William Prince (Wyoming Bar No. 6-3721)
DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Email: prince.william@dorsey.com

Attorneys for Thunder Basin Coal Company, L.L.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The Black Thunder Coal Mine ("Black Thunder") is owned and operated by Thunder Basin Coal Company, L.L.C. ("TBCC"), and is one of the largest, most heavily regulated, and intensely scrutinized mining operations in the world. It is governed by an interlocking matrix of federal and state authorizations and permits, and every aspect of its emissions and surface disturbance is subject to regulation, often by multiple agencies. In 2010, as part of consideration of four proposed new coal leases in the relevant portion of Wyoming's Powder River Basin ("PRB") the United States Bureau of Land Management ("BLM"), United States Forest Service ("USFS"), and Respondent Office of Surface Mining, Reclamation, and Enforcement ("OSMRE"), jointly prepared the 1300+ page, state-of-the-art Wright Area Environmental Impact Statement ("Wright Area EIS"). The Wright Area EIS examined the reasonably foreseeable direct, indirect, and cumulative impacts associated with mining the proposed leases, including the "South Hilight" Lease that would expand Black Thunder.

Petitioner WildEarth Guardians ("WildEarth") challenged the adequacy of the Wright Area EIS in this Court, and lost. In this action, they are taking another swing, nominally focusing on National Environmental Policy Act ("NEPA") compliance associated with OSMRE's 2015 approval of the *second* of two mine plan amendments ("South Hilight II Mine Plan Amendment") to mine the South

Hilight Lease. In evaluating the adequacy of the Wright Area EIS to inform lease issuance, this Court noted the role of *future* state mining and air quality permitting actions in controlling the emissions and impacts of mining. In contrast, OSMRE's review of the South Hilight II Mine Plan Amendment was conducted *following* the issuance of those permits, and indeed OSMRE had the benefit of a record of compliance associated with the *first* South Highlight Mine Plan Amendment. Informed by both the extensive analysis in the Wright Area EIS, and with compliance confirmed by subsequent permit actions and mining, OSMRE appropriately adopted the Wright Area EIS and no further study or public notice or comment was necessary or required. Consequently, WildEarth's Petition must be denied.

LEGAL FRAMEWORK

The United States oversees the disposition of federal coal deposits in Wyoming through a three stage, cooperative federal and state process. First, federal coal is leased under the Mineral Leasing Act of 1920. Second, mining is permitted by Wyoming through the Surface Mining Control and Reclamation Act. Third, the OSMRE then reviews and approves a federal operations plan that considers conformance with the lease terms, the permit, and other federal mandates. Each successive step builds on and is constrained by the preceding steps. Equally importantly, various types of emissions and impacts associated with

mining are separately regulated under the Clean Air Act, the Clean Water Act, and other federal and state laws.

I. The Mineral Leasing Act

Federal coal resources are leased for mining under the Mineral Leasing Act, 30 U.S.C. §§ 181-287 ("MLA"), as amended by the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. §§ 184, 191, 201-209, 352 (1988). 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." 30 U.S.C. § 201(a)(1). Upon the award of a lease and payment by the lessor of a winning and non-refundable bid, *see* 43 C.F.R. Part 3422, a coal lease becomes a contract between the United States and the lessor, and its terms may only be adjusted as specifically provided in the lease. *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949, 951-53 (10th Cir. 1982).

Prior to issuance of a coal lease, the Secretary must evaluate the environmental and other effects of leasing and potential mining methods. 30 U.S.C. § 201(a)(3)(C). This evaluation includes environmental review under NEPA of the reasonably foreseeable environmental effects of the rights to be granted in the lease, including any reasonably foreseeable effects of air emissions from mining and coal combustion. *WildEarth Guardians v. Jewell*, 738 F.3d 298

(D.C. Cir. 2013)("*West Antelope II*").[1] For protection of air resources, each lease must require compliance with the federal Clean Air Act. 30 U.S.C. § 201(a)(3)(E). As part of the leasing process, the Secretary is also required to evaluate various mining methods so as to determine what methods will maximize economic recovery of the coal. 30 U.S.C. § 201(a)(3)(C). Decision-makers thus consider the environmental impacts of leasing in advance, and prospective bidders have notice of the government's assessment of such impacts and lease terms to protect the environment.

After coal is leased, and subject to the terms and conditions of the lease, the MLA also requires Secretarial approval of an "operation and reclamation plan" ("Mine Plan") before the environment is disturbed. 30 U.S.C. § 207(c). The MLA further requires that "no mining operating plan shall be approved which is not found to achieve the maximum economic recovery of the coal within the tract." *Id*.

Leasing further triggers a number of obligations upon the lessor. These include the requirement to diligently and continuously operate the mine and pay applicable royalties and rents, or risk forfeiture of lease rights. 30 U.S.C. §§ 207(a), (b)(1); 43 C.F.R. § 3480.0-5; 43 C.F.R. § 3482.1(c)(7); 43 C.F.R. subpart

[1] Because of the frequency of WildEarth Guardians as a plaintiff in litigation relevant to this proceeding, TBCC generally identifies cases by the name of the mine or decision at issue, to better distinguish among the decisions.

3483. To the extent that discretion is afforded to the Secretary to waive, suspend, or relax royalty or rental obligations, it can only be "for the purpose of encouraging the greatest ultimate recovery of coal." 30 U.S.C. § 209.

II. The Surface Mining Control and Reclamation Act

In addition to the MLA, mining operations are regulated under the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 ("SMCRA"). SMCRA 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 and Reclamation Ass'n*, 452 U.S. 264, 268 (1981) (internal quotation marks and citations omitted). SMCRA establishes a program of cooperative federalism, allowing states to enact and administer their own regulatory programs, within limits established by minimum federal standards, and subject to oversight and limited enforcement by the Department of the Interior. *See* H.R. Rep. No. 95-218, at 57 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 595; *Hodel*, 452 U.S. at 289. Under Section 503, a state may assume primary jurisdiction (i.e., "primacy") over regulation of surface coal mining within its borders by submitting a program proposal to the Secretary of the Interior, 30 U.S.C. § 1253, as Wyoming has done. Once a state program is approved, state law and regulations become operative for the regulation of surface coal mining in the state, and state officials administer the program. *See*

Bragg v. W. Va. Coal Ass'n, 248 F.3d 275, 289 (4th Cir. 2001); *see also In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 518 (D.C. Cir. 1981).

Wyoming was granted primacy in 1980. *See* 30 C.F.R. § 950.10; *see also* 30 C.F.R. § 950.20 (codification of Wyoming's state-federal cooperative agreement, effective March 18, 1981). Wyoming exercises its SMCRA authority through the Wyoming Department of Environmental Quality, Land Quality Division ("WyDEQ"). In its role, WyDEQ considers industry 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.

III. Mine Plans

OSMRE has ongoing authority to oversee the effectiveness of the State's implementation of its SMCRA program. *See, e.g.*, 30 U.S.C. § 1271. To conduct mining operations with respect to federally-leased coal in Wyoming, operators must obtain surface mining permits from WyDEQ. As noted, operators must then obtain the Secretary's approval of Mine Plans under the MLA, or, as relevant here, Mine Plan Amendments. *See* 30 C.F.R. § 746.11(a) ("No person shall conduct surface coal mining and reclamation operations on lands containing leased Federal coal until the Secretary has approved the mining plan.").

To streamline and coordinate state and federal review, an operator prepares a single "Permit Application Package" ("PAP") for review by the state. After state review, the PAP forms the basis for the proposed Mine Plan Amendment. *Southern Utah Wilderness v. Office of Surface Min.*, 620 F. 3d 1227, 1232 (10th Cir. 2010); *See* 30 C.F.R. § 746.13 (charging OSMRE with preparing and submitting to the Secretary a decision document "recommending approval, disapproval or conditional approval of the mining plan"). The Secretary's approval of a Mine Plan or Mine Plan Amendment is based on a recommendation from OSMRE. *Id.* Unlike other aspects of the SMCRA program, the Secretary's approval authority for Mine Plans is not delegated to the states. 30 U.S.C. § 1273(c).

IV. The Clean Air Act

In addition to a SMCRA mining permit from WyDEQ, operators are required under the MLA to separately obtain from WyDEQ a permit regulating air quality emissions from the Air Quality Division ("WyDEQ/AQD"). 30 U.S.C. § 201(a)(3)(E). WyDEQ/AQD has been delegated the authority to issue air quality control permits under the federal Clean Air Act, 42 U.S.C. §§ 7401 et. seq., ("CAA"). This includes an approved State Implementation Plan ("SIP") for attainment of National Ambient Air Quality Standards ("NAAQS"). 40 C.F.R. Part 52, Subpart ZZ (Wyoming State Implementation Plan Approval). Once a SIP

is federally approved, the federal government is prohibited from interfering with or departing from the SIP. 42 U.S.C. § 7506(c); *DOT v. Public Citizen*, 541 U.S. 752, 758 (2004)("*Public Citizen*").

Individual CAA permit decisions are subject to public notice and comment, 42 U.S.C. § 7661b(e), and review and approval by the United States Environmental Protection Agency. 42 U.S.C. § 7661d. CAA permitting decisions are exempt from NEPA. 15 U.S.C. § 793(c)(1). Air quality effects of coal leasing and mining are regulated during the *state* permitting process. *West Antelope II*, 738 F.3d at 311.

Among other pollutants, NAAQS have been issued for fine particulates (Particulate Matter less than 2.5 microns, or "$PM_{2.5}$"), and Nitrogen Dioxide ("NO_2"). *See* National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086, 3086 (Jan. 15, 2013); Primary Ambient Air Quality Standards for Nitrogen Dioxide, 75 Fed. Reg. 6474, 6474 (Feb. 9, 2010). The 2013 revisions to the $PM_{2.5}$ standard changed the primary annual average from 15 micrograms/cubic meter to 12 micrograms/cubic meter, and the 2010 revisions to the NO_2 standard reated a new 1 hour standard of 100 parts per billion (μ/cm^3). *Id.* WyDEQ/AQD CAA permits include enforceable conditions designed to maintain compliance with these standards established in the State Implementation Plan. 42 U.S.C. § 7661c.

CAA permitting decisions are subject to notice and comment, and compliance with CAA provisions can be enforced through citizen suits. 42 U.S.C. § 7604.

V. The National Environmental Policy Act

NEPA serves the dual purpose of informing 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 achieve 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; *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1242 (10th Cir. 2011). 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." 40 C.F.R. § 1506.3(c); *accord, WildEarth Guardians v. U.S. Forest Service*, 120 F. Supp. 3d 1237, 1263 (D. Wyo. 2015).

FACTUAL AND PROCEDURAL BACKGROUND

I. The Black Thunder Mine

The Black Thunder Mine is a surface coal mine located in Campbell County, Wyoming in the Powder River Basin. OSM001521.[2] Black Thunder has been in continuous operation since 1978 and includes 14 federal coal leases in various stages of development. *Id.* As of the South Hilight II Mine Plan Amendment,

[2] Citations with the prefix "OSM" are references to documents in the Administrative Record, lodged at ECF #77.

mining over a billion tons of Federal coal had been approved for mining in the currently approved mining area, covering nearly 11,000 acres within the 47,000 acre state permit area. *Id*.

II. The South Hilight Lease and Environmental Review

The South Hilight Lease (WYW-174596) was proposed in 2005, and analyzed in the Wright Area EIS. OSM001344. The Wright Area EIS conducted, among other analyses, an examination of the air quality effects associated with mining, including emissions of $PM_{2.5}$ and NO_2. *See* OSM000283-300, 608 (particulate, including $PM_{2.5}$) OSM000313-315, 608 (NO_2). Contrary to WildEarth's representations, the Wright Area EIS specifically discussed and considered the updated NO_2 standard. *See* OSM000314 ("EPA recently set a 1-hour NO_2 NAAQS at 100 parts per billion (ppb) effective January 22, 2010"). The Agencies also modeled future compliance with the new NO_2 standard, and even under the extremely conservative assumptions employed in modeling, the region was forecast to remain well under the new limit. OSM000608. The Wright Area EIS further analyzed the emissions and effects of emissions of greenhouse gases ("GHGs") from both mining and the combustion of coal. OSM000556-561; 691-712. OSMRE was a cooperating agency on the Wright Area EIS, OSM00003, 1530, and as such had the opportunity to ensure the analysis would be maximally

informative and useful to OSMRE's later task of approving forthcoming amendments to the Black Thunder Mine Plan of Operations.

WildEarth subsequently challenged the Wright Area EIS in this Court, and the Court upheld the document in its entirety. *WildEarth Guardians v. U.S. Forest Serv.*, 120 F. Supp. 3d 1237 (D. Wyo. 2015). The Court specifically noted the role of subsequent regulatory actions, including CAA permitting by WyDEQ/AQD, in controlling emissions of air pollutants. *Id.* at 1264-67. Although WildEarth appealed *Wright Area* and the appeal remains pending, the only issue WildEarth 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. *Wright Area* is thus final judgment on the adequacy of the agencies' NEPA analysis of emissions of $PM_{2.5}$, NO_2, and the GHG emissions associated with mining, in connection with issuing the South Hilight Lease.

The South Hilight Lease was subsequently issued to TBCC, and added approximately 213.6 million tons of Federal coal to the leased deposits at Black Thunder. OSM001344.

III. First South Hilight Mine Plan Amendment

Rather than address the entire tonnage and acreage in a single SMCRA permit modification and OSMRE mine plan amendment, the South Hilight lease

tract was permitted in two stages – the South Hilight Amendment and South Hilight II Amendment.

Following issuance of the South Hilight Lease, WyDEQ and OSMRE undertook the SMCRA permit modification and mine plan approval process to approve the first 103.7 million tons of South Hilight Lease coal. OSM001393-94. WyDEQ approved the permit modification on October 4, 2012, and OSMRE issued the South Hilight Mine Plan Amendment on December 18, 2013. OSM001493. The South Hilight Mine Plan Amendment provided for an average annual production rate of 101.4 million tons and a maximum production rate of 190 million tons. OSM001393. These production levels were unchanged from the prior mine plan amendment of August 2012. OSM001392.

The South Hilight Mine Plan Amendment is not challenged in the Petition. WildEarth Guardians initially challenged the South Hilight Mine Plan Amendment in the federal District Court for the District of Colorado, *WildEarth Guardians v. OSMRE,* Case No. No. 1:13-cv-00518 (D. Colo.), but then voluntarily dismissed the suit when the suit was transferred to this Court. *WildEarth Guardians v. OSMRE,* Case No. 2:14-cv-00029-ABJ (D. Wyo.), ECF #34.

IV. The South Hilight II Mine Plan Amendment

The South Hilight II Mine Plan Amendment process commenced on February 26, 2013 (OSM001528), encompassing the remainder of the South

Hilight Lease tract coal, which after updated reserve estimates totaled approximately 106.5 million tons. OSM001522. In all other material respects the South Hilight II Mine Plan Amendment was identical to the South Highlight Mine Plan Amendment. Average annual and maximum tonnage remained constant at 101.4 million and 190 million tons, respectively. *Id.* WyDEQ approved the SMCRA permit modification on December 12, 2014. OSM001525. OSMRE approved the South Hilight II Mine Plan Amendment on April 18, 2015. OSM001574-75.

As of the date of approval of the South Hilight II Mine Plan Amendment, OSMRE thus had nearly three years of operational experience at Black Thunder at the approved production levels, and mining of the South Hilight Lease had been approved for 18 months. Moreover, WyDEQ consulted with WyDEQ/AQD, and found that Black Thunder was in compliance with its state-issued, federally delegated Clean Air Act permit. OSM001587.

In order to approve the South Hilight II Mine Plan Amendment, OSMRE also had to ensure compliance with NEPA. OSMRE thus reviewed the Wright Area EIS. OSMRE prepared a Statement of NEPA Adoption and Compliance that described its evaluation. OSM001530-31. OSMRE specifically noted that the Wright Area EIS analyzed the relevant environmental effects associated with mining, including emissions of GHGs. *Id.* OSMRE also took care to verify that

there had been sufficient opportunity for public review and comment on both the Wright Area EIS and the later state and federal permitting decisions. *Id.* OSMRE stressed that it had conducted an independent review, and that it reviewed the Wright Area EIS *in conjunction with* and in light of later approvals and analyses:

> This Statement of NEPA Adoption and Compliance is based on the above EIS in which OSMRE, as a cooperating agency, participated in its development. In accordance with 40 CFR 1506.3(a) and (c), OSMRE has independently reviewed the EIS and finds that OSMRE's comments and suggestions have been satisfied, the EIS meets Council on Environmental Quality (CEQ) standards, and complies with 43 CFR Subpart E and other program requirements. In addition, BLM's review and approval of the Resource Recovery and Protection Plan, the revision to the PAP, and WDEQ's written findings for the revision to the PAP have been independently reviewed by OSMRE. *These documents reviewed in conjunction with the attached EIS* adequately and accurately assess the environmental impacts of the proposed mining plan action. The opportunity for public input was provided during and with completion of the EIS, with submission of the revision to the PAP, and during issuance of the state mining permit.

OSM001530 (emphasis added).

The NEPA review performed for the Wright Area EIS was necessarily a *prediction* of future compliance *in advance* of state permitting. In contrast, by the time of the South Hilight II Mine Plan Amendment, OSMRE had before it a *record* of compliance associated with the South Hilight Lease, and OSMRE's approval was made *following* state SMCRA and CAA permitting of the affected tonnage and acreage, and informed by those state permitting decisions.

STANDARD OF REVIEW

Unlike the CAA, NEPA lacks 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 enjoy a presumption of validity. *Morris v. NRC*, 598 F.3d 677, 691 (10th Cir. 2010). A Petitioner bears the burden of proof at all times and on all elements. *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 [NEPA decision] 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)).

ARGUMENT

I. WildEarth Lacks Standing

Article III of the United States Constitution limits the jurisdiction of the federal judiciary to "Cases" and "Controversies." U.S. Const. Art. III, § 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *Id.* at 560; *see also Summers v. Earth Island Institutue*, 555 U.S. 488, 497 (2009). If a party does not have standing to sue, the party is not entitled to obtain judicial review of the challenged action. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). The party invoking federal jurisdiction has the burden of establishing standing. *Defenders of Wildlife*, 504 U.S. at 561.

A plaintiff must establish three elements in order to satisfy the "irreducible constitutional minimum of standing." *Id.* at 560. First, the plaintiff must have

suffered an "injury in fact." *Id*. An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations omitted). Second, the plaintiff must establish a causal connection between the alleged injury and the conduct complained of; the injury must be "fairly traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." *Id*. Third, the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id*. at 561. Since these elements are "not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.* with the manner and degree of evidence required at the successive stages of the litigation." *Id*. *See also, Comm. to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 449 (10th Cir. 1996).

When a suit is one challenging the legality of government action or inaction, the nature of a plaintiff's burden depends upon whether the plaintiff is the object of the action at issue. *Defenders of Wildlife,* 504 U.S. at 561. If the plaintiff is the object of the challenged government action, for instance as a permit applicant, there is ordinarily "little question" that the action or inaction may injure the plaintiff, and that a judgment preventing or requiring the action will redress the

injury. *See id*. at 561, 572. "When the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Summers*, 129 S. Ct. at 1149.

In addition to the requirements of Article III, a plaintiff must satisfy the "prudential" requirements of standing. *Warth v. Seldin*,422 U.S. 490, 498-501 (1975). One of these is the "general prohibition on a litigant's raising another person's legal rights." *Wyoming Sawmills v. United States Forest Service*, 179 F.Supp.2d. 1279, 1292 (D. Wyo. 2001).

WildEarth's standing is premised on three alleged injuries: (1) the procedural injury of not having had public notice of, and therefore supposedly not having had an opportunity to comment on, the proposed South Hilight II Mine Plan Amendment; (2) the potential harms to declarant Jeremy Nichols from the failure to study potential non-compliance with the updated NAAQS for $PM_{2.5}$ and NO_2; and (3) the potential injuries arising from a changing climate, that theoretically were redressable, in part, had OSMRE conducted an analysis using the "Social Cost of Carbon" protocol before issuing the South Hilight II Mine Plan Amendment. Although the issue has not been settled in the Tenth Circuit, TBCC presumes the Court will continue to follow the lead of the D.C. Circuit, and conclude that if WildEarth establishes standing on any one of these grounds, WildEarth is then free to challenge any aspect of OSMRE's decision to adopt the

Wright Area EIS. *West Antelope II*, 538 F.3d at 305-308; *Wright Area*, 120 F. Supp. 3d at 1257-58. Ultimately, it does not matter, because WildEarth cannot establish standing on *any* of the three grounds, and therefore does not have standing to maintain its suit.

A. WildEarth is Not a Proper Party to Assert Lack of Public Notice

WildEarth's core assertion of notice injury is that it "never had a meaningful opportunity to weigh in on any proposed mining of the federal coal leases." *See* ECF 82-1 at ¶¶ 9; 22. This assertion is ridiculous. In the first instance, WildEarth commented extensively on the Wright Area EIS, which expressly and extensively examined the effects of mining. *Wright Area*, 120 F.Supp. 3d at 1251-57, 59-73. Second, WildEarth chose *not* to comment on any of the subsequent BLM and state permitting proceedings, despite ample public notice of these proceedings. Third, WildEarth was fully cognizant of the prior, first South Hilight Mine Plan Amendment, because WildEarth challenged the decision in federal court. WildEarth has had *multiple* prior opportunities to comments, some of which it exercised, and some of which it ignored.

WildEarth's sole standing declarant is Jeremy Nichols, its Climate and Energy Director. *Id.* ¶ 4. Mr. Nichols is a frequent declarant in federal coal litigation, and was a key standing declarant in the Wright Area EIS litigation. *Wright Area*, 120 F.Supp. 3d at 1251-52. And importantly for the claim of

notice injury in this litigation, as of 2012 Mr. Nichols had "fully learned" of the mine planning process, having conducted detailed discussions with OSMRE staff. *See* Ex. A, Declaration of Jeremy Nichols in *WildEarth Guardians v. Salazar*, 1:13-cv-00518-RBJ (D. Colo.) ECF #51-1 at ¶¶ 6, 14-16. Thus, at least three years before the South Hilight II Mine Plan Amendment was issued, Mr. Nichols knew that once a lease is issued, the federal government will commence the process of amending the mine plan. *Id.* ¶ 7. Mr. Nichols also knew that, where OSMRE was satisfied that prior NEPA documents adequately described the effects of mining, he could not expect formal advance notice of mine plan amendment decisions from OSMRE in either the Federal Register or on the internet, both because of his prior discussions with OSMRE, *id.* ¶¶ 14-16, and because no such notice was provided for the first South Hilight Mine Plan Amendment. Indeed, WildEarth's abandonment of its challenge to the first South Hilight Mine Plan Amendment could plausibly have led OSMRE to conclude that WildEarth had lost interest in mine plan amendments at Black Thunder.

WildEarth and Mr. Nichols also knew that there would be at least one more mine plan amendment following the first South Hilight Mine Plan Amendment, because the first South Hilight Mine Plan Amendment only covered half the coal in the South Hilight Lease. And the second amendment

would likely come soon after the first amendment, because the 100 million tons of coal addressed in the South Hilight Mine Plan Amendment only accounts for about a year of production at Black Thunder. Thus while Mr. Nichols and WildEarth did not know the *exact* date the South Hilight II Mine Plan Amendment would be proposed, they knew it would be coming, and coming soon.

Importantly, Mr. Nichols also knew that he did not need formal notice in order to submit comments to OSMRE and to have OSMRE consider those comments. Interior regulations provide that in a NEPA process, OSMRE must consider any public comments that are timely received, "whether specifically solicited or not." 43 C.F.R. § 46.305(a)(1). And equally importantly, Mr. Nichols did not need to see the proposed mine plan amendment or know the specific submission of the proposed mine plan to alert OSMRE to any of the concerns articulated in the Petition. The promulgation of an updated $PM_{2.5}$ standard,[3] and the availability of the Social Cost of Carbon tool, were all *external* to OSMRE and the details of the proposed Mine Plan Amendment. WildEarth was thus *free at any time* following issuance of the South Hilight Lease to correspond with OSMRE to urge it update the Wright Area EIS in

[3] As noted, the updated NO_2 standard was considered and modeled in the Wright Area EIS. OSM000314, 608 ("EPA recently set a 1-hour NO_2 NAAQS at 100 parts per billion (ppb) effective January 22, 2010").

conjunction with mine planning, and OSMRE would have been under a duty to consider the comments. Nor did WildEarth was unaware how to get unsolicited comments to OSMRE. Mr. Nichols has a long record of requesting meetings and transmitting unsolicited comments to OSMRE. *See* Ex. A ¶ 13. Overall, WildEarth suffered not so much from lack of notice of the South Hilight II Mine Plan Amendment as wilful blindness to it.

A less sophisticated party might plausibly claim it did not know it could submit comments at any time, and obviously any comments premised on the specifics of a proposed mine plan amendment require access to the proposal. But WildEarth is neither unsophisticated nor has it raised any issue that required knowledge of the mine plan details. WildEarth has thus suffered no *personal* injury from the alleged lack of notice. Cf. *WildEarth Guardians v. Salazar*, 104 F.Supp. 3d 1208, 1224 n. 9 (D.Colo. 2015) ("*Colowyo/Trapper*")(For example, if the party challenging an agency's failure to provide public notice of an EA otherwise knew of and had access to the EA, there can be no prejudice"); Mr. Nichols professes a desire to rectify the lack of notice on behalf of the "American Public," ECF #82-1 at ¶¶ 9, 22 but he (and WildEarth) do not have standing to assert the rights of third parties. *Wyoming Sawmills,*179 F.Supp.2d. at 1292. Consequently, because WildEarth has not shown a personal injury on the notice issue, lack of notice cannot be a basis for standing.

B. Mine Plan Approval Did Not Increase the Risk of the Complained-of Environmental Harm

As the second basis for standing, Mr. Nichols asserts that he is injured by the visible emission of air pollutants, including NO_2, which lead him to be concerned for his "health and well-being while recreating in the area." *Id.* ¶¶ 16-19. He claims that these injuries would have been plausibly redressable through an updated NEPA analysis by OSMRE, taking into account the alleged updated air quality standards. *Id.* ¶ 23.

As a threshold matter, the Wright Area EIS did in fact consider and model the updated NO_2 standard, and thus this cannot be a basis for standing. OSM000314, 608. And as to $PM_{2.5}$ these assertions fail to show injury, causation, or redressability, because WildEarth makes no allegation that operations at Black Thunder are or are plausibly likely to be out of compliance with the updated standard. Mr. Nichols includes photos from a visit to the mine in August 2015. *Id.* ¶ 15. Any blasting he observed during that visit would have been in compliance with TBCC's updated permits and standards, including $PM_{2.5}$. To the extent he suffered injury, it is not attributable in any way to OSMRE's alleged failure to consider the updated $PM_{2.5}$ standard under NEPA.

To be clear, Mr. Nichols' sensitivities could well be triggered by mining activities occurring in full compliance with the NAAQS. To the extent that WildEarth had indicated some part of the South Hilight II Mine Plan Amendment

that it feels could be changed and lessen the impacts to Mr. Nichols, there would be an argument to support standing. But given that WildEarth has offered nothing to suggest that Black Thunder was operating out of compliance with the updated $PM_{2.5}$ standard at the time of the South Hilight II Mine Plan Amendment and Mr. Nichols' visits, and there is no new evidence that WildEarth offers to suggest it is likely to become out of compliance,[4] there is a fundamental disconnect between Mr. Nichols' injuries and his alleged solution. The updated air quality standard therefore cannot provide a basis for standing.

C. Alleged Climate Change Effects Alone Cannot Support Standing

It is well-established that the phenomenon of climate change is too generalized and diffuse to support a claim of standing on its own by a private party. *Amigos Bravos v. BLM*, 816 F. Supp. 2d 1118, 1127-38 (D.N.M. 2011); *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013); *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 83-86 (D.D.C. 2012)("*Salazar*") *rev. on other standing grounds* in *West Antelope II*. Where

[4] WildEarth points to modeling conducted for the Wright Area EIS that it contends showed *potential* future non-compliance. ECF #82 at 35-36. The Wright Area EIS makes clear that "such modeling should *not* be construed as predicting an actual exceedance of any standard, *but are at best indicators of potential impacts*." OSM000068-69. (emphasis added). This does not rise to the level of "likely" injury necessary to support standing, and as of the South Hilight II Mine Plan Amendment, OSMRE had five years of additional operational experience at the levels approved in the Amendment, and the certification from WyDEQ that Black Thunder was in compliance with its air quality permits.

standing has been found to challenge a NEPA analysis of climate change, standing has been founded on some *other* injury that provides the gateway to critique the climate change analysis. *West Antelope II*, 538 F.3d at 305-308. Since the foregoing discussion shows that WildEarth does not have a valid alternative foundation for standing, it cannot find standing in its climate change complaints.

Consequently, WildEarth has failed to establish Article III and prudential standing, and the Petition should be dismissed for lack of jurisdiction.

II. The Validity of the South Hilight Lease is Not Before the Court

On pages 21-22 of its memorandum, in the "Background" discussion, WildEarth opines that the South Hilight Lease is not valid because it was allegedly signed by the wrong person at BLM. This claim is not properly before the Court. It was not raised as an issue in the *Wright Area* litigation, in which the validity of the South Hilight Lease was a subject of the Petition. It is not alleged in the Petition currently before the Court, and BLM – the lease issuing agency – is not named as a Defendant. The records on which to evaluate the validity of the lease issuance process are not in the administrative record, and WildEarth never contended that they should be included. Moreover, WildEarth does not develop the argument any further than its unsourced, throwaway assertion on pages 21-22. Consequently, the allegations that the Leases are invalid are not properly presented

for judicial review, are immaterial to the Petition, and should be disregarded by the Court.

III. OSMRE's Findings Satisfied the Applicable Regulations

OSMRE prepared a Statement of NEPA Adoption and Compliance, which documents that OSMRE independently reviewed both the Wright Area EIS and several subsequent state and federal approvals and permitting actions. OSM 001530-31. The Statement further explains that the Wright Area EIS considered effects relevant to the proposed mine plan modification, including emissions of greenhouse gases, and that both the Wright Area EIS and later actions were subject to robust public review and comment. *Id.* This determination is entitled to a presumption of regularity, *Morris v. NRC*, 598 F.3d 677, 691 (10th Cir. 2010), and WildEarth offers no evidence whatsoever that OSMRE did not do the things it said it did.

WildEarth nonetheless asserts that the Statement was insufficiently specific to meet the requirements of 43 C.F.R. § 46.120(c). ECF #85 at 23-27. WildEarth first falsely states that OSMRE adopted the EIS of "another agency," *id.* at 24, when in fact the record is clear that OSMRE was a cooperating agency on the Wright Area EIS, OSM000003, and thus the Wright Area EIS can be considered OSMRE's own work unless there is some showing that the lead agencies rejected some relevant recommendation OSMRE's. WildEarth makes no such showing,

and OSMRE certified that the Wright Area EIS fully addressed its comments. OSM001531.

In terms of documentation, WildEarth faults OSMRE for not citing "pertinent page numbers" in the Wright Area EIS, or "summarizing" the sections in the Wright Area EIS it reviewed. ECF #82 at 25. NEPA imposes no such requirements, which would apparently consist of some sort of running diary of OSMRE's review ("And on the third day, I reviewed EIS Chapter 3, and it was good. Here are the highlights.") Because it is evident from the Statement of NEPA Adoption and Compliance that OSMRE reviewed both the Wright Area EIS and subsequent permitting and compliance, WildEarth is left with nothing but a demand for meaningless and potentially *misleading* paperwork.[5]

WildEarth contends that OSMRE's adoption of the Wright Area EIS is analogous to the adoption of documents overturned by the District of Montana in *WildEarth Guardians v. OSMRE*, 2015 WL 6442724 (D. Mont. Oct. 23, 2015)("*Spring Creek*"), and the District of Colorado in *Colowyo/Trapper*, but both are readily distinguishable. In *Spring Creek*, the adopted environmental document was a leasing Environmental Assessment ("EA") that had not been subject to thorough public notice and comment, as was the case with the Wright Area EIS.

[5] Unless OSMRE reproduced the Wright Area EIS in full, attempts to single out "pertinent" page numbers or to summarize the document would expose OSMRE to the charge that it did not review the entire document, and therefore could not reasonably adopt it.

More importantly, OSMRE in *Spring Creek* relied *exclusively* on the Leasing EA. As a result, the record was devoid of any evidence that OSMRE had considered any intervening information. In stark contrast, for the South Hilight II Mine Plan Amendment, OSMRE expressly referenced, considered and relied upon the state and federal permitting actions in the intervening years, which included certifications of current compliance. This included experience in authorizations for the South Hilight Lease itself, and OSMRE determined that these materials confirmed that no new additional environmental issues had arisen.

Similarly, in *Colowyo/Trapper*, the court faulted the extreme age of the referenced NEPA documents, which did not attempt to forecast mine emissions for the period at issue. 104 F.Supp. 3d at 1228-29. The court acknowledged that state permitting actions could be relevant, but the record did not show that OSMRE *considered* the information in making its determination. *Id.* In addition, the court observed that compliance with updated air quality standards does not exhaust the range of *other* potential air quality effects caused by the proposed action. *Id.* But it surely addresses the issue of *compliance with updated air quality standards*, which are the *only* local effects WildEarth has identified as being in issue. In sum, *Spring Creek* and *Colowyo/Trapper* do not indicate that there was any error in the form of OSMRE's findings or the process of its review of the South Hilight II Mine Plan Amendment.

IV. OSMRE Complied with NEPA's Public Participation Requirements

There can be no dispute that the Wright Area EIS and all the subsequent actions considered by OSMRE in issuing the Statement of NEPA Adoption and Compliance were subject to significant and legally sufficient public comment. *Wright Area*, 120 F.Supp. 3d at 1251. The sole question, then, is whether OSMRE had to undertake *another* round of public notice and comment before adopting those documents for purposes of the South Hilight II Mine Plan Amendment.

On this point the NEPA regulations are quite clear:

> 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.

40 C.F.R. § 1506.3(c). The adoption of documents is intended to minimize unnecessary duplication of analyses and paperwork, 43 C.F.R. § 46.120(d), and it is particularly warranted 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). As a cooperating agency, OSMRE had no duty to publicly recirculate the Wright Area EIS or the other publicly developed documents it considered in preparing the Statement of NEPA Adoption and Compliance for the South Hilight II Mine Plan Amendment. Public notice requirements had already been satisfied.

The District Court for the District of New Mexico recently reached an identical conclusion in the context of an OSMRE mine plan amendment for the El Segundo Mine. *WildEarth Guardians v. Jewell*, 1:16-cv-605-RJ-SCY, ECF #85 (D. N.M. Feb. 16, 2017)("*El Segundo*"), attached as Exhibit B. The court concluded in light of the public participation afforded in the leasing EA for the mine, there was no need for another round in conjunction with the mine plan amendment. *Id.* at 20-21. The only basis WildEarth asserts for distinguishing *El Segundo* from the present case is that less time has passed between the leasing and mine planning decisions. ECF #85 at 22 n. 6. While it is true that the *El Segundo* court noted the "close temporal proximity" of the two decisions, that is not dispositive. The passage of time between two decisions simply creates more opportunity for "significant new information" to arise and create a duty to supplement. In the context of the South Hilight II Mine Plan Amendment, WildEarth has not identified such significant new information.

Equally importantly, while there was five year gap between the Wright Area EIS and the South Hilight II Mine Plan Amendment, there were *additional* intervening opportunities for public review and comment in the context of other state and federal permitting, during which no comments were received. Indeed, public review and commenting on the WyDEQ permitting spanned three months and concluded less than four months before OSMRE issued the Statement of

NEPA Adoption and Compliance. OSM001577. And, WyDEQ permitting and EPA oversight of such permitting are the *exclusive* venues for regulating compliance with the CAA. *Public Citizen*, 541 U.S. 758. As a result, the South Hilight II Mine Plan Amendment process also satisfies any temporal proximity criterion, and there was no requirement for yet another round of public review and comment.

V. WildEarth has Failed to Identify New Information Requiring Supplementation of the Wright Area EIS

The standard for supplementing a prior environmental impact statement was explained in *Wyoming v. Dep't of Agric.*, 661 F.3d 1209, 1257-58 (10th Cir. 2011):

> An agency is required to prepare a supplemental DEIS or FEIS if: (1) "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns," or (2) "[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)(i)-(ii). The duty to prepare a supplemental EIS is based on the need to facilitate informed decisionmaking. *S. Utah Wilderness Alliance v. Norton,* 301 F.3d 1217, 1238 (10th Cir.2002), *rev'd on other grounds and remanded*, 542 U.S. 55, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004). "Of course, every 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,* 565 F.3d at 708.
>
> Therefore, a supplemental EIS is required 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." *Friends of Marolt Park v. U.S. Dept. of Transp.,* 382 F.3d 1088, 1096 (10th Cir. 2004) (quoting *Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 374, 109

> S.Ct. 1851, 104 L.Ed.2d 377 (1989)) (internal quotation marks omitted). As to the latter point, even if a change made "will have a significant environmental impact, the failure to issue a supplemental EIS is not arbitrary or capricious [if] the relevant environmental impacts have already been considered" during the NEPA process. *Id.* at 1097. Furthermore, an agency is generally entitled to deference when it determines that new information or a change made to the proposed action does not warrant preparation of a supplemental EIS. *See Marsh*, 490 U.S. at 375-77, 109 S.Ct. 1851 (stating that because an agency's decision whether to prepare a supplemental EIS requires "substantial agency expertise," courts must defer to the agency's "informed discretion"); *see also Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1524 (10th Cir.1992).

WildEarth does not claim that the Black Thunder Mine has changed from that studied in the Wright Area EIS. Rather, WildEarth asserts that environmental quality standards and methodologies for assessing the effects of mining have changed, thereby constituting "significant new information."

The fundamental problem with WildEarth's supplementation theories is that WildEarth has the concept of "new information" backward. "New information" within the meaning of the supplementation requirement must relate to the *effects* of the proposed action, not the *means of regulating or evaluating* those effects. *See State of Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984) ("new information" must involve "environmental *consequences* associated with the proposed action *not envisioned by the original EIS*" (emphasis added); *Dep't of Agric*., 661 F.3d at 1257 (same)).

A. Updated Air Quality Standards Do Not Constitute "Significant New Information" Mandating NEPA Supplementation

The Wright Area EIS examined $PM_{2.5}$ and NO_2 emissions from mining, and this Court sustained that analysis. *Wright Area*, 120 F.Supp. 3d at 1264-66. Between the Wright Area EIS and the South Hilight II Mine Plan Amendment, the NAAQS for $PM_{2.5}$ was updated, and WildEarth contends that the mere fact of this updating of a single standard[6] constitutes "significant new information" requiring supplementation of the EIS. To the contrary, a change in a NAAQS, by itself, is not a change in the environmental *effects* of a project or a "new circumstance" that requires require supplementation. *Salazar*, 880 F. Supp. 2d at 90 *aff'd sub nom. West Antelope II*, 738 F.3d 298 (D.C. Cir. 2013) (quoting 40 C.F.R. § 1502.9(c)(1)(ii)). *Salazar* is particularly relevant in that the same Petitioner was making the exact same argument regarding supplementation, which was conclusively rejected by the court. The D.C. Circuit found the argument so meritless that it did not even bear separate discussion. *West Antelope II*, 738 F.3d at 312.

Colowyo/Trapper is the sole authority WildEarth cites for the proposition that the promulgation of updated air quality standards constitutes "significant new information" mandating NEPA supplementation. First, WildEarth misconstrues

[6] Contrary to WildEarth's account, NO_2 standard was updated before the Wright Area EIS was published, and the new standard was considered and modeled in the EIS. OSM000314, 608.

Colowyo/Trapper. While the court did point to the fact that the NAAQS had been updated since the last environmental review, the principal problem was that the documents OSMRE adopted never even considered emissions effects during the relevant time period, unlike the Wright Area EIS. 104 F.Supp. 3d at 1228. The promulgation of updated standards was simply an additional reason to re-examine the older analysis. *Id.* Moreover, unlike in *Colowyo/Trapper,* for the South Hilight II Mine Plan Amendment OSMRE did review updated and current findings of compliance from relevant state permitting agency, which were issued after the updated NAAQS had gone into effect.

In addition, it must be noted that *Colowyo/Trapper* is no longer good law. The district court's reasoning on this specific issue was appealed, but the appeal was mooted by a new agency determination before the appeal was decided. *WildEarth Guardians v. U.S. Office of Surface Mining Reclamation & Enforcement,* 652 F. App'x 717 (10th Cir. 2016). Consequently, the Tenth Circuit vacated the district court opinion, and it is not valid authority. *Id.* The constitutional mootness doctrine is intended to address just this scenario, where a party contests the reasoning of a federal district court on appeal, but does not have the opportunity to have its appeal heard by virtue of intervening events. *Id.* ("we normally . . . vacate the lower court judgment in a moot case because doing so clears the path for future relitigation of the issues . . ."). Neither that party nor

other parties can have such a contested-but-unresolved decision held against them in later proceedings.

Consequently, there is compelling case law that updated NAAQS do not constitute "significant new information" within the meaning of NEPA regulations, and the only arguably contrary authority is both distinguishable and invalid. OSMRE had no duty to supplement the Wright Area EIS because of the subsequently updated $PM_{2.5}$ standard.

B. OSMRE Had No Duty to Supplement the Wright Area EIS Through Use of the Social Cost of Carbon

WildEarth asserts that OSMRE had a duty to perform an updated climate change analysis employing the Social Cost of Carbon, before approving the Mine Plan Amendment. In considering this argument, it is important to recognize that WildEarth is *not* contending that, as compared to the climate change analysis in the Wright Area EIS:

- The GHG emissions from mining had changed;
- The environment effects of GHGs emitted during mining had changed;
- The GHG emissions from combustion had changed; or
- The environment effects of GHGs emitted during combustion had changed.

In sum, WildEarth is not contending that there was *any* change in the environmental effects of the proposed action between completion of the Wright Area EIS and issuance of the South Hilight II Mine Plan Amendment. Rather, WildEarth contends that a new *tool for measuring* those effects, specifically a tool for performing cost-benefit analyses, had been developed. In addition to the foregoing discussion demonstrating that measurement tools are inherently not "new information" within the meaning of NEPA supplementation requirments, there are multiple reasons why OSMRE did not err in declining to supplement the Wright Area EIS with a Social Cost of Carbon analysis.

First, there is no NEPA duty to perform a cost-benefit analysis, 40 C.F.R. § 1502.23, and the Wright Area EIS did not perform one. There was thus no old cost-benefit analysis that could have become "out-of-date" by virtue of development of the Social Cost of Carbon. Second, and more fundamentally, it is *improper* to conduct a cost-benefit analysis where there are significant qualitative considerations, as there indisputably are in the context of climate change. 40 C.F.R. § 1502.23; *El Segundo*, at 22-23.

Third, then-applicable Council on Environmental Quality guidance stressed that the use of the Social Cost of Carbon outside of the rulemaking context was purely at the discretion of the agencies. *Id.* at 23 (*citing* CEQ Guidance at 33 n. 86). WildEarth directs the Court to *High Country Conserv. Advocates v. U.S.*

Forest Serv.,52 F. Supp. 3d 1174 (D. Colo. 2014) ("*High Country*") but in *High Country* the error was not the refusal to use the Social Cost of Carbon, but rather the agency's failure to explain why it dropped a social cost of carbon analysis between the draft and final environmental impact statements. *Id.* at 1192-92. This is wholly different from whether there is a requirement to use the Social Cost of Carbon in the first instance.

Relatedly, in the parallel Antelope Coal litigation, Magistrate Rankin concluded that there was no basis to even supplement the record in that case with documents related to the Social Cost of Carbon. Magistrate Rankin explained that WildEarth "fail[ed] to make the necessary showing . . . [that] the agency ignored relevant factors it should have considered in making its decision." *Antelope Coal*, Case No. 2:16-CV-166-ABJ, ECF #80 at 4. Magistrate Rankin found that "[t]he two social costs of carbon documents *do not show a change in the environmental impacts of developing coal in general, or specifically from the Antelope II lease tracts*. Rather, by Petitioner's own accord, the documents *provide a new and different method* for analyzing the impacts." *Id.* at 4 (emphases added). *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 512 (D.C. Cir. 2010) (holding that an agency is not required to "reevaluate their existing environmental analyses each time the original methodologies are surpassed by new developments.").

Fourth, a Social Cost of Carbon analysis could not have provided information useful to OSMRE. WildEarth offers no evidence to suggest that the conducting a monetary quantification of GHG emissions associated with mining could have been material to any decision before OSMRE. And OSMRE had no discretion to approve, disapprove, or modify the proposed Mine Plan Amendment based on combustion emissions. The Federal government had entered into binding contract with TBCC for the mining of the South Hilight Lease. TBCC and OSMRE had statutory, regulatory, and contractual duties to maximize the recovery of coal from the lease tract, and it is the recovery of coal that is TBCC's and OSMRE's sole connection to coal combustion. In the absence of any discretion to change its decision based on a type of environmental effect, a federal agency has no duty to analyze that environmental effect. *Public Citizen*, 504 U.S. at 767-69. The Supreme Court has squarely rejected the idea of gathering information for information's-sake. *Id.* at 768-69.

Finally, 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.

Overall, OSMRE did not act arbitrarily and capriciously in failing to supplement the Wright Area EIS with the Social Cost of Carbon, and this argument in the Petition, like all other arguments, must be rejected.

VI. WildEarth has Failed to Identify any Prejudicial Error, or Any Error that Could Justify Vacatur

To the extent the Court identifies any error in OSMRE's approval of the South Hilight II Mine Plan Amendment, WildEarth must further show that the error was material and prejudicial. *El Segundo*, at 21 (citing *Bar MK Ranches v. Yeutter,* 994 F.2d 735, 740 (10th Cir. 1993)). WildEarth has not seriously attempted, and cannot meet, this burden. As to notice, WildEarth fully availed itself of the opportunity to comment on the Wright Area EIS, and *chose not* to take advantage of numerous opportunities to submit comments on subsequent approvals and permits leading up to the South Hilight II Mine Plan Amendment.

More fundamentally, after an extensive opportunity to review and analyze the administrative record, WildEarth has not identified any useful commentary it would have provided. Compliance with the updated NAAQS has been maintained, and will continue to be maintained through the WyDEQ/AQD CAA permit. And WildEarth's complaints about OSMRE's failure to use the Social Cost of Carbon are the epitome of empty formalism. Even if WildEarth convinces the Court that OSMRE should have considered the Social Cost of Carbon in 2015 during review of the South Hilight II Mine Plan Amendment, the issue has been mooted by the

subsequent retraction of the methodology. It simply cannot be prejudicial error for an agency to have failed to use a methodology that is no longer in use by government by the time of completion of judicial review.

Contrasted with the lack of prejudice to WildEarth, WildEarth seeks to maximize prejudice to TBCC and the thousands of employees that work at Black Thunder by asking the Court to vacate the South Hilight II Mine Plan. ECF #85 at 45. Vacatur is not mandated even if there is prejudicial error. *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150-51 (D.C. Cir. 1993). The appropriateness of vacatur as a remedy requires a balancing of harms to the plaintiff as against the harms inflicted by the vacatur. *Id.* WildEarth devotes no argument and provides no justification for vacatur other than its improper, unsupported, and collateral assertion that South Hilight Lease is void. *Id.* at 45 n. 20. The Court should deny the request for that reason alone.

Moreover, even where federal district courts have identified NEPA errors in coal mine planning, they have refrained from vacatur precisely because of the immediate and severe harm such a remedy would inflict on the affected companies and surrounding communities. *See Colowyo/Trapper*, 104 F. Supp. 3d at 1231-32; *Spring Creek*, 2015 WL 6442724, at *8. Black Thunder is no exception. As one of the largest coal mines in the world, vacatur of the South Hilight II Mine Plan would put the livelihood of thousands of employees in jeopardy, OSM001522,

threaten the viability of TBCC and its parent, Arch Coal, Inc., which has only recently emerged from Chapter 11, cause severe disruption to the governments depending on fee and tax revenues generated by mining at Black Thunder, and not least, disrupt the customers who rely on the 100 million tons of coal Black Thunder annually produces to power their homes and businesses. Vacatur cannot be justified.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Dated: June 9, 2017

William Prince (Wyoming Bar No. 6-3721)

DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Email: prince.william@dorsey.com

Attorneys for Thunder Basin Coal Company, L.L.C.

EXHIBIT LIST

Exhibit A	Declaration of Jeremy Nichols, in District of Colorado Case No. 1:13-cv-00518-RBJ, ECF #51-1
Exhibit B	Order, *WildEarth Guardians v. Jewell*, 1:16-cv-605-RJ-SCY, ECF #85 (D. N.M. Feb. 16, 2017)

CERTIFICATE OF COMPLIANCE

The undersigned, William Prince, certifies that this Response Brief complies with the requirements of Local Rule 83.6(c) and Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman font type space consisting of fourteen characters per inch. The total word count is 9,694 words, excluding the caption, the table of contents, the table of authority, and the certificates of compliance and service. The undersigned relies on the word count of the word processing system used to prepare this document.

Dated: June 9, 2017

William Prince (Wyoming Bar No. 6-3721)

DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Email: prince.william@dorsey.com

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2017, I caused the electronic filing of the foregoing document, Intervenor-Respondent Thunder Basin Coal Company, L.L.C.'s Response to Petitioner's Opening Brief, with the clerk of the court for the United States District Court for the District of Wyoming using the CM/ECF system, which is designed to serve a copy on all counsel of record.

Dated: June 9, 2017

William Prince (Wyoming Bar No. 6-3721)

DORSEY & WHITNEY LLP
136 South Main Street, Suite 1000
Salt Lake City, UT 84101-1685
Telephone: (801) 933-7360
Email: prince.william@dorsey.com

Attorneys for Thunder Basin Coal Company, L.L.C.