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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WILDEARTH GUARDIANS,	)	
	)	
Petitioner,	)	Case No. 2:16-CV-00167-ABJ
	)	
v.	)	
	)	
RYAN ZINKE,	)	**PETITIONER'S**
U.S. OFFICE OF SURFACE MINING	)	**OPENING BRIEF**
RECLAMATION AND ENFORCEMENT,	)	
and U.S. DEPARTMENT OF THE INTERIOR	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
STATE OF WYOMING and	)	
THUNDER BASIN COAL COMPANY LLC,	)	
	)	
Intervenor-Respondents.	)	

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GLOSSARY OF ABBREVIATIONS

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

INTRODUCTION

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

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

Second, OSM violated NEPA when it arbitrarily decided not to prepare supplemental environmental analyses to consider significant new information about mining's impacts to air quality and climate. This new information only became available *after* completion of the EIS adopted by OSM. Stated another way, OSM violated NEPA because it approved the Black Thunder Mining Plan without adequate NEPA documentation based on current conditions. To support its decision to approve the Mining Plan and meet its NEPA obligations, OSM prepared a two-page Statement of NEPA Adoption reporting that mining the federal lease would not have any significant environmental impacts. OSM's ostensible support for this conclusion relied on an EIS prepared in 2010 for the federal coal that would be mined under the challenged Mining Plan approval. However, OSM simply adopted the existing document without performing the required detailed assessment of whether the adopted document met all of NEPA's requirements for a hard look at the direct, indirect, and cumulative impacts of lease development under the conditions present in 2015 at the time OSM was considering the Mining Plan. OSM made the conclusory statement, without any record support, that the existing Leasing EIS was adequate and left it at that.

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

mining generates air pollution in the form of particulate matter, nitrogen dioxide, and greenhouse gases. Additionally, environmental impacts related to coal combustion—which result only because coal is mined—can be even more extensive since coal-fired power plants generate significantly higher levels of conventional air pollutants and greenhouse gases.

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

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

[2] Guardians has a similar challenge pending in this Court against the same Respondents over their approval of the Antelope Mining Plan. *WildEarth Guardians v. Jewell*, Case No. 2:16-cv-0166-ABJ. That case is still being briefed.

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

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

A. The National Environmental Policy Act.

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

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

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

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

(Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. "Effects" are synonymous with "impacts." 40 C.F.R. § 1508.8.

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

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

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

appropriate for the analysis at hand[.]" 43 C.F.R. § 46.120(b). The regulations further provide that:

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

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

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

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

B. The Mining Plan Approval Process.

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

[4] Available at http://www.osmre.gov/lrg/docs/directive490_NEPAHandbook.pdf (last accessed April 20, 2017).

Department of the Interior, is largely responsible for implementing the Secretary's coal leasing responsibilities.

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

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

Mining Plan is "binding on any person conducting mining under the approved mining plan." 30 C.F.R. § 746.17(b).

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

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

Although the Secretary is charged with approving, disapproving, or modifying a Mining Plan, OSM is charged with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval, disapproval or conditional approval of the

mining plan . . . ." 30 C.F.R. § 746.13. Thus OSM plays a critical role in adequately informing the Secretary.

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

II. THE BLACK THUNDER MINE AND THE MINING PLAN APPROVAL

The Powder River Basin in northeastern Wyoming and southeastern Montana is the largest source of coal in the United States. OSM 696. In 2008 alone, 38.5 percent of all coal produced in the United States came from the Powder River Basin. OSM 697. Since 1991, Powder River Basin coal production has increased 242 percent, from 184 million tons to a record 444.9 million tons in 2006. *Id*. Hundreds of coal-fired power plants with various generating capacities in 36 states burn coal from the region. OSM 696.

The Black Thunder Coal Mine is a surface coal mine located in Campbell County, Wyoming. OSM 1520. The mine has been in operation since 1978 and, prior to the

approval of the challenged Mining Plan, mining was occurring on five federal leases containing 1.049 billion tons of federal coal. OSM 1521. Coal is mined using dragline, truck, and shovel mining methods. *Id*.

On April 18, 2015, the Secretary issued the challenged Mining Plan to Thunder Basin Coal, a subsidiary of Arch Coal, Inc., for the mining of federally owned coal at the Black Thunder Mine in the Powder River Basin of Wyoming. OSM 1574-75. The Assistant Secretary of the Interior for Land and Minerals signed the 2015 Black Thunder Mining Plan approval, which authorized mining activities at the Black Thunder Mine related to Federal Coal Lease WYW-174596. *Id*. The challenged Mining Plan approval authorized surface mining, an average annual production rate of up to 101.4 million tons per year, and ultimate recovery of an additional 106.5 million tons of coal from 11,996.5 acres. OSM 1522. The life of the Mine is expected to continue for an additional 21 years. *Id*.

On March 3, 2015, OSM issued a "Statement of NEPA Adoption and Compliance" for the Mining Plan approval in which OSM announced that it was adopting a coal leasing EIS prepared by BLM in July of 2010 to satisfy its NEPA obligations.[5] OSM 1530-31. In adopting BLM's 2010 Leasing EIS, OSM did not prepare a ROD, nor

[5] The coal leasing EIS that OSM adopted—*Final Environmental Impact Statement (EIS) for the Wright Area Coal Lease Applications*—is currently the subject of an appeal in the Tenth Circuit. *WildEarth Guardians v. BLM* (Appeal No. 15-8109). The Tenth Circuit heard argument on the matter on March 21, 2017, and a decision regarding the validity of the EIS is expected by Fall of 2017.

did the agency provide notice in the Federal Register of its intent to adopt the EIS without performing any additional environmental analysis of the Mining Plan. OSM did not provide public notice of the availability of the "Statement of NEPA Adoption and Compliance" either before deciding to adopt the 2010 EIS or before approving the Mining Plan. The Assistant Secretary of the Interior relied on OSM's "Statement of NEPA Adoption and Compliance" when approving the Mining Plan.

Recent rulings from the Interior Board of Land Appeals ("IBLA") interpreting the scope of BLM's delegated authority to approve coal leases indicates that the South Hilight lease that will be mined under the challenged Mining Plan is void as a matter of law. Within the last year, the IBLA has set aside two coal leases and two coal lease modifications on the basis that the BLM employees who issued the approvals lacked the delegated authority to do so. 187 IBLA 349 (May 6, 2016); Order in IBLA 2016-79 (Aug. 25, 2016); Order in IBLA 2016-80 (Aug. 25, 2016); 189 IBLA 274 (Feb. 7, 2017). The lease approvals at issue in these decisions were approved by either a BLM Field Manager or District Manager, rather than a State Director or Deputy State Director. In the most recent decision on this issue, the IBLA held that where a leasing decision "is not issued by an employee with delegated authority, the decision has no legal effect." *See*, *e.g.*, 189 IBLA at 275. The lease underlying the Mining Plan challenged here was approved by the High Plains District Manager, and likely also has no legal effect.

Because the underlying lease is likely invalid, the challenged Mining Plan is likely also invalid.

STANDARD OF REVIEW

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

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

> [T]he agency [h]as relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

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

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

ARGUMENT

I. WILDEARTH GUARDIANS HAS STANDING

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

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

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

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

from which the Mine and its associated infrastructure are visible. *See* Declaration of Jeremy Nichols ("Nichols Decl.") attached hereto as Exhibit 1. Mr. Nichols details all of his previous visits to areas around and adjacent to the Black Thunder Mine, Nichols Decl. ¶¶ 12-16, discusses the mining activities and air pollution he observed during these visits, *id*. at ¶¶ 15-19, and states that "[m]ining detracts from my enjoyment of the aesthetics of the area, it disturbs the remoteness of the area, and interferes with my desire to visit the area to view wildlife, rockhound, and camp." *Id*. at ¶ 19. In addition, Mr. Nichols expresses concern for his health when using the areas around and adjacent to the Black Thunder Mine because of the air pollution he has observed coming from mining operations, often visible as orange clouds from blasting activities at the Mine. *Id*. at ¶¶ 18-19. Mr. Nichols is a member and employee of Guardians and has been since 2008. *Id*. at ¶ 3. OSM's adoption of an EIS that predated the strengthening of air quality standards for $PM_{2.5}$ and NO_2, and OSM's subsequent failure to adequately analyze mining's air quality impacts in the context of these strengthened standards before approving the Black Thunder Mining Plan poses an actual and imminent threat of harm to Mr. Nichol's concrete recreational and aesthetic interests in areas affected by potentially dangerous levels of air pollution from the Black Thunder Mine, injuries incurred at the time OSM approved the Black Thunder Mining Plan without complying with NEPA's requirements. Guardians also suffered concrete harm from the deprivation of its procedural right under NEPA to be provided with notice of OSM's decision to adopt an

existing EIS for the Mining Plan approval without conducting additional analyses or even assessing whether additional analyses under current conditions were necessary. Nichols Decl. ¶ 23-25. This is sufficient to satisfy the injury-in-fact prong of the standing test.

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

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

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

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

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

OSM violated NEPA's procedural requirements. First, OSM failed to provide requisite notice to the public of the availability of its "Statement of NEPA Adoption and Compliance" for the Black Thunder Mining Plan Modification along with notice that the agency was adopting an existing EIS in support of the approval without any additional environmental analyses, and to involve the public in its decisionmaking process in any manner. Second, in adopting BLM's Leasing EIS, OSM failed to show *on the record* that it evaluated the adequacy of the EIS for approval of the Mining Plan Modification. OSM's procedural NEPA violations are part of an ongoing pattern and practice of the agency taking federal action—approving mining plan modifications—without complying

with NEPA's public involvement and environmental analysis adoption requirements. OSM does not have the discretion to ignore these mandates.

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

1. NEPA's public involvement requirements.

NEPA regulations provide that "public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). "Federal agencies shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment," "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures," and provide "public notice of . . . the availability of environmental documents so as to inform those persons . . . who may be interested or affected." 40 C.F.R. §§ 1500.2(d), 1506.6(a), 1506.6(b). "[B]y requiring agencies . . . to place their data and conclusions before the public . . . NEPA relies upon democratic processes to ensure—as the first appellate court to construe the statute in detail put it—that 'the most intelligent, optimally beneficial decision will ultimately be made.'" *Or. Nat. Desert Ass'n. v. BLM*, 625 F.3d 1092, 1099-1100 (9th Cir. 2010) (quoting *Calvert Cliffs' Coordinating Comm'n v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)). This process, in turn, ensures open and honest public discussion "in the service of sound decisionmaking." *Id.* at 1122.

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

OSM failed to satisfy NEPA's public notice and participation requirements in approving the Mining Plan Modification for the Black Thunder Mine. The agency did not notify the public, either prior to or immediately following the Assistant Secretary's approval of the Mining Plan, that it had issued a "Statement of NEPA Adoption and Compliance" and that it had adopted BLM's 2010 Leasing EIS in lieu of doing any additional analysis of mining's environmental impacts. Although the Statement of NEPA Adoption averred that both the Leasing EIS and State "will be made publicly available on the OSM Western Region's website," OSM 1402, there is no evidence in the record that OSM followed through with this commitment.

In two recent decisions in the Districts of Colorado and Montana where Guardians challenged OSM mining plan approvals on similar grounds, including failing to ensure the public was appropriately involved in and notified about those approvals, the courts held that OSM's practice of preparing FONSIs and mining plan approvals through a wholly internal process violated NEPA's public involvement requirements. In *WildEarth Guardians I*, 104 F. Supp. 3d at 1224 (citing 43 C.F.R. § 46.305(c)), the court found OSM's practice of "silently plac[ing] hard copies of its completed EAs and FONSIs on a shelf in its high-rise office . . . in Denver" failed to satisfy NEPA's public involvement requirements. Based on similar facts regarding OSM's practice of making mining plan decision documents available in the agency's Denver office, the court in *WildEarth*

Guardians II, 2015 WL 6442724 at *7, also rejected this practice as complying with NEPA's public involvement requirements. There, the Court found a "complete lack of notice" where the administrative record "include[ed] no suggestion of public notice by the Federal Defendants of the FONSI" nor any "indication . . . that the FONSI actually was placed in a reading room in Denver." *Id*. at *7. As these courts have made clear, the requirement that these NEPA documents be made available for public review is meaningless if the public does not know that such documents exist or that the agency has taken final action on the decision analyzed in those documents.[6]

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

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[6] This case is distinguishable from *WildEarth Guardians v. Jewell*, Case no. 16-cv-605, *20-21 (D.N.M. February 16, 2017), which challenged a mining plan for the El Segundo Mine on similar grounds in the District of New Mexico. There, the court found that OSM could rely on the public involvement process for the leasing EA to meet its obligation for public involvement because of the "close temporal proximity" between the EA and mining plan approval where the EA was "issued just months" prior to approval of the mining plan. This is not the case here where there is a five-year gap between the Leasing EIS and approval of the Mining Plan.

Moreover, OSM cannot discharge NEPA's public participation requirement through the State's public process for the SMCRA permit. Although the Mine's SMCRA permit application was available for public comment, OSM 1529, the availability of State documents for public review does not satisfy OSM's *independent* obligation to inform the public about the potential environmental impacts of mine expansion and solicit meaningful public input as part of the agency's NEPA process. SMCRA explicitly prohibits OSM from delegating NEPA compliance to the State. 30 C.F.R. § 745.13(b). Nor does the record contain any indication that the State's permitting decision put the public on notice that Black Thunder Mine's proposed expansion was subject to federal oversight and approval or that OSM was planning to adopt an EIS prepared by a different agency that would serve as the sole basis for OSM's decision to approve the Mining Plan. And involving the public in OSM's NEPA process is one of NEPA's requirements. 40 C.F.R. § 1500.2(d); *see also Or. Nat. Desert Ass'n*, 625 F.3d at 1120 (holding that "public scrutiny is essential to implementing NEPA."). For these reasons, OSM cannot rely on the State's public notice of its permitting process to satisfy the federal agency's NEPA obligations.

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

Where a federal agency adopts an EA or EIS under NEPA, the agency is required to provide "appropriate supporting documentation, that [the adopted EA or EIS]

adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c). Such supporting documentation "must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." *Id.* In addition, when an agency relies on existing NEPA documents to comply with its obligations under the statute, the agency is required to supplement existing NEPA analyses when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii).

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

Here, OSM met none of these criteria when it adopted the Leasing EIS to support the Mining Plan approval. Although OSM states that it "has independently reviewed the

EIS and finds that OSMRE's comments and suggestions have been satisfied," and the EIS complies with the relevant regulations, the record is devoid of any evidence regarding: (1) OSM's "comments and suggestions" regarding the EIS, (2) OSM's "independent review" of the EIS, or (3) whether there is any new information pertaining to environmental impacts in the five years since BLM completed the EIS. *See generally* OSM 1530-31 (Statement of NEPA Adoption), OSM 1520-25 (OSM's recommendation for mining plan approval). OSM neither cites to pertinent page numbers in the Leasing EIS nor describes the EIS's analyses and conclusions about mining's environmental impacts. Importantly, in the Leasing EIS BLM explicitly recognized that additional analyses of mining's environmental impacts would occur at the mining plan decision phase when OSM received the proposed mining plan from the lessee. OSM 122. Moreover, in upholding the Leasing EIS underlying the Black Thunder Mining Plan, this Court recognized that "future activities . . . are subject to multiple considerations that will more than likely fill the analytical voids" not covered in the EIS. *WildEarth Guardians v. BLM*, 120 F. Supp. 3d 1237, 1265 (D. Wyo. 2015). *See also WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (in upholding the West Antelope Leasing EIS, recognizing that additional analyses of environmental impacts would occur at the mining plan stage, when OSM authorizes mining through approval of a mining plan).

In *WildEarth Guardians I and II*, OSM produced similar conclusory documents as FONSIs stating the agency had independently reviewed adopted EAs, but pointing to no

record evidence demonstrating such a review had occurred. Both courts found that this practice did not comply with NEPA. In *WildEarth Guardians II*, the court recognized that conclusory language about an independent review failed to explain how OSM took a hard look at the environmental impacts of the challenged mining plan:

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

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

that if the basis for an agency's decision is not discernable from the record, "[t]he reviewing court should not attempt itself to make up for such deficiencies . . . [it] may not supply a reasoned basis for the agency's action that the agency itself has not given.") (citation omitted).

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

III. OSM VIOLATED NEPA'S SUPPLEMENTAL ANALYSIS REQUIREMENT

In addition to the NEPA violations discussed above, OSM further violated NEPA because it authorized mining without assessing whether the air quality or greenhouse gas ("GHG") analyses in the 5-year-old EIS needed to be supplemented in light of new circumstances or information "relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). In the five years between BLM's issuance of the leasing EIS and OSM's adoption of that EIS without further analysis, EPA promulgated a new one-hour standard for short-term exposure to nitrogen dioxide ("NO_2") and strengthened the annual standard for $PM_{2.5}$. Also in the intervening period, new tools became available for measuring the environmental and social impacts of GHG emissions from mining and coal combustion. Thus, when authorizing mining on the federal leases through the Mining Plan approval, OSM could not simply rely on the

leasing EIS that predated these new developments without assessing *on the record* whether and how these new developments change the conclusions about environmental impacts that BLM reached in the 2010 EIS.[7]

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

An agency's NEPA duties do not end when it completes its initial environmental analysis and approves a federal project. NEPA imposes an ongoing obligation for agencies to consider and address new information, even after a proposed action has received initial approval. Where "significant new circumstances or information relevant to environmental concerns and bearing on" an action or impacts analyzed in an existing EIS arise, the agency "[s]hall prepare supplements" to the NEPA document. 40 C.F.R. § 1502.9(c)(1).

As the Supreme Court has explained, "[i]t would be incongruous with . . . the Act's manifest concern with preventing uninformed action, for the blinders to adverse

[7] This Court upheld BLM's climate and air quality analyses in the 2010 EIS. *WildEarth Guardians v. BLM*, 120 F. Supp. 3d 1237 (D. Wyo. 2015). Guardians is not attempting, with its challenge to the 2015 Black Thunder Mining Plan approval, to re-litigate the adequacy of the air quality and climate analyses in the 2010 EIS, recognizes that the District of Wyoming has settled these claims as to the adequacy of the Leasing EIS, and has properly appealed to the Tenth Circuit to resolve a single issue related to the *WildEarth Guardians v. BLM* decision. This Court's ruling on the Leasing EIS, however, does not categorically shield from scrutiny OSM's decision to adopt the 2010 EIS without providing an assessment on the record that the analyses and conclusions in that document pertaining to the environmental impacts of mining *remain adequate five years later*. *See* 43 C.F.R. § 46.120(c) (requiring "supporting documentation" for decisions to adopt an existing NEPA analysis and that supplementation is not necessary).

environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Marsh v. ONRC*, 490 U.S. 360, 371 (1989). Thus,

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

Id. at 374; s*ee also Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 557 (9th Cir. 2000) (recognizing that agencies "must be alert to new information that may alter the results of its original environmental analysis, and continue to take a hard look at the environmental effects of [its] planned action.") (*quoting Marsh,* 490 U.S. at 374). Moreover, OSM "has a *continuing duty* to gather and evaluate new information relevant to the environmental impact of its actions." *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1023 (9th Cir. 1980) (emphasis added). As part of this duty, OSM must assess "the extent to which the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS." *Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984).

The Tenth Circuit has articulated a two-part test to determine whether an agency violated NEPA's supplemental analysis requirement. First, the court considers whether the agency took a "hard look" at the new information to determine its significance. *SUWA v. Norton*, 301 F.3d 1217, 1238 (10th Cir. 2002), rev'd on other grounds. If an

agency concludes that new information is not significant and supplementation is not required, the agency must "provide[] a reasoned explanation" for this conclusion. *Id*. "The relative significance of new information is a factual issue," and the court reviews an agency's assessment of (or lack of assessment of) the significance of new information "under the arbitrary and capricious standard." *Dombeck*, 185 F.3d at 1178. Second, if the court determines that the agency took a hard look at the new information and determined supplementation was not necessary, it then reviews the agency's decision not to prepare a supplemental environmental analysis under the same arbitrary and capricious standard. *SUWA v. Norton*, 301 F.3d at 1238. Where an agency engages in a review of new information,[8] it must adequately document its decision process on the record by "review[ing] the proffered supplemental information, evaluat[ing] the significance—or lack of significance—of the new information, and provid[ing] an explanation for its decision not to supplement the existing analysis." *Dombeck*, 185 F.3d at 1178.

Finally, part of the agency's assessment of the need for supplementation includes consideration of whether the existing NEPA analysis might be too old to provide a basis for reasoned decisionmaking. The Council on Environmental Quality's ("CEQ's") guidance[9] on the issue of stale NEPA analyses notes that "EISs that are more than 5 years

[8] As explained above, because OSM did not provide any opportunities for public involvement related to the Black Thunder Mining Plan, Guardians was precluded form offering any new information to the agency.

[9] The Tenth Circuit "consider[s] [the CEQ Forty Questions Guidance] persuasive authority offering interpretive guidance" regarding the meaning of NEPA and the

old should be carefully reexamined to determine if the criteria in Section 1509.2 compel preparation of an EIS supplement." Forty Questions, 46 Fed. Reg 18,026, 18,036 (March 23, 1981). Although the NEPA regulations allow OSM to adopt existing NEPA analyses to avoid duplication of effort, the agency cannot satisfy its NEPA obligation where the adopted document does not include specific information about the environmental impacts of the proposed action, or where the specific conditions underlying the prior analysis have since changed. *Pennaco Energy, Inc. v. USDOI*, 377 F.3d 1147, 1154 (10th Cir. 2004).

B. OSM Ignored Significant New Information Relating to Air Quality and GHG Impacts.

OSM approved the Black Thunder Mining Plan, not on the basis of a newly drafted EA or EIS that might have considered the latest information pertaining to air quality and climate, but rather pursuant to a "Statement of NEPA Adoption and Compliance" that included an unsupported determination that the 2010 EIS "adequately describes the potential direct, indirect, and cumulative impacts that may result from the approval of this mining plan." OSM 1401. The Statement of NEPA Adoption supporting approval of the Mining Plan is not a new NEPA analysis nor does the Statement include documentation of any efforts by OSM to assess whether supplementation of the 2010 EIS was necessary before approval of the Mining Plan. Although the Tenth Circuit has

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implementing regulations." *New Mexico ex rel. Richardson*, 565 F.3d at 705 n.25. (citation omitted).

recognized that an agency may use a non-NEPA document to determine whether supplementation of an existing NEPA document is required, it has also held that the non-NEPA document must thoroughly document the agency's review of new information, evaluation of its significance, and reasoning leading to the decision not to perform supplemental analyses. *Pennaco*, 377 F.3d at 1162; *Dombeck*, 185 F.3d at 1178. OSM's Statement of NEPA Adoption does not meet this standard.

The first step in the Court's review of Guardians' NEPA supplementation claim is to determine whether OSM adequately assessed the significance of new information relating to air quality and GHG impacts. *SUWA v. Norton*, 301 F.3d at 1238; *Dombeck*, 185 F.3d at 1178. However, as discussed in Section II above, OSM did not make any efforts "to gather and evaluate new information relevant to the environmental impact of its actions," *Gribble,* 621 F.2d at 1023, either of its own volition or by providing any public process whereby Guardians could have provided this information to the agency as part of its decisionmaking process. Accordingly, on this ground the Court can remand the Mining Plan decision to the agency to identify whether there is any potentially significant new information or changed circumstances since BLM issued the 2010 EIS bearing on the impacts of mining the leases. Alternatively, the Court can review the new information pertaining to air quality and climate impacts discussed below to reach a determination that this new information warranted supplementation of the 2010 EIS.

1. Promulgation of more stringent air quality standards for two pollutants between 2010 and 2015 required OSM to supplement the EIS's air quality analysis.

In this case, new and revised air quality standards promulgated between BLM's completion of the 2010 EIS and OSM's approval of the Mining Plan in 2015 constitute significant new information about the affected environment (air quality) that would be impacted by mining the federal leases. Because the EIS predates EPA's promulgation of the revised annual $PM_{2.5}$ standard and the new one-hour NO_2 standard, there is no analysis of mining's impacts to these current emissions thresholds in the EIS. In an analogous challenge to mining plan approvals in *WildEarth Guardians I*, the court held that OSM violated NEPA's supplementation requirement where the agency failed to supplement the existing environmental analyses it relied on with an analysis of mining's air quality impacts under recently revised air quality standards:

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

WildEarth Guardians I, 104 F. Supp. 3d at 1228. In upholding the 2010 Leasing EIS, this Court also recognized that the air quality analyses in the EIS were "not the end of the activities that will be required" for subsequent mining to proceed, that subsequent analyses "will more than likely fill the analytical voids" asserted by the petitioners, and recognized that "[n]ew information, new study, new analytical tools, new modeling, *or even new regulatory schemes* may alter the landscape that undergirds this particular

FEIS." *WildEarth Guardians v. BLM*, 120 F. Supp. 3d at 1265 (emphasis added). Yet OSM has not filled any of the EIS's "analytical voids" here. There is no evidence in the record showing OSM made any effort to assess mining's air quality impacts under "new regulatory schemes" that strengthened $PM_{2.5}$ and NO_2 emission standards. Instead, OSM simply adopted the Leasing EIS, without assessing the need for supplementation in light of the new, more stringent standards. Such uninformed action violated NEPA.[10]

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

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

[10] As discussed in Section II.B above, OSM cannot rely on State permitting documents to satisfy its NEPA obligation. Even if OSM could rely on State permitting documents, these documents do not include the requisite analyses. The State permitting documents do not include any analysis of $PM_{2.5}$ or NO_2 impacts from mining. *See* OSM 1580-93 (2014 State Decision Document for Permit).

According to EPA, health effects associated with short-term exposure to $PM_{2.5}$ include "aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions and emergency department visits), changes in lung function and increased respiratory symptoms, as well as new evidence for more subtle indicators of cardiovascular health." 71 Fed. Reg. 61,144, 61,152 (Oct. 17, 2006). In 2006, EPA revised the $PM_{2.5}$ NAAQS, limiting 24-hour concentrations to no more than 35 $\mu g/m^3$, and retaining the 15 $\mu g/m^3$ limit for annual concentrations. *Id*. at 61,144. In 2012, EPA proposed lowering the annual standard to 12 $\mu g/m^3$, a proposal which became final in 2013. 78 Fed. Reg. 3,086 (Jan. 15, 2013).

Motor vehicle emissions and combustion processes from coal mining activities generate $PM_{2.5}$ emissions. 71 Fed. Reg. 61,144, 61,146. Therefore, OSM was required to evaluate air quality impacts from future $PM_{2.5}$ emissions caused by mine expansion.

Although the 2010 EIS had analyzed air quality impacts from mining's $PM_{2.5}$ emissions, EPA's strengthening of the annual $PM_{2.5}$ standard in 2013 represents new information relevant to air quality impacts that post-dates the 2010 Leasing EIS. Moreover, in the 2010 EIS, BLM's cumulative impacts analysis unequivocally demonstrated that additional coal development would result in two-fold exceedances of the annual $PM_{2.5}$ standard in place at that time. AR 682. Where future coal mining was predicted to result in exceedances of a *less* stringent air quality standard, and the standard subsequently becomes *more* stringent, OSM must supplement BLM's analysis of

cumulative air quality impacts from mining's $PM_{2.5}$ emission levels in light of the more stringent standard to determine whether air quality impacts will be significant. *See WildEarth Guardians I*, 104 F. Supp. 3d at 1228. Accordingly, OSM cannot rely on the 2010 EIS's conclusions regarding air quality impacts from $PM_{2.5}$ emissions because EPA changed, *i.e.* strengthened, the annual standard for $PM_{2.5}$. NEPA requires that OSM determine whether the revised annual standard constitutes significant new information requiring supplementation of the 2010 EIS. OSM's failure to do so was arbitrary.

b. EPA promulgated a new one-hour NO_2 standard in 2010.

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

Overburden blasting at Black Thunder Mine produces NO_2 emissions in the form of orange clouds, and is one of the primary sources of NO_2 emissions in the Powder River Basin. AR 357. Railroad locomotives used to haul coal form the Mine are also sources of NO_2 emissions. *Id*. EPA finalized the one-hour NO_2 standard shortly before BLM completed the 2010 EIS, therefore it included no analysis of the degree to which blasting activities at the mine would affect NO_2 concentrations on an hourly basis. Because OSM must ensure its mining plan decisions comply with NEPA, 30 C.F.R. § 745.13(b), and the NO_2 discussion in the Leasing EIS did not evaluate air quality impacts in the context on the one-hour NO_2 standard, OSM was required to analyze the impacts to air quality from one-hour NO_2 emissions prior to approving the Mining Plan.

Here, the one-hour NO_2 standard became final five years *before* OSM took any action on the Black Thunder Mining Plan. Had the agency complied with its "continuing duty to gather and evaluate new information relevant to the environmental impact of its actions," it would have been aware of this changed circumstance in the intervening years since BLM issued the EIS and could have analyzed the air quality impacts from short-term NO_2 emissions in light of this changed circumstance to inform its decision on the Black Thunder Mining Plan. *Gribble,* 621 F.2d at 1023. OSM's failure to consider whether the new NO_2 standard constituted "significant new information" warranting supplementation of the 2010 EIS was arbitrary.

2. OSM failed to use available tools for analyzing mining's GHG emissions.

a. GHG emissions from mining.

Climate change is occurring and currently impacting natural resources, including those under the jurisdiction of the Department of the Interior. OSM 694. This is largely due to the release of greenhouse gases ("GHGs") by humans, including by fossil fuel development.[11] OSM 693. "Continued greenhouse gas emissions at or above current rates would cause further warming and induce many changes in the global climate system during the 21st century that would be very likely to be larger than those observed during the 20th century." *Id*. (quoting report of Intergovernmental Panel on Climate Change ("IPCC")). In the western United States, such changes and impacts will include an increase in the amount and seasonal variability of precipitation; an expansion of some populations of plants, invasive species, and pests; an increase in the frequency, severity, and extent of fires; and an overall reduction in biodiversity and sensitive species, including in particular species relying on high-elevation habitats, for which extinction is probable. OSM 694-95.

Carbon dioxide emissions are the leading cause of climate change. OSM 698. Coal-fired power plants are the "principal sources of anthropogenic GHG emissions" and

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

were responsible for 33 percent of U.S. CO_2 emissions in 2006. OSM 697. As the largest producer of coal in the U.S., coal mining in the Powder River Basin is linked to more GHG emissions than *any other activity* in the United States. *Id*. According to the BLM, "combustion of Wyoming PRB coal to produce electric power was responsible for about 12.8 percent of the estimated U.S. CO2 emissions in 2008." OSM 698.

The lease that will be mined under the challenged Mining Plan has the potential to yield over 100 million tons of coal. OSM 1522. When this coal is burned, it will release approximately 354.4 million tons of CO_2 into the atmosphere. OSM 701.

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

In the Leasing EIS, BLM did not go beyond estimating GHG emissions from mining and coal combustion to actually analyzing the impacts of these emissions because it claimed there were no adequate tools available in 2010 to measure the impacts from these GHG emissions. OSM 695. This Court upheld as adequate BLM's estimates of GHG emissions from mining and burning coal on the Wright Area Leases using "then-available information." *WildEarth Guardians v. BLM*, 120 F. Supp. 3d at 1272. However, this Court also recognized that "today the analysis likely could have been better given the development and acquisition of new knowledge and continuing scientific study," suggesting that what constituted an adequate analysis of GHG impacts in 2010 would not necessarily be adequate for analyzing GHG emissions levels five years later. *Id*. at 1272-73. This acknowledgement is consistent with the purpose of NEPA's

supplementation requirement: that an agency remain "alert to new information that may alter the results of its original environmental analysis." *Marsh,* 490 U.S. at 374. Accordingly, OSM does not get a free pass from complying with NEPA for its mining plan decision simply by adopting an EIS that a court determined complied with NEPA for a different agency decision made five years earlier. *Marsh*, 490 U.S. at 373. Excusing OSM from complying with NEPA's supplementation requirement in its approval of the mining plan simply because the EIS was previously upheld as adequate to support BLM's leasing decision would render NEPA's supplementation requirement a nullity.

Here, there is no record evidence showing that OSM made any efforts to determine whether supplementation of the EIS's GHG analysis was necessary. Yet there were advances in both policy and analysis specifically related to federal agencies' consideration of GHG impacts that OSM could have used to make an informed decision about whether supplementation of the Leasing EIS was necessary. First, between the time BLM completed the Leasing EIS in 2010 and OSM's approval of the Mining Plan in 2015, the Council on Environmental Quality ("CEQ") issued guidance to agencies for considering GHG emissions and climate change in NEPA reviews.[12] The CEQ Guidance

[12] CEQ, Final Guidance for Federal Department and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51,866 (Aug. 5, 2016); available at: https://www.obamawhitehouse.archives.gov/administration/eop/ceq/initiatives//nepa/ghg-guidance.pdf (hereafter, "CEQ Climate Guidance") (last viewed April 19, 2017). The Court may take judicial notice of this report under Federal Rule of Evidence 201. *See New Mexico*, 565 F.3d at 702 n.21-22 (taking judicial notice of information on agency

signaled a shift from the types of general conclusions agencies had been including in pre-2011 NEPA documents stating that "emissions from a proposed federal action represent only a small fraction of global emissions" to "use of appropriate tools and methodologies for quantifying GHG emissions and comparing GHG quantities across alternative scenarios." CEQ Climate Guidance at 11. There is no indication in the record that the CEQ Climate Guidance informed OSM's decisions to adopt the Leasing EIS and not perform any additional analysis.

Second, although current climate models still cannot predict local impacts to climate from a particular GHG emission source, a tool was available (prior to OSM's adopting of the Leasing EIS and approval of the Mining Plan) for evaluating the environmental costs of project-specific GHG emissions, even where those emissions make up only a small fraction of national or global emissions. The social cost of carbon protocol ("SCC"), created by a working group comprised of several federal agencies and scientists, is one generally accepted approach to evaluating the impacts of a proposed action's GHG emissions. *High Country Conserv. Advocates v. USFS*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014). The SCC, first released in 2010 and updated in May 2013, is "designed to quantify a project's contribution to costs associated with global climate change" by estimating the incremental dollar value of damages associated with an incremental increase in GHG pollution. *Id*. It is intended to include changes in net

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websites). Notably, the Guidance is intended to "facilitate compliance with existing NEPA requirements"; *i.e.*, CEQ's NEPA regulations at 40 C.F.R. §§ 1500-1508. *Id.* at 1.

agricultural productivity, human health, property damages, and the value of ecosystem services, all of which climate change can degrade.[13] Although the social cost of carbon was initially designed as an analytical tool to assist agencies with rulemaking, EPA has recommended that agencies use the social cost of carbon in NEPA reviews. *High Country*, 52 F. Supp. 3d at 1190.[14] The SCC Technical Support Document also discusses three additional "integrated assessment models" that agencies can use to determine the impacts of a proposed action's GHG emissions levels.[15] All of this new information regarding the various models available for a more rigorous analysis of mining GHG impacts was available to OSM prior to its adoption of the Leasing EIS and decision to approve the Black Thunder Mining Plan. Because this information "presents a seriously different picture of the likely environmental consequences of the proposed action not adequately envisioned by the original EIS," OSM should have prepared a supplement to

[13] *See* EPA, *The Social Cost of Carbon*, available at https://www.epa.gov/climatechange/social-cost-carbon (last viewed April 19, 2017). *See also* Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 Colum. L. Rev. 167, 171-73 (Jan. 2014) (describing origins of interagency agreement on the social cost of carbon).

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

[15] Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis*, at 5 (2010), available at https://www.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf.

the Leasing EIS addressing the impacts of GHG emissions form mining and coal combustion. *Wis. v. Weinberger*, 745 F.2d at 470.

c. Withdrawal of the CEQ Guidance and the SCC do not excuse OSM from failing to supplement the EIS.

On March 28, 2017, President Trump's Executive Order 13,783 officially disbanded the Interagency Working Group and withdrew its technical support documents that had developed the SCC.[16] The Order also withdrew CEQ's guidance regarding consideration of GHG impacts in NEPA documents.[17] However, withdrawing these documents for political reasons does not invalidate either the climate science that prompted the need for these policies and analytical methods in the first place or federal agencies' obligation under NEPA to analyze a project's environmental impacts. Nor do these withdrawals moot Guardians' claim that OSM ignored significant new information about GHG impacts and analysis that required OSM to supplement the Leasing EIS.

The recent withdrawal of CEQ's Climate Guidance does not change the fact that using available models to calculate the social cost of GHG emissions is consistent with—and also required by—NEPA obligations. As CEQ explained in its withdrawal, the "guidance was not a regulation," and "[t]he withdrawal of the guidance does not change any law, regulation, or other legally binding requirement." 82 Fed. Reg. 16,576. In other

[16] Exec. Order. No. 13,783 § 5(b), 82 Fed. Reg. 16,093 (Mar. 28, 2017).
[17] *Id.* § 3(c).

words, when the Guidance recommended the appropriate use of the SCC in EISs,[18] it was simply explaining that estimating the social cost of GHGs is consistent with longstanding NEPA regulations and case law, all of which are still in effect today. Therefore, although the CEQ Climate Guidance provided a useful framework for agencies to better understand how to meet their NEPA compliance obligations with respect to analyzing GHG impacts, the Guidance did not alter any of NEPA's requirements nor create any additional obligations that agencies did not already have under NEPA.

Withdrawal of technical support documents that had developed the SCC also does not moot Guardians climate supplementation claim or absolve OSM of the responsibility to use "existing creditable scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse [environmental] impacts." 40 C.F.R. § 1502.22(b)(1). The Executive Order withdrew the SCC documents for political reasons.[19] There is no discussion in the Executive Order undermining the credibility of the science that formed the basis of the SCC; therefore, the SCC remains a method for

[18] *See* Revised Draft Guidance at 16 (December 2014), available at https://obamawhitehouse.archives.gov/sites/default/files/docs/nepa_revised_draft_ghg_guidance_searchable.pdf (last visited April 20, 2017) (stating that "[w]hen an agency determines it appropriate to monetize costs and benefits, then, although developed specifically for regulatory impact analyses, the Federal social cost of carbon, which multiple Federal agencies have developed and used to assess the costs and benefits of alternatives in rulemakings, offers a harmonized, interagency metric that can provide decisionmakers and the public with some context for meaningful NEPA review."); *see also* Final Guidance at 33 n.86.

[19] Exec. Order. No. 13,783 § 5(b) (stating the SCC documents are "no longer representative of governmental policy.").

assessing GHG impacts that is "generally accepted in the scientific community." *Id*. The SCC and the other integrated assessment models for evaluating GHG impacts were all available to OSM at the time it was going through the Mining Plan approval process, and the agency could have used any of these existing models to supplement the GHG impacts analysis in the Leasing EIS. Instead, OSM did nothing.

CONCLUSION

For the reasons stated above, Guardians respectfully requests that this court (1) declare that Federal Defendants' approval of the Black Thunder Mining Plan violated NEPA, and (2) vacate Federal Defendants' approval of the Black Thunder Mining Plan until such a time as they have demonstrated compliance with NEPA.[20]

Respectfully submitted on this 21st day of April 2017,

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[20] As discussed above, if the underlying coal lease is void as a matter of law because it was approved by a BLM staffer who lacked delegated authority to effectuate the approval, then the subsequent Mining Plan for that lease is also void as a matter of law, providing an independent basis for vacatur of the Mining Plan.

CERTIFICATE OF WORD LIMIT COMPLIANCE

Pursuant to Local Rule 83.6(c) and Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, I hereby certify that this Opening Brief contains 11,451 words. I relied on my word processing program, Microsoft Word, to obtain this word count.

/s/ Samantha Ruscavage-Barz

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opening Brief and attached exhibit are being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record, this 21st day of April, 2017.

/s/ Samantha Ruscavage-Barz