an independent review of [the entire] environmental impact statement, I have determined that the document adequately addresses the impacts of the [proposed action]. Therefore, I hereby adopt the [entire EIS]." *Id.* The Department of the Interior's rules require OSM to provide "appropriate supporting documentation" that shows that the EIS "adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c).

² http://www.osmre.gov/lrg/docs/directive490_NEPAHandbook.pdf.

A. NEPA did not require the Office of Surface Mining to provide notice of its intent to adopt the EIS to the public.

WildEarth Guardians asserts that OSM should have provided notice of its intent to adopt the EIS. (Br. of Appellant at 19-20). But neither NEPA nor its implementing regulations require public notice and input at every conceivable step of a decisionmaking process. NEPA requires that, when an agency prepares an EIS, the agency must provide public notice that it is preparing the document, as well as notice of "NEPA-related hearings." 40 C.F.R. § 1506.6(b). This requirement ensures that the agency receives public input and information at the earliest stages of the decisionmaking process so that it "is cognizant of all the environmental trade-offs that are implicit in a decision." *California v. Block*, 690 F.2d 753, 770 (9th Cir. 1980).

In this case, when BLM prepared its draft and final environmental impact statements, it solicited significant public involvement and received voluminous comments. Nearly 100 pages of the EIS consist of public comments that BLM received on its draft EIS and its responses to those comments. (OSM 017232-324). WildEarth Guardians made several comments on the draft EIS, including comments that the EIS should have emphasized the Clean Air Act's goal of remedying regional haze as well as the potential impact of acidifying lakes and impacts on sensitive species, among other things. (OSM 017244-61). BLM responded to each concern WildEarth Guardians raised. (OSM 017308-14). BLM noted that the mine was not projected to impact regional haze, that Powder River Basin coal contained less sulfur and was likely to alleviate acidification, and that BLM

worked with the United States Fish and Wildlife Service to determine whether there would be impacts on sensitive species. (*Id.*).

When OSM adopted the EIS in 2013, no new facts required supplemental analysis. The environmental consequences of the mine in 2013 were the same as those analyzed and evaluated by the agencies in 2008. WildEarth Guardians points to no new consequences and provides no evidence that mining will have significant environmental consequences that the agencies did not know and understand in 2008. New public involvement would not have helped OSM discharge a NEPA obligation. OSM specifically found that the EIS adequately addressed the impacts of the mine plan. (OSM 016542-43). Because no provision of NEPA required OSM to publish notice of its decision, OSM did not violate any requirement by not publishing notice.

WildEarth Guardians alleges that cases in Colorado and Montana successfully challenged OSM's NEPA process "on similar grounds." (Br. of Appellant at 20); *WildEarth Guardians v. U.S. Office of Surface Mining Reclamation & Enforcement* (*WildEarth Guardians I*), 104 F. Supp. 3d 1208 (D. Colo. 2015); *WildEarth Guardians v. U.S. Office of Surface Mining Reclamation & Enforcement* (*WildEarth Guardians II*), Nos. CV 146136BLG6SPW6CSO, CV 1461036BLG6SPW6CSO, 2015 WL 6442724 (D. Mont. Oct. 23, 2015). But these cases are distinguishable. OSM did not adopt a full EIS prepared by another agency for the specific maintenance tract at issue in either case. *WildEarth Guardians I*, 104 F. Supp. 3d at 1216-18; *WildEarth Guardians II*, 2015 WL 6442724 at *1-*2. In *WildEarth Guardians I*, OSM attempted to conduct a new NEPA process, and in *WildEarth Guardians II*, OSM attempted to base its conclusions on an

environmental assessment. *WildEarth Guardians I*, 104 F. Supp. 3d at 1216-18; *Wild Earth Guardians II*, 2015 WL 6442724 at *1-2.

In *WildEarth Guardians I*, OSM recommended that the Secretary of the Interior approve two mine plans for mines near Craig, Colorado. *WildEarth Guardians I*, 104 F. Supp. 3d at 1216-18. OSM prepared and issued two Findings of No Significant Impact (FONSI) without soliciting any public comments. *WildEarth Guardians I*, 104 F. Supp. 3d at 1216-18. The FONSI referenced older NEPA and non-NEPA documents, but did not expressly adopt a prior EIS. *Id.* The reviewing court found that OSM made no effort to notify the public that it was developing these FONSI. *Id.* at 1224. Because no EIS covered the specific tracts at issue, the court found that OSM failed to ensure that the public was involved in the NEPA process. *Id.* Accordingly, the court held that OSM violated NEPA when it approved the mine plans. *Id.*

By contrast, in this case BLM prepared an EIS that analyzed and evaluated the environmental consequences of mining the same land that the mine plan covered. (OSM 017232-325). The EIS in this case responded to written comments and comments made at a public hearing. (OSM 017232-325) Unlike *WildEarth Guardians I*, the NEPA process for the OSM decision in this case entailed significant public input. Moreover, in *WildEarth Guardian I*, the Department of the Interior's supplemental NEPA regulations required public notice of FONSI. 43 C.F.R. § 46.305(c). But in the present case, there is no similar requirement that OSM give public notice of its adoption of the EIS. *See* 43 C.F.R. §§ 46.10646.450. For these reasons, *WildEarth Guardians I* is inapplicable.

In *WildEarth Guardians II*, a mine in Big Horn County, Montana, applied to lease additional land. *WildEarth Guardians II*, 2015 WL 6442724, at *1-*2. Rather than prepare an EIS, BLM prepared an environmental assessment that expressly contemplated OSM would prepare an additional site-specific NEPA document when the mine applied for permits from OSM and the state. *Id.* While the mine applied for permits, it revised its application several times, so the plan did not necessarily reflect the plan that BLM reviewed in its environmental assessment. *See id.* at *2. Before finalizing the mine plan, OSM issued a FONSI based on BLM's environmental assessment that had expressly provided that more detailed NEPA work still needed to be done. *Id.* OSM failed to provide public notice of its NEPA process, even though the Department of the Interior's supplemental NEPA regulations require public notice of FONSI's. *Id.* at *6-*7; 43 C.F.R. § 46.305(c). The court found that OSM's failure to provide public notice violated NEPA and that the environmental analysis was not a sufficiently "hard look." *WildEarth Guardians II*, 2015 WL 6442724, at *6-*7.

Here, BLM prepared a more than 700-page EIS analyzing the consequences of mining this specific tract, solicited and received significant public input, and responded to those comments. (OSM 016589-7325). The EIS explicitly recognized that OSM would likely use the EIS to evaluate whether to approve the final mining plan. (OSM 016639). OSM knew that the Antelope Mine's new maintenance tract would significantly impact the environment. The agency adopted the entire EIS, finding that the EIS adequately analyzed the environmental impacts of the new tract. (OSM 016542-43). Finally, here, there is no legal requirement that OSM provide public notice of its adoption of the EIS. *See* 43 C.F.R.

§§ 46.10-46.450. The only suggestion that OSM provide public notice of such adoption is in OSM's handbook, which is not legally binding. *Aragon v. United States*, 146 F.3d 819, 824 (10th Cir. 1998).

An agency's policy documents, such as a handbook, are not necessarily entitled to the force and effect of law. *Id.* If an agency explicitly qualifies its policy document as merely "guidance" or "advisory," it will not have the force of law. *Id.* In *Aragon*, the Tenth Circuit considered whether an Air Force manual identified a "practicable" method for disposing of toxic waste. *Id.* The court noted that the manual "specifically state[d] it [was] intended for guidance." *Id.* That statement "weigh[ed] heavily against ruling the Manual prescribed mandatory directives." *Id.* at 825. The court went on to hold that the Air Force still complied with its own guidance. *Id.* Similarly, in this case, OSM's Handbook explicitly states that it "provides guidance í concerning existing legal requirements but does not create, add to, or otherwise modify any legal requirement." OSM Handbook § 1, 1-1. The OSM Handbook cannot create new legal requirements and it expressly provides that it will not do so. *See Aragon*, 146 F.3d at 824-25.

No provision of NEPA required OSM to notify the public of its intent to adopt the EIS. Such public notice cannot be required at every conceivable step of a decision. OSM rationally relied on the significant public outreach conducted when the agencies developed the EIS. NEPA permitted OSM to adopt the EIS without providing public notice of its intent to do so.

B. The Office of Surface Mining showed on the record that it evaluated the adequacy of the EIS.

WildEarth Guardians also argues that OSM did not show on the record that it evaluated the adequacy of the EIS. (Br. of Appellant at 22-25). But nothing in NEPA requires a specific procedure that OSM must follow when it is evaluating the adequacy of an EIS. Here, OSM followed its Handbook's procedure when it adopted the EIS. (OSM 016542-43). OSM's Handbook is not legally binding. *See Aragon*, 146 F.3d at 824-25. Nevertheless, it does suggest what OSM **may** say when it evaluates the adequacy of an EIS that it is adopting. OSM Handbook § 3.B.3.a. Here, OSM stated in its Statement of NEPA Adoption and Compliance that the EIS "adequately address[ed] the impact of the proposed mining plan modification" and that it would "adopt the entire EIS." (OSM 016542-43). OSM could not be forced to follow this provision of the Handbook, because the Handbook does not create new legal requirements. *See Aragon*, 146 F.3d at 624-25. But because OSM made this statement, it certainly stated on the record that it evaluated the adequacy of the EIS.

While the Department of the Interior's rules require OSM to provide "appropriate supporting documentation" that shows that the EIS "adequately assesses the environmental effects of the proposed action and reasonable alternatives," there was no new information about the impacts of the mine plan for OSM to evaluate. 43 C.F.R. § 46.120(c). Again, WildEarth Guardians provides no evidence that the consequences of this mine will be any different than they were in 2008. The environmental consequences of the mine plan did not change from 2008 to 2013. Millions more tons of coal will be available to mine and the

mine will stay in existence for about another 10 years. The EIS considered, analyzed, and evaluated these consequences. It took a hard look at these consequences in 2008 as well as in 2013.

WildEarth Guardians only supplies the following new information: there is a new standard for nitrogen dioxide, EPA raised the standard for PM_{2.5}, and a group of agencies developed a rudimentary tool to determine the social cost of carbon emissions. (Br. of Appellant at 29-42). These new standards did not alter the significant impacts the mine would have which the EIS analyzed and evaluated in 2008. The EIS considered the significant impacts of the mine. OSM did not need to show on the record that it evaluated the adequacy of new information because no new information about the mine existed for them to evaluate.

II. NEPA did not require the Office of Surface Mining to conduct a supplemental analysis.

WildEarth Guardians argues that NEPA required OSM to conduct a supplemental NEPA analysis in 2013 because EPA promulgated a new one-hour nitrogen dioxide exposure standard and a stronger particulate matter emission standard **after** BLM issued the EIS. (Br. of Appellant at 25-26). WildEarth Guardians also asserts that OSM should have used “the social cost of carbon” to measure the impacts of greenhouse gas emissions from the mine. (Br. of Appellant at 26). These complaints lack merit.

A. More stringent air quality standards do not require OSM to conduct a supplemental NEPA analysis.

When a federal agency adopts a previously-prepared EIS, it must seek out new information and consider whether the new information is significant enough to require preparation of a supplemental NEPA analysis. 40 C.F.R. § 1502.9(c). In this case, however, no new information exists about how the mine will operate. Rather, the only new information relevant to impacts to air quality are new rules that will actually mitigate the impacts of mining. (Br. of Appellants at 26). Because these new rules do not change how the mine will operate or allow more pollutants to be emitted, NEPA did not require OSM to conduct a supplemental NEPA analysis to evaluate additional environmental impacts. *Dombeck*, 185 F.3d at 1177-78.

As an initial matter, WildEarth Guardians cannot contest the sufficiency of the EIS. The D.C. Circuit court already considered and adjudicated that, as the group admits. *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013); (Br. of Appellant at 26 n.5). The EIS adequately considered the air quality impacts of the mine when it was completed in 2008. WildEarth Guardians can only argue that circumstances changed between 2008 and 2013 such that there would be environmental impacts that BLM did not consider. But the mine's circumstances did not change.

Agencies are required to prepare a supplemental EIS only if new information is sufficient to show [the proposed action] will affect the quality of the human environment in a significant manner or to a significant extent not already considered. *Dombeck*, 185 F.3d at 1177-78 (quoting *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 374 (1989)). If

new information existed, in order to avoid having to prepare a supplemental NEPA analysis, the agency must take a hard look at the information, explain why the new information is not significant, and record its reasoning. *So. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1238 (10th Cir. 2002), *rev'd on other grounds*, *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Dombeck*, 185 F.3d at 1178.

An agency's obligation to conduct a supplemental analysis is most important when there will be environmental consequences not already considered by the agency. *Marsh*, 490 U.S. at 374; *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984); *Norton*, 301 F.3d at 1238. The regulations implementing NEPA emphasize this, requiring a supplemental environmental analysis only if there have been "substantial changes in the proposed action" or "significant new circumstances or information relevant to environmental concerns." 40 C.F.R. § 1502.9.

Thus, this process assumes that new information shows that there are additional environmental impacts associated with the action that were not considered by the agency. In this case, the proposed action remains the same. The anticipated impacts to air quality in 2013 resulting from mining the maintenance tract did not differ from the anticipated impacts to air quality in 2008. No new information about the mine existed for OSM to consider. Therefore, OSM did not need to supplement the EIS.

Had WildEarth Guardians proffered any new information about the mine's impacts to OSM, that might have changed this analysis. *Marsh*, 490 U.S. at 363-68, 378-80 (holding that an agency had "carefully scrutinized" a memorandum supplied by an interest group that was allegedly relevant to a project's environmental impacts). But WildEarth

Guardians offered no new evidence to OSM about the consequences of the mine. The only information WildEarth Guardians provided relevant to air quality impacts at all is EPA's promulgation of stricter emissions standards. The EIS exhaustively analyzed the impacts the mine would have under the old emissions standards. (OSM 016722-42, 016913623). Stricter emissions standards mean that the mine will have **fewer** environmental impacts than were considered by BLM. The mine will need to comply with the stricter standards. The EIS notes that Antelope "would need an air quality permit modification" from DEQ and that the mine would need to demonstrate "on-going compliance with all applicable ambient standards," including standards that change over time. (OSM 016726, 016729). The EIS analyzed more significant environmental impacts than NEPA required, and OSM found the EIS sufficient.

While it is true that, before 2010, no one-hour nitrogen dioxide ambient air quality standard existed, this does not make the EIS's analysis insufficient for OSM's purposes. *See Primary Ambient Air Quality Standards for Nitrogen Dioxide*, 75 Fed. Reg. 6474, 6474 (Feb. 9, 2010). The EIS considered the short-term impacts of nitrogen dioxide in the air. (OSM 016737, 017073-102). It considered EPA's recommendations at the time, as well as the National Institute for Occupational Safety and Health's recommendations for worker safety, and the Occupational Safety and Health Administration's requirements for worker safety. (OSM 016737). And the EIS described how mines in the region, in collaboration with DEQ, developed studies and practices to mitigate the impact of short-term nitrogen dioxide emissions. (OSM 017085-86). Thus, even without any one-hour nitrogen dioxide ambient air quality standard, the EIS still analyzed the potential for short-term emissions

of nitrogen dioxide, noted that several organizations were concerned with the potential for human health impacts, and described a process for mitigating those impacts. (OSM 016737, 017073-102). Even without a short-term ambient air standard for nitrogen dioxide, the EIS took a hard look at the issue of short-term nitrogen dioxide emissions.

Finally, EPA raised the standard for particulate emissions smaller than 2.5 microns ($PM_{2.5}$) in 2013, but this does not change the analysis. *National Ambient Air Quality Standards for Particulate Matter*, 78 Fed. Reg. 3086, 3086 (Jan. 15, 2013). A standard for $PM_{2.5}$ existed in 2008, but WildEarth Guardians did not raise it when it challenged the adequacy of the EIS. *Id.*; (Compl., *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012), No. 10-01174 (not raising the issue of $PM_{2.5}$ emissions)). $PM_{2.5}$ was not enough of a concern for the agencies that developed the EIS to take a hard look at its potential impacts, and WildEarth Guardians did not contest this decision. Moreover, the new standards will be incorporated into the mine's air quality permit from the Wyoming Department of Environmental Quality, thus reducing the impact of the mine below what it would have been in 2008. Because the EIS discussed PM_{10} in detail, but not $PM_{2.5}$, and WildEarth Guardians did not contest this decision at the leasing stage, this Court can infer that $PM_{2.5}$ did not require analysis.

BLM analyzed the significant environmental consequences of this action in the EIS in 2008. The action remains the same; the circumstances remain the same; the information remains the same. BLM took a hard look at the air quality impacts of the mine in the EIS, and stronger emissions standards do not alter the strength of its analysis. OSM did not violate NEPA when it adopted the EIS.

B. The EIS adequately analyzed greenhouse gas emissions from mining.

WildEarth Guardians argues that the EIS did not adequately assess the mine's greenhouse gas emissions. (Br. of Appellant at 36-38). But the EIS analyzed the mine's contribution to the country's greenhouse gas emissions and expressly stated that refusing to lease the maintenance tract would not affect the amount of coal burned in the United States. (OSM 016980-81). As the D.C. district and circuit courts have already held, the EIS adequately analyzed the tract's greenhouse gas emissions.

The EIS discussed "emissions and by-products that are generated when coal is burned to produce electricity," the use to which almost all coal mined in the Powder River Basin is put. (OSM 016971-82). It assumed that coal would supply half of the country's fuel mix for electricity generation through 2020. (OSM 016980). It found that leasing the maintenance tract would "extend [carbon dioxide] emissions related to burning coal from Antelope Mine for up to 13 additional years beyond 2018." (OSM 016981). (OSM 016981). Without the maintenance tract and accounting for burning of coal, Antelope Mine accounted for about 1.1 percent of the United States's carbon footprint. (OSM 016980). While the EIS did not expressly calculate the greenhouse gas emissions of burning 400 million tons of coal, it did find that it was unlikely that refusing to lease the maintenance tract would affect the demand for coal in the United States and the attendant emissions of greenhouse gases. (OSM 016981). The EIS justified finding that it would be impossible to project the level of carbon emissions because over the life of the mine, between 2008 and 2030, emissions limits might have been or may be enacted or the coal put to different use than burning to generate electricity. (*Id.*). This justification still holds true today. Assuming

that this is not the case, however, the mine's emissions will likely be the same for the additional time that it operates.

Furthermore, as WildEarth Guardians admits, "current climate models still cannot predict local impacts to climate from a particular [greenhouse gas] emission source." (Br. of Appellant at 39). NEPA requires agencies to consider the direct, indirect, and cumulative impacts of their actions. 40 C.F.R. § 1502.16. But because the direct and indirect impacts caused by whatever amount of climate change is attributable to the mine are impossible to glean for several reasons, the EIS could only evaluate the cumulative effects of climate change to the extent possible. (OSM 016972-82).

WildEarth Guardians's argument that OSM should have used the "social cost of carbon" protocol lacks merit. (Br. of Appellant at 40). As a BLM economist pointed out in a previous case, different groups value the social cost of emitting a ton of carbon dioxide-equivalent from anywhere between \$5 and \$800. *High Country Conserv. Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014). Such a wide range does not provide an agency with a useful tool to determine the social cost of greenhouse gas emissions. And while EPA suggested that one agency use the protocol that some agencies developed during its review of a controversial pipeline's application for one permit, the Council on Environmental Quality did not direct agencies to use this protocol in conducting NEPA analyses. *High Country*, 52 F. Supp. 3d at 1190.

More importantly, by asking this Court to force OSM to use the social cost of carbon to gauge the impact of mining, WildEarth Guardians implicitly demands that OSM reconsider a decision, made years before, to mine the coal from this maintenance tract. But

BLM has already made the decision to lease this land and allow this coal to be burned. WildEarth Guardians litigated this decision and lost. *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013). At the mining plan stage, OSM is not considering whether coal is going to be mined. Instead, OSM considers **how** the coal is to be mined. This Court should reject WildEarth Guardians's collateral attack on BLM's leasing decision.

NEPA does not demand a cost-benefit analysis of every proposed action. NEPA requires a hard look at particular and cumulative **environmental impacts** of proposed actions. 42 U.S.C. § 4332(C). The Council on Environmental Quality only requires that, if an agency considers a cost-benefit analysis relevant, it should be included in the environmental analysis. 40 C.F.R. § 1502.23. The social cost of carbon protocol merely attempts to monetize the wide-ranging impacts of greenhouse gas emissions on the environment. Here, the agencies found that, if the maintenance tract were mined, the mine's greenhouse gas emissions would largely be the same for an additional thirteen years, but cumulatively, the decision to grant or deny the maintenance tract would not likely have an effect on national greenhouse gas emissions. (OSM 016980681). Adopting these conclusions discharged OSM's obligations under NEPA. OSM does not have to put a dollar value on these emissions, particularly where the Bureau has already made the decision to lease the land.

WildEarth Guardians argues that the D.C. Circuit court "recognized that additional analyses of environmental impacts would occur" at this stage. (Br. of Appellant at 24). This is not so. Rather, the panel asserted that greenhouse gas emissions would be somewhat speculative until this stage, when mitigation measures might be developed or imposed.

Jewell, 738 F.3d at 309. But the court also noted that there is “considerable uncertainty about regulatory and technological developments that could affect further emissions.” *Id.* Moreover, the court agreed that “current science does not allow for” specificity about the impacts of climate change. *Id.* The court’s belief that “mitigation measures” might exist by now did not make it impossible for OSM to adopt the EIS for its purposes. Therefore, this contention is without merit.

WildEarth Guardians points out that the Council on Environmental Quality issued guidance aiming to help federal agencies assess how their actions would bear on climate change. (Br. of Appellant at 39). *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 81 Fed. Reg. 51,866 (Aug. 5, 2016). However, the Council issued this Guidance three years **after** OSM adopted the EIS. OSM did not have to follow a guidance framework that did not exist when it acted.

Finally, WildEarth Guardians argues that the EIS does not adequately analyze the consequences of burning the coal and releasing greenhouse gases. (Br. of Appellant at 41-42). At the outset, WildEarth Guardians advanced this same argument at the leasing stage and both the D.C. district court and the D.C. Circuit court rejected this argument. *Salazar*, 880 F. Supp. 2d at 83-86; *Jewell*, 738 F.3d at 308-11. The EIS adequately analyzes the impact of burning the coal mined in the maintenance tract. The EIS states that, without any further action, the mine would continue to account for approximately 1.1 percent of the nation’s total carbon dioxide emissions “until about 2018.” (OSM 016980). In the EIS, the agencies optimistically believed that regulations or technologies limiting carbon emissions

from combusting coal would be in effect at that time. (OSM 016980). But the EIS still concludes that the mine would continue to account for approximately 1.1 percent of the nation's emissions. (OSM 016980). The EIS expressly notes that granting the maintenance tract "would extend [carbon dioxide] emissions related to burning coal from Antelope Mine for up to 13 additional years beyond 2018." (OSM 016981). While the agencies again believed that regulations may limit emissions or that the coal may be used for some other means at that time, the EIS admittedly does not estimate how much greenhouse gas would be emitted by the mine. Instead, it argues that "[i]t is not likely that" not granting the maintenance tract to the mine "would result in a decrease of U.S." greenhouse gas in the long-term because demand for coal would likely be relatively consistent. (OSM 016981).

While the Eighth Circuit rejected this analysis in *Mid States Coalition for Progress v. Surface Transportation Board*, that case is distinguishable because the agency there intended to increase the availability of coal. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003). In *Mid States Coalition for Progress*, the National Surface Transportation Board approved a rail line that would carry low-sulfur coal from the Powder River Basin. *Id.* at 531-33. The Board argued that utilities would switch to the low-sulfur coal regardless whether the rail line was built, so it did not need to analyze the effects of burning the coal. *Id.* at 549. The Eighth Circuit disagreed, finding that the Board should have analyzed the impacts of combusting additional coal. *Id.* at 549-50.

Key distinctions exist between *Mid States* and this case. First, the stated goal of the new rail line in *Mid States* was to **increase** the availability of Powder River Basin coal and

lower its price. *Id.* at 549. The Surface Transportation Board identified that goal in the draft EIS, and the *Mid States* court relied heavily on that fact in coming to its decision. *Id.* at 550. That is not the situation here. The purpose of the maintenance tract is to **maintain**, not increase, the amount of coal that is supplied to the market. (OSM 016980681). This distinction alone is enough to render *Mid States* inapposite.

If this Court finds that *Mid States* is not distinguishable, then it should find that *Mid States* was wrongly decided. *See Hill v. Kan. Gas Serv. Co.*, 323 F.3d 858, 869 (10th Cir. 2003) (holding that courts in the Tenth Circuit are not bound by the opinions of courts in other circuits; affirming a decision of the United States District Court for the District of Kansas which contradicted a decision of the D.C. Circuit). The *Mid States* court rejected arguments that the country's coal usage would not be affected by approving individual mines. *Mid States*, 345 F.3d at 549-50. It held that it was reasonably foreseeable that a new source of coal would drive down coal prices and prompt market entrants to buy the coal. *Id.* But this is incorrect, because considerations other than the details of one mine carry more weight in determining whether more or less coal will be burned.

For example, in 2008, the agencies assumed that coal would continue to make up half of the nation's 2030 electricity mix. (OSM 016980 & tbl. 4-36). But in 2016, the Energy Information Administration estimated that this number had fallen to one-third. United States Energy Information Administration, *What is U.S. Electricity Generation by Energy Source?*³ This fall happened largely because of the explosion in abundant, cheap

³ <https://www.eia.gov/tools/faqs/faq.cfm?id=427&t=3> (last updated Apr. 1, 2016).

natural gas made available by hydraulic fracturing. United States Energy Information Administration, *Electric Power Monthly, Table 1.1. Net Generation by Energy Source: Total (All Sectors), 2006-December 2016* (Feb. 24, 2017).⁴ While the agencies could not reasonably foresee this technological change in 2008, it demonstrates that factors beyond approving or disapproving one mine's operations are more likely to actually contribute to increasing or decreasing greenhouse gas emissions. The true impact of OSM's decision on the amount of coal that will actually be combusted is not reasonably foreseeable. Because a wide array of factors actually control whether more or less coal will be burned, and not whether an individual coal mine is opened, it was not arbitrary or capricious of BLM or of OSM to not analyze indirect impacts due to coal combustion allegedly set in motion by these agency actions.

This maintenance tract will not alter the demand for coal in this country. (OSM 016981). Moreover, current climate science does not allow agencies to tie individual federal projects to worsened impacts from climate change. *Jewell*, 738 F.3d at 309; (Br. of Appellant at 39). Despite that, the EIS still discussed the causes and impacts of climate change. (OSM 016971-82). It still projected how large the mine's share of American emissions would be. (OSM 016980-81). And the District of Columbia Circuit affirmed that the EIS adequately assessed how the mine would contribute greenhouse gas emissions. *Jewell*, 738 F.3d at 308-10. This Court should not second-guess that decision.

⁴ http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_1_01 (showing natural gas's growth from 800 million megawatthours to almost 1.4 billion megawatthours).

III. Even if this Court decides that the EIS does not sufficiently analyze the environmental impacts of the mine, this Court should not vacate the mine plan.

WildEarth Guardians asks this court to vacate OSM's approval of the Antelope Mining Plan. (Br. of Appellant at 43). The State of Wyoming disagrees that this would be the appropriate remedy. *See, e.g., Nat'l Parks Conserv. v. Jewell*, 62 F. Supp. 3d 7, 20 (D.D.C. 2014) (holding that remand without vacatur can be appropriate when "there is at least a serious possibility that the agency will be able to substantiate its decision on remand") (quoting *Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993)). The APA grants this Court the equitable power to fashion relief appropriate to the case. 5 U.S.C. § 702. In this case, the relief should be to remand the mine plan amendment to OSM without vacating it.

Remand without vacatur is appropriate where "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Nat'l Parks Conserv.*, 62 F. Supp. 3d at 20 (quoting *Allied-Signal Inc.*, 988 F.2d at 151). NEPA requires no substantive outcome but merely requires that agencies follow the correct procedure to analyze the environmental consequences of their decisions. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009). OSM will be able to substantiate its decision on remand simply by conducting further environmental analysis. Therefore, remand without vacatur is appropriate. The State of Wyoming wishes to reserve a fuller discussion of the remedy after the merits stage in the event that the Court finds in favor of WildEarth Guardians.

CONCLUSION

In 2010, BLM decided to lease the tracts at issue here. The EIS that the agencies prepared for that decision took a hard look at the significant impacts of mining the land. The agencies that prepared the EIS contemplated that OSM would use it to make decisions about the mine plan. WildEarth Guardians vigorously litigated the adequacy of this very EIS and lost. OSM adopted the EIS, which still analyzed the significant environmental impacts of the mine, when it recommended that the Secretary of the Interior approve the amended mining plan. Other courts have already answered most of the same allegations that WildEarth Guardians advances here. For the reasons stated above, the State of Wyoming respectfully requests that this Court deny WildEarth Guardians's Petition for Review.

Respectfully submitted on this 5th day of April, 2017,

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CERTIFICATE OF WORD LIMIT COMPLIANCE

Pursuant to Local Rule 83.6(c) and Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, I hereby certify that this Response Brief contains 10,290 words. I relied on my word processing program, Microsoft Word, to obtain this word count.

/s/ James LaRock _____

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response Brief is being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record, this 5th day of April, 2017.

/s/ James LaRock _____