



February 7, 2014

**BY CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Joe Pizarchik  
Director  
U.S. Office of Surface Mining Reclamation and Enforcement  
1951 Constitution Ave., NW  
Washington, D.C. 20240

**Re: Petition for Rulemaking Under the Surface Mining Control and Reclamation Act,  
30 U.S.C. § 1211(g)**

Dear Director Pizarchik:

Enclosed, please find a petition to the Office of Surface Mining Reclamation and Enforcement (“OSM”) for the issuance and/or amendment of a rule pursuant to the Surface Mining Reclamation and Enforcement Act (“SMCRA”), 30 U.S.C. § 1211(g).

The petition specifically calls on OSM to promulgate a rule to ensure compliance with the National Environmental Policy Act (“NEPA”) when reviewing and making recommendations on Mining Plans in accordance with 30 C.F.R. § 746. NEPA is considered “our basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1(a). Mining Plans are required before a company can mine leased federal coal, in other words, coal owned by the American public. Among other things, Mining Plans must ensure that relevant environmental protection requirements under SMCRA are met, ensure that other environmental laws are met, including the Endangered Species Act, Clean Air Act, and Clean Water Act, and ensure that such plans are adopted based on a thorough analysis of impacts and consideration of alternatives under NEPA.

In accordance with 30 C.F.R. § 700.12(b), the petition provides a concise statement of the facts, technical justification, and law which require the issuance and/or amendment of the petitioned rule. The petition also includes draft rule language, which we request OSM consider adopting in full or modify as appropriate to ensure the agency reviews and makes recommendations on Mining Plans in accordance with NEPA. In accordance with 30 C.F.R. § 700.12(b), we do not request a public hearing. However if OSM believes that a public hearing would serve the agency and be in the interest of the public, we would support holding a public hearing.

We believe this petition has a reasonable basis, especially in light of clear indications that

OSM is not fully complying with NEPA when reviewing and making recommendations regarding Mining Plans. The failure to ensure full compliance with NEPA raises serious concerns that OSM is not making well-informed decisions as to whether or not to approve the mining of federal coal. This is particularly troublesome in the American West, where the majority of the nation's federally owned coal is located and where the majority of the nation's coal is mined, often through large strip mining operations. However, this issue is national in scope. As the U.S. Bureau of Land Management, the Interior Department agency charged with leasing federal coal, has noted, approximately 570 million acres of coal (roughly 890,000 square miles) is federally owned throughout the U.S. (*see*, [http://www.blm.gov/wo/st/en/prog/energy/coal\\_and\\_non-energy.print.html](http://www.blm.gov/wo/st/en/prog/energy/coal_and_non-energy.print.html)).

Although the petition does not request that OSM do anything more than what it is already required and authorized to do, it is necessary to assure full and consistent compliance with NEPA. The American public deserves such an assurance, not only given the impacts coal mining poses to the environment, but given the public nature of the coal resource at issue here. It is imperative that OSM give full and thorough consideration as to whether the mining of leased federal coal is appropriate. The enclosed petition ensures that consideration.

In addition to filing the petition with your office, we have also copied the White House Council on Environmental Quality. It is crucial that the Council be notified of the need for OSM to ensure full compliance with NEPA.

In accordance with 30 U.S.C. § 1200(g), we look forward to OSM granting our petition within 90 days. If you have any questions or concerns, please contact me at the information below. Thank you.

Sincerely,

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cc: White House Council on Environmental Quality

**BEFORE THE DIRECTOR  
UNITED STATES DEPARTMENT OF INTERIOR  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT**

In the Matter of:	)	
	)	
Issuance and/or Amendment of a Rule	)	Petition for rulemaking under
Adopting National Environmental Policy	)	the Surface Mining Control and
Act Procedures for the Review and	)	Reclamation Act, 30 U.S.C. § 5
Recommendations Regarding the Approval,	)	1211(g), and Administrative
Disapproval, or Conditional Approval of	)	Procedure Act, 5 U.S.C. § 553(e)
Mining Plans Under 30 C.F.R. § 746, <i>et seq.</i>	)	
	)	

**PETITION FOR THE ISSUANCE AND/OR AMENDMENT OF A RULE TO THE  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT**

## TABLE OF CONTENTS

<b>INTRODUCTION</b> .....	1
<b>PETITIONER</b> .....	3
<b>LEGAL BASIS FOR PETITION</b> .....	3
<b>LEGAL BACKGROUND</b> .....	3
1. National Environmental Policy Act.....	4
2. Mining Plans Under the Surface Mining Reclamation and Control Act.....	5
3. Interior Department and OSM National Environmental Policy Act Requirements.....	7
<b>THE PETITIONED RULE AND FACTUAL, LEGAL, AND TECHNICAL JUSTIFICATION</b> .....	8
1. Proposed 30 C.F.R. § 746.12(a).....	10
2. Proposed 30 C.F.R. § 746.12(b).....	10
3. Proposed 30 C.F.R. § 746.12(c).....	12
4. Proposed 30 C.F.R. § 746.12(d).....	14
5. Proposed 30 C.F.R. § 746.12(e).....	16
<b>CONCLUSION</b> .....	18

## INTRODUCTION

WildEarth Guardians hereby petitions the Director of the Department of Interior, Office of Surface Mining Reclamation and Enforcement (“OSM”) for the issuance and/or amendment of a rule pursuant to the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1211(g) and the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e).

Specifically, we petition the Director to issue and/or amend a rule to adopt procedures assuring OSM compliance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331, *et seq.*, Council on Environmental Quality (“CEQ”) rules implementing NEPA, 40 C.F.R. § 1500, *et seq.*, and other relevant authorities under NEPA with regards to the agency’s review and recommendations on the approval, disapproval, or conditional approval of Mining Plans under 30 C.F.R. § 746. Attached to this Petition as Exhibit 1 is proposed rule language, which we request OSM either fully promulgate as a new section, 30 C.F.R. § 746.12, or incorporate into another section of 30 C.F.R. § 746, and modify through a public rulemaking, as appropriate. Further in this petition, we provide the factual, technical, and legal justification for promulgating the proposed rule.

This Petition is filed based on mounting evidence that OSM review and recommendations regarding Mining Plans are falling short of ensuring full compliance with NEPA procedures. This raises significant concerns that OSM is not taking into account the full impacts of surface coal mining, including the surface impacts of underground mining, prior to recommending Secretarial approval. This is disconcerting given that coal mining poses a number of potentially significant direct impacts to the human environment, including, but not limited to:

- Air pollution impacts: Directly, coal mining can generate large amounts of particulate matter from strip mining, reclamation, and other material moving, as well as nitrogen oxides (which form ground-level ozone) from blasting, haul trucks, and other combustion activities;
- Greenhouse gas impacts: Directly, coal mines release large amounts of methane, a potent greenhouse gas. Coal mines are the fourth largest source of methane emissions in the United States. *See* U.S. Environmental Protection Agency (“EPA”), *Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1990-2011* (April 12, 2013) at ES-6 (Executive Summary attached as Exhibit 2);
- Water quality impacts: Coal mines produce large amount of water pollution, often discharging into surface waters or groundwater. In some cases, coal ash (or coal combustion byproduct) disposal at coal mines could directly impact surface and groundwater (OSM has clearly acknowledged the potential for coal ash disposal at coal mines to pose contamination risks, *see* OSM, “Placement of Coal Combustion Byproducts in Active and Abandoned Coal Mines, Advanced Notice of Proposed Rulemaking,” 72 Fed. Reg. 12026-12030 (March 14, 2007));
- Land impacts: Thousands of acres of lands, including federal and other public lands, are disturbed by coal mining in the U.S. every year. The surface impacts include

extensive stripping operations, stockpiling, the construction of ventilation shafts and methane drainage wells associated with underground mines, road construction, and the construction of coal handling and processing facilities, and reclamation activities; and

- Fish Wildlife impacts: The impacts of coal mining can impact fish and wildlife and irreversibly degrade their habitat. Imperiled species that may be impacted by coal mining include, but are not limited to, the greater sage grouse, Gunnison sage grouse, ferruginous hawk, golden eagle, razorback sucker, Colorado pikeminnow, Indiana bat, threatened and endangered invertebrates, including several freshwater mussel species, and many more.

Environmental impacts related to coal combustion, which result only because coal is mined, are even more extensive and include: air pollution impacts, including sulfur dioxide, nitrogen oxide, mercury, and carbon dioxide emissions (coal-fired power plants are the largest source of carbon dioxide emissions in the U.S., *see* Exhibit 2 at ES-10); water impacts, including water consumption (for producing steam and cooling) and water pollution; waste impacts, including coal ash and other combustion byproduct production, which can present contamination concerns for lands and waters; and impacts to fish and wildlife. *See e.g.* EPA, “Environmental Impacts of Coal,” website available at <http://www.epa.gov/cleanenergy/energy-and-you/affect/coal.html> (last accessed Feb. 3, 2014).

Put simply, coal mining is an intensive industrial activity with far reaching impacts that deserves equally intensive environmental scrutiny before garnering federal approval. This Petition seeks to ensure OSM provides an appropriate level of NEPA review to its Mining Plan reviews and recommendations.

This Petition is also submitted in light of mounting evidence that greater public involvement and scrutiny of Mining Plans is not only necessary, but would be enormously beneficial to OSM’s review and recommendations regarding Mining Plans. Indeed, “public scrutiny” is essential to implementing NEPA. 40 C.F.R. § 1500.1(b). Currently, public involvement in Mining Plan reviews and recommendations is unacceptably limited. OSM must not only ensure adequate environmental considerations are made, but also ensure the public is informed and involved to ensure the “excellent action” envisioned by NEPA. 40 C.F.R. § 1500.1(c).

As detailed below, the issuance and/or amendment of key changes to OSM rules at 30 C.F.R. § 746 are not only factually, technically, and legally justified, but will greatly advance the public interest by assuring that OSM “make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c).

## PETITIONER

WildEarth Guardians is a Santa Fe, New Mexico-based conservation group with offices in Denver, Utah, Montana, and elsewhere in the American West. WildEarth Guardians is dedicated to protecting and restoring the wildlife, wild rivers, and wild places of the American West. To this end, WildEarth Guardians seeks to safeguard the climate by promoting cleaner energy, efficiency and conservation, and alternatives to fossil fuels. WildEarth Guardians has engaged extensively in coal mining issues for many years, primarily in the western United States, advocating for greater oversight of environmental impacts.

## LEGAL BASIS FOR PETITIONING

WildEarth Guardians petitions OSM pursuant to SMCRA and the APA. The APA generally provides that, “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e).<sup>1</sup> SMCRA specifically provides that “any person may petition the [OSM] Director to initiate a proceeding for the issuance, amendment, or repeal of a rule under this chapter.” 30 U.S.C. § 1211(g); *see also* 30 C.F.R. § 700.12(a).

A rulemaking petition must present a “concise statement of facts, technical justification, and law which require issuance, amendment, or repeal of a regulation” under SMCRA. 30 C.F.R. § 700.12(b). Upon receipt, OSM must determine whether the facts, technical justification, and law set forth in the petition “may provide a reasonable basis for issuance, amendment, or repeal of a regulation.” 30 C.F.R. § 700.12(c). If a petition has a “reasonable basis,” a notice shall be published in the Federal Register seeking public comment on the proposed changes. *Id.* OSM may also hold a public hearing or undertake an investigation. *Id.*

Within 90 days of receipt, OSM must either grant or deny a petition. *See* 30 U.S.C. § 1211(g)(4); *see also* 30 C.F.R. § 700.12(d). If a petition is granted, a rulemaking proceeding must be initiated. *See* 30 C.F.R. § 700.12(d)(1). If a petition is denied, the Director must notify the petitioner in writing and set forth the reasons for denial. *See* 30 C.F.R. § 700.12(d)(2).

## LEGAL BACKGROUND

This petition requests that OSM issue and/or amend a rule to ensure compliance with NEPA in fulfilling its duty under SMCRA to review and recommend to the Secretary of Interior approval, disapproval, or modification of a Mining Plan or Mining Plan Modification. Below, we outline key legal requirements related to the Agency’s duties under NEPA and its Mining Plan review and recommendation process.

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<sup>1</sup> A rule is defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]” 5 U.S.C. § 551(4).

## **1. The National Environmental Policy Act**

NEPA aims to “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. Regulations promulgated by the CEQ, which apply to every federal agency, explain, “[NEPA] is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).

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(C)(i); 40 C.F.R. § 1501.4. 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. *See* 40 C.F.R. §§ 1502.14 and 1502.16.

An agency may also prepare an Environmental Assessment (“EA”) to determine whether an EIS is necessary. *See* 40 C.F.R. §§ 1501.3, 1508.9. An EA must include a discussion of alternatives and the environmental impacts of the action. 40 C.F.R. § 1508.9.

CEQ rules require that EISs and EAs be based on “high quality information” and accurate scientific analysis,” “expert agency comments,” and “public scrutiny.” 40 C.F.R. § 1500.1(b). To this end, agencies must “insure the professional integrity, including scientific integrity, of the discussions and analyses in [EISs].” 40 C.F.R. § 1502.24.

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. An assessment of whether or not an impact is “significant” is based on a consideration of the “context and intensity” of the impacts. 40 C.F.R. § 1508.27. “Context” refers to the scope of the proposed action, including the interests affected. 40 C.F.R. § 1508.27(a). “Intensity” refers to the severity of the impact and must be evaluated with a host of factors in mind, including “[t]he degree to which the proposed action affects public health or safety” and “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b).

Where a decision based on an EIS is issued, the federal agency must prepare a “public record of decision” (“ROD”). 40 C.F.R. § 1502.2. An ROD must “state what the decision was,” “[i]dentify all alternatives considered,” and “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.” 40 C.F.R. §§ 1502.2(a)-(c).

An agency may adopt all or a portion of an EIS “provided that the statement or portion thereof meets the standards for an adequate statement” under the CEQ regulations. 40 C.F.R. § 1506.3(a).

Federal agencies must “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). To the fullest extent possible, agencies must “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. § 1500.2(d). At a minimum, agencies must “[p]rovide public notice of...the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.” 40 C.F.R. § 1506.6(b). “Environmental documents” include EAs, EISs, FONSI, and notices of intents to prepare and/or consider EISs. 40 C.F.R. § 1508.10. CEQ regulations stress that “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken” and that “public scrutiny [is] essential to implementing NEPA.” 40 C.F.R. § 1500.1(b).

Where “significant new circumstances or information relevant to environmental concerns and bearings on” an action or impacts analyzed in an EIS arise(s), an agency “shall” prepare a supplement to the NEPA document. 40 C.F.R. § 1502.9(c)(1). A supplement to an EIS “shall” generally be “prepare[d], circulate[d], and file[d]” in the same fashion as an EIS. 40 C.F.R. § 1502.9(c)(4).

The process established by NEPA ultimately serves two central purposes: First, “[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Second, it “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Id.* In other words, compliance with NEPA ensures good decisions by the federal government.

To this end, federal agencies must not only comply with relevant NEPA and CEQ requirements, but must also “review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of [NEPA].” 40 C.F.R. § 1500.6. Agencies must specifically ensure that they adopt procedures supplementing the CEQ rules to ensure compliance with relevant procedural provisions therein. *See* 40 C.F.R. § 1507.3(a). Agencies must “continue to review their [NEPA] policies and procedures and in consultation with the Council [on Environmental Quality] to revise them as necessary to ensure full compliance with the purpose and provisions of [NEPA].” *Id.*

## **2. Mining Plans Under the Surface Mining Reclamation and Control Act**

The Secretary of the Department of Interior is responsible for authorizing the surface mining of federal coal leased by the U.S. Bureau of Land Management (“BLM”). *See* 30 C.F.R. § 740.4(a)(1).<sup>2,3</sup> This authorization is provided by the issuance of a Mining Plan. The authority

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<sup>2</sup> “Surface coal mining operations” include both activities conducted on the surface of lands in connection with a surface coal mining operation and the surface operations and surface impacts incident to an underground coal mining operation. 30 C.F.R. § 700.5.

to issue a Mining Plan is primarily set forth under the federal Mineral Leasing Act, which states that before any entity can take action on a federal leasehold that “might cause a significant disturbance of the environment,” an operation and reclamation plan must be submitted to the Secretary of Interior for approval. 30 U.S.C. § 207(c). Referred to as a “Mining Plan” by SMCRA and its underlying regulations (*see* 30 U.S.C. § 1273(c) and 30 C.F.R. § 746), the Secretary “shall approve or disapprove the [mining] plan or require that it be modified.” *Id.*; *see also* 30 C.F.R. § 746.14 (stating that Secretary “shall approve, disapprove or conditionally approve” a Mining Plan).

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).

A Mining Plan must ensure compliance with applicable surface mining performance standards under SMCRA and the terms, conditions, and stipulations of the federal coal lease. *See* 30 C.F.R. §§ 740.19(a) and (b). Furthermore, a Mining Plan must assure compliance with applicable requirements of federal laws, regulations, and executive orders other than SMCRA, 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, “No 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). Accordingly, surface coal mining operations on lands containing leased federal coal must be conducted in accordance with a Mining Plan. *See* 40 C.F.R. § 740.19(a)(2).

Although the Secretary of Interior is charged with approving, disapproving, or modifying a Mining Plan, 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.

While states have largely been delegated authority under SMCRA 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). To this end, under SMCRA, the Secretary is prohibited from delegating authority to states to comply with the NEPA. *See* 30 C.F.R. § 745.13(b).

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<sup>3</sup> “Leased Federal coal means coal leased by the United States pursuant to 43 CFR part 3400[.]” 30 C.F.R. § 740.5(a).

### 3. Interior Department and OSM NEPA Requirements

In 2008, the Interior Department promulgated regulations to implement NEPA pursuant to the CEQ regulations. *See* 43 C.F.R. § 46, *et seq.* These regulations are to be used by the Interior Department and its agencies, including OSM, “in conjunction with and supplementary to” authorities set forth under the CEQ NEPA regulations. *Id.*

These NEPA regulations explain that adoption of both EISs and EAs are allowed. *See* 43 C.F.R. § 46.120. However, the regulations make clear that where an EIS or EA is adopted, the agency must determine “with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives.” 43 C.F.R. § 46.120(c). Such supporting documentation “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.” *Id.* Where an EA is to be adopted, yet is inadequate, agencies must either prepare a new EA or “augment” the EA as appropriate. 43 C.F.R. §§ 46.300, 46.320(b).

The Interior Department NEPA regulations also explicitly require that the public be notified “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 agencies are not explicitly required to solicit comments on EAs, they may do so “if they determine it to be appropriate.” 43 C.F.R. § 46.305(b). The rules explain that agencies “must consider comments that are timely received, whether specifically solicited or not.” 43 C.F.R. § 46.305(a)(1).

The Department of Interior Departmental Manual also sets forth NEPA implementing procedures specific to OSM. *See* Department of Interior Departmental Manual, 516 DM 13. Among other things, the Departmental Manual explains that where approval of a Mining Plan for surface mining involves “environmental impacts [that] are not adequately analyzed in an earlier environmental document covering the specific leases or mining activity,” where “[t]he area to be mined is 1280 acres or more, or the annual full production level is 5 million tons or more,” and where “[m]ining and reclamation operations will occur for 15 years or more,” an EIS is normally required. 516 DM 13.4(A)(4). Where an action is one that normally requires preparation of an EIS and a decision is made not to prepare an EIS, the FONSI must be made available for public review for 30 days prior to a decision in accordance with 40 C.F.R. § 1501.4(e)(2). *See* 516 DM 13.4(B).

OSM has further adopted its own directives to implement and ensure compliance with NEPA. *See* OSM Handbook on Procedures for Implementing the National Environmental Policy Act (“OSM NEPA Handbook”). These directives emphasize that NEPA documents may be adopted by OSM, but that the agency must “ensure that the findings of the documents are in full compliance with NEPA and OSM policy.” OSM NEPA Handbook, Chapter 3 § B.1. Where an EA is inadequate for adoption, OSM must “augmen[t] or rewrit[e]” the EA. OSM NEPA Handbook, Chapter 3 § B.2.

Where an EIS is adopted, OSM’s directives state that the agency should publish a “notice of intent to adopt” in the Federal Register. OSM Handbook, Chapter 3 § B.3.a. The directives

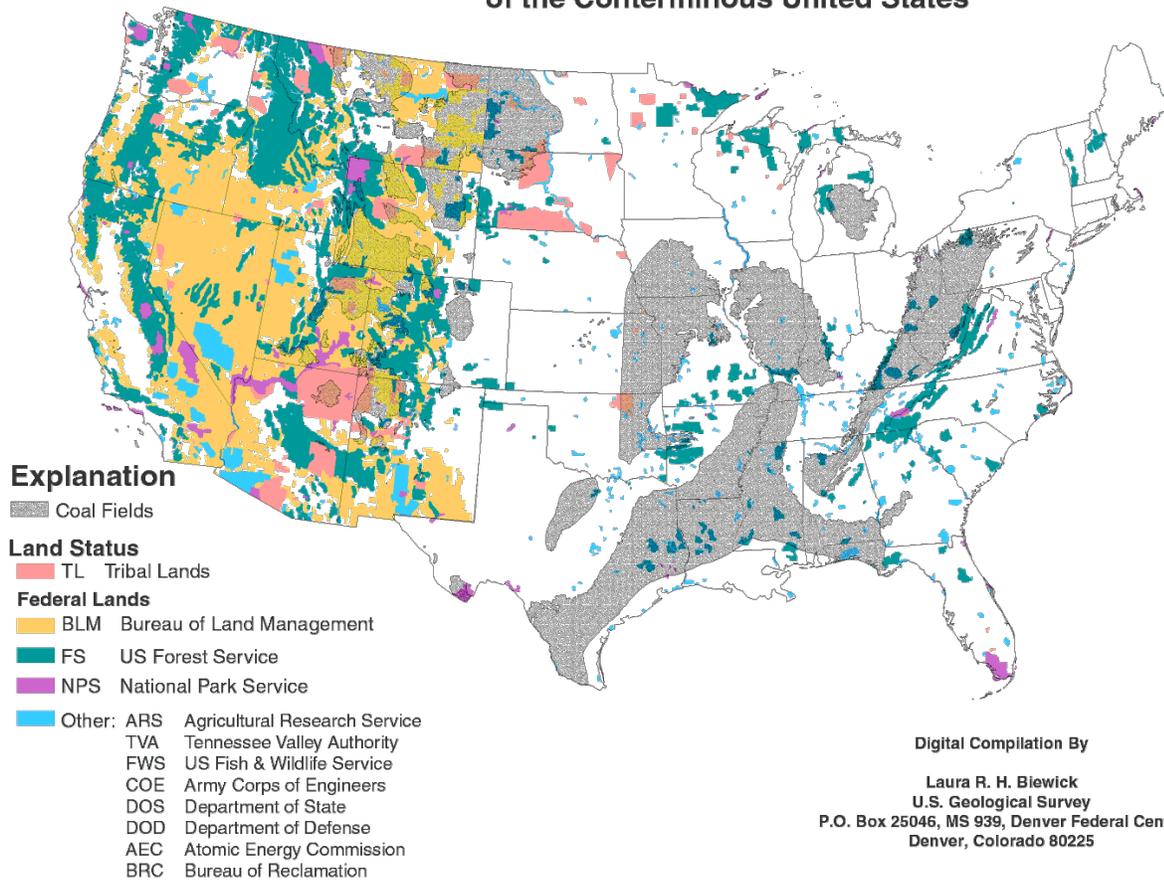
also state that “[a]n ROD is prepared for all actions involving an EIS.” OSM Handbook, Chapter 3 § B.3.c.

### **THE PETITIONED RULE AND FACTUAL, TECHNICAL, AND LEGAL BASIS**

This rulemaking petition is brought forward in light of mounting evidence that OSM is not fully complying with NEPA when reviewing and making recommendations regarding the approval, disapproval, or modification of Mining Plans under 30 C.F.R. § 746. To this end, Guardians brings this rulemaking petition pursuant to 40 C.F.R. § 1500.6 and 40 C.F.R. § 1507.3, which require that OSM review and revise its NEPA procedures to ensure compliance with NEPA and CEQ regulations, as well as pursuant to regulations under SMCRA, which explicitly state that Mining Plan or Mining Plan Modification recommendations must be based on “[i]nformation prepared *in compliance with NEPA*.” 30 C.F.R. § 746.13(b) (emphasis added).

OSM reviews and makes recommendations for several Mining Plans each year. In 2013 alone, OSM’s Western Regional Office reviewed and made recommendations to the Secretary for the approval of at least six Mining Plans. *See* OSM, Western Regional Office, “Federal Lands Mining Plan Decision Document NEPA Compliance Documentation,” website available at <http://www.wrcc.osmre.gov/programs/FederalLandsMiningPlansNEPA.shtm> (last accessed Feb. 3, 2014). Although the majority of these plans are for mines in the western United States, due largely to the high concentration of federally owned lands (including underlying federal minerals) in the region, federal coal is found throughout the United States (albeit in smaller quantities outside of the west). *See* Map below. Indeed, according to a recent Government Accountability Report, a number of federal coal leases have been issued in Alabama and Kentucky since 1990. *See* U.S. Government Accountability Office, “Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information,” Report No. GAO-14-140 (Dec. 2013) at 55-62. Furthermore, according to the BLM, in 2013 a federal coal lease was issued in West Virginia. Called the East Lynn Lake Coal Lease by Applications, these leases conveyed 76 million tons of in-place coal under more than 13,000 acres. *See* BLM, Record of Decision for Land Use Analysis and Environmental Impact Statement, East Lynn Lake Coal Lease by Applications,” NEPA No. EIS-ES-030-2008-0004 (March 2013), available online at [http://www.blm.gov/pgdata/etc/medialib/blm/es/es\\_media\\_library/eastlynnlake/ell\\_record\\_of\\_decision.Par.22325.File.dat/Final%20EastLynnLake\\_ROD.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/es/es_media_library/eastlynnlake/ell_record_of_decision.Par.22325.File.dat/Final%20EastLynnLake_ROD.pdf) (last accessed Feb. 3, 2014). Thus, there is an urgent need to ensure that, as OSM continues to make recommendations regarding the mining of federal coal throughout the United States, that compliance with NEPA is assured throughout the agency.

## Coal Fields and Federal Lands of the Conterminous United States



To this end, we petition OSM to incorporate (or modify as appropriate) the rule language detailed below into 30 C.F.R. § 746 as a new subpart, 30 C.F.R. § 746.12.<sup>4</sup> The proposed language does not impose any new requirements or authorities upon OSM that do not already exist, but rather ensures full and consistent compliance with NEPA. As will be explained in more detail below, OSM is not meeting key requirements under NEPA related to Mining Plan reviews and recommendations, indicating that specific rules are necessary to assure compliance. Below, we provide the specific language and also provide the factual, technical, and legal justification for the adoption of the proposed rule language:

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<sup>4</sup> We believe this proposed language would best be promulgated as a new subpart, 30 C.F.R. § 746.12, to precede 30 C.F.R. § 746.13, which specifies the actions that must be taken by OSM in preparing a decision document and recommendation to the Secretary of Interior as to the disposition of a Mining Plan. However, we urge OSM to determine the best placement for the proposed rule language.

**1. Proposed 30 C.F.R. § 746.12(a)**

**(a) General NEPA Compliance**

In meeting the requirements of 30 C.F.R. § 746.13 involving recommendations to the Secretary regarding Mining Plan approval, disapproval, or conditional disapproval, OSM shall meet the following requirements to ensure compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., and Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 C.F.R. § 1500-1508. The following rules supplement and are to be used in conjunction with the CEQ regulations and relevant Department of Interior and OSM authorities.

30 C.F.R. § 746.12(a) Factual, Technical and Legal Justification: This provision sets forth general language to clearly convey that the rules are meant to ensure full compliance with NEPA and supplement, rather than supplant or preclude, other relevant NEPA authorities. This rule is authorized and compelled by 40 C.F.R. § 1500.6, which directs agencies to review their policies, procedures, and regulations and revise them as necessary to ensure full compliance with NEPA, as well as 30 C.F.R. § 746.13(b), which requires that Mining Plan decisions be based on information prepared in compliance with NEPA.

**2. Proposed 30 C.F.R. § 746.12(b)**

**(b) Public Notice and Comment—General Requirements.**

(1) *Notice.* OSM shall provide public notice of recommendations made to the Secretary under 30 C.F.R. § 746.13, the availability of any documents prepared by or adopted by OSM pursuant to NEPA, and the Secretary's decision to approve, disapprove, or conditionally approve a Mining Plan or Mining Plan Modification under 30 C.F.R. § 746.14. At a minimum, OSM shall provide public notice through its website and mail notice of environmental documents to those who have requested it on an individual action. Notice must be given of OSM's proposed recommendations at least 30 days prior to submitting to the Secretary and within one week following the Secretary's decision.

30 C.F.R. § 746.12(b)(1) Factual, Technical and Legal Justification: This rule would ensure that OSM makes environmental information available to public officials and citizens before decisions are made and before actions are taken, and would ensure that relevant public notice requirements under NEPA are met.

This rule language is proposed to address to clear indications that OSM is not providing adequate notice of Mining Plan NEPA documents to the public. For example, while OSM's Western Regional Office has only recently started to provide public notice of environmental documents prepared under NEPA on its website (*see* <http://www.wrcc.OSM.gov/programs/FederalLandsMiningPlansNEPA.shtm>) (last accessed Feb.

3, 2014)), other OSM regional offices are still providing no public notice whatsoever of environmental documents prepared under NEPA in association with Mining Plan reviews.<sup>5</sup> Furthermore, even the Western Region is not providing full public notice of environmental documents under NEPA. For example, OSM's Western Region is not providing public notice of Mining Plan decision documents issued by the Secretary or of recommendations provided by OSM or of interagency memoranda to the extent that they transmit comments of federal agencies on the environmental impacts of Mining Plans.

This rule is proposed to ensure that OSM complies with 40 C.F.R. § 1500.1(b) (requiring that agencies must ensure environmental information is made available before decisions and actions), 40 C.F.R. 1500.2(d) (requiring that agencies must “encourage and facilitate public involvement in decisions which affect the quality of the human environment), 40 C.F.R. § 1506.6(a), (b) (ensuring that agencies must make diligent efforts to involve public and provide notice of the availability of environmental documents to the interested or affected public, and that agencies must “mail notice” to those who have requested it), 43 C.F.R. § 46.305(c) (requiring that the public must be notified of the availability of environmental assessments and any associated finding of no significant impact), and OSM's NEPA Handbook, Chapter 3 § A (requiring OSM to make completed NEPA documents, including “interagency memoranda to the extent they transmit comments of federal agencies on the environmental impacts of the proposed action,” available to the public).

(2) *Response to Public Comment.* OSM shall review and respond to public comments submitted to the Director on any proposed recommendation or related environmental document, whether solicited or not, prior to submitting its recommendation to the Secretary. OSM shall respond to comments in accordance with 40 C.F.R. § 1503.4. OSM may set a public comment deadline or otherwise rely on public comment deadlines that may be required by this Section or other applicable requirements.

30 C.F.R. § 746.12(b)(2) Factual, Technical and Legal Justification: This rule would ensure that public comment is meaningfully addressed by OSM in recommendations to the Secretary. This rule also makes clear that OSM has discretion to provide for reasonable comment periods. This rule is primarily proposed in light of indications that OSM is not responding to comments submitted on proposed Mining Plan and Mining Plan Modification approvals.

An example of this occurred recently where in late 2013, OSM did not respond to public comments regarding a Modification to the Black Thunder Mining Plan in Wyoming. In March of 2013, Guardians submitted a detailed request to the OSM Director and Regional Director in

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<sup>5</sup> The failure to provide notice is not due to a lack of federal coal leasing in other OSM regions. For example, according to OSM's sister agency, the BLM, 12 coal leases have been sold in the Eastern Region since 1990. See BLM, “Successful Competitive Lease Sales Since 1990, Eastern States,” website available at [http://www.blm.gov/wo/st/en/prog/energy/coal\\_and\\_non-energy/coal\\_lease\\_table/Eastern\\_States\\_Coal\\_Table.html](http://www.blm.gov/wo/st/en/prog/energy/coal_and_non-energy/coal_lease_table/Eastern_States_Coal_Table.html) (last accessed Feb. 3, 2014).

March of 2013 that the Agency address new air quality impacts related to the mining of the South Hilight coal lease, which would expand the Black Thunder mine. *See* Exhibit 3, “Petition to Supplement the Wright Area Coal Lease Applications Final Environmental Impact Statement to Address Significant New Information Regarding the Air Quality Impacts of Coal Mining in the Powder River Basin of Northeastern Wyoming and Southeaster Montana” (March 15, 2013). This petition detailed how the Environmental Impact Statement for the South Hilight coal lease, which was prepared in mid-2010, did not adequately address air quality impacts related to coal mining, as well as address new information regarding the air quality impacts of coal mining that had arisen since mid-2010. On December 17, 2013, OSM issued its recommendation to the Secretary to modify the Black Thunder Mining Plan to incorporate the South Hilight coal lease. This recommendation did not mention Guardians’ petition or the information contained therein. On December 28, 2013, the Acting Assistant Secretary approved the Mining Plan Modification without any apparent consideration given to Guardians’ comments. *See* Exhibit 4, Excerpts from 2013 Black Thunder Mining Plan Modification Decision Document, including OSM Recommendation Document, Statement of NEPA Compliance, and Mining Plan Modification.

This rule is proposed to ensure compliance with 40 C.F.R. § 1503.4 (setting forth requirements for responding to comments on environmental impact statements), 43 C.F.R. § 46.305(a)(1) (requiring consideration of public comments received on EAs, whether or not solicited), as well as to ensure compliance with general principles of administrative law, which require that a response to significant comments is an inherent component of any meaningful notice and opportunity for public comment (*Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)).

(3) *Public Comment Deadlines.* OSM may extend any deadline for public comment set forth under this Part for good cause. Any decision to extend a public comment deadline must be documented in writing and notice provided in accordance with this Section.

30 C.F.R. § 746.12(b)(3) Factual, Technical and Legal Justification: This rule would simply and expressly provide that comment deadlines may be extended by OSM, provided that good cause is shown and documented so as to prevent unreasonable delay in taking action on Mining Plans.

This rule is proposed to ensure compliance with 40 C.F.R. § 1506.10(d) (providing that deadlines may be extended under NEPA by lead agencies).

### **3. Proposed 30 C.F.R. § 746.12(c)**

(c) Additional requirements Related to Mining Plan and Mining Plan Modification Recommendations Relying on an Environmental Impact Statement.

(1) *Adoption of Environmental Impact Statement (EIS).* Prior to the adoption of another federal agency’s EIS pursuant to 40 C.F.R. § 1506.3, OSM must publish a notice of intent to adopt the EIS in the Federal Register. Such notice shall describe the proposed action, the possible

alternatives, solicit public comments for a reasonable timeframe (not less than 30 days), and state the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement(s) proposed for adoption.

30 C.F.R. § 746.12(c)(1) Factual, Technical and Legal Justification: This rule would ensure that adequate public notice and an opportunity to comment is provided for OSM's intent to adopt an EIS consistent with the OSM's NEPA Handbook. The Handbook states that, when adopting an EIS, "a notice of intent to adopt should be published in the Federal Register." OSM NEPA Handbook, Chapter 3 § B.3.a. Currently, OSM does not publish a notice of intent to adopt an EIS in the Federal Register. Thus, this rule is necessary to bring OSM into compliance with its Handbook. This rule also ensures that any notice of intent contains information required by 40 C.F.R. § 1508.22 and solicits public comment according to scoping requirements set forth at 40 C.F.R. § 1501.7.

This rule is proposed to ensure compliance with OSM's NEPA Handbook, Chapter 3 § B.3.a (stating OSM must publish notice of intent to adopt EIS in Federal Register) and 40 C.F.R. §§ 1501.7 and 1508.22 (setting forth scoping requirements triggered by a notice of intent and requirements for the contents of a notice of intent).

(2) *Documentation of Decisions.* Decisions that rely on an EIS, including an adopted EIS, shall be documented in the form of a Record of Decision (ROD), prepared in accordance with 40 C.F.R. § 1505.2. Where an EIS is adopted, the ROD shall document OSM's determination that the adopted EIS adequately assesses the environmental effects of mining and rigorously explores and objectively evaluates reasonable alternatives that can be adopted by OSM.

30 C.F.R. § 746.12(c)(2) Factual, Technical and Legal Justification: This rule would ensure that a decision based on an EIS is documented in an ROD and that the ROD contains information required by 40 C.F.R. § 1505.2. Both CEQ NEPA regulations and OSM's NEPA Handbook state that an ROD is required to approve all actions involving an EIS. This rule also ensures that, where an EIS is adopted, that sufficient information is presented in the ROD to demonstrate the appropriateness of adopting the EIS.

The need for this rule is especially apparent in light of the fact that OSM does not currently issue RODs for Mining Plan decisions that rely upon adopted EISs. Currently, OSM issues what is described as a "Statement of NEPA Adoption and Compliance" where an EIS is adopted. *See e.g.* Exhibit 5, OSM, "Statement of NEPA Adoption and Compliance for Antelope Coal Mine, West Antelope II Amendment" (Oct. 28, 2013). While relevant NEPA authorities nowhere provide for the use of a "Statement of NEPA Adoption and Compliance" to document decisions relying upon an adopted EIS, the content Statements of NEPA Compliance fail to include all information required under NEPA. For example, they do not identify all alternatives considered by OSM in reaching its decision, they do not state whether all "practicable means to avoid or minimize environmental harm from the alternative selected have been adopted," and they do not adopt a "monitoring and enforcement program" for any applicable mitigation, as

required by 40 C.F.R. § 1505.2. The failure of OSM to identify alternatives is especially of concern given that action alternatives considered in adopted EISs only relate to BLM coal leasing decisions, rather than actual mining decisions. Thus, the actions approved by BLM do not appear to be substantially the same as actions on Mining Plans.

This rule is proposed to ensure compliance with the OSM NEPA Handbook, Chapter 3 § B.3.c (requiring Record of Decision for all actions involving an EIS), 40 C.F.R. § 1505.2 (requiring Record of Decision for all actions requiring EIS), and 43 C.F.R. § 46.120(c) (requiring that supporting documentation be provided when adopting other agencies' environmental documents under NEPA).

#### **4. Proposed 30 C.F.R. § 746.12(d)**

##### **(d) Additional Requirements Related to Mining Plan and Mining Plan Modification Recommendations Relying on an Environmental Assessment(s).**

(1) *Public Comment Where OSM Prepares Environmental Assessment (EA).* A 30-day public comment period must be provided on an EA and proposed finding of no significant impact (FONSI) prepared by OSM prior to submission to the Secretary. Notice of the opportunity to comment shall be provided in accordance with section (a)(i) above.

30 C.F.R. § 746.12(d)(1) Factual, Technical and Legal Justification: Although OSM has discretion as to whether to provide an opportunity for public comment on an EA, OSM must provide for some form of public involvement in the preparation of an EA. This rule would ensure the public is adequately involved by providing an opportunity to comment. A 30-day public comment period is consistent with what other agencies normally provide for EAs (e.g., U.S. Forest Service, 36 C.F.R. § 218.24(b)(4)) and consistent with what CEQ regulations require for FONSI under certain circumstances.

The need for this rule is especially important given that OSM inconsistently provides for public involvement in the preparation of EAs. For example, in 2009, OSM prepared an EA for a Mining Plan approval for the School Creek Mine in Wyoming and in 2010, OSM prepared a FONSI based on the EA. *See* Exhibit 6, OSM, “Final Environmental Assessment, School Creek Mine, Mining Plan Approval” (Oct. 2009) and Exhibit 7, OSM, “FONSI for School Creek Mine Mining Plan Decision Document” (Oct. 26, 2010). This approval authorized new surface coal mining, an increased production rate of up to 40 million tons per year, and ultimately recovery of 792 million tons of additional coal from 7,394 acres for a period of 21 years. Yet at no point in the preparation of its EA or FONSI did OSM provide for public involvement, including an opportunity for public comment. This failure is especially of concern in light of the fact that the Mining Plan approval was one that would normally require an EIS under the Department of Interior Departmental Manual due to the fact that impacts were not adequately analyzed in earlier environmental documents, the size of the area approved for mining was greater than 1,280 acres, the production rate was more than five million tons annually, and that mining and reclamation operations would occur for more than 15 years. In spite of this, OSM did not provide for a 30-day public comment period on the FONSI as required by CEQ NEPA regulations.

This rule is proposed to ensure compliance with OSM's NEPA Handbook, Chapter 2 § C.5 (encouraging OSM to solicit public comment on EAs where proposed action is likely to generate public interest), 40 C.F.R. § 1506.6 (requiring federal agencies to make diligent efforts to involve public), 40 C.F.R. § 1501.4(e)(2) (requiring 30-day public comment period on FONSI in certain situations where an action is likely to pose significant impacts), 43 C.F.R. § 46.305(a) (requiring public involvement when an EA is being prepared).

(2) *Public Notice Where EA is Adopted.* Where OSM intends to adopt another federal agency's EA, notice must be provided at least 30 days prior to adoption. OSM may provide a 30-day public comment period on its proposed adoption.

30 C.F.R. § 746.12(d)(2) Factual, Technical and Legal Justification: This rule is proposed to acknowledge that OSM has discretion as to whether to provide public comment on a proposal to adopt an EA, but still ensures adequate public involvement on such proposed actions. As explained above, OSM is not providing sufficient notice of adopted EAs. Namely, OSM is not providing adequate notice prior to adopting an EA. Although the Western Regional Office, for example, is providing notice subsequent to adopting EAs, Interior Department NEPA regulations state that adequate public notice must be provided before adopting EAs.

This rule would ensure compliance with 40 C.F.R. § 1506.6 (requiring federal agencies to make diligent efforts to involve the public), 43 C.F.R. § 46.305(a) (requiring public involvement when an EA is being prepared), 43 C.F.R. § 46.320(d) (requiring public involvement requirements are met before adopting an EA).

(3) *Documentation of Decisions.* Decisions that rely on an EA, including an adopted EA, shall be documented in the form of a FONSI, prepared in accordance with 40 C.F.R. § 1508.13. Where an EA is adopted, the FONSI shall document OSM's determination that the adopted EA adequately assesses the environmental effects of mining and reasonable alternatives that can be adopted by OSM.

30 C.F.R. § 746.12(d)(3) Factual, Technical and Legal Justification: This rule would make clear that a FONSI is required for decisions relying on an EA and ensure that the content standards of a FONSI set forth at 40 C.F.R. § 1508.13 are met. This rule would also ensure that a determination to adopt an EA is appropriately documented in the FONSI.

Although OSM meets this rule in part, there is concern that OSM does not adequately assess whether EAs adopted by other agencies, particularly coal leasing EAs prepared by the BLM, sufficiently address the impacts of coal mining. For example, OSM recently issued a FONSI that adopted an EA prepared by the BLM in order to approve a Mining Plan for the Deserado Mine in Colorado. *See Exhibit 8, OSM, "Finding of No Significant Impact and Adoption of the Environmental Assessment for Blue Mountain Energy, Inc., Deserado Mine Mining Plan Decision Document" (Oct. 21, 2013).* In this FONSI, OSM asserted that the adopted EA sufficiently analyzed and assessed all impacts of mining. However, the EA clearly

discloses that it does not fully analyze or assess the impacts of mining, stating that, “Any future proposed surface disturbances associated with this lease would be analyzed and approved by OSM.” See Exhibit 9, BLM, “Environmental Assessment for the Blue Mountain Energy Coal Lease by Application” (Feb. 2013) at 59. It appears as if OSM may, in some situations, simply assert that adopted EAs are sufficient without actually analyzing and documenting the reasons for reaching this conclusion. Given that Department of Interior NEPA regulations clearly state that supporting documentation must be provided when adopting another federal agency’s EA, this proposed rule would ensure that OSM consistently assesses whether EAs are adequate.

This rule would ensure compliance with OSM’s NEPA Handbook, Chapter 3 § B.2 (requiring FONSI for all actions involving EAs), 40 C.F.R. § 1501.3(e) (requiring FONSI where action relies on EA), 43 C.F.R. § 46.325 (requiring FONSI where a decision relies on an EA), 43 C.F.R. § 46.120(c) (requiring that supporting documentation be provided when adopting other federal agencies’ environmental documents under NEPA).

## **5. Proposed 30 C.F.R. § 746.12(e)**

### **(e) Additional Requirements Related to Supplementation or Revision of NEPA Documents Relied Upon for Mining Plan and Mining Plan Modification Recommendations Prior to Submission to Secretary.**

(1) *Review of Information.* Prior to making a recommendation to the Secretary, if an EA or EIS (including an adopted EA or EIS) relied upon for a recommendation is more than three years old, OSM must review and determine whether significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts have come about since the preparation of the document. OSM shall document its review and determination as part of its recommendation to the Secretary.

30 C.F.R. § 746.12(e)(1) Factual, Technical and Legal Justification: This rule is proposed ensure that OSM consistently reviews potentially outdated NEPA documents to ensure they continue to adequately disclose impacts or support previous conclusions. It is important to note that CEQ has urged, as a rule of thumb, that agencies should review EISs for actions that have yet to be implemented when they are more than five years old to determine whether significant information or circumstances have arises. See CEQ, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations” (March 23, 1981) at Question 32 (see also 46 Fed. Reg. 18026 (March 23, 1981)). Although this rule would require a review for documents that are more than three years old, this is to ensure that OSM is as attentive as possible to new information or circumstances that may be significant. This rule also ensures that assessments of new circumstances or information are documented as part of a recommendation to the Secretary.

The need for this rule is especially important given that, in reviewing and making recommendations regarding Mining Plans, OSM often relies on EAs or EISs that are more than five years old. In a 2007 FONSI for a Mining Plan approval for the San Juan Mine in New

Mexico, for example, relied upon an EA prepared by the BLM in 1988. *See* Exhibit 10, OSM, “Finding of no Significant Impact for San Juan Mine, Mining Plan Decision Document” (Nov. 19, 2007). Similarly, in a 2012 FONSI for a Mining Plan approval for the Spring Creek Mine in Montana, OSM relied upon an EA prepared by the BLM in 2006. *See* Exhibit 11, OSM, “Finding of no Significant Impact for Spring Creek Mine, Mining Plan Decision Document” (June 5, 2012). In neither of these FONSI, nor the associated recommendations to the Secretary, did OSM review whether new information or circumstances relevant to environmental concerns and bearing on the proposed action or its impacts had come about since the preparation of the NEPA documents.

This rule is not meant to imply that any NEPA document more than three years old is insufficient, but rather simply ensures that OSM assesses whether significant new information or circumstances have arisen when NEPA documents are several years old. Examples of new information or circumstances that may arise and require OSM attention include, but are not limited to, the listing of new species and the designation of new critical habitat by the U.S. Fish and Wildlife Service under the U.S. Endangered Species Act, the adoption of new air quality standards by states or the U.S. Environmental Protection Agency, and the adoption of new water quality standards, including Total Maximum Daily Load standards, by states or the U.S. Environmental Protection Agency.

This rule would ensure compliance with 40 C.F.R. § 1500.1(b) (requiring that NEPA analyses be based on accurate and high quality information), 40 C.F.R. § 1502.9(c) (requiring agency’s to assess where significant new information or circumstances have arisen in context of EIS), and 43 C.F.R. § 46.120(c) (requiring that adopted EAs and EISs be analyzed to ensure they assess new information and circumstances).

(2) *Supplementation of an EIS.* If OSM determines that significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts have come about since the preparation of an EIS (including an adopted EIS), OSM shall prepare a supplement to the EIS to support its recommendation to the Secretary. This subpart shall not preclude OSM from supplementing an EIS at any time or for any other reason as appropriate in accordance with NEPA authorities. Any supplement shall be prepared, circulated, and filed in the same fashion as a draft and final Environmental Impact Statement in accordance with 40 C.F.R. § 1502.9(c)(4).

30 C.F.R. § 746.12(e)(2) Factual, Technical and Legal Justification: This rule would ensure that potentially outdated EISs are supplemented as necessary in accordance with NEPA. This rule also makes clear that OSM is not precluded from supplementing or preparing new EISs for other reasons that may be required or allowed by NEPA.

This rule would ensure compliance with 40 C.F.R. § 1500.1(b) (general duty to ensure NEPA documents are based on high quality and accurate information), 40 C.F.R. § 40 C.F.R. § 1502.9(c) (requiring supplementation of EISs in response to significant new circumstances or information, providing that agencies may supplement at any time to further NEPA).

(3) *Revision of an EA.* If OSM determines that significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact have come about since the preparation of an EA (including an adopted EA), OSM shall revise the EA to support its recommendation to the Secretary. OSM may revise the entire EA or revise only sections that require revision. This subpart shall not preclude OSM from revising an EA at any time or for any other reason as appropriate in accordance with relevant NEPA authorities. Adequate notice and opportunity for comment on the revised EA must be provided in accordance with sections (a) and (d) of this subpart.

30 C.F.R. § 746.12(e)(3) Factual, Technical and Legal Justification: This rule ensures that potentially outdated EAs are revised as necessary under NEPA. Although OSM's NEPA Handbook states that EAs must be revised or "augmented" in response to significant new information or circumstances, the term "augmented" is not defined in relevant NEPA authorities and is vague. This rule also correctly requires that a revision is the proper procedure for addressing new information or circumstances in outdated EAs. This rule also makes clear that OSM is not precluded from revising an EA at any time in accordance with NEPA.

This rule is necessary to ensure that deficient EAs are appropriately revised. OSM has previously addressed inadequate EAs by preparing supplemental EAs. For example, in 2006, OSM prepared a supplement to several EAs, some of which were prepared as long ago as 1975. *See e.g.* Exhibit 12, OSM, "Supplemental Environmental Assessment for Colowyo Mine Mining Plan Decision Document" (2006). "Supplementation" of EAs, however, is not specifically provided for under NEPA or CEQ's NEPA regulations, relevant Department of Interior regulations, or OSM guidance. Even OSM's sister agency, the BLM, has noted that, "Supplementation is a process applied only to draft and final EISs, *not EAs*....[I]f new circumstances or information arise that alters the validity of an EA analysis prior to the implementation of the Federal action, prepare a new EA." BLM NEPA Handbook, H-1790-1 § 5.3 (emphasis added). Thus, the proposed rule would correctly require that EAs be revised in response to significant new circumstances or information, as well as ensure that proper public notice and involvement is provided for in the preparation of a revised EA in accordance with NEPA.

This rule would ensure compliance with OSM's NEPA Handbook, Chapter 3 § B.2 (requiring augmentation or revision of adopted EAs that are inadequate), 40 C.F.R. § 1501.4 (requiring that EAs provide sufficient basis for FONSI or decision to prepare EIS), 43 C.F.R. § 46.320(b) (requiring augmentation of an adopted EA as necessary).

## CONCLUSION

For the foregoing, WildEarth Guardians requests that OSM issue and/or amend a rule pursuant to 30 U.S.C. § 1211(g) to ensure compliance with NEPA when reviewing and making recommendations regarding Mining Plans in accordance with 30 C.F.R. § 746. Not only do

NEPA and the CEQ regulations require that federal agencies, like OSM, adopt procedures to ensure compliance with NEPA, but OSM's own rules require the Agency to ensure that Mining Plan recommendations are based on information prepared in compliance with NEPA. With clear evidence that OSM is not fully complying with NEPA when reviewing and making recommendations on Mining Plans, the need for an explicit rule setting forth clear procedural obligations is paramount. By adopting the petitioned rule, OSM will ensure compliance with NEPA, in turn ensuring adequate public involvement in the Mining Plan decisionmaking process, ensure that the environmental impacts of coal mining are fully accounted for before the Secretary takes action on a Mining Plan, and ultimately ensure well-informed and excellent decisions as to the disposition of federal coal in the United States.

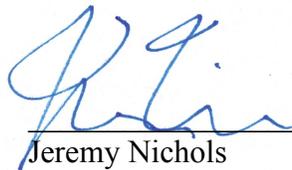
Pursuant to 30 U.S.C. § 1211(g), we look forward to OSM granting this Petition within 90 days and initiating a public rulemaking immediately thereafter. Should OSM not respond to this Petition within 90 days, Guardians will consider OSM to have failed to perform a nondiscretionary duty.

Please direct all correspondence regarding this Petition to the following WildEarth Guardians contact:

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Dated this 7<sup>th</sup> day of February 2014.

Respectfully submitted,



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Jeremy Nichols  
Climate and Energy Program Director  
WildEarth Guardians

Cc: Nancy Sutley  
Chair  
Council on Environmental Quality  
722 Jackson Place, NW  
Washington, D.C. 20503

## TABLE OF EXHIBITS

1. Proposed 30 C.F.R. § 746.12 Rule Language.
2. U.S. Environmental Protection Agency (“EPA”), *Inventory of U.S. Greenhouse Gas Emissions and Sinks, 1990-2011* (April 12, 2013).
3. “Petition to Supplement the Wright Area Coal Lease Applications Final Environmental Impact Statement to Address Significant New Information Regarding the Air Quality Impacts of Coal Mining in the Powder River Basin of Northeastern Wyoming and Southeaster Montana” (March 15, 2013).
4. Excerpts from 2013 Black Thunder Mining Plan Modification Decision Document, including OSM Recommendation Document, Statement of NEPA Compliance, and Mining Plan Modification.
5. OSM, “Statement of NEPA Adoption and Compliance for Antelope Coal Mine, West Antelope II Amendment” (Oct. 28, 2013).
6. OSM, “Final Environmental Assessment, School Creek Mine, Mining Plan Approval” (Oct. 2009).
7. OSM, “FONSI for School Creek Mine Mining Plan Decision Document” (Oct. 26, 2010).
8. OSM, “Finding of No Significant Impact and Adoption of the Environmental Assessment for Blue Mountain Energy, Inc., Deserado Mine Mining Plan Decision Document” (Oct. 21, 2013).
9. BLM, “Environmental Assessment for the Blue Mountain Energy Coal Lease by Application” (Feb. 2013).
10. OSM, “Finding of no Significant Impact for San Juan Mine, Mining Plan Decision Document” (Nov. 19, 2007).
11. OSM, “Finding of no Significant Impact for Spring Creek Mine, Mining Plan Decision Document” (June 5, 2012).
12. OSM, “Supplemental Environmental Assessment for Colowyo Mine Mining Plan Decision Document” (2006).