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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WILDEARTH GUARDIANS, Petitioner, v. RYAN K. ZINKE[1], *et al.*, Federal Respondents, and STATE OF WYOMING, THUNDER BASIN COAL COMPANY LLC, Intervenor-Respondents,	Case No. 2:16-CV-167-ABJ **FEDERAL RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITIONER'S OPENING MERITS BRIEF**

[1] Ryan K. Zinke was confirmed by the United States Senate as Secretary of the Interior and took his oath of office on March 1, 2017. By operation of Federal Rule of Civil Procedure 25(d), he is "automatically substituted" for former Secretary S.M.R. Jewell as a party defendant. *See Soc'y of Separationists v. Pleasant Grove*, 416 F.3d 1239, 1241 n.2 (10th Cir. 2005).

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Federal Respondents the Department of the Interior ("Interior"), the Secretary of the Interior, and Interior's Office of Surface Mining Reclamation and Enforcement ("OSMRE"), submit this memorandum in opposition to the opening brief of Petitioner WildEarth Guardians, ECF No. 82 ("Br."), filed in support of its Petition for Review, ECF No. 1 (filed D. Colo. Sept. 15, 2015; transferred to D. Wyo. June 20, 2016), ECF Nos. 60 and 61, and asserting that Interior's approval of a mining plan under authority of the Mineral Leasing Act of 1920 ("MLA") violated the National Environmental Policy Act ("NEPA").

INTRODUCTION

To conduct surface coal mining operations on federal coal lands in Wyoming, an operator must traverse a three-stage state and federal administrative process. In the first stage, the United States Bureau of Land Management ("BLM") leases federal coal lands under the MLA. In the second stage, the State of Wyoming issues a permit for operation in accordance with the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), in a program of cooperative federalism. In the final stage, the Secretary, as required by the MLA and based on OSMRE's recommendation, exercises one of three options with respect to a mining plan: approval, disapproval, or approval subject to condition. This construct ensures compliance with the MLA requirement that the Secretary approve an operation and reclamation plan before any action is taken on the federal coal lease that might significantly disturb the environment. 30 U.S.C. § 207(c).

The Assistant Secretary lawfully exercised this MLA authority in April 2015 when she approved the mining plan modification at issue here. That modification, in conjunction with a Wyoming-issued SMCRA permit, authorizes Thunder Basin Coal Company LLC to extend its mining operations at the Black Thunder Mine onto a new federal coal lease covering 1,010.1

acres. OSM001574. In support of its recommendation that the Secretary approve the mining plan, OSMRE formally adopted a Final Environmental Impact Statement ("FEIS") for the Wright Area Coal Lease Applications, prepared by BLM in July 2010. The FEIS, in which OSMRE was a "cooperating agency," *see* 40 C.F.R. § 1501.6, was undertaken in support of BLM's issuance of federal coal leases, including the lease underpinning the April 2015 mining plan at issue in this case. *See* OSM001530-1531 (Mar. 5, 2015 Statement of NEPA Adoption and Compliance) ("NEPA Statement").

Petitioner claims legal injury from Interior's alleged failure to provide notice of the adoption and asserts Interior erred in approving the modification without taking account of what Petitioner calls "significant new information," Br. 26-29 – information Petitioner says demands a supplemental NEPA process. Petitioner is incorrect in both respects. OSMRE satisfied its notice requirements by posting a NEPA Statement on its website shortly after it was signed. NEPA and its implementing regulations require nothing further.

Petitioner's additional claims that Interior ignored "significant new information" and failed to consider the severity of greenhouse gas ("GHG") emissions and coal combustion impacts is both barred under the doctrine of res judicata, *see MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005), and waived due to Petitioner's failure to alert the agency to its concerns. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004). The claims also fail on the merits because, as explained herein, the FEIS adequately examined GHG emissions and combustion impacts, as this Court recently held when addressing the same FEIS, *WildEarth Guardians v.U.S. Forest Serv.*, 120 F. Supp. 3d 1237, 1272 (D. Wyo. 2015) ("The FEIS adequately disclosed the effects of GHG emissions."). It also fails for the simple reason that what Petitioner calls "significant new information" does not meet the definition of that phrase in the

governing NEPA regulation, 40 C.F.R. § 1502.9(c)(1)(ii), as construed by Tenth Circuit authority. *E.g*., *Colorado Evnt'l Coal. v. Dombeck*, 185 F.3d 1162, 1177-78 (Tenth Cir. 1999).

For all these reasons, Federal Respondents respectfully ask that the Court deny the petition and enter judgment in their favor as a matter of law.

STATUTORY AND REGULATORY BACKGROUND

A. The Mineral Leasing Act of 1920

The MLA, 30 U.S.C. §§ 181-287, authorizes the Secretary to lease federal coal deposits. *Id*. § 181. The MLA provides that the Secretary shall, on request of a qualified applicant or on his own initiative, "offer [coal] lands for leasing," and "award leases thereon by competitive bidding . . . ." *Id.* § 201(a)(1). Regulations implementing the MLA set forth procedures that govern leasing of federal coal. *See* 43 C.F.R. Part 3420. These procedures include a requirement that BLM prepare an environmental assessment ("EA") or an EIS for the proposed leasing; publish notice in the Federal Register of the availability of the EA or draft EIS; and hold a public hearing under 43 C.F.R. § 3425.4(a)(1). *See* 43 C.F.R. § 3425.3. The MLA also requires approval of a mining plan by the Secretary before surface-disturbing activity occurs, 30 U.S.C. § 207(c), based on the required recommendation of OSME. Federal regulations require OSMRE to provide the Secretary with a recommendation on whether the mining plan should be approved, disapproved, or approved with conditions. 30 C.F.R. § 746.13.

B. The Surface Mining Control and Reclamation Act of 1977

SMCRA, 30 U.S.C. §§ 1201-1328, is a "comprehensive statute designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981) (quoting 30 U.S.C. § 1202(a)). SMCRA establishes a program of cooperative federalism,

allowing states to administer their own regulatory programs within limits established by federal standards and subject to oversight by Interior. *See* H.R. Rep. No. 95-218, at 57 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 593, 595; *Hodel*, 452 U.S. at 289. Under Section 503 of SMCRA, a state may assume primary jurisdiction (or "primacy") over regulation of surface mining by submitting a program proposal to the Secretary and obtaining approval thereof. 30 U.S.C. § 1253. Once a state program is approved, state law then governs regulation of surface coal mining operations in the state, including the issuance of surface mining permits. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 288-89 (4th Cir. 2001); *see also In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 518 (D.C. Cir. 1981) (en banc). Once a state attains primacy, OSMRE is authorized to oversee the effectiveness of state program implementation, including inspection and enforcement activities. *See* 30 U.S.C. § 1271.

C. The Wyoming Regulatory Program

Wyoming, through the Wyoming Department of Environmental Quality ("Wyoming DEQ), attained primacy under SMCRA in 1980. Primacy jurisdiction under SMCRA does not automatically extend to federal coal; however, Interior and a state can enter into a cooperative agreement that allows a state to assume certain regulatory and enforcement responsibilities for federal coal. Wyoming entered into such cooperative agreement in 1981. *See* 30 C.F.R. § 950.20 (codification of Wyoming's state-federal cooperative agreement, effective March 18, 1981). Pursuant to this cooperative agreement, Wyoming bears primary responsibility for regulating and enforcing surface coal mining operations on federal coal lands located within its borders.

In its SMCRA regulatory authority role, Wyoming DEQ considers applications for surface mining permits, publishes notices of its proceedings requesting public input, and issues permits, under a regulatory program approved by OSMRE. 30 C.F.R. §§ 950.10, 950.15. Under

other statutory authorities, Wyoming also plays a role in implementing the Clean Water Act and the Clean Air Act.

D. The National Environmental Policy Act of 1969

NEPA serves the dual purpose of informing agency decision makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to the public so that it "may also play a role in both the decisionmaking process and the implementation of that decision." *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). NEPA's intent is to focus the attention of agencies and the public on a proposed action so its consequences may be studied before implementation. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

To assist in meeting these goals, NEPA requires preparation of an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1502.3, unless the agency concludes that project impacts will be insignificant and, on that basis, issues a Finding of No Significant Impact ("FONSI"). *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9. An environmental impact statement must examine, among other things, "alternatives to the proposed action," and the project's direct, indirect and cumulative impacts. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.16, 1508.7.

"Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency." 40 C.F.R. § 1501.6. A "cooperating agency" is defined as "any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in . . . major Federal action significantly affecting the quality of the human environment." *Id.* § 1508.5; *accord Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1242 (10th Cir. 2011). "A cooperating agency may adopt without recirculating

the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied." 40 C.F.R. § 1506.3(c); *accord WildEarth Guardians*, 120 F. Supp. 3d at 1263.

Judicial review of agency NEPA compliance is deferential. *Marsh*, 490 U.S. at 377. The "role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97-98 (1983); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1237 (10th Cir. 2004) (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002), *modified on reh'g,* 319 F.3d 1207 (10th Cir. 2003)). In a case such as this, where an agency is "making predictions . . .within its area of special expertise . . . as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co.,* 462 U.S. at 103; *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 684-85 (10th Cir. 2010) (quoting *Envtl. Def. Fund v. U.S. Nuclear Regulatory Comm'n,* 902 F.2d 785, 789 (10th Cir. 1990)).

FACTUAL AND PROCEDURAL BACKGROUND

The Black Thunder Mine is a surface coal mine located in Campbell County, Wyoming, and is operated by Thunder Basin Coal Company LLC. OSM001389, OSM001392. It has been in operation since 1978, and acquired its first federally-approved mining plan in 1986. OSM001392. Since then, nine mining plan modifications have been approved, including the one at issue in this case. OSM001392, OSM001574-1575. This most recent modification allows operations on a new federal coal lease, designated by BLM as lease WYW174596. OSM001574. The lease covers 1,010.1 acres. *Id.*

1. Lease Acquisition

On October 7, 2005, pursuant to the MLA and federal regulations at 43 C.F.R. Subpart 3425 (referred to as the "lease by application" process), Ark Land Company filed an application with BLM's Wyoming State Office (High Plains District) seeking to lease "federal coal reserves in two separate tracts located north and southwest of and immediately adjacent to the Black Thunder Mine. OSM001344 (BLM's Record of Decision), OSM001366 (map). BLM decided that the two tracts should be leased separately, and the South Hilight Field was designated as Federal coal lease WYW174596. OSM001344. As applied for, the South Hilight Field covered approximately 1,976.69 acres and contained approximately 213.6 million tons of recoverable Federal coal. *Id*. It was expected that this lease would extend the life of the mine by about 1.6 years. *Id*.

In early July 2007, BLM published notices in the *Federal Register* (July 3, 2007), the *Gillette News-Record* (July 6, 2007), and the *Douglas Budget* (July 11, 2007) of its intent to prepare an environmental impact statement for four federal coal lease applications and announced a public "scoping" period, including a public meeting in Gillette, Wyoming, which was held on July 24, 2007. OSM000721-722; OSM001355; *see also* Notice of Intent ("NOI") To Prepare an Envtl. Impact Statement (EIS) & Notice of Pub. Meeting on Four Fed. Coal Lease Applications in the Decertified Powder River Fed. Coal Prod. Region, WY, 72 Fed. Reg. 36,476 (July 3, 2007). Three oral comments were made at the scoping meeting, and nine comment letters were received during the scoping period. OSM000722. After review of the scoping feedback, BLM began preparing a draft environmental impact statement. Because OSMRE was a cooperating agency, BLM sent OSMRE a preliminary draft for review and comment. BLM28950. OSMRE reviewed this draft, found no serious flaws, and stated that it anticipated

that it would serve OSMRE's NEPA needs when it came time for OSMRE to prepare review the mining plan modification. *Id*. On June 26, 2009, the Environmental Protection Agency published a Notice of Availability of the draft environmental impact statement, the Wright Area Coal Lease Application Draft EIS in the *Federal Register*, which included the South Hilight Field. OSM00722; *see also* Environmental Impact Statements; Notice of Availability, 74 Fed. Reg. 30,569, 30,570 (June 26, 2009). With the publication of this notice, a sixty-day comment period began. *Id*. BLM published its own Notice of Availability in the *Federal Register*, which again broadcast the opportunity for public comment and announced a public hearing would be held on July 29 in Gillette. Notice of Availability & Notice of Hearing for the Wright Area Coal Draft Envtl. Impact Statement That Includes Four Fed. Coal Lease-by-Applications, 74 Fed. Reg. 32,642 (July 8, 2009). 73 Fed. Reg. 7555-01, 7555 (July 8, 2009). BLM also published notices of the public hearing in the local newspapers in Gillette and Douglas. OSM000722; OSM001355. At the public hearing, two individuals submitted written comments. *Id*. BLM received a total of 17 written comments, including a comment from WildEarth Guardians, and over 500 comment emails from other interested parties. OSM000722; OSM001206-001233 (comments from Plaintiff); OSM001355. Over the next year, BLM and OSMRE (as a cooperating agency) completed preparation of the FEIS. On July 30, 2010, in compliance with 40 C.F.R. § 1506.9, EPA published notice of availability of the FEIS[2]. Notice of Availability of the Wright Area Coal Final Envtl. Impact Statement That Includes Four Fed. Coal Lease-by-Applications, Wyo., 75 Fed. Reg. 44,978 (July 30, 2010). It also provided direct notice of the FEIS to several organizations and individuals, including WildEarth Guardians and Jeremy Nichols, an employee

[2] For more information regarding the public process for the EIS, *see WildEarth Guardians v. U.S. Forest Serv*., 120 F. Supp. 3d 1237, 1261 (D. Wyo. 2015).

of WildEarth Guardians and Petitioner's declarant for standing in this case. OSM000728-000733; Decl. of Nichols, ECF No. 82-1 at ¶3.

On March 1, 2011, BLM's Wyoming State Director approved a record of decision ("ROD") for the leasing decision related to the South Hilight Field, which authorized BLM to offer the tracts for acquisition at a competitive lease sale. OSM001363. Notice of this record of decision was published in the *Federal Register* and mailed to WildEarth Guardians and Mr. Nichols. BLM25331-25379; BLM27994; *see also* Notice of Availability of the Record of Decision for the Wright Area S. Hilight Field Coal Lease-by-Application & Envtl. Impact Statement, 76 Fed. Reg. 12,132 (Mar. 4, 2011). On February 27, 2012, BLM notified Ark Land Company that it was the successful bidder for the South Hilight Field. BLM25437.

Plaintiff and several other conservation groups challenged BLM's approval of the South Hilight Field lease (and the other leases analyzed in the Wright Area Final Environmental Impact Statement). *WildEarth Guardians*, 120 F. Supp. 3d 1237. In that lawsuit, the conservation groups claimed BLM violated "federal law by failing to consider a reasonable range of alternatives in making the decisions authorizing leasing of these tracts, and failed to consider direct and indirect air quality impacts, hydrological and groundwater impacts, mitigation and reclamation, and global climate impacts." *Id*. at 1259. This Court disagreed with Plaintiffs and held that "analysis and assessments set forth in the FEIS are sufficient to satisfy NEPA." *Id*. at 1276.

2. Wyoming Permit Proceedings

On February 26, 2013, Thunder Basin Coal Company, the operator of the Black Thunder Mine, submitted a permit application package to Wyoming DEQ, seeking to amend its SMCRA permit for the mine to include the South Hilight Field. OSM001528. Wyoming DEQ began its review of the application package, in accord with the governing state-federal cooperative

agreement, 30 C.F.R. § 950.20, and its own SMCRA regulations. On October 6, 2014, Wyoming DEQ determined that the application for the South Hilight permit amendment was administratively complete and commenced public review and an opportunity to comment on the permit amendment. *Id*. For four weeks ending on November 6, 2014, notice of the public review period was published in the *High Plains Sentinel*. OSM001529. Wyoming DEQ received no objections or other responses to its published notices. OSM001510. Following its review, Wyoming DEQ approved the permit on December 12, 2014. OSM001477-1478, OSM001523.

3. OSMRE Proceedings

As the state reviewed the SMCRA permit amendment, OSMRE's Western Regional Office in Denver, Colorado was concurrently reviewing the proposed mining plan modification. OSMRE determined that, under the criteria in 30 C.F.R. § 746.18(d), a mining plan approval by the Assistant Secretary was necessary, and it began preparing a recommendation. *Id*. § 746.18(c).

As part of this process, OSMRE took steps to ensure compliance with NEPA and its implementing regulations. This included an independent review of the FEIS. *See* NEPA Statement, OSM001530-1531 . The NEPA Statement reflected that the FEIS adequately considered and disclosed the environmental impacts of approving the mining plan modification. *Id*. OSMRE subsequently took steps to ensure public notice of its adoption decision. On or about May 18, 2015, it posted the FEIS Executive Summary and the NEPA Statement on its website. *See* Ex. 1, Declaration of Marcelo Calle ("Calle Decl.") ¶4. Later that day, OSMRE's Western Region Director sent a memorandum to the OSMRE Director, which recommended approval of the mining plan modification. OSM001520-1525.

After reviewing the recommendation, the OSMRE Director sent a memorandum also recommending approval of the mining plan modification to the Assistant Secretary's office for

final decision. OSM001518-1519. The Assistant Secretary signed the mining plan modification approval on April 18, 2015, and OSMRE posted the NEPA Statement, related map, and the decision on its website on May 18, 2015. OSM001574-1575; *see also* Ex. 1, Calle Decl.

STANDARD OF REVIEW

Challenges to agency actions are reviewed under the standard of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, which allows a court, if the equities so counsel, to vacate agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *S. Utah Wilderness All. v. OSMRE*, 620 F.3d 1227, 1233 (10th Cir. 2010). An agency's decision is arbitrary and capricious only if the agency:

> (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.

W. Watersheds Project v. BLM, 721 F.3d 1264, 1273 (10th Cir. 2013) (citation omitted); *accord Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). This standard is "very deferential" and the court presumes validity of the action. *W. Watersheds Project,* 721 F.3d at 1273 (quotation and citation omitted). Consequently, the court "must uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors." *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006) (internal quotations and citations omitted). Moreover, when examining agency scientific findings made within an area of an agency's technical expertise, the court must generally be at its most deferential. *Marsh*, 490 U.S. at 376-77; *Balt. Gas & Elec. Co.*, 462 U.S. at 103 ; *W. Watersheds Project*, 721 F.3d at 1273 (deference is "most pronounced" where "the challenged decision involves 'technical or scientific

matters within the agency's area of expertise.'") (quoting *Utah Envtl. Congress v. Bosworth*, 443 F.3d 732, 739 (10th Cir. 2006)).

ARGUMENT

The Petition for Review charges that OSMRE and the Secretary violated NEPA for their respective roles in approving a mining plan modification at the Black Thunder Mine encompassing a new federal coal lease, designated WYW174596. Petitioner contends this approval violated NEPA in four ways: first, because Interior failed to provide public notice of the availability of the NEPA Statement and its decision to adopt the FEIS prepared for BLM for its leasing decision; second, OSM failed to show on the record that it evaluated the adequacy of the FEIS for approval of the mining plan modification; third, because it failed to supplement the FEIS in light of supposedly "significant new information" on air quality and climate change; fourth, because it failed to use alternative "tools" to evaluate the severity of greenhouse gas ("GHG") emissions and combustion impacts.

As explained below, all four claims should be rejected as meritless. In addition, the third and fourth claims may be rejected as waived because Petitioner declined to bring them to the agency's attention, despite ample awareness and opportunity to do so. The fourth claim may also be rejected as barred under the doctrine of *res judicata*. Federal Respondents address the legal defenses of waiver and *res judicata* in arguments 1 and 2, below, and the merits of all four claims in argument 3.

1. Petitioner's Claims Regarding Climate Change, the Severity of GHG and Combustion Emissions, Air Quality, and Supplementation are Waived.

The Supreme Court has made clear that "[p]ersons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give [issues raised] meaningful

consideration." *Dep't of Transp.*, 541 U.S. at764-65 (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 553 (1978)); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (courts should not "topple over administrative decisions unless the administrative body not only has erred but has erred against objection made *at the time appropriate* under its practice) (emphasis added). The Tenth Circuit has echoed these requirements, stating in a NEPA case that claims "not properly raised before an agency are waived, unless the problems underlying the claim are obvious." *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir. 2007) (citing *Pub. Citizen*, 541 U.S. at 764-65) (internal quotation marks omitted).

Petitioner claims it was left in the dark by a "deeply flawed process," Br. 3, that deprived its members of their "procedural right under NEPA to be provided with notice," *id*. at 17, but Petitioner is no stranger to the federal coal program. It has filed a dozen or more lawsuits in the past decade challenging leasing decisions and mining plan approvals in the Districts of Wyoming, Colorado, Montana, New Mexico, Utah, and the District of Columbia. Petitioner is also no stranger to the administrative processes that occur in connection with these decisions, having participated in numerous NEPA processes supporting federal coal decisions throughout the mountain west, including here in Wyoming. In fact, Petitioner formally participated in BLM proceedings for the very FEIS challenged in this case, (OSM001206-001233) and went on to challenge that same FEIS, without success, in this Court. *See e.g.*, *WildEarth Guardians v. Jewell*, 120 F. Supp. 3d at 1251. As further indication of its awareness of process for approving mining plans, Petitioner sued OSMRE in Colorado in March 2013 – well *before* OSMRE acted in this case – challenging seven distinct mining plan approvals for mines in four states (i.e., Colorado, New Mexico, Montana, and Wyoming), including a 2011 mining plan modification at

the Black Thunder Mine. *WildEarth Guardians v.Klein*, No. 1:13-CV-00518 (D. Colo. filed Feb. 27, 2013).[3]

These actions demonstrate Petitioner's keen awareness of two important circumstances: first, of the effort of Thunder Basin Coal Company to mine federal coal lease, designated WYW174596; and second, of OSMRE's role in the mining plan approval process. Despite Petitioner's obvious awareness of these efforts, its formal participation in BLM's NEPA proceedings, and the well-publicized Wyoming permitting process for the Black Thunder Mine, *see* discussion *supra* at 9-10, Petitioner made no effort to alert the agency to its views on the severity of GHG emissions or combustion impacts. It also made no effort to alert the agency to its view that supplemental NEPA analysis was required as a result of EPA's 2010 promulgation of a new air-quality standard for nitrogen dioxide (NO_2), and the agency's 2013 strengthening of the air-quality standard for particulate matter ($PM_{2.5}$). Further, it made no effort to advise the agency that, in Petitioner's view, legal error would ensue if OSMRE did not consider a new protocol for assessing the effects of GHG emissions, the so-called "Social Cost of Carbon." Br. at 39-45.[4] This litigation, coming on the heels of such neglect, is the sort of "unjustified obstructionism" the Supreme Court condemned in *Vermont Yankee,* 435 U.S. at 553-54. Federal Respondents ask the Court to declare the claims waived.

[3] On respondents' motions, the out-of-state claims were subsequently transferred to the Districts of Montana, New Mexico and Wyoming. *See WildEarth Guardians v. OSMRE*, No. 1:13-CV-00518, 2014 WL 503635, at *2 (D. Colo. Feb. 7, 2014).

[4] The Social Cost of Carbon has since been rescinded. 82 Fed. Reg. 16576, 16576-77 (Apr. 5, 2017). WildEarth would thus have the Court overturn federal agency action for failure to employ a methodology that the federal government has since abandoned

2. Petitioner's Claims Regarding Climate Change, the Severity of GHG and Combustion Emissions, and Air Quality are Barred by the Doctrine of *Res Judicata*.

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *MACTEC, Inc.*, 427 F.3d at 831. *Res judicata*, usually referred to as "claim preclusion" in the Tenth Circuit, requires: "(1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits." *Yapp v. Excel Corp.,* 186 F.3d 1222, 1226 (10th Cir.1999). If these requirements are met, as they are here, claim preclusion is appropriate, unless the party seeking to avoid preclusion did not have a "full and fair opportunity" to litigate the claim in the prior suit. *Id*. at n.4.

Petitioner had ample opportunity to litigate its contention that the FEIS is inadequate. As noted, it brought suit in this Court against the Secretary of the Interior and BLM asserting numerous errors and omissions in the same environmental impact statement challenged in this case. This satisfies the second and third prongs of the test for claim preclusion. The first prong is also met because this court issued a final judgment rejecting Petitioner's claims. *WildEarth Guardians v. Jewell*, 120 F. Supp. 3d 1237.[5]

Against this backdrop, Petitioner disingenuously declares it is not attempting to "re-litigate the adequacy of the [FEIS's] air quality and climate analyses," Br. at 28 n.7, even as it effusively assails the FEIS on grounds previously raised, including the adequacy of Interior's air

[5] Although WildEarth appealed that decision, and the appeal remains pending, the only issue Petitioner raised on appeal was the adequacy of the agencies' analysis of the effects of issuing the leases on the national supply and demand for coal. Thus, the decision is considered final judgment on the adequacy of the agencies' NEPA analysis for the issues Petitioner raises in this suit.

quality and climate change analysis. *Id*. at 38-45. The Court should reject Petitioner's attempt to avoid preclusion by cloaking its claims in the rubric of a duty to supplement under NEPA. Reduced to their essence, Petitioner's claims regarding air quality, climate change, and the severity of GHG emissions and combustion emissions directly impugn the adequacy of the FEIS, *see id.*, and are the foundation of Petitioner's prayer for an order vacating the Assistant Secretary's decision. As such, they are barred by the doctrine of *res judicata*.

3. Petitioner's NEPA Claims Lacks Merit.

Even if the Court concludes that waiver and *res judicata* do not bar the claims just discussed, it should nonetheless enter judgment in favor of all Respondents, and deny the Petition for Review, because Petitioner's claims lack merit.

A. OSMRE complied with NEPA's Public Involvement Requirements.

Petitioner claims OSMRE violated NEPA by failing to include the public in its decision-making process and by failing to give notice of the NEPA Statement. Br. at 20. The first contention lacks merit because Petitioner cites no law or regulation requiring public participation when a cooperating agency adopts an EIS. In fact, the adoption regulations directly contradict Petitioner's claim. *See* 40 C.F.R. § 1506.3(c) (a cooperating agency may adopt an EIS "without recirculating" it when, "after an independent review," the cooperating agency "concludes that its comments and suggestions have been satisfied."); *see also WildEarth Guardians*, 120 F. Supp. 3d at 1263 (noting that CEQ's NEPA regulations permit adoption if the EIS meets the standards for an adequate statement under the CEQ NEPA regulations). Where an agency adopts an EIS, an additional public comment period is unnecessary because the original EIS proceedings were open to the public, and here Petitioner actually availed itself of those opportunities.

Petitioner's second claim, that OSMRE failed to give notice of the NEPA Statement, also lacks merit because it is factually incorrect. First, as discussed above, there is no authority that OSMRE had a mandatory duty to provide public notification of its adoption of the EIS. Nonetheless, OSMRE *did* notify the public that it had done so. Shortly after adopting the FEIS, the OSMRE Western Regional Office placed on its website a copy of the NEPA Statement, a map, and the decision document. *See* Ex. 1 (Calle Decl. confirming postings of the the NEPA Statement and mining plan approval on May 18, 2015).

Furthermore, Petitioner cannot realistically suggest that it was precluded from alerting the agency to its concerns and, in fact, Petitioner had ample opportunity to do so. Further, the Wyoming permitting process was completed in December 2014, but the mining plan was not approved until months later. After formally participating in BLM's proceedings for the leasing decision (and then challenging those decisions in the District of Columbia), Petitioner sat idly by while Wyoming conducted its well-publicized permitting process, where the details of the mining plan modification were forged, and it sat idly by while OSMRE examined the Wyoming permit and proposed mining plan modification. As a result, even if the Court were to conclude that public participation opportunities were inadequate, it may nonetheless withhold relief. *See* 5 U.S.C. § 706 (directing courts to take "due account . . . of the rule of prejudicial error."). On this record, the remedy Petitioner seeks – vacatur – is unwarranted because Petitioner suffered no prejudice except by its own choice to ignore agency proceedings.

B. Supplementation of the FEIS is not required.

Petitioner contends Interior had a duty to supplement the FEIS, given what it calls "significant new information" on air quality and climate change. Br. at 2, 7, 24-45. It points to two circumstances occurring since 2010, when the FEIS was published. First, EPA revised its

National Ambient Air Quality Standards (NAAQS) by promulgating a more stringent standard for nitrogen dioxide and a new standard for fine particulate matter ($PM_{2.5}$). *Id*. at 34. *See also* Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474 (Feb. 9, 2010) (new one-hour NO_2 standard of 100 parts per billion); National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,086 (Jan. 15, 2013) (strengthened annual $PM_{2.5}$ standard of 12 micrograms per cubic meter ($\mu g/m^3$)). Second, an alternative "tool – the social cost of carbon – became available for measuring the environmental and social impacts of GHG emissions from mining and coal combustion." Br. at 27.

Neither of these circumstances, however, amounts to significant new information of the sort that demands supplemental study under NEPA. The regulation Petitioner relies on for the claimed duty to supplement states that, where "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" comes to light, the agency shall supplement its prior NEPA analysis. 40 C.F.R. § 1502.9(c)(1)(ii). However, the Tenth Circuit has interpreted this provision to require a supplemental EIS "only if the new information or changes made to the proposed action 'will affect the quality of the human environment in a significant manner or to a significant extent not already considered.'" *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1257 (10th Cir. 2011) (quoting *Friends of Marolt Park v. U.S. Dept. of Transp.*, 382 F.3d 1088, 1096 (10th Cir. 2004)); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989)). In addition, the Council for Environmental Quality ("CEQ") provides that "EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 150.9 compel preparation of an EIS supplement." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981); *see also New Mexico ex rel. Richardson v. Bureau of Land*

Mgmt., 565 F.3d 683, 705 n.25 (10th Cir. 2009) (recognizing that the Forty Most Asked questions are persuasive authority as to the meaning of the NEPA implementing regulations). The FEIS in the case was less than five years old contrary to Petitioner's assertions, Br. 37; thus, the CEQ's own guidance presumes the adequacy of the FEIS relied on by OSMRE.

In this case, the revised air quality standards and the alternative tool for assessing GHG impacts do not affect the human environment at all, let alone affect it "in a significant manner" or "to a significant extent . . . ." *Wyoming,* 661 F.3d at 1257 (citation omitted). This is because the standards and the tool are not themselves *impacts* of the proposed mining operation, newly uncovered and demanding study and disclosure; nor do they reveal aspects of the project the effects of which were never considered. Rather they are, in the case of the new standards, changes in the regulatory framework which actually enhance environmental protection; and, in the case of the tool, simply another way of looking at the cost to society of GHG emissions, one Petitioner did not bother to bring to the agency's attention. Federal Respondents address these two categories of purported "new information" below.

(i) New Air Quality Standards

As discussed, the FEIS's air quality analysis has already been sustained by this Court, including its analysis addressing the pollutants of chief concern to Petitioner: nitrogen dioxide and particulate matter. *See WildEarth Guardians,* 120 F. Supp. 3d at 1264-66 (rejecting Petitioner's contention that "the FEIS included insufficient analysis of the indirect effects of NO_2, SO_2, $PM_{2.5}$, PM_{10}, and mercury emissions caused by the combustion of coal mined from the Wright area lease tracts," and concluding "[e]nvironmental consequences relating to particulate emissions were analyzed. . . . Emissions of nitrogen dioxide, nitrogen oxides and ozone are specifically analyzed . . .").

Petitioner concedes that the FEIS analyzed air quality impacts, Br. at 35, but argues that OSMRE must supplement BLM's analysis because EPA issued more stringent standards. To the contrary, a change in the standards does not, in and of itself, alter the impacts of the project previously analyzed, nor create "new circumstances" that rise to the level of significance, so as to require supplementation. 40 C.F.R. § 1502.9(c)(1)(ii). *See also WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 90 (D.D.C. 2012), *aff'd*, 738 F.3d 298 (D.C. Cir. 2013). Moreover, Wyoming DEQ permits, require compliance with all applicable state and federal laws. ECF No 83 at 25. This would encompass the National Ambient Air Quality Standards, codified at 40 C.F.R. § 50.1-50.19, which have the force of law. Thus, if anything, the existence of such new standards will *reduce* any potential impact, and Petitioner's argument that their imposition should require the agency to undertake a new, expensive, and time-consuming NEPA analysis of *reduced* impacts, is unavailing.

Further, the reasonableness of OSMRE's conclusion that the FEIS is adequate is underscored by the agency's regulatory role, which is implicated only *after* BLM makes a decision to lease and develop federal coal, and after a SMCRA permit is issued by Wyoming. OSMRE has an independent obligation to comply with NEPA, but NEPA also contemplates (and invites) agencies to avoid duplicating analyses and efforts. 40 C.F.R. §1506.4. *See also id.* §1506.2. OSMRE was entitled, therefore, to place some weight on the import of these previous decisions. OSMRE has long-standing experience with the well-known effects of surface coal mining operations in this region, and it also reasonably relies on Wyoming to ensure compliance with the Clean Air Act and, as the regulatory authority, to ensure compliance with its approved SMCRA program. And indeed, as indicated above, Wyoming's permit imposes the new, more

stringent standards to do so. OSMRE's conclusion that the FEIS was adequate and that it need not be supplemented is reasonable and should be sustained.

(ii) The Social Cost of Carbon.

Petitioner next urges that Federal Respondents should have used the "social cost of carbon" tool for evaluating GHG emissions. Br. at 41-45. The Court should reject this contention, as the District of New Mexico recently did in *WildEarth Guardians v. Jewell*, no. 16-cv-00605 (D.N.M. Feb. 16, 2017) ("*El Segundo*") (Order attached as Ex. 2). There, the court sustained a climate change analysis that, like the one at issue here, used GHG emissions as a proxy for assessing a mining plan's potential climate change effects. The court noted that CEQ's regulations discourage the use of cost-benefit analyses in situations involving important qualitative considerations, 40 C.F.R. § 1502.23, and held that Respondent's choice of methodology for assessing impacts relating to GHG emissions has a rational basis and is not arbitrary or capricious. *El Segundo* at 24, citing *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004); *Utahns for Better Transp.*, 305 F.3d at 1171.[6]

The approach used in the FEIS also has a rational basis, reflected in the agency's two-step analysis. First, the agency analyzed GHGs using data from the existing Black Thunder Mine, and a predicted increase in national demand, to project GHG emissions from mining the expansion tracts. *See* OSM000064-65, 556-561. Based on this, BLM concluded that it was not

[6] Federal Respondents note, in addition, that it is not the task of the district court to "decide which party utilized the better methodology in conducting its . . . analysis. Rather, [the court] simply determine[s] whether the appellees' choice of methodology had a rational basis . . . taking relevant considerations into account," *Jones v. Peters*, No. 2:06-CV-00084BSJ, 2007 WL 2783387, at *22 (D. Utah 2007) (quoting *Druid Hills Civic Ass'n v. Fed. Highway Admin.*, 772 F.2d 700, 711 (11th Cir. 1985)). Further, a court "will defer to an agency's judgment to use a particular model if the agency examines the relevant data and articulates a reasoned basis for its decision." *Natural Res. Def. Council v. Herrington, 768 F.2d 1355, 1385 (D.C. Cir. 1985).*

likely that even the No Action alternative would result in a decrease of national CO2 emissions. OSM0000702.

Second, the FEIS considered the potential contribution that expanded operations at the Black Thunder Mine might make to global climate change and GHG emissions, OSM0000696-704. This approach recognizes the fact that GHGs contribute to climate change only after entering and mixing with the upper atmosphere; they have global rather than local effect. *See* "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 66,496, 66,514 (Dec. 15, 2009); upheld in *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curium). Given these considerations, the Interior Board of Land Appeals, in an appeal from BLM's leasing decision, properly concluded that BLM cannot be expected to "posit a precise correlation between specific climatological changes or the environmental impacts thereof attributable to projected GHG emissions from the particular project." *Powder River Basin Res. Council*, 180 IBLA 119, 134 (2010). While Petitioner may not like this approach and may prefer that federal agencies use another methodology, such as the Social Cost of Carbon, OSMRE's reliance on proxies is entirely reasonable.

Finally, to the extent Petitioner's contentions regarding a "duty to supplement" may be construed as an indirect challenge to the adequacy of the FEIS itself, they should be rejected. This Court already sustained the Wright Area leasing decision against Petitioner's earlier challenge. *See WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d at 1273. In addition, two federal courts in the District of Columbia and one in New Mexico have already concluded that a qualitatively comparable analysis of climate change and GHG emissions is adequate.

For all these reasons, the Court should reject Petitioner's argument that "significant new information" demands additional analysis of climate change and air quality, and its artfully subsumed attack on the adequacy of the FEIS.

C. OSMRE'S Independent Review of the EIS was Proper.

After BLM issued the lease and while Wyoming DEQ was reviewing the SMCRA permit revision application, OSMRE's Western Regional Office commenced its own review of planned operations for the purpose of recommending whether the Secretary should approve the mining plan modification. Although OSMRE had been a cooperating agency on the FEIS, it nonetheless conducted an independent review of the FEIS, as reflected in its NEPA Statement. OSM001530-1531. The NEPA Statement recounts that, in compliance with the CEQ regulations at 40 C.F.R. §§ 1506.3(a), (c), OSMRE "independently reviewed the [FEIS]" and found "that OSMRE's comments and suggestions [had] been satisfied," and that "the [FEIS] meets [CEQ] standards[] and complies with 43 C.F.R. Subpart E and other program requirements." *OSM001530*.

A brief examination of the relevant regulations illustrates the adequacy of OSMRE's "independent review." The first CEQ regulation cited in the NEPA Statement provides that an agency may adopt a draft or final EIS "provided that [it] meets the standards for an adequate statement under these regulations." 40 C.F.R. § 1506.3(a). The second cited CEQ regulation provides that a cooperating agency "may adopt without recirculating the [EIS] of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied." *Id*. § 1506.3(c). In addition to these CEQ regulations, Interior's NEPA regulations, which complement the CEQ regulations, expressly allow use of previously-prepared NEPA documents if they adequately address the proposed action.

> An 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 assesses 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).

Petitioner contends OSMRE erred by not "Independently Assessing Whether the EIS Complied with NEPA," Br. at 23, and argues that OSMRE "met none of [the regulatory] criteria," *id*. at 24, adding that the record is "devoid of any evidence" of an "'independent review.'" *Id* at 25. These assertions are contradicted by the record and entirely ignore the NEPA Statement itself, including its plain indication that OSMRE had conducted an "independent review" of the EIS and had made three findings: first, that OSMRE's comments and suggestions in the EIS process had been satisfied, a finding required by 40 C.F.R. § 1506.3(c); second, that the FEIS meets CEQ standards for NEPA compliance, thus satisfying 40 C.F.R. §1506.3(a); and third, that the FEIS complies with Interior's NEPA regulations and other program requirements.

The NEPA Statement, which was prepared to meet the agency's obligations under 40 C.F.R. § 1506.3, is an "established administrative procedure," *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993), and as such is entitled to a presumption of administrative regularity. *Id*. Petitioner demands a more rigorous explanation, faulting Interior for not citing "pertinent page numbers" in the FEIS and for not "describing" the analyses and conclusions of the FEIS, but Petitioner cites no law or regulation requiring these things. Br. at 25.

In fact, Petitioner cites no record evidence of any sort to rebut the presumption of administrative regularity, such as evidence of bad faith or improper behavior that would give the Court reason to doubt whether independent review occurred. *See Citizens For Alternatives To*

Radioactive Dumping v. U.S. Dep't of Energy, 485 F.3d 1091, 1097 (10th Cir. 2007) (finding that the presumption of administrative regularity had not been rebutted by the required "strong showing" of improper behavior). Nor can it identify any authority supporting its argument that more than the NEPA Statement was required to comply with 40 C.F.R. § 1506.6. Instead Petitioner relies on two factually dissimilar cases in which OSMRE was faulted for not properly explaining its rationale for issuance of two Findings of No Significant Impact. Br. at 25-27 (citing *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208, 1226 (Colo. 2015), *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, Nos. CV 14-13-BLG-SPW-CSO, CV 14-103-BLG-SPW-CSO, 2015 WL 6442724 at *7 (Mont. 2015)). Different standards govern where an agency finds that a proposed action will not have significant impact and, on that basis, concludes that an EIS is not required.

In contrast, in a case that actually was factually on point, the District of New Mexico *in El Segundo* found a similar agency statement adequate for purposes of 40 C.F.R. § 1506.6. Ex. 3. As with this case, the claims in *El Segundo* were severed from Petitioner's original District of Colorado action. *See* ECF No. 1. Although the NEPA analysis adopted in *El Segundo* was an Environmental Assessment ("EA"), and not an EIS, OSMRE was nonetheless required to conduct an independent review of the prior NEPA analysis before adopting it. The agency did so, and the New Mexico court sustained the adoption decision, as reflected in the following language, which is almost identical to that challenged here: in particular, that "OSMRE has independently reviewed the EA and finds that [it] complies with 43 C.F.R. § 46, Subpart D, the relevant provisions of the [CEQ] regulations and other program requirements." Ex. 2 at 19 (final alteration in original) (citation omitted).

Petitioner also contends OSMRE violated Interior's NEPA regulation at 43 C.F.R. § 46.120, set out in block form above. It argues the record is "devoid of any evidence" regarding whether there is "new information pertaining to environmental impacts in the five years since BLM completed the EIS." Br. at 25. Yet again, Petitioner identifies no authority supporting its argument. Moreover, it conflicts with common sense and a plain-language reading of the regulation. Evidently Petitioner construes the regulation to require a statement on "new information" even if no new information (of the sort requiring additional NEPA study) has come to light. Federal Respondents submit that the *absence* of a discussion on new information is not improper where no new information has come to light. The plain language of Interior's regulation only requires a discussion where "new information . . . *not previously analyzed* may result in significantly different environmental effects." 43 C.F.R. § 46.120(c) (emphasis added). Here, there is no new information that "may result" in significantly different effects. This is because the Social Cost of Carbon and the new air quality standards do not alter the effects of the approved activity. Petitioner's claim that the adoption decision was improper should be rejected.

CONCLUSION

For the foregoing reasons, Federal Defendants are entitled to judgment as a matter of law, and respectfully request that the Petition for Review, ECF No. 1, be denied and judgment entered in favor of all respondents.

Respectfully submitted this 9th day of June, 2017.

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