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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, LLC, Intervenor-Respondents.	)	Case No. 2:16-CV-00167-ABJ **PETITIONER'S** **REPLY BRIEF**

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GLOSSARY OF ABBREVIATIONS

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

ARGUMENT

I. GUARDIANS HAS STANDING

Federal Defendants have not challenged WildEarth Guardians' ("Guardians") standing on any ground. Only Intervenor Thunder Basin Coal Company (hereafter, "TB") challenges Guardians' standing, pressing three arguments that all lack merit. First, TB argues Guardians lacks standing to argue that the Office of Surface Mining Reclamation and Enforcement's ("OSM's") Mining Plan approval failed to comply with the National Environmental Policy Act's ("NEPA's") public involvement requirements because Guardians' standing declarant is familiar with the mining plan approval process and could have submitted comments on the Mining Plan to OSM at any time. TB Resp. 20-21. TB's argument improperly ties demonstration of standing to resolution of the merits. The U.S. Supreme Court and the Tenth Circuit have rejected this cart-before-the-horse approach to standing. *See*, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 181 (2000) (warning that the standing inquiry should not be a higher hurdle than the merits inquiry); *WildEarth Guardians v. USEPA*, 759 F.3d 1196, 1207 (10th Cir. 2014) (following the Ninth, D.C., and Federal Circuits in recognizing that "[i]n resolving a standing issue . . . we must start from the premise that the plaintiff will prevail on its merits argument."). Because courts do not determine standing based on the likely outcome of merits questions, TB's argument fails on this issue.

Second, TB argues that Guardians is not injured by Mining Plan approval because it did not allege that air pollution from the mine might exceed federal air quality standards. TB Resp. 24-25. This argument impermissibly raises the standard for demonstrating injury-in-fact by requiring Guardians to show that air quality will exceed federal standards as a result of mine expansion. However, in a NEPA case Guardians is only required to show "an injury of alleged increased environmental risks due to an agency's uninformed decisionmaking[.]" *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 1996). Moreover, the proper focus is whether the *plaintiff* has been harmed, not the amount of harm to the *environment*. *See e.g.*, *Laidlaw*, 528 U.S. at 183-84 (holding that "reasonable concerns" about effects of a defendant's action are sufficient); *LaFleur v. Whitman*, 300 F.3d 256, 270-71 (2d Cir. 2002) (finding standing even where pollution levels remained within federal standards because one need only show an "identifiable trifle" of injury to establish standing); *Public Interest Research Group of N.J. v. Powell Duffryn Terminals*, 913 F.2d 64, 71 (3d Cir. 1990) (following "identifiable trifle" standard). Accordingly, the case law does not support TB's assertion that Guardians must demonstrate an injury to air quality.

Third, TB disputes Guardians' standing to raise NEPA supplementation arguments related to the greenhouse gas ("GHG") impacts of mining federal coal. TB Resp. 25-26. Several courts, including this one, have already expressly rejected this type of standing challenge. In *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013), the

Court held that Guardians had standing to challenge the U.S. Bureau of Land Management's ("BLM's") consideration of climate impacts from two coal leases in Wyoming based solely on Guardians' members' aesthetic and recreational injuries caused by the leases' local air pollution. The D.C. Circuit expressly rejected the same argument TB make here, concluding: "[t]he district court therefore seemed to require that the specific type of pollution causing the Appellants' aesthetic injury—here, local pollution—be the same type that was inadequately considered in the FEIS. In this respect, we think it sliced the salami too thin." *Id*. at 307 (*citing Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 78-79 (1978)). *Accord WildEarth Guardians v. USFS*, 120 F. Supp. 3d 1237, 1257 (D. Wyo. 2015); *High Country Conserv. Advocates v. USFS*, 52 F. Supp. 3d 1174, 1187 (D. Colo. 2014).

In *Jewell*, 738 F.3d at 305-07, 308 n.3, the D.C. Circuit thoroughly explained how its decision was consistent with the Supreme Court's prior holdings in *Duke Power*, 438 U.S. at 78 (holding that a plaintiff need not demonstrate a nexus between the injury relied on to establish standing and the substantive merits argument), *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (standing required for each form of relief sought), and *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (procedural error must harm plaintiff's concrete interest). With specific focus on *Summers*, the D.C. Circuit explained that whereas the Supreme Court held that a procedural injury must be tethered to *some* concrete interest, it is sufficient for the procedural injury (such as deficient NEPA

documents) to be tied to *any* of the plaintiff's concrete interests, including local aesthetic and recreational interests. *Id.* at 305 (*citing Summers*, 555 U.S. at 496). TB does not cite to *Jewell* or this Court's holding in *WildEarth Guardians v. USFS* adopting *Jewell*'s holding with respect to this specific standing argument. Instead, TB ignores the well-settled case law on this issue and cites to standing cases that either predate *Jewell* or are not on point.[1] TB Resp. 25. Accordingly, this Court should find that Guardians meets all Article III standing requirements to press each of its NEPA arguments.

II. ALL DEFENSES LACK MERIT

A. This Litigation is not a Collateral Attack on BLM's Leasing Decision.

OSM argues that Guardians' NEPA claims are barred under the doctrine of res judicata. OSM Resp. 15. This argument is tied to this Court's decision in *WildEarth Guardians v. USFS*, 120 F. Supp. 3d 1237, upholding the U.S. Bureau of Land Management's ("BLM's) decisions to issue four federal coal leases including one that underlies the challenged Mining Plan. Because Guardians is not attempting to relitigate the Leasing EIS and instead has raised claims against OSM under a different NEPA provision for OSM's failure to *supplement* the 2010 EIS, Guardians' claims are not barred by *WildEarth Guardians v. USFS*.

[1] Rather than citing *Jewell*, TB cites to the district court's standing ruling in *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. 2012), that *Jewell* overturned. TB also cites to *Washington Envtl. Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), which was a Clean Air Act case, not a NEPA case, and in which plaintiffs only alleged injury from climate harms rather than from both greenhouse gases and conventional pollutants as Guardians does here.

OSM's preclusion argument conflates the issue in *WildEarth Guardians v. USFS* with the issue here. There, Guardians challenged the adequacy of the EIS supporting BLM's leasing decisions. Here, Guardians challenges OSM's failure to consider whether *supplementation* of that EIS was necessary prior to approving the Mining Plan. The adequacy of an existing NEPA document and the need to supplement that document are two distinctly different inquiries.

To determine whether an agency violated NEPA's supplementation requirement, courts do not evaluate the adequacy of an existing NEPA document. Rather, review focuses on whether the agency took a "hard look" at new information that became available *after* completion of the existing NEPA document, and whether the agency provided a "reasoned explanation" for its determination of the new information's significance. *SUWA v. Norton*, 301 F.3d 1217, 1238 (10th Cir. 2002), *rev'd on other grounds*; *see also Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1178 (10th Cir. 1999). If the Court determines that OSM violated NEPA's supplementation requirement, the decision will not conflict with or disturb this Court's decision in *WildEarth Guardians v. USFS* that the Leasing EIS was adequate to support BLM's leasing decision. *Valley Citizens for a Safe Environment v. Aldridge*, 969 F.2d 1315, 1318-19 (1st Cir. 1992) (noting that "[n]othing in [NEPA's supplementation] regulations suggests that preparation of an SEIS assumes or reflects that an earlier EIS was not adequate.").

In its Opening Brief, Guardians informed the Court that the coal lease underlying the challenged Mining Plan could be void because it was approved by a BLM staffer who lacked the delegated authority to authorize the lease. Op Brf. 13. In so doing, Guardians was not asking the Court to determine whether the underlying lease was valid, and agrees with TB that the validity of the lease is not before the Court in this case. TB Resp 26. Rather, the cloud on the lease's validity implicates the validity of the Black Thunder Mining Plan and, if the Court finds that OSM did not comply with NEPA when it approved the Mining Plan, tips the scales in favor of vacatur as the appropriate remedy.

B. Guardians Has Not Waived Its NEPA Claims.

OSM argues that Guardians waived its substantive NEPA claims by not raising them with the agency prior to commencing litigation. OSM Resp. 12-14. This argument fails because: (1) no statutory exhaustion requirements apply to NEPA claims, and (2) OSM provided *no* opportunity for Guardians to raise its concerns during OSM's NEPA process for Mining Plan approval. NEPA does not contain a statutory exhaustion requirement necessary to create a jurisdictional exhaustion requirement. *See Darby v. Cisneros*, 509 U.S. 137, 154 (1993). However, several courts have recognized a judicially-created exhaustion doctrine for NEPA claims when the plaintiff did not participate in NEPA's administrative process. *See*, *e.g.*, *DOT v. Public Citizen*, 541 U.S. 752, 764 (2004). Judicially-created exhaustion requirements for NEPA claims are prudential rather than jurisdictional, and subject to several exceptions. *Forest Guardians*

v. USFS, 641 F.3d 423, 431-432 (10th Cir. 2011). Directly applicable here, these exceptions "include when the plaintiff was not properly notified of the administrative remedies available to it and/or was not provided a meaningful opportunity to participate in the administrative process." *Dine CARE v. Klein*, 676 F. Supp. 2d 1198, 1210-11 (D. Colo. 2009) (citations omitted). Because there was no public process for OSM's Mining Plan decision, this exception applies.

OSM argues that as "no stranger to the federal coal program" Guardians has participated in NEPA processes for coal leasing decisions, and therefore should have known that OSM would prepare a mining plan for this particular lease and should have "alert[ed] the agency to its views" that supplementation of the EIS's analysis of air quality and climate impacts was necessary. OSM Resp. 13-14. Yet, until OSM provided notice to the public that it was reviewing the Black Thunder Mining Plan, Guardians could not reasonably be expected to know that OSM had started the review process and that the time had come to convey its concerns to the agency. In similar circumstances, the District of Colorado has refused to dismiss claims as waived where plaintiffs had no notice or opportunity to comment on OSM's mining plan decisions. *Dine CARE*, 676 F. Supp. 2d at 1211.

III. OSM'S DECISION DID NOT COMPLY WITH NEPA

A. OSM's Failed to Allow Public Involvement for Mining Plan Approval.

OSM and Intervenors argue that both BLM's NEPA process for its 2010 Leasing EIS and the State permitting process provided sufficient public opportunity to comment on the Mining Plan. OSM Resp. 16-17; TB Resp. 30-32, Wyoming Resp. 13-17. However, neither process substitutes for OSM's own responsibilities under NEPA.

None of the State permitting documents provide NEPA's requisite discussion of environmental impacts necessary for meaningful public participation. Nor is the State permitting process subject to NEPA's requirements. Although the State made permitting documents available for public comment, these materials do not include the relevant information about project impacts required by NEPA (*e.g.*, indirect and cumulative environmental impacts). The State process cannot be used to solicit meaningful public input and effectuate NEPA's purpose of informed agency decisionmaking. *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983).

Neither can OSM rely on the public process for BLM's Leasing EIS to satisfy its own public participation requirements for its decision to approve the Mining Plan. In the Leasing EIS, BLM explicitly recognized that additional, site-specific analyses of mining impacts on the lease would occur when OSM received a mining plan from the lessee. OSM 122. This did not happen. OSM's NEPA "process" for its Mining Plan decision consisted of a 1.5-page Adoption Statement wherein OSM reported that it had adopted

BLM's Leasing EIS and a conclusory statement that there was no need for additional analyses of mining's environmental impacts. OSM 1530-31; *see also* OSM 1523 (OSM's recommendation for Mining Plan approval). OSM states, through a staff declaration, that it posted the Adoption Statement to its website one month after approving the Mining Plan. Dkt. 85-1 ¶ 4. However, this information is not in the administrative record for this case. Such "[a]fter-the-fact rationalization by counsel in briefs or argument will not cure noncompliance by the agency with [NEPA] principles." *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1575 (10th Cir. 1994).

OSM and Intervenors argue that there was no requirement for public participation when a cooperating agency adopts an EIS. OSM Resp. 16; Thunder Basin Resp. 30; Wyoming Resp. 13. This argument misinterprets 40 C.F.R. § 1506.3(c) which only states that an agency need not recirculate an EIS that it decides to adopt. The regulation says nothing about EIS adoption excusing an agency from involving the public in its NEPA process. OSM's interpretation ignores the broad language of NEPA's public involvement requirement—that agencies involve the public "to the extent practicable." 40 C.F.R. § 1501.4(b). Although an agency has broad discretion regarding *how* to structure public involvement, OSM lacks discretion to *not* involve the public in any way in the NEPA process for mining plan decisions. *See Citizens for Better Forestry v. USDA*, 341 F.3d 961, 970 (9th Cir. 2003) (holding "that the regulations at issue must mean something" even if they do not require circulation of EAs/FONSIs). Here, Guardians' claim is not

premised on OSM's failure to *recirculate* the Leasing EIS but on its failure to involve the public *in any way* in the NEPA process for its decision to approve the Mining Plan. Thus, OSM prejudiced Guardians by violating NEPA's statutory language and its fundamental purpose.

Two courts recently held that OSM's practice of making mining plan decisions through a wholly internal process, similar to OSM's process here, violated NEPA's public involvement requirements.[2] *WildEarth Guardians v. OSMRE*, 104 F. Supp. 3d at 1224 ("*WildEarth Guardians I")*; *WildEarth Guardians v. OSMRE*, 2015 WL 6442724, at *7 (D. Mont. Oct. 23, 2015) ("*WildEarth Guardinas II*"). Because OSM's mining plan decision is subject to NEPA, 30 C.F.R. § 746.13(b), OSM was required to provide an opportunity for meaningful public participation in *its* NEPA process for *its* decision, even where the agency adopts an existing earlier NEPA document in lieu of doing any additional analysis. This is particularly true where that older NEPA document itself identifies a need to conduct additional analysis at the mining plan stage.

[2] TB presses the Court to follow *WildEarth Guardians v. Jewell*, Case no. 16-cv-605, *20-21 (D.N.M. February 16, 2017), which found OSM could rely on the public involvement process for a leasing decision to meet its public involvement obligation for a mining plan because of the "close temporal proximity" between the leasing and mining plan decisions where the leasing decision was "issued just months" prior to the mining plan decision. This is not the case here where there is a five-year gap between the Leasing EIS and approval of the Mining Plan.

B. OSM Must Provide an Independent Assessment of the Leasing EIS's Adequacy.

Although OSM asserts it "independently reviewed the [FEIS]," OSM provides no record citation for its "independent review" beyond the Adoption Statement. OSM Resp. 23; OSM 1530-31; *see also* TB Resp. 27, Wyoming Resp. 19. Regardless of OSM's role as a cooperating agency in the EIS,[3] if it intended to adopt the EIS without doing supplemental analysis, OSM was still required to make a determination, "with appropriate supporting documentation, that [the adopted document] adequately assesses the environmental effects of the proposed action." 43 C.F.R. 46.120(c). Instead, OSM parroted regulatory language in a conclusory sentence and asked the reader to take the agency's word for it. The court cannot "defer to a void." *WildEarth Guardians I,* 104 F. Supp. 3d at 1219 (quoting *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010)). In a similar circumstance where OSM failed to show any work relating to its "independent assessment" of an adopted NEPA document, *WildEarth Guardians II*, 2015 WL 6442724, at *7, held "that such conclusory statements do not comply with governing laws and regulations." *See also* Op. Brf. at 21-22 (discussing holdings in *WildEarth Guardians I* and *II* on this issue).

[3] OSM was also a cooperating agency for the leasing environmental assessment ("EA") at issue in *WildEarth Guardians II*. *See* 2015 WL 6442724, at *1 (acknowledging OSM's role as a cooperating agency for the leasing EA).

C. OSM Must Comply with NEPA's Supplementation Requirement.

OSM violated NEPA by authorizing the Black Thunder Mining Plan without considering significant new information available to it at the time of its decision that pertains to strengthened air quality standards and assessment of GHG impacts. *See* Opening Brf. 27-45. As the Supreme Court explained in *Marsh v. ONRC*, 490 U.S. 360, 374 (1989), NEPA requires an agency to take a "hard look" at new information even after an EIS has been finalized, and the agency must supplement its environmental analysis if the new information is significant and "relevant to environmental concerns." *See* 40 C.F.R. § 1502.9(c)(1)(ii). Regardless of whether an agency ultimately decides to supplement an EIS, the agency must evaluate whether new information requires supplementation. *Marsh*, 490 U.S. at 385; *see also Trout Unlimited v. USDA*, 320 F. Supp. 2d 1090, 1111 (D. Colo. 2004). Because OSM failed to take the first step of determining whether new information had come to light in the five years since completion of the Leasing EIS, and failed to evaluate on the record whether supplementation of the 2010 EIS was necessary in light of this new information, OSM's approval of the Black Thunder Mining Plan violated NEPA.

1. Other Proceedings Do Not Excuse OSM From Its NEPA Obligations.

Wyoming's contention that "OSM was not empowered to second guess the Bureau's decision to lease the coal in question" grossly understates OSM's statutorily-

imposed role in mining plan decisions for federal coal.[4] Wyoming Resp. 21. The mining plan approval process for federal coal is independent from both the State permitting process for coal mining and BLM's coal leasing process. Thus, OSM's independent NEPA obligations are not "circumscribed by" either process. Op. Brf. 8-11. Rather, OSM has statutory authority to approve or deny a mining plan, or require that it be modified, indicating that OSM's role in mining plan review goes beyond a rubber stamp. 30 U.S.C. § 207(c). The Surface Mining Control and Reclamation Act ("SMCRA") explicitly prohibits OSM from delegating authority to the states to comply with NEPA and other federal laws, therefore the responsibility to conduct the environmental analyses for mining plan approvals rests with OSM. 30 C.F.R. § 745.13(b).

Wyoming also argues the Mineral Leasing Act's ("MLA's") requirement that any approved mining plan must achieve maximum economic recovery ("MER") of coal within the lease tract prevents OSM from denying or conditioning mining plans based on air quality impacts. Wyoming Resp. 21 (citing 30 U.S.C. § 201(a)(3)(c)).[5] Wyoming's proffered interpretation of this provision—if a mining plan achieves MER, OSM is *required* to approve the plan, regardless of the plan's environmental impacts—is simply

[4] Tellingly, OSM does not press this "limited regulatory authority" theory in its Response. Furthermore, OSM expressly rejected this theory in *WildEarth Guardians I*, 104 F. Supp. 3d at 1228 (noting that "even OSM's counsel acknowledged that he does not read the Clean Air Act exemption to mean that OSM cannot or need not assess the impacts of mining activities on air quality.").

[5] The relevant MLA provision states "no mining operating plan shall be approved which is not found to achieve the maximum economic recovery of the coal within the tract." 30 U.S.C. § 201(a)(3)(c).

wrong. The provision merely requires that any plan OSM approves must, in addition to complying with other federal statutes, also achieve MER. It does not trump all other laws. Although Wyoming asserts that this provision limits OSM's authority to condition or deny a mining plan based on air quality impacts, it provides no evidence showing that maximizing economic recovery of coal and minimizing environmental impacts are mutually exclusive. Nor does it provide any support for the suggestion that MER preempts all other federal statutes.

OSM's independent duty to comply with NEPA for the Black Thunder Mining Plan decision does not constitute an improper reconsideration of BLM's prior coal leasing decision as Wyoming asserts. Wyoming Resp. 28. Wyoming implies that an analysis of environmental impacts is unnecessary at the mining plan stage because BLM had already decided to issue the coal lease, and OSM merely "considers *how* the coal is to be mined." Wyoming Resp. 28 (emphasis in original). Wyoming dismisses the need for considering environmental impacts at the mining plan stage "[b]ecause OSM is statutorily required to approve a mining plan that achieves [MER] of the coal in question." *Id*. *WildEarth Guardians I*, 104 F. Supp. 3d at 1229, rejected these arguments as too limited, recognizing that a mining plan approval caused environmental impacts because it "increased the area of federal land on which mining has occurred and has, in turn, led to an increase in the amount of federal coal available for combustion."[6] All of

[6] *WildEarth Guardians I* was also responding to the Intervenor's assertion, similar to that made by Wyoming here, that lease approval was the cause of environmental impacts

Wyoming's arguments relating the OSM's "circumscribed" authority to analyze mining's environmental impacts at the mining plan stage are meritless.

2. OSM's Failure to Supplement the EIS's Air Quality Analysis Violated NEPA.

As an initial matter, OSM and TB assert that OSM did not need to consider whether to supplement the Leasing EIS's air quality analysis because this Court upheld this analysis for BLM's leasing decision in *WildEarth Guardians v. USFS*. OSM Resp. 19; TB Resp. 34. But as discussed above, Guardians is not challenging the adequacy of the Leasing EIS. Rather, Guardians challenges OSM's failure to consider whether *new* information pertaining to air quality had become available since completion of the EIS and OSM's failure to consider whether this new information required supplementation of the EIS. OSM does not get a pass from complying with NEPA by adopting an EIS that a court found adequate for a different decision made five years earlier. *See Valley Citizens for a Safe Environment*, 969 F.2d at 1318-19. Without knowing the one-hour NO_2 and $PM_{2.5}$ levels in the area surrounding mining operations before the proposed expansion *and* the impacts of future coal mining on these levels in the context of current standards, it was impossible for OSM to support its determination that the EIS "adequately describes" mining's impacts on air quality. OSM 1530-31.

Next, OSM and TB argue that the agency was not required to update the EIS's air quality analyses using the new standards because the revision and promulgation of new

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whereas mining plan approval "simply specifies how the coal will be extracted," and rejected this theory. *WildEarth Guardians I*, 104 F. Supp. 3d at 1229.

air quality standards does not constitute the kind of "new" information relevant to analysis of air pollution levels from mine expansion. OSM Resp. 18 (citing *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 90 (D.D.C. 2012); TB Resp. 33 (same). *Salazar* is not persuasive on this issue because there the new NO_2 standard had been promulgated *after* the agency issued the challenged decision, and the agency used the standard applicable during the NEPA process for the challenged decision.[7] *Id*.; *see also* Op. Brf. 37. Here, the new standard was promulgated five years *before* OSM approved the Mining Plan. 75 Fed. Reg. 6,474 (Feb. 9, 2010).

OSM and TB's exclusive reliance on *Salazar* to support its argument that new air quality standards can never trigger supplementation ignores this Court's observation in *WildEarth Guardians v. USFS*, that an air quality analysis done for the Leasing EIS "is not the end of the activities that will be required" before mining can proceed. 120 F. Supp. 3d at 1265. There, this Court recognized that "[n]ew information, new study, new analytical tools, new modeling, or even new regulatory schemes may alter the landscape that undergirds this particular FEIS." *Id*. OSM and TB also ignore *WildEarth Guardians I*, 104 F. Supp. 3d at 1228, that held the opposite of *Salazar*, finding that a change in air quality standards would "at a minimum" require OSM to consider how the new standards

[7] TB's assertion that this was an issue in the *Salazar* appeal that the D.C. Circuit found "so meritless that it did not even bear separate discussion" is false. TB Resp. 34. *Salazar*'s holding regarding BLM's analysis of $PM_{2.5}$ and NO_2 emissions was not appealed; rather, with respect to air quality, only *Salazar*'s holding relating to BLM's ozone analysis was raised on appeal. *Jewell*, 738 F.3d at 311-12. The issue here of whether a change in an air quality standard constitutes the type of new information that could trigger NEPA supplementation was also not raised in *Jewell*. *Id*.

impact its prior determination of no significant air quality impacts. Accordingly, if OSM had made any effort "to gather and evaluate new information relevant to the environmental impacts of its actions" as NEPA requires, or if OSM had provided an opportunity for the public to comment on the Mining Plan decision, it would have been aware of the strengthened standards and could have considered whether EIS supplementation was appropriate in light of this new information. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980).

Lastly, OSM argues that it was reasonable for OSM to rely on Wyoming's air quality permit for the Mine to keep the Mine's emissions below the new standards. OSM Resp. 20. However, even if mining activities on the lease would not result in a violation of the $PM_{2.5}$ or NO_2 standards, compliance with the Clean Air Act is not the sole measuring standard for assessing whether coal mining will significantly affect air quality. *WildEarth Guardians I*, 104 F. Supp. 3d at 1227-28, recognized that compliance with a Clean Air Act permit is not the relevant inquiry for compliance with NEPA; rather; the inquiry is whether the increased emissions will have a "significant effect on the environment."[8] The court based this holding on a scenario where a mine was in

[8] Moreover, cases from other circuits have recognized that an agency cannot rely on another agency's non-NEPA document. *Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 595 (D.C. Cir. 1994) (holding that attempting "to rely entirely on the environmental judgments of other agencies [is] in fundamental conflict with the basic purpose of NEPA."); *S. Fork Band Council of W. Shoshone v. USDOI*, 588 F.3d 718, 726 (9th Cir. 2009) (accord); *North Carolina v. FAA*, 957 F.2d 1125, 1129-30 (4th Cir. 1992) (accord). An agency may adopt another agency's analysis only after "independent[ly] review[ing]" that analysis and explaining how it satisfies the reviewing agency's NEPA obligations. 40

compliance with an air permit but "collectively" contributed to air quality impacts, and determined that OSM had a "duty" to analyze a mining plan's cumulative impacts to air quality under NEPA. *Id*.; *see also Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 789 (9th Cir. 2001) (recognizing "the fact that [an] area will remain in compliance with [air quality standards] is not particularly meaningful . . . A more relevant measure would be the degree to which [the Federal action] contributes to the degradation of air quality."); *Colorado Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1257 (D. Col. 2012) (holding "[t]he mere fact that the area has not exceeded [pollutant] limits in the past is of no significance when the purpose of the EIS is to attempt to predict what environmental effects are likely to occur in the future."). Accordingly, the State's air quality permit did not excuse OSM from its NEPA obligation to take a hard look at air quality impacts before approving the Mining Plan.

3. OSM's Failure to Supplement the EIS's GHG Analysis Violated NEPA.

The crux of Guardians' NEPA supplementation claim against OSM on the issue of GHG emissions rests on the agency's failure to: (1) supplement the EIS's discussion of mining's GHG levels with an analysis of GHG impacts using available analytical tools, and (2) supplement the EIS with an analysis of coal combustion GHG levels, which BLM did not do.

C.F.R. § 1506.3(c); *see also* 42 U.S.C. § 4332(D)(iv) (agency remains "responsib[le] for the scope, objectivity, and content of the entire [NEPA] statement").

OSM argues it need not consider whether to supplement the EIS's discussion of GHG emissions because that discussion was sufficient. OSM Resp. 21-22 (summarizing the EIS's GHG discussion for support). However, the adequacy of the EIS's GHG discussion is not at issue here. Instead, the issue before the Court is whether OSM violated NEPA's supplementation requirement when it failed to consider whether new information pertaining to GHG impacts was significant enough to require supplementation of the EIS. *SUWA v. Norton*, 301 F.3d at 1238; *see also* Op. Brf. 39.

OSM attempts to distract from its failure to consider whether supplementation of the EIS's GHG discussion was necessary by suggesting that Guardians simply disagrees with BLM's methodology for estimating mining's direct GHG emissions. OSM Resp. 23. However, the dispute is not about the methodology BLM used to estimate GHG emissions in the Leasing EIS but rather OSM's failure to determine whether supplementation was necessary given advances in assessing GHG impacts in the intervening years. Op. Brf. 39-40.[9]

Here, OSM's Mining Plan approval is arbitrary because the agency failed to consider new information related to the impacts of GHG emissions from coal mining and combustion. OSM argues that it need not consider new information that became available after completion of the EIS because this Court in *WildEarth Guardians v. USFS*, 120 F. Supp. 3d 1237, upheld the GHG analysis in the Wright Area EIS. OSM Resp. 22.

[9] *See also* Op. Brf. 43-45 discussing why withdrawal of climate guidance and the social cost of carbon protocol does not moot Guardians' arguments on this issue.

However, this holding does not relieve OSM of its obligation to consider whether EIS supplementation is necessary. In *WildEarth Guardians v. USFS*, this Court recognized that "today the analysis likely could have been better given the development and acquisition of new knowledge and continuing scientific study," suggesting that what constituted an adequate analysis of GHG impacts in 2010 would not necessarily be adequate for analyzing GHG emissions levels five years later. 120 F. Supp. 3d at 1272-73.

Intervenors suggest it would be inappropriate to apply the social cost of carbon ("SCC") to mining's GHG emissions because NEPA does not require a cost-benefit analysis. TB Resp. 27; Wyoming Resp. 29. However, the Leasing EIS did provide a detailed account of revenue generated from mining the six Wright Area leases, including $3.6-7.2 billion for the federal government and $4.5-8.7 billion for the State of Wyoming. OSM 64. Although NEPA does not require agencies to conduct cost-benefit analyses, it is "arbitrary and capricious to quantify the *benefits* of [an action] and then explain that a similar analysis of the *costs* [is] impossible when such an analysis [is] in fact possible." *High Country Conserv. Advocates v. USFS*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014).[10]

[10] *See also* 42 U.S.C. § 4332(B) (requiring agencies to develop procedures to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations"); *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983) (holding an agency may not present economic analysis in misleading way to give impression that benefits exceed costs).

Finally, Wyoming argues that the Magistrate Judge's decision in Case No. 2:16-cv-166 (the Antelope Mining Plan case) disallowing supplementation of the *administrative record* relating to the social cost of carbon and climate guidance renders Guardians' NEPA supplementation argument on this issue meritless. Wyoming Resp. 27. However, a decision that Guardians did not meet "one of the narrow enumerated exceptions allowing for supplementation of the record" is not the equivalent of a judicial decision as to whether OSM violated NEPA when it failed to supplement the EIS. Case No. 2:16-cv-166, Dkt. 80 at 5. The Magistrate Judge's decision on record supplementation simply means that Guardians' arguments relating to GHG impacts must rely on the record prepared by the agency. The Magistrate Judge's decision on the record motion is not the equivalent of a ruling on the merits of the NEPA supplementation claim.

IV. VACATUR OF THE MINING PLAN IS THE APPROPRIATE REMEDY

TB and Wyoming argue that the Court should not vacate the Black Thunder Mining Plan even if the Court finds that Federal Defendants violated federal law. TB Resp. 41; Wyoming Resp. 29-30. Part of TB's argument on this issue is that even if OSM was required to provide some type of public notice for the Mining Plan approval and had erred in failing to do so, Guardians was not prejudiced by this error. TB Resp. 40. NEPA regulations contain their own version of the "harmless error" rule, limiting it to "trivial violations of these regulations." 40 C.F.R. § 1500.3. Given that public participation and

informed agency decisionmaking are the "twin aims" at the heart of NEPA, *Balt. Gas & Elec. Co.*, 462 U.S. at 97, OSM's public participation failure cannot constitute harmless error.

"Vacatur is the normal remedy for an agency action that fails to comply with NEPA." *High Country Conserv. Advocates v. USFS*, 67 F. Supp. 3d 1262, 1263 (D. Colo. 2014). Under the Administrative Procedure Act courts "shall . . . hold unlawful and set aside agency action" that is found to be arbitrary or capricious. 5 U.S.C. § 706(2)(A). Although courts retain equitable discretion in setting the remedy, here vacatur is the only remedy that serves NEPA's fundamental purpose of requiring agencies to look *before* they leap and the only one that avoids a "bureaucratic steam roller." *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002). NEPA regulations instruct that the NEPA process must "not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5. As the Colorado District Court explained in a closely analogous case, vacatur was appropriate because the agency's decision on remand was not a "foregone conclusion . . . NEPA's goals of deliberative, non-arbitrary decision-making would seem best served by the agencies approaching these actions with a clean slate." *High Country*, 67 F. Supp. 3d at 1265. The same is true here. However, if Guardians prevails on the merits of this litigation, it does not oppose bifurcating the remedy phase of this litigation.

CONCLUSION

For these reasons, and those stated in Guardians' Opening Brief, Guardians respectfully requests that this Court (1) declare Federal Defendants' approval of the Black Thunder Mining Plan violated NEPA, and (2) vacate Federal Defendants' approval of the Black Thunder Mining Plan until such a time as they have demonstrated compliance with NEPA.

Respectfully submitted on this 30th day of June 2017,

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CERTIFICATE OF WORD LIMIT COMPLIANCE

Pursuant to Local Rule 83.6(c) and Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, I hereby certify that this Reply Brief contains 5,811 words. I relied on my word processing program, Microsoft Word, to obtain this word count.

/s/ Samantha Ruscavage-Barz

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief is being filed with the Clerk of the Court using the CM/ECF system, thereby serving it on all parties of record, this 30th day of June, 2017.

/s/ Samantha Ruscavage-Barz