IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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, and S.M.R. JEWELL, in her official capacity as U.S. Secretary of the Interior, Federal Defendants, SAN JUAN COAL CO., Defendant-Intervenor.	)	Case No. 1:14-cv-00112-MV-RHS

PLAINTIFF'S OPENING BRIEF

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GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
AR	Document pages in administrative record
BLM	U.S. Bureau of Land Management
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FONSI	Finding of No Significant Impact
Guardians	Plaintiff WildEarth Guardians
MLA	Mineral Leasing Act
NAAQS	National Ambient Air Quality Standard
NEPA	National Environmental Policy Act
NOx	Nitrogen oxides
OSM	Office of Surface Mining Reclamation and Enforcement
$PM_{2.5}$	Particulate matter less than 2.5 microns in diameter
PM_{10}	Particulate matter less than 10 microns in diameter
ppm	Parts per million
SMCRA	Surface Mining Reclamation and Control Act
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 San Juan Mine in northwest New Mexico and to involve the public in their mining-related decision in accordance with federal law. At issue is Federal Defendants' approval of a "mining plan" which authorizes 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 a mining plan authorizing continued federal coal development at the San Juan Mine. In approving this plan, however, OSM failed to comply with NEPA. Specifically, OSM failed to ensure that the public was appropriately notified of and involved in the approval of the mining plan 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 San Juan.

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 surface processing activities, reclamation, and other material moving activities, as well as nitrogen oxides (which form ground-level ozone) from 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 approval of the mining plan modification for San Juan failed to comply with NEPA. For its approval, OSM prepared a one-page Finding of No Significant Impact purporting to analyze the environmental impacts of expanded coal mining operations at San Juan but did nothing more than reference existing NEPA and non-NEPA documents as sufficiently analyzing the environmental impacts of additional coal mining at San Juan. OSM made no effort to determine whether the impacts analyses and conclusions in the existing documents were relevant to assessing impacts of mining additional coal from San Juan almost 10 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 nor even provided public notice that the agency had issued a FONSI and approved a mining plan

modification 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 modification for the San Juan Mine. Guardians respectfully requests that this Court declare OSM's FONSI for the San Juan mining plan modification arbitrary and capricious, and vacate this approval 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's 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.*, AR 1-2 (mining plan approval 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. The San Juan Mine and Approval of the Mining Plan Modification.

The San Juan Mine is located in San Juan County, New Mexico, approximately 15 miles west of Farmington, New Mexico. AR 24. San Juan began as a surface coal mine

in 1973, but converted to an underground mine in 2001. *Id*. Underground mining operations use a combination of room and pillar and longwall mining methods. *Id*. The Mine underlies BLM, State, and private lands. *Id*. The San Juan Coal Company owns the San Juan Mine. *Id*. The Mine provides coal exclusively to the San Juan Generating Station coal-fired power plant in northwest New Mexico. AR 4369.

San Juan's mining plan modification extends coal mining operations for the first time onto federal lease NM-99144, consisting of 4,483.88 acres of federal coal. AR 25. This revision adds 36.6 million tons of federal coal and extends the life of the Mine by 11 years. *Id*. On January 17, 2008, the Assistant Secretary approved the mining plan modification the for San Juan Mine authorizing the mining of federally owned coal on Lease NM-99144. AR 1. 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. AR 23 (Director Klein's recommendation).

On November 19, 2007, OSM issued a one-page FONSI for the mining plan modification allowing recovery of coal from Lease NM-99144. AR 11. Although OSM issued a FONSI, it did not do an EA or other environmental analysis for the mining plan modification. Instead, according to OSM, the 2007 FONSI relied on the 1998 decision record and EA for an amendment to BLM's 1988 Farmington Resource Management Plan. *Id*. For information on listed species, cumulative hydrological impacts, and historic properties, OSM relied on the State of New Mexico's 2004 decision document approving San Juan's Mining Permit 99-01. *Id*. In the FONSI, OSM stated that: "These

documents have been independently evaluated by OSM and determined to assess the environmental impacts of the proposed action adequately and accurately and to provide sufficient evidence and analysis for this finding of no significant impact." *Id*.

B. Environmental Impacts of Coal Mining.

Underground mining techniques are used to extract coal from the San Juan Mine. The Mine uses the longwall mining method to extract coal, which consists of removing coal in long, narrow strips through shearing. AR 4368-69. Once the coal has been cut, it is hauled to a feeder-breaker for crushing so it can be loaded onto a conveyor belt and transported out of the mine. AR 2551. Once at the surface, coal is loaded onto haulers for transport either to the crushing plant or one of three stockpiles. AR 2554-55. These activities directly generate air pollution, including ozone precursors and particulate matter. Indirectly, coal-fired power plants such as the San Juan Generating Station that rely on coal from the San Juan Mine for fuel can release large amounts of air pollution and impact ambient air quality on local and regional scales. *See generally* 76 Fed. Reg. 52,388 (Aug. 22, 2011) (EPA final rule promulgating a Federal Implementation Plan to control air pollution from San Juan Generating Station and describing it as "one of the largest sources of [nitrogen oxide] pollution in the United States.").

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 ("NOx") 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 approval of the San Juan mining plan modification. *See* Declarations of Michael Eisenfeld ("Eisenfeld Decl.") and Jeremy Nichols ("Nichols Decl.") attached hereto as Exhibits 1 and 2 respectively. Guardians is a nonprofit organization whose mission includes protecting the environment and public health. Eisenfeld Decl. ¶ 3, Nichols Decl. ¶¶ 3-4. Guardians has standing as an organization because: its members Mr. Eisenfeld and Mr. Nichols each 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. Eisenfeld or 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 San Juan—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 Mine and the San Juan Generating Station. Eisenfeld Decl. ¶¶ 7-10, Nichols Decl. ¶¶ 18-20. This increased risk of harm is a direct result of the inadequate agency analysis challenged here which authorizes expansion of coal mining at San Juan 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 its procedural right under NEPA to be provided with notice of OSM's FONSI for the mining plan approval. Eisenfeld Decl. ¶¶ 12-14, Nichols Decl. ¶ 21. A favorable decision will set aside the agency decision authorizing such damaging action 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, Eisenfeld Decl. ¶¶ 8-9, Nichols Decl. ¶ 24, 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 DECISION AND OPPORTUNITY FOR PUBLIC INVOLVEMENT IN THE NEPA PROCESS

OSM failed to provide notice to the public of the availability of OSM's FONSI for the San Juan mining plan modification or otherwise involve the public in its decision in any manner. Thus, OSM violated NEPA by denying the public the opportunity to review and comment during OSM's NEPA decision-making process. 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 Decision and Allow for Participation in Its FONSI for the San Juan Mining Plan Modification.

OSM failed to satisfy NEPA's public notice and participation requirements in approving the mining plan modification for the San Juan Mine. The agency did not notify the public that it had issued a FONSI either prior to or following the Assistant Secretary's approval of the Plan. OSM provided *no* notice to the public that the agency had issued a FONSI. Instead, OSM prepared the FONSI as an internal document only. OSM's admission that the FONSI was *available* for public review demonstrates that the agency failed to notify the public that this document even existed:

> Federal Defendants . . . admit that OSM's November 19, 2007 Finding of No Significant Impact ("2007 FONSI"), as well as the 1998 EA and the State of New Mexico's 1999 decision to issue a mining permit to San Juan Coal Company, 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 these documents are in fact presently located there.

Answer ¶ 50 (ECF Doc. No. 40). OSM made these admissions in response to Guardians' allegations in its Amended Petition that "OSM did not provide public *notice* of the FONSI." Am. Pet. ¶ 50 (ECF Doc. No. 37) (emphasis added). OSM's failure to provide public notice is even more egregious here than in *Klein* where the court found that OSM's published notice of a permit revision in a local newspaper for four consecutive weeks did not constitute adequate notice of the agency's decision because the notice did not reach the segment of the public—a tribal community—most affected by the agency's action which relied on tribal radio and a tribal newspaper as its primary news source. *Klein*, 747 F. Supp. 2d at 1261-62. Here, not only did OSM fail to provide any public notice of its decision, but it has admitted the record of its decision is only available in Denver, 400 miles away from the community of Farmington and the San Juan Mine.

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 *Klein* recognized, "[a]dequate notice requires a meaningful effort to provide 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 either "encourage and facilitate public involvement" or "involve . . . the public, to the extent practicable" in any stage of the agency's approval of

the mining plan modification for San Juan. 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 either provide for public involvement in the preparation of its FONSI or to notify the public that the FONSI relied on documents nearly a decade old and was 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 approval of the mining plan modification for the San Juan Mine violated NEPA.

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

Underground coal mining and its associated surface activities generate various air pollutants, including ozone precursors and $PM_{2.5}$, that degrade air quality and compromise health. Yet OSM failed to consider these effects in its decision record underlying the agency's approval of mining expansions at San Juan. For the San Juan plan approval, OSM completed a one-page FONSI that included *no* analysis of environmental impacts in general, or of impacts to air quality in particular. Instead, OSM referred to three documents produced between 1998 and 2004 as forming the basis of the agency's FONSI. *See generally* AR 11 (FONSI). These materials include: an EA

prepared by BLM in 1998 for an amendment to its 1988 Coal Leasing Area Resource Management Plan ("RMP"), BLM's "Decision Record" for the 1998 RMP Amendment, and one non-NEPA permitting document for San Juan Mine Permit 99-01 prepared by the State of New Mexico in 2004.[2]

Although OSM does not state so explicitly, the agency appears to have adopted BLM's 1998 EA in lieu of doing any analysis of environmental impacts from the mining plan modification challenged herein. 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 approval at issue here.

Regardless of whether OSM's FONSI for the San Juan mining plan approval tiers to, adopts, or supplements the 1998 and 2004 documents, the combination of BLM's 1998 EA and New Mexico's 2004 permit approval do not constitute the "hard look" at direct impacts to air quality from expansion of the San Juan Mine that NEPA requires. As discussed in footnote 2, New Mexico's permit approval does not address air quality

[2] In its FONSI, OSM stated that it relied on the Findings from New Mexico's 2004 permit approval for expansion of the San Juan Mine only "with respect to information on threatened and endangered species, cumulative hydrologic impacts, and historic preservation." AR 11. New Mexico's permit approval and associated findings do not address air quality impacts of expanded mining in any manner. *See generally* AR 6500-12 (New Mexico Permit approval and Findings).

impacts and OSM only relied on that document with respect to listed species, cultural resources and hydrologic impacts. BLM's 1998 EA for the RMP Amendment analyzed additional coal leasing for coal located east of the San Juan Mine. AR 4362. The 1988 RMP had only analyzed coal leasing in the southern half of BLM's Farmington Field Office boundaries and had not considered leasing coal adjacent to existing coal mining operations at that time. *Id*. As a result, San Juan Coal Company's application to lease federal coal immediately adjacent to the existing Mine required BLM to do an RMP amendment. AR 4365. However, BLM's discussions of the affected environment and environmental consequences of the RMP Amendment did not include any analysis of air quality. BLM neither described the environmental baseline with respect to air quality nor analyzed impacts to air quality from expanded coal mining at San Juan. *See generally* AR 15-28 (EA sections on Affected Environment and Environmental Consequences). Accordingly, OSM cannot rely on the 1998 EA to support a finding that expansion of the San Juan Mine will not significantly affect air quality either locally or within the San Juan Basin.[3]

When a NEPA decision such as OSM's FONSI tiers to or adopts an impacts analysis from another NEPA document, courts will review the two documents together to

[3] OSM also relied on BLM's "Decision Record" for the 1998 RMP Amendment to support OSM's FONSI. AR 11. However, BLM's Decision Record document does not include any analysis of environmental impacts from mine expansion. Rather, the Decision Record is similar to a FONSI in that it explains BLM's decision and includes a statement that, based on the EA, BLM has concluded that there will be no significant environmental impacts from expansion of the San Juan Mine. AR 6181-84 (BLM Decision Record for 1998 RMP Amendment). As discussed above, BLM's EA for the RMP Amendment did not analyze air quality impacts from mine expansion.

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 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[4] 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

[4] 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).

provision particularly applicable when dealing with EAs over 10 years old, citing, *inter alia*, the CEQ language).

Accordingly, even though both the CEQ's and Interior's NEPA regulations allow OSM to tier to or adopt existing NEPA analyses to avoid duplication of effort, 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).[5]

Here, the record clearly demonstrates that OSM's approval of the mining plan modification for San Juan did not comply with NEPA. OSM based its FONSI on a decade-old EA that did not analyze the impacts of expanded coal mining on air quality. Therefore, OSM has not provided any basis for a finding that expansion of mining at San Juan will not significantly impact air quality either locally or regionally. Neither did

[5] 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 prepare an air quality analysis that would fill the analytical gap in BLM's 1998 EA. OSM was required to do an air quality analysis because none of the documents OSM cites in its FONSI evaluated air quality impacts from coal mining at San Juan. Because OSM authorized additional mining at San Juan 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.

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

The San Juan Mine provides coal for the San Juan Generating Station, a coal-fired power plant in northwest New Mexico. AR 4369. Therefore, coal combustion using coal from the San Juan Mine is a reasonably foreseeable indirect effect of OSM's Mining Plan approval that the agency must analyze and disclose to the public. 40 C.F.R. § 1508.8(b). EPA has recognized the San Juan Generating Station as one of the largest sources of air pollution in New Mexico, particularly for the ozone precursor NOx. 76 Fed. Reg. 52,388. 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. *Mid-States Coal. for Progress*, 345 F.3d at 532; *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1006, 1017 (S.D. Cal. 2003); *see also High Country Conserv. Advocates v. USFS*, 2014 WL 2922751 at *14-15 (D. Colo. June 27, 2014) (overturning agency NEPA analysis as arbitrary where agency failed to analyze impacts of coal combustion flowing from decision to issue coal leases).

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*, 260 F. Supp. 2d at 1006, 1017, 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 Working Group*, coal combustion at the San Juan Generating Station is a reasonably foreseeable effect of the expansion of the San Juan Mine, which OSM was required, but failed, to fully consider before approving the plan modification. As in *Mid-States Coalition*, here, the record demonstrates that coal to be mined from the San Juan Mine is destined for combustion at the San Juan Generating Station. AR 4369. Indeed, the foreseeability of combustion of the coal at the San Juan Generating Station is even

more pronounced in this case than was the coal combustion in *Mid-States Coalition* because here the San Juan Mine exists to provide coal exclusively to the San Juan Generating Station. *Id*.

OSM cannot rely on the BLM's 1998 EA for the RMP Amendment for analysis of air quality impacts of coal combustion at San Juan Generating Station because, as discussed above, this document lacks any discussion of air quality impacts. The EA does not analyze direct impacts to air quality from mining or indirect impacts to air quality from coal combustion at San Juan Generating Station even though BLM recognized that San Juan Generating Station would purchase all of the coal from the San Juan Mine. AR 4369. 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 approval of the mining plan modification was arbitrary and a violation of NEPA.

CONCLUSION

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

Respectfully submitted on this 29th day of September, 2014.

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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 29th day of September 2014.

/s/ Samantha Ruscavage-Barz