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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WILDEARTH GUARDIANS, Petitioner, v. RYAN ZINKE, *et al.*, Respondents, and STATE OF WYOMING and ANTELOPE COAL LLC, Intervenor-Respondents.	)	Case No. 2:16-cv-00166-ABJ **ANTELOPE COAL LLC'S RESPONSE TO PETITIONER'S OPENING BRIEF**

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GLOSSARY OF ABBREVIATIONS

Antelope	Antelope Coal LLC
APA	Administrative Procedure Act
AR	Document pages in the Administrative Record, which have the prefix "OSM" (ex: OSM####)
AQD	Air Quality Division
BLM	U.S. Bureau of Land Management
BLM AR	Document pages in the Administrative Record, which have the prefix "BLM" (ex: BLM####)
CAA	Clean Air Act
CEQ	Council on Environmental Quality
DOI	U.S. Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FCLAA	Federal Coal Leasing Act Amendments of 1976
FONSI	Finding of No Significant Impact
GHG	Greenhouse Gas
LQD	Land Quality Division
MER	Maximum Economic Recovery
MLA	Mineral Leasing Act of 1920
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act of 1970
NO_2	Nitrogen dioxide
NO_x	Nitrogen oxides
OSMRE	U.S. Office of Surface Mining Reclamation and Enforcement
PAP	Permit Application Package
PM_{10}	particulate matter less than 10 microns in diameter
$PM_{2.5}$	particulate matter less than 2.5 microns in diameter
R2P2	Resource Recovery and Protection Plan
ROD	Record of Decision
Secretary	U.S. Secretary of the Interior
SMCRA	Surface Mining Control and Reclamation Act of 1977
WDEQ	Wyoming Department of Environmental Quality
WildEarth	WildEarth Guardians

INTRODUCTION

This case represents Plaintiff WildEarth Guardians' ("WildEarth") second attempt to prevent Antelope Coal LLC ("Antelope") from mining federal coal contained in the West Antelope II Tracts, which the Secretary of the Interior ("Secretary") leased to Antelope in 2011. WildEarth previously challenged the Secretary's leasing decision under the National Environmental Policy Act ("NEPA") arguing (among other things) that the two-volume, 737-page Environmental Impact Statement dated December 2008 ("2008 EIS" or "EIS") did not adequately evaluate air quality and climate change impacts from mining the coal. Both the U.S. District Court for the District of Columbia and the D.C. Circuit Court of Appeals soundly rejected all of WildEarth's arguments, held that the 2008 EIS fully complied with NEPA, and affirmed the Bureau of Land Management's ("BLM") decision to lease the West Antelope II Tracts in all respects. *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012) ("*Salazar*"), *aff'd sub nom. WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013) ("*Jewell*"). Indeed, on appeal to the D.C. Circuit, the court concluded that even though WildEarth raised "numerous challenges to the sufficiency of the FEIS, . . . none ha[d] merit and . . . only two [were] worthy of discussion." *Jewell*, 738 F.3d at 308.

Following the Secretary's leasing decision, and while WildEarth's legal challenges were pending in D.C., the State of Wyoming's Department of Environmental Quality ("WDEQ") undertook its delegated duties under the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 ("SMCRA"), the Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), and corresponding state statutes and regulations, to again fully analyze the environmental impacts from mining and issue the necessary state permits to develop the West Antelope II Tracts. WildEarth completely ignored WDEQ's air quality and mine permitting processes – which included numerous public participation opportunities where WildEarth could have directly influenced the performance standards imposed in the Antelope Mine's air quality and operating permits.

Following WDEQ's issuance of the necessary state permits, the Office of Surface Mining Reclamation and Enforcement ("OSMRE") undertook its duty to review the federal mining plan to ensure compliance with various federal statutes, including the CAA and NEPA. In fulfilling its NEPA duty, OSMRE independently analyzed and ultimately adopted the 2008 EIS, which OSMRE helped prepare as a cooperating agency. OSMRE concluded that the 2008 EIS, in combination with the recent analysis and permitting process undertaken by WDEQ, adequately and accurately assessed the environmental impacts of the

proposed mining plan. In 2013, over eight and a half years after Antelope first applied to lease the West Antelope II Tracts, and after years of multi-agency environmental analyses, OSMRE approved the mining plan modification authorizing Antelope to mine the West Antelope II Tracts.

Once again, WildEarth is challenging yet another authorization for Antelope to develop the coal in the West Antelope II Tracts with the hope of shutting down the Antelope Mine and consequently disrupting the livelihoods of hundreds of workers who depend on the Antelope Mine's continued operation for their employment. WildEarth's legal challenges have been previously rejected and are without merit. WildEarth's present challenge should also be denied.

STATUTORY AND REGULATORY BACKGROUND

The two statutes that primarily govern the leasing and mining of federal coal—the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181-287 ("MLA") and SMCRA—establish a three-stage, coordinated federal and state permitting and environmental evaluation process by which private companies are authorized to mine federal coal. Antelope supplements Federal Respondents' Statutory and Regulatory Background section to highlight, not only the laws relevant to OSMRE's mining plan review, but also the legal obligations that BLM's initial leasing decision imposed on both OSMRE and WDEQ as regulators and on Antelope as a federal coal lessee.

I. The Mineral Leasing Act of 1920, as Amended

The MLA grants to the Secretary authority to lease federal coal deposits, which he has delegated to BLM. 30 U.S.C. § 201(a)(1); *see* 43 C.F.R. § 3400.0-3(a). Since the enactment of the MLA, Congress has consistently declared this Nation's policy to be that of encouraging the development of domestic coal reserves through the Federal leasing process. *See* 56 Cong. Rec. 6985 (1918) ("The leasing system and the intelligent utilization of the coal . . . [is] imperative"); *see also* Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a ("Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in . . . the orderly and economic development of domestic mineral [coal] resources.").

Further, through the Federal Coal Leasing Act Amendments of 1976, Pub. L. 94-377, 90 Stat. 1083 ("FCLAA"), Congress sought to "encourage the maximum ultimate recovery of the coal deposits in the leasable lands of the United States," by imposing diligent development and maximum economic recovery ("MER") requirements. *See Hearing Before the Subcomm. on Mines and Mining of the H. Comm. on Interior and Insular Affairs*, 94th Cong. 133 (1975); *see* 30 U.S.C. §§ 201(a)(3)(C) and 207(b).

The Secretary's statutory duty under the FCLAA to ensure MER and diligent development has been delegated to both BLM and OSMRE. "Prior to

issuance of a lease, the Secretary [BLM] shall . . . [ensure] the [MER] of the coal within the proposed leasing tract." 30 U.S.C. § 201(a)(3)(C). In addition, "[e]ach lease shall be subject to the conditions of diligent development." *Id.* § 207(b).

Once BLM issues the lease, BLM is obligated under the MLA to review and approve a Resource Recovery and Protection Plan ("R2P2"), a document that describes the leased coal reserves, proposed mining methods, and includes an "[e]xplanation of how MER of the Federal coal will be achieved for the Federal coal leases." 43 C.F.R. § 3482.1(c)(7).

Following BLM's leasing decision and approval of the R2P2, and WDEQ's approval of the state mining permit (described below), the Secretary (based on the recommendation from OSMRE) is obligated under the MLA to approve a mining plan before any surface disturbance can occur. 30 U.S.C. § 207(c); 30 C.F.R. §§ 740.4(a)(1) and (b)(1) and 746.11. The MLA compels the Secretary to approve a mining plan that maximizes coal recovery: "no mining operating plan shall be approved which is not found to achieve the [MER] of the coal within the tract." 30 U.S.C. § 201(a)(3)(C). Therefore, as part of the mining plan review process, the MLA's implementing regulations require OSMRE to review BLM's R2P2. 30 C.F.R. § 746.13(a) and (e).

MER means that "all profitable portions of a leased Federal coal deposit must be mined." 43 C.F.R. § 3480.0-5(a)(21) (emphasis added). This requires that

"the operator/lessee shall conduct operations to achieve MER of the Federal coal." *Id.* § 3484.1(b)(1) (emphasis added); *see also id.* § 3483.1(a)(1) (imposing an obligation of diligent development on all federal coal lessees).

Therefore, once BLM issues a lease for federal coal, the lessee is legally obligated to diligently develop the lease to achieve MER. So too, OSMRE is legally obligated to ensure that any proposed mining plan also "achieve[s] the [MER] of the coal within the tract." 30 U.S.C. § 201(a)(3)(C).

II. The Surface Mining Control and Reclamation Act of 1977

SMCRA was enacted "to strike a balance between the nation's interests in protecting the environment from the adverse effects of surface coal mining and in assuring the coal supply essential to the nation's energy requirements." *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001) (citing 30 U.S.C. § 1202(a), (d), (f)). SMCRA accomplishes these purposes through "cooperative federalism," in which responsibility for the regulation of surface coal mining is shared between the Secretary (through OSMRE) and state regulatory authorities (in this case, WDEQ). *Id.* Under this statutory scheme, "Congress established in SMCRA 'minimum national standards' for regulating surface coal mining and encouraged the states, through an offer of exclusive regulatory jurisdiction, to enact their own laws incorporating these minimum standards, as well as any more stringent, but not inconsistent, standards that they might choose." *Id.*; *see* 30 U.S.C. § 1253.

In addition, SMCRA allows states to enter into cooperative agreements with the Secretary to "provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State." 30 U.S.C. § 1273(c). Under such an agreement, the federal government retains the ability to perform certain functions, such as to approve mining plans for federally-leased coal, designate certain federal lands as unsuitable for mining, and regulate other activities on federal lands. *Id*. The state, however, becomes the primary permitting authority responsible for reviewing and approving SMCRA permit applications and it is the state that enforces its program by applying state law on both federal and non-federal lands. *See* 30 U.S.C. § 1270(c); 30 C.F.R. §§ 740.4(c)(1), (5), 740.5, 740.13(d), 740.17(a)(2), 745.12, 745.13.

III. The Wyoming Program

A. WDEQ's Regulation of Coal Mining Operations

Since 1980, WDEQ's Land Quality Division ("LQD") has regulated coal mining within the state under an approved SMCRA program. 30 C.F.R. § 950.10; *see* Wyoming Environmental Quality Act – Land Quality, Wyo. Stat. Ann. §§ 35-11-401 to 35-11-437; WDEQ Land Quality – Coal Rules, Wyo. Admin. Code § ENV LQC Chapters 1–20.

Under the Wyoming-Federal Cooperative Agreement, a federal coal leaseholder in Wyoming must submit a permit application package ("PAP") to

OSMRE and WDEQ for any proposed coal mining and reclamation operations on federal lands, or involving federal coal, in the state. 30 C.F.R. § 950.20 ¶ 6. WDEQ's LQD reviews the PAP for compliance with permitting requirements and federally-approved regulatory program performance standards. *Id.* ¶ 10b. OSMRE, BLM, and other federal agencies review the PAP to ensure it complies with the terms of the coal lease, the MLA, NEPA, and other federal laws and regulations. *Id.* ¶¶ 7b. – 10.

WDEQ's review of the PAP is governed in detail by the WDEQ Land Quality Coal Rules. These rules specify the information that must be submitted with a mining permit application, including a detailed description of the proposed mining methods, the proposed plan for the life of mine progression, plans for the protection of protected species and habitats, plans to protect water resources, proposed post-mining land uses, and a detailed reclamation plan. Wyo. Admin. Code § ENV LQC Ch. 2 §§ 5(a), 6. And, although air quality is outside the scope of WDEQ's LQD mining permit approval process, WDEQ's regulations nonetheless require LQD to determine whether the applicant operator is in compliance with all "air or water quality laws" at all mining operations owned or operated by the applicant. *Id.* Ch. 12 § 1(a)(viii)(C). Once WDEQ concludes that the permit application is satisfactory, and after an opportunity for public notice and

comment, WDEQ may issue the mining permit to the mine operator. *See id.* Ch. 12 § 1(a)(xviii); *see also id.* Ch. 13 § 3.

B. WDEQ's Regulation of Air Quality

Because the Environmental Protection Agency ("EPA") has approved Wyoming's air quality regulatory program, WDEQ is the primary regulatory authority for air quality in Wyoming. 42 U.S.C. § 7410(a); 40 C.F.R. Part 52, Subpart ZZ. WDEQ's Air Quality Division ("AQD") administers and enforces Wyoming's air quality program under the Wyoming Air Quality Standards and Regulations. Wyo. Admin. Code § ENV AQ Chapters 1 – 14; *see also* Wyoming Environmental Quality Act – Air Quality, Wyo. Stat. Ann. §§ 35-11-201 to 35-11-214.

In order to operate in Wyoming, a surface coal mine must first obtain an air quality permit from WDEQ's AQD. *See* Wyo. Admin. Code § ENV AQ Ch. 6 § 2(a)(i). The AQD will not issue an air quality permit unless the applicant shows that the mine will comply with all of WDEQ's statutory and regulatory air quality standards. These standards must be consistent with the most current federal CAA standards for regulated pollutants such as particulate matter ("$PM_{2.5}$" and "PM_{10}") and nitrogen oxides ("NO_2"). *Id.* Ch. 6 § 2(c); *compare id.* Ch. 2 §§ 2(a)-(b) and 3(a)-(b) *with* 40 C.F.R. §§ 50.6, 50.11, 50.13, and 50.18. Before AQD may issue an air quality permit, the public is provided a 30-day period within which to submit

comments and/or request a hearing on the proposal to approve an air permit application or modification. *Id.* Ch. 6 § 2(m).

IV. The National Environmental Policy Act of 1970

NEPA requires that an agency consider information regarding environmental impacts of the proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). However, "NEPA itself does not mandate particular results." *Id.* at 350; *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004). Instead, "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Id.* at 756-57.

Under NEPA, an agency must prepare "the highest level of environmental review"—an EIS—for any major federal action that will "significantly affect[] the quality of the human environment." *Sierra Club v. Dep't of Transp*., 753 F.2d 120, 126-27 (D.C. Cir. 1985). In an EIS, the agency is required to consider, among other things, the environmental impact of the proposed action and alternatives, as well as means to mitigate adverse environmental impacts. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.16. The preparation of an EIS ensures that the agency, in reaching its decision, will carefully consider detailed information concerning significant environmental impacts. *Robertson*, 490 U.S. at 349. NEPA also "guarantees that the relevant information will be made available to the larger audience," such as

members of the public and other state and federal agencies, "that may also play a role in both the decision making process and the implementation of that decision." *Id.*

NEPA and its implementing regulations are governed by the "'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision making process." *Pub. Citizen*, 541 U.S. at 767. The Supreme Court has made clear that the scope of an agency's analysis under NEPA is circumscribed by the agency's statutory jurisdiction: "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, . . . the agency need not consider these effects" in its environmental analysis. *Id.* at 770.

The Council on Environmental Quality ("CEQ") has promulgated regulations to guide federal agencies in reducing duplication in complying with NEPA. The CEQ regulations provide that "[a]n agency may adopt a Federal draft or final [EIS] or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations." 40 C.F.R. § 1506.3(a). Relevant to this case, the CEQ regulations further specify that:

> A cooperating agency may adopt without recirculating the [EIS] of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

Id. § 1506.3(c) (emphasis added). CEQ authorized this adoption procedure in response to "situations in which two or more agencies had an action relating to the same project; however, the timing of the actions was different." *CEQ Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34263, 34265 (July 28, 1983).

Similarly, the Department of the Interior's ("DOI") own NEPA regulations provide that agencies within DOI "should make the best use of existing NEPA documents by . . . adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork." 43 C.F.R. § 46.120(d). DOI's regulations further provide that an "existing environmental analysis prepared pursuant to NEPA and [CEQ] regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives." *Id.* § 46.120(c).

Indeed, the Wyoming-Federal Cooperative Agreement provides further guidance on how WDEQ and OSMRE may avoid NEPA duplication at OSMRE's mining plan review stage. The Agreement provides: "To the fullest extent allowed by the State and Federal law and regulations, the State and OSMRE will cooperate so that duplication will be eliminated in conducting the technical analyses and meeting NEPA requirements for the proposed mining operation." 30 C.F.R. § 950.20 ¶ 10(e). The Agreement is consistent with the SMCRA

regulations, which provide that OSMRE may delegate to the State the responsibility of "[p]repar[ing] . . . documentation to comply with the requirements of [NEPA]." *Id.* § 740.4(c)(7). In short, the PAP and decision package prepared by WDEQ during the mining permit review stage may serve as documentation supporting OSMRE's NEPA review.

FACTUAL BACKGROUND

Antelope operates the Antelope Mine under federal leases in Campbell and Converse Counties, Wyoming. *See* Administrative Record ("AR") 4.[1] The leasing and mining of federal coal involves a three-stage, coordinated state and federal approval process. AR16647-48. For over eight and a half years, Antelope navigated this comprehensive approval process in order to lease and obtain the necessary authorizations to mine the coal in the West Antelope II Tracts.

I. First Stage: Federal Leasing

A. BLM's and OSMRE's Leasing Stage Environmental Review

Beginning in April 2005, Antelope filed an application with BLM to lease federal coal adjacent to the Antelope Mine. AR16614. This application, assigned case number WYW163340, is referred to as the West Antelope II Lease-by-Application. *Id.* As proposed, the West Antelope II Tract consisted of two separate blocks of federal coal located west of, and immediately adjacent to, the

[1] Unless otherwise indicated, Antelope's administrative record citations refer to those citations containing the "OSM" prefix.

Antelope Mine. AR16660. Antelope applied to lease the tract in order to extend the life of the Antelope Mine. AR16546. As applied for, the West Antelope II Tract included approximately 4,109 acres with approximately 429.7 million tons of coal. *Id.*

Antelope's submission of its LBA and BLM's ultimate decision to offer the coal lease for competitive public auction triggered a statutorily-required review by BLM, not only of the MER and fair market value of the federal coal at issue, but also of the environmental and socioeconomic impacts of leasing and mining federal coal in accordance with the requirements of NEPA. AR16547. To fulfill its NEPA obligations, BLM, with OSMRE, WDEQ, and the U.S. Forest Service as cooperating agencies, prepared the 2008 EIS, which thoroughly evaluated the environmental impacts of leasing and mining coal on the proposed West Antelope II Tract. AR16593. At the outset of the NEPA review process, BLM held a public scoping meeting, which included an opportunity for public participation and comment. AR16556; *see also* 71 Fed. Reg. 61064, 61065 (Oct. 17, 2006).

BLM offered a second public comment opportunity when the agency published a Notice of Availability/Notice of Public Hearing for its Draft EIS in the *Federal Register* on March 17, 2008. AR16557; *see also* 73 Fed. Reg. 14267 (Mar. 17, 2008). The 60-day comment period on the Draft EIS, which was triggered by EPA's earlier publication of the Draft EIS in February, ended on April

8, 2008. AR16591; *see also* 73 Fed. Reg. 7555 (Feb. 8, 2008). A public hearing on the Draft EIS was held midway through this comment process, on March 24, 2008, in Douglas, Wyoming. AR16557. WildEarth submitted comments on the Draft EIS. AR16557; AR17246-17252.

Moreover, OSMRE reviewed the Draft EIS and, on April 7, 2008, submitted comments that it was "well written and organized." AR17243. OSMRE concluded that the Draft EIS "adequately describes the purpose and need for the proposed action and the alternatives considered." *Id*. OSMRE explicitly noted that "the final EIS will serve OSM[RE]'s NEPA needs in preparing a Federal Mining Plan recommendation . . ." *Id*.

On December 19, 2008, EPA issued the Notice of Availability for the Final EIS. *Id*.; *see also* 73 Fed. Reg. 77687 (Dec. 19, 2008). The 2008 EIS responded to WildEarth's comments regarding air quality and climate change and indicated ways in which the corresponding sections of the EIS were updated and revised to address WildEarth's concerns. AR17311-17313. The Air Quality analysis is 30 pages long and discusses particulate emissions, emissions of nitrogen oxides, visibility, acidification of lakes, and residual impacts to air quality. AR16719-16749. The Cumulative Impacts Analysis of Air Quality and Climate Change is an additional 27 pages. AR16903-16913; AR16971-16988. Further, Appendix F to the 2008 EIS, which spans 29 pages, provides background information on air

quality issues, including the regulatory framework, regional air quality conditions, dispersion model methodologies, and the Best Available Control Technologies process. AR17073-17102. As discussed below, when WildEarth challenged the adequacy of the 2008 EIS in federal court, the courts held that the EIS' air quality analysis – which spans approximately 85 pages – fully complied with NEPA.

On March 25, 2010, BLM issued its Record of Decision ("ROD") that approved a modified version of Antelope's application by segmenting Antelope's proposed West Antelope II Tract into two separate lease sales. AR16551. The West Antelope II Tracts were then offered separately for competitive lease sale under BLM lease numbers WYW-163340 (West Antelope II North) and WYW-177903 (West Antelope II South). *Id*; 75 Fed. Reg. 16502 (Apr. 1, 2010). Antelope was the successful bidder for both leases. The West Antelope II North lease became effective on July 1, 2011 and the West Antelope II South lease became effective September 1, 2011. AR17326, 17338.

Significant to this appeal, both the Executive Summary and Introduction section of the Final EIS put the public on notice that "[o]ther agencies, including OSM[RE], will also use this analysis to make decisions related to leasing and mining the federal coal in this tract." AR16617. The EIS explicitly informed the public that "OSM[RE] [is a] . . . cooperating agenc[y] on this EIS. OSM[RE] has primary responsibility to administer federal programs that regulate surface coal

mining operations and will use this EIS to make decisions related to the approval of the MLA mining plan if the tract is leased." AR16639 (emphasis added).

B. Legal Challenges to BLM's West Antelope II Leasing Decision

BLM's decision to lease the West Antelope II Tracts was appealed by several environmental groups, including WildEarth and the Powder River Basin Resource Council, to the Interior Board of Land Appeals ("IBLA"). *See Powder River Basin Res. Council*, 180 IBLA 119, 121 (2010); *WildEarth*, Docket No. IBLA 2010-129. The IBLA soundly rejected every NEPA challenge raised by the Powder River Basin Resource Council. However, before the IBLA could reach a decision in WildEarth's appeal, WildEarth voluntarily dismissed its appeal and took its NEPA challenges directly to federal court in Washington, D.C. *See Powder River Basin Res. Council*, 180 IBLA 119 at 121 n.1. WildEarth's substantive NEPA claims against BLM, which are nearly identical to its claims against OSMRE in this case, were uniformly rejected by the D.C. District Court and the D.C. Circuit Court of Appeals. *Salazar*, 880 F. Supp. 2d 77; *Jewell*, 738 F.3d 298.

II. Second Stage: Wyoming State Permits

Upon acquiring the leases from BLM, Antelope was required to revise its coal mining permit, *see* 30 C.F.R. § 950.20, as well as its state air quality permit.

A. WDEQ LQD Coal Mining Permit

On November 22, 2011, Antelope submitted a PAP to WDEQ for a revision to the Antelope mining permit. AR16541. The PAP proposed extending surface mining operations into 4,746 acres of federal leases WYW-163340 and WYW-177903. AR16535. On December 22, 2011, WDEQ determined that Antelope's PAP was administratively complete and ready for public review and comment. AR16541. On January 4, 2012, Antelope published in the *Douglas Budget* the fourth consecutive weekly notice that its complete PAP was filed with WDEQ. *Id.*

Antelope's PAP provides a detailed picture of the land quality and natural resources located within the permit boundary and describes the full scope of potential impacts from mining. The PAP spans approximately 16,500 pages in the administrative record and addresses the impacts of coal leasing on wildlife, cultural resources, soils and vegetation, air and water quality, and more. *See* AR28 – 16527. Consistent with WDEQ LQD's limited role with respect to air quality regulation, the PAP includes the required finding that Antelope is in compliance with its air quality permit, which is issued and enforced by WDEQ's AQD. AR17421.

Upon complete review of the PAP, WDEQ provided public notice of the proposed permit revision in the *Douglas Budget* from December 19, 2012 to January 9, 2013. AR17400. WDEQ received no objections to the permit revision.

Id. On April 29, 2013, WDEQ approved Antelope's mining permit revision. *Id.*; *see also* AR16541.

B. WDEQ AQD Air Quality Permit

Separate and apart from the WDEQ LQD mining permit revision, Antelope was required to amend its air quality permit to account for the additional mining that would take place on the West Antelope II Tracts. AR17320; *see also* Exhibit A, Antelope Mine Air Quality Permit at 1. As BLM recognized in response to EPA's comments on the 2008 EIS, air quality mitigation measures and ensuring compliance with all applicable aspects of Wyoming's air quality standards rest solely with WDEQ's AQD. AR17320.

On November 5, 2012, AQD issued Antelope an air quality permit modification (Permit No. MD-13361) to increase the maximum permitted coal production rate from 42 million tons per year to 52 million tons per year. Exhibit A, at 1. The permit also confirmed that Antelope must comply with all air quality performance standards within AQD's Air Quality Standards and Regulations, including the standards for CAA-regulated pollutants such as particulate matter and nitrogen oxides. *See id.* at 9 (citing Wyo. Admin. Code § ENV AQ Ch. 6 § 2).

Prior to approving the permit, AQD afforded the public a 30-day period in which to submit comments concerning the proposed modification and an opportunity for public hearing. *Id.* at 2. No comments were received. *Id.*

III. Third Stage: OSMRE Mining Plan Modification

Both during and after WDEQ's review of Antelope's PAP, OSMRE conducted its review of Antelope's mining plan modification. *See* AR16541; *see also* 30 C.F.R. § 950.20, ¶ 7b. OSMRE consulted with other state and federal agencies, including the U.S. Fish and Wildlife Service, BLM, and the Wyoming State Historic Preservation Office to ensure compliance with all federal laws. *Id.*; *see also* AR16536, 17360, 17362, and 17363-72.

OSMRE also fulfilled its duty to comply with NEPA at the mining plan modification review stage. Consistent with the 2008 EIS' notice to the public that OSMRE would "use th[e] EIS to make decisions related to the approval of the MLA mining plan," (AR16617, 16639), OSMRE independently reviewed and formally adopted the 2008 EIS on October 28, 2013. AR16542. OSMRE found that the 2008 EIS adequately described the potential direct, indirect, and cumulative impacts that may result from approval of the mining plan modification. *Id*. OSMRE also determined that an "opportunity for public input was provided during and with completion of the EIS, with submission of the PAP, and during issuance of the State permit." AR16543. In particular, OSMRE determined that its public involvement requirement for the 2008 EIS had been met.

The 2008 EIS was subject to public comment and all the comments received were addressed in the Final EIS or ROD. *Id.* OSMRE also determined that there

were no objections raised to the PAP. *Id.* Upon formally adopting the 2008 EIS and issuing its Statement of NEPA Adoption and Compliance on October 28, 2013, OSMRE made its Statement publicly available on OSMRE's Western Region website. *See id.* ("the referenced EIS and this Statement of NEPA Adoption and Compliance will be made publicly available on the OSM[RE] Western Region's website."[2]).

On November 18, 2013, OSMRE recommended approval of Antelope's mining plan modification. AR16531. OSMRE's recommendation was based upon (1) Antelope's PAP; (2) OSMRE's NEPA review and adoption of the 2008 EIS; (3) OSMRE's review of documentation assuring compliance with federal laws; (4) OSMRE's consultation with other federal agencies; (5) BLM's recommendation to approve the mining plan modification as achieving MER of the federal coal reserves; and (6) WDEQ's findings and recommendations regarding state mining permit approval and compliance with the State program. AR16531, 16533.

Finally, the Principal Deputy Assistant Secretary for Land and Minerals Management issued the final federal approval of the mining plan modification and notice of entry on November 26, 2013. AR17373. This final regulatory approval, which relied upon and incorporated the previous federal and state authorizations,

[2] *See* http://www.wrcc.osmre.gov/programs/federalLands/NEPA.shtm (last visited Mar. 31, 2017).

authorized Antelope to mine the coal which it had applied to lease more than eight years earlier.

IV. Current Operations at the Antelope Mine

Antelope currently mines from four federal leases: WYW-177903 (West Antelope II South), WYW-178457, WYW-141435, and WYW-151643. Exhibit B, Cowan Declaration, ¶ 9. A significant portion of Antelope's mining operations are approaching the boundaries of WYW-163340 (West Antelope II North), which Antelope expects to mine beginning in mid-2018. *Id.* ¶ 11. In 2017, Antelope anticipates that it will mine approximately 28 million tons of coal from these federal leases. *Id.* ¶ 9.

Antelope currently employs approximately 530 full-time employees, with average full-time compensation of $121,800 (salary and benefits). *Id.* ¶ 18. The Antelope Mine also employs approximately 30 full-time local contractors and 25-30 part-time contractors for various services, such as housekeeping, security, blasting, maintenance, and labor services. *Id.* ¶ 19.

STANDARD OF REVIEW

Antelope incorporates by reference Federal Respondents' Standard of Review Section.

SUMMARY OF THE ARGUMENT

The Court should reject WildEarth's second attempt to prevent Antelope from mining the West Antelope II Tracts. As an initial matter, WildEarth lacks

Article III standing because it fails to satisfy the Tenth Circuit's injury in fact prong. WildEarth cannot show that OSMRE's adoption of the 2008 EIS increased the risk of actual, threatened, or imminent environmental harm, particularly to air quality.

Second, a number of the issues raised by WildEarth, including allegations that the 2008 EIS did not adequately consider air quality and climate change impacts of coal leasing, are barred by collateral estoppel. WildEarth had ample opportunity to comment upon and litigate every air quality and climate change argument in the context of the 2008 EIS. WildEarth may not relitigate issues which were raised, and soundly rejected, by other federal courts.

Third, OSMRE's environmental analysis fully complied with NEPA. WildEarth's public participation claim fails because OSMRE, as a cooperating agency in the 2008 EIS, was not required to provide yet another opportunity for notice or comment before adopting that EIS in connection with OSMRE's mining plan approval. Similarly, OSMRE's publication of its NEPA analysis on its website satisfied NEPA's general public notice requirement.

Fourth, OSMRE properly adopted the 2008 EIS after conducting an independent review to determine that the 2008 EIS, along with the more recent environmental analysis included in Antelope's mining permit application and WDEQ's permit analysis, adequately evaluated the environmental impacts of

mining the coal in the West Antelope II Tracts. Neither new air quality emissions standards, nor the social cost of carbon tool for measuring the impacts of greenhouse gas emissions, constituted "new information" triggering OSMRE's duty to supplement the 2008 EIS.

Finally, WildEarth's requested relief—vacatur of OSMRE's 2013 mining plan approval—would cause great harm to Antelope, would put hundreds of Wyoming residents out of work, and would punish the local communities and Wyoming as a whole by significantly reducing the economic benefits and tax revenue produced from the Antelope Mine.

ARGUMENT

I. WildEarth Cannot Satisfy the Tenth Circuit's Test for Standing Because OSMRE's Decision Did Not Create an Increased Risk of Environmental Harm

In the Tenth Circuit, a plaintiff bringing a NEPA claim must satisfy Article III's injury in fact requirement by showing, among other things, that: (1) in making its decision without following NEPA, the agency created "an increased risk of actual, threatened, or imminent environmental harm;" and (2) the increased risk of environmental harm injures the plaintiff's concrete interests. *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996). "The risk of environmental harm . . . must be actual, threatened, or imminent, not merely conjectural or hypothetical." *Id.* at 449.

WildEarth asserts that OSMRE's adoption of the 2008 EIS "poses an actual and imminent threat of harm" to WildEarth's declarant Jeremy Nichols because the 2008 EIS does not adequately analyze air quality (particularly NO_2 and $PM_{2.5}$ emissions) under WDEQ's updated and strengthened standards and, thus, Mr. Nichols is affected by "potentially dangerous levels of air pollution" when he recreates near the Antelope Mine. ECF 85 at 16.

WildEarth's asserted basis for standing is purely conjectural and totally unsupported by the record. OSMRE's mining plan approval decision followed years of environmental review and was fully informed. OSMRE's decision was based on the 2008 EIS, Antelope's PAP, and WDEQ's Decision Document. AR16542. When OSMRE adopted the 2008 EIS in October 2013, the EIS had recently been upheld by the D.C. District Court as fully compliant with NEPA. *Salazar*, 880 F. Supp. 2d 77; *see also* AR16537-38. The District Court even rejected WildEarth's argument that agencies must supplement the 2008 EIS to analyze air quality under the new, more stringent standards. *Salazar*, 880 F. Supp. 2d at 90-91. Moreover, WDEQ's Decision Document specifically found that Antelope was in full compliance with its WDEQ-issued air quality permit (which incorporated the more stringent air quality standards). AR17421; *see* Exhibit A, at 9. Therefore, WildEarth's hypothetical and conjectural assertion that OSMRE's reliance on the judicially-affirmed 2008 EIS amounted to uninformed decision

making and increased the risk of environmental harm, particularly to air quality, is without merit.

WildEarth's additional claim that it suffered injury in fact because it lacked notice of OSMRE's NEPA analysis and was deprived of an opportunity to submit comments is also unsupported by the record. ECF 85 at 16-17; ECF 85-1 ¶ 28. As a cooperating agency, OSMRE provided numerous opportunities for members of the public to submit comments on the Draft EIS. AR16556-57, 16591, 17243.

Indeed, WildEarth submitted comments which were incorporated into the Final EIS. AR17246-52, 17311-13. WildEarth also had the opportunity to fully litigate the sufficiency of the 2008 EIS. *Salazar*, 880 F. Supp. 2d 77; *Jewell*, 738 F.3d 298. The 2008 EIS informed the public that OSMRE would rely on the 2008 EIS to make its mining plan decision. AR16639. Consistent with that notice, OSMRE adopted the 2008 EIS for its mining plan decision and then posted its formal adoption on its website. AR16543. WildEarth's assertion that it was "denied an opportunity to voice concerns over the environmental impact of mining" is baseless. *See* ECF 85-1 at ¶ 28; *see also id.* (asserting that OSMRE should have provided notice "through [a] posting on OSMRE's website").

Accordingly, because WildEarth's alleged harms are conjectural, hypothetical, and unsupported by the record, WildEarth has failed to establish the injury in fact prong of Article III standing.

II. WildEarth is Barred Under the Doctrine of Collateral Estoppel from Relitigating Nitrogen Dioxide and Climate Change Arguments Raised in the West Antelope II Leasing Litigation

The NEPA challenge pending before this Court is WildEarth's second attempt to litigate the NO_2 and climate change analyses in the 2008 EIS. In the present litigation, WildEarth attempts to use OSMRE's adoption of the 2008 EIS as an opportunity to rehash the very same issues that were adjudicated on the merits before the U.S. District Court for D.C. and the D.C. Circuit Court of Appeals ("Leasing Litigation"). Although WildEarth maintains that it does not intend to relitigate the validity of the 2008 EIS (ECF 85 at 26 n.5), many of WildEarth's complaints relate to the substance of the 2008 EIS. ECF 85 at 34-42. WildEarth is collaterally estopped from relitigating issues that have been fully resolved in the Leasing Litigation.

The doctrine of collateral estoppel provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Collateral estoppel protects litigants by "preclud[ing] relitigation of issues actually litigated and determined in a prior lawsuit." *Lujan v. Dep't of the Interior*, 673 F.2d 1165, 1168 (10th Cir. 1982). Collateral estoppel also "aims to promote judicial efficiency, encourage reliance on previously adjudicated matters, and avoid inconsistent rules

of decision." *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1297 (10th Cir. 2014).

A party invoking collateral estoppel must show the following four elements:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits,(3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Murdock v. Ute Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 687 (10th Cir. 1992). Collateral estoppel has been invoked by federal courts to prevent relitigation of NEPA issues when an agency tiered to or adopted existing environmental analysis that had already withstood judicial scrutiny. *See, e.g., Hoosier Envtl. Council v. U.S. Army Corps. of Eng'rs*, 2012 WL 3028014, at *8 (S.D. Ind. July 24, 2012) (holding that "to the extent that Plaintiffs seek to re-litigate the tiering issue, they are barred by the principles of collateral estoppel from doing so here"), *aff'd on other grounds*, 722 F.3d 1053 (7th Cir. 2013).

The first element has been met because the NO_2 and climate change issues raised by WildEarth in the context of OSMRE's mining plan approval are identical to the issues raised in the Leasing Litigation. WildEarth has made little effort to conceal its intent to relitigate the 2008 EIS in the present dispute. WildEarth's fifth and sixth claims allege that "Federal [Respondents] adopted NEPA

documents that did not take a hard look at the reasonably foreseeable air quality . . . [and] climate impacts of mining."[3] *WildEarth v. Jewell*, 15-cv-2026-WYD, ECF 1 at ¶¶ 115, 118 (D. Colo. Sept. 15, 2015). Moreover, WildEarth consistently and repeatedly critiques the 2008 EIS throughout its Opening Brief. *See, e.g.*, ECF 85 at 31 ("The EIS did not consider $PM_{2.5}$ emissions from mining activities"); *id.* at 33 ("Although the 2008 EIS discusses PM_{10} levels from ongoing mining at the Antelope Mine, it lacks *any* discussion of $PM_{2.5}$ levels from either ongoing or future mining"); *id.* at 33 ("the EIS did not analyze the impacts of $PM_{2.5}$ emissions from mining"); *id.* at 34 (criticizing the 2008 EIS because it "provided no analysis to support [the] assertion" that "voluntary mitigation measure [sic] would address potentially significant short-term NO_2 impacts").

With regard to NO_2 impacts, WildEarth alleged in the Leasing Litigation that BLM violated NEPA because it "had adequate opportunity to supplement its analysis of NO_2 with an analysis of short-term NO_2 impacts based on the new one-hour standard." *Salazar*, 1:10-cv-1174-CKK, ECF 71 at 17 (D.D.C. Aug. 15, 2011). Here, WildEarth again contends that the 2008 EIS "predates the promulgation of the one-hour NO_2 standard" and thus, "the NO_2 discussion in the

[3] During the briefing on Federal Respondent's Motion to Sever and Transfer, WildEarth similarly maintained that an issue before this Court is "whether the adopted documents took a hard look at mining's air quality and climate impacts." *WildEarth v. Jewell*, 15-cv-2026-WYD, ECF 42 at 10 (D. Colo. Jan. 7, 2016).

2008 [EIS] was . . . inadequate." ECF 85 at 34-35. In fact, WildEarth's NO_2 argument in this case bears a striking resemblance to the argument presented by WildEarth in the Leasing Litigation. *See Salazar*, 1:10-cv-1174-CKK, ECF 71 at 16-17 (D.D.C. Aug. 15, 2011). Portions of WildEarth's NO_2 arguments are nearly identical to those presented in the Leasing Litigation. *Comp.* ECF 85 at 34 ("Discussion of NO_2 emissions in the 2008 EIS is limited to an assertion that voluntary mitigation measure [sic] would address potentially significant short-term NO_2 impacts; however, the EIS provided no analysis to support this assertion. [BLM] AR 4364-67."), *with Salazar*, 1:10-cv-1174-CKK, ECF 71 at 16 (D.D.C. Aug. 15, 2011) ("BLM asserts that voluntary mitigation measures will address any potentially significant short-term NO2 impacts; however, the agency provided no air quality analysis in its FEIS to support this assertion. *See* AR 04364-67.").

With regard to climate change impacts, WildEarth argued in the Leasing Litigation that "BLM failed to analyze the indirect impacts of carbon dioxide emissions that would result from burning the coal recovered from the Leases." *Salazar*, 1:10-cv-1174-CKK, ECF 71 at 19 (D.D.C. Aug. 15, 2011). In the present litigation, WildEarth again argues that the 2008 EIS "did not estimate [greenhouse gas] emissions from coal combustion." ECF 85 at 42; *see also id*. at 38 ("the 2008 EIS does not include an assessment of the severity of [greenhouse gas] emissions and their impacts resulting from coal combustion").

Federal courts have rejected attempts to relitigate NEPA issues when an agency adopts an EIS that has already been judicially reviewed and affirmed. For example, in *Piedmont Environmental Council v. Flowers*, environmental plaintiffs brought a NEPA challenge to an EIS prepared by the Federal Highway Administration in connection with a highway reconstruction project. 319 F. Supp. 2d 678, 681-82 (N.D. W. Va. 2004). After extensive litigation, the EIS was upheld by the district court and the district court's judgment was affirmed by the Fourth Circuit Court of Appeals. *Id*. at 679. In the plaintiffs' subsequent challenge to the U.S. Army Corps of Engineers' adoption of the EIS, as part of its own approvals related to the highway project, the district court held that the plaintiffs were barred by collateral estoppel from relitigating issues related to the validity of the EIS. *Id*. at 681. This Court should likewise bar WildEarth from raising issues in this case regarding the sufficiency of 2008 EIS' analysis of climate change and NO_2 impacts that were definitively rejected in the Leasing Litigation.

The remaining elements of collateral estoppel have also been met. The second element has been satisfied because WildEarth's arguments regarding the NO_2 and climate change impacts analyses in the 2008 EIS were finally adjudicated on the merits. These arguments were rejected by both the U.S. District Court for D.C. and the D.C. Circuit Court of Appeals. The third and fourth elements have also been met because WildEarth was a party to the Leasing Litigation and was

provided a full and fair opportunity to litigate its NO_2 and climate change arguments in the Leasing Litigation. WildEarth is therefore estopped from raising the same climate change and NO_2 arguments that were rejected in the Leasing Litigation.

III. OSMRE Fully Complied with NEPA's Public Participation Mandate

WildEarth's claim that OSMRE failed to provide any public participation in its NEPA process ignores the regulatory and factual background of this case. WildEarth is asking this Court to disregard the numerous opportunities for public participation that were provided to WildEarth and other members of the public over a period of seven years and, then, contrary to law, find that OSMRE was required to do more. WildEarth's public participation claim must be rejected.

Throughout WildEarth's Opening Brief, WildEarth attempts to hide the fact that OSMRE was a cooperating agency on the 2008 EIS in order to diminish OSMRE's NEPA review. *See, e.g.,* ECF 85 at 2, 22-23, 31. WildEarth would have this Court believe that OSMRE did nothing more to satisfy its NEPA obligation than issue its Statement of NEPA Adoption and Compliance. *Id.* at 12. However, when OSMRE was a cooperating agency on the 2008 EIS, BLM informed members of the public, including WildEarth, that OSMRE would "use this EIS to make decisions related to the approval of the MLA mining plan." AR16639.

Because the 2008 EIS was to be used by OSMRE to evaluate mining impacts, BLM made clear that the impacts of mining the coal – not just the impacts of leasing the coal – were to be evaluated in the EIS. AR16870; *see also* AR16645-48. Contrary to WildEarth's claim, BLM did not "explicitly recognize[]" that additional environmental analysis would be required when the mining plan was proposed. *See* ECF 85 at 23-24 (citing to BLM AR4272).[4] The environmental analysis in the 2008 EIS was intended to both support BLM's leasing determination and inform OSMRE's mining plan decision. AR16617, 16639. Accordingly, OSMRE's adoption of the 2008 EIS through its October 28, 2013 Statement of NEPA Adoption and Compliance was simply the culmination of its NEPA process that began in 2006.

The regulatory requirements for public participation are very different when an agency adopts a final EIS for which it was a cooperating agency rather than when an agency initiates an entirely new NEPA analysis. For example, the CEQ regulation governing adoption provides that a "cooperating agency may adopt without recirculating the [EIS] of a lead agency . . ." 40 C.F.R. § 1506.3(c) (emphasis added). An agency does not need to provide additional notice of, or an

[4] Contrary to WildEarth's assertion, *Jewell* does not recognize that additional environmental analysis would occur at the mining plan decision stage either. ECF 85 at 24 (citing *Jewell*, 738 F.3d at 309). Instead, *Jewell* merely acknowledges the three-stage regulatory process involving BLM, WDEQ, and OSMRE. 738 F.3d at 309.

opportunity to comment on, the adopted EIS. *Id*. Similarly, under DOI's regulations, OSMRE may adopt a prior EIS that has been "prepared pursuant to NEPA and the [CEQ] regulations." *See* 43 C.F.R. § 46.120(c).

Through its Statement of NEPA Adoption and Compliance, OSMRE confirmed that the public participation requirements in CEQ's regulations were satisfied. OSMRE specifically found that an "opportunity for public input was provided during and with completion of the [2008] EIS" and that "OSM[RE]'s public involvement requirements for EISs have been met." AR16543. In particular, OSMRE found that the 2008 "EIS was subject to public review and comment prior to publication of the final EIS. All comments received during the comment period were addressed in either the Final EIS or the [ROD]." *Id.*

OSMRE also considered the fact that members of the public were afforded an opportunity to comment upon Antelope's PAP to WDEQ to amend its mining permit, as well as WDEQ's proposed decision to approve the amendment. *Id.* OSMRE's finding that there was ample opportunity for public participation is fully supported by its administrative record. The following chart illustrates the many opportunities for public participation in both the NEPA process and the State of Wyoming's permitting process that preceded OSMRE's mining plan decision for the West Antelope II Tracts:

Date	Public Notice / Participation Opportunities	Cite
October 17, 2006	Notice of Intent to Prepare an EIS and Notice of Public Meeting	AR16556
October 2006	Notice of Scoping Meeting published in local newspapers	AR16556
November 1, 2006	Public Scoping Meeting	AR16556
February 8, 2008	Notice of Availability of Draft EIS	AR16556
February 8, 2008 – April 8, 2008	60-day Comment Period for Draft EIS	AR16557
March 24, 2008	Public Hearing on Draft EIS	AR16557
December 19, 2008	Notice of Availability of Final EIS	AR16557
December 19, 2008 – January 20, 2009	30-Day Comment Period for Final EIS	AR16557
December 22, 2011 – January 4, 2012	Public Notice of Complete PAP for WDEQ Mining Permit	AR16541
December 19, 2012 – January 9, 2013	Notice of WDEQ's Proposal to Approve Mining Permit	AR17400
September 20, 2012	Start of 30-day Comment Period for WDEQ Air Quality Permit	Exhibit A, at 2
Around October 28, 2013	Notice of OSMRE's Statement of NEPA Adoption and Compliance Posted on OSMRE's Website	AR16543

After OSMRE adopted the 2008 EIS and prepared its October 28, 2013 Statement of NEPA Adoption and Compliance, it posted its Statement on OSMRE's website. AR16543. Nothing more was required of OSMRE. Indeed, in a recent decision rejecting WildEarth's NEPA challenge to OSMRE's mining plan approval for a coal mine in New Mexico, the federal district court held that OSMRE's decision to adopt an Environmental Assessment ("EA") that it helped

prepare as a cooperating agency, and the posting of that final decision on its website, were sufficient to comply with NEPA. *WildEarth v. Jewell*, 1:16-cv-605-RJ-SCY, ECF 85 at 20-21 (D. N.M. Feb. 16, 2017) ("WildEarth New Mexico Case"). The district court agreed with OSMRE that the public had been afforded adequate opportunity to provide input through the completion of the EA and during the state's review of the PAP. *Id.* And because the laws applicable to adopting an EA "did not require OSMRE to allow for additional public involvement before adopting the EA," the district court found that OSMRE "was not arbitrary and capricious in determining that the public was given adequate opportunity to participate in the mining plan decision process." *Id.* at 21.

WildEarth's misplaced attempts to impose additional, fictitious, public participation burdens on OSMRE should be rejected. While WildEarth cites to CEQ regulations such as 40 C.F.R. §§ 1501.4(b) and 1503.4(a) to argue that OSMRE was required to undergo yet another public comment period (*see* ECF 85 at 21), those regulations apply only to an agency's obligations when it prepares an EIS in the first instance and do not apply to situations where an agency such as OSMRE adopts an existing EIS.

Similarly, WildEarth's reliance on district court decisions which held that OSMRE failed to provide adequate notice of its mining plan decisions is unavailing as those cases involved circumstances in which OSMRE did not post its

mining plan approval decision or NEPA documents on its website. *See* ECF 85 at 20-21 (citing *WildEarth v. OSMRE,* 104 F. Supp. 3d 1208 (D. Colo. 2015), *vacated*, 652 F. App'x 717 (10th Cir. 2016), and *WildEarth v. OSMRE*, 2015 WL 6442724 (D. Mont. Oct. 23, 2015)).

Here, as in the WildEarth New Mexico Case, members of the public (including WildEarth) were afforded numerous opportunities to provide input and even challenge the federal and state approvals needed to mine the coal in the West Antelope II Tracts. After seven years of public participation, and three and one-half years of active litigation by WildEarth and others, OSMRE was not required to provide even more participation opportunities. 40 C.F.R. § 1506.3(c); 43 C.F.R. § 46.120(c). OSMRE's determination that the public was afforded an adequate opportunity to provide input is legally sound. *See WildEarth New Mexico Case*, 1:16-cv-605-RJ-SCY, ECF 85 at 21.

IV. OSMRE Properly Adopted the 2008 EIS After Independently Analyzing Whether the 2008 EIS Complied with NEPA

WildEarth improperly asks this Court to determine the adequacy of OSMRE's NEPA adoption based solely on the level of detail provided within the four corners of OSMRE's Statement of NEPA Adoption and Compliance. *See* ECF 85 at 23-24. In other words, WildEarth is again asking this Court to ignore the factual background of this case and the extensive administrative record that was before OSMRE when it made its decision.

This Court's review under the Administrative Procedure Act ("APA"), however, must be "based on the full administrative record that was before all decision makers . . . at the time of the decision." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party"). The Court's review of the administrative record must be a "thorough, probing, in-depth review" not only of the basis articulated by the agency, but also of "the evidence and proceedings before the agency at the time it acted." *Lewis v. Lujan*, 826 F. Supp. 1302, 1306 (D. Wyo. 1992), *aff'd sub nom. Lewis v. Babbitt*, 998 F.2d 880 (10th Cir. 1993). In determining the adequacy of a NEPA document, the Court must examine, not only the NEPA document, but also "the record as a whole." *Wyoming v. Dep't of Agric*., 661 F.3d 1209, 1251-52 (10th Cir. 2011); *see also Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Transp*., 153 F.3d 1122, 1130 (10th Cir. 1998) ("review[ing] both the EIS and the ROD, as well as the portions of the administrative record submitted on appeal").

The administrative record in this case confirms OSMRE's independent review of the 2008 EIS and determination that it complies with NEPA. For example, in the Statement of NEPA Adoption and Compliance, OSMRE determined that its "comments and suggestions" on the 2008 EIS were satisfied. AR16542. Consistent with OSMRE's Statement, the administrative record

contains both OSMRE's submitted comments and BLM's response. AR17243, 17308. In addition, OSMRE found that the 2008 EIS complied with CEQ's NEPA requirements and 43 C.F.R. Part 46, Subpart E. AR16542. Indeed, at the time OSMRE made its decision, the 2008 EIS had been affirmed by the D.C. District Court.[5]

Most significant, however, is OSMRE's independent review of the 2008 EIS and more recent environmental analysis to determine that, in October 2013, the 2008 EIS still adequately assessed the environmental impacts of the proposed mining plan. Contrary to WildEarth's assertion, the Court need not "dig through the record" to find support for OSMRE's independent review. ECF 85 at 25. OSMRE's main decision documents detail the materials it reviewed for its mining plan decision and NEPA compliance. In its Statement of NEPA Adoption and Compliance, OSMRE explained that it reviewed the 2008 EIS, the R2P2, the PAP, and WDEQ's State Decision Document. AR16542. Similarly, in OSMRE's several memoranda recommending approval of the proposed mining plan, OSMRE explained that its recommendation was based on the 2008 EIS, the PAP, recommendations from and consultation with other federal and state agencies, the

[5] WildEarth's previous legal challenges did not raise any concerns over compliance with 43 C.F.R. Part 46, Subpart E. *See* AR16542 (referencing litigation); *see also Salazar*, 880 F. Supp. 2d 77.

R2P2, and WDEQ's approval of the mining permit. AR16531, 16533-34, 16536-37.

The CEQ and DOI regulations governing adoption of EISs do not require the level of granularity demanded by WildEarth. ECF 85 at 23 (criticizing OSMRE's independent review because it does not "cite[] to pertinent page numbers in the [2008] EIS"). The only court to criticize the level of specificity in a coal leasing NEPA adoption document is an unpublished decision that relied on the leasing EA's acknowledgement that it was not analyzing the impacts of the proposed mining plan. *Id.* at 24-25 (quoting *WildEarth v. OSMRE*, 2015 WL 6442724, at *7). In contrast, OSMRE's mining plan approval decision in this case, as well as the supporting administrative record, show that OSMRE independently reviewed and properly adopted the 2008 EIS in support of its mining plan approval. *See* AR16617, 16639. WildEarth's arguments to the contrary should be rejected.[6]

[6] OSMRE fully complied with NEPA's public participation and procedural requirements in adopting the 2008 EIS to approve Antelope's mining plan modification. However, to the extent WildEarth could show a procedural irregularity in OSMRE's NEPA compliance, any such technical violation would be harmless error. *McCulloch Interstate Gas Corp. v. Fed. Power Comm'n*, 536 F.2d 910, 913 (10th Cir. 1976) (An "[a]gency action will not be upset because of harmless error."); *see* 40 C.F.R. § 1500.3 (trivial violations should "not give rise to any independent cause of action"); *see also* 43 C.F.R. § 46.10(b) (same). In any event, WildEarth's challenge must fail because WildEarth cannot "demonstrate[] prejudice resulting from [any] error." *Prairie Band Pottawatomie Nation v. Fed. Highway Admin.*, 684 F.3d 1002, 1008 (10th Cir. 2012).

V. OSMRE Properly Adopted the 2008 EIS Without Preparing a Supplemental NEPA Document

In compliance with 43 C.F.R. § 46.120(c), OSMRE adopted the 2008 EIS after reviewing newly prepared environmental analysis and permitting decisions and finding that the 2008 EIS still adequately evaluated the environmental impacts of the proposed mining plan. AR16542. WildEarth claims that "new information" has come to light that triggered OSMRE's duty to prepare a supplemental NEPA analysis—namely, more stringent air quality standards and the social cost of carbon tool for measuring the impacts of greenhouse gas ("GHG") emissions. ECF 85 at 26. However, neither the revised air quality standards nor the social cost of carbon analytical tool constitutes "new information" that would require OSMRE to supplement the 2008 EIS.

First, new air quality standards and the social cost of carbon tool have no bearing on OSMRE's limited regulatory authority at the mining plan decision stage; therefore, OSMRE had no obligation to consider this information in its NEPA analysis. *Pub. Citizen*, 541 U.S. at 756. Second, the 2008 EIS already sufficiently analyzed air quality and climate change impacts. *Salazar*, 880 F. Supp. 2d 77; *Jewell*, 738 F.3d 298. The new air quality standards and analytical tool are not "new information" that affect the environment "in a significant manner or to a significant extent not already considered." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989); *see also State of Wis. v. Weinberger*, 745 F.2d 412, 418

(7th Cir. 1984) ("new information" must involve "environmental consequences associated with the proposed action not envisioned by the original EIS" (emphasis added)); *Dep't of Agric*., 661 F.3d at 1257 (same). Third, the social cost of carbon protocol has been rescinded and is no longer an appropriate analytical tool for OSMRE, or any other federal agency, to use in analyzing the impacts of carbon emissions on global climate change.

A. OSMRE's NEPA Adoption Decision Was Circumscribed by Prior Agency Decisions and OSMRE's Limited Regulatory Authority at the Mining Plan Decision Stage

In this case, OSMRE's mining plan review and NEPA analysis was the last step in the seven-year, three-stage regulatory approval process. OSMRE's review of Antelope's mining plan followed significant legal approvals by BLM and WDEQ and those approvals precluded OSMRE from second guessing either the initial authorization to mine the coal or the environmental performance standards imposed by WDEQ under its delegated authority to implement SMCRA and the CAA. As such, OSMRE's NEPA duties were circumscribed by its limited regulatory authority. *Pub. Citizen*, 541 U.S. at 770 ("where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, . . . the agency need not consider these effects" in its NEPA analysis); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 555 (1978) ("the role of a court in reviewing the sufficiency of an

agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review"); *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 347 (6th Cir. 2006) (under the "rule of reason" an agency is not required to analyze "policy alternatives that are contrary to the pertinent statutory goals or do not fulfill a project's purpose").

By the time OSMRE conducted its additional NEPA review in 2013, BLM, OSMRE, and WDEQ had already conducted an in-depth analysis of the environmental impacts of mining the West Antelope II Tracts in the 2008 EIS. And once BLM issued the West Antelope II leases, Antelope was granted both a right and an obligation under the MLA to diligently mine commercial quantities of the leased coal. 30 U.S.C. § 207(a). Under the MLA, this statutory diligence requirement becomes contractually binding on BLM and the lessee upon the issuance of a federal lease: "each lease shall be subject to the conditions of diligent development and continued operation of the mine." *Id*. at § 207(b)(1); 43 C.F.R. Part 3480 (establishing diligent development and minimum production obligations).

In addition, by the time OSMRE was reviewing Antelope's mining plan proposal, Antelope was already under a legal obligation to produce the federal coal reserves under its lease in order to achieve MER, 43 C.F.R. § 3480.0-5(a)(21), and

OSMRE had no authority to disturb this obligation. Indeed, the MLA compels OSMRE to select a mining plan that maximizes coal recovery: "no mining operating plan shall be approved which is not found to achieve the [MER] of the coal within the tract." 30 U.S.C. § 201(a)(3)(C). Because OSMRE was statutorily required to approve a mining plan that achieved MER of the federally-leased coal, OSMRE lacked the authority to recommend modifications to, or disapprove, Antelope's mining plan based on any desire to minimize the indirect air quality impacts resulting from combusting that coal. And because OSMRE lacked the legal authority to prevent these air quality impacts resulting from the federally leased coal, OSMRE "need not consider these effects in its [NEPA document]." *Pub. Citizen*, 541 U.S. at 770.

Moreover, WildEarth's claim that OSMRE was required to supplement its NEPA analysis to evaluate air impacts under the more stringent standards (presumably to impose air quality mitigation requirements), undermines WDEQ's delegated authority under the CAA. *See* AR17320 ("The mitigation measures that would be required to control air emissions would be developed at the time of permitting by WDEQ/AQD.").

The EPA has granted WDEQ primary regulatory authority for air quality in Wyoming. 42 U.S.C. § 7410(a); 40 C.F.R. Part 52, Subpart ZZ. WDEQ has exercised that authority by granting the Antelope Mine its air quality permit, which

encompasses all air quality effects from implementation of the mining plan. *See* Exhibit A. OSMRE has no authority to directly control the air quality emissions from the Antelope Mine by altering the WDEQ air quality permit. And, as discussed above, OSMRE also lacks the authority to *indirectly* alter the air quality emissions at the Antelope Mine by withholding OSMRE's consent for the mining plan on the ground that the plan allows for the development of too much coal. *See* 30 U.S.C. § 201(a)(3)(C).

Accordingly, because OSMRE has no authority to prevent the air quality impacts from mining the coal, under NEPA's rule of reason, OSMRE had no obligation to supplement the 2008 EIS to analyze air quality impacts under the new air quality standards or with the social cost of carbon tool. OSMRE properly confirmed that the 2008 EIS adequately analyzed air quality, and that OSMRE's record demonstrated that the Antelope Mine was in full compliance with its air quality permit. AR17421.

B. The Revised Air Quality Standards and The Social Cost of Carbon Tool are Not "New Information" Requiring Supplementation

CEQ regulations require agencies to supplement a final EIS if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii) (emphasis added). However, "[a]n important difference between an agency's

decision whether to file an initial EIS and its decision whether to supplement an EIS is that the decision to supplement is made in light of an already existing, in-depth review of the likely environmental consequences of the proposed action." *Weinberger*, 745 F.2d at 418. An agency is only required to supplement an existing EIS when new information is presented that is "of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary." *Id.* (emphasis added). An agency decision concluding that new information does not warrant preparation of a supplemental EIS is entitled to deference. *Dep't of Agric.*, 661 F.3d at 1258.

1. Revised Air Quality Standards for $PM_{2.5}$ and NO_2

The 2008 EIS' analysis of air quality impacts, which spans approximately 85 pages and includes technical reports, air quality modeling, and a detailed analysis of the site specific mining impacts, took a sufficiently "hard look" at the air quality impacts from mining the West Antelope II Tracts. *Salazar*, 880 F. Supp. 2d 77; *Jewell*, 738 F.3d 298; *see also* AR16719-749, 16903-913, 16971-988, 17074-102.

In addition, because WildEarth failed to raise its concerns over NO_2 and $PM_{2.5}$ emissions in its comments to BLM and OSMRE during the preparation of the 2008 EIS and ROD, WildEarth's current NO_2 and $PM_{2.5}$ arguments are waived. *See Vt. Yankee*, 435 U.S. at 553 (plaintiffs must structure their participation "so that it is meaningful, so that it alerts the agency to the[ir] position and

contentions."). Indeed, WildEarth's comments on the 2008 EIS raise only concerns with PM_{10} (*see* BLM AR1750), even though EPA established NAAQS for $PM_{2.5}$ in 1997. ECF 85 at 32 (citing 62 Fed. Reg. 38652 (July 18, 1997)). And the *Salazar* court already found that WildEarth waived its NO_2 arguments. 880 F. Supp. 2d at 90. Therefore, the only issue that remains is whether OSMRE was required to supplement the 2008 EIS. It was not.

Not only has WildEarth waived its right to raise concerns about OSMRE's consideration of $PM_{2.5}$ and NO_2, but EPA's promulgation and WDEQ's adoption of new, more stringent air quality standards for $PM_{2.5}$ and NO_2 is not a "new circumstance[] or information" triggering OSMRE's duty to supplement the 2008 EIS. *Salazar*, 880 F. Supp. 2d at 90 (quoting 40 C.F.R. § 1502.9(c)(1)(ii)). The federal district court hearing WildEarth's challenge to the 2008 EIS has already rejected this argument. *Id*. WildEarth claims that *Salazar* rejected its argument for one reason only – because there was no ongoing federal action triggering supplementation. ECF 85 at 35. However, WildEarth ignores the two other reasons offered by the court.

The *Salazar* court explicitly rejected WildEarth's supplementation argument, finding it "unavailing for at least three reasons." 880 F. Supp. 2d at 90 (emphasis added). First, "[b]y failing to bring the issue to BLM's attention prior to the signing of the ROD, WildEarth . . . waived their right to pursue the issue in this

action." *Id.* Second, there was "no ongoing major Federal action that could require supplementation." *Id.* (internal quotation and citation omitted). "Third, EPA's promulgation of the 1–hour NO_2 standard does not reflect the sort of 'new circumstances or information' triggering an agency's duty to supplement. 40 C.F.R. § 1502.9(c)(1)(ii)." *Id.* (emphasis added). This third basis for the *Salazar* court's holding bars WildEarth from relitigating that issue here.

Under *Salazar*, OSMRE was not required to supplement the 2008 EIS because new air quality standards, as a category of information, do not trigger the duty to supplement. *Id.* New air quality standards simply do not amount to new environmental consequences "not already considered." *Dep't of Agric.*, 661 F.3d at 1257. The prior, in-depth analysis in the 2008 EIS sufficiently analyzed the environmental consequences of mining coal in the West Antelope II Tract on air quality. *Salazar*, 880 F. Supp. 2d at 87-91; *Jewell*, 738 F.3d at 308-12.[7]

New air quality standards are performance standards relevant to WDEQ's air quality permitting decision. As this Court has recognized, WDEQ AQD's "active regulatory role . . . ensuring air quality compliance" is properly a significant consideration in a federal agency's NEPA analysis. *WildEarth v. U.S. Forest*

[7] WildEarth's reliance on *WildEarth v. OSMRE*, 104 F. Supp. 3d at 1228, is misplaced because (1) that decision has been vacated, and (2) the prior NEPA documents that were adopted for mining plan decisions in 2007 and 2009 were from 1979 and were "considerably outdated," only analyzing air quality "through 1990." *Id.*

Serv., 120 F. Supp. 3d 1237, 1265 (D. Wyo. 2015). Given OSMRE's lack of regulatory authority over air quality and coal combustion, and WDEQ's finding that Antelope was in compliance with its AQD air quality permit, it was entirely proper for OSMRE to adopt the 2008 EIS without supplementing its air quality analysis.

2. The Social Cost of Carbon Tool

Similarly, OSMRE was not required to supplement the 2008 EIS to employ the social cost of carbon protocol for evaluating the impacts of GHG emissions. It is now settled that the 2008 EIS adequately evaluated the impacts of GHG emissions on climate change. *Jewell*, 738 F.3d at 308-11; *see also* AR16972-82. And in 2013 when OSMRE conducted its NEPA analysis for the mining plan, the social cost of carbon protocol was not a relevant factor that OSMRE was required to consider.

Indeed, Magistrate Rankin has already concluded, in the context of WildEarth's Motion to Supplement the Administrative Record with social cost of carbon documents, that WildEarth "fail[ed] to make the necessary showing . . . [that] the agency ignored relevant factors it should have considered in making its decision." ECF 80 at 4. Magistrate Rankin applied the U.S. Supreme Court's test for when an agency's duty to supplement prior NEPA analysis is triggered: whether "the new information affects the environment 'in a significant manner or

to a significant extent not already considered.'" *Id.* at 3-4 (quoting *Marsh*, 490 U.S. at 374).

Under this test, Magistrate Rankin found that "[t]he two social costs of carbon documents do not show a change in the environmental impacts of developing coal in general, or specifically from the Antelope II lease tracts. Rather, by Petitioner's own accord, the documents provide a new and different method for analyzing the impacts." *Id.* at 4 (emphasis added); *see also id.* ("Therefore, the Court finds the social cost of carbon documents do not change the environmental impacts of developing the mine; it only provides another method for evaluating the impacts."); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 512 (D.C. Cir. 2010) (holding that an agency is not required to "reevaluate their existing environmental analyses each time the original methodologies are surpassed by new developments.").

Magistrate Rankin's supplementation order—which WildEarth chose not to appeal—bars WildEarth from re-litigating whether OSMRE should have considered the social cost of carbon documents in its NEPA review. *N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1180 (D. Wyo. 2015) (Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding the district court

properly concluded that an "issue . . . was barred by the law of the case . . . [due to], among other things, plaintiffs' failure to appeal the magistrate's ruling"); *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999) (same).

Further, WildEarth's request that OSMRE should be directed to consider the social cost of carbon documents in its NEPA analysis is moot because those documents have been rescinded. *See S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (mootness arises when "circumstances changed since the beginning of litigation that forestall any occasion for meaningful relief"). In a March 28, 2017 Executive Order entitled "Promoting Energy Independence and Economic Growth," ("March 28th Executive Order") President Trump directed CEQ to rescind all social cost of carbon documents and its 2016 climate change guidance. *See* Exhibit C, March 28th Executive Order, Sections 3(c) and 4(b). On April 5, 2017, CEQ implemented the Executive Order and rescinded the 2016 climate change guidance. 82 Fed. Reg. 16576, 16576-77 (Apr. 5, 2017). OSMRE could not now be judicially directed to employ an analytical tool that has been formally rescinded.

Of course, OSMRE was not required to use the social cost of documents even when they were still in effect. Under CEQ's regulations and guidance, no agency was required to employ the non-binding social cost of carbon protocol. *See* 40 C.F.R. § 1502.23 ("the weighing of the merits and drawbacks of the [proposed

action] need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations"); *see also WildEarth New Mexico Case,* 1:16-cv-605-RJ-SCY, ECF 85 at 23 (holding neither the CEQ regulations nor guidance require use of the social cost of carbon tool).

Indeed, the court in the WildEarth New Mexico Case rejected the very same argument WildEarth makes here. In rejecting WildEarth's argument that OSMRE's 2014 mining plan approval for a New Mexico mine violated NEPA because OSMRE did not use the tool, the New Mexico district court found that "CEQ regulations discourage the use of cost-benefit analysis in situations involving qualitative considerations." *Id.* (citing 40 C.F.R. § 1502.23). In addition, the New Mexico court found that CEQ's now rescinded 2016 climate change guidance—which WildEarth claims OSMRE should have followed for its 2013 Antelope mining plan decision (ECF 85 at 39)— "specially states that agencies need not use the social cost of carbon method to evaluate GHG emissions." *WildEarth New Mexico Case,* 1:16-cv-605-RJ-SCY, ECF 85 at 23 (citing CEQ Guidance at 33 n. 86).[8]

[8] Also, as discussed, CEQ's 2016 climate change guidance has been formally rescinded. 82 Fed. Reg. at 16576-77.

VI. Vacatur of OSMRE's Mining Plan Modification Approval is Not Warranted

WildEarth asks this Court to vacate OSMRE's mining plan approval and enjoin mining. *WildEarth v. Jewell*, 15-cv-2026-WYD, ECF 1, Prayer for Relief at ¶¶ B, D (D. Colo. Sept. 15, 2015). As shown above, there is no legal justification to vacate the mining plan because OSMRE satisfied all its legal obligations in approving the 2013 mining plan. Moreover, vacatur is a draconian remedy that should be rejected on equitable grounds as it would threaten the viability of the Antelope Mine, force the layoff of hundreds of local Wyoming residents, and significantly harm the local communities which rely on the Antelope Mine for employment and essential revenue.

To determine whether vacatur of an agency action is warranted in a particular case, courts weigh "the seriousness of the [agency's] deficiencies . . . and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150-51 (D.C. Cir. 1993); *see also WildEarth v. OSMRE*, 104 F. Supp. 3d at 1231-32 (applying balancing test); *WildEarth v. OSMRE*, 2015 WL 6442724, at *8 (same).

WildEarth's requested relief would impose tremendous hardship on Antelope, its employees, and the local community surrounding the Antelope Mine. Without the ability to mine the West Antelope II Tracts, Antelope's mining operations would be greatly diminished. Exhibit B, at ¶ 8. While Antelope could

continue mining operations in the short-term on three other federal leases (WYW-151643, WYW-14135, WYW-178457), it could only do so by reducing its annual production rate from 28 million tons per year to 13-14 million tons per year; an approximately 50% reduction. *Id*. ¶ 10. The remaining coal reserves in Antelope's other federal leases would be exhausted within three years, at which point mining operations at the Antelope Mine would cease entirely. *Id*. Although Antelope holds two additional federal leases (at ¶ 13) and two state leases (at ¶¶ 14-15), those leases do not present realistic short-term alternatives to the West Antelope II Tracts because they could not be mined without additional permitting or contain negligible amounts of remaining reserves.

The significant reduction and eventual cessation of Antelope's mining operations would have an immediate and direct substantial negative economic impact on the Antelope Mine's 530 full-time employees, 25-30 part-time contractors, and local businesses and communities. *Id*. ¶¶ 18-19. The inability to conduct coal mining operations on the West Antelope II Tracts will result in the near-term layoff of a high percentage—up to 45%—of Antelope's workforce. *Id*. ¶ 20. In the longer-term, assuming Antelope could obtain the necessary approvals to mine its two state leases, Antelope would only be able to employ approximately 40-45% of its current workforce. *Id*. ¶ 21.

The vacatur of the mining plan will also have significant negative economic impacts on the Antelope Mine. *Id*. ¶ 23. If the mining plan is vacated and operations must cease, Antelope may be unable to meet its commitments under existing commercial agreements and could potentially face challenges from its customers due to its inability to perform. *Id*. Finally, the federal government and the State of Wyoming would also be harmed by vacatur through its reduced receipt of taxes and royalties from the Antelope Mine, which amounted to $109.5 million in 2016. *Id*. ¶ 22. These substantial harms to Antelope, its employees, local businesses and communities, and the public interest greatly outweigh the technical and procedural NEPA violations alleged by WildEarth.

Moreover, WildEarth's request that the Court enjoin mining, while allowing reclamation to continue, reflects a fundamental misunderstanding of both the legal requirements governing federal mining plan approvals and the inextricably interrelated nature of coal mining and reclamation operations. Under the MLA, Antelope must obtain a valid mining plan "[p]rior to taking any action on a leasehold which might cause a significant disturbance of the environment," including reclamation. 30 U.S.C. § 207(c) (emphasis added). Without a valid mining plan, Antelope would be required to halt reclamation efforts on tracts subject to its mining plan approval. *See* 30 C.F.R. § 746.11(a) ("[n]o person shall

conduct surface coal mining and reclamation operations on lands containing leased Federal coal until the Secretary has approved the mining plan" (emphasis added)).

Antelope's reclamation activities on federal leases not subject to the challenged mining plan would also be significantly impaired. As a practical matter, Antelope's ability to continue reclamation operations is wholly dependent on the continued advancement of mining in accordance with Antelope's mining plan. Exhibit B, at ¶ 24. To begin the reclamation process, Antelope must back fill the pit with overburden material derived from its contemporaneous mining operations to uncover the coal seam in the subsequent mining area. *Id*. Without the ability to conduct mining operations in the West Antelope II Tracts, Antelope will lack the necessary earthen materials to perform reclamation on its adjacent federal leases. *Id*. The inability to conduct reclamation during vacatur would result in serious environmental and safety consequences at the Antelope Mine and the surrounding area, including soil erosion, runoff, reduced water quality, spontaneous combustion from exposed coal reserves, fires, unmitigated dust generation, and weed propagation. *Id*. ¶ 25.

As shown above, there is no legal justification to vacate the 2013 mining plan decision as OSMRE satisfied all its legal obligations in approving this plan. Moreover, vacatur of the mining plan is wholly improper on equitable grounds

given the serious consequences to Antelope, its employees, and the surrounding communities that would result from vacatur.

CONCLUSION

For the foregoing reasons, WildEarth's Petition for Review should be denied and OSMRE's mining plan approval should be affirmed in all respects.

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

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EXHIBIT LIST

Exhibit A	Antelope Mine Air Quality Permit
Exhibit B	Cowan Declaration
Exhibit C	March 28, 2017 Executive Order entitled "Promoting Energy Independence and Economic Growth"

CERTIFICATE OF COMPLIANCE

The undersigned, Andrew C. Emrich, certifies that this Response Brief complies with the requirements of Local Rule 83.6(c) and Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman font type space consisting of fourteen characters per inch. The total word count is 12,880 words, excluding the caption, the table of contents, the table of authority, the glossary, and the certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2017, I electronically filed the foregoing document, Intervenor-Respondent Antelope Coal LLC's Response to Petitioner's Opening Brief, with the clerk of the court for the United States District Court for the District of Wyoming using the CM/ECF system, which is designed to serve a copy on all counsel of record.

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