IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-00518-JLK

WILDEARTH GUARDIANS,

Plaintiff,

v.

U.S. OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT,
AL KLEIN, in his official capacity as Western Regional Director of the Office of Surface Mining Reclamation and Enforcement, Denver, Colorado, and
S.M.R. JEWELL, in her official capacity as U.S. Secretary of the Interior,

Federal Defendants,

COLOWYO COAL CO. L.P, and TRAPPER MINING, INC.,

Defendant-Intervenors.

PLAINTIFF'S OPENING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

GLOSSARY OF ABBREVIATIONS ix

INTRODUCTION 1

STATEMENT OF FACTS 3

I. STATUTORY BACKGROUND 3

A. The National Environmental Policy Act. 3

B. CEQ and Department of Interior Regulations Relating to Efficiency of the NEPA Process. 6

C. Legal Framework for Approval of Mining Plans. 8

II. FACTUAL BACKGROUND 10

A. Colowyo Mine and Approval of the Mining Plan Modification. 10

B. Trapper Mine and Approval of the Mining Plan Modification. 13

C. Environmental Impacts of Coal Mining. 15

STANDARD OF REVIEW 18

ARGUMENT 19

I. WILDEARTH GUARDIANS HAS STANDING 19

II. OSM FAILED TO PROVIDE NOTICE OF ITS DECISIONS AND OPPORTUNITY FOR PUBLIC INVOLVEMENT IN THE NEPA PROCESS 21

A. OSM's Public Involvement Duties. 21

B. OSM Failed to Provide Public Notice of Its Decisions and Allow for Participation in Its EAs/FONSIs for the Colowyo and Trapper Mining Plan Modifications. 23

III. OSM FAILED TO TAKE A HARD LOOK AT DIRECT IMPACTS TO AIR QUALITY FROM THE MINING PLAN APPROVALS 25

A. OSM Failed to Take a Hard Look at Air Quality Impacts from Ozone and $PM_{2.5}$ Emissions Resulting from Expansion of the Colowyo Mine............ 26

B. OSM Failed to Take a Hard Look at Air Quality Impacts from Ozone and $PM_{2.5}$ Emissions Resulting from Expansion of the Trapper Mine. 32

IV. OSM FAILED TO TAKE A HARD LOOK AT INDIRECT IMPACTS TO AIR QUALITY FROM COAL COMBUSTION 36

CONCLUSION 39

TABLE OF AUTHORITIES

Cases

Baltimore Gas and Electric Co. v. NRDC,
462 U.S. 87 (1983) 4

Bering Strait Citizens for Responsible Res. Dev. v. COE,
524 F.3d 938 (9th Cir. 2008) 23

Border Power Plant Working Group v. DOE,
260 F. Supp. 2d 997 (S.D. Cal. 2003) 38

Calvert Cliffs' Coordinating Comm'n v. U.S. Atomic Energy Comm'n,
449 F.2d 1109 (D.C. Cir. 1971) 22

Colo. Envtl. Coal. v. Dombeck,
185 F.3d 1162 (10th Cir. 1999) 18, 19, 21

Colo. Envtl. Coal. v. Office of Legacy Mgmt.,
819 F. Supp. 2d 1193 (D. Colo. 2011) 5

Comm. to Save Rio Hondo v. Lucero,
102 F.3d 445 (10th Cir. 1996) 20, 21

Dep't of Transp. v. Public Citizen,
541 U.S. 752 (2004) 37

Dine Citizens Against Ruining Our Env't v. Klein,
747 F.Supp.2d 1234 (D. Colo. 2010) 5, 23, 24

Found. on Econ. Trends v. Heckler,
756 F.2d 143 (D.C. Cir. 1985) 5

Friends of Marolt Park v. USDOT,
382 F.3d 1088 (10th Cir. 2004) 31

Friends of the Earth v. Laidlaw Envtl. Servs.,
528 U.S. 167 (2000) 20

Greater Yellowstone Coal. v. Flowers,
359 F.3d 1257 (10th Cir. 2004) 23

Hunt v. Wash. State Apple Adver. Comm'n,
432 U.S. 333 (1977) 20

Lands Council v. Powell,
395 F.3d 1019 (9th Cir. 2005) 30

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 20

Marsh v. ONRC,
490 U.S. 360 (1989) 31, 36

Metro. Edison Co. v. People Against Nuclear Energy,
460 U.S. 766 (1983) 37

Mid-States Coal. for Progress v. Surface Transp. Bd.,
345 F.3d 520 (8th Cir. 2003) 5, 37, 38

Morris v. U.S. Nuclear Regulatory Comm'n,
598 F.3d 677 (10th Cir. 2010) 19

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,
463 U.S. 29 (1983) 19, 39

N. Plains Res. Council, Inc. v. Surface Transp. Bd.,
668 F.3d 1067 (9th Cir. 2011) 30, 35

New Mexico ex rel Richardson v. BLM,
565 F.3d 683 (10th Cir. 2009) 3, 4, 29

Olenhouse v. Commodity Credit Corp.,
42 F.3d 1560 (10th Cir. 1994) 18, 39

Or. Envtl. Council v. Kunzman,
817 F.2d 484 (9th Cir. 1987) 22

Or. Nat. Desert Ass'n v. BLM,
625 F.3d 1092 (9th Cir. 2010) 22

Or. Natural Res. Council Action v. USFS,
445 F. Supp. 2d 1211 (D. Or. 2006) 29

Pennaco Energy, Inc. v. USDOI,
377 F.3d 1147 (10th Cir. 2004) 28, 31

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 3, 4, 22

Rocky Mountain Wild v. Vilsack,
2013 WL 3233573 (D. Colo. June 26, 2013) 19

S. Or. Citizens Against Toxic Sprays v. Clark,
720 F.2d 1475 (9th Cir. 1983) 28

Sierra Club v. DOE,
287 F.3d 1256 (10th Cir. 2002) 21

Sierra Club v. Marsh,
769 F.2d 868 (1st Cir. 1985) 37

Utah Shared Access Alliance v. Carpenter,
463 F.3d 1125 (10th Cir. 2006) 18

Utah Shared Access Alliance v. USFS,
288 F.3d 1205 (10th Cir. 2002) 19, 32

Utahns For Better Transp. v. USDOT,
305 F.3d 1152 (10th Cir. 2002) 19

Warm Springs Dam Task Force v. Gribble,
621 F.2d 1017 (9th Cir. 1980) 31

Wis. v. Weinberger,
745 F.2d 412 (7th Cir. 1984) 32

Statutes

30 U.S.C. § 201 8
30 U.S.C. § 207(a) 8
30 U.S.C. § 1201 1
30 U.S.C. § 1273(c) 9
30 U.S.C. § 181 .... 1, 8
30 U.S.C. § 207(c) 9

42 U.S.C. § 4231 1
42 U.S.C. § 4332(2)(C) 3
42 U.S.C. § 4332(2)(C)(i) 4, 36
42 U.S.C. § 4332(2)(C)(ii) 36
42 U.S.C. § 7409(b) 16
5 U.S.C. § 701 3
5 U.S.C. § 702 18
5 U.S.C. § 706(2)(A) 18
5 U.S.C. § 704 18

Other Authorities

44 Fed. Reg. 8,202 (Feb. 8, 1979) 30
46 Fed. Reg 18,026 (March 23, 1981) 29, 35
52 Fed. Reg. 24,634 (July 1, 1987) 17
62 Fed. Reg. 38,652 (July 18, 1997) 16, 17, 30
71 Fed. Reg. 61,144 (Oct. 17, 2006) 18
73 Fed. Reg. 16,436, (Mar. 27, 2008) 16, 17
73 Fed. Reg. 61,292 (Oct. 15, 2008) 6, 30

Regulations

30 C.F.R. § 745.13(b) 9
30 C.F.R. § 745.13(i) 9
30 C.F.R. § 746 1
30 C.F.R. § 746.11(a) 10
30 C.F.R. § 746.13 .... 9, 10
30 C.F.R. § 746.14 9
30 C.F.R. § 746.17(b) 10
30 C.F.R. § 746.18 10
40 C.F.R. § 1500.1 3
40 C.F.R. § 1500.1(b) 22
40 C.F.R. § 1500.2(d) 3, 22, 25
40 C.F.R. § 1501.4(e) 4
40 C.F.R. § 1502.14 4
40 C.F.R. § 1502.16 4
40 C.F.R. § 1502.20 6
40 C.F.R. § 1502.21 7
40 C.F.R. § 1502.9(c) 29
40 C.F.R. § 1503.4(a) 25
40 C.F.R. § 1506.3(a) 7

40 C.F.R. § 1506.6(a) ... 22
40 C.F.R. § 1506.6(b) ... 22
40 C.F.R. § 1508.13 ... 5
40 C.F.R. § 1508.25(c) ... 36
40 C.F.R. § 1508.28 ... 6
40 C.F.R. § 1508.8(a) ... 37
40 C.F.R. § 1508.8(b) ... 36, 37
40 C.F.R. § 1508.9 ... 4
40 C.F.R. § 1508.9(b) ... 4, 36
40 C.F.R. § 50.1 ... 16
43 C.F.R. § 120 ... 26
43 C.F.R. § 3425.1-8(a) ... 8
43 C.F.R. § 3475.1 ... 8
43 C.F.R. § 3475.2 ... 8
43 C.F.R. § 46 ... 6
43 C.F.R. § 46.135(a,b) ... 7
43 C.F.R. § 46.140 ... 6
43 C.F.R. § 46.140(a) ... 7
43 C.F.R. § 46.140(b) ... 7
43 C.F.R. § 46.140(c) ... 6
43 C.F.R. § 46.305(c) ... 22, 25
43 C.F.R. § 46.120(b) ... 7
43 C.F.R. § 46.120(c) ... 8

GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
BLM	U.S. Bureau of Land Management
COLOWYO	Document pages in Colowyo administrative record
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FONSI	Finding of No Significant Impact
Guardians	Plaintiff WildEarth Guardians
MLA	Mineral Leasing Act
NAAQS	National Ambient Air Quality Standard
NEPA	National Environmental Policy Act
NO_x	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 Reclamation and Control Act
TRAPPER	Document pages in Trapper administrative record
TSP	Total suspended particulates
VOC	Volatile organic compound

INTRODUCTION

This litigation seeks to remedy the chronic failure of the Federal Defendants to address the potentially significant environmental impacts of coal mining at the Colowyo and Trapper Mines in Colorado and to involve the public in its mining-related decisions in accordance with federal law. At issue are Federal Defendants' approvals of "mining plans" which authorize the development of federally owned coal. The Mineral Leasing Act of 1920 ("MLA"), as amended, 30 U.S.C. § 181 *et seq.*, and the Surface Mining Reclamation and Control Act ("SMCRA") of 1977, 30 U.S.C. § 1201 *et seq.*, require that the Secretary of the Interior approve mining plans before companies can mine federally owned coal. Among other things, a mining plan must ensure that mining complies with applicable federal laws and regulations and be based on information prepared in compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4231 *et seq*. *See* 30 C.F.R. § 746 *et seq*.

Federal Defendants U.S. Office of Surface Mining Reclamation and Enforcement ("OSM") and Al Klein, serving in his official capacity as Western Regional Director of OSM, and the Secretary of the Interior (collectively "OSM") have approved mining plans authorizing continued federal coal development at the Colowyo and Trapper Mines in northwest Colorado. In approving these plans, however, OSM failed to comply with NEPA. Specifically, OSM failed to ensure that the public was appropriately involved in the approvals of the mining plans and failed to take a hard look at potentially significant environmental impacts, in particular, impacts to air quality from the expansion of coal mining at Colowyo and Trapper.

Coal mining is an intensive industrial activity with far reaching impacts that deserves equally intensive environmental scrutiny before garnering federal approval. For example, coal mining results in air pollution that can have potentially significant impacts on air quality and, by extension, human health. Directly, coal mining can generate large amounts of particulate matter from strip mining, reclamation, and other material moving activities, as well as nitrogen oxides (which form ground-level ozone) from blasting, haul trucks, and other combustion activities. In addition, environmental impacts related to coal combustion, which result only because coal is mined, are even more extensive and include air quality impacts from particulate matter, nitrogen oxide, sulfur dioxide, mercury, and carbon dioxide emissions.

Yet the record here demonstrates that OSM's recent approvals of mining plan modifications for Colowyo and Trapper failed to comply with NEPA. For each approval, OSM prepared four-page environmental assessments ("EAs") purporting to analyze the environmental impacts of expanded coal mining operations at Colowyo and Trapper but did nothing more than reference decades-old NEPA and non-NEPA documents as sufficiently analyzing the environmental impacts of additional coal mining at Colowyo and Trapper. OSM made no effort to determine whether the impacts analyses and conclusions in these documents from the late 1970s remained valid for assessing impacts of mining additional coal from Colowyo and Trapper 30 years later.

In addition, OSM has not complied with NEPA's mandate that the agency provide the public with opportunities to be involved in preparation of NEPA documents or even provided public notice that the agency had completed EAs and approved mining plan

modifications expanding coal mining. OSM has ignored NEPA's mandate that it "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment" and has, instead, opted to conduct its NEPA process wholly within the confines of the agency's Denver office. 40 C.F.R. § 1500.2(d).

Accordingly, Plaintiff WildEarth Guardians ("Guardians") alleges that Federal Defendants violated NEPA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, by unlawfully approving the mining plan modifications for the Colowyo and Trapper Mines. Guardians respectfully requests that this Court declare OSM's NEPA analyses of the Colowyo and Trapper mining plan modifications arbitrary and capricious, and vacate these approvals until Federal Defendants have complied with NEPA.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

A. The National Environmental Policy Act.

NEPA is the "basic national charter for protection of the environment," and the "centerpiece of environmental regulation in the United States." 40 C.F.R. § 1500.1; *New Mexico ex rel Richardson v. BLM*, 565 F.3d 683, 703 (10th Cir. 2009). Congress enacted NEPA to ensure that Federal projects do not proceed until the Federal agency analyzes all environmental effects associated with those projects. *See* 42 U.S.C. § 4332(2)(C); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA achieves its purpose through "action forcing procedures. . . requir[ing] that agencies take a *hard look* at environmental consequences.") (citations omitted) (emphasis added). NEPA's hard look should provide an analysis of environmental impacts that is useful to

both decisionmakers and the public. *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983) (describing NEPA's "twin aims" as informing the agency and the public). "By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check those decisions." *New Mexico ex rel. Richardson*, 565 F.3d at 703; *see also Robertson*, 490 U.S. at 356 (explaining NEPA analysis "generate[s] information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision.") (citation omitted).

Under NEPA, a federal agency must prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). In the EIS, the agency must, among other things, rigorously explore and objectively evaluate all reasonable alternatives; analyze and assess all direct, indirect, and cumulative environmental effects; and include a discussion of the means to mitigate adverse environmental impacts. 40 C.F.R. §§ 1502.14 and 1502.16.

When an agency is uncertain whether a federal action may have significant environmental impacts, the agency may prepare an Environmental Assessment ("EA") to determine whether an EIS is necessary. 40 C.F.R. § 1508.9. Although an EA may be more brief than an EIS, the EA must nonetheless include a discussion of alternatives and the environmental impacts of the action. 40 C.F.R. § 1508.9(b). If an agency decides not to prepare an EIS, an EA must provide sufficient evidence to support a Finding of No Significant Impact ("FONSI"). 40 C.F.R. § 1501.4(e). Such evidence must demonstrate

that the action "will not have a significant effect on the human environment[.]" 40 C.F.R. § 1508.13.

NEPA's "hard look" mandate applies to EAs as well as EISs, and courts do not hesitate to set aside agency action based on an EA's inadequate assessment of impacts. *See Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1207-11 (D. Colo. 2011), *amended on reconsideration*, 2012 WL 628547 (D. Colo. Feb. 27, 2012) (applying "hard look" requirement to EA and finding agency failed to disclose site-specific impacts of mining); *Dine Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234, 1256-57, 1259 (D. Colo. 2010) (applying "hard look" requirement to an EA and setting it aside for failing to take a "hard look" at mitigation measures). "An environmental assessment that fails to address a significant environmental concern can hardly be deemed adequate for a reasoned determination that an EIS is not appropriate." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985) (holding that "[i]n light of this complete failure to address a major environmental concern, [the agency's] environmental assessment utterly fails to meet the standard of environmental review necessary before an agency decides not to prepare an EIS."). In addition, courts have specifically overturned NEPA analyses where the agency failed to take a hard look at impacts to air quality. *See*, *e.g.*, *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 532 (8th Cir. 2003).

B. CEQ and Department of Interior Regulations Relating to Efficiency of the NEPA Process.

The Council on Environmental Quality's ("CEQ's") NEPA regulations provide three procedural means for eliminating duplicative environmental analyses: tiering, incorporation by reference, and adoption. The Department of Interior's supplemental NEPA regulations[1] provide specific requirements that agencies such as OSM must follow if they want to avail themselves of one or more of these options. First, NEPA allows an agency to "tier" a site-specific environmental analysis for a project to a broader EIS for a program or plan under which the subsequent project is carried out. 40 C.F.R. § 1508.28. Thus, when an agency tiers a site-specific analysis to a broader EIS, "the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action." 40 C.F.R. § 1502.20.

Interior's NEPA regulations for using tiered documents specify that site-specific EAs "can be tiered to a programmatic or other broader-scope [EIS]." 43 C.F.R. § 46.140(c). As a general rule, an EA that tiers to another NEPA document "must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions." 43 C.F.R. § 46.140. If the EIS analyzes the impacts of the site-specific action, the agency is not required to perform

[1] In 2008, the U.S. Department of Interior ("Interior") promulgated regulations to implement NEPA. 73 Fed. Reg. 61,292 (Oct. 15, 2008); 43 C.F.R. § 46 *et seq.* Interior and its agencies, which includes OSM, must use these regulations "in conjunction with and supplementary to" authorities set forth under the NEPA regulations. *Id.*

additional analysis of impacts. 43 C.F.R. § 46.140(a). However, if the impacts analysis in the EIS "is not sufficiently comprehensive or adequate to support further decisions," the agency EA must explain this and provide additional analysis. 43 C.F.R. § 46.140(b).

Second, an agency can incorporate material into an environmental document by reference "when the effect will be to cut down on bulk without impeding agency and public review of the action." 40 C.F.R. § 1502.21. When the agency chooses to incorporate material by reference, it must cite and briefly describe the incorporated material in its environmental analysis. *Id*. If an agency such as OSM chooses to incorporate materials by reference into a NEPA document, Interior's NEPA regulations require a determination "that the analysis and assumptions used in the referenced document are appropriate for the analysis at hand" and that the agency cite the specific information or analysis from the referenced document by "page numbers or other relevant identifying information." 43 C.F.R. § 46.135(a,b).

Finally, NEPA allows an agency to adopt all or a portion of a draft or final EIS provided that the adopted material "meets the standards for an adequate statement under [NEPA's] regulations." 40 C.F.R. § 1506.3(a). Interior's NEPA regulations encourage adoption of existing NEPA analyses "[i]f [the] existing NEPA analyses include data and assumptions appropriate for the analysis at hand." 43 C.F.R. 46.120(b). Furthermore, the regulations provide that:

> An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. *The supporting record must include an evaluation of*

> *whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects*.

43 C.F.R. 46.120(c) (emphasis added). In other words, an agency cannot adopt an existing NEPA document to meet its statutory obligations without evaluating whether conditions have changed or new information has come to light since the prior analysis that render that analysis no longer adequate for evaluating the current environmental impacts of and reasonable alternatives to the proposed action.

C. Legal Framework for Approval of Mining Plans.

Under the Mineral Leasing Act ("MLA"), the Secretary of Interior has two primary responsibilities regarding the disposition of federally owned coal. First, the Secretary is authorized to lease federal coal resources, where appropriate. *See* 30 U.S.C. §§ 181 and 201. A coal lease must be in the "public interest" and include such "terms and conditions" as the Secretary of the Interior shall determine. 30 U.S.C. §§ 201 and 207(a); *see also* 43 C.F.R. §§ 3425.1-8(a) and 3475.1. A coal lease is issued "for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities[.]" 30 U.S.C. § 207(a) and 43 C.F.R. § 3475.2. The U.S. Bureau of Land Management ("BLM"), an agency within the Interior Department, is largely responsible for implementing the Secretary's coal leasing responsibilities.

The second responsibility of the Secretary of the Interior is to authorize, where appropriate, the mining of federally owned coal through approval of a mining plan. The authority to issue a mining plan is set forth under the MLA, which states that before any entity can take action on a leasehold that "might cause a significant disturbance of the

environment," the mining company must submit an operation and reclamation plan to the Secretary of the Interior for approval. 30 U.S.C. § 207(c). Referred to as a "mining plan" by the Surface Mining Control and Reclamation Act ("SMCRA") and its implementing regulations, the Secretary "shall approve or disapprove the [mining] plan or require that it be modified." 30 U.S.C. § 1273(c) and 30 C.F.R. § 746.14. It is standard practice for the Assistant Secretary of the Interior for Land and Minerals Management to sign such mining plans on behalf of the Secretary. *See*, *e.g.*, COLOWYO 6-7; TRAPPER 17-18 (mining plan approvals signed by Assistant Secretary).

Although SMCRA largely delegates to states the authority to regulate surface coal mining activities, the law prohibits the Secretary of Interior from delegating to states the duty to approve, disapprove, or modify mining plans for federally owned coal. *See* 30 U.S.C. § 1273(c); *see also* 30 C.F.R. § 745.13(i). SMCRA also prohibits the Secretary from delegating authority to states to comply with NEPA and other federal laws and regulations with regards to the regulation of federally owned coal resources. 30 C.F.R. § 745.13(b). Therefore, the responsibility to conduct an environmental analysis for mining plan modifications pursuant to NEPA rests with the Secretary and OSM.

Among other things, a mining plan must, at a minimum, assure compliance with applicable requirements of federal laws, regulations, and executive orders, and be based on information prepared in compliance with NEPA. *See* 30 C.F.R. § 746.13. A legally compliant mining plan is a prerequisite to an entity's ability to mine leased federal coal. Regulations implementing SMCRA explicitly state that, "[n]o person shall conduct surface coal mining and reclamation operations on lands containing leased federal coal

until the Secretary has approved the mining plan." 30 C.F.R. § 746.11(a). To this end, a mining plan is "binding on any person conducting mining under the approved mining plan." 30 C.F.R. § 746.17(b).

Although the Secretary of Interior is charged with approving, disapproving, or modifying a mining plan, the Office of Surface Mining Reclamation and Enforcement ("OSM") is charged with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval, disapproval or conditional approval of the mining plan[,]" 30 C.F.R. § 746.13. Thus, OSM plays a critical role in adequately informing the Secretary of Interior.

A "mining plan shall remain in effect until modified, cancelled or withdrawn[.]" 30 C.F.R. § 746.17(b). The Secretary must modify a mining plan where, among other things, there is "[a]ny change in the mining plan which would affect the conditions of its approval pursuant to federal law or regulation[,]" "[a]ny change which would extend coal mining and reclamation operations onto leased federal coal lands for the first time[,]" or "[a]ny change which requires the preparation of an environmental impact statement under the National Environmental Policy Act[.]" 30 C.F.R. §§ 746.18(a), (d)(1), (d)(4), and (d)(5).

II. FACTUAL BACKGROUND

A. Colowyo Mine and Approval of the Mining Plan Modification.

The Colowyo Mine is located in Moffat and Rio Blanco Counties, approximately 28 miles south of Craig, Colorado. COLOWYO 13. Colowyo is a surface coal mine owned and operated by the Colowyo Coal Company, L.P. *Id*. The Mine underlies BLM,

State, and private lands. *Id*. Colowyo Coal Company is the majority owner of the surface acreage within the permitted boundary of the Mine. COLOWYO 852 (map of surface ownership). Operations at Colowyo use a combination of dragline, truck and shovel, and highwall mining methods. COLOWYO 54.

On July 3, 2006, Colowyo Coal Company submitted a permit application package for a permit revision for the Colowyo Mine to the Colorado Division of Reclamation, Mining and Safety proposing to add 6,050 acres to its existing permit area,[2] of which 5,219 acres contained federal coal. COLOWYO 13. This revision extends surface coal mining operations into the remainder of federal leases C-29225 and C-29226,[3] and extends mining for the first time onto federal lease C-0123476. *Id*. This revision also increases the annual coal production rate to 5.8 million tons per year for the life of the mine, extends the life of the mine by 11 years, and adds an additional 43 million tons of federal coal. *Id*.

On May 4, 2007, the Colorado Division of Reclamation, Mining and Safety approved Colowyo's permit revision application and issued its Proposed Decision and Findings of Compliance for the application. *Id*.; *see also* COLOWYO 3656 (decision document). On June 15, 2007, the Assistant Secretary approved the Mining Plan modification for Colowyo Coal Company authorizing the mining of federally owned coal

[2] Colowyo's existing permit area is 7,531 acres. COLOWYO 13. Approval of the mining plan modification increases the permitted area for mining to 13,581 acres. *Id*.
[3] On July 25, 2001 OSM approved a mining plan modification for Colowyo to begin mining on portions of federal leases C-29225 and C-29226. COLOWYO 54. Prior to the approval, OSM prepared an EA to analyze the impacts of extending mining onto 518 acres of the new federal leases. *See generally* COLOWYO 2968 (OSM's 2001 EA). The EA did not analyze the impacts of mining expansion on air quality.

at Colowyo. COLOWYO 6-7. The Assistant Secretary's approval relied on OSM's recommendation for approval of the mining plan modification. As part of OSM's recommendation for approval, the agency stated that it had complied with NEPA. COLOWYO 52.

On May 8, 2007, OSM issued a FONSI for the 2007 Colowyo Mining Plan approval. COLOWYO 12. According to OSM, the FONSI relied on a four-page "supplemental EA" prepared by OSM purporting to analyze the impacts of the mining plan modification. *Id.*; *see also* COLOWYO 13-16 (OSM's supplemental EA). Although OSM captioned this document as a "supplemental EA," it did not include any analyses of environmental impacts from coal mining at Colowyo nor did it include any analyses "supplementing" the existing documents on which OSM relied. Instead the EA referred readers to, and ostensibly relied on, a number of NEPA and non-NEPA documents from BLM and OSM, issued between 10 and 30 years ago, for information about the affected environment and environmental impacts of the proposed action. *See generally* COLOWYO 15-16. The referenced documents included BLM's 1977 EIS for Northwest Colorado Coal that analyzed both the regional impacts of coal-related development in Moffat, Rio Blanco, and Routt Counties, and the site-specific impacts of four proposed mining actions including the Colowyo Mine. COLOWYO 2137. The referenced documents also included BLM's 1979 Northwest Supplemental Report which, although not a NEPA document, updated the 1977 EIS to take into account existing environmental conditions in northwest Colorado in light of coal development and to

address new laws and regulations that had come into effect since 1977. COLOWYO 2979.

In the supplemental EA, OSM asserts that these documents "described the proposed operation adequately and accurately assess the environmental impacts of mining." COLOWYO 15. OSM relied on the analyses and assessments in these documents to conclude in its supplemental EA that the mining plan modification would have "no significant impacts to air, soils, land use, vegetation, water, wildlife, or cultural resources identified in the environmental studies." COLOWYO 16. In the FONSI, OSM stated that the agency "takes full responsibility for the accuracy, scope, and content of the attached environmental assessment." COLOWYO 12.

B. Trapper Mine and Approval of the Mining Plan Modification.

The Trapper Mine is located in Moffat County, approximately six miles south of Craig, Colorado. TRAPPER 681. Trapper is a surface coal mine owned and operated by Trapper Mining, Inc. *Id*. The Mine underlies State and private lands. *Id*. Operations at Trapper use a combination of dragline, truck and shovel, and limited highwall mining methods. *Id*. Trapper provides coal for the Craig Power Station immediately adjacent to the north boundary of the Mine's permitted area. TRAPPER 2508.

On February 11, 2009, Trapper Mining submitted a permit application package for a permit revision for the Trapper Mine to the Colorado Division of Reclamation, Mining and Safety proposing to recover 8.1 million tons of federal coal on 312 acres previously

affected by a landslide.[4] TRAPPER 681-82. This revision would also allow Trapper to recover an additional 17.4 million tons of federal coal. TRAPPER 682.

On September 1, 2009, the Colorado Division of Reclamation, Mining and Safety approved Trapper's permit revision application and issued its Proposed Decision and Findings of Compliance for the application. TRAPPER 709 (decision document). On November 27, 2009, the Assistant Secretary approved the mining plan modification for Trapper Mining authorizing the mining of federally owned coal at Trapper. TRAPPER 17-18. The Assistant Secretary's approval relied on OSM's recommendation for approval of the mining plan modification. As part of OSM's recommendation for approval, the agency stated that it had complied with NEPA. TRAPPER 11.

On October 26, 2009, OSM issued a FONSI for the 2009 Trapper Mining Plan approval. TRAPPER 25. According to OSM, the FONSI relied on a four-page "supplemental EA" prepared by OSM purporting to analyze the impacts of the mining plan modification. *Id.*; *see also* TRAPPER 681-84 (OSM's supplemental EA). Similar to the Colowyo EA, OSM captioned the EA for Trapper as a "supplemental EA" even though the document did not include any analysis of environmental impacts from coal mining nor did it "supplement" the analyses in any of the existing documents on which OSM relied. Instead the EA referred readers to, and ostensibly relied on, a number of NEPA and non-NEPA documents from OSM and other agencies, issued between 20 and 30 years ago, for information about both the environmental baseline and the

[4] This acreage encompasses federal leases C-07519 and C-079641. TRAPPER 25. There are no NEPA documents in the record analyzing the impacts of mining on these leases.

environmental impacts of the proposed action. *See generally* TRAPPER 683-84. Like the Colowyo EA, the Trapper EA also referenced BLM's 1977 EIS for Northwest Colorado Coal and BLM's 1979 Northwest Supplemental Report. In addition to these planning documents, the EA referenced and relied on an EIS from 1975 that assessed the environmental impacts of the soon-to-be-built Craig Power Station near Craig, Colorado. *Id*.

In the EA, OSM concluded that the mining plan modification would have "no significant impacts to air, soils, land use, vegetation, water, wildlife, or cultural resources identified in the environmental studies." TRAPPER 684. In the FONSI, OSM stated that the agency had reviewed the environmental assessment and determined that the document "assess[ed] the environmental impacts of the proposed action adequately and accurately and [provided] sufficient evidence and analysis" for the FONSI. TRAPPER 25.

C. Environmental Impacts of Coal Mining.

Surface mining techniques are used to extract coal from the Colowyo and Trapper Mines. Draglines and blasting are used to remove overburden, while front-end loaders and haul trucks are used to remove the coal seams. TRAPPER 723-24. These activities generate harmful air pollutants, the effects of which OSM must take into account in its decisions regarding whether to approve mining plans. For example, stripping, blasting, and removal and transport of coal can produce particulate matter. COLOWYO 1844, 1850. Vehicle exhaust from diesel mining equipment, hauling trucks, and gas-powered trucks can release ozone precursors. COLOWYO 1851. Indirectly, coal-fired power plants such as the Craig Power Station that rely on coal from the Colowyo and Trapper

Mines for fuel can release large amounts of air pollution and impact ambient air quality on local and regional scales. *See generally* COLOWYO 2967 (supplemental environmental report identifying the Craig Power Station as a major point source for several air pollutants including particulate matter and ozone precursors).

Ozone and particulate matter are two of six "criteria" pollutants considered harmful to public health and the environment for which the U.S. Environmental Protection Agency ("EPA") has established National Ambient Air Quality Standards ("NAAQS") under the Clean Air Act. *See* 40 C.F.R. § 50.1 *et seq.* (setting forth NAAQS). The Clean Air Act identifies two types of national ambient air quality standards. Primary standards provide public health protection, including the health of sensitive populations such as children, the elderly and asthmatics. 42 U.S.C. § 7409(b)(1). Secondary standards provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings. *Id.* at § 7409(b)(2).

Ozone is formed when the ozone precursors nitrogen oxide ("NO_x") and volatile organic compounds ("VOC") react with sunlight. 62 Fed. Reg. 38,856, 38,858 (July 18, 1997). Ground-level ozone is a dangerous pollutant that has a causal relationship with a range of respiratory problems including decreased lung function, increased respiratory symptoms, airway inflammation, and respiratory-related hospitalizations and emergency room visits. 62 Fed. Reg. 38,856; 73 Fed. Reg. 16,436, 16,443-46 (Mar. 27, 2008) (accord). Furthermore, EPA has stated that the latest scientific evidence regarding ozone effects "is highly suggestive that [ozone] directly or indirectly contributes to non-

accidental and cardiorespiratory-related mortality," including "premature mortality." *Id.* EPA has concluded that individuals with asthma are at particular risk from the adverse effects of ozone. *Id.* Pursuant to the Clean Air Act, in 1997 EPA established a NAAQS for ozone at 0.080 parts per million ("ppm") over an eight-hour period. 62 Fed. Reg. 38,856. In 2008, EPA revised the 8-hour ozone NAAQS down to 0.075 ppm over an eight-hour period. 73 Fed. Reg. 16,436.

EPA describes "particulate matter" as "the generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes." 52 Fed. Reg. 24,634, 24,636 (July 1, 1987). EPA first set a NAAQS for particulate matter in 1971 as a standard which measured total suspended particulate ("TSP") material up to 45 micrometers. *Id.* Responding to repeated studies recognizing that smaller particles become embedded deeper in the human body—including the lungs and the heart—and so represented a "markedly greater" risk to human health, EPA revised the NAAQS for particulate matter ("PM") in 1987 to apply only to particles equal to or smaller than 10 micrometers ("PM_{10}"). *Id.* at 24,639. In 1997, EPA again revised the particulate matter NAAQS, this time setting separate $PM_{2.5}$ standards for fine particles (having a diameter of 2.5 micrometers or less), while retaining the existing PM_{10} standards. 62 Fed. Reg. 38,652, 38,654 nn.5-6 (July 18, 1997).

According to EPA, health effects associated with short-term exposure to $PM_{2.5}$ include "aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions and emergency department visits), changes in lung function and

increased respiratory symptoms, as well as new evidence for more subtle indicators of cardiovascular health." 71 Fed. Reg. 61,144, 61,152 (Oct. 17, 2006). In 2006, EPA revised the $PM_{2.5}$ NAAQS, limiting 24-hour concentrations to no more than 35 $\mu g/m^3$, and retaining the 15 $\mu g/m^3$ limit for annual concentrations. *Id*. at 61,144.

STANDARD OF REVIEW

Because NEPA does not include a citizen suit provision, a plaintiff may challenge final agency action that violated NEPA pursuant to the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 702, 704; *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006). OSM's and the Secretary's actions are reviewed under the "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Agency action is unlawful and should be set aside where it "fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1574 (10th Cir. 1994) (internal quotations omitted).

Under the arbitrary and capricious standard "[the court] must ensure that the agency 'decision was based on a consideration of the relevant factors' and examine 'whether there has been a clear error of judgment.'" *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1167 (10th Cir. 1999) (citations omitted). Agency action will be set aside if:

> [T]he agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Under NEPA, an agency action is arbitrary and capricious when it has not "adequately considered and disclosed the environmental impact of its actions." *Utah Shared Access Alliance v. USFS*, 288 F.3d 1205, 1208 (10th Cir. 2002). The court applies a "rule of reason" in determining whether deficiencies in NEPA analyses "are significant enough to defeat the goals of informed decisionmaking and informed public comment." *Utahns For Better Transp. v. USDOT*, 305 F.3d 1152, 1163 (10th Cir. 2002); *Colo. Envtl. Coal.,* 185 F.3d at 1174 (holding the rule of reason requires "sufficient discussion of the relevant issues and opposing viewpoints to enable [an agency] to take a hard look at the environmental impacts."). Further, "a court cannot defer when there is no analysis to defer to, and a court cannot accept at face value an agency's unsupported conclusions." *Rocky Mountain Wild v. Vilsack*, No. 09-CV-01272-WJM, 2013 WL 3233573, at *3 n.3 (D. Colo. June 26, 2013). The burden of proof rests with the parties who challenge agency action under the APA. *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691 (10th Cir. 2010).

ARGUMENT

I. WILDEARTH GUARDIANS HAS STANDING

To establish standing, a party must show that it has suffered an injury-in-fact, *i.e.,* a concrete and particularized, actual or imminent invasion of a legally protected interest; that the injury is fairly traceable to the challenged action of the defendant; and that a favorable decision will likely redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 560-561 (1992). A plaintiff's members' "reasonable concerns" of harm caused by pollution from the defendant's activity directly affecting those affiants' recreational, aesthetic, and economic interests establishes injury-in-fact. *Friends of the Earth v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 183-84 (2000).

Guardians has standing to challenge OSM's approvals of the Colowyo and Trapper mining plan modifications. *See* Declaration of Jeremy Nichols ("Nichols Decl."), attached hereto as Exhibit 1. Guardians is a nonprofit organization whose mission includes protecting the environment and public health, Nichols Decl. ¶¶ 3-4, 18. Guardians has standing as an organization because: its member Mr. Nichols has standing to sue in his own right; the interests at stake are germane to Guardians' purpose; and neither the claim asserted, nor the relief sought requires Mr. Nichols to participate directly in this lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

OSM's failure to adequately analyze the air pollution from expansion of coal mining at Colowyo and Trapper—including $PM_{2.5}$ and ozone—increases the risk that Guardians' members will suffer harm to their aesthetic and recreational interests when they use the areas around the Mines and the Craig Power Station. Nichols Decl. ¶¶ 19-23. This increased risk of harm is a direct result of the inadequate agency analyses challenged here which, together, authorize expansion of coal mining at Colowyo and Trapper over the next several years. *See Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) ("Under [NEPA], an injury results not from the agency's decision, but from the agency's *uninformed* decisionmaking."). Guardians also suffered

concrete harm from the deprivation of their procedural right under NEPA to be provided with notice of OSM's FONSIs/EAs for the mining plan approvals. Nichols Decl. ¶¶ 11-12. A favorable decision will set aside agency decisions authorizing such damaging actions until OSM appropriately evaluates environmental impacts. That is sufficient to satisfy the redressability requirement. *See*, *e.g.*, *Sierra Club v. DOE*, 287 F.3d 1256, 1265-66 (10th Cir. 2002).

Because Guardians seeks to protect its members' recreational and aesthetic interests in these areas, Nichols Decl. ¶¶ 19, 27, Guardians' injuries fall squarely within the "zone of interests" NEPA was designed to protect. *Lucero*, 102 F.3d at 448.

II. OSM FAILED TO PROVIDE NOTICE OF ITS DECISIONS AND OPPORTUNITY FOR PUBLIC INVOLVEMENT IN THE NEPA PROCESS

OSM failed to provide notice to the public of the availability of OSM's EAs/FONSIs for both the Colowyo and Trapper mining plan modifications or otherwise involve the public in its decisions in any manner. Thus, OSM violated NEPA by denying the public the opportunity to review and comment on OSM's NEPA decisions. OSM's actions are part of an ongoing pattern and practice of the agency taking federal action—approving mining plan modifications—in violation of NEPA's public involvement requirements. OSM does not have the discretion to ignore these mandates.

A. OSM's Public Involvement Duties.

A NEPA document will only pass muster if its "form, content and preparation foster both informed decision-making and informed public participation." *Colo. Envtl. Coal.*, 185 F.3d at 1172 (quoting *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th

Cir. 1987)). NEPA works "through the creation of a democratic decisionmaking structure that, although strictly procedural, is 'almost certain to affect the agency's substantive decision[s].'" *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1099 (9th Cir. 2010) (quoting *Robertson*, 490 U.S. at 350). "[B]y requiring agencies . . . to place their data and conclusions before the public . . . NEPA relies upon democratic processes to ensure—as the first appellate court to construe the statute in detail put it—that 'the most intelligent, optimally beneficial decision will ultimately be made.'" *Id*. (quoting *Calvert Cliffs' Coordinating Comm'n v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)). This process, in turn, ensures open and honest public discussion "in the service of sound decisionmaking." *Id*. at 1122.

CEQ's NEPA regulations provide that "public scrutiny [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). "Federal agencies shall to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment," "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures," and provide "public notice of . . . the availability of environmental documents so as to inform those persons . . . who may be interested or affected." 40 C.F.R. §§ 1500.2(d), 1506.6(a), 1506.6(b). Moreover, Interior's NEPA regulations specifically require that OSM "must notify the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed." 43 C.F.R. § 46.305(c).

Although "NEPA's public involvement requirements are not as well defined as when an agency prepares only an EA and not an EIS," *Greater Yellowstone Coal. v.*

Flowers, 359 F.3d 1257, 1279 (10th Cir. 2004), NEPA's regulations require that agencies "involve . . . the public, to the extent practicable, in preparing [EAs]." 40 C.F.R. § 1501.4(b); *see also Klein*, 747 F. Supp. 2d at 1261 (accord). This involvement does not necessarily require circulation of draft or final EAs for public comment; however, the agency must make "a meaningful effort to provide information to the public affected by an agency's actions." *Klein*, 747 F. Supp. 2d at 1262; s*ee also Greater Yellowstone Coal.*, 359 F.3d at 1279 n.18 (holding public involvement in EA process legally adequate where the agency did not provide a comment period for an EA but did hold several public meetings discussing alternatives and environmental impacts); *Bering Strait Citizens for Responsible Res. Dev. v. COE*, 524 F.3d 938, 953 (9th Cir. 2008)(recognizing that "[a]n agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process.").

Accordingly, OSM must make an effort to inform the public of the potential environmental impacts of its proposed actions. At a minimum, Interior's NEPA regulations require that OSM notify the public that it has prepared an EA and FONSI, and make those documents available to the public for review.

B. OSM Failed to Provide Public Notice of Its Decisions and Allow for Participation in Its EAs/FONSIs for the Colowyo and Trapper Mining Plan Modifications.

OSM failed to satisfy NEPA's public notice and participation requirements in approving the mining plan modifications for the Colowyo and Trapper Mines. Neither the supplemental EAs nor the FONSIs for these decisions were circulated to the public

either prior to or following the Assistant Secretary's approval of the Plans. OSM provided *no* notice to the public that the agency had prepared supplemental EAs and issued FONSIs. Instead, OSM prepared the supplemental EAs and FONSIs as internal documents only. OSM's admissions that the EAs and FONSIs for both approvals were *available* for public review demonstrate that the agency failed to notify the public that these documents even existed:

> Federal Defendants . . . admit that OSM's May 8, 2007 Finding of No Significant Impact ("2007 FONSI") and the 2007 Supplemental EA would have, in the standard course of business, been promptly made available for public review on the shelves of OSM's Mine Plan Reference Center, located at 1999 Broadway, 34th Floor, Denver, Colorado, where they would remain for the active life of the mine, and further admit that a recent inspection of the facility indicates that the 2007 FONSI and 2007 Supplemental EA are in fact presently located there.

Answer ¶ 50 (ECF Doc. No. 45) (relating to the Colowyo approval); *see also* Answer ¶ 61 (same admission for Trapper approval). OSM made these admissions in response to Guardians' allegations in its Amended Petition for both the Colowyo and Trapper approvals that "OSM did not provide public *notice* of its supplemental EA." Am. Pet. ¶¶ 50, 61 (ECF Doc. No. 45) (emphasis added).

There is no evidence in the record that OSM provided any notice to the public of the availability of these documents. The requirement that these NEPA documents be made available for public review is meaningless if the public does not know that such documents exist or that the agency has taken final action on the decision analyzed in those documents. As this Court has recognized, "[a]dequate notice requires a meaningful effort to provider information to the public affected by an agency's actions." *Klein*, 747 F. Supp. 2d at 1262. Here, the record and OSM's own admissions demonstrate that the

agency made no meaningful efforts to "encourage and facilitate public involvement in" its supplemental EAs nor "involve . . . the public, to the extent practicable" in any stage of the agency's approvals of the Mining Plan Modification for either mine. 40 C.F.R. §§ 1500.2(d), 1501.4(b). OSM also failed to comply with the minimal Department of Interior requirement that the agency "*notify* the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed." 43 C.F.R. § 46.305(c) (emphasis added).

OSM's failure to provide for public involvement in the preparation of its supplemental EAs or to notify the public that the EAs were available for review is contrary to the basic purpose of public involvement: to prompt a dialogue between OSM and the public and to trigger responsive agency action such as "supplement[ing], improv[ing], or modify[ing] its analyses." 40 C.F.R. § 1503.4(a). Accordingly, OSM's approvals of the mining plan modifications for the Colowyo and Trapper Mines violated NEPA.

III. OSM FAILED TO TAKE A HARD LOOK AT DIRECT IMPACTS TO AIR QUALITY FROM THE MINING PLAN APPROVALS

Surface coal mining activities generate various air pollutants, including ozone and $PM_{2.5}$, that degrade air quality and compromise health. Yet OSM failed to consider these effects in its supplemental EAs underlying the agency's approvals of mining expansions at Trapper and Colowyo. For both the Colowyo and Trapper approvals, OSM completed four-page "supplemental" EAs that included *no* analysis, supplemental or otherwise, of environmental impacts in general, or of impacts to air quality in particular. Instead, the

supplemental EAs referred to a number of existing NEPA and non-NEPA documents from BLM and OSM, issued between 10 and 30 years earlier, for information about the affected environment and environmental impacts of the proposed actions. *See generally* COLOWYO 15-16, TRAPPER 683-84.

Although OSM does not state so explicitly, the agency appears to have adopted the various NEPA documents listed in each of the supplemental EAs in lieu of doing any analyses of environmental impacts for approvals of the mining plan modifications. As discussed in detail in Section I.B of the Statement of Facts, CEQ and Interior NEPA regulations allow the agency to adopt other NEPA documents if the analyses, data, and assumptions in those documents are relevant to the proposed action, and there are no new circumstances or new information relevant to "impacts not previously analyzed [that] may result in significantly different environmental effects." 43 C.F.R. § 120(b,c). However, OSM has not met these criteria with respect to ozone and $PM_{2.5}$ impacts from mining for the approvals at issue here.

A. OSM Failed to Take a Hard Look at Air Quality Impacts from Ozone and $PM_{2.5}$ Emissions Resulting from Expansion of the Colowyo Mine.

The supplemental EA for the 2007 Colowyo mining plan approval provides a list of seven documents, issued between 1975 and 2001, that OSM relied on to conclude that its approval of the Colowyo plan modification would not significantly impact the environment. COLOWYO 15 (list of documents). Five of the documents were prepared to satisfy either BLM or OSM NEPA obligations for agency decisions related to coal mining in northwest Colorado, and two of the documents are non-NEPA reports. Only

three of the listed documents include any discussion of potential air quality impacts from coal mining:[5]

- BLM, *Northwest Colorado Coal Environmental Statement*, 1977 (COLOWYO 2131 [Vol. I: Regional Analysis], 951 [Vol. II: Site Specific Analysis])
- BLM, *Northwest Supplemental Report*, 1979 (COLOWYO 2967)
- OSM, *Environmental Assessment, Colowyo Mine, Mine Plan Approval*, 1989 (COLOWYO 2995)

Regardless of whether OSM's 2007 supplemental EA for the Colowyo mining plan approval tiers to, adopts, or supplements these documents, the combination of the 2007 EA and the older documents do not constitute the "hard look" at direct impacts to air quality from expansion of the Colowyo Mine that NEPA requires. BLM's 1977 EIS and 1979 Report are programmatic documents that evaluate the environmental impacts of coal mining in northwest Colorado. The 1977 EIS also includes evaluation of site-specific impacts of mining at Colowyo. However, for the reasons described below, OSM cannot avoid analyzing air quality impacts from expansion of Colowyo in 2007 by simply referencing the air quality analyses in 30+-year old documents that were performed in the context of NAAQS that have since been repealed or revised. Nor can OSM avoid the requisite impacts analyses by relying on the brief discussion of air quality in the 1989 EA for expansion of Colowyo. That discussion is limited to a statement that Colowyo

---

[5] The four remaining documents listed in the supplemental EA do not discuss either baseline air quality conditions at Colowyo or air quality impacts from expansion of the mine. *See generally* COLOWYO 2583 (1975 Taylor Creek Study to determine baseline data for choosing reclamation objectives for coal lease stipulations), 3654 (1980 OSM Letter regarding Colowyo's request for production rate increase), 2979 (1992 OSM EA for additional mining in federal lease C-29224), 2968 (OSM 2001 EA for new mining in federal leases C-29225 & C-29226).

"employs fugitive dust control measures" and that "[f]ugitive dust generated from operations in this mining plan area is not expected to result in any adverse air quality impacts."[6] COLOWYO 3001. There is no discussion of particulate matter levels from mining in the 1989 EA, which were subject to a NAAQS for PM_{10} that EPA had promulgated two years earlier, or ozone for which EPA had promulgated a NAAQS in 1979.

When a NEPA document such as the 2007 supplemental EA tiers to or adopts an impacts analysis from another NEPA document, courts will review the two documents together to determine the "sufficiency of the environmental analysis as a whole." *S. Or. Citizens Against Toxic Sprays v. Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983), *cert. denied*, 469 U.S. 1028 (1984); *see also Pennaco Energy, Inc. v. USDOI*, 377 F.3d 1147, 1159-60 (10th Cir. 2004) (to determine whether BLM complied with NEPA when it adopted two previous oil and gas EISs in lieu of doing a site-specific NEPA analysis, the Court reviewed the impacts discussions in the EISs). The NEPA documents adopted or tiered to must fully address the environmental consequences of the proposed action. *Pennaco*, 377 F.3d at 1151.

In addition, when an agency plans to rely on existing NEPA documents to comply with its obligations under the statute, the agency is required to supplement existing NEPA analyses "when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id*. (citing 40

[6] The 1989 EA supported OSM's approval of a mining plan modification allowing Colowyo to mine an additional 335 acres of federal coal. COLOWYO 2995.

C.F.R. § 1502.9(c)(ii)). Part of the agency's assessment of the need for supplementation includes consideration of whether the existing NEPA analysis might be too old to provide a basis for reasoned decisionmaking. The CEQ's guidance[7] on the issue of stale NEPA analyses notes that "EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1509.2 compel preparation of an EIS supplement." Forty Questions, 46 Fed. Reg 18,026, 18,036 (March 23, 1981); *see also Or. Natural Res. Council Action v. USFS*, 445 F. Supp. 2d 1211, 1232 (D. Or. 2006) (finding this provision particularly applicable when dealing with EAs over 10 years old, citing, *inter alia*, the CEQ language).

Under these requirements, OSM's 2007 supplemental EA, the 1977 EIS for coal mining in Northwest Colorado, and the 1979 Northwest Supplemental Report taken together do not constitute a hard look at air quality impacts from mining at Colowyo. The air quality discussions in the EIS and supplemental report reflect neither the current environmental baseline nor the environmental impacts that may be expected from expansion of coal mining at Colowyo. The air quality analyses in the older documents, including the site-specific analysis of the Colowyo Mine, do not evaluate impacts to regional or site-specific air quality from ozone and $PM_{2.5}$ emissions from coal mining. Indeed, the 1977 EIS and the 1979 Report both pre-date EPA's promulgation of NAAQS

[7] The Tenth Circuit "consider[s] [the CEQ Forty Questions Guidance] persuasive authority offering interpretive guidance" regarding the meaning of NEPA and the implementing regulations." *New Mexico ex rel. Richardson*, 565 F.3d at 705 n.25. (citation omitted).

for ozone and $PM_{2.5}$.[8] As a result, the 30-year-old air quality analyses in both documents are simply too stale to provide the requisite hard look at air quality impacts from coal mining's $PM_{2.5}$ and ozone emissions for the 2007 EA. *See*, *e.g.*, *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011)(ten-year old survey data for wildlife "too stale" thus reliance on it in EIS was arbitrary and capricious); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (six year-old survey data for cutthroat trout was "too outdated to carry the weight assigned to it" and reliance on that data violated NEPA).

In addition to the air quality standards used in the 1977 and 1979 documents being outdated for assessing air quality impacts from coal mining 30 years later, the projections in those documents for future air quality impacts from coal mining in northwest Colorado are also outdated because they only estimate air emissions and analyze the impacts of those emissions through 1990. COLOWYO 2137 (BLM's 1977 EIS for Northwest Colorado Coal states that "[t]he time-frame for all analyses is fifteen years, with projections of activities and impacts in 1980, 1985, and 1990."); COLOWYO 2980 (analysis in BLM's 1979 Northwest Supplemental Report estimated air quality impacts from coal mining and other sources through 1990). Although neither the NEPA regulations nor case law recognize any automatic threshold or presumptive period of obsolescence for a NEPA analysis, BLM recognized that the data, analyses, and

---

[8] EPA first established primary and secondary NAAQS for ozone in 1979. 44 Fed. Reg. 8,202 (Feb. 8, 1979). EPA revised the ozone NAAQS in 1997 and again in 2008.[8] 62 Fed. Reg. 38,856 (July 18, 1997); 73 Fed. Reg. 16,436. EPA promulgated NAAQS for $PM_{2.5}$ for the first time in 1997 and revised the standard in 2006. 62 Fed. Reg. 38,652; 71 Fed. Red. 61,144.

conclusions in these documents could only be considered representative of environmental impacts of coal mining for the next 15 years, or until 1992. Given that since 1992, EPA has repealed the TSP standard on which those analyses were based, and promulgated and revised NAAQS for ozone and $PM_{2.5}$, the emissions estimates for future coal mining in those old documents are no longer valid and cannot be used to represent either the environmental baseline for air quality in 2007 or air quality impacts from future coal mining under the 2007 mining plan modification for Colowyo.

Accordingly, even though both the CEQ's and Interior's NEPA regulations allow OSM to tier a site-specific EA to a programmatic EIS for coal mining in northwest Colorado, the agency cannot satisfy its NEPA compliance obligation in this manner if the documents tiered to do not contain specific information about the environmental impacts of the proposed action, or where the specific conditions underlying the prior analysis have since changed. *Pennaco*, 377 F.3d at 1154. As the Supreme Court and Tenth Circuit have recognized in cases involving whether existing NEPA documents need to be supplemented, an agency must supplement an environmental analysis where the proposed action "will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh v. ONRC*, 490 U.S. 360, 374 (1989); *Friends of Marolt Park v. USDOT*, 382 F.3d 1088, 1096 (10th Cir. 2004) (citing *Marsh* for this principle).

Moreover, OSM "has a *continuing duty* to gather and evaluate new information relevant to the environmental impact of its actions." *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1023 (9th Cir. 1980) (emphasis added). As part of this duty,

OSM must assess "the extent to which the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS." *Wis. v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984). OSM did not provide this assessment for air quality impacts in light of the NAAQS for ozone and $PM_{2.5}$ in its supplemental EA and did not supplement existing studies with an updated evaluation of Colowyo's expected $PM_{2.5}$ and ozone emissions. OSM was required to do this evaluation because none of the documents OSM cites in its supplemental EA analyze $PM_{2.5}$ and ozone emission levels from coal mining at Colowyo. Because OSM authorized additional mining at Colowyo without "adequately consider[ing] and disclos[ing] the environmental impact of its actions," the decision is arbitrary and should be set aside. *Utah Shared Access Alliance*, 288 F.3d at 1208.

B. OSM Failed to Take a Hard Look at Air Quality Impacts from Ozone and $PM_{2.5}$ Emissions Resulting from Expansion of the Trapper Mine.

The supplemental EA for the Trapper mining plan approval provides a list of six documents, issued between 1975 and 1988, that OSM relied on to conclude that its approval of the Trapper plan would not significantly impact the environment. TRAPPER 683. Four of the documents were prepared to satisfy U.S. Department of Agriculture, BLM, or OSM NEPA obligations and two of the documents are non-NEPA reports. Four of the listed documents include discussions of potential air quality impacts from coal mining:[9]

[9] The two remaining documents listed in the supplemental EA do not discuss either baseline air quality conditions at Trapper or air quality impacts from expansion of the mine. *See generally* TRAPPER 2508 (OSM's 1982 EA for permit area expansion at

- USDA-Rural Electrification Administration, *Yampa Project Final Environmental Statement*, January 1975 (TRAPPER 2528 [Vol. I], 3086 [Vol. II])
- BLM, *Northwest Colorado Coal Environmental Statement*, 1977
- BLM, *Northwest Supplemental Report*, 1979
- OSM, *Environmental Assessment, Trapper Mine, Modified Mining Plan*, 1988 (TRAPPER 762)

Like OSM's approval of the Colowyo mining plan modification where OSM relied on a series of outdated existing NEPA documents and did not do any impacts analysis in its supplemental EA, OSM's 2009 supplemental EA for Trapper also did not analyze the air quality impacts of the plan approval but simply relied on existing documents over three decades old to satisfy the agency's NEPA obligation. And as is the case for the NEPA documents used to support the 2007 Colowyo decision, the combination of the 2009 EA and the older NEPA documents OSM relied on for the Trapper approval do not constitute the "hard look" at direct impacts to air quality from mining at Trapper that NEPA requires.

For the reasons discussed above for the Colowyo approval, OSM cannot avoid its obligation to analyze direct air quality impacts from $PM_{2.5}$ and ozone emissions at the Trapper Mine by tiering to, or otherwise relying on, BLM's 1977 EIS and 1979 Report. The air quality data and analyses in these documents are stale because the standards in place when these studies were undertaken in the 1970s have since been repealed or revised. In addition, EPA has promulgated new NAAQS for air pollutants—ozone and

---

Trapper), 4321 (OSM's 1982 Cumulative Hydrological Assessment of coal mining in northwest Colorado).

$PM_{2.5}$ in particular—that were not measured 30 years ago when BLM completed these documents. Coal mining activities emit both ozone precursors and $PM_{2.5}$, yet there is no information in the record regarding either current levels of these pollutants in the vicinity of Trapper or estimated levels of these pollutants from future mining at Trapper as a result of OSM's approval of the mining plan modification.

OSM also cannot rely on the 1975 Yampa EIS or the 1988 EA for the Trapper Mine because, like the BLM documents, neither of these documents evaluates air quality impacts from mining in the context of current standards or current mining levels. The 1975 Yampa EIS evaluated site-specific impacts from operation of the Craig Power Station and an "adjacent" coal mine that would provide fuel for the power station. TRAPPER 2542. The EIS provided baseline air quality information for particulate matter and NOx using data collected between 1970 and 1973. TRAPPER 2601. Similar to the BLM documents, the Yampa EIS analyzed particulate matter emissions using the TSP standard in place at that time, which has since been repealed, and nitrogen oxides—which include the ozone precursor NOx—for which EPA had set a NAAQS that did not differentiate among different nitrogen oxide classes such as NOx and nitrogen dioxide. TRAPPER 2649-64. The air quality analysis in the Yampa EIS was limited to impacts from two units at the Craig Power Station and did not analyze air quality impacts from mining at Trapper. *Id*.

OSM also cannot avoid the requisite impacts analyses by relying on the brief discussion of air quality in the 1988 EA for expansion of Trapper because that discussion is limited to a statement that Trapper "employs fugitive dust control measures" and that

"[f]ugitive dust generated from operations in this mining plan area is not expected to result in any adverse air quality impacts."[10] TRAPPER 773. Like the 1989 EA for expansion of Colowyo, there is no discussion in the 1988 Trapper EA of particulate matter levels from mining, which were subject to a NAAQS that EPA had promulgated in 1987, or ozone for which EPA had promulgated a NAAQS in 1979.

All of the arguments regarding OSM's failure to take a hard look at $PM_{2.5}$ and ozone impacts from expansion of the Colowyo Mine are equally applicable for Trapper. The documents that OSM relies on to avoid doing an air quality analysis that would satisfy NEPA's requirements do not "accurately assess the environmental impacts of mining" as OSM asserts in its supplemental EA. TRAPPER 684. The documents either do not address air quality impacts at all or include air quality analyses based on data that is simply to old to be relevant or meaningful to a decision whether to expand coal mining in 2009, or include only a few conclusory statements.

A NEPA analysis supported by data that is 5-10 years old can be too stale to legally support a subsequent agency decision. *See*, *e.g.*, Forty Questions, 46 Fed. Reg. at 18,036; *N. Plains Resource Council*, 668 F.3d at 1086. EPA has repealed, revised, and promulgated new air quality standards for air pollutants like $PM_{2.5}$ and ozone generating by coal mining since the documents that OSM relies on were prepared. OSM must analyze air quality impacts from coal mining under these new standards because the extent to which ozone and $PM_{2.5}$ levels from coal mining cause on contribute to violation

[10] The 1988 EA supported OSM's approval of a mining plan modification allowing Trapper to mine an additional 274 acres of federal coal. TRAPPER 762.

of these standards has not been considered in previous NEPA documents. *See Marsh*, 490 U.S. at 374. Because OSM failed to consider the impacts of its decision on air quality, the Court should set aside the agency's approval of the 2009 Trapper mining plan modification.

IV. OSM FAILED TO TAKE A HARD LOOK AT INDIRECT IMPACTS TO AIR QUALITY FROM COAL COMBUSTION

Both the Colowyo and Trapper Mines provide coal for coal-fired power plants. Coal from the Trapper Mine is produced exclusively for the nearby Craig Power Station in Craig, Colorado. TRAPPER 2508. Coal from the Colowyo Mine supplies Colorado Springs and other consumers. COLOWYO 1146. Therefore, coal combustion using coal from these mines is a reasonably foreseeable indirect effect of OSM's Mining Plan approvals that the agency must analyze and disclose in its supplemental EAs. 40 C.F.R. § 1508.8(b). By failing to consider the impacts of coal combustion—an impact that was reasonably foreseeable—OSM acted arbitrarily and capriciously and in violation of NEPA.

NEPA is characterized as a "look before you leap" statute in that it requires federal agencies to consider the environmental impacts of proposed actions before approving the action. 42 U.S.C. § 4332(2)(C)(i) (analysis must consider "the environmental impact of the proposed action"); 40 C.F.R. § 1508.25(c); *id.* § 1508.9(b) (in EAs, agencies must discuss "the environmental impacts of the proposed action"). NEPA broadly requires agencies to consider "*any* adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii) (emphasis added). NEPA

regulations further specify that environmental impacts include both direct and indirect effects. 40 C.F.R. § 1508.8(a)-(b). Indirect effects are defined as effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," including "effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b).

NEPA requires agencies to consider those effects that have a "reasonably close causal relationship" to the agency action. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *see also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (reaffirming requirement for reasonably close causal relationship). Thus, "agencies need not consider highly speculative or indefinite impacts." *Sierra Club v. Marsh*, 769 F.2d 868, 878 (1st Cir. 1985). With respect to energy development, courts have already held that agencies must consider foreseeable upstream and downstream impacts of such development. In *Mid-States Coal. for Progress*, 345 F.3d at 532, the Eighth Circuit considered the adequacy of the Board's NEPA analysis of the construction of a new railroad line to haul coal from Wyoming to markets in the Midwest. The plaintiffs asserted that the agency "failed wholly to consider the effects on air quality that an increase in the supply of low-sulfur coal to power plants would produce." *Id.* at 548. The Court agreed that it was "reasonably foreseeable" that construction of the rail line would lead to increased coal consumption and that the resultant air pollution should have been analyzed in the Board's EIS as an indirect effect. *Id.* at 549-50. In reaching this conclusion, the court found "significant" that the agency had acknowledged that

construction of the line would lead to increased availability and utilization of coal. *Id.* at 549.

Similarly in *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1006, 1017 (S.D. Cal. 2003), the court held that in approving the construction of two electricity transmission lines the Department of Energy was required in its NEPA analysis to consider as "indirect effects" air pollution from two upstream power plants in Mexico. The court found that operation of the two power plants and the attendant air pollution were reasonably foreseeable effects of construction of the transmission lines because the lines would be the only means for the power plants to transmit electricity to their intended markets in the United States. *Id.* at 1017.

Here, like the fossil fuel combustion in *Mid-States Coalition* and *Border Power Plant* , coal combustion at the Craig Power Station and other facilities is a reasonably foreseeable effect of the expansion of the Colowyo and Trapper Mines, which OSM was required, but failed, to fully consider in its supplemental EAs. As in *Mid-States Coalition*, here, the record demonstrates that coal to mined from the Colowyo and Trapper is destined for combustion at the Craig Power Station and other facilities. COLOWYO 1146, TRAPPER 2508. Indeed, the foreseeability of combustion of the coal at the Craig Power Station is even more pronounced in this case than was the coal combustion in *Mid-States Coalition* because here the Trapper Mine exists to provide coal exclusively to the Craig Power Station. TRAPPER 2542, 2508.

OSM cannot rely on the 1975 Yampa EIS for analysis of air quality impacts of coal combustion at the Craig Generating Station because, as discussed above, the data

and analyses in the document are outdated. The predictions for TSP and nitrogen oxide levels from Craig Units 1 and 2 are no longer relevant in light of new and revised NAAQS promulgated by EPA over the last two decades. Nowhere in the Yampa EIS is there consideration of whether ozone and $PM_{2.5}$ emissions from continued operation of Craig resulting from Colowyo and Trapper coal may cause or contribute to violations of these standards. Finally, even if the air quality analysis in the Yampa EIS were somehow sufficient to constitute a hard look at indirect impacts from expansion of the Trapper Mine, there is no record evidence assessing indirect impacts from coal combustion using coal that will be mined as a result of the Colowyo Mine expansion.

By failing to fully consider the indirect impacts of the mine expansion—air pollution from coal combustion—OSM failed to consider a relevant factor and important aspect of the problem. *Motor Vehicle Mfrs.*, 463 U.S. at 43; *Olenhouse*, 42 F.3d at 1574. Therefore, its analyses for the Colowyo and Trapper approvals were arbitrary and a violation of NEPA.

CONCLUSION

For the reasons stated above, Guardians respectfully request that this Court (1) declare that Federal Defendants' approvals of the Colowyo and Trapper Mining Plan modifications violated NEPA, and (2) vacate Federal Defendants' approvals until such a time as they have demonstrated compliance with NEPA.

Respectfully submitted on this 22nd day of August, 2014.

/s/ Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org

/s/ Ashley D. Wilmes
WildEarth Guardians
680 W. Hickory St.
Louisville, CO 80027
(859) 312-4162
awilmes@wildearthguardians.org

Attorneys for Plaintiff WildEarth Guardians

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF'S OPENING BRIEF was served on all counsel of record through the Court's ECF system on this 22nd day of August 2014.

/s/ Samantha Ruscavage-Barz