IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS and PHYSICIANS FOR SOCIAL RESPONSIBILITY,

Plaintiffs,

v.

RYAN ZINKE, MICHAEL NEDD, and U.S. BUREAU OF LAND MANAGEMENT,

Federal Defendants,

STATE OF WYOMING, STATE OF COLORADO, STATE OF UTAH, WESTERN ENERGY ALLIANCE, PETROLEUM ASSOCIATION OF WYOMING, and AMERICAN PETROLEUM INSTITUTE,

Intervenor Defendants.

Case No. 1:16-cv-01724-RC

MEMORANDUM IN SUPPORT OF WYOMING, COLORADO, AND UTAH'S CROSS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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CROSS-MOTION FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56 and Local Civil Rule 7(h), Wyoming, Colorado, and Utah (collectively, the States) hereby move for summary judgment in the above-captioned case. The States submit the following memorandum in support of their motion and in opposition to the motion for summary judgment submitted by WildEarth Guardians and the Physicians for Social Responsibility (collectively, WildEarth).

INTRODUCTION

WildEarth argues that the Bureau of Land Management violated the National Environmental Policy Act (NEPA) when it conducted a series of oil and gas lease sales in Wyoming from 2015 to 2016. While WildEarth puts forward a number of discrete arguments, they essentially boil down to the assertion that the Bureau did not adequately consider the impacts of climate change and greenhouse gas emissions at the leasing stage. This, despite the fact that WildEarth admits that the Bureau openly discussed the potential impacts of climate change in the agency's environmental analysis, despite the fact that developers will need to obtain further authorization before they can engage in the commercial extraction of oil and gas, and despite the fact that the Bureau will again need to comply with NEPA before issuing such an authorization.

This suit is the latest in a long string of lawsuits brought by WildEarth and similar entities in a thinly-veiled attempt to slow, reduce, and ultimately halt the extraction of fossil fuels in Wyoming and other states. That is their mission, and they are entitled to pursue it. But they are not entitled to twist NEPA from a statute intended to disclose potential environmental impacts into a "flyspecking" tool to obstruct development. WildEarth's arguments are without merit, and Wyoming, Colorado, and Utah respectfully request that this Court deny WildEarth's motion for summary judgment and grant the motions submitted by the Bureau and the Intervenor-Defendants.

BACKGROUND

I. Statutory and Regulatory Framework

A. The National Environmental Policy Act

NEPA establishes a process that federal agencies must use to consider the environmental consequences of their actions. *See* 42 U.S.C. §§ 4321-4370h. NEPA requires federal agencies to 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). An EIS must include a "detailed [written] statement" concerning "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided." *Id*. An EIS should inform the decision-maker and the public of reasonable alternatives that are designed to

minimize the adverse impacts or enhance the quality of the environment. *Id*.; *see also* 40 C.F.R. §§ 1502.1, 1508.11.

NEPA is a procedural statute rather than a substantive one, and it does not require an agency to arrive at a particular decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "Even as to impacts that are sufficiently likely to occur such that they are reasonably foreseeable and merit inclusion, [an EIS] need only furnish such information as appears to be reasonably necessary under the circumstances for evaluation of the project." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1251 (10th Cir. 2011) (citation omitted); 40 C.F.R. § 1500.1(b) ("Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.").

In order to determine whether an EIS is necessary for a particular agency action, an agency prepares an Environmental Assessment (EA). 40 C.F.R. § 1508.9; (AR28440). If, after preparing the EA, the agency determines that an EIS is not necessary, the agency issues a finding of no significant impact (FONSI) and that is the end of that particular NEPA analysis. 40 C.F.R. § 1501.4; (AR28440). When considering the necessity of preparing an EIS or just an EA, the Department of the Interior's NEPA regulations provide that agencies within the Department "should make the best use of existing NEPA documents by [] adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork." 43

C.F.R. § 46.120(d); *Sierra Club v. Andrus*, 581 F.2d 895, 906 (D.C. Cir. 1978), *rev'd on other grounds*, 442 U.S. 347 (1979) ("[NEPA's] rule of reason does not demand rethinking of everything all of the time."). "It would be absurd to require an EIS on every decision on the management of federal land[.]" *Id.* at 902. The courts "cannot allow NEPA to be bloated, and indeed enfeebled, by pushing the logic of [NEPA's requirements] to ridiculous extremes." *Id* at 906.

B. The Regulatory Process for Leasing Federal Oil and Gas

Under the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181 through 287, the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), 30 U.S.C. §§ 181 through 287, and other statutes, Congress charged the Department of the Interior with making federal mineral resources available to private industry for extraction in order to meet the nation's energy and resource needs. (AR3379). The Secretary of the Interior then delegated this responsibility to the Bureau of Land Management. (*Id.*). The Bureau discharges this responsibility in accordance with the multiple-use mandate of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 through 1787. As part of this process, the Bureau makes federal onshore oil and natural gas available for lease and production. (AR3379).

"Mineral leasing and development on federal public lands is usually conducted through a five stage decision-making process in accordance with, *inter alia*, the [MLA] and [FOOGLRA]." *Chihuahuan Grasslands All. v. Norton*, 507 F.

Supp. 2d 1216 (D. N.M. 2007), *vacated by Chihuahuan Grasslands All. v. Kempthorne*, 545 F.3d 884, 894 (10th Cir. 2008) (appeal dismissed as moot). The process begins when one of the Bureau's field offices develops a resource management plan (RMP). *See* 43 C.F.R. § 1610.1-1. An RMP is a land use plan that provides direction for managing public lands in accordance with FLPMA's multiple-use mandate, which is a directive to "manage[] the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people." 43 U.S.C. § 1702(c). The RMP establishes goals and objectives for resource management and delineates the measures needed to achieve them. *See* 43 U.S.C. § 1712.

One key aspect of the RMP is that it designates lands as open for certain uses and lands that are closed for certain uses. *See id*. For example, in Wyoming, an RMP may close certain lands to oil and gas production because those lands are important habitat for the sage grouse. *(See, e.g.*, AR3381). The creation of a new RMP is a Herculean task that often takes years, involves countless hours of public involvement, and is accompanied by an EIS that analyzes the environmental impact of the RMP's many objectives and directives. Here, the Bureau created a number of RMPs and EISs that bear upon the leases at issue. (*See, e.g.*, AR57435, AR57634, AR57841, AR61385, AR62466, AR64511, AR66312, AR72386). But an "[a]pproval of a resource management plan is not a final implementation decision

on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." 43 C.F.R. § 1601.0-5.

The second stage in the mineral leasing and development process involves the leasing of discrete parcels. *Chihuahuan Grasslands*, 507 F. Supp. 2d at 1221; (AR3379). "The offering and subsequent issuance of oil and gas leases is strictly an administrative exercise, which, in and of itself, does not cause or directly result in any surface disturbance." (AR3382). "The Bureau cannot determine at the leasing stage whether or not a nominated parcel will actually be leased, or if it is leased, whether or not the parcel would be explored or developed." (*Id.*). In short, the Bureau merely selects parcels for industry to bid on for potential **future** development.

Once a mineral lease is granted, the lessee proceeds to the third stage, where the lessee "explores" the parcel for mineral resources. *Chihuahuan Grasslands*, 507 F. Supp. 2d at 1221. If mineral deposits are found, the lessee may proceed with the fourth stage – "full-field development." *Id.* "In the fifth and final stage . . . , [the Bureau] oversees reclamation of the lease parcel[.]" *Id.*

Critically, in order to proceed to full-field development at the fourth stage, a developer must submit an Application for Permit to Drill (APD) to the Bureau and obtain the agency's approval. (AR3382). This "may be the first useful point at which a site-specific environmental appraisal can be undertaken." (*Id.*). "In order to work the lease, the lessee must submit site-specific proposals to [the Bureau, which] can

then modify those plans to address any number of environmental considerations. Each action is subject to continuing NEPA review." *Park Cty. Res. Council v. U.S. Dep't of Agric.*, 817 F.2d 609, 622 (10th Cir. 1987), *overruled on other grounds by Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992). As noted above, this may never occur, even if the land has been leased. (AR3382).

The Bureau's rules confirm that NEPA continues to apply at the fourth stage of development. 72 Fed. Reg. 10308, 10334 (Mar. 7, 2007). "The [Bureau] cannot approve an APD . . . until the requirements of certain other laws and regulations including NEPA . . . have been met." *Id*. In addition, the Bureau's rules require the agency to incorporate any mitigation requirements identified through the APD review and NEPA analysis as conditions of the approval of the APD. *Id*.

II. Factual Background

A. The Oil and Gas Leases at Issue

Here, WildEarth challenges five discrete oil and gas lease sales conducted from May 2015 through August 2016. (Dkt. No. 55 at 8). In other words, WildEarth challenges the second step in the five-step process. These lease sales concern 282 parcels located in three separate Bureau field offices, and the leases cover over 300,000 acres of federal land in Wyoming.[1] (*Id*. at 1, 8). The lease sales were

[1] WildEarth also challenges hundreds of lease sales in Colorado and Utah. (*See, e.g.*, Dkt. No. 55 at 1). The merits of WildEarth's challenge to these leases will be addressed at a later date. (*Id*.).

conducted by the Bureau's High Desert, High Plains, and Wind River / Big Horn field offices. (*Id.*).

B. The Environmental Assessments and Public Participation

At the leasing stage, the three Bureau field offices collectively prepared nine EAs to comply with the agency's NEPA obligations and issued attendant FONSIs. These EAs relied, in part, on the environmental analyses prepared by the Bureau in the EISs for the relevant RMPs. (*See, e.g.*, AR3381). NEPA not only allows for this "tiering" approach, it encourages it. 43 C.F.R. § 46.120(d) (stating that agencies "should make the best use of existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork."). In addition to the EISs, each EA (1) establishes the purpose and need for the proposed action, (2) describes a range of alternatives to the proposed action, (3) describes the affected environment, and (4) analyzes the environmental impacts of the proposed action and the alternatives, including the direct, indirect, and cumulative impacts of each. (*See, e.g.*, AR28437-439). The EAs "serve[] to verify conformance with the approved [RMPs], address[] new information, and provide[] the rationale for offering the parcels" for sale. (AR28440). At this stage, the Bureau only analyzes the impacts of leasing. The Bureau will analyze the impacts of well development at the APD stage.

As was the case here, the Bureau's leasing review process typically takes over a year and involves extensive coordination with other federal agencies, the states, and the public. (AR28442; AR3383-84). In each FONSI, the Bureau determined that the lease sales were not "a major federal action [that] significantly affect[s] the quality of the human environment[.]" (*See, e.g.*, AR55029). The Bureau based its decision on the "significance factors" delineated in the White House Council on Environmental Quality's (CEQ) NEPA regulations. (*See id.*). Therefore, NEPA did not require the Bureau to prepare an EIS other than those supporting the RMPs.

ARGUMENT

I. Standard of Review

The Court reviews these types of challenges under the Administrative Procedure Act (APA), 5 U.S.C. § 706, which requires courts to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008) (quoting 5 U.S.C. § 706(2)). An agency decision is arbitrary and capricious if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004).

APA review is "very deferential," *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009), especially where, as here, the agency is "making predictions, within its area of special expertise, at the frontiers of science." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 375-77 (1989); *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1000 (D.C. Cir. 2008). This standard "mandates judicial affirmance if a rational basis for the agency's decision is presented [] even though [a court] might otherwise disagree." *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted). Consistent with this deferential standard of review, an agency is entitled to the presumption that it has acted in accordance with the law. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). Accordingly, "the party challenging an agency's action as arbitrary and capricious bears the burden of proof." *Oceana, Inc. v. Pritzker*, 24 F. Supp. 3d 49, 60 (D.D.C. 2014) (citing *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc)).

When reviewing whether an agency acted arbitrarily or capriciously under NEPA, the court asks "whether claimed deficiencies in [an environmental analysis]

are merely flyspecks, or are significant enough to defeat the goals of informed decision making and informed public comment." *Utahns for Better Transp. v. U.S. Dep't of Trans.*, 305 F.3d 1152, 1163 (10th Cir. 2002); *Envtl. Def. v. U.S. Corps of Eng'rs*, 515 F. Supp. 2d 69, 78 (D.D.C. 2007). NEPA "involves an almost endless series of judgment calls, and the line-drawing decisions necessitated by the NEPA process are vested in the agencies, not the courts." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 312 (D.C. Cir. 2013) (citation omitted). "The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Balt. Gas & Elec. Co.*, 462 U.S. at 97-98 (citation omitted).

II. The Bureau complied with NEPA prior to issuing the leases in question.

WildEarth argues that the Bureau failed to take the requisite "hard look" at the impacts of climate change and greenhouse gas emissions in the EAs and, therefore, acted in an arbitrary and capricious manner. (Dkt. No. 55 at 11-30). This argument lacks merit.

A. The Bureau appropriately analyzed the potential impacts of greenhouse gas emissions at the leasing stage.

WildEarth asserts that the Bureau did not take a "hard look" at greenhouse gas emissions and climate change impacts in the nine EAs that the Bureau prepared. (Dkt. No. 55 at 13-16). In the same breath, WildEarth admits that the Bureau

disclosed the following in its EAs: (1) the climate is changing; (2) those changes will have severe consequences; and (3) emissions from fossil fuel combustion are a driver of these changes. (*Id*. at 13). WildEarth also recognizes that the Bureau cited to and discussed the findings of the United Nations's Intergovernmental Panel on Climate Change that "warming of the climate is unequivocal" and that "the observed increase in global average surface temperature . . . was caused by the anthropogenic increase in [greenhouse gas] concentrations[.]" (*Id*. at 14). WildEarth goes on to state that the Bureau discussed the existing number of producing oil and gas wells and the per well emission factor. (*Id*. at 17-18).

Despite this detailed discussion and analysis on greenhouse gas emissions and climate change in the EAs, WildEarth argues the Bureau violated NEPA at the leasing stage because the agency did not predict the amount of greenhouse gas emissions that will result from the Bureau's lease sales. (*Id*. at 13-20). NEPA does not require the Bureau to take such action at the leasing stage, however, because such a prediction would amount to speculation, it would be inefficient, and it would produce inaccurate results. *See, e.g.,* Council for Environmental Quality, *Forty Most Asked Questions Regarding CEQ's National Environmental Policy Act Regulations*, at 18. (Mar. 16, 1981) ; *Park Cty. Res. Council*, 817 F.2d at 624. At this stage in the leasing process, the information necessary to meaningfully predict greenhouse gas emissions does not exist. Instead, the more logical approach is for the Bureau to

discuss and analyze the potential impact of greenhouse gas emissions during the fourth stage of development, when a developer actually applies for a permit to extract oil and gas pursuant to a lease. (AR3382). Only at that time can the Bureau accurately determine how much oil and gas may be extracted, which will lead to a more informed NEPA analysis. (*Id*.). And that is precisely what the Bureau plans to do here. (*See, e.g.*, *id*.).

The logic behind this approach was discussed in *Chihuahuan Grasslands*, 507 F. Supp. 2d 1216. In that case, as here, the plaintiffs alleged that the Bureau did not take a hard look at the anticipated impacts of an oil and gas lease sale. *Id.* Faced with the same case law upon which WildEarth now relies, the court held that an oil and gas lease is merely a paper exercise, and that the Bureau can reasonably defer a more fulsome and precise NEPA analysis to the APD stage. *Id*. at 1234-35. That is precisely what the Bureau did here.

WildEarth makes essentially the same argument with regard to cumulative impacts, arguing that the Bureau could not defer a more fulsome and precise NEPA analysis to the APD stage. (Dkt. No. 55 at 22-26). But the analysis in *Chihuahuan Grasslands* holds equally true for cumulative impacts, and this Court should reject WildEarth's argument as a result.

The cases cited by WildEarth do not require a different outcome. (*Contra* Dkt. No. 55 at 15) (citing, among others, *Conner v. Buford*, 848 F.2d 1441 (9th Cir. 1986)

and *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983)). Neither *Conner* nor *Peterson* apply here because they were issued prior to the enactment of the FOOGLRA, "which prohibits issuance of permits to drill until [the Bureau] has analyzed and approved a lessee's plans." *Chihuahuan Grasslands*, 507 F. Supp. 2d at 1232-33 (citing 30 U.S.C. § 226(g)). As the *Chihuahuan Grasslands* court explained, those cases also predate the Department of the Interior's regulation that "authorizes the agency to explicitly disapprove applications for drilling permits." *Id*. at 1233 (citing 43 C.F.R. § 3162.3-1(h)). In short, the decisions in *Conner* and *Sierra Club* are not relevant here because they predate two meaningful laws that prevent commercial drilling without further approval (and, implicitly, further NEPA analysis) after the Bureau makes its leasing decision. This Court should discount WildEarth's reliance on those cases for the same reasons.[2]

Without directing this Court to support in the administrative record, WildEarth argues that the Bureau violated NEPA because some of the leases in this case do not contain "no surface occupancy" stipulations. (Dkt. No. 55 at 16). But even when leases do not contain such stipulations, the Bureau can condition permits for drilling on the implementation of environmentally protective measures,

[2] WildEarth cites two other D.C. Circuit cases, but these cases merely mention *Sierra Club v. Peterson* in dicta. (Dkt. No. 55 at 15) (citing *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999) and *Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466, 480 (D.C. Cir. 2009)).

including mitigation. *Chihuahuan Grasslands*, 507 F. Supp. 2d at 1234-35. Indeed, the Bureau can reject an application if such conditions are not met. *Id*. And as the *Chihuahuan Grasslands* court explained, the Bureau's "inability to preclude surface operations is not troubling (in the NEPA context) because [the Bureau] already considered which lands posed the greatest environmental concerns when it decided which lands required [no surface occupancy] stipulations." *Id*.

WildEarth argues that the Bureau will not follow through on preparing a robust NEPA analysis at the APD stage. (Dkt. No. 55 at 24 n.16). The *Chihuahuan Grasslands* court rejected a similar argument, concluding that it would be inappropriate to "assume that government agencies will not comply with their NEPA obligations in later stages in development." 507 F. Supp. 2d at 1235 (citing *Conner*, 848 F.2d at 1448). And, "[a]t any rate, [p]laintiffs will have a chance to object at a later stage, should they believe that the agency is delinquent in completing its NEPA obligations for the leased parcels." *Id*. (citing *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977-78 (9th Cir. 2006)). This Court should follow the logic in *Chihuahuan Grasslands* and reject WildEarth's argument.

B. NEPA did not require the Bureau to consider the downstream combustion of oil and gas at this stage in the leasing process.

WildEarth next argues that the Bureau failed to consider the foreseeable, indirect greenhouse gas impacts of the oil and gas lease sales. (Dkt. No. 55 at 20-21). In other words, WildEarth claims that NEPA required the Bureau to consider

the greenhouse gas emissions that result from combustion of the oil and gas by an unknown entity, in an unknown location, at some future date . . . maybe. This argument ignores the reality that, at the leasing stage, there is no way for the Bureau to know how much oil and gas will eventually be extracted and then combusted during the fourth stage of development. Oil and gas will only be extracted if a developer applies for a lease, obtains the lease, submits an APD, obtains a permit to drill, and the developer determines that extraction is feasible under the Bureau's permit terms. *See supra* at 6-7. That is too much uncertainty for the Bureau to act on at the leasing stage. Accordingly, the Bureau appropriately chose to analyze these effects at the APD stage, when the agency will have far more information and certainty. *See id*.; *Park Cty. Res. Council*, 817 F.2d at 624.

In support of its "downstream" argument, WildEarth relies on a handful of out-of-circuit district court cases, none of which involve oil and gas leasing, and a lone decision from the Eighth Circuit – *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003). (Dkt. No. 55 at 20-21). As is true with the district court decisions, *Mid States* is readily distinguishable from the facts in the instant case.

In *Mid States*, the Surface Transportation Board prepared an EIS that considered the environmental impacts of a "proposal to construct approximately 280 miles of new rail line to reach the coal mines of Wyoming's Powder River Basin."

Mid States, 345 F.3d at 532. The Eighth Circuit found that the Surface Transportation Board violated NEPA by not considering the potential environmental impacts that would result from an increased supply of Powder River Basin coal, particularly due to its low cost and environmental benefits. *Id*. at 548-50. While that scenario might at first seem somewhat analogous to the facts in the case at bar, in reality that is far from the truth.

There are key distinctions between *Mid States* and this case. For example, the stated goal of the new rail line in *Mid States* was to **increase** the availability of Powder River Basin coal and **lower** its price by removing a rail capacity bottleneck between the abundant coal supply in the Powder River Basin and the demand for Powder River Basin coal in the United States. *Id*. at 549. The Surface Transportation Board identified that goal in the draft EIS, and the *Mid States* court relied heavily on that fact in coming to its decision. *Id*. at 550. In other words, it was reasonably foreseeable that approval of the rail line would inexorably lead to its construction and the increased availability of Powder River Basin coal. That is not the situation here. The purpose of the leasing sale is merely to identify areas where oil and gas **may** be commercially extracted in the future **if** the developer applies for and obtains a permit to drill, all of which would be subject to further NEPA review. (AR3380, 3382). This distinction alone is enough to render *Mid States* inapposite. In addition, the Eighth Circuit has since distinguished *Mid States* and limited its applicability to

facts that are not present in this case. *See Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096 (8th Cir. 2005).

In *Arkansas Wildlife*, the United States Army Corps of Engineers prepared an EIS to consider the potential impacts related to a water usage plan that the Corps estimated would cost over three hundred million dollars. *Ark. Wildlife*, 431 F.3d at 1098-99. The plaintiffs alleged that the Corps "improperly deferred the study of cumulative impacts of reasonably foreseeable action" in the EIS, and the plaintiffs relied on *Mid States* to support their argument. *Id*. at 1102. But the Eighth Circuit rejected this argument and limited the applicability of its ruling in *Mid States* to cases where an agency said that it would consider the impacts from a reasonably foreseeable outcome and then failed to do so. *Id*. (finding reliance on *Mid States* to be misplaced where these factors are not present). Here, the Bureau never said that it would consider downstream impacts. Thus, a key element necessary to apply *Mid States* does not exist here. This Court should refuse to follow *Mid States* in this case for this reason.

This Court's recent decision in *Sierra Club v. FERC*, No. 16-1329, 2017 U.S. App. LEXIS 15911 (D.C. Cir. Aug. 22, 2017) (*Sierra Club*) does not change that analysis. In *Sierra Club*, this Court considered whether NEPA required the Federal Energy Regulatory Commission (FERC) to consider the environmental effects from downstream combustion of natural gas before authorizing the construction of a

natural gas pipeline. *Sierra Club*, at *2-3. In other words, did NEPA require FERC to consider the greenhouse gas emissions from combustion by end users, like power plants, before authorizing the pipeline? The Court found that NEPA did so require, but this decision is readily distinguishable from this case. *See id*. at *35.

In *Sierra Club*, the Court considered FERC's authorization of a pipeline. *Id*. at *2-3. Pipelines are built once the developer obtains commitments from customers that will essentially guarantee the viability of the pipeline. *See id*. at *3-4 (noting that several utilities have "already committed to buying nearly all the gas the project will be able to transport"). The immense cost involved with constructing a pipeline prohibits speculation.[3] Thus, it was reasonably foreseeable under NEPA that the pipeline would be built if authorized and that it would operate at the designed capacity. And, indeed, construction on the pipeline commenced before the project's opponents even petitioned the D.C. Circuit to review FERC's authorization. *Id*. at *5.

This stands in stark contrast with oil and gas leases. While some of the leased property will likely be developed, at the leasing stage the Bureau cannot know which parcels will ultimately be developed or how much oil and gas will be extracted from those parcels. *(See, e.g.*, AR3380, AR3382). Simply put, during the second stage of

[3] *See, e.g*., http://landowners.daplpipelinefacts.com/resources/faq.html (stating that the Dakota Access Pipeline "is supported by long-term binding contractual commitments from shippers").

development (*i.e.*, leasing), production is uncertain. There is far less certainty than with a pipeline, which is why it is far more prudent for the Bureau to analyze the potential greenhouse gas emissions at the APD stage. Indeed, the D.C. Circuit expressly recognized in *Sierra Club* that "[w]e do not hold that quantification of greenhouse-gas emissions is required *every* time those emissions are an indirect effect of agency action." *Sierra Club*, at *25. Instead, the Bureau quantifies those emissions when they can be predicted with reasonable certainty. In the context of oil and gas leasing, that cannot be done until the fourth stage of development. Accordingly, the Bureau acted appropriately under the logic of the D.C. Circuit's decision in *Sierra Club*.

C. NEPA did not require the Bureau to use the "carbon budget" or "social cost of carbon" models.

WildEarth argues that NEPA required the Bureau to consider the environmental impact of issuing the leases through the lens of a "carbon budget," but it provides no legal support for its position. (Dkt. No. 55 at 27-30). This is a pure policy dispute that is inappropriate to address in a NEPA legal challenge. WildEarth should pursue its goals in the halls of Congress rather than in federal court. *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) ("NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by any agency, as 'NEPA was not intended to resolve fundamental policy disputes.'") (citation omitted).

WildEarth next contends that NEPA required the Bureau to consider the "social cost of carbon" before issuing the leases in question. (Dkt. No. 55 at 31-34). This argument falls short for several reasons. First, an examination using the social cost of carbon protocol would not have been productive. As an economist pointed out in a previous case, different groups value the social cost of emitting a ton of carbon dioxide from anywhere between $5 and $800. *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (citation omitted). Such a wide range does not provide an agency with a useful tool to determine the social cost of greenhouse gas emissions. And while in the past EPA has suggested that one agency should use the protocol during its review of a controversial pipeline's application for one permit, the White House Council on Environmental Quality does not direct agencies to use this protocol in conducting all NEPA analyses. *Id*.; (*contra* Dkt. No. 55 at 32). Accordingly, NEPA did not require the Bureau to consider the social cost of carbon before issuing the leases. The same logic applies to the "carbon budget."

Also, the social cost of carbon model and the carbon budget are cost-benefit modeling tools. NEPA does not demand a cost-benefit analysis of every proposed action. Rather, NEPA requires a hard look at particular and cumulative environmental impacts of proposed actions. 42 U.S.C. § 4332(C). The Court of Appeals for Tenth Circuit recently issued an opinion that discussed the issue of

modeling in the coal leasing context. *WildEarth Guardians v. United States Bureau of Land Mgmt.*, No. 15-8109, 2017 WL 4079137 (10th Cir. Sept. 15, 2017). The court found that "choosing not to adopt a modeling technique does not render [the Bureau's] EIS arbitrary and capricious[,]" because "'NEPA does not require agencies to adopt any particular decision making structure.'" *Id*. at *12 (quoting *Balt. Gas. & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983)).[4] The same is true here.

Moreover, CEQ only requires that, if an agency considers a cost-benefit analysis relevant, it should be included in the environmental analysis. 40 C.F.R. § 1502.23. The "carbon budget" and "social cost of carbon" protocol attempt to monetize the wide-ranging impacts of greenhouse gas emissions on the environment. Here, the Bureau did not find a cost-benefit analysis to be relevant. (*See, e.g.*, AR28181). Accordingly, NEPA did not require the Bureau to consider it. 40 C.F.R. § 1502.23. For these reasons, WildEarth's argument lacks merit.

WildEarth attempts to rely upon a decision by the United States District Court for the District of Colorado to support its "social cost of carbon" argument, but that

[4] The remainder of the Tenth Circuit's decision should not guide this Court's analysis because it deals with deficiencies in the administrative record that are case-specific. *WildEarth Guardians*, No. 15-8109, 2017 WL 4079137. The court found that the Bureau acted arbitrarily and capriciously when it assumed, without hard data, that coal removed from federal land would be substituted from other sources so that the impacts of the action alternative and the no-action alternative would be the same. *Id*.

reliance is misplaced. (Dkt. No. 55 at 32-33) (citing *High Country Conservation Advocates*, 52 F. Supp. 3d at 1190). In *High Country*, an out-of-circuit district court found that the Forest Service and the Bureau were required to consider the social cost of carbon because "[t]he agencies expressly relied on the anticipated economic benefits of the [coal] Lease Modifications in justifying their approval." *High Country*, 52 F. Supp. 3d at 1191. In other words, in *High Country*, the agencies relied upon the benefits of the project to justify their approval but ignored the costs of the project. (*See id*.). That did not happen here.

The Court need only look to the record citations provided by WildEarth to dismiss its argument. (Dkt. No. 55 at 32). These citations point to **one-paragraph** discussions in five of the nine EAs, which are **not** the agency's decision documents, where the Bureau merely notes the mundane reality that lessees must bid for oil and gas leases. This is a far cry from the one-sided cost-benefit analysis that the agencies relied upon to **justify** their action in *High Country*. It is understandable that WildEarth scoured the administrative record for anything related to economic benefit in an attempt to shoehorn *High Country* into this case, but it simply does not apply here. To hold otherwise would run counter to the very reasoning upon which the *High Country* decision rests. One paragraph in a hundred page EA that includes a dollar sign cannot be the trigger to require the Bureau to apply the social cost of

carbon protocol, particularly when CEQ itself does not direct agencies to use it. WildEarth's argument fails as a result.

III. NEPA did not require the Bureau to prepare an Environmental Impact Statement.

Lastly, WildEarth argues that NEPA required the Bureau to prepare an EIS (rather than nine EAs and nine FONSIs) before issuing the leases in question. (Dkt. No. 55 at 34-38). Not so. While the federal Defendants will no doubt explain to this Court why NEPA does not require an EIS in this case based on the CEQ's significance factors, the States ask this Court to also consider the practical reasons to refrain from preparing an EIS at this stage.

The Court of Appeals for the Tenth Circuit looked squarely at these practical reasons in the context of oil and gas leasing, and that court's analysis is highly instructive. *See Park Cty. Res. Council*, 817 F.2d at 620-24. In *Park County*, the plaintiffs argued that NEPA required the Forest Service to prepare an EIS, rather than an EA, prior to issuing oil and gas leases. *Id*. The Tenth Circuit rejected this argument for practical reasons. Namely, "the oil and gas lease, by itself, does not cause a change in the physical environment. In order to work the lease, the lessee must submit site-specific proposals to the Forest Service and [the Bureau, both of which] can modify those plans to address any number of environmental conditions. Each action is subject to continuing NEPA review." *Id*. at 622. "To require a cumulative EIS contemplating full field development at the leasing stage would []

result in a gross misallocation of resources, 'would trivialize NEPA and would diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.'" *Id*. at 623 (citations and internal quotation marks omitted). Simply put:

> As an overall regional pattern or plan evolves, the region-wide ramifications of development will need to be considered at some point. A singular, site-specific [application for a permit to drill], one in a line that prior to that time did not prompt such a broad-based evaluation, will trigger the necessary inquiry as plans solidify.
>
> When [the Bureau] is considering a mere leasing proposal, it has no idea whether development activities will ever occur, let alone where they might occur in the lease area. When [an application for a permit to drill] is submitted, [the Bureau] then has a concrete, site-specific proposal before it and a more useful environmental analysis can be undertaken. [] **In short, the specificity that NEPA requires is simply not possible absent concrete proposals**.

Id. at 624 (emphasis added).

The same logic applies here. There is no guarantee that a particular lease will be developed. (*See*, *e.g.*, AR3382). And even if the Bureau believes that developers will eventually extract oil and gas from at least some of the parcels, at the leasing stage the agency does not know which parcels will be developed. (*See id.*). This means, as in *Park County*, the Bureau acted properly in preparing EAs at this stage and deferring further NEPA analysis until a developer applies for a permit to drill.

IV. In the event that this Court grants summary judgment to WildEarth, vacatur of the leases is not the appropriate remedy.

In the event that WildEarth prevails on one or more of its NEPA arguments, WildEarth asks this Court to vacate the Bureau's leasing authorizations and void the leases themselves. (Dkt. No. 1 at 39; Dkt. No. 55 at 2). Given the circumstances, this is not the appropriate remedy.

"An inadequately supported [agency decision] . . . need not necessarily be vacated." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (citation omitted). This Court possesses the equitable power necessary to fashion relief appropriate to the case. 5 U.S.C. § 702. "The decision whether to vacate depends upon 'the seriousness of the [decision's] deficiencies (and thus the extent of doubt that the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal*, 988 F.2d at 150-51 (citation omitted). Here, should the Court grant WildEarth Guardian's motion, the appropriate remedy would be remand without vacatur. *See, e.g.*, *Nat'l Parks Conservation v. Jewell*, 62 F. Supp. 3d 7, 20 (D.D.C. 2014) (holding that remand without vacatur can be appropriate when "there is at least a serious possibility that the agency will be able to substantiate its decision on remand") (quoting *Allied-Signal Inc.*, 988 F.2d at 151).

NEPA requires no substantive outcome but merely requires that agencies follow the correct procedure to analyze the environmental consequences of their

decisions. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 704 (10th Cir. 2009). The Bureau considered climate change in detail in the EAs, but, according to WildEarth, the Bureau did not sufficiently "connect the dots." (Dkt. No. 55 at 18). Should this Court find in favor of WildEarth, the Bureau could connect these dots in relatively short order. If the Court believes such agency action is necessary under the requirements of NEPA, remand without vacatur would be the most equitable solution, particularly given how much Wyoming and its communities rely upon the oil and gas sector to power the state and local economies and because commercial extraction will not commence on any of the parcels until a developer applies for a permit to drill and the Bureau issues the permit, after complying with NEPA. In short, vacatur would unnecessarily impose significant economic "disruption." *Allied-Signal*, 988 F.2d at 150-51.

CONCLUSION

Wyoming, Colorado, and Utah respectfully submit that the Bureau did more than enough to comply with NEPA by preparing nine EAs that each discuss greenhouse gas emissions and climate change. And when actual proposals to drill are submitted to the Bureau, the agency will conduct further analysis on these issues. WildEarth remains free to challenge the adequacy of the agency's NEPA analysis at that stage. Accordingly, for the reasons discussed, WildEarth's motion should be

denied, and the motions submitted by the Bureau and the Intervenor-Defendants should be granted.

SUBMITTED this 22nd day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2017, the foregoing pleading was served by the Clerk of the U.S. District Court of Columbia through the Court's CM/ECF system, which will send notification of such filing to other participants in this case.

/s/ Erik Petersen
Wyoming Attorney General's Office

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILDEARTH GUARDIANS and PHYSICIANS FOR SOCIAL RESPONSIBILITY,

Plaintiffs,

v.

RYAN ZINKE, MICHAEL NEDD, and U.S. BUREAU OF LAND MANAGEMENT,

Federal Defendants,

STATE OF WYOMING, STATE OF COLORADO, STATE OF UTAH, WESTERN ENERGY ALLIANCE, PETROLEUM ASSOCIATION OF WYOMING, and AMERICAN PETROLEUM INSTITUTE,

Intervenor Defendants.

Case No. 1:16-cv-01724-RC

[Proposed] Order

Having considered the submissions of the parties, the Court hereby orders that:

1. Plaintiffs' Motion for Summary Judgment is DENIED; and

2. Intervenor-Defendants Wyoming, Colorado and Utah's Cross-Motion for Summary Judgment is GRANTED.

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