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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

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, STATE OF MONTANA, SPRING CREEK COAL LLC, NATIONAL MINING ASSOCIATION, Defendant-Intervenors.	Case No. 1:14-cv-00013-BLG-SPW-CSO MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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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
Interior	Department of Interior
MDEQ	Montana Department of Environmental Quality
MLA	Mineral Leasing Act
NAAQS	National Ambient Air Quality Standard
NEPA	National Environmental Policy Act
NOx	Nitrogen oxides
NO_2	Nitrogen dioxide
OSM	Office of Surface Mining Reclamation and Enforcement
PAP	Permit Application Package
PM	Particulate matter
$PM_{2.5}$	Particulate matter less than 2.5 microns in diameter
PM_{10}	Particulate matter less than 10 microns in diameter
ppm	Parts per million
SMCRA	Surface Mining Control and Reclamation Act
TSP	Total suspended particulates
VOC	Volatile organic compound

INTRODUCTION

This litigation seeks to remedy Federal Defendants' (collectively "OSM's") chronic failures to address the environmental impacts of coal mining at the Spring Creek Mine in southeastern Montana and to involve the public in their decision authorizing mining of federal coal. The Mineral Leasing Act ("MLA"), 30 U.S.C. § 181 *et seq.*, and the Surface Mining Reclamation and Control Act ("SMCRA"), 30 U.S.C. § 1201 *et seq.*, require Secretary of the Interior approval of mining plans before companies can mine federal coal. 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.*; 30 C.F.R. § 746.13(b).

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 impacts air quality and, by extension, human health. Coal mining generates high levels of particulate matter, nitrogen oxides (which form ground-level ozone), and nitrogen dioxide. Additionally, 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.

OSM approved a mining plan authorizing continued federal coal development at the Spring Creek 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 analyze air quality impacts from mine expansion. For its approval, OSM prepared a one-page Finding of No Significant Impact ("FONSI") purporting to analyze the environmental impacts of mine expansion but did nothing more than adopt a 2006 NEPA document for a federal coal lease. OSM made no effort to determine whether the analyses in the 2006 document adequately assessed impacts of mining additional coal from Spring Creek six years later.

Accordingly, Plaintiff WildEarth Guardians ("Guardians") alleges that OSM violated NEPA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, by unlawfully approving the Spring Creek mining plan. Guardians respectfully requests that this Court declare OSM's FONSI for the mine expansion arbitrary, and vacate this approval until OSM has complied with NEPA.

BACKGROUND

I. THE NATIONAL ENVIRONMENTAL POLICY ACT

NEPA is the "our basic national charter for protection of the environment." *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215-1216 (9th Cir. 1998) (quoting 40 C.F.R. § 1500.1(a). 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); *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 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); *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). If 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. An EA must include discussions of alternatives and the direct, indirect, and cumulative 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 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.

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 ("DOI's") supplemental NEPA regulations[1] provide specific requirements that agencies such as OSM must follow if they want to avail themselves 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 under which the subsequent project is carried out. 40 C.F.R. § 1508.28. 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, DOI's NEPA regulations require a determination "that the analysis and assumptions used in the referenced document

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

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 an existing 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). DOI'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). The regulations further provide that:

> An existing environmental analysis prepared pursuant to NEPA and the [CEQ] 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, OSM cannot adopt an existing NEPA document to meet its statutory obligations without evaluating whether conditions have changed or new information has come to light that render prior analysis no longer adequate for evaluating the current environmental impacts of the proposed action.

II. THE MINING PLAN APPROVAL PROCESS

Pursuant to the MLA, once the Secretary of the Interior ("Secretary") issues a federal coal lease but "[p]rior to taking any action on a leasehold which might cause a significant disturbance of the environment . . . the lessee shall submit for the Secretary's approval an operation and reclamation plan." 30 U.S.C. § 207(c). Referred to as a "mining plan" by 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. By delegation, the Assistant Secretary for Land and Minerals ("Assistant Secretary") must approve the mining plan before any mining operations may commence on "lands containing leased Federal coal." 30 C.F.R. § 746.11(a).

In addition to an approved mining plan, SMCRA requires that either the Secretary or a federally-delegated state surface mining agency approve a surface mining permit application and reclamation plan ("SMCRA permit") before an entity can commence mining. *See* 30 U.S.C. § 1256(a). The SMCRA permit governs surface disturbance for coal mining operations. In SMCRA, Congress authorized the Secretary to delegate administration and enforcement of SMCRA to states that have a federally approved surface mining program. 30 U.S.C. § 1273(c). In 1998, DOI approved Montana's surface mining program and delegated SMCRA administration and enforcement authority to the State of Montana through

the Montana Department of Environmental Quality ("MDEQ")[2] subject to OSM oversight. 30 C.F.R. § 926.30.

However, Congress expressly prohibited the Secretary from delegating approval of mining plans to a state with an approved SMCRA program. 30 U.S.C. § 1273(c); 30 C.F.R. § 745.13(i). Further, in the State-Federal cooperative agreement between the Secretary and the State of Montana, the Secretary explicitly "[r]eserves the right to act independently of [the State] to carry out his responsibilities under laws other than SMCRA." 30 C.F.R. § 926.30, Art. VI.B.3.b. Therefore, the Secretary's mining plan decision is wholly separate and independent from the State's SMCRA permitting decision.

To streamline the submittal and approval processes for mining plans and SMCRA permits, applicants must submit one "permit application package" ("PAP") to the State, which constitutes both a mining plan and a SMCRA permit application. 30 C.F.R. § 926.30 Art. VI.A; 30 C.F.R. § 740.5(a) (definition of "permit application package"). Although the application is submitted as one package, it is approved in two separate parts by two separate agencies. Once the applicant submits the PAP, the State must make copies for OSM.[3] 30 C.F.R. §

[2] Hereafter, the State of Montana and the MDEQ are collectively referred to as "the State."

[3] Although the Assistant Secretary 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

926.30 Art. VI.A.2. For the SMCRA permit portion of the application, the State exercises approval authority by virtue of the above-mentioned cooperative agreement. *Id*. at Art. VI.C.1.

For the mining plan portion of the application, the Assistant Secretary exercises approval authority that is entirely separate and independent from the State's decision on the SMCRA permit. 30 U.S.C. § 1273(c); 30 C.F.R. §§ 745.13(i); 926.30 Art. VI, B.3.b, Art. VI.C.3; *S. Utah Wilderness Alliance*, 163 IBLA 142, 147 (2004) ("Not included [in State of Utah's jurisdiction] would be approval of [the applicant's] mining plan, since that authority was retained by the Secretary, under 30 C.F.R. § 745.13, and delegated to the Assistant Secretary[.]"). In the event that there is a difference between the terms and conditions of the Assistant Secretary's approved mining plan and the State-approved SMCRA permit, the State reserves the right to amend or rescind any requirements of the SMCRA permit to conform with the federal mining plan. 30 C.F.R. § 926.30 Art. VI.C.3. Once the State has approving the mining permit and the Assistant Secretary has approved the mining plan, the permittee may engage in mining activities.

Assistant 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 Assistant Secretary's decision.

A "mining plan shall remain in effect until modified, cancelled or withdrawn[.]" 30 C.F.R. § 746.17(b). The Assistant 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).

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to the Administrative Procedure Act, this Court "may direct that summary judgment be granted to either party based upon . . . review of the administrative record." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 961 (9th Cir. 2006). The Court shall set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "short of statutory right," or "without observance of procedure required by law." 5 U.S.C. §§ 706 (2)(A), (C), (D).

II. 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). As Exhibit 1 demonstrates, Guardians has standing.

III. OSM FAILED TO PROVIDE NOTICE OF ITS DECISION OR OPPORTUNITY FOR PUBLIC INVOLVEMENT IN THE NEPA PROCESS

A. OSM's Public Involvement Duties under NEPA.

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, DOI'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).

This Circuit has recognized the fundamental importance of NEPA's public participation requirement in effectuating NEPA's purpose. A NEPA document will only pass muster if its "form, content and preparation foster both informed decision-making and informed public participation." *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) (citation omitted). 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). This process, in turn, ensures open and honest public discussion "in the service of sound decisionmaking." *Id*. at 1122.

Although NEPA's public involvement requirements are not as well defined when an agency prepares an EA, "a complete failure to involve or even inform the public about an agency's preparation of an EA and a FONSI . . . violates these regulations." *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 970 (9th Cir. 2003). This involvement does not necessarily require circulation of draft or final EAs for public comment; however, "[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." *Bering Strait Citizens for Responsible Res. Dev. v. COE*, 524 F.3d 938, 953 (9th Cir. 2008).

B. OSM Failed to Provide for Any Public Participation in Its FONSI for the Mining Plan.

OSM failed to satisfy NEPA's public notice and participation requirements in approving the mining plan modification for the Spring Creek 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. 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 June 5, 2012 Finding of No Significant Impact ("2012 FONSI") 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 2012 FONSI is in fact presently located there.

Answer ¶ 54 (ECF Doc. No. 55). OSM made these admissions in response to Guardians' allegations in its Amended Complaint that "OSM did not provide public *notice* of the FONSI." Am. Pet. ¶ 54 (ECF Doc. No. 40) (emphasis added). Here, OSM failed to provide any public notice of its decision, and has admitted the

record of its decision was made available to the (uninformed) public by being placed on a shelf in Denver, over 450 miles away from the Spring Creek Mine in Montana. Placing the FONSI on a shelf in Denver without any notice to the public also does not satisfy DOI's own regulation 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).

Here, OSM made no meaningful efforts to either "encourage and facilitate public involvement" or "involve . . . the public, to the extent practicable" in any stage of the mining plan approval. 40 C.F.R. §§ 1500.2(d), 1501.4(b). This failure 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).

Finally, although the State's permitting decision was noticed in a local newspaper, AR 15, the availability of State documents for public review does not satisfy OSM's *independent* obligation to inform the public about the potential environmental impacts of mine expansion and solicit meaningful public input as part of the agency's NEPA process. SMCRA explicitly prohibits OSM from delegating NEPA compliance to the State. 30 C.F.R. § 745.13(b). Nor does the

record contain any indication that the State's permitting decision put the public on notice that Spring Creek Mine's proposed expansion was subject to federal oversight and approval or that OSM was planning to adopt an EA prepared by a different agency that would serve as the sole basis for OSM's FONSI. And involving the public in OSM's NEPA process is one of NEPA's requirements. 40 C.F.R. § 1500.2(d); *see also Or. Nat. Desert Ass'n*, 625 F.3d 1120 (holding that "public scrutiny is essential to implementing NEPA."). For these reasons, OSM cannot rely on the State's public notice of its permitting process to satisfy the federal agency's NEPA obligations.

IV. OSM FAILED TO TAKE A HARD LOOK AT DIRECT IMPACTS TO AIR QUALITY FROM MINE EXPANSION

Coal mining at the Spring Creek Mine generates various air pollutants that degrade air quality and compromise health, including fine particulate matter, ozone precursors, and nitrogen dioxide. Yet OSM failed to consider these effects before approving mine expansion. The record shows that OSM's NEPA compliance consists of a one-page FONSI that included *no* analysis of mining's environmental impacts in general, or of impacts to air quality in particular. Instead, OSM adopted in its entirety the Bureau of Land Management's ("BLM's") 2006 EA for BLM's authorization of federal lease MTM94378 as the basis for OSM's 2012 FONSI. *See generally* AR 16 (FONSI). However, neither the 2006 EA nor any other record documents support OSM's 2012 finding of no significant impacts to air

quality. Because OSM "entirely failed to consider an important aspect of the problem" with respect to air quality, the FONSI is arbitrary and violates NEPA. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A. OSM's Adoption of the 2006 EA Without Assessing Whether Any Changes Affecting Air Quality Had Occurred in the Intervening Years was Arbitrary.

CEQ and DOI NEPA regulations allow OSM to adopt another agency's NEPA document "if the Responsible Official determines, with supporting documentation, that it adequately assesses the environmental effects of the proposed action" and "includes 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). When an agency adopts an existing NEPA analysis to support a FONSI, courts 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 EISs in lieu of doing a site-specific NEPA analysis, the Court reviewed the impacts

discussions in the EISs). The NEPA documents adopted must fully address the environmental consequences of the proposed action. *Pennaco*, 377 F.3d at 1151.

In addition, when an agency relies 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." 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. CEQ's guidance on 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 Clark*, 720 F.2d at 1480 (noting that the continuing duty to evaluate new information is especially relevant where the original environmental analysis was more than five years old); *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).

Accordingly, although both CEQ's and DOI's NEPA regulations allow OSM to adopt existing NEPA analyses to avoid duplication of effort, the agency

cannot satisfy its NEPA compliance obligation in this manner if the adopted documents 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 Ninth Circuit have recognized, 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 Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (citing *Marsh* for this principle).[4]

Finally, even though the 2006 EA was produced by a federal agency subject to NEPA, OSM may not adopt the EA without performing its own independent assessment. Attempting "to rely entirely on the environmental judgments of other agencies [is] in fundamental conflict with the basic purpose of NEPA." *Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 595 (D.C. Cir. 1994) (citation and alteration omitted). An agency may adopt another agency's analysis only after "independent[ly] review[ing]" that analysis and explaining how it satisfies the

[4] 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).

reviewing agency's NEPA obligations. 40 C.F.R. § 1506.3(c); *see also* 42 U.S.C. § 4332(2)(D) (agency remains "responsib[le] for the scope, objectivity, and content of the entire [NEPA] statement").

Here, OSM has met none of these criteria with respect to air quality impacts from mine expansion. The record is devoid of any evidence showing OSM conducted an independent assessment of the 2006 EA to ensure that the analyses were current and adequately analyzed air quality impacts of future mining. *See generally* AR 16 (FONSI), AR 4-11 (OSM's recommendation for mining plan approval). As set forth in Section C below, the 2006 EA was inadequate on both fronts.[5]

B. OSM's Legal Duty to Analyze Air Quality Impacts under NEPA is Statutorily Distinct from the State's Duties as the SMCRA Permitting Authority.

As discussed in Background Section II above, OSM's mine plan decisions are independent from the State's permitting decisions. *See also Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, 343 (6th Cir. 2006) (stating that [w]hatever duties [SMCRA] imposes on [OSM], it does not suspend the agency's independent obligations under [NEPA]."). Furthermore, OSM is prohibited from delegating NEPA compliance to the State, thus the responsibility

[5] However, in the 2006 EA BLM explicitly recognized that a detailed, site-specific impacts analysis of mining activities would occur at the mine plan decision phase when OSM received the proposed mining plan from the lessee. AR 27.

to conduct NEPA-compliant environmental analyses for mining plan decisions rests with OSM. 30 C.F.R. § 745.13(b). Although the SMCRA regulations require OSM to consider, *inter alia*, "[t]he findings and recommendations of the regulatory authority with respect to the permit application and the State program" in making a mine plan recommendation to the Assistant Secretary, the plain language of the regulation does not require the Assistant Secretary to follow a state's recommendations. 30 C.F.R. 746.13(f); *see also S. Utah Wilderness Alliance v. OSMRE*, 2007 WL 4300095, at *7 (D. Utah Dec. 5, 2007). Therefore, neither the existence of the State permitting process nor the State's independent obligation to consider the environmental effects of mine expansion excuse OSM from taking a hard look at the air quality impacts of mine expansion pursuant to NEPA's standards.

Moreover, with respect to the issue of a federal agency relying on documents prepared by a state agency to meet NEPA obligations, the Ninth Circuit has explicitly recognized that "[a] non-NEPA document—let alone one prepared and adopted by a state government—cannot satisfy a federal agency's obligations under NEPA." *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009); *see also Calvert Cliffs Coordinating Comm'n v. U.S. Atomic Energy Comm'n,* 449 F.2d 1109, 1122-23 D.C. Cir. 1971) (explaining that NEPA would "wither away in disuse, [if] applied only to those environmental

issues wholly unregulated by any other federal, state or regional body."). Accordingly, even if there were evidence in the record that the State had conducted air quality analyses using current standards, which there is not, the existence of such documents would not excuse OSM from taking its own hard look at air quality impacts. *See*, *e.g.*, *Kern v. BLM,* 284 F.3d 1062, 1073 (9th Cir. 2002) (holding that "tiering to a document that has not itself been subject to NEPA review is not permitted"); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 811 (9th Cir. 1999) (holding that it is impermissible under the NEPA regulations to tier an EIS to a non-NEPA "report" to cure the deficiencies in the EIS analysis).

C. Promulgation of More Stringent Air Quality Standards for Three Pollutants Between 2006 and 2012 required OSM to Supplement the EA's Air Quality Analysis.

The new air quality standards promulgated between 2006 and 2010 constitute changed circumstances that require supplementation of the air quality analysis in the 2006 EA. The EA did not consider $PM_{2.5}$ emissions from mining activities. The EA also predates the current standards for ozone and one-hour nitrogen dioxide emissions, therefore there is no analysis of these emissions based

on the standards in place in 2012 when OSM issued the FONSI. Given these changed circumstances, OSM's wholesale adoption of the 2006 EA was arbitrary.[6]

1. The EA did not consider $PM_{2.5}$ emissions from mining under the standard in place at that time nor did OSM consider these emissions under the revised standard.

Particulate matter is one 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). EPA recognizes two different types of particulate matter ("PM") based on particle size: (1) particulate matter less than 10 microns in diameter, or PM_{10}, and (2) particulate matter less than 2.5 microns in diameter, or $PM_{2.5}$. *See generally*, 52 Fed. Reg. 24,634 (July 1, 1987) (setting NAAQS for PM_{10}); 62 Fed. Reg. 38,652 (July 18, 1997) (setting NAAQS for $PM_{2.5}$).

[6] As discussed in Section B above, OSM cannot rely on State permitting documents to satisfy its NEPA obligation. Even if OSM could rely on State permitting documents, these documents do not include the requisite analyses. None of the State permitting documents include any analysis of $PM_{2.5}$ impacts from mining. *See* AR 5401; AR 5492; AR 196. The air permit's mention of NOx is limited to tables of one-hour and annual NO_2 modeling results that "were adjusted for the conversion of NOx to NO_2." AR 5422. Although the air permit found that future mining would not violate *the State's* one-hour NO_2 standard, AR 5422, the State's hourly standard is nearly four times higher than the standard EPA set in 2010.

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.

Although the 2006 EA discusses PM_{10} levels from ongoing mining at Spring Creek, it lacks *any* discussion of $PM_{2.5}$ levels. AR 59, 103. Motor vehicle emissions and combustion processes from mining activities generate $PM_{2.5}$ emissions. 71 Fed. Reg. 61,144, 61,146; AR 5047. Therefore, OSM was required to evaluate air quality impacts from future $PM_{2.5}$ emissions caused by mine expansion. Moreover, EPA's strengthening of the standard for 24-hour concentrations of $PM_{2.5}$ represents a change in circumstances since BLM issued the EA in 2006. Thus, OSM cannot rely on the 2006 EA for analysis of $PM_{2.5}$ for two reasons: 1) the EA did not analyze the impacts of $PM_{2.5}$ emissions from mining, and 2) EPA changed the 24-hour standard for $PM_{2.5}$ so that even if the EA had analyzed these emissions, NEPA requires that OSM supplement this analysis pursuant to the current standard.

2. OSM failed to consider ozone emissions under the new standard.

Ozone is formed when the ozone precursors nitrogen oxide ("NOx") and volatile organic compounds ("VOCs") 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). 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.

Coal mining activities produce ozone precursors, particularly NOx emissions. AR 59-60. The 2006 EA provided estimates of annual NOx emissions from various mining activities in tabular form but did not translate these estimates into estimated ozone levels from mine expansion. AR 60. Although the D.C. Circuit has upheld use of NOx emissions as a proxy for ozone emissions, the Court did so based on the agency's "extensive discussion of NOx" and NOx emission reduction measures in an EIS. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 311-12 (D.C. Cir. 2013). No such "extensive discussion" of NOx is included in the 2006 EA. Because there has been no prior analysis of impacts to air quality from

ozone emissions resulting from mine expansion, OSM was required to take a hard look at these impacts before approving the mine expansion. OSM has not done so, therefore its approval of the mining plan violates NEPA.

3. OSM failed to consider NO_2 emissions under the new standard.

Nitrogen dioxide ("NO_2") is a criteria pollutant under the Clean Air Act. 42 U.S.C. § 7408. The NO_2 annual standard is 53 parts per billion ("ppb"). On July 15, 2009, EPA proposed to supplement the annual standard with a one-hour NO_2 standard of between 80 and 100 ppb because "recent studies provide scientific evidence that is sufficient to infer a likely causal relationship between short-term NO_2 exposure and adverse effects on the respiratory system." 74 Fed. Reg. 34,404, 34,410 (July 15, 2009). According to EPA, "[e]pidemiologic evidence exists for positive associations of short-term ambient NO_2 concentrations below the current NAAQS with increased numbers of emergency department visits and hospital admissions for respiratory causes, especially asthma." *Id.* at 34,413. EPA promulgated the final one-hour NO_2 standard of 100 ppb on February 9, 2010. 75 Fed. Reg. 6,474 (Feb. 9, 2010).

Overburden blasting at Spring Creek Mine produces NO_2 emissions in the form of orange clouds. AR 59. The 2006 EA predates promulgation of the one-hour NO_2 standard, therefore it contains no assessment of one-hour NO_2 concentrations from blasting. Discussion of NO_2 emissions in the 2006 EA is

limited to noting that "reducing the size of cast blasting shots" is the "most successful control measure" for NO_2 emissions from ongoing mining activities. AR 59. Because OSM must ensure its mine plan decisions comply with NEPA, 30 C.F.R. § 745.13(b), and the NO_2 analysis in the 2006 EA was stale by the time OSM adopted it in 2012, OSM was required to analyze the impacts to air quality from one-hour NO_2 emissions prior to approving the mining plan.

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

The Spring Creek Mine provides coal for combustion at coal-fired power plants. AR 5090. Therefore, coal combustion 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). 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). By failing to consider the indirect impacts of coal combustion, OSM's FONSI was arbitrary and violated NEPA.

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). "[A]gencies need not consider highly speculative or indefinite impacts." *Sierra Club v. Marsh*, 769 F.2d 868, 878 (1st Cir. 1985). Courts have previously held that agencies must consider foreseeable upstream and downstream impacts of energy development. *See*, *e.g.*, *Mid-States Coal. for Progress V. Surf. Trans. Bd.*, 345 F.3d 520, 532 (8th Cir. 2003); *Border Power Plant Working Group v. DOE*, 260 F. Supp. 2d 997, 1006, 1017 (S.D. Cal. 2003); *High Country Conserv. Advocates v. USFS*, 2014 WL 2922751 at *14-15 (D. Colo. June 27, 2014).

In *Mid-States*, 345 F.3d at 532, the Eighth Circuit considered the adequacy of a NEPA analysis for construction of a new railroad line to haul coal from Wyoming to Midwestern markets. 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 rail line construction would lead to increased coal consumption and that the EIS should have analyzed the resultant air pollution as an indirect effect. *Id.* at 549-50.

Similarly in *Border Power*, 260 F. Supp. 2d at 1006, 1017, the court held that in approving construction of two electricity transmission lines the agency's NEPA analysis was required to consider as "indirect effects" air pollution from two upstream power plants in Mexico. The court found that power plant operation

and the attendant air pollution were reasonably foreseeable effects of transmission line construction because the lines would be the only means for the power plants to transmit electricity to their intended U.S. markets. *Id.* at 1017.

In *High Country Conservation Advocates*, 2014 WL 2922751, the court rejected BLM's argument that it was not required to analyze the indirect impacts of coal combustion because its leasing decision would have no effect on coal supply—and therefore no effect on greenhouse gas levels from combustion—since coal would be obtained from other sources if it was not made available from BLM's lease. *Id*. at *15. Relying on the Eighth Circuit's reasoning in *Mid States*, the court determined that coal produced from BLM's leasing decision would increase the supply of inexpensive coal relative to other fuel sources, promoting continuation of coal combustion and its attendant effects. *Id*. Thus, the court held that coal combustion was a reasonably foreseeable effect of leasing federal coal and the agency had to analyze emissions from combustion "even if the extent of the effect is less certain." *Id*. *See also South Fork Band*, 588 F.3d at 726 (holding that agency violated NEPA by failing to consider indirect effects of off-site air pollution caused by subsequent processing of ore from mine expansion).

Like the foreseeable combustion in *Mid-States*, *Border Power*, and *High Country Conservation Advocates,* here coal combustion is a reasonably foreseeable effect of the Spring Creek Mine expansion. AR 5090. Expansion of the mine will

result in combustion of 117.3 million tons of coal, which, as the court stated in *High Country Conservation Advocates*, "otherwise would have been left in the ground." 2014 WL 2922751 at *15. OSM's decision allows the mine to expand, resulting in combustion of an additional 117.3 million tons of coal and the release of the associated air pollutants that would not otherwise occur.

OSM cannot rely on the 2006 EA for analysis of air quality impacts from coal combustion because that document lacks any discussion of such impacts. *See generally* AR 56-61, 103-04 (discussing air emissions from coal mining only). By failing to fully consider the indirect impacts of 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. Therefore, its FONSI was arbitrary and a violation of NEPA.

CONCLUSION

For the reasons stated above, Guardians respectfully requests that this Court (1) declare that Federal Defendants' approval of the Spring Creek 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 8th day of December, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was served on all counsel of record through the Court's ECF system on this 8th day of December 2014.

s/ Samantha Ruscavage-Barz

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1.D.E, I hereby certify that this brief is proportionally spaced, has a typeface of 14 points, and contains 6,477 words.

s/ Samantha Ruscavage-Barz