IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:19-1920

WILDEARTH GUARDIANS,
HIGH COUNTRY CONSERVATION ADVOCATES,
CENTER FOR BIOLOGICAL DIVERSITY,
SIERRA CLUB, and
WILDERNESS WORKSHOP,

Petitioners,

v.

DAVID L. BERNHARDT, in his capacity as United States Secretary of the Interior;
UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT;
JOSEPH BALASH, in his official capacity as Assistant Secretary of Land and Minerals Management, U.S. Department of the Interior;
GLENDA OWENS, in her official capacity as Acting Director of U.S. Office of Surface Mining Reclamation and Enforcement;
DAVID BERRY, in his official capacity as Regional Director of U.S. Office of Surface Mining, Western Region,

Federal Respondents,

and

Mountain Coal Company, LLC, Intervenor

MOUNTAIN COAL COMPANY'S BRIEF ON THE MERITS

INTRODUCTION

The present case is the fourth chapter in the now decade plus opus of environmental litigation involving the West Elk Coal Mine (the "Mine"), operated by Mountain Coal Company, LLC ("Mountain Coal"). In this episode, Petitioners WildEarth Guardians, High Country Conservation Advocates, Center for Biological Diversity, Sierra Club, and Wilderness Workshop (collectively, "Conservation Groups") have challenged the Office of Surface Mining Reclamation and Enforcement's ("OSMRE") decision to approve a mining plan modification (the "Mine Plan") for the Mine. Although the Conservation Groups' brief spans 40+ pages, all the arguments are variations on a single issue—whether OSMRE erred in adopting prior environmental review documents without formal supplementation under the National Environmental Policy Act ("NEPA"). These documents consist of two supplemental Environmental Impact Statements: (1) a 2016 document prepared for the North Fork Exception to the Colorado Roadless Rule ("Rulemaking SFEIS"), and (2) a 2017 analysis prepared for lease modifications to two of the Mine's existing leases, COC-1342 and COC-67232 ("Lease Modifications" and "Leasing SFEIS"). OSMRE was a cooperating agency on the Leasing SFEIS, which tiered to the Rulemaking SFEIS. AR000188.[1]

The Conservation Groups' first and most significant allegation is that OSMRE did not take a hard look at the option of flaring methane emitted from methane ventilation boreholes at the Mine. This argument is legally misguided and factually incorrect. As a matter of law, the

[1] "AR" refers to the indexed page number(s) of documents in the Administrative Record lodged with the Court. ECF #28. This record in turn incorporated the prior Administrative Records for the Rulemaking SFEIS and Leasing SFEIS. Where referenced, documents in those records have their own prefixes.

environmental consequences of flaring were fully discussed in the Leasing SFEIS, upheld in court, are undisputed, and have not changed. Consequently, there was no need for OSMRE to supplement the Leasing SFEIS.

Factually, OSMRE did in fact carefully review the feasibility of flaring. Since 2008, the Leases have required Mountain Coal to actively manage methane emitted from the Mine if it can be done safely and economically. In 2009, Mountain Coal prepared a Resource Recovery and Protection Plan report ("R2P2 Report") for the Bureau of Land Management ("BLM") concluding that active management of methane at the Mine could not be demonstrated to be safe or economic, and has annually re-confirmed that conclusion. The Lease Modifications contained a term requiring Mountain Coal to submit an updated R2P2 ("R2P2 Update") once Mountain Coal had obtained exploration data and developed a proposed mine plan modification. Mountain Coal submitted the required report, which the BLM and OSMRE reviewed and approved. The Conservation Groups do not dispute any of the findings of the R2P2 Update. Instead, they challenge the definition of "economic feasibility" employed in the R2P2 Update, which has been consistent since 2009 and was never challenged during the lease modification process.

The Conservation Groups flaring theory thus suffers from a multitude of deficiencies. Because there is no dispute over the environmental consequences of flaring, it is fundamentally not a NEPA claim. Even if it is a NEPA claim, it was waived when the Conservation Groups failed to raise it as an issue during the lease modification proceeding. Moreover, the Conservation Groups are, in effect, asking OSMRE to modify a contract term between Mountain Coal and BLM, which OSMRE lacks the legal authority to do. Finally, OSMRE's review and

determination to accept the R2P2 Update was eminently reasonable, well supported, and fully sustainable under the Administrative Procedure Act.

The Conservation Groups' additional NEPA theories fare no better. They allege that the Leasing SFEIS conducted a defective cumulative impacts discussion on which OSMRE should not have relied. This argument has also been waived because it was never raised during the lease modification process. And on the merits, their theory about how a cumulative impacts discussion should be performed is contrary to recent case law from this District, Council on Environmental Quality ("CEQ") guidance, and is itself arbitrary.

The Conservation Groups next contend that a 2016 hydrology report revealed significant new information regarding water resources that required NEPA supplementation. But the hydrology report explicitly says that there has been no material change in the understanding of water resources or impacts of mining on water resources. The Conservation Groups instead focus on changes in the *phrasing* of the Leasing SFEIS and OSMRE's preferred characterization of the phrasing. These are exclusively semantic distinctions that do not come close to requiring NEPA supplementation.

Finally, should the Court conclude that OSMRE erred, the Conservation Groups' requested remedy of full vacatur of the mine plan approval is excessive and unwarranted given the nature of the alleged defects. Longwall mining that would cause the complained-of impacts has not begun, and there is an opportunity to take corrective action in advance of impacts without vacatur. Consequently, a focused remand would be a more appropriate remedy and would be consistent with Tenth Circuit precedent.

BACKGROUND

Much of the relevant background leading up to the Leasing SFEIS and issues in this case are described in three decisions: (1) the Court's decision in *WildEarth Guardians v. United States Forest Service,* 828 F.Supp.2d 1223, 1229 (D. Colo. 2011) ("*West Elk I*"), which first addressed the issue of flaring; (2) this Court's decision, *High Country Conservation Advocates v. United States Forest Service*, 52 F.Supp.3d 1174 (D. Colo. 2014) ("*West Elk II*"); and (3) the successor decision *High Country Conservation Advocates v. United States Forest Service*, 333 F.Supp.3d 1107 (D. Colo. 2018) ("*West Elk III*").[2] In brief, in *West Elk I*, the Court affirmed the United States Forest Service's ("USFS") determination not to require flaring or capture of methane at the Mine. In *West Elk II*, the Court vacated three inter-related decisions of the USFS and BLM. The USFS and BLM then spent the next three years diligently addressing the Court-identified NEPA defects, culminating in the Leasing SFEIS, which was upheld in *West Elk III.* In this action, the Conservation Groups present three new issues not litigated in *West Elk III*, under the theory that the Leasing SFEIS was not adequate for OSMRE's review of the post-lease mine plan modification. The background associated with the Conservation Groups' cumulative impacts and water resources arguments is relatively straightforward, and can be addressed in the respective sections of the Argument. In contrast, there is more than a decade of relevant history related to management of methane emissions at the Mine, and a summary of that is necessary to

[2] The Conservation Groups refer to *West Elk II* as *High Country I*, CG Br. at 10, and refer to *West Elk III* as *High Country III*. CG Br. at 11. In *West Elk II*, after the Court determined there were NEPA violations, the Court entertained separate briefing and issued a separate opinion regarding the remedy. Mountain Coal refers to this opinion, *High Country Conservation Advocates v. U.S. Forest Service*, 67 F.Supp.3d 1262 (D. Colo. 2014), as *West Elk II (Remedies)*. The Conservation Groups refer to it as *High Country II*. CG Br. at 10.

evaluate the Conservation Groups' claims on that issue. Principal events are also summarized in a timeline attached as Exhibit 1.

A. <u>Coal Mine Methane and Management Options.</u>

Coal and methane go together. This is because the same geophysical processes that convert accumulated biological material into coal typically convert a fraction of the same material into methane. AR000530; *Amoco Production Company v. Southern Ute Indian Tribe,* 536 U.S. 865, 872-73 (1999); *West Elk III,* 333 F.Supp.3d at 1123-24. As coal is mined through the "longwall" method employed at the Mine, a portion of that methane is liberated. This liberated methane is termed "coal mine methane" ("CMM") and can pose a significant safety hazard to miners. *Id*. CMM is explosive at atmospheric concentrations between 5 and 15%, and CMM is an acute issue at the Mine because the Mine's coal is considered "high volatile" and prone to spontaneous combustion. AR000080. For that reason, the Mine Safety and Health Administration ("MSHA") generally prohibits the Mine from allowing methane to accumulate anywhere in the range of 3.5% to 20%. *Id.* For the first thirty years of operations at the Mine, Mountain Coal thus faced a single imperative—get the CMM out of the Mine by any means necessary. This is accomplished through two mechanisms: (1) a powerful ventilation system that flushes CMM out of the Mine ("Ventilation Air Methane," or "VAM"); and (2) mine ventilation boreholes ("MVBs") (also referred to as methane drainage wells or "MDWs") drilled from the surface that allow CMM to directly rise and escape. Both systems are required by MSHA for West Elk. AR000125-133 (high velocity ventilation system); 133 (requiring MVBs).

In the mid-2000s, regulators, Mountain Coal, and certain of the Conservation Groups began considering mechanisms to manage the CMM in additional ways. This arose from two

considerations: (1) methane is the principal component of natural gas and conceivably could be captured and put to productive use ("Resource Recovery" objective), and (2) methane is a greenhouse gas ("GHG") and there would be environmental value in reducing emissions ("Pollution Control" objective). Each objective faced legal obstacles. The BLM did not believe it had the legal authority to allow or require Mountain Coal to conduct Resource Recovery of CMM, because deposits of natural gas can normally only be disposed through competitive leasing under the Mineral Leasing Act, and competitive leasing of CMM that must be emitted for safety reasons would pose a host of legal and logistical obstacles. *See West Elk I*, 828 F.Supp.2d at 1229. Conversely, methane was exempt from regulation under the Clean Air Act, and even today, there are no promulgated standards that would allow emissions to be regulated under a permit. *See, e.g.*, AR003369; AR000160 (2018 statement by air permit regulators that they do not see "methane emissions as a source that they can permit").

In 2008, WildEarth Guardians challenged a USFS decision to allow construction of an array of MVBs for mining the "E Seam" of coal at the Mine. Guardians contended that the CMM emitted from the Mine was valuable and could "power thousands of homes," and argued that CMM could be managed safely. Guardians presented evidence consisting of CMM recovery projects at inactive and foreign mines with different coal characteristics, and "conceptual" statements from regulators other than MSHA. The USFS rejected this evidence on the grounds that it was inapplicable to the circumstances at the Mine and did not demonstrate that CMM use is safe or economic. The Court affirmed this decision in *West Elk I*. 823 F.Supp.2d at 1237-38.

B. Resource Recovery Opportunity and Additional Litigation.

In mid-2008, the opportunity for Resource Recovery arose following a decision by the Interior Board of Land Appeals. In *Vessels Coal Gas*, *Inc.,* 175 IBLA 8 (2008), the IBLA held that because CMM has been released from the surrounding rock, it is no longer a "deposit" within the meaning of the MLA, and therefore BLM has the authority to manage it aside from competitive leasing and distinct from air quality permitting. *See West Elk I,* 828 F.Supp.2d at 1232-33. For its part, Mountain Coal has never been averse to managing CMM for Resource Recovery, provided management can be accomplished safely and economically. Mountain Coal and the BLM thus immediately began negotiating amendments to the Leases to allow for Resource Recovery. In January 2009, they executed Lease Amendments that would allow Resource Recovery and provide for the payment of royalties to the BLM, provided that Resource Recovery could be demonstrated to be safe and economic. *Id.* at 1233. "Economic feasibility" was deliberately not defined in the Lease Amendments, because the BLM and Mountain Coal agreed that further technical analysis and deliberation was necessary to develop an appropriate standard.

1. The 2009 R2P2 Report.

Shortly after the lease amendments were executed, the BLM directed Mountain Coal to use the Resource Recovery and Protection Plan process set forth at 43 C.F.R. § 3482.1(b) to prepare an analysis of CMM options. AR000530. BLM further directed Mountain Coal to consider the economic feasibility of these options, including such factors as the cost of capital and other tools used in project finance. AR000538. Mountain Coal retained several consultants to assist in the effort, and in September 2009 submitted a 200+ page R2P2 Report discussing

CMM options and economics. AR00527-000744. In the R2P2 Report, Mountain Coal proposed that "economic feasibility" be defined as the point where the revenue obtained from the CMM (which could be from natural gas sales, the value of using the methane on-site, carbon credits, or any combination thereof) at least equaled the cost of gathering and processing the CMM. AR000538-539. Mountain Coal reasoned that if the costs of managing CMM exceed the potential revenues, then by definition the CMM could not be a "valuable resource" in which a rational actor would invest its own capital to develop under a Resource Recovery framework. *Id*. Mountain Coal concluded that none of the many CMM options (including flaring) for either VAM or MVB emissions could then meet this threshold. But Mountain Coal proposed to revisit the issue annually against several benchmarks, including natural gas prices, electricity prices, and carbon offset prices. AR000547.

In 2012, the BLM accepted the R2P2 Report. BLM_mods004117-18.[3] From this point forward, there was a common and accepted understanding of "economic feasibility" as that term was used in the Leases, meaning that active management of CMM was "economic" if it was at least a break-even proposition.

2. The Lease Stipulation Requiring an R2P2 Update.

After the BLM issued the Lease Modifications in 2012, the Conservation Groups challenged them in *West Elk II.* But the Conservation Groups did not challenge the decision not to require flaring or capture of CMM as part of the Lease Modifications. The Court vacated the Lease Modifications on other grounds.

[3] "BLM_mods" refers to the BLM's Administrative Record for the Leasing SFEIS.

Following the remedial work performed after the Court's vacatur of the Lease Modifications in *West Elk II*, the Conservation Groups again argued that flaring or capture should be required. The Conservation Groups presented essentially the same evidence that the USFS and BLM ("Agencies") rejected in 2008, and the Agencies again carefully reviewed and rejected it in the Leasing SFEIS. AR00264-270. The BLM did not change the lease term, and critically, the Conservation Groups did not challenge the conclusions or definition of economic feasibility in the R2P2 Report, which was included in Appendix A to the Leasing DEIS and SFEIS. *See* AR00527-000744. The USFS and BLM nevertheless added a stipulation to the Lease Modifications requiring Mountain Coal to do a comprehensive update of the R2P2 Report within one year after the Lease Modifications were issued, following the collection of exploration data and preparation of an updated mine plan. AR00247.

3. <u>The Raven Ridge Report.</u>

<u>*After*</u> the Leasing SFEIS was finalized, the Conservation Groups released an expert report by Raven Ridge Resources ("Raven Ridge Report"). AR003272-3312. The Raven Ridge Report offhandedly and without any regulatory authority suggested that recovery of CMM could be considered a "cost of mining," AR004146, but principally contended that the flaring could be profitably undertaken using historical methane emissions rates, current carbon offset prices, and current flaring technology. AR003276. The Conservation Groups submitted the Raven Ridge Report as part of their objections to the proposed USFS consent to use and occupancy of the surface. The USFS denied the objections, explaining that the issues regarding safety and economic feasibility had not been resolved. AR003369. The USFS determined that these issues could be revisited in the context of the R2P2 Update. *Id.*

In *West Elk III*, the Conservation Groups challenged the Agencies' determination not to analyze the prospect of flaring in greater detail. They *did not*, however, contest the definition of economic feasibility employed in the R2P2 Report and the Lease Modifications. The Court upheld the Agencies' decision in all respects in *West Elk III*, including the Agencies' handling of the flaring issue. 333 F.Supp.3d at 1124-1127.

C. <u>The Updated R2P2 Report.</u>

One of the reasons an updated R2P2 Report was necessary is that methane emissions at the Mine have been declining significantly. Emissions have declined because the E Seam has generally been trending closer to the surface as mining progresses south, and CMM levels decrease with proximity to the surface. In addition, the Mine changed to a new "bleederless" progressive sealing system, under which the mine would seal off completed mine workings more quickly, and then focus on keeping methane levels above the 20% MSHA requirement rather than below the 3.5% MSHA threshold. AR00080-81. This had the effect of retaining more CMM in the Mine rather than flushing it out through VAM or MVBs. Collectively, these changes reduced methane emissions from the Mine's MVBs by nearly **<u>90%</u>** from 2011 through 2017. AR00081.

Exploration data collected in 2018 verified that the declining E Seam CMM emission trends would likely continue, and in November 2018 Mountain Coal submitted an extensive R2P2 Update prepared by Tetra Tech, Inc. AR00067-187. In addition to a fresh look at all methane management options and resource markets, the R2P2 Update specifically examined the assumptions in the Raven Ridge Report. AR000096-97. Among other things, the R2P2 Update observed that Raven Ridge had:

- Overestimated forecasted CMM emissions by more than double;
- Advocated a potentially dangerous shifting of CMM emissions from VAM to MVBs to better support operation of a flare; and
- Underestimated operating and maintenance costs by nearly half.

Id. Leaving all other assumptions the same, correction of these errors demonstrated the flaring system advocated by Raven Ridge would fall far short of break-even for the Mine. *Id.*

Many other management options were also examined. Notably, Mountain Coal is a charter member of the North Fork Coal Mine Methane Working Group ("NFCMMWG"), which was established in 2017 to provide a regular forum for industry, utilities, state and federal regulators, and other stakeholders and interested persons to convene and examine technologies and options for managing CMM. *See*, *e.g.*, NFCMMWG Minutes, AR000158-161. Drawing in part from the ongoing efforts of the NFCMMWG, Tetra Tech examined and modeled a variety of management options, concluding that all presently available systems are not economically viable. AR000093.

Because no system was economically viable, Tetra Tech did not examine mine safety in detail. However, it noted there remain significant safety issues with any flaring system, and concluded it was unlikely MSHA would authorize a flare of the type suggested by Raven Ridge while the Mine is actively producing coal. AR000084. In particular, the practice of retaining more methane in the sealed sections of the Mine, while producing significant safety and environmental benefits, also heightens the risk of a flaring system. AR00080-81. MVBs are not operated continuously, but only as needed to maintain safe conditions in the Mine. *Id.* at 80. As suggested by Raven Ridge, aggressively drawing more CMM to a flare might increase the

quantity of methane processed by the flare, but would also increase hazards in the Mine and might not even be eligible for carbon offset credits. *Id.* at 81.

D. **BLM/OSMRE Review of the R2P2 Update.**

BLM undertook a detailed review of the R2P2 Update, conducted by multiple staff at the Solid Mineral Branch, Fluid Minerals Branch, and a Socioeconomic Specialist. AR000045-50. BLM identified areas where it disagreed with the report, but ultimately accepted its principal conclusions. BLM concluded that Mountain Coal had satisfied the requirements of the lease stipulation, AR00050, and thereby 43 C.F.R. § 3482.1(b).

BLM forwarded its recommendation and summary memorandum to OSMRE, which OSMRE also independently reviewed. AR000051-66. OSMRE then addressed the flaring issue in its Record of Decision for the proposed mine plan amendment. OSMRE agreed with all the reasons stated in the Leasing SFEIS that flaring had not been shown to be economically feasible or safe, and further accepted BLM's review and recommendation of the R2P2 Update. AR000035.

STANDARD OF REVIEW

NEPA documents need only be supplemented when there is either: (a) a proposed significant change to the proposed action, or (b) there 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). The decision not to perform supplementary NEPA analysis is reviewed under the arbitrary and capricious standard. *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997). This review is a narrow one that implicates the agencies' technical expertise. *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989). As

such, the Court should "defer to the informed discretion of the responsible federal agencies." *Id.* (quotations omitted).

ARGUMENT

The Conservation Groups do not contend there has been a significant change to the proposed action since the completion of the Leasing SFEIS, and therefore 40 C.F.R. § 1502.9(c)(1)(i) is not at issue. The sole question is whether significant post-leasing environmental information has come to light within the meaning of 40 C.F.R. § 1509(c)(1)(ii).

A. OSMRE Appropriately Adopted the Leasing SFEIS on the Subject of Methane Flaring and All Parties Satisfied the Lease Stipulations.

The Conservation Groups attack OSMRE's decision to not supplement the Leasing SFEIS as it relates to their proffered flaring alternative on three grounds: (1) that OSMRE misrepresented the findings of the Leasing SFEIS, (2) that OSMRE never performed a promised follow-up analysis of the economics and safety of flaring, and (3) to the extent OSMRE did such a review, it acted unreasonably in accepting the interpretation of "economic feasibility" employed in the 2009 R2P2 Report and accepted by the BLM in 2012. Each of these arguments is incorrect.

1. OSMRE Fairly Represented the Findings of the Leasing SFEIS and Did Not Stop with the Leasing SFEIS.

The Conservation Groups devote much of their argument to the following phrase from the OSMRE ROD: "[OSMRE] agree[s] with USFS and the BLM's determination that this alternative is not technically or economically feasible (SFEIS Section 2.3.7.5)." AR000035. They assert that the Leasing SFEIS did not make such a finding, which provides the gravamen for their assertion that OSMRE engaged in a "shell game" by asserting that the matter was closed

in the Leasing SFEIS when it was not. The Conservation Groups correctly state that SFEIS Section 2.3.7.5 did not affirmatively state that flaring was infeasible, but that Section presented a wide array of legal, economic, safety, and technical obstacles to any flaring system, and clearly concluded that flaring had *not been shown* to be feasible. AR000268-269.

Moreover, the Conservation Groups might have an argument had OSMRE done nothing more than reference the Leasing SFEIS and call the matter closed. But the remainder of the OSMRE ROD details the additional analysis performed in the R2P2 Update, the BLM's review of the R2P2 Update, and OSMRE's independent consideration of both. AR000035. In context, it is abundantly clear that OSMRE did not rely exclusively on Leasing SFEIS Section 2.3.7.5, but rather simply used that as the starting point for its further economic and safety review. The question then is not whether OSMRE stopped with the Leasing SFEIS (it did not), but whether the BLM's and OSMRE's supplemental review and acceptance of the R2P2 Update needed to be conducted through a supplemental *NEPA* document. As explained below, it did not.

2. <u>The Conservation Groups Do Not State a NEPA Claim.</u>

The irony of the Conservation Groups' energetic challenge to the Leasing SFEIS and OSMRE ROD is that none of it is directed at any claim that OSMRE fails to understand the *environmental* impacts of methane flaring as a mitigation approach. The Leasing SFEIS fully disclosed that flaring CMM would reduce its carbon dioxide equivalent ("CO_2e") impact by as much as 87%.[4] AR000268, 270, 993-994. Neither BLM, USFS, OSMRE, nor Mountain Coal

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[4] It is also relevant that the new information shows that methane emissions are *declining*. The Conservation Groups stress the potential 87% reduction in CO2e emissions from flaring, but the Mine has already reduced methane emissions from MVBs by 90% since 2011, and exploration data indicates emissions will continue to fall. Supplementation is generally not required where the new information reveals a lesser environmental impact than was estimated in the original

dispute this fact. AR000035. Moreover, the Conservation Groups do not contest in any way the updated emission estimates for VAM and MVB CMM emissions employed in the R2P2 Update. As with the social cost of carbon analysis performed by the Agencies and upheld by the Court in *West Elk III*, the 87% reduction is easily multiplied by the emissions estimates, such that OSMRE (and all other agencies and decisionmakers) know exactly the environmental impacts of flaring or not flaring CMM through the projected life of the Lease Modifications. *See West Elk III*, 333 F.Supp.3d at 1132. The Court in *West Elk III* specifically held that: "[i]n line with the project's purpose, the Leasing SFEIS and record of decision *considered the environmental impact of methane venting* and the modified lease terms require further study of this issue." *Id.* at 1126 (emphasis added). That is all that NEPA requires, and the fact that there was additional *non-environmental* economic and safety analysis to be done does not mean that NEPA supplementation was necessary. *See* 42 U.S.C. § 4332 (requiring agencies to consider *environmental* factors); *Public Util. Com'n of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (holding that NEPA does not require consideration of non-environmental factors); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 123-24 (D.C. Cir. 1990) ("NEPA's concern is to inform other governmental agencies and the public about the environmental consequences of its proposed activities, not to inform them about *all* possible consequences of an agency's action.").

NEPA document, and does not undercut the original findings. *Friends of the Bow,* 124 F.3d at 1218-19. Here, reduced methane emissions *reinforce* the original conclusion that flaring had not been shown be economic, because lower emissions reduce the economic feasibility of flaring. OSMRE reasonably concluded that the new information did not warrant supplementation.

This also does not mean that the USFS, BLM, or OSMRE have been or are insulated from public scrutiny or judicial review under the Administrative Procedure Act. At the leasing stage, the Conservation Groups were free to contend that another definition of economic feasibility besides the definition employed since 2012 should have been used for the Lease Modifications. And, once the Lease Modifications were issued, the Conservation Groups were also free to contest any of the economic or safety determinations in the R2P2 Update or challenge BLM's/OSMRE's acceptance of the R2P2 Update as failing to comply with the terms of the Lease Modifications, 43 C.F.R. § 3482.1(b), and/or the requirements of the Mineral Leasing Act. But not everything is a NEPA issue and those are simply not environmental claims. Since there was and is no dispute as to the environmental consequences of flaring as accurately described in the Leasing SFEIS, OSMRE was fully justified in adopting the Leasing SFEIS without further NEPA supplementation.

3. The Conservation Groups have Waived Any Argument for a Different Definition of Economic Feasibility, and OSMRE Does Not Have the Legal Authority to Employ One.

The Lease Modifications are contracts between the BLM and Mountain Coal. Those contracts have terms, one of which is "economically feasible." Although not specifically defined in the contract, "economically feasible" has had a well-understood and accepted meaning since BLM accepted the R2P2 Report in 2012. As noted, the Conservation Groups were free to urge a different definition during the lease modification process, when all contract terms were open for negotiation; they did not. They did not make the argument in their June 1, 2018 comments to OSMRE. *See* AR003316-26. In fact, they did not raise the general argument until their preliminary injunction brief on July 2, 2019, long after the lease modifications had been executed

and after the mine plan modification had been approved. And tellingly, they still provide no clue as to what they think a replacement economic feasibility standard should be. If neither the parties nor the Court can *presently* decipher what alternative definition the Conservation Groups advocate, neither could the Agencies at the time of their decisions. As such, the Conservation Groups have waived any argument that the Agencies should have considered different interpretations of economic feasibility either in the Leasing SFEIS or in subsequent consideration of the mine plan amendment. *See Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006).

In addition to the fact that the Conservation Groups have *waived* any argument for a different definition, OSMRE lacks the *authority* to impose one. BLM and Mountain Coal executed the lease modifications with the understanding that the 2012 interpretation of "economic feasibility" would carry forward. BLM assessed the fair market value of the coal and Mountain Coal agreed to pay the bonus bid and commit itself to all the other requirements of the Lease Modifications with that understanding. OSMRE does not have the legal authority to alter that term of the contract any more than it could *post-hoc* demand Mountain Coal pay double the bonus bid. Where an agency has no legal authority to order implementation of an alternative, it has no duty to analyze that alternative under NEPA. *Dep't. of Public Transp. v. Public Citizen,* 541 U.S. 752, 770 (2004). Consequently, even if the Conservation Groups have articulated what would otherwise be a NEPA claim, OSMRE had no authority or duty to consider alternative definitions of "economic feasibility" as a lever to require flaring.

Without any citation to authority, the Conservation Groups claim that OSMRE could require flaring "as a condition of mining publicly-owned coal from beneath publicly-owned

lands." CG Br. at 19. OSMRE does not have such wide-ranging and standard-less authority. The Forest Service administers the "publicly-owned [national forest system] lands" and the BLM administers the "publicly-owned coal." This is why the BLM issues coal leases, to which the Forest Service must expressly consent. OSMRE's consent for leasing is not required. Rather, OSMRE administers only the reserved federal authority under the Surface Mining Control and Reclamation Act ("SMCRA") and selected provisions of the Mineral Leasing Act regarding mine plans and resource recovery. Ordinarily, OSMRE would have no role regarding the management of CMM. In this instance, however, the Lease Modifications imposed specific post-leasing requirements regarding CMM evaluation on Mountain Coal, which BLM and OSMRE reviewed. The Lease Modifications supply the applicable standards for further consideration of CMM management, and OSMRE is not free to modify those standards.

The Conservation Groups' attempt to move the legal goalposts by changing contract terms is their *only* substantive critique of the R2P2 Update and the BLM's and OSMRE's review and acceptance of the R2P2 Update. They do not dispute that the expected methane emissions from Lease Modifications are *far* less than assumed by the Raven Ridge Report. They do not dispute that the Raven Ridge Report substantially overestimated the cost of a flaring system. They have no rebuttal to the determination that there are significant safety issues associated with flaring, and the conclusion that MSHA is unlikely to authorize a system like the Conservation Groups have proposed.[5] At a minimum, BLM and OSMRE carefully considered the

[5] The Conservation Groups contend that MSHA ventilation plans are unenforceable, citing *Zeigler Coal Co. v. Kleppe,* 536 F.2d 398, 406-407 (D.C. Cir. 1976). CG Br. at 25. In fact, the quoted passage was a preface to an extended discussion of why and how ventilation plans *are* enforceable: ("the life-and-death nature of mine ventilation only confirm us in our belief that Congress intended for mine ventilation plans to be enforceable."). *Id.* at 409. Moreover, the

Conservation Groups' various arguments and evidence, examining the differences between other mines where methane is flared and the Mine, as well as the Raven Ridge Report's suggestion that VAM and MVB emissions be rebalanced to better support a flare. The Conservation Groups may have a different view, but BLM's and OSMRE's technical judgments on these matters (some of which are literally life-and-death) are entitled to deference. The Leasing SFEIS satisfied NEPA, and Mountain Coal, BLM and OSMRE scrupulously complied with the post-leasing commitments set forth in the lease stipulations. The Conservation Groups' flaring argument therefore fails.

B. The Conservation Groups' Cumulative Impacts Theory is Contrary to Recent Case Law in this District, CEQ Guidance, and is Inherently Arbitrary.

The Conservation Groups also contend that OSMRE violated NEPA because they claim that the cumulative impacts discussion in the Leasing SFEIS was defective. According to the Conservation Groups, OSMRE could not rely on the Leasing SFEIS's discussion of cumulative climate impacts because the Leasing SFEIS calculated combustion emissions from the Mine as a percentage of U.S. and global emissions and compared those emissions to total U.S. power plant coal combustion. The Conservation Groups contend that the Leasing SFEIS, and later OSMRE,

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Conservation Groups incorrectly frame the issue. If MSHA was to determine flaring to be safe (*and* BLM/OSMRE determined it to be economic), then the Lease Modifications would obligate Mountain Coal to implement flaring. None of this changes the fact the MSHA is the expert agency on mine safety, and whether flaring is safe is not an issue for OSMRE to determine in a NEPA document. *See Glass Packaging Institute v. Regan,* 737 F.2d. 1083, 1091-92 (D.C. Cir. 1984) ("The limits to which NEPA's causal chain may be stretched before breaking must be defined by the policies and legislative intent behind NEPA. NEPA is meant to supplement federal agencies' other nonenvironmental objectives, not to transplant specific regulatory burdens from those expert agencies otherwise authorized to redress specific nonenvironmental problems and pointlessly to reimpose those objectives on other unqualified agencies.").

should have discussed the specific emissions associated with other past, present, or future actions and quantified the cumulative impacts of expanding the Mine in light of the overall emissions from these other projects. *See* CG Br. at 30-31.

As a threshold matter, the Conservation Groups are inconsistent and arbitrary in their demands. In their Complaint, they fault the Leasing SFEIS and OSMRE for not quantifying and considering other *fossil fuel* actions before the Department of the Interior, including oil and gas and coal *leasing* actions. Complaint ¶¶ 111-116. In their brief, however, they first fault OSMRE for not considering other "federal coal mining projects," CG Brief at 30, and then narrow that further to "OSM coal mining approvals." *Id.* at 31. Conversely, their list could just as logically be *expanded*, to include other actions before the Department of Interior that emit GHGs (such as livestock grazing), or the federal government's actions generally, or indeed to the national and worldwide economies. Every ton of CO_2e emitted worldwide has the same impact on climate as every other ton. No matter what benchmark the Leasing SFEIS selected short of worldwide emissions, the Conservation Groups could fault it for being under-inclusive. Their goalposts thus shift in and out, accordion-like.

Aside from this baseline arbitrariness, the Conservation Groups' claim regarding cumulative climate impacts should be denied for at least three reasons. First, because the Conservation Groups failed to raise this specific issue with any of the Agencies at any stage, they have waived the argument. Second, this argument should be dismissed based on claim preclusion. The Conservation Group's clearly could have raised this argument in *West Elk III*; it is primarily a collateral attack on the Leasing SFEIS. Third, even if Conservation Groups'

argument on cumulative climate impacts is *procedurally* proper, OSMRE did not violate NEPA in relying on the Leasing SFEIS, because the Leasing SFEIS satisfies NEPA.

1. <u>The Conservation Groups Waived their Cumulative Effects Argument.</u>

If the party challenging a decision in court failed to raise an issue it is complaining of in the administrative forum, that party forfeits its ability to raise the objection on appeal. *Silverton Snowmobile Club*, 433 F.3d at 783; *see also Dep't of Transp.*, 541 U.S. at 764. "The claim must [have] be[en] presented in sufficient detail to allow the agency to rectify the alleged violation." *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 430 (10th Cir. 2011).

The Conservation Groups failed to raise their current theory in their comments regarding the Leasing SFEIS or in their comments to OSMRE. On July 24, 2017, the Conservation Groups submitted a 129-page comment letter to the Forest Service regarding the Leasing SDEIS. FSLeasingII-0038919-053. While this comment letter touched on cumulative impacts and climate change as separate topics, it did not articulate Conservation Groups' current argument—that the Agencies should have specifically discussed all other pending projects before OSMRE (or USFS, or BLM, or some combination of the three). Indeed, in the comment letter, Conservation Groups fault the Forest Service for not "account[ing] for the climate impacts of *this proposed action*" and complain that "the Forest Service must disclose the reasonably foreseeable impacts of the GHG emissions of mining and combusting the coal *made available by the Lease Modifications* . . . ." *Id*. at 0038962-62 (emphases added). And while Conservation Groups include a section complaining that the Forest Service did not take a hard look at *some* cumulative impacts, they do not complain about the cumulative impacts analysis as it relates to climate change or GHGs. *Id.* at 0038981-85.

Similarly, on June 1, 2018, certain of the Conservation Groups (WildEarth Guardians, Center for Biological Diversity, and Sierra Club) submitted a comment letter to OSMRE regarding the proposed mine plan. AR003316-26. But this comment letter does not complain of cumulative impacts or climate change.

Accordingly, the Conservation Groups did not raise this claim in sufficient detail at the appropriate stage in front of the Agencies to preserve it here. While the Conservation Groups technically touched on climate change issues in their comments to the Leasing SDEIS, they complained of the Forest Service's failure to look at climate change impacts of *this particular action*. Here, the Conservation Groups fault the Leasing SFEIS and OSMRE for failing to analyze *other actions*. To survive a waiver challenge, the claims must not simply relate to the same general subject matter as those raised with the agency. Instead, "the claims raised at the administrative appeal and in the federal complaint must be so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised in federal court." *Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999). Because the Conservation Groups failed to raise this issue with the Agencies, they have forfeited it here.

2. The Claim is Barred by Claim Preclusion because Conservation Groups Could have Raised in in *West Elk III*.

Res judicata, or claim preclusion, bars a litigant from bringing claims that were or could have been litigated in a prior action. *See MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (10th Cir. 2005). A claim will be barred by res judicata if there is: (1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999). In the

Tenth Circuit, "a claim arising out of the same transaction, or series of connected transactions as a previous suit, which concluded in a valid and final judgment, will be precluded." *Id.* at 1227.

All three elements of claim preclusion are satisfied here. There was a judgment on the merits in *West Elk III* and the parties in the two cases are identical. And this is an argument that could have been raised in *West Elk III*, but was not. It is therefore barred.

3. NEPA Does Not Demand the Analysis that the Conservation Groups Contend was Required.

Even if the Court determines that the Conservation Groups' cumulative impacts argument is not forfeited or barred by claim preclusion, it should be rejected because NEPA does not require such an inquiry for cumulative impacts relating to climate change. Earlier this year, another court in this District rejected the Conservation Groups' theory. In *Citizens for a Healthy Community v. U.S. Bureau of Land Mgmt.*, 377 F.Supp.3d 1223 (D. Colo. 2019), Judge Babcock upheld the agencies' analysis of the cumulative impacts of climate change.[6] The petitioners in that case faulted the agencies for not considering the effects of other BLM actions. *Id.* at 1239. The Court rejected this argument and held that such an analysis was unnecessary. The Court noted the specific problem of performing a cumulative impacts analysis of climate when millions of sources worldwide contribute to the impacts in the same way. It explained that the agencies satisfied NEPA by analyzing statewide emissions levels from coal-fired power plants, providing a qualitative analysis of climate change and the role played by GHG emissions, discussing the

[6] It is unclear why the Conservation Groups do not cite this recent published decision from this district concerning the exact issue in this litigation. The Conservation Groups cannot fairly claim that they are unaware of the decision, given that four of the conservation group petitioners in this case were also petitioners in *Citizens for a Healthy Community*. Moreover, Alison Melton, who submitted a declaration regarding standing, *see* CB Br. at Exh. 2, was a counsel of record in *Citizens for a Healthy Community*, *see* 377 F.Supp.3d at 1230.

potential for climate change impacts using reports from the Intergovernmental Panel on Climate Change ("IPCC") and National Climate Assessment, performing regional cumulative impacts analysis of the future mineral development by relying on the Colorado Air Resources Management Modeling Study to assess predicted impacts on air quality, and predicting the total GHG emissions from the product per year. *Id.*

This is exactly the analysis the Agencies undertook in the Leasing SFEIS. The Agencies provided a qualitative analysis of climate change, explained the role of GHGs and discussed IPCC reports. The Agencies utilized the Colorado Air Resources Management Modeling Study to assess emissions impacts. AR000322-30. And the Agencies calculated the West Elk Mine's specific emissions, and compared those emissions as a percentage of U.S. GHG emissions and explained the difficulty in performing a direct analysis. AR000337.

This approach is also consistent with CEQ's guidance, which has remained consistent on this issue across Administrations. Such guidance explains that a separate cumulative impacts analysis for GHG emissions is *not required* and, based on the inherently global cumulative effects of climate change, a discussion of local, regional, national or sector-wide emissions estimates and a qualitative summary of the effects of GHG emissions satisfies NEPA. *See* Aug. 1, 2016 Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 81 Fed. Reg. 51866 (Aug. 5, 2016); Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 84 Fed. Reg. 30097 (June 26, 2019). Furthermore, this approach has also been approved by numerous other courts. *See WildEarth Guardians v. Bureau of Land Mgmt.*, 8 F.Supp.3d 17, 35-36 (D.D.C. 2014) (approving

discussion of climate change impacts in terms of percentage of state and nationwide emissions); *W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, Case No. CV 16-21-GF, 2018 WL 1475470, at *13-14 (D. Mont. Mar. 26, 2018) (approving use of GHG emissions as proxy for global climate change).

The Conservation Groups cite two cases to support their position that the Agencies were required to consider other specific projects, *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41 (D.D.C. 2019) and *Indigenous Environmental Network v. U.S. Dep't of State*, 347 F.Supp.3d 561 (D. Mont. 2018). Not only are these two cases non-binding on this Court, and contrary to *Citizens for a Healthy Community*, but they are distinguishable. In *WildEarth Guardians*, the District of D.C. held that the cumulative impacts climate change analysis was inadequate. But its decision hinged on the fact that the agencies did not quantify the GHG emissions for each specific oil and gas leasing application that was *the subject of the proposed action*. *See* 368 F.Supp.3d at 76-77. According to the Court, "[w]ithout access to a data-driven comparison of GHG emissions from the leased parcels to regional and national GHG emissions, the public and agency decisionmakers had no context for the . . . conclusion that the GHG emissions from the leased parcels would represent only an incremental' contribution to climate change." *Id.* at 77. Here, the Leasing SFEIS set forth this data. It sets forth the total CO_2e emitted from the U.S. in 2014 and the percentage of the 2014 level that combustion of the Mine's coal would represent based on its percentage of the total U.S. coal production. AR000337. In short, the Leasing SFEIS provides just the data that the Court determined was lacking in *WildEarth Guardians*.

Similarly, in *Indigenous Environmental Network v. U.S. Department of State*, which involved the Keystone Pipeline, the District of Montana determined that the Department of State

should have analyzed the GHG emissions associated with the contemporaneous expansion of another pipeline, the Alberta Clipper. 347 F.Supp.3d at 577-78. But, in that case, the State Department had included the Keystone emissions in the Albert Clipper EIS, but excluded the Alberta Clipper emissions from the Keystone EIS. *Id.* at 578-79. The court found the two pipelines to be "connected actions," and the inconsistency in analysis to be arbitrary. *Id.* at 579. Here, there is no claim that the other actions are connected to the Lease Modifications, or there has been any inconsistent treatment of cumulative impacts across actions.

The Agencies' analysis of cumulative climate impacts comports with what both the court in *Citizens for a Healthy Community* and CEQ Guidance requires. As such, the Agencies did not violate NEPA in their analysis of cumulative climate impacts in the Leasing SFEIS, and OSMRE did not err in relying on the Leasing SFEIS.

C. Updated Information on Water Resources Confirmed the Validity of the Leasing SFEIS.

Unlike the prior arguments, the Conservation Groups' water resources argument actually focuses on new information obtained since the Leasing SFEIS, and therefore is properly a supplementation claim rather than simply collateral attack in the Leasing SFEIS. The claim nevertheless fails because the new information did not indicate any significant new impacts, but rather confirmed the continuing validity of the Leasing SFEIS.

As part of analyzing whether the Leasing SFEIS remained adequate for approval of proposed mine plan modification, OSMRE reviewed West Elk's 2016 Annual Hydrology Report ("2016 Hydro Report") and compared it to the data and statements in the Leasing SFEIS. This review prompted OSMRE staff to draft five clarifications and updates to the Leasing SFEIS. AR000043-44. The Conservation Groups claim that four of these reveal significant new

information about surface water resources and potential impacts to those resources. In fact, the 2016 Hydro Report identifies *no* significant changes from prior years, and is fully consistent with the Leasing SFEIS. OSMRE's revisions are exactly what OSMRE said them to be—minor clarifications and updates that do not diminish the continuing validity of the Leasing SFEIS for informing the mine plan modification.

The Leasing SFEIS came to the following conclusions about surface water resources in the mine vicinity and lease modification area, and the potential impact of underground mining on these resources:

- Most of the waterways in the lease modification area are ephemeral or intermittent, AR00361;
- There are two short stretches of perennial streams, *id.*;
- While underground mining can affect stream water quantity, there is no evidence that underground mining has materially affected the quantity of stream flows in the vicinity of the mine, AR00755; AR00364; and
- It is possible that mining has affected stream water quality, but observed elevated levels are more likely the result of seasonal/natural events like spring runoff. *Id.*

There were some ambiguities in the text of the Leasing SFEIS. For example, the document states:

> About 11.3 miles of tributary streams drain the lease modification areas and most flow only intermittently. *Lease 1362 has about 0.27 miles of perennial stream* and 5.58 miles of intermittent channels. *Lease 67232 has about 0.31 miles of perennial stream* and 5.17 miles of intermittent channels.
>
> . . .

> *South Prong Creek and Horse Creek, as reported by MCC data, are ephemeral* and flow only in response to spring runoff conditions and storm events. *Perennial and intermittent streams in the lease modifications area are shown on Figure 3-20.*

AR00361 (emphases added). Figure 3-20 clearly shows that the referenced perennial segments are found on South Prong Creek and Horse Creek. AR00363. Consequently, it is not precisely true that the entirety of the two creeks are ephemeral, as suggested by the second highlighted excerpt, if read in isolation. The Conservation Groups called this out in comments as an "error" in the Leasing DSEIS, and in response, the USFS verified the validity of the Figure (then Figure 3-18). AR001099-1100. The Agencies did not modify the text in the SFEIS, but in the full context of the passage and the Figure there is no confusion. The extent of perennial streams is known down to the hundredth of a mile, and the understanding of that extent did not change as a result of the 2016 Hydro Report. Nevertheless, OSMRE picked up on this ambiguity during its review, and corrected the text to read: *"South Prong Creek and Horse Creek, as reported by MCC data, are <u>perennial and intermittent</u>."* (italics in original, underline added). This is simply clarifying what is already stated in the Leasing SFEIS.

OSMRE made a similar clarification regarding perennial seeps/springs. OSMRE observed that because there are short stretches of perennial streams in the lease modification area, there are likely some degree of perennial springs feeding those streams. AR000043. This change was not prompted by specific data in the 2016 Hydro Report, but was simply an inference from the long-known and unchanged character of the stream resources. *Id.*

The Conservation Groups characterize these textual reconciliations as some kind of revelation. They argue, incorrectly, that these are "new findings" and a "reclassification" of resources deriving from the 2016 Hydro Report, and this new understanding of the extent of

perennial streams and springs/seeps mandates a new analysis of impacts and NEPA supplementation. As shown, they are neither new nor did they derive from the 2016 Hydro Report. Moreover, the potential impacts of mining on streams and springs (of any type) were fully disclosed and did not change as a result of the 2016 Hydro Report.

Contrary to the Conservation Groups' characterization, the potential impacts of mining on all types of water resources were discussed in the Leasing SFEIS. West Elk has been in operation for nearly 40 years, and there is a rich set of data on the potential impacts of mining on both water quality and quantity. This is most fully discussed at page 546 of the Leasing SFEIS, which describes the resources in the lease modification area and potential impacts on those resources:

> Two short perennial stream reaches exist within the modifications area, and intermittent and ephemeral drainages do receive nominal amounts of sediment from the soils and existing instability of slopes in the area (Figure 3-16).
> . . .
> Increased sedimentation occurs during normal precipitation and spring runoff, so effects of increased sedimentation may not be quantifiable beyond baseline levels. Increased surface erosion, changes to drainage morphology and possible disruption of seasonal stream-flow could occur as a result. Since subsidence is not expected in the vicinity of floodplains or major stream channels, disruptions of stream flow as a low probably [sic] of occurrence. The magnitude and duration of predicted effects depends upon the amount and location of subsidence. Although material damage to the quality and quantity water arising on or flowing over the proposed lease modifications is possible, because of the reason listed above, this is not anticipated, and would be hard to separate from natural process that are currently affecting water quality/quantity.

AR00755. This analysis in the Leasing SFEIS tracks exactly what the Conservation Groups claim should have been done. The Conservation Groups are either unaware of or fail to acknowledge this discussion, because they do not cite this passage in their brief, focusing instead on page 155 (AR000364). But even the discussion on page 155, just three sentences after the

passage the Conservation Groups focus on, notes that changes in water quality can occur after mining. The Leasing SFEIS thus addresses the issue that the Conservation Groups claim was not identified until the 2016 Hydro Report.

Moreover, the 2016 Hydro Report does not change any of the conclusions from the Leasing SFEIS. As to stream water quality, the Report states that most monitored sites, including all sites in the vicinity of current mining, did not show exceedances. Where there were exceedances, it concludes they "were not likely mining related, since mining discharges have not and are not occurring in the vicinity of the monitored sites." AR001506. As to stream flows, the Report states: "[b]ased on the flow monitoring data through WY 2016 (Appendices A and B), there are no mining induced impacts to the water quantity of these streams." AR001509. Regarding seeps, the Report states "[t]ypically, underground coal mining does not impact spring water quality, but it can reduce or eliminate flows due to subsidence or dewatering." It further states that "[w]ater quality data from WY 2016 do not indicate significant changes from baseline conditions for most of the monitored springs. However, many of the springs had slightly elevated [values] that were also noted in WYs 2004[7] through 2015. These elevated values are likely the result of physical and or seasonal variations and are not related to mining operations." *Id*. The 2016 Hydro Report thus shows no change from the prior 11 years of data.

The Conservation Groups make much of the fact that OSMRE chose to rephrase the Leasing SFEIS statement on page 155 that the elevated values are "attributed to spring runoff" to state that they are "<u>likely</u> the result of [spring runoff]. . . and <u>possibly</u>" the result of mining.

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[7] OSMRE has a typo in its summary, stating that the prior data range runs from 2014-2015 rather than 2004-15. AR00043.

AR00043 (emphasis added). But as more fully discussed on page 546 of Leasing SFEIS, the Agencies expressly stated that material damage was "possible" but "not anticipated," because spring runoff was the likely cause. AR00755. The 2016 Hydro Report is thus in harmony with the Leasing SFEIS, using nearly identical wording.

Finally, the Conservation Groups fail to acknowledge that if mining does affect water quality or quantity, the Leases require Mountain Coal to replace the affected water with a similar quantity and quality, sufficient "to maintain existing riparian habitat, livestock and wildlife use, or other land uses as authorized by 36 CFR 251." AR000240. Therefore there was no reason for OSMRE to further analyze downstream impacts of mining—there likely was none in the first instance, and if so would be rectified pursuant to the Leases. Collectively, the Conservation Groups' critiques of OSMRE's determination not to formally supplement the water resources discussion of the Leasing SFEIS do not even rise to the level of flyspecking. *See Richardson v. Bureau of Land Management*, 565 F.3d 683, 704 (10th Cir. 2009).

D. <u>If the Court Identifies a NEPA Error, a Limited Remand and Injunction is the Appropriate Remedy.</u>

If the Court determines that OSMRE violated NEPA, instead of vacating the Mine Plan, the Court should remand to OSMRE to perform any necessary corrective action.

Contrary to the Conservation Groups' assertion, vacatur is not the only lawful or standard remedy where there has been a NEPA violation. *See* CG Br. at 39. The Tenth Circuit has explained that where a NEPA error is narrow and well-defined, a narrow remedy shaped by equitable principles is appropriate. *See WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239-40 (10th Cir. 2017). In that case, after reversing the district court's decision to uphold a NEPA analysis of coal leases, the Tenth Circuit remanded the case to the district court

to fashion its own remedy. It explained that the district court could "fashion some narrower form of injunctive relief based on equitable arguments." *Id.* at 1240.

In *West Elk II (Remedies)*, this Court similarly recognized that it "ha[d] a great deal of discretion in crafting a remedy" and that it could rely on equitable principles exercising such discretion. *See* 870 F.Supp.3d at 1263-64 ("The APA does not . . . deprive reviewing courts of traditional equitable powers when fashioning a remedy."). While this Court ultimately vacated the Agencies' approvals of the lease modifications, it did so based on the complex and interrelated nature of the decisions at issue. It explained that the decisions were like a "Gordian knot that need[ed] cutting" and that it thus "view[ed] skeptically any argument that a simple remand and temporary injunction [wa]s all that [wa]s needed." 67 F.Supp.3d at 1265.

Unlike the complex matters at issue in *West Elk II*, the alleged errors in OSMRE's decision at issue in this case are merely "a simple tangle that the government can untie with a little extra time." *Id.* Although Mountain Coal is conducting "development mining" (i.e., limited coal extraction in preparation for longwall mining), Mountain Coal has not commenced longwall mining in the Lease Modifications. It is longwall mining that releases CMM and necessitates emissions through MVBs, and it is longwall mining that causes subsidence and would be the cause of impacts to surface water resources, if any. Longwall mining is not scheduled to commence until the first quarter of 2020, providing a window for focused corrective action without necessitating vacatur of the mine plan.

This remedy is especially warranted if the Court finds that OSMRE's only NEPA violation was its failure to supplement the Leasing SFEIS regarding flaring. With regard to methane flaring, the Conservation Groups do not argue that Mountain Coal should not be

permitted to mine the coal in the Lease Modifications. Indeed, they stress that, in their view, flaring is *compatible* with mining. CG Br. at 20-21 ("[A] mandatory flaring alternative . . . allow[s] [Mountain Coal] to mine precisely the same amount of coal as under the preferred alternative, while significantly reducing the direct climate harms the project will cause."). Accordingly, because Mountain Coal will not be venting methane from any of the new MVBs permitted on the Lease Modifications for some time, there is no justification to vacate the entire Mine Plan. This remedy will simultaneously allow Mountain Coal to continue operating the Mine and mining coal, but will protect against the very environmental harms that the Conservation Groups complain of.

Moreover, such a remedy will not endorse a "bureaucratic steam roller" or cause any further review to be "a pro-forma exercise in support of a 'predetermined outcome." *See* CG Br. at 40. To the contrary, courts must presume that agencies will follow the law and comply with NEPA, even in later stages of a project. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082-83 (9th Cir. 2010); *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988). The Conservation Groups cite *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002), to support their point. But their argument misreads *Davis*. In *Davis*, the agencies proposed to *proceed with the environmental harm* while they completed the required supplemental NEPA review. The Tenth Circuit held that such an approach would simply compound the agencies' prior error and was incompatible with NEPA. *Id.*

In contrast to *Davis*, in this case, Mountain Coal is not proposing to take any actions during the pendency of the supplemental NEPA review that will cause any of the Conservation Groups' complained of effects on the environment. As such, no "egg[s] will have already been

scrambled" by the time the OSMRE performs its supplemental NEPA analysis. *See* CG Br. at 41 (citing *Milk Train v. Veneman*, 10 F.3d 747, 756 (D.C. Cir. 2002). Mountain Coal is simply requesting a remedy that will not undo, and then perhaps compel OSMRE to redo, very extensive analyses that are now at issue. OSMRE rapidly and successfully performed corrective NEPA after this Court's remand in *WildEarth Guardians v. OSMRE,* 104 F.Supp.3d 1208, 1232 (D. Colo. 2015). That is the model that should be employed here.

Respectfully submitted this 6th day of September 6, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, I caused the foregoing document, **MOUNTAIN COAL COMPANY'S BRIEF ON THE MERITS** to be electronically filed with the Clerk of the Court using the CM/ECF system.

s /*Vanessa Thompson*