IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:12-cv-1275-JLK

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT;
SAN JUAN CITIZENS ALLIANCE;
SIERRA CLUB;
CENTER FOR BIOLOGICAL DIVERSITY; and
AMIGOS BRAVOS,

Plaintiffs,

vs.

UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, an agency within the U.S. Department of the Interior;
SALLY JEWELL, in her official capacity as Secretary of the Interior;
AL KLEIN, in his official capacity as Regional Director of U.S. Office of Surface Mining Reclamation and Enforcement, Western Region;
BOB POSTLE, in his official capacity as Manager of the Program Support Division for the Western Region of the Office of Surface Mining Reclamation and Enforcement;
RICK WILLIAMSON, in his official capacity as Manager of the Indian Programs Branch of the Western Region of the Office of Surface Mining Reclamation and Enforcement

Defendants, and

BHP NAVAJO COAL COMPANY,

Intervenor-Defendant, and

NAVAJO NATION,

Intervenor-Defendant.

PLAINTIFF'S REPLY BRIEF

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Plaintiffs (collectively, "Diné CARE") respectfully reply as follows.

ARGUMENT

A. Coal mining and combustion and subsequent disposal of coal combustion waste are connected actions, which OSM was required, but failed, to include in the scope of its analysis in violation of NEPA.

Neither OSM nor BHP disputes that the approved coal mining in Area IV North and subsequent combustion of that coal and disposal of the coal combustion waste ("CCW") pursuant to BHP's coal supply contract are inextricably intertwined actions that lack independent utility. Concession of this point establishes mining and combustion and CCW disposal as connected actions. Further, neither OSM nor BHP disputes that OSM failed to include the impacts of coal combustion within the scope of its environmental assessment ("EA") or, for that matter, any other document to which the EA tiered, adopted, or incorporated by reference.[1] Concession of this point establishes that the agency violated NEPA by impermissibly limiting the scope of its NEPA analysis. OSM, however, raises, and BHP adopts, various arguments that seek to evade this conclusion. For the reasons stated below, their arguments are unavailing.

1. NEPA's proposal requirement does not impose limitations on connected actions beyond the independent utility test.

OSM's principal argument is that NEPA's connected actions requirement applies only to "proposals" pending concurrently before an agency. Doc. 53 at 26-33. Without addressing the actual definition of the term "proposal" (*see* 40 C.F.R. § 1508.23). OSM

[1] BHP alone argues that disposal of the CCW that will be produced by combustion of the Area IV North coal was adequately evaluated. Doc. 54 at 21. That argument fails, as elaborated below. *See infra* Part D.3.

seems rigidly to contend that a "proposal" exists only if an agency or other actor actually declares one to exist. Thus, OSM argues, because BHP executed and began performance of its coal supply contract (just barely) before submitting the mine expansion application to OSM,[2] the decisions to mine and burn the coal are not concurrently pending proposals and, therefore, not connected actions—even though, as everyone agrees, BHP's performance of its obligations under the contract cannot occur without the proposed mine expansion to Area IV North.[3]

OSM's argument would impose a significant though wholly artificial and unlawful restriction on NEPA's connected action requirement, a restriction that has been rejected as "elevat[ing] form over substance." *Blue Ocean Preservation Soc'y v. Watkins*, 754 F.

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[2] OSM never specifies when the current coal supply contract was executed. However, the agency implies that it occurred a considerable time ago. Doc. 53 at 26 ("years earlier"), 28 (same), 31 (same). In fact, it appears that the current contract was executed at some point between 2000 and 2004, just before BHP submitted its initial proposal in 2004 to expand the mine into Area IV North. AR:1-1-1-1 ("On December 8, 2004, [BHP] requested approval of an operations plan to initiate development activities in Area IV North, on approximately 3,800 acres."); AR:8-1-1-2343 (noting in 2000 EA that then-current contract only allowed mining through 2004). After this Court vacated OSM's approval of the initial application for violating NEPA, BHP resubmitted its application and sought to expand the mine into a smaller segment of Area IV North. AR:1-1-1-1. It is OSM's approval of the resubmitted application that is challenged here.

[3] BHP and OSM both note that OSM approved expanding the life-of-operations permit area of the strip-mine by 12,000 acres in 1989—with a 31 page EA and accompanying finding of no significant impact ("FONSI")—to include the northern portion of Area IV North. Doc. 53 at 1; Doc. 54 at 2 n.2. For this reason BHP asserts that OSM, in allowing mining to occur in Area IV North, did not actually approve a "mine or permit area 'expansion.'" Doc. 54 at 2. BHP's point appears to be semantic. It is undisputed that that the 1989 approval of the life-of-operations permit in 1989 did *not* give BHP the right to mine in Area IV. *See* Doc. 53. As the 1989 EA acknowledged, "Mining in Area IV North is contingent upon . . . subsequent approval by OSMRE [OSM] . . . ." AR:8-1-1-2264. Thus, without OSM's approval of BHP's current expansion application, the company will not be able to expand operations into Area IV North.

Supp. 1450, 1462 (D. Haw. 1991). OSM's proposed narrowing of NEPA's connected actions requirement would allow the broad-scale contamination of a region to go unmentioned in an environmental analysis, even when, as here, such contamination would not occur independent of the agency's action. As elaborated below, OSM's position conflicts with NEPA, its implementing regulations, and case law.

The fundamental purpose of NEPA's procedural provisions is to foster environmental protection. 42 U.S.C. §§ 4321, 4331. Congress has mandated that the statute and its regulation be interpreted to further this goal: "The Congress authorizes and directs that, *to the fullest extent possible* . . . the policies, regulations, and public laws of the United States *shall be interpreted* . . . in accordance with the policies set forth in this chapter . . . ." 42 U.S.C. § 4332(1). Conversely, NEPA and its regulations must not be interpreted to lessen environmental protection—though this is precisely what OSM proposes. *See, e.g.*, *Scottsdale Mall v. Indiana*, 549 F.2d 484, 489 (7th Cir. 1977) (holding that withdrawal of highway project from federal funding to avoid NEPA would be inconsistent with congressional directive that statute be "interpreted" "to the fullest extent possible" to further environmental protection).

a. NEPA's proposal and connected action rules are separate but complementary provisions, and the former does not limit the latter.

The proposal requirement in NEPA (40 C.F.R. § 1508.23) does not limit NEPA's connected actions requirement (40 C.F.R. § 1508.25(a)(1)), beyond the existing independent utility test. This is because if a project is temporally segmented into stages or phases, each of which wholly lacks independent utility (as here), the segments are

functionally and in reality a single undertaking, even if denominated separate proposals to be approved in staggered fashion. Recognizing that such artificial temporal segmentation or staggered phasing[4] of a project would, if permitted, (1) undermine the national environmental policies established by NEPA and (2) allow agencies and non-federal actors to easily evade the statute's mandate, courts have condemned such segmentation since the adoption of NEPA. Thus both the NEPA regulations that prohibit segmentation (principally the connected action provisions) and case law have established that the proposal requirement does not limit the application of the connected action rule when a single undertaking has been temporally segmented and the individual segments wholly lack independent utility.

Here OSM's argument—that the coal supply contract is not a pending proposal because it was executed just before BHP submitted its initial proposal to OSM in 2004 to expand the mine into Area IV North—fails. *See supra* note 3. OSM cannot evade NEPA's connected action requirement simply because non-federal actors executed a coal supply contract governing mining and combustion of coal from the Navajo Mine through 2016 and *then* sought OSM's approval to expand the mine to fulfill the terms of the contract. Indeed, these actions reflect a textbook example of prohibited temporal segmentation.

[4] The term "temporal segmentation" is used throughout this brief to refer to this practice.

b. Historical development of the proposal and connected action requirements.

A brief review of relevant law is helpful. NEPA's implementing regulations' distinct (though complementary) requirements regarding proposals, § 1508.23,[5] and connected actions, § 1508.25(a)(1), developed out of separate lines of early NEPA cases.[6]

The proposal requirement arose from *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). In *Kleppe*, plaintiffs sued to enjoin any approval of coal development in the "Northern Great Plains region" until various agencies prepared an environmental impact statement ("EIS") for all coal-related activities in that region. *Id.* at 394-95. The Supreme Court, relying on the use of the term "proposal" in NEPA,[7] held that there was no definite proposal for region-wide coal development, only a series of background studies by agencies that may have been contemplating a regional proposal. *Id.* 398-404. *Kleppe* established the rule that the "[m]ere 'contemplation' of certain action is not sufficient to require an EIS." *Id.* at 404. Instead "an agency's action" must "reach[] sufficient maturity" before an agency may be required to prepare an EIS. *Id.* at 406 n.15. Importantly, *Kleppe* did not involve interdependent actions lacking independent utility. *Fritiofson*, 772 F.2d at 1241 n.10 (contrasting *Kleppe* and early "independent utility cases" and adding "[i]t is important to remember that issues of economic and functional dependence are distinct from questions of environmental synergy").

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[5] *See also* 40 C.F.R. §§ 1502.4(a), 1508.25(a)(2)-(3) (related and cumulative actions must be "proposed").

[6] *Fritiofson v. Alexander*, 772 F.2d 1225, 1241-42 & nn.10-12 (5th Cir. 1985), *abrogated on other grounds Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 677-78 (5th Cir. 1992).

[7] 42 U.S.C. § 4332(2)(C).

The connected actions requirement, § 1508.25(a)(1), on the other hand, developed from a separate line of NEPA cases involving segmentation of highway projects into component parts that were "functionally or economically interdependent." *Fritiofson*, 772 F.2d at 1241 n.10.[8] Many of these cases involved temporal segmentation of highway construction projects.[9] These cases established what has become known as the independent utility test: "[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to *future projects*, the environmental consequences of the projects should be considered together." *Fritiofson*, 772 F.2d at 1241 n.10 (emphasis added).[10] This rule serves, as noted, to (1) assure meaningful compliance with the statutory mandate of NEPA and (2) prevent federal and non-federal actors from evading NEPA's requirements.[11] In prohibiting segmentation of projects that lack "independent utility," the courts acknowledged that in

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[8] *See also, e.g.*, *Swain v. Brinegar*, 542 F.2d 364 (7th Cir. 1976) (improper highway segmentation); *accord Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973); *Named Individual Members of San Antonio Conservation Soc'y v. Tex. Highway Dep't*, 446 F.2d 1013 (5th Cir. 1971); *Thompson v. Fugate*, 347 F. Supp. 120 (E.D. Va. 1972); *Comm. to Stop Route 7 v. Volpe*, 346 F. Supp. 731 (D. Conn. 1972), *injunction vacated Citizens for Balanced Env't & Transp., Inc. v. Sec'y of Transp.*, 515 F. Supp. 151 (D. Conn. 1980).

[9] *E.g.*, *Swain*, 542 F.2d at 366, 369-70 (middle section of highway already built, other sections in development phases); *Indian Lookout Alliance*, 484 F.2d at 16, 19-20 (northern segment proposed, middle segment at project stage, southern connecting segment not yet proposed); *Named Individual Members*, 446 F.2d at 1016-17 (agency approved construction of two end segments but postponed decision on construction of middle, connecting segment).

[10] *Accord O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 236-37 (5th Cir. 2007) (quoting *Fritiofson* and labeling rule "the independent utility test").

[11] *Swain*, 542 F.2d at 369 (quoting *Indian Lookout Alliance*, 484 F.2d at 17-18); *Named Individual Members*, 446 F.2d at 1023-24, 1027; *Thompson*, 347 F. Supp. at 124; *Comm. to Stop Route 7*, 346 F. Supp. at 739-40.

such cases, "[t]he two components are really one enterprise," *Swain*, 542 F.2d at 370,[12] or in the language of 40 C.F.R. § 1508.23, a single proposed action "in fact" (this latter point is elaborated below).

In 1978 the Council on Environmental Quality ("CEQ") promulgated NEPA's implementing regulations, codifying the proposal requirement from *Kleppe* and, separately, the rule against segmentation (i.e., the connected action requirement). Daniel R. Mandelker et al., NEPA Law and Litigation § 8.17 (Westlaw 2013); *Fritiofson*, 772 F.2d at 1242. A close review of these rules reveals that they are complementary but distinct and that the proposal requirement was not intended and does not operate to limit application of the connected action requirement.

Section 1508.23 defines proposals as follows:

> Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

"This definition is plainly geared toward a more general, functional interpretation of the term, not the literal interpretation urged by the Government." *Blue Ocean Preservation*

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[12] *See also, e.g.*, *Envtl. Def. Fund v. Marsh* (*EDF*), 651 F.2d 983, 998 (5th Cir. 1981) (observing that in early highway segmentation cases, improper segmentation occurred when "the segments were actually a single project"); *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 440 (5th Cir. 1981) (noting that independent utility test "reveals whether the [alleged segment] is indeed a separate project"); *Named Individual Members*, 446 F.2d at 1023 (question whether agency "may take a single 'project' and divide it into 'segments'").

Soc'y, 754 F. Supp. at 1461. The intended breadth of the term is revealed in the last sentence, which expressly provides that a proposal may exist "in fact" even when an agency has not so declared. *See* Alexander Hood, Note, *The Same NEPA Proposal or Connected NEPA Actions?: Why the Bureau of Land Management's New Oil Shale Rules and Regulations Should Be Set Aside*, 37 B.C. Envtl. Aff. L. Rev. 191, 207 (2010). Further, consideration of certain actions within the scope of a single environmental review—those that are "cumulative" and "similar" actions, like those in *Kleppe*—is expressly limited to "proposed actions." 40 C.F.R. § 1508.25(a)(2)-(3).

The "connected actions" provisions, on the other hand, embody the independent utility rule from the highway segmentation cases. *Fritiofson*, 772 F.2d at 1241 & n.11. The three formulations of connected actions plainly indicate that actions which are temporally segmented must nevertheless be considered together if they are "connected." 40 C.F.R. § 1508.25(a)(1)(i) (actions connected if completion of one "automatically trigger[s] other actions"); § 1508.25(a)(1)(ii) (actions connected if one action cannot proceed "unless other actions are taken previously"). Further, unlike cumulative and similar actions (mentioned above), consideration of connected actions is not limited to "proposed actions." *Compare* 40 C.F.R. § 1508.25(a)(1), *with* § 1508.25(a)(2)-(3); *Fritiofson*, 772 F.2d at 1242 & nn.11-12. This reflects the recognition from the highway segmentation cases that individual segments that each lack independent utility—even if segmented over time—are in fact a single project. *Piedmont*, 637 F.2d at 440; *Swain*, 542 F.2d at 370; *see also Fritiofson*, 772 F.2d at 1241 n.10 ("A highway segment to

nowhere . . . should not be evaluated apart from later connectors that will be necessary to make the initial segment useful.").

Further, and contrary to OSM's contention, the connected actions requirement, § 1508.25(a)(1), is not applied exclusively via § 1502.4(a), which prohibits segmentation of proposals. Rather, with regard to "actions" (which term is expressly defined to include "new *and continuing* activities," § 1508.18(a) (emphasis added)), the regulations provide: "Significance cannot be avoided by terming an *action* temporary or by breaking it down into small component parts." § 1508.27(b)(7) (emphasis added). The Tenth Circuit has acknowledged that the requirement to consider connected *actions* in § 1508.25(a)(1) and the prohibition on segmentation of *actions* in § 1508.27(b)(7) operate together and are applied via the independent utility test. *Utahns for Better Transp. v. Dep't of Transp.*, 305 F.3d 1152, 1182-83 (10th Cir. 2002).

As for § 1502.4(a), upon which OSM relies heavily, instead of restricting application of the connected actions requirement, this provision, read in conjunction with § 1508.25(a)(1), § 1508.27(b)(7), and § 1508.18(a), demonstrates the CEQ's overriding and repeated concern "for a discussion and analysis of the environmental impact *as a whole*." Frank P. Grad, Treatise on Environmental Law § 9.02[2][a], 9-114.4 n.9 (Matthew Bender 2013) (emphasis added). Together these provisions prohibit segmentation on any level—that of proposals or actions—from subverting the goals of NEPA. And to the degree that these provisions overlap, the Ninth Circuit has held, in a case cited by OSM, that the broader connected-action requirements of § 1508.25(a)(1) control the somewhat narrower requirements of § 1502.4(a)—not, as OSM argues, the

other way around. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1097-98 (9th Cir. 2012).

c. Case law arising after the promulgation of NEPA's implementing regulations applies the connected action requirement to temporally segmented projects that lack independent utility.

Case law subsequent to the promulgation of NEPA's implementing regulations confirms that, contrary to OSM's assertions, agencies and non-federal actors may not evade NEPA by temporally segmenting actions that lack independent utility (i.e., connected actions).[13] These holdings are consistent with the rationale from the highway cases that the separate segments are, in reality, a single project. *Swain*, 542 F.2d at 370;*see supra* note 13 (citing cases).

Of particular importance is a line of cases from the Fifth Circuit that hold that the proposal requirement developed in *Kleppe* and brought forward in NEPA's implementing

[13] *Save the Yaak Comm. v. Block*, 840 F.2d 714, 716-17, 719-20, 721-22 (9th Cir. 1988) (rejecting segmentation of ongoing construction of logging road and present and future logging operations and enjoining road construction and timber sales); *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1987) (requiring EIS for non-federal highway project that lacked utility independent of subsequent connecting phase that would "inevitabl[y]" require federal approval and admonishing that "[n]on-federal actors may not be permitted to evade NEPA by completing a project without an EIS and then presenting the responsible official with a *fait accompli*"); *Thomas v. Peterson*, 753 F.2d 754, 756-59 (9th Cir. 1985) (requiring single EIS for logging road and timber sales, even though road proposal was made and approved prior to timber sales and affirming rule that "an EIS must cover *subsequent stages* when '[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken'" (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974))); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 401 F. Supp. 2d 1298, 1312-17 (S.D. Fla. 2005) (temporally segmented phases of research park development were connected actions); *Blue Ocean Preservation Soc'y v. Watkins*, 754 F. Supp. 1450, 1457-59 (D. Haw. 1991) (temporally segmented phases of geothermal development project were connected actions).

regulations does not operate to limit the connected action requirement when the segmented actions, including those that are temporally segmented, lack independent utility. This line of cases is particularly important, here, because the most recent case, *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 236 (5th Cir. 2007), was cited by the Tenth Circuit in *Wilderness Workshop v. BLM*, 531 F.3d 1220, 1229 (10th Cir. 2008) for the proposition that "'projects,' for the purposes of NEPA are described as 'proposed actions,' or proposals in which action is imminent." OSM relies heavily on this statement from *Wilderness Workshop*. Doc. 53 at 29, 32.

The first of these cases is *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971), one of the seminal highway segmentation cases. There, federal actors sought to approve the end segments of a highway while postponing a decision on the central, connecting segment. *Id.* at 1016-17. The court held that "the division of the Project into segments" violated NEPA and the Department of Transportation Act. *Id.* at 1023-24 (violation of Transportation Act); *id.* at 1024 (violation of NEPA for same reason). Construction of the end segments would make the eventual construction of the central segment "inevitable," and allowing segmentation in that circumstance would undermine or "make[] a joke" of the statutes. *Id.*

Next, in *Environmental Defense Fund v. Marsh* (*EDF*), the Fifth Circuit held that two canal project were not improperly segmented because the second project was not sufficiently developed to constitute a proposal in light of *Kleppe*. 651 F.2d 983, 986, 997-99 (5th Cir. 1981). Importantly, though, the court noted that the proposal

requirement, as announced in *Kleppe*, does not condone temporal segmentation of connected actions: "We believe that *Kleppe* also leaves room for a court to prohibit segmentation or require a comprehensive EIS for two projects, *even when one is not yet proposed*, if an agency has egregiously or arbitrarily violated the underlying purpose of NEPA." *Id.* at 999 n.19 (emphasis added). The court specifically cited *Named Individual Members* as the paradigmatic case of improper temporal segmentation. *Id.* Then, in *Save Barton Creek Ass'n v. Federal Highway Administration*, the Fifth Circuit clarified that the standard for evaluating temporally segmented projects is objective (it does not consider the subjective intentions of the decision-makers) and that the proper standard is the independent utility test. 950 F.2d 1129, 1140, 1143-44 (5th Cir. 1992); *see also Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 440 (5th Cir. 1981) (test for segmentation is independent utility test), *cited with approval*, *Save Barton Creek Ass'n*, 950 F.2d at 1143.

d. *O'Reilly v. U.S. Army Corps of Engineers* and *Wilderness Workshop* import the proposal requirement into the connected actions analysis, but recognize that it does not condone piecemeal analysis of temporally segmented projects when segments lack independent utility.

Most recently, the Fifth Circuit addressed alleged temporal segmentation of a residential subdivision project in *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 227 (5th Cir. 2007). There, the court affirmed that the independent utility test governs the analysis of alleged improper segmentation, even for phased projects. *Id.* at 236-37 (citing *Fritiofson*, 772 F.2d 1241 n.10, and *EDF*, 651 F.2d at 999 n.19). The court also introduced the proposal requirement from 40 C.F.R. § 1508.23 to the analysis,

stating: "It is important to note that 'projects,' for the purposes of NEPA, are described as 'proposed actions,' or proposals in which action is imminent." *Id.* at 236. But, at the same time, the court recognized the exception articulated in *EDF* for segmentation that arbitrarily violates NEPA—i.e., the temporal segmentation of actions without independent utility as in *Named Individual Members*. 477 F.3d at 237 (citing *EDF*, 651 F.2d at 999 n.19)

In *Wilderness Workshop v. BLM*, the Tenth Circuit followed *O'Reilly* and imported the proposal requirement of § 1508.23 into the connected actions analysis of § 1508.25(a)(1). 531 F.3d 1220 (10th Cir. 2008). There, plaintiffs challenged BLM's approval of a natural gas pipeline. *Id.* at 1222. The pipeline would connect existing drilling operations in an area with the nationwide pipeline network. *Id.* at 1230-31. The plaintiffs alleged that BLM improperly segmented the pipeline from additional, future drilling in the same area that might be induced by the pipeline's construction, because the pipeline was much bigger than needed for the existing wells and was designed to accommodate additional volumes of gas. *Id.* at 1231. The court found no improper segmentation. *Id.* at 1231. In reaching this conclusion, the court acknowledged the connected action requirement, § 1508.25(a)(1), and application via the independent utility test. *Id.* at 1228-29. However, the court also cited the language from *O'Reilly* regarding proposals:

> It is important to note that "projects," for the purposes of NEPA, are described as "proposed actions," or proposals in which action is imminent. The mere contemplation of certain action is not sufficient to require an impact statement. [I]mproper segmentation is *usually* concerned with projects that have reached the proposal stage.

Id. at 1229 (emphasis added) (quotations and internal citations omitted) (quoting *O'Reilly*, 477 F.3d at 236). The last sentence of this statement acknowledged the exception to the proposal requirement for temporally segmented projects that (as in *Named Individual Members*) lack independent utility. The court went on to apply both the connected action requirement (via the independent utility test) and the proposal requirement. *Id.* at 1230-31. Finding that the pipeline had independent utility because it could serve existing gas wells and that development of future wells was "entirely speculative" and not "imminent," the court concluded that there had been no improper segmentation. *Id.* at 1231.

e. Synthesis: The proposal requirement does not alter the connected actions analysis because temporally segmented portions of a project that individually lack independent utility are "in fact" one proposal.

The upshot of these cases is that the proposal requirement is complementary—not contrary—to the connected actions requirement, and it does not impose any additional restrictions on the independent utility test, even in the case of temporally segmented projects. In this latter case, if the segments have independent utility—like the phases of the housing development in *O'Reilly* or the pipeline and possible future drilling in *Wilderness Workshop*—then they are not connected actions *and* any future phase is likely not sufficiently definite to constitute a proposal. On the other hand, if the temporally segmented phases lack independent utility—like the highway segments in *Named Individual Members* and *Gilchrist*, the phases of the geothermal project in *Blue Ocean*

Preservation Society, the roads and timber sales in *Thomas* and *Save the Yaak*,[14] and the coal mining, combustion, and CCW disposal, here—then, pursuant to the exception acknowledged in *EDF*, *O'Reilly*, and *Wilderness Workshop*, the proposal requirement does not operate to excuse the improper segmentation.

As the early segmentation cases observed, segments of a project that lack independent utility—even if denominated as separate "proposals" and temporally separated—are "really one enterprise." *Swain*, 542 F.2d at 370.[15] In the language of NEPA's proposal requirement, such interdependent segments constitute one proposal "in fact," even if the agency has not declared it as such. 40 C.F.R. § 1508.23. *See Blue Ocean Preservation Soc'y*, 754 F. Supp. at 1459, 1460-62 (finding, first, that phases of temporally-segmented project lack independent utility and were connected actions and, second, that action was proposal "in fact" even though agency had not denominated it as such). This harmonization accords with *Wilderness Workshop* and the Fifth Circuit cases, and accounts for CEQ's decision not to not to modify the connected actions requirement with the term "proposed." *Compare* 40 C.F.R. § 1508.25(a)(1), *with* § 1508.25(a)(2)-(3). It also furthers the bedrock goals of (1) assuring meaningful environmental review under NEPA, and (2) prohibiting federal agencies and non-federal actors alike from gerrymandering their actions to evade scrutiny of environmental effects.

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[14] *See supra* note 14 (noting cases).

[15] *See Piedmont Heights*, 637 F.2d at 440; *EDF*, 651 F.2d at 998; *Utahns for Better Transp. v. Dep't of Transp.*, 305 F.3d at 1183 (independent utility test "reveals whether the project is indeed a separate project"); *see also* Grad, *supra*, Environmental Law Treatise at § 9.02[2][a], 9-114.4 ("The regulations also require that proposals or parts of proposal related to each other closely enough to be, *in effect, a single course of action* shall be evaluated in a single EIS." (emphasis added)).

Swain, 542 F.2d at 369; *Indian Lookout Alliance*, 484 F.2d at 17-18; *Named Individual Members*, 446 F.2d at 1027; *see also Wilderness Workshop*, 531 F.3d at 1228 (independent utility test intended to prevent agency segmentation).[16] This harmonization is also consistent with the congressional mandate that NEPA and its regulations be "interpreted" "to the fullest extent possible" to further the statute's broad policies of environmental protection. 42 U.S.C. § 4332(1).

OSM's argument, on the other hand, finds no harbor in NEPA, NEPA's implementing regulations, or NEPA's case law. Indeed, OSM's proposed interpretation of these two requirements would permit just what the Fourth Circuit rejected in *Maryland Conservation Council, Inc. v. Gilchrist*: non-federal actors could "evade NEPA by completing a project without an EIS and then presenting the responsible official with a *fait accompli*." 808 F.2d 1039, 1042 (4th Cir. 1986). Under OSM's reading of the regulations, BHP can shield coal combustion impacts from any environmental scrutiny simply by executing a coal supply contract shortly before seeking federal approval to strip-mine the coal needed to fulfill the contract. Doc. 53 at 26,33 (arguing that combustion is not a connected action because the "decision" to do so was "made years

[16] As the Fifth Circuit noted in *EDF*, agencies can "easily enough" structure a project so that approval of separate segments are staggered temporally. 651 F.2d at 999 n.19. Courts have long taken a dim view of attempts by agencies and non-federal parties to structure their actions to evade NEPA. *Named Individual Members*, 446 F.2d at 1023-24, 1027-28 (segmentation would make "joke" of statutes and allow "the circumvention of an Act of Congress"); *see also* ; *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122-23 (9th Cir. 2005) (non-federal actors may not "gerrymander" projects to evade NEPA); *Ross v. Fed. Highway Admin.*, 162 F.3d 1046, 1051-53 (10th Cir. 1998); *Scottsdale Mall v. Indiana*, 549 F.2d 484, 488-90 (7th Cir. 1977).

earlier" and citing previous coal supply contract). This Court should decline OSM's invitation to weaken NEPA.

f. Here, despite the fact that BHP executed its coal supply contract just prior to seeking to expand the mine, the mining and coal combustion and subsequent waste disposal lack independent utility and, as such, are connected actions and one proposal "in fact."

Application of the proper standard here is straightforward. No party disputes that the expansion of mining into Area IV North and combustion of that coal at FCPP pursuant to BHP's coal supply contract lack independent utility. As such, they are both connected actions and a single proposal "in fact," even if OSM and BHP have not expressly acknowledged them as such. *See Blue Ocean Preservation Soc'y*, 754 F. Supp. at 1459-62 (finding connected actions and proposal in fact).

Indeed, applying the definition of proposal from the regulations, it is clear that the goal of OSM and BHP is to mine the coal in Area IV North and supply it to FCPP to be burned. 40 C.F.R. § 1508.23. OSM's statement of the purpose and need for the mine expansion reads: "The purpose and need for the proposed significant permit revision to mine coal in Area IV North is to continue to provide a coal supply in accordance with [BHP's] contract obligations with the FCPP through July 2, 2016." AR:1-2-11-28. BHP's application for mining in Area IV North similarly states: "The revised mine operation plan proposes development of approximately 800 acres of Area IV North to meet BHP Navajo Coal Company's (BNCC) contractual obligations through 2016." AR:1-1-1-1.

Similarly, there is no question that OSM is "actively preparing to make a decision on one or more means of accomplishing that goal." § 1508.23. The current coal supply contract was executed just before BHP originally sought approval to expand the mine into Area IV North, *see supra* note 3, OSM has approved the mine expansion, and BHP is actively mining in Area IV. Unlike *Kleppe*, this is not a case involving "mere contemplation" of a proposal that has not reached sufficient "maturity." *See* 427 U.S. at 404, 406 n.15. Similarly, there is little question that the effects of mining and coal combustion can be meaningfully evaluated. § 1508.23. Unlike the speculative drilling at issue in *Wilderness Workshop*, here the parties know precisely how much coal is going to be mined and then burned—the 12.7 million tons in the challenged Area IV expansion. AR:1-2-11-29.

Finally, the feasibility of evaluating the regional impacts of air pollution—and particularly mercury pollution—from the combustion of the coal is amply demonstrated in the U.S. Fish & Wildlife's draft Biological Opinion for the Desert Rock Project. AR:1-2-14-1871 to -2034. Thus, mining and combustion are connected actions and, "in fact," a single proposal. 40 C.F.R. §§ 1508.23, 1508.25(a)(1).

2. Cases cited by OSM are either distinguishable or incorrect or both.

In addition to *Wilderness Workshop*, OSM cites four cases—*Bullwinkel v. U.S. Department of Energy*, 899 F. Supp. 2d 712, 730 (W.D. Tenn. 2012), *Lone Tree Council v. U.S. Army Corps of Engineers*, No. 06-12042, 2007 WL 1520904 (E.D. Mich. May 24, 2007), *Uranium Watch v. U.S. Forest Service*, No. 10-721, 2010 WL 3703807 (D. Utah

Sept. 14, 2010), and *Webster v. U.S. Department of Agriculture*, No. 09-138, 2011 WL 8788223 (N.D. W. Va. June 13, 2011)—in support of its position that only concurrently pending proposals can be considered connected actions under NEPA. But the latter two cases don't support OSM's contention. And the former two cases, while perhaps correct in the result reached, are incorrect in their interpretation of the law of connected actions and, further, plainly distinguishable from the present case.

In *Uranium Watch*, federal agencies approved an application to drill vent holes for an existing uranium mine. 2010 WL 3703807, at *1, *3. Plaintiffs sued under NEPA and sought a preliminary injunction, arguing that the vent holes and existing mining operations were connected actions that had to be analyzed together. *Id.* **4-5. The defendants conceded that the vent holes were necessary to the mining operation, but argued, referencing the proposal language from *Wilderness Workshop*, that the connected action requirement "only applies to future actions." *Id.* at *5. The court, however, observed that *Wilderness Workshop* had not addressed the issue of connected actions "in the context of an existing operation" and was unwilling to accept the agencies' argument: "[I]t is unclear whether *Wilderness Workshop* can actually be read for the proposition that connected actions are only future plans." *Id.* at *5. However, the court was persuaded by the agencies' argument that they should not be "required to redo an EIS or EA for every minor project that may be connected to the EIS or EA," and on that basis found that the plaintiffs had not made a sufficient showing for success at the preliminary injunction stage. *Id.* at *5.

Two important points emerge from *Uranium Watch*. First, the court was unwilling to accept the argument presented by OSM here, which it found unsupported by *Wilderness Workshop*. Second, while in *Uranium Watch* the existing operations had apparently been adequately analyzed under NEPA, here there is no previous adequate NEPA analysis of coal combustion that OSM has identified either in its EA or in its brief. *See S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (holding that agency could not evade NEPA's hard look requirement where "there is no indication that these impacts were properly considered at any time, even on a year-to-year basis"). And, to address the practical concern of the court in *Uranium Watch* about applying the connected action requirement to continuing activities, even if there were a prior, fully adequate NEPA analysis here (there is not), OSM would not be required to redo the analysis: it could simply tier to the previous analyses and thereby "eliminate repetitive discussions." 40 C.F.R. § 1502.20. Thus, the court's practical concern is not an impediment to a full and lawful NEPA analysis.

Notably, the Ninth Circuit rejected segmentation in an analogous situation in *Save the Yaak Committee v. Block*, where an ongoing road construction project was connected to various then-present and future timber sales. 840 F.2d 714, 716-17, 720 (9th Cir. 1988). Similarly, in *Thomas v. Peterson*, the court rejected segmentation of a road and two timber sales, even though evaluation and approval of the road predated the second timber sale by over a year. 753 F.2d 754, 756-58, (9th Cir. 1985); *see also Barnes v. Babbitt*, 329 F. Supp. 2d 1141, 1161 (D. Ariz. 2004) (rejecting specifically the argument that the connected action requirement only applies to new proposals and noting that

"[n]othing in *Thomas* suggests that the prohibition against improper segmenting is limited to 'new' activities"); *Sierra Club v. U.S. Dep't of Energy*, 255 F. Supp. 2d 1177, 1180-81, 1183-85 (D. Colo. 2002) (finding road easement and proposed expansion of existing mining operation to be connected actions); 40 C.F.R. § 1508.18(a) (defining "[a]ctions" broadly to include "new *and continuing activities*" (emphasis added)).

In *Webster*, federal agencies sought to construct a dam in West Virginia to serve three purposes: "(1) Watershed protection; (2) Flood prevention; and (3) Rural water supply." 2011 WL 8788223, at *5. In upholding the agencies' NEPA analysis, the court rejected the plaintiffs' argument that the dam and "water treatment plant that might be built at [the site] in the future" were connected actions. *Id.* at **7-8. Citing *Kleppe*, the *Webster* court reasoned that the "potential future construction of a water treatment plant" was not a connected action because there was no proposal for construction. *Id.* It was clear, however, that the dam had independent utility for flood prevention purposes, without the treatment plant. *Id.* at *5. The court also noted that construction of any water treatment plant would "not occur within the foreseeable future." *Id.* at *8. Thus *Webster* merely confirms that when separate phases of a multi-phase project have independent utility, the future phases are not connected actions and are also often insufficiently definite to constitute proposals, as in *Wilderness Workshop*. It does not refute the rule from the Fifth Circuit cases (referenced in *Wilderness Workshop*), that the proposal requirement does not limit the connected actions requirement in temporally segmented projects when the separate segments wholly lack independent justification, as here. Because in the instant case mining and burning coal from Area IV North lack

independent utility and are ongoing (and thus not speculative), they are connected actions and one proposal in fact, unlike the dam and treatment plant in *Webster*.

In *Lone Tree*, plaintiffs challenged the Corps' approval of a dredged material disposal site adjacent to the Saginaw River, arguing that it had been improperly segmented from the planned dredging operations that would generate the material requiring disposal. 2007 WL 1520904, at **1-2. The dredging operations had been approved decades earlier, and an EIS prepared for them; however, no dredging had occurred for over a decade. *Id.* at **2, 14. Additional dredging could apparently not go forward without approval of the disputed disposal site. *Id.* at *6.[17] The plaintiffs argued that "the Corps improperly segmented its review of the [disposal facility] from its prior assessment of dredging activities in its earlier EIS." *Id.* at *13. The court rejected the segmentation argument. *Id.* at *14. First, the court concluded that the earlier EIS had adequately addressed the plaintiffs' concerns about dredging operations. *Id.* at **15-16. Then, in dicta, the court stated: "Moreover . . . the notion that impermissible segmentation is at issue in this case *likely* fails as a matter of law." *Id.* at *17 (emphasis added). Citing *Kleppe*, the court continued: "The proposed actions with 'connected actions with cumulative impacts' apply only to proposed actions 'pending concurrently' before an agency." *Id.* Because approval of the dredging occurred years earlier, the court concluded, it was "no longer pending before the Corps." *Id.* Thus, the court finished,

[17] Elsewhere, however, the opinion suggests that dredging might occur independent of development of the disposal site: "If a facility is unavailable, the Corps' obligation to dredge in accordance with the [prior] EIS still continues." *Id.* at *14.

"The plaintiffs' argument that improper segmentation occurred *likely* fails for that reason alone." *Id.* (emphasis added).

Lone Tree is distinguishable and its connected actions analysis was incorrect.[18] First, there, unlike here, an earlier EIS had already fully addressed the plaintiffs' environmental concerns. *Id.* at **15-16. Second, its analysis about concurrently pending proposals was mere dicta. *Id.* at *17. Third, its statement about concurrently pending actions was incorrect. *See id.* Contrary to the court's statement, *Kleppe* did not state that connected actions had to be pending concurrently. In fact, as the Fifth Circuit noted in *Fritiofson*, *Kleppe* did not address connected actions at all. 772 F.2d at 1241 n.10. Indeed, the *Lone Tree* court's statement requiring connected actions to be pending concurrently is contradicted by its own quotation earlier in the opinion of *Hirt v. Richardson*, 127 F. Supp. 2d 833 (W.D. Mich. 1999), which acknowledged that "*multiple stages* of a development must be analyzed together when 'the dependency is such that it would be irrational, or at least unwise, to undertake the *first phase if subsequent phases* were not also undertaken.'" *Lone Tree*, 2007 WL 1520904, at *14 (emphasis added) (quoting *Hirt*, 127 F. Supp. 2d at 841-42 (quoting *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985))).[19] The *Lone Tree* court's formalistic reliance on whether there had been an official agency announcement of a proposal is contrary to the independent utility rule,

[18] However, the court's ultimate conclusion that no additional NEPA analysis was required may have been appropriate, given that an entirely adequate NEPA analysis had already been prepared for the dredging operations.

[19] The quotation from *Hirt* also cited *Gilchrist*, where the Fourth Circuit forcefully rejected a temporally segmented project in which the connected action had not yet been formally designated as a proposal. 808 F.2d at 1042-43.

acknowledged in *EDF*, *O'Reilly*, and *Wilderness Workshop*, and codified in the connected actions requirement at § 1508.25(a)(1). It is also contrary to the functional definition of "proposal" in § 1508.23, which acknowledges proposals "in fact." *See Blue Ocean Preservation Soc'y*, 754 F. Supp. at 1461-62. If adopted, the dicta from *Lone Tree* would condone the improper temporal segmentation of projects in order to evade NEPA, as was condemned in *Named Individual Members*, *EDF*, and *Gilchrist*, among other cases.

In *Bullwinkel*, plaintiffs challenged the approval of a site for industrial development, arguing, among other things, that it was connected to a solar energy farm. 899 F. Supp. 2d at 730-31. That case is distinguishable because, there, unlike here, the two projects had independent utility. *Id.* at 731. The district court, however, did cite the dicta from *Lone Tree* that connected actions must be "pending concurrently before an agency." *Id.* at 730. That dicta, however, as noted above with regard to *Lone Tree*, is simply incorrect.

Last, citing *Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115, 1125 (10th Cir. 2009), OSM also asserts that there can be no connected actions in the instant case because coal combustion at FCPP is a continuing action to which NEPA does not apply. The issue in *Greater Yellowstone Coalition*, however, was simply whether ongoing federal oversight over a state activity would trigger NEPA. 572 F.3d at 1123. There was no other federal action. Here, unlike *Greater Yellowstone Coalition*, there is no dispute that there has been a federal action that has triggered NEPA—OSM's approval of mining in Area IV North. Once NEPA was triggered, OSM was required to fully comply with its

requirements, including considering connected actions, such as combustion of the Area IV North coal at FCPP. *See S. Fork Band*, 588 F.3d at 725-26 (concluding, with regard to indirect effects, that NEPA analysis for mine expansion had to consider air pollution impacts from subsequent ore processing at separate facility, even though processing facility was already operating and its rate of ore processing would not change).

3. OSM's remaining arguments fail.

OSM further argues that no analysis of coal combustion was required because (1) the mine expansion will not alter the status quo at FCPP, which will burn the coal from Area IV North at the same historical rates that it burned coal from other segments of the mine, and (2) OSM lacks control and authority over operations at FCPP. Doc. 53 at 34. OSM does not develop these arguments, but simply refers to its parallel arguments with regard to indirect effects. But OSM's "status quo" and "lack-of-authority" arguments fail with regard to indirect effects. *See infra* parts B.2, B.4. For the same reasons, they fail with regard to connected actions.

B. OSM failed to take a hard look at indirect effects of coal combustion and subsequent waste disposal.

Similar to its arguments regarding connected actions, here OSM and BHP do not dispute either that the combustion of the coal from Area IV North and subsequent disposal of the CCW are reasonably foreseeable actions or that the reason for the mine expansion was to supply coal for combustion at FCPP. As such, they satisfy the definition of indirect effects. 40 C.F.R. § 1508.8(b). OSM and BHP also do not dispute

that coal combustion was not adequately evaluated.[20] These concessions establish a NEPA violation. However, OSM again seeks to avoid this conclusion by raising various arguments, which are adopted by BHP. OSM's arguments are without merit.

1. Plaintiffs have not argued that past placement of coal combustion waste is an indirect effect of expanding the mine into Area IV North.

OSM first argues that past placement of CCW from the power plant is not an indirect effect of the proposed expansion into Area IV North. Doc. 53 at 35-36. OSM is correct. Diné CARE, however, has not argued that past placement of CCW is an indirect effect. Rather, it has argued that "coal combustion at FCPP and *subsequent* CCW disposal" are indirect effects "of the expansion of the Navajo Mine into Area IV North." Doc. 48 at 41 (emphasis added). It is this future disposal of CCW that will be produced by the combustion of the coal in Area IV North that Diné CARE asserts OSM was required, but failed, to evaluate. *Id.* at 41-42. Thus, OSM's point about past disposal of coal combustion is correct, but immaterial.

2. Because approval of the mine expansion altered the status quo for the mine, OSM was required to fully evaluate all indirect effects, including coal combustion and subsequent waste disposal.

Next OSM asserts that it was not required to consider the reasonably foreseeable impacts of coal combustion and CCW disposal at FCPP because the proposed mine expansion "did not change the status quo with respect to coal combustion at FCPP."

[20] BHP alone argues that disposal of the CCW that will be produced by combustion of the Area IV North coal was adequately evaluated. Doc. 54 at 21. That argument fails, as elaborated below. *See infra* Part D.3.

Doc. 53 at 41. The flaw in OSM's argument is apparent in its too-careful phrasing which shies away from asserting that the mine expansion does not change the status quo with regard to the *mine*. *See id.* And the challenged mine expansion is plainly going to alter the status quo: it will lead to the strip-mining of approximately 800 acres of high desert land that would not otherwise be strip-mined, and combustion of 12.7 million tons of coal that would not otherwise be burned. AR:1-2-11-29.

The relevant rule with regard to the status quo is that "[t]he duty to prepare an EIS normally is triggered when there is a proposal to change the status quo." *Comm. for Auto. Responsibility v. Solomon* (*CAR*), 603 F.2d 992, 1002-03 (D.C. Cir. 1979); *accord Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980). This rule is based on the idea that when there is "no deterioration from the current state of the environment," *Burbank Anti-Noise Group*, 623 F.2d at 117, requiring a NEPA analysis would "trivialize" the law and "diminish its utility," *CAR*, 603 F.2d at 1003. On the other hand, the status quo rule does not apply to expansions of operations. *CAR*, 603 F.2d at 1003 n.47 ("A revision or expansion of an agency program in a manner constituting major action significantly affecting the quality of the human environment must be accompanied by an EIS.")[21]; *see also Pitt River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (lease extension that granted party additional time to develop geothermal energy altered status quo). Further, the status quo rule should be applied narrowly because it is in tension with NEPA's implementing regulations, which apply to

[21] OSM refers to the challenged mine expansion as a "significant revision." AR:1-2-16-20; *see* 30 C.F.R. § 773.15 (rule governing approval of "significant revisions").

"continuing activities," 40 C.F.R. § 1508.18(a), and because broad application of the rule would not further NEPA's goals of environmental protection, 42 U.S.C. § 4332(1) (laws and regulations should be interpreted to further NEPA's goals).

Here, unlike the cases cited by OSM, the status quo is being changed because the mine is expanding. *Cf. CAR*, 603 F.2d at 1003 (lease of existing parking garage); *Burbank Anti-Noise Group*, 623 F.2d at 115-16 (purchase of existing airport with federal funding); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995) (transfer of ownership of existing ranch); *Westside Property Owners v. Schlesinger*, 597 F.2d 1214,1215-17 (9th Cir. 1979) (bringing new aircraft operations to existing military airport)[22]; *Keep Yellowstone Nuclear Free v. U.S. Dep't of Energy*, No. 07-36, 2007 WL 3237731, at *1, **4-5 (D. Idaho Oct. 30, 2007) (operations and maintenance of existing nuclear test reactor).[23] As such, aside from recognition that the status quo rule does not apply to expansions, the cited cases are not relevant.

[22] *Westside Property Owners* is also distinguishable because it involved cumulative effects of separate activities, not indirect effects of on proposed action and effects of connected actions, as here.

[23] *Tri-Valley CARES v. U.S. Department of Energy*, 671 F.3d 1113 (9th Cir. 2012) differs from the other cases cited by OSM. It is, nevertheless, irrelevant to the instant case. There, the Department of Energy sought to build a certain biosafety lab at Lawrence Livermore National Laboratory. *Id.* at 1118-19. Plaintiffs sued alleging that the agency's NEPA analysis did not adequately evaluate the threat of a possible terrorist attack. *Id.* The court upheld the EA, noting that the agency had evaluated the threat of terrorist attack and concluded that construction of the facility would not alter the status quo regarding potential terrorist attacks, given that hundreds of similar facilities exist across the country. *Id.* at 1126-27. The court deferred to the agency's analysis. *Id.* at 1127. Here, OSM does not argue that it actually considered the impacts of coal combustion—mercury emissions, in particular—and then, as in *Tri-Valley CARES*, determined that they would not have a significant effect on the status quo. Rather, OSM

More relevant is *South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of the Interior*, 588 F.3d 718 (9th Cir. 2009). There, as here, plaintiffs challenged federal approval of a proposed mining expansion project. *Id.* at 722-23. Similar to the instant case, the plaintiffs alleged that the agency's NEPA analysis had failed to consider as indirect effects air pollution from processing the ore at an off-site facility, which would cause "the release of some quantity of mercury, a hazardous air pollutant." *Id.* at 725. The court concluded that the agency violated NEPA by failing to consider the off-site air pollution impacts. *Id.* at 726. In reaching this conclusion, the court found that "[t]he air quality impacts associated with transport and off-site processing of the five million tons of [ore] are prime examples of indirect effects that NEPA requires be considered." *Id.* at 725. The court then directly rejected the status quo argument OSM offers here:

> BLM is incorrect in asserting that these effects need not be considered simply because no change in the rate of shipping and processing is forecast. That may be so, but the mine expansion will create ten additional years of such transportation[;] that is, ten years of environmental impacts that would not be present in the no-action scenario.

Id. at 725-26. The court further noted that, as here, there was no prior NEPA analysis that had properly evaluated the processing facility, "even on a year-to-year basis." *Id.* at 726.

South Fork Band is directly on point. Here, because there is no alternative source of coal, AR:2-11-294 to -95, expansion of the mine will result in the combustion 12.7

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conducted no analysis of mercury from air emissions. As such, *Tri-Valley CARES* is simply irrelevant to this case.

million tons of coal, which, as the court stated in *South Fork Band*, "would not be present in the no-action scenario." 588 F.3d at 726; *see* AR:1-2-11-189 (noting that under the "No Action Alternative . . . coal production . . . would begin to decline"); *see also Pitt River Tribe*, 469 F.3d at 784 (lease extension gave party additional time to develop project). Thus OSM's decision changes the status quo both in allowing the mine to expand and, thereby, allowing combustion of an additional 12.7 million tons of coal and release of the associated pollutants that would not otherwise occur. The additional emissions are important because the chief pollutant of concern, as in *South Fork Band*, is mercury, which "bioaccumulates in the aquatic environment." AR:1-2-14-1962. Thus, the additional mercury emissions—approximately 1,500 lbs[24]—will, even if occurring at a constant rate, cause increased environmental harms. With no contrary analysis from OSM in its EA, which failed entirely to address mercury emissions from FCPP, this significant amount of toxic mercury pollution—more than 1% of total annual mercury emissions from coal plants in the United States, AR:1-2-14-1000—cannot be deemed to have no or only a trivial effect. *Cf. Burbank Anti-Noise Group*, 623 F.2d at 117 (airport sale caused "no deterioration from the current state of the environment"); *CAR*, 603 F.2d at 1003 (applying NEPA to parking lot lease would trivialize law); *see* AR:1-2-14-1966, 1990 (Draft Biological Opinion for Desert Rock finding that 0.1 percent increase (171

[24] FCPP emits over 1,000 lbs. of mercury annually. AR:1-2-14-1946. Annual coal consumption at FCPP is approximately 8.5 million tons. AR:1-2-11-20. Thus, combustion of the 12.7 million tons of coal in the permitted portion of Area IV North should result in the release of approximately 1,500 lbs. of mercury.

lbs.) in annual mercury deposition could jeopardize the continued existence of Colorado pikeminnow).

For these reasons, OSM's status quo argument fails.

3. OSM's arguments that other agencies have evaluated related air pollution impacts is an improper *post hoc* argument of counsel that has been forfeited; OSM's EA did not tier to or incorporate by reference any of the other studies; and none of the other studies cited by OSM evaluated the deleterious mercury impacts from air pollution from FCPP on the Four Corners Region.

OSM next argues that the agency's failure to adequately evaluate the impacts of combustion of the coal from the Area IV North expansion at FCPP should be excused because other state and federal agencies have addressed related air pollution from FCPP under the Clean Air Act. Doc. 53 at 42-46. This argument fails for three reasons. First, OSM never raised this contention either in its EA or in its response to comments. AR:1-2-11-175 to -191 (no argument that other agencies' research and regulation of air pollution obviated the need for OSM to do so in EA); AR:1-2-11-229 to -232 (same); AR:1-2-16-08 to -12 (same).[25] It is therefore forfeited. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574-75 (10th 1994) (agency action may not be upheld on basis "that the agency itself has not given" (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983))).

[25] While OSM's EA cursorily addressed some air pollution from FCPP (though there was *no* mention of mercury) in its cumulative effects analysis, the agency consistently considered them to be external to the impacts of its approval of the mine expansion. Thus such impacts did not inform the agency's critical determination of whether to prepare an EIS—NEPA's fundamental requirement. *See* Doc. 48 at 28-29 (expanding on this point).

Second, while OSM is correct that NEPA's regulations seek to avoid unnecessary duplication, 40 C.F.R. § 1500.4(n), here, OSM did not actually follow any of the approved methods of avoiding such duplication. For example, OSM could have avoided duplication of work by state agencies by including those agencies in a joint NEPA planning process. § 1506.2. OSM could also have adopted any relevant NEPA analysis prepared by other federal agencies, such as EPA. § 1506.3. And if OSM thought that any EPA rules or other documents adequately evaluated air impacts from the foreseeable and intended combustion of coal at FCPP, the agency could have tiered to these documents or incorporated them into its NEPA analysis by reference. § 1502.20; § 1502.21. Having followed none of these permitted means of avoiding duplication which would have allowed OSM to produce a concise NEPA analysis that still fully informs the public and decision-makers of the environmental consequences of its actions, OSM cannot now argue *post hoc* that other agencies' work can substitute for its failure to adequately address air pollution issues in its EA. This very argument was presented and rejected in *South Fork Band*:

> Finally, BLM argues that the off-site impacts [of ore processing] need not be evaluated because the [off-site] facility operates pursuant to a state permit under the Clean Air Act. This argument is also without merit. A non-NEPA document—let alone one prepared and adopted by a state government—cannot satisfy a federal agency's obligations under NEPA.

588 F.3d at 726. And there is good reason that OSM should not be able to shirk its duties under NEPA and then seek to excuse its actions on the basis of work done by other agencies under other laws: NEPA alone operates to require federal agencies to conduct

comprehensive studies across multiple media in order to inform the public and decision-makers of the environmental impacts of agency actions. *See* 40 C.F.R. § 1500.1

Finally, and most importantly, even if OSM could rely on the cited work from New Mexico and the U.S. Environmental Protection Agency (EPA)—various iterations of the Federal Implementation Plan for FCPP, the New Mexico State Implementation Plan under the Clean Air Act, and EPA rules on hazardous air pollutants—none of those documents address Diné CARE's chief concerns in this case: the impacts of mercury pollution from FCPP on aquatic life in the San Juan River watershed, such as the endangered Colorado pikeminnow, and on the communities in the region. Indeed, OSM does not even suggest that the other documents address these impacts. Doc. 53 at 42-46. Thus, the inadequacy of OSM's NEPA analysis is not cured by the efforts of these other agencies.

4. OSM's acknowledged authority over the indirect effects of the mine expansion is sufficient to require it to consider those indirect effects under NEPA.

OSM correctly argues that an agency does not have to consider the effects of an action if it has absolutely no authority or ability to prevent those impacts. This rule does not apply to the instant case, however, because OSM does indeed have substantive authority over the indirect effects of its actions—OSM's recognition of this authority is implied in its hedging statement that is has "*little, if any,* authority to address the effects of emissions from the FCPP." Doc. 53 at 46. OSM is unable to assert outright that it has no authority over these indirect effects.

Department of Transportation v. Public Citizen announced the relevant rule: "[W]here an agency has *no ability* to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered the legally relevant 'cause' of the effect." 541 U.S. 752, 770 (2004) (emphasis added). The reason for this rule is that analysis of environmental impacts would serve no purpose if the agency could not then alter its decision based on the information gained. *Id.* 767-69. Commentators have observed that a broad reading of this rule would be inconsistent with NEPA precedent. *See* Daniel L. Mandelker et al., NEPA Law and Litigation § 8.24.20 (Westlaw 2013). Courts have recognized that this rule is limited to "circumstances where the agency *clearly ha[s] 'no ability'* to take actions that could lessen the environmental impacts of concern to the plaintiffs." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 104 (D.D.C. 2006) (emphasis added), *followed in, Human Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 25-26 (D.D.C. 2007); *see also White Tanks Concerned Citizens, Inc. v. Strock*, 563 F.3d 1033, 1040 (9th Cir. 2009); *League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1217 (9th Cir. 2008). If agency approval of a permit will cause the relevant environmental effects, then the agency has sufficient ability to prevent the effect to require their inclusion in its NEPA analysis. *White Tanks*, 563 F.3d at 1040.

Here, OSM does not dispute that under the Endangered Species Act (ESA), it has the authority and the duty to deny a strip mining permit if the indirect effects of approving the permit will cause jeopardy to listed species. OSM acknowledges that it has the authority to deny an application for a "significant revision of a permit," as here, "if it cannot make the findings specified" in 30 C.F.R. § 773.15 (a regulation promulgated

under the Surface Mining Control and Reclamation Act (SMCRA)). Doc. 53 at 47; *accord* AR:1-2-16-5 ("OSM may only deny the proposed mine plan revision if findings for the permit application cannot be made under 30 CFR § 773.15."); AR: 1-2-7-1 (findings). One such required finding is that: "[t]he operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, *as determined under the Endangered Species Act of 1973*." § 773.15(j) (emphasis added).

Under the ESA, an agency may not take an action if the effects of its action will jeopardize endangered species. 16 U.S.C. § 1536(a)(2). The effects of an agency action include "indirect effects" and the effects of "interrelated" and "interdependent" actions. 50 C.F.R. § 402.02 (definition of "Effects of the action"). The definitions of these terms under the ESA are virtually identical to the definitions of "indirect effects" and "connected actions" under NEPA. *Cf.* 40 C.F.R. §§ 1508.8(b), 1508.27(a)(1). Accordingly, under SMCRA and the ESA, OSM has the ability, authority, and duty to deny an application for a permit revision, as here, if the indirect effects of the action or the effects of "interrelated" and "interdependent" actions (i.e., connected actions) will jeopardize threatened or endangered species. *See White Tanks*, 563 F.3d at 1040 (if agency's denial of permit will prevent impacts, *Public Citizen* does not apply). OSM acknowledged this authority in its published notice of intent to prepare an EIS for post-2016 mine and power plant operations:

> As part of its consideration of impacts of the proposed Project on threatened and endangered species, *OSM will conduct formal consultation with the USFWS pursuant to section 7 of the [ESA]*, 16 U.S.C. 1536, and its

> implementing regulations, 50 CFR Part 400. Formal *consultation will consider* direct and *indirect impacts* from the operation of the Project, *including operation of the FCPP*, continuing operation and maintenance of existing transmission lines and ancillary facilities, and all mining and related operations within the Navajo Mine Lease.

77 Fed. Reg. 42,329, 42,330 (July 18, 2012) (emphasis added).

It is thus not surprising that OSM does not dispute that pollution from combustion of the Area IV North coal at FCPP satisfies the definition of an indirect effect under the ESA ("reasonably certain to occur") and NEPA ("reasonably foreseeable"). Instead, OSM asserts that it does not administer the ESA. Doc. 53 at 50. This point, though, is immaterial because, as OSM acknowledges, it "must comply with the ESA." Doc. 53 at 50. What is relevant is OSM's duty to comply and refrain from acting when doing so would violate the ESA, since *Public Citizen* is solely concerned with an agency's *ability* to prevent a given effect on the basis of information gathered in the NEPA investigation. 541 U.S. at 767-70.

OSM further argues that it is BHP, not the owners and operators of FCPP, that is seeking the current permit revision. Doc. 53 at 50. This point, while true, is also immaterial. As noted above, in making its decision to issue the strip-mining permit, OSM must consider the indirect effects of its actions and the effects of interdependent and interrelated actions under the ESA. 30 C.F.R. § 773.15(j); 50 C.F.R. § 402.02 (definition of "Effects of the action"); *Id.* § 402.14(c)(3) (in consultation agency must provide information about the effects of its action); 16 U.S.C. § 1536(a)(2) (if consultation results in jeopardy finding, no action may go forward). Because the environmental investigation of the indirect effects of mining may reveal information that

would require OSM to deny BHP's application, such investigation would plainly serve a purpose, unlike in *Public Citizen*. *Cf.* 541 U.S. at 767-69 (no analysis of effects required because agency could not, on the basis of such analysis, act to prevent the environmental impacts in question (air emissions from Mexican trucks)). OSM's additional points about the Desert Rock Biological Opinion and the related ESA case do not bear on the critical question of OSM's ability to prevent the air pollution impacts that will result from combustion of the coal from Area IV North at FCPP; as such, they are immaterial.

Because OSM has the acknowledged ability and duty prevent the air pollution impacts of combustion of the Area IV North coal by withholding approval of BHP's permit application (if environmental investigation reveals jeopardy), the rule from *Public Citizen* does not apply. As such, OSM's argument fails.

5. OSM's intent to prepare an EIS in the future for post-2016 operations does not excuse the inadequacies of its EA for pre-2016 operations in Area IV North.

Finally, relying on *Center for Environmental Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1010-11 (9th Cir. 2011), OSM argues that it should be excused for failing to adequately evaluate connected actions and indirect effects because the agency has recently announced its intention to prepare a comprehensive EIS of the mine and the power plant covering post-2016 operations in another mining area (the "Pinebete Permit area"). Doc. 53 at 41, 48-49; 77 Fed. Reg. 42,329, 42,331 (July 18, 2012) (Pinebete expansion project "beginning in 2016"). This argument fails because the rule from *Center for Environmental Law & Policy* applies to the evaluation of *cumulative effects* of *separate*, *future* actions. 655 F.3d at 1009-10. Here, the deficiency in OSM's

analysis is not its failure to adequately consider cumulative effects of separate, future actions (i.e., post-2016 mine and power plant operations), but rather its failure to take a hard look at the indirect effects of the *present* action and connected actions (i.e., pre-2016 mine and power plant operations). *See* AR:1-2-11-28 (purpose of Area IV North expansion is to meet coal supply obligations to FCPP "through July 6, 2016"). To expand the rule from *Center for Environmental Law & Policy* to the present case would run afoul of NEPA's basic premise that agencies must consider environmental effects before commencing an action. *Id.* at 1006 (stating that agencies must complete EA "before the 'go-no go' stage of a project, which is to say before 'making an irreversible or irretrievable commitment of resources'" (internal citations omitted) (quoting *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000))); 42 U.S.C. § 4332(2)(C)(v) (NEPA analysis must address "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented"). As such, OSM's argument fails.

C. An EIS is required because the indirect impacts and the impacts of connected actions implicate multiple significance factors.

OSM is correct that the arguments favoring preparation of an EIS are largely based on OSM's failure to adequately consider the impacts of coal combustion. As such, resolution of the EIS issue turns chiefly on resolution of the issues of connected actions and indirect effects. No greater elaboration of the EIS arguments is warranted here.

A response, however, to OSM's allegations that Diné CARE has made misleading statements about the record, however, is warranted. *See* Doc. 53 at 56 n.16. First, OSM

asserts that Diné CARE has made misleading statements about the record by not noting that an ozone violation occurred at a monitoring station somewhat distant from the mine. Doc. 53 at 55-56. OSM contends that this is misleading because Diné CARE "ha[s] not challenged the scope of the Air Quality Resource Area." Doc. at 56. OSM's argument is a stretch. While Diné CARE has not specifically challenged the scope of OSM's Air Quality Resource Area, it has been plain throughout this case that Diné CARE's central objection is that OSM improperly excluded evaluation of the broader air pollution impacts from FCPP in its evaluation of the mine expansion. *See, e.g.*, Doc. 53 at 52 (OSM acknowledging that Diné CARE's arguments focus on "coal combustion").

OSM also asserts that Diné CARE has made misleading statements alleging "exceedances of the standard for 'nitrogen oxides.'" Doc. 53 at 56 n.56. But the allegedly offending sentence from Diné CARE's brief simply reads: "Further, NO_x emissions have violated ambient air quality standards for ozone in the recent past . . . ." Doc. 48 at 58. While perhaps not phrased as elegantly as possible, the sentence is fair and accurate given that "NO_x is a precursor of ozone formation," AR:1-2-16-9, and that FCPP is the largest source of NO_x pollution in the United States, AR:1-2-14-1094. The sentence does not mention "air quality standards for nitrogen oxides," as OSM asserts. Doc. 53 at 56 n.16. Instead, it expressly references "air quality standards for ozone." Doc. 48 at 58. With respect, Diné CARE submits that OSM's allegations are misplaced.

D. BHP's arguments.

BHP largely joins the arguments of OSM. Doc. 54 at 1-2. As such, additional response is for the most part unnecessary. BHP does raise issues regarding standing, remedies, and CCW that warrant brief reply.

1. Diné CARE has standing.

BHP challenges standing on two bases. Both fail. First, BHP asserts that Diné CARE's members lack standing because OSM has no power to reduce emissions from FCPP. Doc. 54 at 2 n.3. Second, BHP asserts that harm to Diné CARE's members from the surface impacts of strip-mining operations are insufficient to establish standing because Diné CARE's merits arguments focus on impacts from coal combustion. *Id.* Both of BHP's arguments improperly conflate standing and the merits.

Diné CARE has constitutional standing regardless of the merits of its claims. In NEPA cases, if a party is harmed by an agency action, in any regard, the plaintiff will have standing to challenge the agency's NEPA analysis on any basis. *WildEarth Guardians v. Jewell*, Nos. 12-5300, 12-5312, 2013 WL 6767844, at **5-6 (D.C. Cir. Dec. 24, 2013). Article III standing does not require the plaintiff to show "that the specific type of pollution causing [its] injury . . . be the same type that was inadequately considered in the [NEPA analysis]." *Id.* at *5. BHP does not dispute that Diné CARE's members are harmed by the surface impacts of strip-mining operations. Standing based on such harm is sufficient to establish standing for all of Diné CARE NEPA claims.

2. Remedies.

BHP asserts that consideration of remedies is premature at this point, given the bifurcation of merits and remedies in the Joint Case Management Plan. Doc. 54 at 3; Doc. 20. BHP is right. Consideration of the appropriate remedy should be deferred until resolution of the merits.

3. The CCW at issue is that which will be produced when Area IV North coal is burned at FCPP.

Last, BHP address issues related to CCW. BHP asserts that "it is unclear from Petitioners' Brief whether Petitioners challenge OSM's discussion of past CC[W]disposal at the mine, past and current CC[W] disposal at FCPP, or future disposal of CC[W] at FCPP, or some combination of all three." Doc. 54 at 15. To be clear, the CCW impacts that Diné CARE asserts should have been evaluated, but were not, are those that will result—as indirect effects and the effects of a connected action—following combustion of the coal from Area IV North. *See* Doc. 48 at 41 ("Here, . . . coal combustion at FCPP and subsequent CCW disposal are reasonably foreseeable effects of the expansion of the Navajo Mine into Area IV North, which OSM was required, but failed, to fully consider in its NEPA analysis."). As with coal combustion, the EA failed to discuss what would become of this CCW, beyond saying that it would not be buried at FCPP. *See* AR:1-2-11-19 to -20.

BHP, in one paragraph on the last page of its brief, attempts to defend OSM's analysis of the CCW that will be generated by combustion of the coal from Area IV North. Doc. 54 at 21. BHP does not dispute that disposal of this CCW is the effect of a

connected action and an indirect of mine expansion. Instead, BHP cites a single sentence in which the EA states, "There are no indications that other activities at the FCPP have affected the Chaco River alluvial groundwater." Doc. 54 at 21 (quoting AR:1-2-11-222). This oblique statement, however, does not fulfill OSM's duty to fully analyze the impacts of CCW disposal. As noted in Diné CARE's opening brief, it does not address impacts to surface water, and it does not address or respond to other reports showing that CCW disposal at FCPP is affecting water quality in the Chaco River. Doc. 48 at 56; *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1318 (W.D. Wash 1994) ("[An EIS] must also disclose responsible scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it."). Further, there is no mention of where FCPP is going to be placing CCW *in the future* (i.e., the CCW from combustion of Area IV coal) now that backfilling at the mine has been discontinued. As such, the EA's cursory reference to disposal of CCW at FCPP did not satisfy its obligations under NEPA.

CONCLUSION

For the foregoing reasons and for those in its opening brief, Diné CARE respectfully requests that this Court declare OSM's NEPA analysis of the Area IV North Permit Revision Application arbitrary, capricious and unlawful.

Respectfully submitted this 10th day of January 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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