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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WILDEARTH GUARDIANS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:16-CV-00167-ABJ
	)	
RYAN ZINKE, in his capacity as U.S. Secretary of the Interior, U.S. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT and the U.S. DEPARTMENT OF INTERIOR,	)	
	)	
Respondents,	)	
	)	
STATE OF WYOMING and THUNDER BASIN COAL Company, LLC,	)	
	)	
Intervenor-Respondents.	)	

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INTRODUCTION

As sure as the sun will rise, when the federal government makes a decision related to coal mining, WildEarth Guardians will take issue with it. Indeed, it is a foundational principle of their promotional materials. By their own words, WildEarth Guardians' mission is to end the mining of coal in the Powder River Basin.[1] Here, they attempt to advance that position, irrespective of years of hard work by dedicated public servants and well over a thousand pages of environmental analysis. Their position is ideological and not based in the law.

In this case, WildEarth Guardians tries to get a second bite at the apple. They challenged the Bureau of Land Management's decision to lease the coal, and they lost. Now, they have supposedly identified deficiencies committed by the Office of Surface Mining, which provides WildEarth Guardians the opportunity to take that second bite. These arguments lack merit. The employees of the Bureau of Land Management performed an extensive analysis. This Court endorsed that analysis. OSM reasonably relied upon it. Respectfully, this Court should deny WildEarth Guardians' arguments as a result.

[1] http://www.wildearthguardians.org/site/PageServer?pagename=priorities_climate_energy_coal_powder_river_global_warming#.WSWY9evyvRY (last visited May 24, 2017).

STATEMENT OF FACTS

I. Statutory and Regulatory Framework

A. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) establishes a process that federal agencies use to consider the environmental consequences of their actions. *See* 42 U.S.C. §§ 4321-4370h. In particular, NEPA requires federal agencies to prepare a detailed "environmental impact statement" (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). An EIS must include a "detailed [written] statement" concerning "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided." *Id*. An EIS should inform the decision-maker and the public of reasonable alternatives that are designed to minimize the adverse impacts or enhance the quality of the environment. *Id*.; *see also* 40 C.F.R. §§ 1502.1, 1508.11. That said, while NEPA ensures informed public decision-making, NEPA does not require an agency to arrive at a particular decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). 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." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004).

An EIS must discuss the following: (1) the environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposed action be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C). However, "[e]ven as to impacts that are sufficiently likely to occur such that they are reasonably foreseeable and merit inclusion, the FEIS need only furnish such information as appears to be reasonably necessary under the circumstances for evaluation of the project." *Wyoming v. U.S. Dep't of Agriculture*, 661 F.3d 1209, 1251 (10th Cir. 2011) (citation omitted); 40 C.F.R. § 1500.1(b) ("Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.").

An agency's preparation of an EIS ensures that the agency has carefully considered 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*.

When an agency becomes aware of "significant new circumstances or information relevant to environmental concerns" on an action or impacts analyzed in an EIS, the agency must prepare a supplemental EIS. 40 C.F.R. § 1502.9(c)(1). But NEPA is 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. "[E]very change [to a proposed action] however minor will not necessitate a new substantive analysis and repetition of the EIS process. To make such a requirement would lead agencies into Xeno's paradox, always being halfway to the end of the process but never quite there." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009). Also, the agency's statutory jurisdiction circumscribes the scope of an agency's analysis under NEPA: "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. *Pub. Citizen*, 541 U.S. at 770.

The Council on Environmental Quality (CEQ) has promulgated regulations to guide federal agencies 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). And "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). This adoption procedure is appropriate in "situations in which two or more agencies had an action relating to the same project; however, the timing of the actions was different." CEQ Final Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34265 (July 28, 1983). That is the precise situation here.

Similarly, the Department of the Interior's NEPA regulations provide that agencies within the Department "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). 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).

B. The Process for Leasing Federal Land to Mine Coal

The Mineral Leasing Act, 30 U.S.C. §§ 181-196, and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, prescribe the process for

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

Next, a successful bidder prepares a mine plan and submits the plan to the Office of Surface Mining (OSM). 30 U.S.C. § 207(c); 30 C.F.R. § 746.11(a). The mine plan must assure compliance with federal law, including the Surface Mining Control and Reclamation Act. 30 C.F.R. § 746.13. OSM then recommends to the Secretary of the Interior whether to approve or disapprove the mine plan. *Id*. As part of this process, OSM must comply with NEPA and must base its recommendation to the Secretary of the Interior on information that the agency prepared in compliance with NEPA. *Id*. "An approved mine plan shall remain in effect until modified, cancelled or withdrawn[.]" 30 C.F.R. § 746.17(b).

In Wyoming, the mine operator must also obtain two permits from Wyoming's Department of Environmental Quality (DEQ). The operator must obtain a permit to mine from DEQ's Land Quality Division and an air quality permit from

DEQ's Air Quality Division. (OSM 15). Once the Secretary of the Interior approves the mine plan, the applicant can begin operations under the terms of the plan. 30 C.F.R. § 746.17(b).

II. The Black Thunder Mine and the Lease

The Black Thunder mine is located in Campbell County, Wyoming, in the Powder River Basin, the most productive source of coal in the United States. (*See* OSM 696, 1520). The Black Thunder mine has been in operation since 1978. (OSM 1521). In 2005, the company that operates the Black Thunder mine submitted an application to the Bureau to lease federal coal reserves in an area of land adjacent to the existing Black Thunder mine. (OSM 105). The proposed lease would extend the life of the mine by opening more coal reserves to mining once the existing, recoverable coal is extracted. (*See id.*). Because the lease would merely maintain existing operations at the Black Thunder mine for a longer period of time, as opposed to increasing the volume of existing mining, it is referred to as a "maintenance" lease. (*Id.*).

III. The 2010 EIS and Public Participation

A. The Environmental Impact Statement

On July 3, 2007, the Bureau published a notice of intent to prepare an EIS to, among other things, analyze the anticipated impacts from leasing the Black Thunder maintenance tract. (OSM 128). Later that month, the Bureau held a public scoping

meeting in Gillette, Wyoming, to obtain public input on issues associated with leasing the tract. (*Id.*). On June 26, 2009, after two years of study, the Bureau published a notice of availability of a draft EIS and opened the public comment period. (OSM 14). One month later, the agency held a public hearing in Gillette to receive public input on the draft EIS and on the fair market value and maximum economic recovery of the proposed lease. (*Id.*). During the 60-day comment period, the Bureau received written comments from 15 individuals, agencies, businesses, and organizations, as well as hundreds of emails from other interested parties. (*Id.*). The Bureau then prepared the final EIS, taking into account and responding to the comments it received. (*See* OSM 130).

In the thirteen hundred-page final EIS, the Bureau considered the direct, indirect, and cumulative impacts of the proposed Black Thunder maintenance tract. The agency examined impacts to air and water quality, climate change, visual resources, socio-economics, and transportation, among others. (OSM 1-1342). The EIS reflects years of study, during which the public was afforded opportunities to participate in the decision-making process. The Bureau conducted this effort to satisfy NEPA's directive of ensuring informed decision-making and promoting public participation in the process.

B. The Record of Decision

Following publication of the final EIS and completion of another public comment period, the Bureau issued a Record of Decision for the Black Thunder maintenance lease. (OSM 1532-33). In the Record of Decision, the Bureau explained the rationale behind its decision to offer the tract in question for lease. (*Id.*). In short, the Bureau found that it was in the public interest to offer this tract for competitive sale. (*Id.*). In so doing, the Bureau selected the "preferred alternative," which was to hold a competitive lease sale for the Black Thunder tract and issue a lease to the successful bidder, rather than the "no action alternative," which would have rejected the lease application outright. (*Id.*).

C. WildEarth Guardians' Challenge to the EIS

WildEarth Guardians and others brought three separate lawsuits challenging the Bureau's decision to lease the maintenance tract. *See WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d 1237 (D. Wyo. 2015). In these consolidated cases, the plaintiff groups alleged numerous violations of law under a variety of federal statutes, including NEPA. *Id*. On October 17, 2015, this Court issued a detailed opinion that rejected all of the arguments advanced by the various plaintiff groups *Id.* In so doing, this Court acknowledged the thoroughness of the EIS that the Bureau prepared prior to approving the Black Thunder mine lease. (*Id*.). WildEarth Guardians and others appealed that decision to the United States Court of Appeals

for the Tenth Circuit, where the issues have been fully briefed and argued. The parties await a decision.[2]

IV. The Mine Plan and the Challenged Plan Modification

In 2014, Thunder Basin Coal Company, LLC requested that DEQ approve a modification to the existing Black Thunder mine plan. (OSM 1528). The proposed modification would extend surface mine operations into roughly 1,000 acres of federal land covered by the existing lease. (OSM 1518-19). Wyoming DEQ approved this permit revision on December 12, 2014. (OSM 1528). The Mineral Leasing Act requires the Secretary of the Interior to approve such a revision before it goes into effect. 30 U.S.C. §§ 181 through 196. Prior to issuing such an approval, the Secretary must also ensure compliance with NEPA. 42 U.S.C. §§ 4321 through 4370h.

[2] WildEarth Guardians failed twice in their attempts to challenge the Bureau's NEPA analysis related to several coal leases in the Powder River Basin. *See WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012), *aff'd, WildEarth Guardians v. Jewell*, 738 F.3d 298, (D.C. Cir. 2013); *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17 (D.D.C. 2014). They also failed in a broader challenge to coal leasing in the Powder River Basin as presently practiced. *WildEarth Guardians v. Salazar*, 783 F. Supp. 2d 61 (D.D.C. 2011). And WildEarth Guardians was not successful in a case attacking a Forest Service NEPA analysis of asserted climate impacts in the United States District Court for the District of Colorado. *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223 (D. Colo. 2011). Most recently, in a similar case involving a coal mine located outside the Powder River Basin, the United States District Court for the District of New Mexico rejected many of the same arguments advanced here. *WildEarth Guardians v. Jewell*, No. 16-cv-605-RJ-SCY, Dkt. No. 85 (D. N.M. Feb. 16, 2017) (unreported).

OSM conducted an independent review of the EIS issued by the Bureau in 2010. (OSM 1530-31). On March 5, 2015, OSM determined that the Bureau's 2010 EIS "adequately address[ed] the impacts of the proposed min[e] plan modification" and adopted the 2010 EIS to fulfill the Secretary's NEPA obligation. *Id*. OSM posted a copy of this decision on the agency's NEPA compliance website.[3] On April 18, 2015, the Secretary approved the modified mine plan. (OSM 1574-75). WildEarth Guardians now challenges the Secretary's decision to approve the modified mine plan. (Dkt. No. 82).

ARGUMENT

I. Standard of Review

NEPA does not have a citizen suit provision, so this Court reviews OSM's final NEPA action under the Administrative Procedure Act. 5 U.S.C. §§ 702, 704; *New Mexico ex rel. Richardson v.BLM*, 565 F.3d 683, 704 (10th Cir. 2009). Under the Administrative Procedure Act, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency actions are presumed valid. *Morris v. NRC*, 598 F.3d 677, 691

[3] https://www.wrcc.osmre.gov/programs/federallands/nepa.shtm (last visited May 24, 2017).

(10th Cir. 2010). Parties challenging agency actions have the burden of proof to show that an action was arbitrary or capricious. *Id.*

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

When reviewing whether an agency acted arbitrarily or capriciously under NEPA, the court asks "whether claimed deficiencies in a [final environmental impact statement] are merely flyspecks, or are significant enough to defeat the goals of informed decisionmaking and informed public comment." *Utahns for Better Transp. v. U.S. Dep't of Trans.*, 305 F.3d 1152, 1163 (10th Cir. 2002). The reviewing court must "simply … ensure that the agency has adequately considered and disclosed the environmental impact of its actions." *Id.* (quoting *Utah Shared Access Alliance v. U.S. Forest Serv.*, 288 F.3d 1205, 1208 (10th Cir. 2002)).

II. The Office of Surface Mining complied with NEPA's procedural requirements.

WildEarth Guardians contends that OSM violated NEPA's procedural requirements in two discrete ways. (Dkt. No. 82 at 19-20). First, WildEarth Guardians asserts that OSM failed to provide sufficient notice to the public when the agency issued its "Statement of NEPA Adoption and Compliance." (*Id*.). And second, WildEarth Guardians claims that OSM failed to sufficiently support the "Statement of NEPA Adoption and Compliance" in the agency's administrative record. These arguments lack merit.

A. NEPA does not require a federal agency to provide the public with notice of its intent to adopt an EIS.

WildEarth Guardians contends that NEPA required OSM to provide notice to the public when the agency issued its "Statement of NEPA Adoption and Compliance." (Dkt. No. 82 at 21-23). WildEarth Guardians is incorrect.

NEPA does not require a federal agency to provide the public with notice of its intent to adopt an EIS. 42 U.S.C. §§ 4321 through 4370h. And NEPA's implementing regulations do not require this either. 40 C.F.R. §§ 1500 through 1518. This is borne out by a plain reading of the statute and the regulations. The legally mandated public participation process takes place during the preparation of an EIS. *Id*. That happened here. *WildEarth Guardians*, 120 F. Supp. 3d 1237. The statute and regulations require no such notice when an agency adopts an EIS.

WildEarth Guardian's brief, which fails to cite to any relevant statutory or regulatory requirement, confirms this statutory and regulatory analysis. WildEarth Guardians only provides two citations to NEPA's implementing regulations, and neither apply here. (Dkt. No. 82 at 22 (citing 40 C.F.R. §§ 1500.2(d) and 1503.4(a)). Section 1500.2(d) is a broad policy statement, rather than a statutory directive tied to the adoption of an EIS. 40 C.F.R. § 1500.2(d). And section 1503.4(a) relates to responding to comments on a draft EIS. 40 C.F.R. § 1503.4(a). Neither provision applies. And in any event, the requirements of 40 C.F.R. §§ 1500.2(d) and 1503.4(a) were met in full when the Bureau prepared the EIS in 2010.[4] OSM adopted this participation as part of its decision. Accordingly, WildEarthGuardians' argument lacks merit.

WildEarth Guardians' reliance on case law is similarly unavailing. Specifically, WildEarth Guardians contends that lawsuits in Colorado and Montana successfully challenged OSM's NEPA process "on similar grounds." (Dkt. No. 82 at 21); *WildEarth Guardians v. U.S. Office of Surface Mining Reclamation & Enforcement* (*WildEarth Guardians I*), 104 F. Supp. 3d 1208 (D. Colo. 2015), *vacated by WildEarth Guardians v. U.S. Office of Surface Mining Reclamation & Enforcement,* 652 F. App'x 717 (10th Cir. 2016); *WildEarth Guardians v. U.S.*

[4] WildEarth Guardians cannot contest the sufficiency of the EIS. This court already considered and rejected WildEarth Guardians' complaints. *WildEarth Guardians,* 120 F. Supp. 3d 1237.

Office of Surface Mining Reclamation & Enforcement (*WildEarth Guardians II*), Nos. CV 14–13–BLG–SPW–CSO, CV 14–103–BLG–SPW–CSO, 2015 WL 6442724 (D. Mont. Oct. 23, 2015). But these cases are distinguishable from the facts before this Court because OSM did not adopt a full EIS prepared by another agency for a maintenance tract in either case. *WildEarth Guardians I*, 104 F. Supp. 3d at 1216-18; *WildEarth Guardians II*, 2015 WL 6442724 at **1-2. In *WildEarth Guardians I*, OSM attempted to conduct a new NEPA process, and in *WildEarth Guardians II*, OSM attempted to base its conclusions on an environmental assessment. *WildEarth Guardians I*, 104 F. Supp. 3d at 1216-18; *Wild Earth Guardians II*, 2015 WL 6442724 at **1-2. Neither of those scenarios happened here.

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

Here, the Bureau prepared an EIS that analyzed and evaluated the environmental consequences of mining within the scope of the lease. (OSM 1-1342). The Bureau received and responded to written comments and comments made at a public hearing. (*See* OSM 14). So, unlike *WildEarth Guardians I*, the NEPA process in this case entailed significant public input. (*Id.*). Moreover, in *WildEarth Guardians I*, the deciding factor was that the Department of the Interior's NEPA regulations required public notice of FONSIs and that the agency failed to provide such notice. 43 C.F.R. § 46.305(c). In the present case, there is no similar requirement that OSM give public notice of its adoption of the EIS. *See* 43 C.F.R. §§ 46.10–46.450. For these reasons, Petitioners' reliance on *WildEarth Guardians I* is misplaced.

In *WildEarth Guardians II*, the operator of a mine in Big Horn County, Montana, applied to **lease** additional land. *WildEarth Guardians II*, 2015 WL 6442724, at **1-2. Rather than prepare an EIS, the Bureau prepared a much shorter environmental assessment that expressly contemplated that OSM would prepare an additional, site-specific NEPA document when the operator applied for permits from OSM and Montana. *Id.* During the time that the operator applied for permits, the operator revised its application several times, so the plan did not reflect what the Bureau reviewed in its environmental assessment. *See id.* at *2. Before finalizing the mine plan, OSM issued a FONSI based on the Bureau's environmental assessment

that expressly provided that more detailed NEPA work still needed to be done. *Id.* OSM failed to provide public notice of its NEPA process, even though the Department of the Interior's NEPA regulations require public notice of FONSIs. *Id.* at **6-7; 43 C.F.R. § 46.305(c). The court found that OSM's failure to provide public notice violated NEPA and that the environmental analysis was not a sufficient "hard look." *WildEarth Guardians II*, 2015 WL 6442724, at **6-7.

Here, by contrast, BLM prepared a more than thirteen hundred-page EIS that analyzed the consequences of mining the tract in question, solicited and received significant public input, and responded to those comments. (OSM 1-1342). OSM then adopted the entire EIS, finding that the EIS adequately analyzed the environmental impacts of the new maintenance tract. (OSM 1530-31). The situation here is utterly different than the one considered in *WildEarth Guardians II*.

In sum, no provision of NEPA or its implementing regulations require OSM to notify the public of its intent to adopt the EIS. That makes sense because public notice cannot be required at every conceivable step of a decision. OSM rationally relied on the significant public outreach conducted when the Bureau developed the EIS and was not required to unnecessarily duplicate that effort. NEPA permitted OSM to adopt the EIS without providing public notice of its intent to do so. Nevertheless, OSM posted a copy of this decision on the agency's NEPA

compliance website, thereby providing public notice.[5] Accordingly, WildEarth Guardians' argument lacks merit.

B. The administrative record shows that the Office of Surface Mining independently evaluated the adequacy of the EIS.

WildEarth Guardians next asserts that OSM's administrative record does not sufficiently support the agency's independent assessment of the adequacy of the Bureau's EIS. (Dkt. No. 82 at 23-27). Not so.

In the agency's "Statement of National Environmental Policy Act (NEPA) Adoption," OSM recognizes the following: (1) that the Bureau's EIS "adequately describes the potential direct, indirect, and cumulative impacts that may result from approval of the min[e] plan modification[;]" (2) that OSM participated in the development of the Bureau's EIS as a cooperating agency; (3) that OSM "independently reviewed the EIS and [found] that [OSM's] comments and suggestions had been satisfied;" (4) that the EIS complies with CEQ's and the Department of the Interior's NEPA regulations; (5) that the permit application package, together with the EIS, "accurately assess the environmental impacts of the proposed min[e] plan;" (6) that "the EIS was subject to public review and comment

[5] https://www.wrcc.osmre.gov/programs/federallands/nepa.shtm (last visited May 24, 2017).

prior to publication of the final EIS;" and (7) that "[c]omments on the EIS were reviewed and analyzed [] as appropriate." (OSM 1530-31).

The administrative record supports OSM's adoption with the following: (1) the Bureau's draft EIS; (2) OSM's comments on the draft EIS; (3) the Bureau's final EIS; (4) OSM's comments on the final EIS; (5) the permit application package; (6) public comment on the EIS; and (7) the Bureau's response to public comment. (*E.g.*, OSM 1-1342) While WildEarth Guardians no doubt would always prefer more analysis, OSM complied with the requirements of NEPA when it adopted the Bureau's comprehensive EIS. *WildEarth Guardians*, 120 F. Supp. 3d at 1265 ("[i]t is an unlikely case where analysis cannot be more thorough or based upon better modeling at some point in time, or simply more comprehensive. [] Perfection is not required."); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 312 (D.C. Cir. 2013) (NEPA "involves an almost endless series of judgment calls, and the line-drawing decisions necessitated by the NEPA process are vested in the agencies, not the courts.") (citation omitted). "The flyspeck analysis petitioners want is not required to fulfill NEPA's goals of informed decision making and informed public comment." *WildEarth Guardians*, 120 F. Supp. 3d at 1266 (citing *WildEarth Guardians v. National Park Serv.*, 703 F.3d 1178, 1183 (10th Cir. 2013)).

This position is buttressed by the fact that WildEarth Guardians provides no evidence that the consequences of extending the life of the Black Thunder mine will

create new environmental impacts not already considered in the EIS. The environmental consequences of the mine plan did not change from 2010 to 2015. Coal will be available to mine, and the mine will continue to operate. The EIS considered, analyzed, and evaluated these consequences. That is sufficient under NEPA.

III. NEPA did not require the Office of Surface Mining to prepare a supplemental analysis for the Black Thunder Mine.

WildEarth Guardians asserts that OSM did not comply with NEPA's substantive requirements because the agency did not prepare a supplemental EIS prior to approving the mine plan modification. (Dkt. No. 82 at 27-45). Specifically, WildEarth Guardians argues that NEPA required OSM to analyze the Environmental Protection Agency's new standards for fine particulate matter ($PM_{2.5}$) and nitrogen dioxide (NO_X) in a supplemental NEPA document. (*Id*.). They also allege that OSM should have considered new "tools" that are available to measure the environmental and social impacts of greenhouse gas emissions from mining and coal combustion. (*Id*.). While these concerns may be reasonable policy choices for a particular administration to consider, NEPA does not compel an agency to do so.

A. The Office of Surface Mining properly scoped its Statement of NEPA Adoption.

WildEarth Guardians contends that NEPA required OSM to prepare a supplemental analysis to address new information related to $PM_{2.5}$, NO_X, and the

social cost of carbon. (Dkt. No. 27-45). In so doing, WildEarth Guardians shows a fundamental misunderstanding of NEPA.

By the time that OSM considered the proposed mine plan modification challenged in this case, the agency's role was already significantly cabined. The Bureau had already determined that the coal at issue should be leased and approved a lease to allow for coal mining. (OSM 1532-37). WildEarth Guardians challenged this lease and failed. *WildEarth Guardians*, 120 F. Supp. 3d 1237. At that point, OSM's job was to prepare, and if necessary modify, a mine plan. 30 C.F.R. Part 746. OSM was not empowered to second guess the Bureau's decision to lease the coal in question. (*Id.*). As a result, OSM's NEPA analysis was limited to the scope of its 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). And because OSM is statutorily required to approve a mine plan that achieves maximum economic recovery of the coal in question, OSM was precluded from disapproving or modifying the mine plan in order to reduce air or CO_2 emissions. *See* 30 U.S.C. § 201(a)(3)(C) ("no mining operating plan shall be approved which is not found to achieve the maximum economic recovery of the coal within the tract."). Put another way, OSM lacked the legal authority necessary to reduce air impacts from the coal mine. In turn, this means that NEPA did not require OSM to prepare a supplemental

NEPA document to consider these environmental effects. *Pub. Citizen*, 541 U.S. at 770. WildEarth Guardians' argument fails as a result.

B. WildEarth Guardians did not identify any "new information" upon which to base a supplement.

Even if OSM possessed the regulatory authority necessary to enact reductions in air and CO_2 emissions, which it does not, NEPA does not require the agency to prepare a supplemental NEPA document because the information identified by WildEarth Guardians is not "new information" sufficient to trigger a supplemental NEPA analysis. (*Contra* Dkt. No. 82 at 31-32).

NEPA's implementing regulations require agencies to prepare a supplemental NEPA analysis only 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). When an agency considers whether this threshold has been met, the agency's "decision to supplement is made in light of an already existing, in-depth review of the likely environmental consequences of the proposed action." *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984). An agency must prepare a supplemental analysis only if the new information is "of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary." *Id*. And the agency's determination of the information's gravity is entitled to deference. *Dep't of Agric*., 661 F.3d at 1258. Here, based on the Bureau's 2010 EIS, and the information

contained in the administrative record, OSM determined that a supplemental analysis was not necessary. (OSM 1530-31). That was sufficient, and this Court should defer to OSM's expert determination. *See Dep't of Agric*., 661 F.3d at 1258.

i. The Air Quality Standards

WildEarth Guardians asserts that NEPA required OSM to conduct a supplemental analysis to address two new air quality standards put in place by EPA after the Bureau's preparation of the 2010 EIS. (Dkt. No. 82 at 33-39). In this case, however, no new information exists about how the mine will operate. Rather, the only new information relevant to impacts to air quality are new standards that will actually **mitigate** the impacts of mining. (*See id.*). Because these new standards do not change how the mine will operate or allow more pollutants to be emitted, NEPA did not require OSM to conduct a supplemental NEPA analysis to evaluate additional environmental impacts. *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d at 1177-78.

An agency's obligation to conduct a supplemental analysis is most important when there will be environmental consequences not already considered by the agency. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989); *Weinberger*, 745 F.2d at 418. The regulations implementing NEPA emphasize this by requiring a supplemental environmental analysis only if there have been "substantial changes in the proposed action" or "significant new circumstances or information relevant to

environmental concerns." 40 C.F.R. § 1502.9. Thus, this process assumes that new information shows that there are additional environmental impacts associated with the action that were not considered by the agency. In this case, the proposed action remains the same. The anticipated impacts to air quality in 2015 resulting from mining the maintenance tract are not greater than the anticipated impacts to air quality in 2010. No new information about the mine existed for OSM to consider. Therefore, OSM did not need to supplement the EIS.

Moreover, WildEarth Guardians offered no new evidence to OSM about the consequences of mining the maintenance tract. The only information WildEarth Guardians provided relevant to air quality impacts was EPA's promulgation of stricter emissions standards. The EIS exhaustively analyzed the impacts the mine would have under the old emissions standards. (OSM 4, 37-44, 64-65, 67, 72, 280-32). Stricter emissions standards mean that the mine will have **fewer** environmental impacts than were considered by the Bureau. Accordingly, OSM did not need to supplement.

And while it is true that, before 2010, no one-hour nitrogen dioxide ambient air quality standard existed, this does not make the EIS's analysis insufficient for OSM's purposes. *See* Primary Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474, 6474 (Feb. 9, 2010). The EIS considered the short-term impacts of nitrogen dioxide in the air. (OSM 313-315). It considered EPA's

recommendations at the time, as well as the National Institute for Occupational Safety and Health's recommendations for worker safety, and the Occupational Safety and Health Administration's requirements for worker safety. (*Id.*). And the EIS described how mines in the region, in collaboration with Wyoming DEQ, developed studies and practices to mitigate the impact of short-term nitrogen dioxide emissions. (*Id.*). Thus, even without a one-hour nitrogen dioxide ambient air quality standard, the EIS still analyzed the potential for short-term emissions of nitrogen dioxide, noted that several organizations were concerned with the potential for human health impacts, and described a process for mitigating those impacts. (*Id.*). In short, the EIS took a hard look at the issue of short-term nitrogen dioxide emissions.

Finally, WildEarth Guardians argues that NEPA required OSM to prepare a supplemental analysis of EPA's decision to adjust the standard for particulate emissions smaller than 2.5 microns. (Dkt. No. 82 at 34-36); *see National Ambient Air Quality Standards for Particulate Matter*, 78 Fed. Reg. 3086, 3086 (Jan. 15, 2013). But this does not change the analysis required by NEPA. A standard for $PM_{2.5}$ existed in 2010, and the Bureau considered it. *WildEarth Guardians*, 120 F. Supp. 3d at 1264-67. Moreover, DEQ will incorporate the new $PM_{2.5}$ standards into the mine's air quality permit, thus reducing the $PM_{2.5}$ impacts from the mine below what they would have been in 2010. WildEarth Guardians' argument fails as a result.

In sum, the Bureau analyzed the significant environmental consequences of this action in the EIS in 2010, and OSM reasonably adopted that analysis. The action remains the same; the circumstances remain the same; the information remains the same. The Bureau took a hard look at the air quality impacts of the mine in the EIS, and stronger emissions standards do not alter the strength of the agency's analysis. Accordingly, OSM did not violate NEPA when it adopted the EIS.

ii. The Social Cost of Carbon Tool

WildEarth Guardians argues that NEPA required OSM to prepare a supplemental analysis regarding greenhouse gas emissions. (Dkt. No. 82 at 39-43). Specifically, WildEarth Guardians asserts that OSM should have considered CEQ's guidance on greenhouse gas emissions and the social cost of carbon protocol. (*Id*.). These arguments lack merit.

NEPA did not **require** OSM to consider CEQ's guidance on greenhouse gas emissions. At the time that OSM made the decision at issue in this case, CEQ's guidance was merely in draft form. The guidance was not finalized until after OSM made its decision to approve the Black Thunder mine plan modification. 81 Fed. Reg. 51866 (Aug. 5, 2016). That alone defeats WildEarth Guardians' argument. Moreover, CEQ has since rescinded this guidance document, which renders WildEarth Guardians' claim moot. 82 Fed. Reg. 16576 (rescinding the 2016 guidance); *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997)

("circumstances changed since the beginning of the litigation that forestall any occasion for meaningful relief" render a claim moot).

WildEarth Guardians' argument with respect to the social cost of carbon protocol falls short for several other reasons. First, when the magistrate judge resolved a dispute regarding the scope of the administrative record in the companion case to this one, he found that the social cost of carbon protocol was irrelevant to this Court's NEPA analysis. *WildEarth Guardians v. Zinke*, Case No. 2:16-cv-00166-ABJ (D. Wyo.) (Dkt. No. 80) (unreported). Specifically, the magistrate judge found that the social cost of carbon protocol was irrelevant because it did "not change the environmental impacts of developing the mine; it only provides another method for evaluating the impacts." *Id*. at 4. WildEarth Guardians did not appeal this ruling, and they chose not to pursue a similar argument regarding supplementation of the administrative record in this case, presumably because the cases nearly mirror one another, and WildEarth Guardians could foresee a similar ruling. While WildEarth Guardians is not technically barred from advancing their argument by the law of the case doctrine, because the two cases are separate though related, the implication of the magistrate judge's ruling is clear. The social cost of carbon protocol is irrelevant to this Court's consideration of the merits in this case. *See WildEarth Guardians v. Zinke*, Case No. 2:16-cv-00166-ABJ (D. Wyo.) (Dkt. No. 80).

In any event, an examination using the social cost of carbon protocol would not have been productive. (*Contra* Dkt. No. 82 at 39-43). As an economist pointed out in a previous case, different groups value the social cost of emitting a ton of carbon dioxide from anywhere between $5 and $800. *High Country Conserv. Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014) (citation omitted). Such a wide range does not provide an agency with a useful tool to determine the social cost of greenhouse gas emissions. And while in the past EPA suggested that one agency should use the protocol during its review of a controversial pipeline's application for one permit, CEQ does not direct agencies to use this protocol in conducting all NEPA analyses. *Id*.

By asking this Court to force OSM to use the social cost of carbon to gauge the impact of mining, WildEarth Guardians implicitly demands that OSM reconsider a decision, made years before, to mine the coal from this maintenance tract. But the Bureau already made the decision to lease this land and to allow this coal to be mined and consumed. WildEarth Guardians litigated this decision and lost. *WildEarth Guardians*, 120 F. Supp. 3d 1237. At the mine plan stage, OSM does not consider whether coal is going to be mined. Instead, OSM considers **how** the coal is to be mined. That is not the appropriate stage to consider the social cost of carbon. This Court should reject WildEarth Guardians' collateral attack on the Bureau's leasing decision as a result.

Lastly, NEPA does not demand a cost-benefit analysis of every proposed action. NEPA requires a hard look at particular and cumulative environmental impacts of proposed actions. 42 U.S.C. § 4332(C). CEQ only requires that if an agency considers a cost-benefit analysis relevant, it should be included in the environmental analysis. 40 C.F.R. § 1502.23. The social cost of carbon protocol attempts to monetize the wide-ranging impacts of greenhouse gas emissions on the environment. Here, the agencies found that, if the maintenance tract were mined, the mine's greenhouse gas emissions would largely be the same for the extended life of the mine, but cumulatively, the decision to grant or deny the maintenance tract would not likely have an effect on national greenhouse gas emissions. (OSM 64-65, 556-559). Adopting these conclusions discharged OSM's obligations under NEPA. OSM does not have to put a dollar value on these emissions, particularly where the Bureau has already made the decision to lease the land.

IV. Vacatur is not the appropriate remedy.

WildEarth Guardians asks this court to vacate OSM's approval of the Black Thunder mine plan. (Dkt. No. 1 at 37). "An inadequately supported [agency decision], however, need not necessarily be vacated." *Allied-Signal, Inc. v. NRC,* 988 F.2d 146, 150 (D.C. Cir. 1993) (citation omitted). This Court possesses the equitable power necessary to fashion relief appropriate to the case. 5 U.S.C. § 702. "The decision whether to vacate depends upon 'the seriousness of the [decision's]

deficiencies (and thus the extent of doubt that the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal*, 988 F.2d at 150-151 (citation omitted).

Here, the appropriate remedy would be remand without vacatur. *See, e.g.*, *Nat'l Parks Conserv. v. Jewell*, 62 F. Supp. 3d 7, 20 (D.D.C. 2014) (holding that remand without vacatur can be appropriate when "there is at least a serious possibility that the agency will be able to substantiate its decision on remand") (quoting *Allied-Signal Inc.*, 988 F.2d at 151). NEPA requires no substantive outcome but merely requires that agencies follow the correct procedure to analyze the environmental consequences of their decisions. *New Mexico ex rel. Richardson*, 565 F.3d at 704. OSM will be able to substantiate its decision on remand simply by conducting further environmental analysis. And remand without vacatur would avoid hugely disruptive consequences to the Black Thunder mine in the interim. Therefore, remand without vacatur is appropriate.

CONCLUSION

The employees of the Bureau of Land Management performed an extensive analysis before authorizing the lease of the coal in question. This Court endorsed that analysis. OSM then reasonably relied upon it. Respectfully, this Court should deny WildEarth Guardians' arguments as a result.

Submitted this 7th day of June, 2017.

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CERTIFICATE OF WORD LIMIT COMPLIANCE

Pursuant to Local Rule 83.6(c) and Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, I hereby certify that this Response Brief contains 6,955 words. I relied on my word processing program, Microsoft Word, to obtain this word count.

/s/ *Erik E. Petersen*
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2017, the foregoing was served by the Clerk of Court through the Court's CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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Wyoming Attorney General's Office