UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

WILDEARTH GUARDIANS, Appellant	)	IBLA No. 2014-
	)	Notice of Appeal, Spruce Stomp Coal Lease, COC-75916, EA #DOI-BLM-CO S050-2013-0010, Delta County, Colorado

STATEMENT OF REASONS

On March 6, 2014, WildEarth Guardians ("Guardians") gave Notice of Appeal of the decision by Bureau of Land Management ("BLM") Uncompahgre Field Office Manager, Barbara Sharrow, to authorize the sale and issuance of coal lease by application COC-75916, described as the "Spruce Stomp Coal Lease," in Delta County, Colorado. The decision is documented in a Decision Record ("DR") signed by Ms. Sharrow on February 4, 2014. The DR adopted the Proposed Action as documented in the Environmental Assessment for the Spruce Stomp Coal Lease, DOI-BLM-CO-S050-2013-0010-EA ("Spruce Stomp EA" or "EA"), and authorized the sale and issuance of the Spruce Stomp Coal Lease (also referred to in this appeal as "the proposed lease"), which includes 1,790.2 acres and 8.92 million tons of recoverable coal. See DR at 2. The BLM assumes that Bowie Resources, LLC will be the successful bidder and that the lease will facilitate expansion of the company's Bowie No. 2 mine in western Colorado. *See* EA at 8. Pursuant to 43 C.F.R. § 4.412, Guardians now files the following Statement of Reasons with the Interior Board of Land Appeals ("IBLA") in support of their Notice of Appeal.[1]

[1] Given that the 30 day deadline for filing a Statement of Reasons in this matter fell on April 5, a Saturday, this Statement of Reasons is timely filed by the end of the next business day in accordance with 43 C.F.R. § 4.22(e).

I. INTRODUCTION

Guardians challenges the Spruce Stomp Coal Lease DR, FONSI, and EA on the basis that: (1) the Field Manager lacked authority to approve the proposed lease under the Agency's Competitive Coal Leasing Handbook, H-3020-1; (2) the BLM failed to analyze and assess the impacts of volatile organic compound ("VOC") air pollution associated with ventilation operations at the Bowie No. 2 Mine, including mine shaft ventilation and methane venting, thereby failing to demonstrate that impacts will not be significant under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*.; (3) the BLM failed to analyze and assess impacts to health-based national ambient air quality standards ("NAAQS") for nitrogen dioxide adopted in 2010, further failing to support its FONSI and decision not to prepare an Environmental Impact Statement ("EIS"); and (4) the BLM failed to account for the direct, indirect, and cumulative impacts of exporting coal produced from the Bowie No. 2 Mine, a potentially significant impact of material relevance to the approval of the Spruce Stomp Coal Lease.

The BLM is authorized, but not obligated, to approve a coal lease by application. *See* 30 U.S.C. § 207(a). However, while taking action on a coal lease by application is discretionary, the Agency is duty-bound to reject a lease by application that, for environmental or other sufficient reasons, is contrary to the public interest. *See* 43 C.F.R. § 3425.1-8(a)(3). Indeed, as federal courts have noted, Congress's intent in authorizing the leasing of federal coal through the Federal Coal Leasing Act Amendments of 1976 was equally tempered by environmental considerations:

> [T]o provide for a more orderly procedure for the leasing and development" of coal the United States owns, while ensuring its development "in a manner compatible with the public interest. . . . Congress's underlying substantive policy concern was to develop the coal resources in an environmentally sound manner. This purpose lays as much stress on the developing [of] the coal resources as it does on the environmental effects of development.

See Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1156 (9th Cir. 1988) (citation omitted). Taken together, the BLM's failure to appropriately comply with its Competitive Coal Leasing Handbook and to

appropriately analyze and assess potentially significant environmental impacts, further indicates a failure to ensure the Spruce Stomp Coal Lease is, in fact, in the public interest.

Guardians respectfully requests that the IBLA set aside BLM's decisions to authorize the lease and remand to the BLM to achieve compliance with its Handbook, NEPA and other applicable requirements.

II. APPELLANT IS A PARTY WHO IS ADVERSELY AFFECTED

To maintain an appeal, an Appellant must (1) be a party to the case; and (2) be adversely affected by the decision being appealed. *See* 43 C.F.R. § 4.410(a). Guardians satisfies both these requirements.

WildEarth Guardians is a registered non-profit corporation whose purpose is the conservation of natural resources. With more than 43,000 members and activists, Guardians' mission is to protect and restore the wildlife, wild places, and wild rivers of the American West. Guardians is headquartered in Santa Fe, New Mexico, but has offices in Denver, Colorado, Salt Lake City, Utah, Missoula, Montana, Portland, Oregon, Laramie, Wyoming, and Tucson, Arizona. Through its Climate and Energy Program, Guardians works to safeguard the climate, clean air, and communities of the American West by promoting a sensible transition to renewable energy.

To be a party to the case, a person or group must have actively participated in the decisionmaking process regarding the subject matter of the appeal. *See* 43 C.F.R. § 4.410(b). Here, Guardians submitted comments to the BLM regarding the Spruce Stomp Coal Lease during the public comment period provided by the BLM. Guardians submitted comments on the BLM's Draft EA on August 2, 2013. Thus, Guardians satisfies the "party to a case" qualification.

To demonstrate that it will "be adversely affected by the decision being appealed," a party must demonstrate a legally cognizable "interest" and that the decision appealed has caused or is substantially likely to cause injury to that interest. *Glenn Grenke v. BLM*, 122 IBLA 123, 128 (1992); 43 C.F.R. § 4.410(d). This requisite "interest" can be established by cultural, recreational, or aesthetic uses as well as

enjoyment of the public lands. *Southern Utah Wilderness Alliance*, 127 IBLA 325, 326 (1993); *Animal Protection Institute of America*, 117 IBLA 208, 210 (1990). The IBLA does not require a showing that an injury has actually occurred. Rather, a "colorable allegation" of injury suffices. *Powder River Basin Resource Council*, 124 IBLA 83, 89 (1992). Moreover, it is not necessary for parties to show that they have actually set foot on the impacted parcel or parcels to establish use or enjoyment for purpose of demonstrating adverse effects. Rather, "one may also establish he or she is adversely affected by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests." *Coalition of Concerned National Park Retirees*, *et al*., 165 IBLA 79, 84 (2005).

The Declaration of Jeremy Nichols is attached as Exhibit 1. It shows he is a member and employee of WildEarth Guardians. *See* Exhibit 1 at ¶ 1. His Declaration shows he personally uses and enjoys the area that will be directly and indirectly affected by the Spruce Stomp Coal Lease and the Bowie No. 2 Mine for recreational and aesthetic, educational, and conservation purposes, and that he intends to return to the area for enjoyment. *See id*. at ¶¶ 6-8. Mr. Nichols also regularly visits and enjoys lands in the North Fork of the Gunnison River Valley, which is the area where the Bowie No. 2 Mine is located, for recreational purposes. He regularly visits friends in the nearby town of Paonia, Colorado. He regularly observes the coal mining operations at the Bowie No. 2 Mine and is offended by their sights and sounds as they detract from his enjoyment of the natural beauty of the area. Mr. Nichols' Declaration establishes that the BLM's decision to offer for sale and execution the Spruce Stomp Coal Lease will adversely affect his recreational and aesthetic interests, which are legally cognizable, in these areas through increased air pollution and other environmental impacts and the failure of the BLM to comply with its Competitive Coal Leasing Handbook. *See id*. at ¶¶ 22-28. Mr. Nichols' Declaration further demonstrates that if Guardians' receives a favorable ruling in this matter, those harms will be redressed. *See id*. at ¶¶ 27-28. Mr. Nichols' Declaration establishes that the BLM's decision in turn adversely

affects WildEarth Guardians and that a favorable ruling in this matter will ameliorate those adverse effects.

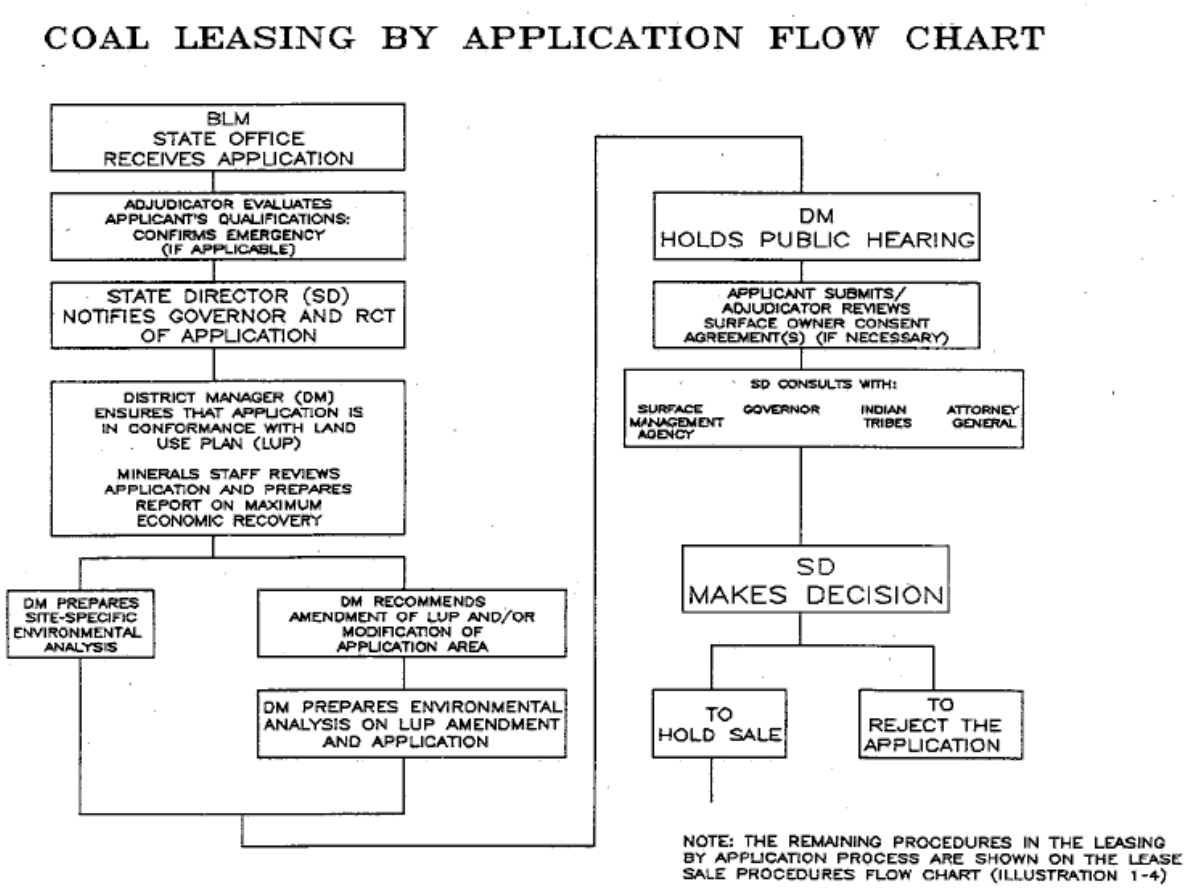
III. STATEMENT OF REASONS

For the following reasons, Guardians requests that IBLA set aside and remand the BLM's decision to offer for sale and issuance the Spruce Stomp Coal Lease.

A. The Field Manager Lacked Authority to Approve the Spruce Stomp Coal Lease

The BLM's Competitive Coal Leasing Handbook explains that the State Director is the only BLM official with authority for approving coal lease by applications, including underlying environmental analyses for NEPA compliance. *See* BLM Coal Leasing Handbook, H-3020-1, Chapter 3, Section II.E.6. In spite of this, the Uncompahgre Field Manager, not the Colorado State Director, authorized the Spruce Stomp Coal Lease, including the underlying EA, DR, and FONSI. The Handbook does not allow this.

The BLM's Handbook expressly states that, "Both the environmental assessment and the FONSI must be approved by the State Director." BLM Competitive Coal Leasing Handbook, H-3020-1, Chapter 3, Section II.E.6, at III-8. A flow chart in the Handbook, shown below, illustrates that the State Director "Makes [the] Decision" on whether to offer a lease by application for sale or reject an application. Even the BLM states in the EA that, "[t]he BLM State Director is the Authorized Officer for the BLM and will decide whether or not to conduct a competitive sale for the coal lease under the MLA of 1920, as amended, and the federal regulations under 43 CFR 3400." EA at 6. The EA continues that the Field Manager is only "responsible for providing the State Director with briefings and recommendations." *Id*.



Flowchart of Coal Lease by Application Process, BLM Competitive Coal Leasing Handbook, H-3020-1, Chapter 3, Illustration 3-1 at III-10.

Perhaps the BLM believes that the DR, FONSI, and EA only serve as "recommendations," and therefore that the Field Manager's authorization of the Spruce Stomp Coal Lease was justified under the Competitive Coal Leasing Handbook. This appears dubious as Ms. Sharrow expressly states in her DR that, "It is my decision to offer for lease the B seam in the Spruce Stomp LBA tract COC-75916 as described in DOI-BLM-CO-S050-2013-0010-EA . . . This decision makes available 8.02 million tons of coal for recovery in the B seam." DR at 1. It appears clear that her DR is a decision to approve the coal lease and to approve the EA. Ms. Sharrow even signed the FONSI, stating "I have determined that the Proposed Action will not have a significant effect on the human environment, individually or cumulatively, with other actions in the general area." FONSI at 2. Yet as the Handbook states, the State

Director must approve the FONSI.

The BLM must ensure the appropriate authorized officer approves a coal lease by application. Here, the failure of the Agency to ensure that the Colorado State Director approved the EA, DR, and FONSI for the Spruce Stomp Coal Lease represents a failure to comply with the Competitive Coal Leasing Handbook. The EA, DR, and FONSI must be remanded and the BLM directed to ensure the appropriate authorized officer makes any new decision regarding the Spruce Stomp Coal Lease.

B. The BLM Failed to Comply with the National Environmental Policy Act

The IBLA has set forth the BLM's duties under NEPA in many proceedings. *See*, *e.g.*, *Center for Native Ecosystems*, 170 IBLA 331, 344-345 (2006). Noting that "NEPA is designed to 'insure a fully informed and well-considered decision,'" the IBLA has explained that NEPA requires a consideration of the potential environmental impacts of a proposed action, including a consideration of the unavoidable adverse impacts of a proposed action, alternatives to it, the relationship between short-term uses of the environment and its long-term productivity, and irreversible commitments of resources from implementing a proposed action. *Id*.

Where the BLM prepares an EA and concludes that an EIS is not required, the IBLA has held that such decisions will comply with NEPA:

> [I]f the record demonstrates that the agency has considered all relevant matters of environmental concern, taken a 'hard look' at potential environmental impacts, and made a convincing case that any potentially significant impact will be reduced to insignificance by imposing appropriate mitigation measures.

National Wildlife Federation, 170 IBLA 240, 244 (2006). Guardians is cognizant of the IBLA's holding that "[a]n appellant seeking to overcome a FONSI bears the burden of demonstrating, with objective proof, that the BLM has failed to adequately consider an environmental question of significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA." *Id*.

Here, objective proof demonstrates the BLM failed to comply with the requirements of NEPA in

its authorization of the Spruce Stomp Coal Lease because it failed to appropriately analyze and assess: (1) the direct and indirect impacts of VOC emissions associated with mine ventilation, (2) the direct and indirect impacts to NAAQS limiting harmful levels of nitrogen oxide emissions, and (3) the potentially significant impacts of exporting coal mined from Bowie No. 2. By failing to address these impacts, the BLM has failed to demonstrate the impacts of approving the coal lease will not be significant and that an EIS is not warranted.

1. The BLM Failed to Analyze and Assess the Impacts of Volatile Organic Compound Emissions Associated with Methane Venting, Failing to Provide Sufficient Evidence and Analysis Necessary to Support a FONSI

In comments on the Spruce Stomp Coal Lease EA, Guardians commented that the EA failed to analyze and assess the impacts of regulated VOC emissions associated with mine ventilation activities. *See* WildEarth Guardians' Comments at 4.[2] The issue of regulated VOC emissions associated with methane venting is not a speculative matter. In fact, in response to an awareness that regulated VOC emissions associated with methane venting could be a serious issue at the Bowie No. 2 Mine, in January of 2013 and again in April of 2013, the Colorado Department of Public Health and Environment, Air Pollution Control Division, requested that Bowie Resources "submit information regarding volatile organic compound emissions from your coal mine(s), including the Bowie #2 active underground mine." Exhibit 2, "Request for Information regarding VOC emissions from coal mines," Letter from Shannon L. McMillan, Colorado Air Pollution Control Division, to Bill Bear, Bowie Resources, LLC (January 11, 2013). The Air Pollution Control Division explained to Bowie Resources:

> The Division recently became aware that coal mines have the potential to emit VOC emissions from mine shafts and methane drainage wells drilled primarily for mine safety purposes. While the VOC concentrations may be low, the total volume of air emitted through these shafts and wells on an annual basis is often quite large, leading to VOC emissions that could exceed the

[2] Regulated VOCs are defined under 40 C.F.R. § 51.100(s) and, as the BLM acknowledges on page 18 of the EA, explicitly exclude methane and ethane. This definition does not, however, exclude a wide variety of VOCs that are emitted by mine ventilation activities.

Division's reporting and permitting thresholds.

Exhibit 2.

To this end, in a revised request to Bowie Resources submitted in April of 2013, the Air Pollution Control Division explicitly asked the company to provide, among other things, the following information:

> Extended gas analysis shall be performed on each gas sample collected from the methane drainage wells and mien ventilation shafts, while operating under normal conditions, to determine total hydrocarbon (THC) concentrations in the gas stream. Ventilation shaft samples should be collected while longwall mining is operational. Each sample collected shall be analyzed for the speciation of hydrocarbon components and their respective concentrations from C1 through C10. For facilities utilizing methane drainage wells, at least one sample shall be collected and analyzed for BTEX [benzene, toluene, ethylbenzene, and xylene] and total sulfur compounds. All extended gas analysis and other non-Greenhouse gas-reporting methane analyses performed at the mine since 2011 shall be submitted to the Division for review, including those conducted prior to this request. The Division will work with Bowie to determine the minimum number of samples required based on the specifics of the mine. For mines with multiple ventilation shafts and methane drainage wells, this will likely include requiring only a small subset of sources to be tested.

Exhibit 3, "Revised request for Information regarding VOC emissions from coal mines," Letter from Shannon L. McMillan, Colorado Air Pollution Control Division, to Bill Bear, Bowie Resources, LLC (April 18, 2013). In response to the Colorado Air Pollution Control Division, Bowie Resources proposed a VOC sampling proposal that involved "Collect[ing] one sample every 2 weeks from the most recent GVB [gob ventilation borehole] put into production and analyze for C1 through C10 hydrocarbons," "Collect[ing] one sample every two weeks from the Terror Creek ventilation shaft and analyze for C1 through C10 hydrocarbons," and "Collect[ing] one sample from the most recent GVB put into production and analyze for BTEX, [and sulfur compounds] CS_2, H_2S, and SO_2." Exhibit 4, E-mail from John Zutman, Bowie Resources, to Ben Cappa Environmental Protection Specialist, Colorado Air Pollution Control Division (April 29, 2013).[3] The Air Pollution Control Division responded by approving Bowie's

[3] This e-mail, as well as all correspondence from the Colorado Air Pollution Control Division regarding VOC emissions from the Bowie Mine, were obtained through a Colorado Open Records Act ("CORA") Request submitted by WildEarth Guardians to the Air Pollution Control Division on August 14, 2013. This CORA request is attached as Exhibit 5.

proposed testing procedure, provided that sampling at both the gob ventilation borehole and Terror Creek ventilation shaft provided for "total hydrocarbon in the analysis." *Id*.

Despite the fact that VOC emissions related to mine ventilation, including from both methane venting wells and ventilation shafts, are clearly an issue, and that Bowie Resources has clearly been gathering information regarding VOC emissions associated with mine ventilation activities, the BLM refused to address this issue in the Spruce Stomp Coal Lease EA and failed to make any effort to even briefly analyze and assess impacts associated with these emissions. The omission of a VOC analysis is evident in the EA in Table 5 on page 35, where the BLM reports VOC emissions associated with ventilation and methane venting as "NA," or not applicable. An EA is required to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). Here, the failure to even briefly analyze and assess impacts associated with VOC emissions indicates the BLM's FONSI is unsupported and, therefore, arbitrary.

BLM's failure to analyze and assess VOC emissions is not a matter of Guardians flyspecking the EA. The BLM itself notes that VOCs form ground-level ozone and are considered "ozone precursor" emissions. EA at 28.[4] Ozone is a harmful air pollutant for which the U.S. Environmental Protection Agency ("EPA") has established health-based NAAQS. As the BLM discloses, current NAAQS limit ozone concentrations to no more than 0.075 parts per million over an eight-hour period in order to ensure protection of public health.[5] *See* EA at 28. Ozone, as well as air quality more generally, was

[4] As the BLM also discloses, nitrogen oxides, or NOx, are also considered ozone precursor emissions. *See* EA at 21.

[5] The BLM notes that the ozone standard is attached whenever the "[a]nnual fourth-highest daily maximum 8-hr concentrations, averaged over 3 years" is at or below the NAAQS. However, an exceedance of the ozone NAAQS occurs whenever there is "one occurrence of a measured or modeled concentration that exceeds the specified concentration level of [the NAAQS]." 40 C.F.R. § 50.1(l).

acknowledged by the BLM as such an important issue that it was carried forward for analysis in the EA.[6] *See* EA at 33-42.

In response to Guardians' comments, the BLM asserted that "the current Bowie No. 2 Mine is not a significant source of NOx and VOC emissions[.]" EA at 41. BLM may be able to support this assertion if that agency had "[b]riefly provide[d] sufficient evidence and analysis" disclosing VOC emissions associated with ventilation activities, but BLM provided no such evidence or analysis. There is simply no basis in the record for this assertion. The BLM also asserts that based on "county level analysis of the emissions inventory" that ozone "controls should focus on controlling NOx [nitrogen oxide] emissions." EA at 41. However, because emission inventories do not yet include VOC emissions associated with ventilation activities, it would be groundless to assert that VOC emissions can be completely ignored as a potential source of harmful ozone.

It is notable that while assessing the issue of VOC emissions from mine ventilation activities at the neighboring Elk Creek Mine, which is located directly east of the Bowie No. 2 Mine in the North Fork Valley, the Colorado Air Pollution Control Division found that VOC emissions exceeded legally required reporting and permitting thresholds. *See* Exhibit 6, Colorado Air Pollution Control Division, "Field Inspection Report, Oxbow Mining LLC – Elk Creek Mine" (Nov. 20, 2012) at 21. The Air Pollution Control Division stated at the time that "[e]nforcement action" was recommended because of these violations. *Id*. Although the Air Pollution Control Division has, to our knowledge, not yet made a similar assessment at the Bowie No. 2 Mine, this is not due to a lack of concern over VOC emissions, as evidenced by the information requests APCD submitted to Bowie in 2013. The Air Division's findings at Elk Creek simply underscore the groundlessness of the BLM's assertions that VOC emissions are not

[6] Indeed, BLM's NEPA Handbook states the only issues that must be analyzed in an EA are those issues where "analysis is necessary to...make a reasoned choice among alternatives (if any), or determine the significance of effects." BLM NEPA Handbook, H-1790-1 at 81, Section 8.3.6. Thus, issues of no relevance to a reasoned choice among alternatives, or that have no bearing on the significance of effects, are not to be analyzed in an EA.

"significant."

While the BLM did not even attempt to address the issue of VOC emissions associated with ventilation, the Agency will nonetheless likely reiterate its claim in the EA that, "With respect to the facility's emissions in the regional context, emissions of criteria pollutants from the Bowie No. 2 Mine are not presently causing or contributing to any violations of national ambient air quality standards, should not increase above current levels, and therefore should not result in any additional impacts on existing ambient air quality in the area." EA at 42. This argument is specious. Because the Agency has not analyzed VOC emissions associated with ventilation activities, there is no basis for BLM to assert that emissions "should not" increase above current levels and therefore "should not" result in any additional impacts on existing ambient air quality in the area. As to the BLM's assertion that the mine is not currently causing or contributing to any violations of the NAAQS, there is simply no evidence to support this assertion in the EA or elsewhere in the record.

Although the Agency cites an "air quality analysis" prepared for the "North Fork Coal EIS" that found "no significant air quality impacts" (*see* EA at 41), this analysis did not analyze and assess VOC emissions associated with mine ventilation at either the Bowie No. 2 Mine or other mines in the region.[7] The Agency also appears to argue that, based on an unidentified Colorado Department of Public Health and Environment analysis and based on the Department's "approval of the mine's permits," that mine operations "are within tolerable impacts to air quality." EA at 41. Yet, while the EA does not actually present or reference any Colorado Department of Public Health and Environment analysis (even the references listed in the EA from pages 130-136 do not reference any Department of Public Health and Environment Analysis specific to the Bowie No. 2 Mine), what the BLM does not acknowledge is that permits issued by the Colorado Department of Public Health and Environment do not yet include VOC

[7] Furthermore, this EIS was prepared in 2000, eight years before the current ozone NAAQS were adopted in 2008.

emissions associated with mine ventilation. *See* EA at 35.

As to BLM's insinuation that a lack of current ozone NAAQS violations indicates there will never be any ozone violations and therefore there is no reason to be concerned over VOC emissions, this assertion suffers from three flaws.

First, simply because there may not be current violations of the NAAQS does not absolve the Agency from its obligations under NEPA to analyze and assess reasonably foreseeable effects in an EA in order to justify a FONSI. Indeed, the definition of "effects" under the Council on Environmental Quality's ("CEQ's") NEPA regulations explicitly includes effects that may be "beneficial." 40 C.F.R. § 1508.8. In this case, BLM may well be correct at the end of the day that there is no cause for concern, but they may well be incorrect, there is absolutely no way to know. For the Agency to simply assert, absent even acknowledging that VOC emissions from mine ventilation are an issue, that there will be no adverse impacts is the epitome of the very uninformed decisionmaking that NEPA forbids.[8, 9]

Second, BLM's assertion appears to signify that the Agency only believes significant air quality impacts occur if a NAAQS is violated. This approach to NEPA would effectively ensure that the BLM will not mitigate air quality impacts unless and until the consequences are so grave that a violation occurs. Although the BLM is certainly entitled to deference in terms of establishing significance thresholds under

[8] Indeed, BLM's approach defies the way the real world works. If violations of the NAAQS definitively indicated future violations, then under the BLM's rationale, no area currently violating the NAAQS would ever come into compliance. However, numerous areas that once violated the NAAQS have come into compliance. In Colorado alone, a number of areas once violated NAAQS for particulate matter, yet have now come into compliance. *See* 40 C.F.R. § 81.306. Conversely, areas that once complied with the NAAQS have also fallen into violation. Notably in Colorado, the Denver Metropolitan Area fell into violation of the ozone NAAQS and was designated nonattainment in 2012. *See id*.

[9] It is notable that the U.S. District Court for the District of Colorado rejected the same BLM argument in the context of an EIS prepared by the Agency support of an oil and gas drilling plan in the Roan Plateau area of western Colorado. In her ruling, Judge Krieger stated, "The mere fact that the area has not exceeded ozone limits in the past is of no significance when the purpose of the EIS is to attempt to predict what environmental effects are likely to occur in the future[.]" *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1257 (D. Colo. 2012).

NEPA, NEPA regulations are clear that significance depends upon the intensity of the action which includes, among other things, "the degree to which the proposed action affects public health and 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)(2) and (10). For the BLM to assert that significant air quality impacts only occur when a violation of the NAAQS occurs would strip all meaning from the CEQ's definition of significance as it would effectively prevent any consideration of "the degree" to which an action may affect public health and whether a violation of a requirement imposed for the protection of the environment is "threatened" with violation.

Third, and perhaps most significant, is that there are actually violations of the ozone NAAQS occurring in the region. The BLM points to monitoring data from surrounding counties to support its assertion that "ambient air quality standards are being met." EA at 40. Yet at the Rio Blanco County, Colorado monitoring site, which the BLM references in its EA, the current three year average of the fourth highest maximum annual 8-hour ozone reading is 0.077 parts per million, meaning this monitoring site is actually in violation. The Colorado Air Pollution Control Division has acknowledged this violation, stating in a fall 2013 presentation that the monitoring site, which is located in Rangely, Colorado, is "above the [ozone] standard." Exhibit 7, Colorado Department of Public Health and Environment, Air Pollution Control Division, "2013 Summer Ozone Season Review," Briefing to Colorado Air Quality Control Commission and Colorado Board of Health (Oct. 17, 2013) (noting on slides 5, 6, 10, and 12 that the design value at the Rangely monitor is above the NAAQS).

Fundamentally, under NEPA, the BLM cannot have it both ways. It cannot completely ignore a potentially significant effect, yet at the same time assert that the effect is not significant or otherwise not relevant. If there is uncertainty associated with VOC emissions from mine ventilation activities, the BLM could have addressed this by preparing an EIS. As CEQ NEPA regulations clearly state, significance depend on whether impacts are "highly uncertain." 40 C.F.R. § 1508.27(b)(5). The BLM obviously did

not do so in this case. Thus, the Agency was obligated to actually analyze and assess these impacts and, if necessary, gather the emissions information that Bowie Resources is already in the process of gathering. It did not do this, either. To this end, BLM's DR, FONSI, and EA violate NEPA and the IBLA must set aside the decision to offer the Spruce Stomp Coal Lease for sale and issuance.

2. The BLM Failed to Analyze and Assess the Impacts of Mining Operations, Including the Indirect Impacts of Coal Hauling, to Health-Based Ambient Air Quality Standards for Nitrogen Dioxide Adopted in 2010

In its comments on the EA, Guardians pointed to the need for the BLM to analyze and assess impacts to 1-hour NAAQS for nitrogen dioxide ("NO_2") adopted in 2010 by the EPA and promulgated under 40 C.F.R. § 50.11. *See* WildEarth Guardians' Comments at 4. This short-term NAAQS represented a significant development, as it was the first time the EPA established a short-term limit on concentrations of nitrogen dioxide in the air that people breathe in order to safeguard their health. Previously, the EPA had in place only an annual NAAQS for nitrogen dioxide.

The short-term nitrogen dioxide NAAQS is actually meant to protect public health from nitrogen oxide gases. "Nitrogen oxides are a mixture of gases that are composed of nitrogen and oxygen [and are] released to the air from the exhaust of motor vehicles, the burning of coal, oil, or natural gas, and during processes such as arc welding, electroplating, engraving, and dynamite blasting." Exhibit 8, Agency for Toxic Substances and Disease Registry, "Nitrogen oxides (nitric oxide, nitrogen dioxide, etc.)," Division of Toxicology ToxFAQs (April 2002) at 1. Put another way, nitrogen oxides are byproducts of combustion, including engine exhaust. At low levels, the health effects of nitrogen oxides include irritation of eyes, nose, throat, and lungs, as well as other adverse health effects, while at high levels the gases can cause rapid burning, spasms, and swelling of throat and upper respiratory tract tissues, as well as death. *See id*. at 2. Nitrogen oxides also contribute to the formation of ground-level ozone and particulate matter, which are also harmful to public health. *See* Exhibit 9, EPA, "Nitrogen Dioxide,

Health," website available at http://www.epa.gov/oaqps001/nitrogenoxides/health.html (last accessed April 7, 2014).

In recognition of the health risks of nitrogen oxides, the EPA has adopted NAAQS under the Clean Air Act to limit concentrations of this dangerous group of gases.[10] Specifically, the EPA has adopted a NAAQS limiting nitrogen dioxide as an indicator of overall nitrogen oxide concentrations. *See* 40 C.F.R. § 50.11. In doing so, the EPA has adopted both long and short-term NAAQS, limiting concentrations of NO_2 to no more than 53 parts per billion on an annual basis and 100 parts per billion on an hourly basis. *See* 40 C.F.R. §§ 50.11(a) and (b). The BLM acknowledges these standards in its EA. *See* EA at 27.

The short-term, 1-hour NAAQS for nitrogen dioxide is especially significant as it was adopted only in 2010. *See* 75 Fed. Reg. 6474 (Feb. 9, 2010). The standard represented the first time that EPA adopted a short-term NAAQS for nitrogen dioxide and also acknowledged the important health concerns associated with short-term exposure to nitrogen dioxide. As was stated in the final rule:

> [T]he [EPA] Administrator determines that the appropriate judgment, based on the entire body of evidence and information available in this review, and the related uncertainties, is a standard level of 100 ppb [parts per billion] (for a standard that reflects the maximum allowable NO_2 concentration anywhere in an area) [and] concludes that such a standard, with the averaging time and form discussed above, will provide a significant increase in public health protection compared to that provided by the current annual standard alone and would be expected to protect against the respiratory effects that have been linked with NO_2 exposures in both controlled human exposure and epidemiologic studies.

75 Fed. Reg. 6501. The EPA affirmed, "a standard reflecting the maximum allowable NO_2 concentration anywhere in an area set at 100 parts per billion is sufficient to protect public health with an adequate margin of safety, including the health of at-risk populations, from adverse respiratory effects that have been linked to short-term exposures to NO_2 and for which the evidence supports a likely causal relationship with NO_2 exposures." *Id*. at 6502. The adoption of the short-term NAAQS recognized that

[10] Under the Clean Air Act, the EPA establishes NAAQS based solely on what is "requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

anytime nitrogen dioxide concentrations exceed 100 parts per billion on an hourly basis anywhere in an area, there was cause for public health concern.

The BLM has never analyzed the impacts of coal mining at the Bowie No. 2 Mine, let alone at other mines in the North Fork Valley, to the 1-hour NO_2 NAAQS. The BLM admits as much as in the EA, stating that in analyzing and assessing the impacts of the Spruce Stomp Coal Lease to NO_2 levels, the Agency did not prepare its own analysis, but rather relied on analyses prepared by the Colorado Department of Public Health and Environment, Air Pollution Control Division and on the 2000 North Fork Coal EIS. *See* EA at 41. The reliance on these assessments, however, fails to shed any light on the potentially significant direct and indirect impacts of mining operations at the Bowie Mine to the 1-hour NO_2 NAAQS.

Indeed, what the BLM fails to acknowledge that the Colorado Air Pollution Control Division has actually never analyzed the impacts of pollutant emitting activities at the Bowie No. 2 Mine to the 1-hour NO_2 NAAQS. This is because the Air Pollution Control Division could not have possibly completed any such analysis because the permits issued to the Bowie No. 2 Mine, which the BLM references on page 34 of the EA, were all issued well before the 2010 NAAQS adopted. Attached to this Statement of Reasons as Exhibit 10 are the permits referenced by the BLM in the EA, which all indicate that permits for the Bowie No. 2 Mine were all issued well before 2010. *See also* Table below.

Permits for Bowie No. 2 Mine and Date of Issuance.

Permit No.	Date Issued
96DL103-1	Aug. 20, 2004
96DL103-6	Aug. 20, 2004
96DL103-7F	Aug. 20, 2004
98DL0726	Aug. 20, 2004
01DL0685	Aug. 14, 2006
03DL0099F	Aug. 20, 2004
03DL0596	Jan. 16, 2007
03DL0923F	Sept. 27, 2006
04DL0560	Aug. 14, 2006

Further, even if these permits did somehow address nitrogen oxide emissions and the impacts to 1-hour NO_2 concentrations, reliance on the permits would fail to account for the fact that mobile sources are not actually included, addressed, or even acknowledged in any of the permits referenced by the BLM in the EA. Mobile source emissions are not considered in the permits because only stationary sources, not mobile sources, are subject to permitting by the Colorado Air Pollution Control Division. BLM's failure to consider mobile source emissions is a significant oversight given the EA's express disclosure that mobile sources have the potential to release 80.83 tons of nitrogen oxides annually (*see* EA at 35), which represents 10% of all "vehicle" nitrogen oxide emissions (745.32 tons annually) in Delta County. *See* EA at 38.[11] It is further notable that even the Colorado Air Pollution Control Division has recommended that where a permitted source of air pollution releases more than 40 tons of nitrogen oxides annually, a modeling analysis is required to determine impacts to the 1-hour NO_2 NAAQS. *See* Exhibit 11, Memo from Kirsten King and Roland C. Hea, Colorado Air Pollution Control Division, to Station Sources Staff, Local Agencies, Regulated Community, "Permit Modeling Requirements for the 1-hour NO_2 and SO_2 NAAQS," PS Memo 10-01 (Sept. 20, 2010), available online at http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CDPHE-AP%2FCBONLayout&cid=1251597387439&pagename=CBONWrapper (last accessed April 7, 2014). Here, the Bowie No. 2 Mine would release twice as much air pollution as what the Air Pollution Control Division has recognized is a significant nitrogen oxide emission rate.

The BLM's reliance on the North Fork Coal EIS is equally misplaced. The Agency asserts that, although the EIS was prepared 10 years prior to the adoption of the 1-hour NO_2 NAAQS and although the EIS does not actually analyze impacts to NO_2 concentrations on a one-hour basis, that there will be "no

[11] This would be a conservative estimate, however, it appears the inventory in the EA does not take into account indirect nitrogen oxide emissions from locomotives and other truck traffic related to mining operations. This is another questionable oversight, particularly given that previous BLM analyses—including the North Fork Coal EIS—do address locomotive and other indirect emission sources, as acknowledged by the BLM on page 41 of the EA.

significant impacts to air quality." EA at 41. Although the BLM certainly may be correct that "air quality impacts associated with the LBA tract can be presumed to be equal to, or less than, impacts predicted in the original air quality impact assessment" (*see* EA at 41), this conclusion would appear to have little relevance or bearing on the issue of the 1-hour NO_2 NAAQS because no 1-hour NO_2 impacts were actually predicted in the "original air quality impact assessment." The BLM is, essentially, comparing apples to oranges rendering arbitrary BLM's reliance on past, non-comparable emissions to predict future emissions measured under a different standard.

That the BLM failed to analyze and assess impacts to the 1-hour NO_2 NAAQS is not because the issue is not significant. The Agency has clearly recognized the need to analyze the impacts of coal mining activities in the North Fork Valley to NO_2 concentrations as it explicitly analyzed the impacts of coal mining to the annual NO_2 NAAQS in the North Fork Coal EIS. Unfortunately, annual and 1-hour NO_2 impacts are not the same. Indeed, annual average NO_2 concentrations fail to illustrate how NO_2 concentrations, particularly near industrial facilities, are affected on a short-term basis, such as when locomotives are operating during coal loading operations and when methane venting wells are drilled. Furthermore, as the BLM acknowledges, there is currently no monitoring of 1-hour NO_2 concentrations at or near the Bowie No. 2 Mine. The EA discloses that the only monitors "near" the mine are in La Plata County, which is located approximately 150 miles south of the Spruce Stomp Coal Lease, and Rio Blanco County, which is located approximately 100 miles north of the proposed lease. *See* EA at 40.

The failure of the BLM to analyze and assess impacts associated with these emissions renders the Agency's FONSI unsupported and the decision to sell and issue the Lease fatally flawed. The IBLA must therefore set aside and remand the BLM's decision to offer for sale and issuance the Spruce Stomp Coal Lease.

3. The BLM Failed to Acknowledge or Address the Potentially Significant Impacts Coal Exports in its EA

The issue of the export of federally leased coal has become the subject of intense oversight scrutiny. Recently, investigators with both the Interior Department's Office of Inspector General ("IG") and U.S. Government Accountability Office ("GAO") found that BLM is not taking coal exports (i.e., the sale of coal to international customers) into account in its leasing authorizations, raising questions over whether the Agency is adequately taking into account the full range of effects—including economic effects—of its leasing decisions. In the case of the Spruce Stomp Coal Lease, these concerns are extremely and materially relevant as Bowie Resources has clearly stated an intent to export coal from the Bowie No. 2 Mine. In spite of this, the BLM made no mention of the impacts of coal exports in its EA, further undermining the Agency's claim that a FONSI is appropriate.

In its June 2013 report, the IG found that:

> BLM does not fully account for export potential in developing the FMVs [Fair Market Values]. The export of public coal has been growing in recent years, especially to Asian markets. The U.S. Energy Information Administration reported 125 million tons of coal exports for calendar year 2012, over twice the export levels of 2007. Likewise, the price of exported coal has more than doubled from 2007 through 2011. Coal companies are reported to be exporting the expansion of ports in the Northwest United States to enable coal to be shipped overseas. Accordingly, the BLM should reflect the export potential in its FMV calculations to ensure the Government receives proper value for lease sales. Based upon our analysis of appraisals, however, it appears that several state offices overlook the export potential, thus possibly undervaluing the public's coal.

Exhibit 12, IG, "Coal Management Program, U.S. Department of the Interior," Report No. CR-EV-BLM-0001-2012 (June 11, 2013) at 7. The GAO subsequently followed up with an oversight report of the federal coal leasing program, which was released publicly on the same day the BLM issued its decision on the Spruce Stomp Coal Lease. In its report, the GAO echoed the IG's conclusions, finding that BLM State Offices, including in Colorado, "did not consider exports when estimating fair market value because there were few or no coal exports from their state." Exhibit 13, GAO, "Coal Leasing: BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public

Information," GAO-14-140 (Dec. 2013) at 38. Yet as the GAO noted, Colorado "ha[s] coal exports from mines on federal leases[.] *Id*. The findings of the GAO were confirmed by the IG in a follow up letter to U.S. Senator Ron Wyden, former Chairman of the U.S. Senate Committee on Energy and Natural Resources. In this letter, which was dated November 15, 2013, yet not released publicly until February 2014, the IG confirmed not only that federal leases in Colorado have produced coal for export, but that Colorado is one of at least five states that "overlook the export potential" of Federal coal leases. Exhibit 14, Letter from Mary L. Kendall, Deputy Inspector General, to Sen. Ron Wyden, Chairman, Committee on Energy and Natural Resources, U.S. Senate (Nov. 15, 2013) at 3.

In the case of the Spruce Stomp Coal Lease, there is no question that the BLM is overlooking the potential for coal exports. Here, the BLM made no mention of coal exports in its EA. In fact, in its EA, the BLM states that one of its responsibilities in approving the Spruce Stomp Coal Lease is to "[g]ive the nation a greater assurance of being able to meet its national energy objective[.]" EA at 6. Yet according to Bowie Resources, the company currently is exporting coal from its Bowie No. 2 Mine and likely will have the potential to ship at least 3.2 million tons of coal—64% of the total production at the Mine—in the near future. As the company explains in a recent news released posted by Bowie Resource's "exclusive" marketer of production, Trafigura AG:

> Bowie has a long-term agreement with Metropolitan Stevedore Company ("Metro Ports") for the Port of Stockton, which will provide BRP [Bowie Resource Partners, LLC] with the opportunity to ship up to 2.3 million tons annually, as the Metro Ports/Stockton agreement will be assigned by Bowie to BRP. Bowie has also been in negotiations with Levin Richmond Terminal Corporation for the port of Richmond, which would provide BRP with annual "topping off" capacity of an additional 1.2 million tons. Recent bowie/Trafigura shipments have set loading records at both Stockton and Richmond. Bowie has signed a Letter of Intent for additional export capacity via a Pacific port in the Northwestern US, which would also be assigned to BRP.

Exhibit 15, Trafigura AG, "Galena Private Equity Resource Fund JV with Bowie Resources," Online press release posted June 18, 2013, available online at http://www.trafigura.com/media-centre/latest-news/galena-co-invests-with-bowie-resources/?lang=NL#.U0MBbpTF2Qw (last accessed April 7, 2014).

That coal produced from the Bowie No. 2 Mine is being exported is not unusual and does not appear to be an exceptional economic activity. In the North Fork Valley, Arch Coal announced in a recent earnings conference call that it shipped "50%" of the coal produced at the company's West Elk Mine, which is located to the east of the Bowie No. 2 Mine. In a transcript of this call, which is available online at http://seekingalpha.com/article/1993391-arch-coals-ceo-discusses-q4-2013-results-earnings-call-transcript?part=single (last accessed April 7, 2014), and is attached to this Statement of Reasons as Exhibit 16, Arch Chief Executive Officer ("CEO"), John Eaves, commented, "As you know, our West Elk mine in Colorado is heavily focused on the export market. As 50% of the mine's output were sold in the Europe, Latin America, and Asia in 2013." Exhibit 16 at Unnumbered Page 3.

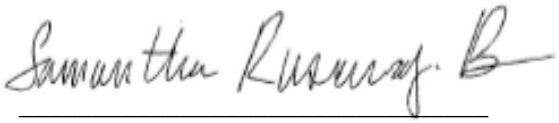
Without a doubt, coal mined from the Spruce Stomp Coal Lease and exported to other countries would have economic implications, but it would also appear to pose material environmental consequences. For instance, a reasonably foreseeable environmental impact of exporting coal from the Bowie No. 2 Mine would be the potentially significant impact of port operations, including operations in Stockton and Richmond, California. Furthermore, if is shipped overseas, then the greenhouse gas emissions associated with the Spruce Stomp Coal Lease would be much higher due to the impacts of shipping emissions. The reasonably foreseeable indirect impacts of shipping coal overseas is not even acknowledged, let alone briefly analyzed, in the EA.

The failure of the BLM to analyze and assess the potentially significant impacts of coal exports associated with the Spruce Stomp Coal Lease further underscores that the Agency failed to provide sufficient evidence and analysis to justify a FONSI. The DR must therefore be set aside and the decision to offer the Spruce Stomp Coal Lease for sale and issuance must be remanded to the BLM.

IV. CONCLUSION

For the aforementioned reasons, WildEarth Guardians requests that the IBLA set aside and remand the BLM's decision to offer for sale and issuance the Spruce Stomp Coal Lease. The State Director failed to approve the lease in accordance with the BLM Handbook and ultimately, the BLM failed to take the requisite "hard look" at the potentially significant air quality and coal export impacts of the proposed lease such that a FONSI was justified, in turn rendering the DR legally inadequate under NEPA.

Respectfully submitted this 7th day of April 2014



Samantha Ruscavage-Barz
Staff Attorney
WildEarth Guardians
516 Alto St.
Santa Fe, NM 87501
(505) 401-4180
Fax: (505) 213-1895
sruscavagebarz@wildearthguardians.org

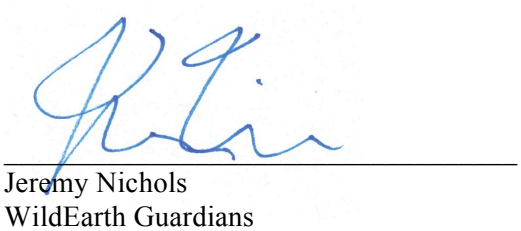
CERTIFICATE OF SERVICE

I certify that on April 7, 2014, I served this Statement of Reasons by Priority U.S. Mail upon:

U.S. Department of Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St.
MS 300-QC
Arlington, VA 22203

U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
755 Parfet St., Suite 151
Lakewood, CO 80215

Bureau of Land Management
Uncompahgre Field Office
2465 South Townsend Avenue
Montrose, CO 81401



Jeremy Nichols
WildEarth Guardians