

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

WILDEARTH GUARDIANS,)	
)	IBLA No. 2013-110
)	
Appellant)	Notice of Appeal, Blue Mountain
)	Energy Coal Lease, COC-74813, Rio
)	Blanco and Moffat Counties, Colorado
)	
)	
_____)	

ANSWER OF BLUE MOUNTAIN ENERGY, INC.

Introduction

Pursuant to 43 C.F.R. § 4.414, Blue Mountain Energy, Inc. submits this Answer to the Statement of Reasons (“SOR”) submitted by WildEarth Guardians in the above-captioned proceedings.¹ Blue Mountain holds seven federal coal leases for the Deserado Mine and submitted a Lease-by-Application (“LBA”) to the Bureau of Land Management (“BLM”) for the coal property that is the subject of this appeal. Blue Mountain’s LBA covers approximately 3,154.76 acres of federal coal reserves that are adjacent to the Deserado Mine and that are located in Rio Blanco and Moffat Counties, Colorado. Coal at the Deserado Mine is recovered by means of an underground “long-wall” mining operation that has operated within the current coal seam since the development of main mine entries and conveyor systems in 1998. The coal from the reserves would become part of the Deserado Mine and mining operations would extend into the new reserves as a logical extension of the existing underground workings. *See* BLM, Environmental Assessment for the Blue Mountain Energy Coal Lease Application COC74813 (February 2013) (“EA”).

¹ This Board granted Blue Mountain’s motion to intervene on May 23, 2013.

On May 29, 2013, BLM accepted Blue Mountain's bid for the coal reserves within the LBA. The new coal reserves would allow the Deserado Mine to extend coal mining operations until 2032; however, due to geological conditions and the current approved mining plan, the logical sequence of safe mining would result in Blue Mountain mining the new reserves as early as late summer 2013, perhaps within the next 60 days. A delay in mining the new reserves as a result of setting aside or remanding the BLM decision would therefore interfere with the approved mining plan, and will force Blue Mountain to begin permanently bypassing recoverable coal reserves. This in turn would force the Mine to begin shortening developed and planned long-wall panels and increase the frequency of difficult, challenging longwall moves in the coming years. Doing so would require careful planning and adequate safety measures to account for exposure of the professional workforce to otherwise potential risks of unnecessarily shortened coal panels. Such measures will eventually shorten the number of years Blue Mountain could continue mining in the existing mine development.

WildEarth Guardians seems to be under the misimpression that BLM's approval of Blue Mountain's LBA will result in an extension of the life of the Bonanza Power Station to which the Deserado Mine output is sold. But WildEarth's "connected-action" argument is contrary to the record and fact. After an evaluation of this exact question, BLM specifically found that if the LBA is disapproved, the Bonanza Station can find replacement coal from other sources.² Thus, emissions from Bonanza Station will almost certainly remain unaffected by BLM's decision, regardless whether the LBA is approved. For that and other reasons discussed below, BLM was not required to examine the environmental impacts of the continued operation of the Bonanza Station as a "connected action" under the National Environmental Policy Act ("NEPA"), 42

² BLM, Record of Decision ("ROD") at 7-8.

U.S.C. § 4321, *et seq.* Although WildEarth wants to divert the Board's attention to the Bonanza Station, this case first and foremost concerns the validity of BLM's assessment of the environmental impacts of mining the coal on the proposed lease.

WildEarth also far overstates the importance of the high ozone readings at the Rangely ozone monitor in the first part of this year. For multiple reasons, those readings do not invalidate BLM's EA:

- As BLM found, Deserado Mine emissions that could conceivably create ozone are small;
- The Mine (and the Bonanza Station for that matter) have operated for decades without creating ozone problems;
- Approval of the LBA would not result in an increased rate of production, and therefore increased emissions, at the Mine;
- Environmental regulation will ensure that the true causes of any ozone nonattainment problems are addressed;
- Although the EA was prepared before the 2013 Rangely monitor readings, it anticipated the possibility of such readings by analyzing the possible causes of similarly high readings at other ozone monitors in the region and the relatively high readings at the Rangely monitor in 2010 and 2011;
- A draft environmental impact statement that BLM is preparing that exhaustively examines the impact of the significant new oil and gas development in the region concludes that, even with increased oil and gas development, future ozone levels will likely fall because of environmental regulation of existing and new facilities.

WildEarth's other arguments are makeweight and may readily be rejected. Its NEPA alternative argument is too conclusory and the alternatives it offers are too speculative to warrant detailed consideration. And its claim under the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, *et seq.*, has been previously rejected by this Board and in court, and therefore should be summarily dismissed.

In sum, as discussed in more detail below, BLM fully complied with its NEPA obligation to take a “hard look” at the impact of approving the LBA and reasonably concluded that LBA-approval would cause no significant impact. WildEarth’s appeal should be rejected.³

Argument

1. BLM Was Not Required to Examine the Bonanza Station’s Emissions as Part of a NEPA “Connected-Action” Analysis.

WildEarth claims that BLM failed to treat continued operation of the Bonanza Station as a “connected action” to BLM’s decision to approve coal Blue Mountain’s LBA and therefore failed to sufficiently consider the impact of the Station’s emissions. SOR at 6-9. WildEarth’s claim rests on its unsupported assertion that continuation of the Bonanza Station is dependent on issuance of this coal lease. *Id.* at 9. This assertion, however, is factually inaccurate and contrary to the record. Although it is true that the Bonanza Station is the only outlet for the Deserado Mine coal, it is not true that the Bonanza Station could not continue to operate indefinitely if BLM disapproves the LBA. As the BLM’s ROD states:

The Deserado Mine has supplied the Bonanza Power Plant for more than 27 years and if the LBA is leased and approved for mining, BME’s Deserado Mine would continue to supply the Bonanza Power Plant through 2032... *The inability of BME to supply coal to Bonanza Power Plant would not cause electric generators to stop burning coal. Operations of the existing coal-burning facility would continue utilizing*

³ WildEarth filed two comment letters on the EA, a January 11, 2012 letter providing scoping comments and an October 5, 2012 letter on the draft EA. WildEarth’s October 5, 2012 letter was extremely brief and made, in a highly summary fashion, the NEPA ozone-impacts argument that WildEarth makes in its SOR. The October 5, 2012 letter did not make either WildEarth’s NEPA alternatives argument or its FLPMA argument nor did it refer to the January 11, 2012 letter or incorporate it by reference. In preparing the final EA, therefore, BLM may logically have assumed that WildEarth was no longer pressing its NEPA alternatives claim or its FLPMA claim. Those claims should now be deemed waived. *See Forest Service Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10th Cir. 2007) (“Parties generally must structure their participation so that it alerts the agency to the parties’ position and contentions, in order to allow the agency to give the issue meaningful consideration” (citations and internal quotation marks deleted)). Indeed, given WildEarth’s cursory discussion of its NEPA ozone-impacts claim in the October 5, 2012 letter, that argument should be deemed waived as well. Blue Mountain’s substantive response to all three of these arguments in this Answer is in addition to and in the alternative to Blue Mountain’s contention that these arguments are waived.

alternative coal sources from Colorado, Utah or Wyoming. This would continue until either cost or regulatory requirements make them ineffective, or until they are replaced by an alternative electric generator.

ROD at 7-8 (emphasis supplied).⁴

WildEarth failed to offer any evidence to contradict this BLM's finding and indeed did not even mention it at all. BLM's finding must therefore be accepted by this Board.

Because the Bonanza Station would continue to operate even if the Deserado Mine is closed, WildEarth's "connected-action" argument cannot stand. Here is how WildEarth formulates its argument:

Using the Tenth Circuit's "independent utility" test, the question here is straightforward: Would the operation of the Bonanza Power Station be extended without the approval of the Blue Mountain Energy Coal Lease? The answer is similarly straightforward: "no." But for the approval of the Blue Mountain Energy Coal Lease, the life of the Bonanza Power Station would not be extended. In accordance with NEPA, the BLM was therefore obligated to analyze and assess the impacts of this connected action to support its EA and FONSI.

SOR at 9. WildEarth, however, has its facts wrong; what is "straightforward," therefore, is that its legal argument must fail.

WildEarth's "connected-action" argument fails for yet another reason—namely, there is no "action" as to Bonanza that the BLM action at issue here could be connected to. WildEarth seems to assume that there is some life-extension project proposed at the existing Bonanza generating facility. Yet WildEarth produces no evidence of any such project; there is none. The existing Bonanza facility is already permitted and will continue to operate indefinitely without

⁴ WildEarth leaps irrationally to the conclusion that simply because Deserado coal is destined exclusively for the Bonanza Station, the Bonanza Station is somehow precluded from obtaining alternative fuel supply from various coal sources in the region. Although the existing capital investment in mining infrastructure and coal delivery system at Deserado continue to make this coal supply the optimal source for Bonanza Station, if anything, the reasonable assumption is that, were the Deserado coal reserves unavailable, the Bonanza Station would likely seek to purchase much less expensive, somewhat similar quality fuel stock such as those available from Wyoming's Powder River Basin reserves, thereby *significantly extending* the operational life of generating units and *increasing* coal consumption at Bonanza Station.

further federal action needed or anticipated. WildEarth's argument thus must be rejected because the "connected-action" doctrine does not apply where only one action is proposed.⁵ The cases that WildEarth cites state that the purpose of the "connected-action" doctrine is to prevent federal agencies from carving into separate actions what is essentially a single action, or at least closely connected actions, in order to evade the full requirements of NEPA.⁶ That policy concern does not apply here where there is only one action proposed.

Even though no "connected action" is proposed at Bonanza, BLM assessed Bonanza's emissions as a part of its cumulative analysis of the impact of mining the new coal lease. EA at 28-30. WildEarth, however, does not challenge the sufficiency of this cumulative analysis, only BLM's asserted failure to analyze Bonanza's emissions as a part of a "connected-action" analysis.⁷ Thus, the record contains no evidence contradicting the sufficiency of BLM's analysis of Bonanza's emissions *as a cumulative impact*.

In sum, because Bonanza's continued operation is not dependent on the Deserado Mine, and because there is no "action" at Bonanza that is "connected" to the new coal lease, WildEarth's attack on the sufficiency of BLM's analysis of the generating facility's emissions must be rejected.

⁵ See *Wilderness Workshop v. Bureau of Land Mgmt.*, 531 F.3d 1220, 1229 (10th Cir. 2008) ("[i]t is important to note that 'projects,' for purposes of NEPA, are described as 'proposed actions,' or proposals in which action is imminent"); *Webster v. U.S. Dept. of Agric.*, Civil Action No. 2:09cv138, 2011 U.S. Dist. LEXIS 156004, at *21-22 (N.D. W.Va. June 13, 2011), *aff'd* 685 F.3d 411 (4th Cir. 2012) ("[t]he potential future construction of a water treatment plant is not a 'connected action' – indeed, it is not an 'action' at all, since it is not a proposed federal project.").

⁶ See *Wilderness Workshop*, 531 F.3d at 1228; *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006); *South Carolina ex. rel. Campbell v. O'Leary*, 64 F.3d 892, 898 (4th Cir. 1995).

⁷ SOR at 9-10 (criticizing the EA for considering the Bonanza Station's emissions as a cumulative impact rather than a connected-action impact requiring a more detailed analysis).

2. BLM Adequately Considered the Impacts of the Mine's Emissions on Ozone Formation.

WildEarth claims that the 2013 Rangely ozone readings fatally undermine the EA's analysis of the impacts that the Mine will have on air quality. SOR at 17-20. But WildEarth fails to address the obvious fact that the Mine has produced coal for decades without causing ozone problems, and hence cannot be the cause of the 2013 elevated readings. Nor will the Mine increase production or emissions in the future, and thus the Mine will not be the source of future ozone problems. WildEarth similarly fails to come to grips with the inescapable fact that the Mine emits only minor amounts of substances that might contribute to ozone formation.

WildEarth also does not address the national and state system of environmental regulation under which facilities deemed to cause or contribute to nonattainment of federally-established ozone standards will be required to reduce emissions in order to eliminate the violation. Finally, WildEarth's criticism of the modeling that BLM used to predict future ozone concentrations reflects a misunderstanding of the purpose of the modeling and its results.

a. The Mine cannot be the cause of or a meaningful contributor to the 2013 Rangely ozone monitor readings.

WildEarth's argument that BLM failed to adequately examine emissions at the Mine relies entirely on the fact that, following completion of the EA, the Rangely ozone monitor recorded ozone concentrations in 2013 that are in excess of the ozone standard set by the U.S. Environmental Protection Agency ("EPA").⁸ EPA has set a standard (a "National Ambient Air Quality Standard," or "NAAQS") for ozone of 0.075 parts per million ("ppm").⁹ The standard is deemed to be exceeded if the three-year average of the fourth highest annual ozone readings is

⁸ SOR at 15-16.

⁹ EA at 15.

higher than that level.¹⁰ Although the Rangely monitor has never previously yielded a fourth-highest reading that is higher than 0.075 ppm, WildEarth says that the fourth highest reading experienced so far this year is high enough that the three-year average is 0.077 ppm.¹¹

WildEarth, however, offers no evidence that coal production at the Deserado Mine contributed in any meaningful way to these elevated 2013 readings.¹² The Deserado Mine has produced coal since 1983.¹³ Issuance of the lease would not result in a higher rate of production compared to historical levels. As the EA states, if the lease is issued to BME, “[m]ining operations would continue at the current production rate of approximately 2 million tons of deliverable coal per year.... development of the coal resources in the LBA will likely occur in a similar manner as the current Federal coal resource recovery in the adjacent lease under the provision of the approved Deserado Mine Permit (C-1981-018).”¹⁴ Since mining production levels would not change, and since “currently employed extraction and processing methodologies would not increase or change,”¹⁵ emissions levels would not change either. As

¹⁰ *Id.*

¹¹ Blue Mountain has not verified WildEarth’s claim as to the 2013 ozone-monitor readings and assumes them to be true for purposes of this response. So far as Blue Mountain is aware, however, and WildEarth makes no claim to the contrary, no action has been taken so far to initiate the process under 42 U.S.C. § 7407(d) to designate the Rangely area as nonattainment for ozone. Simply because the three-year average of fourth highest ozone readings exceeds the ozone standard does not automatically mean the area will be designated nonattainment. For instance, data showing exceedances of the standard can be disregarded if the exceedance is the result of an “exceptional event,” such as fire or unusual meteorological conditions. *See* EPA, “Treatment of Data Influenced by Exceptional Events,” 72 Fed. Reg. 13, 1560 (Mar. 22, 2007), and EPA, “Interim Guidance to Implement Requirements for the Treatment of Air Quality Monitoring Data Influenced by Exceptional Events” (May 10, 2013), available at http://www.epa.gov/ttn/analysis/docs/exceptevents_guidememo_130510.pdf (last visited May 30, 2013).

¹² *Cf. WildEarth Guardians and Sierra Club*, 182 IBLA 100, 106 (2012) (rejecting another WildEarth challenge to a coal lease because “WildEarth does not offer any expert opinion or evidence that ... establishes that any potential environmental impact *specifically attributable to the proposed leasing and development* of the ECET was other than assessed by BLM” (emphasis added)).

¹³ EA at 4.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 19.

the EA states, air quality “[i]mpacts from leasing of the coal resources in the LBA would continue current impacts at the same level as in the past and present.”¹⁶ A detailed air quality assessment that was performed for the Mine’s last permit modification in 2003, based on the same level of coal production that will continue if the new lease is granted, gave the Mine a clean air quality bill of health.¹⁷ After three decades of mining that has resulted in no ozone concerns, 2013’s elevated ozone readings cannot be attributed to the Deserado Mine nor can the possibility of future elevated ozone levels be attributed to a decision to allow continued mining at historical levels.¹⁸

b. WildEarth fails to counter BLM’s findings that approving the LBA will not significantly impact ozone levels because the Mine’s emissions of NO_x and VOCs are small.

In determining that emissions from the Deserado Mine are not likely to cause ozone-formation problems, BLM reasonably relied on the fact that Deserado Mine nitrogen oxide (“NO_x”) and volatile organic compounds (“VOC”) emissions are small and well-controlled as required by environmental regulation.¹⁹ NO_x emissions at the Deserado Mine are primarily produced by diesel-fueled mobile equipment.²⁰ BLM quantified these emissions to the extent

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 25.

¹⁸ WildEarth asserts that a “key underpinning” of BLM’s Finding of No Significant Impact is the statement in the EA that “[t]he cumulative impacts of the Proposed Action are not anticipated to exceed any NAAQS,... and should not result in any net change to baseline air quality given that the mine and Bonanza Power Station are existing sources within the regional emissions profile.” WildEarth asserts that the credibility of this statement is undermined by the 2013 ozone data from the Rangely monitor. SOR at 17-18. But WildEarth’s statement utterly fails to come to grips with the decades-long operating history of the Mine and generating facility that resulted in no ozone exceedances.

¹⁹ Ozone is not directly emitted but instead is formed in the atmosphere as sunlight reacts with certain naturally occurring and anthropogenically emitted chemical compounds. NO_x and VOCs are ozone “precursors” in that the emission of these substances can react in the atmosphere to create ozone. They are also the only mining emissions that could possibly be linked with ozone formation. EA at 17.

²⁰ EA at 21-22.

feasible,²¹ and concluded that “emissions from these sources are not expected to impact regional air quality due to the fact that they are a very small portion of the existing county inventory and are not significant by themselves.”²² As BLM found, the Mine’s NO_x emissions are not “major emissions of concern from the Deserado Mine, and therefore the mine’s contributions of these emissions in the regional context should produce [] minor or insignificant impacts on potential regional ozone formation.”²³ Indeed, the Mine’s NO_x emissions are below the level that would trigger a Colorado Department of Public Health and the Environment (“CDPHE”) requirement that a stationary source seeking an air permit would be required to perform ozone modeling.²⁴

The same is the case for the Mine’s methane emissions. As the EA found, although methane itself is not a regulated VOC, recent analyses indicate that regulated VOCs make up some percentage of coal mine methane emissions.²⁵ The CDPHE has examined whether the VOC component of coal mine methane emissions should be regulated and at this point has found no basis to regulate.²⁶ If it does decide to regulate, however, its emissions thresholds for permitting are sufficiently low that such regulation would likely cover coal mine VOC emissions from the Deserado Mine and therefore would subject the Mine’s emissions to appropriate regulatory limitations.²⁷

²¹ *Id.* at 22, Table 4.

²² *Id.* at 25.

²³ *Id.* at 28.

²⁴ *Id.* at B-6.

²⁵ *Id.* at 20.

²⁶ *Id.*

²⁷ *Id.*

WildEarth complains that BLM did not exactly quantify the Mine's methane emissions (there being no available data as to these emissions, EA at 22, Table 4). But WildEarth reaches the illogical and unfounded conclusion that because the Mine produces small but not precisely quantified VOC emissions, the effect of the Mine's VOC emissions on ozone formation must be "highly uncertain or involve unique or unknown risks" within the meaning of 40 C.F.R. §1508.27(b)(5).²⁸ But precise quantification is not necessary to determine that the Mine's VOC emissions are small enough not to create concern. In the end, WildEarth has not brought forth any evidence to show that the Mine's small VOC emissions "involve unique or unknown risks" of any consequence.²⁹

Although the Mine's NO_x and VOC emissions are low and cannot be expected to affect ozone levels, the EA nevertheless considered regional ozone levels and any possible contribution the Mine might make to such levels.³⁰ As set forth in the EA, ozone formation is a regional phenomenon that results from complex non-linear atmospheric processes – increased ozone precursor emissions do not result in increased ozone formation on a one-for-one basis.³¹ Moreover, elevated ozone concentrations at a particular ozone monitor may not reflect local emissions sources but may instead be caused by windblown ozone from a distant location.³² As a result, models cannot simulate how minor emissions of ozone precursors occurring at one

²⁸ SOR at 18.

²⁹ See *Great Basin Mine Watch*, 148 IBLA 1, 9 (1999) (absent objective proof to the contrary, NEPA does not require detailed analysis of impacts that BLM regards as insignificant").

³⁰ EA at 15-26.

³¹ *Id.* at 17.

³² *Id.*

source, for instance the Deserado Mine, will affect regional ozone levels.³³ BLM accordingly and appropriately assessed the possibility that the Mine's NO_x and VOC emissions might affect regional ozone concentrations on a qualitative basis and concluded that because these emissions are small in relation to regional emissions, the Mine's emissions do not pose an air quality concern.³⁴ As the EA concluded, "[t]he Deserado Mine sources (including all of the diesel fuel fired mobile sources) and associated processing equipment are not significant sources of NO_x or VOC emissions..., the photochemical reactivity potential of methane in the troposphere is considered negligible..., and therefore the mine's operations are not expected to contribute significantly to any regional ozone formation potential."³⁵ In the absence of reliable quantification methods, BLM's qualitative approach was appropriate.³⁶

c. The EA discussed and analyzed the phenomenon of high wintertime ozone concentrations that have been recorded at other monitors in the region, including the Rangely monitor.

The high 2013 ozone readings at the Rangely monitor are not a surprise, and the conditions that led to these readings have caused high readings at other ozone monitors in the region in the recent past. The EA stated that although air quality in the area of the Mine is "good," activities in the region "have caused localized or regional increases in pollution monitoring values within the past few years."³⁷ The EA also discussed the phenomenon that

³³ *Id.*

³⁴ *Id.* at 17, 19.

³⁵ *Id.* at 26.

³⁶ *League of Wilderness Defenders-Blue Mountain Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1076 (9th Cir. 2012) ("qualitative analyses are acceptable in an EIS where an agency explains 'why objective data cannot be provided,'" citing *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 & n.1 (9th Cir. 2004)).

³⁷ EA at 14.

may be causing the recent readings at the Rangely monitor. As the EA reported, although ozone formation is generally a summertime phenomenon, some higher-elevation areas in the West have experienced high wintertime ozone readings at times of high snow cover.³⁸

This issue was discussed at much greater length in the comprehensive draft environmental impact statement (“DEIS”) that BLM is preparing in connection with significantly increased regional oil and gas development in BLM’s White River region.³⁹ BLM relied on this DEIS in responding to WildEarth’s comments on the ozone issue.⁴⁰ As the DEIS found, oil and gas production is now the single largest source of emissions in the region.⁴¹ Although prepared before the 2013 Rangely ozone monitor readings, the DEIS noted that the three highest daily ozone readings at the Rangely monitor for 2011 were above 0.075 ppm and had reached as high as 0.088 ppm.⁴² These 2012 readings occurred in February. The DEIS stated that the cause of these unusual wintertime ozone readings—which have now recurred in 2013 and which are similar to high wintertime ozone readings in some (but not other) nearby locations—has not been determined, although causes could include long-range pollutant transport or a combination of unusual winter conditions conducive to ozone formation.⁴³

Ultimately, BLM’s modeling, using the EPA-approved model for simulating ozone creation, predicted that even with the significant new oil and gas development (and including baseline emissions that account for the Deserado Mine and Bonanza Station), ozone levels will

³⁸ *Id.* at 17.

³⁹ BLM, DRAFT RESOURCE MANAGEMENT PLAN AMENDMENT AND ENVIRONMENTAL IMPACT STATEMENT FOR OIL AND GAS DEVELOPMENT 4-24 (August 2012).

⁴⁰ EA at B-5 - B-6.

⁴¹ DEIS at 4-24.

⁴² *Id.* at 4-471.

⁴³ *Id.* at 4-470-71.

fall in the future because of state- and EPA-mandated emissions controls.⁴⁴ WildEarth disagrees; it has petitioned BLM to supplement its DEIS to account for the 2013 Rangely ozone monitor readings.⁴⁵ But in this Petition, WildEarth reveals its view that it is not the Deserado Mine that is causing the ozone concern, but oil and gas leasing and, in WildEarth's view, the Bonanza Station. WildEarth's petition places great stock in the fact that the Rangely ozone monitor readings are similar to those obtained from an ozone monitor in the Uintah Basin in Utah and at other nearby ozone monitors in Utah beginning in 2010. As WildEarth's petition states, the Utah Department of Environmental Quality has studied the Uintah Basin exceedances and concluded that 98-99% of all regional VOC emissions and 57-61% of all regional NO_x emissions result from oil and gas development, with the Bonanza Station another material NO_x emitter.⁴⁶ Coal mining is thus not the culprit.⁴⁷ In any event, BLM's discussion of the wintertime high ozone phenomenon that has recurred in 2013 (at a somewhat higher level) at the Rangely monitor fulfilled the agency's responsibility to present a "reasonably thorough discussion of . . . significant aspects of the probable environmental consequences."⁴⁸

d. The EA appropriately considered environmental regulations in concluding that approving the LBA will not significantly impact ozone levels.

The EA also appropriately considered the environmental regulatory scheme under which ozone is regulated. Under the federal Clean Air Act, 42 U.S.C. § 7401, *et seq.*, ozone is a

⁴⁴ *Id.* at Chapter 4.

⁴⁵ WildEarth Guardians' Petitions to Revise (May 15, 2013). WildEarth's Petition may be found at <https://www.dropbox.com/s/npljmv6erj5brnn/White%20River%20Field%20Office%20Petition%20w-o%20Exhibits%20w-Cover.pdf>.

⁴⁶ Petition at 12.

⁴⁷ Nor is it likely that the Bonanza electric generating station is the cause of the ozone exceedances, as Bonanza, like the Deserado Mine, has operated for decades without causing elevated ozone readings.

⁴⁸ *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1248 (M.D. Pa.1992) (internal quotation marks and citations omitted).

“criteria air pollutant” for which EPA has set a NAAQS at a level that, in the judgment of the EPA Administrator, is sufficient to protect the public health with a margin of safety and without considering the cost of compliance.⁴⁹ Currently, the affected project region is deemed to be in attainment of EPA’s ozone NAAQS. CDPHE is therefore required to have on file with EPA an approved State Implementation Plan containing measures to ensure that the area remains in attainment.⁵⁰ If the area nevertheless slips out of attainment, CDPHE will be required to submit a new plan containing highly stringent measures to ensure that the area reverts to attainment status as expeditiously as possible but no longer than five years unless EPA grants an additional five-year extension for good cause shown.⁵¹ Thus, if as WildEarth claims, Rio Blanco County will become an ozone nonattainment area, CDPHE will be required to develop a plan to eliminate the nonattainment, and if CDPHE determines that the Deserado Mine’s ozone precursor emissions contribute to that nonattainment, the Mine will be forced to reduce those emissions to the extent necessary.⁵² As this Board said in a recent decision involving a coal lease:

This Board has previously held that BLM properly may rely on the State, which is subject to oversight by the EPA, to ensure permitted activities do not exceed or violate any State or Federal air quality standard under the CAA, 42 U.S.C. §§ 7401-7671q (2006). *See, e.g., Wyoming Outdoor Council, 176 IBLA 15, 27 (2008)* (“[I]n approving the Project, BLM properly assumed that emissions would be regulated, and, if necessary, controlled so as to satisfy both Federal and State air quality standards”); *id. at 30* (“In assessing the potential significant environmental impacts in the EIS, BLM properly relied upon the adequacy of State enforcement to ensure that no CAA violation

⁴⁹ 42 U.S.C. §§ 7408-09.

⁵⁰ 42 U.S.C. § 7410.

⁵¹ *Id.* and 42 U.S.C. Chapter 85, Subchapter I, Part D. The Clean Air Act requirements for attainment and nonattainment areas are described more fully in Julie R. Domike and Alec C. Zacaroli, *THE CLEAN AIR ACT HANDBOOK* (3d ed. 2011), chs. 3 and 6.

⁵² EA at 14.

occurs"); *see also WildEarth Guardians*, July 2012 Mem. Opinion at 27 (BLM satisfied its FLPMA obligation “by preparing a lease for the WAIL tracts requiring compliance with air and water quality standards”). We have held, moreover, that “BLM need not evaluate the potential environmental consequences resulting from noncompliance with Federal and State permitting requirements or assume that violations of Federal and State standards will inevitably occur.” *Powder River Basin Resource Council*, 180 IBLA at 57.⁵³

WildEarth also fails to consider or acknowledge that the Deserado Mine is required, pursuant to 5 Colo. Code Regs. § 1001-5 (LexisNexis 2013) of the Colorado Code of Regulations, to obtain and operate in accordance with a state air permit that governs emissions of potentially harmful pollutants. BLM has satisfied its obligations by relying, as it should, on the adequacy and effectiveness of those air permit requirements that address emissions at the Deserado Mine.⁵⁴

e. BLM reasonably relied on modeling to conclude that approving the LBA will not significantly impact ozone levels.

WildEarth’s critique of the ozone modeling that BLM performed for the DEIS reflects a fundamental misunderstanding of BLM’s modeling effort and the role of the model’s results in BLM’s conclusions in the EA. In the first place, the EA did not primarily rely on the DEIS modeling to conclude that approval of Blue Mountain’s LBA would not materially affect ozone levels. Indeed, the body of the EA does not even refer to the modeling and instead relied on the factors discussed above—that ozone precursor emissions from the Mine are minimal, that approval of the LBA will not increase those emissions, and that the Mine’s emissions have not previously been responsible for elevated ozone concentrations.

⁵³ *Powder River Basin Resource Council*, 183 IBLA 83, 95, 2012 IBLA LEXIS 40, at *28-29 (2012) (footnote omitted).

⁵⁴ EA at 20.

Moreover, the elevated readings at the Rangely ozone monitor in 2013 do not, as WildEarth asserts,⁵⁵ undermine the credibility of the modeling. The modeling was a projection of future ozone concentrations under four alternative scenarios of future oil and gas development.⁵⁶ In all scenarios analyzed, ozone concentrations at all receptor locations showed attainment of the ozone standard, and indeed the model predicted a reduction in the number of days with ozone concentrations above 0.075 ppm and the number of areas with absolute ozone concentrations above that level.⁵⁷ The DEIS recognized that this result might seem improbable given the extensive new projected oil and gas development, but explained it on the basis of stringent emissions controls that oil and gas operations will be required to meet, and stringent EPA NO_x-reduction requirements now being implemented that will lower future emissions from existing sources.⁵⁸

The DEIS, however, was careful to explain the uncertainties inherent in these model projections. Although the model was one of the best available models for simulating ozone formation (a fact that WildEarth concedes⁵⁹), BLM noted the following modeling limitations:

- potential inaccuracies in emissions inventories (which include emissions from the 48 contiguous states);
- potential inability to accurately model stratospheric ozone intrusion at high-altitude monitors;
- potential inability to accurately model winter ozone events;

⁵⁵ EA at 19-20.

⁵⁶ DEIS at 4-19.

⁵⁷ *Id.* at 4-469-70.

⁵⁸ *Id.* at 4-470.

⁵⁹ WildEarth states that it that “does not question the validity” of the model, which it states was “comprehensive” and based on proper methodologies. SOR at 19.

- potential difficulty modeling extremely complex terrain in the Rocky Mountains; and
- lack of ozone monitoring data that could be used to evaluate model performance at locations within the oil and gas development areas in the White River Field Office region.⁶⁰

As stated above, the DEIS also discussed the fact that although the Rangely ozone monitor had not, at the time the DEIS was prepared, experienced fourth-highest annual ozone readings above 0.075 ppm, it had experienced high ozone readings in 2010 and 2011.⁶¹ As also stated above, the DEIS noted that these wintertime ozone readings mirrored high ozone readings in the Uintah Basin, and these unusual wintertime readings could have the same cause. On the other hand, the DEIS noted that another nearby ozone monitor was not experiencing elevated ozone readings.⁶² In any event, the DEIS concluded that the modeling predicted a greater number of ozone-concentration reductions than increases at the Rangely monitor.⁶³

BLM's comprehensive discussion of the ozone modeling, including the model's limitations, complied with the agency's obligation, as part of its "hard look" at possible environmental impacts, to provide a "reasoned explanation" for its policy choices.⁶⁴ BLM was not required to have scientific certainty before reaching conclusions.⁶⁵ An agency's NEPA analysis will be upheld so long as the agency, as BLM did here, discloses and discusses the

⁶⁰ DEIS at 4-469.

⁶¹ *Id.* at 4-470-71.

⁶² *Id.* at 4-471.

⁶³ *Id.* at 4-469.

⁶⁴ *Wyoming State Snowmobile Ass'n v. U.S. Fish and Wildlife Serv.*, 741 F. Supp. 2d 1245, 1256-1257 (D. Wyo. 2010).

⁶⁵ *Village of False Pass v. Clark*, 733 F.2d 605, 614 (9th Cir. 1984), citing *Sierra Club v. Sigler*, 695 F.2d 957, 970 (5th Cir. 1983) ("the unavailability of information, ... should not be permitted to halt all government action ...").

uncertainty.⁶⁶ Courts moreover “defer to the expertise and discretion” of agencies in determining analytical methodologies.⁶⁷ BLM fully discussed the uncertainties in the ozone modeling. It was required to do no more.⁶⁸

f. Conclusion as to ozone impacts.

In sum, in deciding whether BLM has taken the required “hard look” at potential environmental impacts, this Board is governed by a “rule of reason”:

An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. By nature, it is intended to be an overview of environmental concerns, *not* an exhaustive study of all environmental issues which the project raises. If it were, there would be no distinction between it and an EIS. Because it is a preliminary study done to determine whether more in-depth study analysis is required, an EA is necessarily based on “incomplete and uncertain information.” *Blue Ocean Preservation Society v. Watkins*, 767 F.Supp. 1518, 1526 (D. Hawaii 1991) So long as an EA contains a “‘reasonably thorough discussion of . . . significant aspects of the probable environmental consequences,’” NEPA requirements have been satisfied. *Sierra Club v. United States Department of Transportation*, 664 F.Supp. 1324, 1338 (N.D.Ca. 1987), . . . quoting *Trout Unlimited v. Norton*, 509 F.2d 1276, 1283 (9th Cir. 1983). [Footnote deleted.]⁶⁹

Considering the record as a whole,⁷⁰ the EA more than met this standard. The EA examined the potential impact of the Mine’s NO_x and VOC emissions on ozone formation. Although the EA was prepared too late to discuss the 2013 Rangely ozone monitor readings, it

⁶⁶ *Sierra Nevada Forest Prot. Campaign v. Rey*, 573 F. Supp. 2d 1316, 1345 (9th Cir. 2008), *aff’d*, 646 F.3d 1161 (2011).

⁶⁷ *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012 (10th Cir. 2002); *see also League of Wilderness Defenders-Blue Mountain Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1073 (9th Cir. 2012) (court is “most deferential when the agency is making predictions[] within its area of special expertise” (internal citation omitted)).

⁶⁸ BLM’s conclusions would be entitled to deference even if there were a difference of expert opinion. *Id.* But there are no conflicting expert opinions here. WildEarth offers only the opinions of Jerry Nichols, a WildEarth employee, whose credentials, if any, to offer opinions on complex air quality models are not evident in the materials WildEarth has placed in the record.

⁶⁹ *Don’t Ruin Our Park*, 802 F. Supp at 1248.

⁷⁰ *Wyoming State Snowmobile Ass’n*, 741 F.Supp. 2d at 1260.

discussed the fact that previous Rangely readings had been high and that EPA's ozone standard had been violated at other monitors in the region. It discussed the wintertime ozone problem in the area and possible explanations. In the end, BLM's conclusions that issuance of the new lease will not cause or exacerbate ozone problems is more than supported by the facts: (a) the mine's emissions of ozone precursors are small, (b) issuance of the lease will not increase those emissions, (c) the Mine has operated for decades without causing ozone problems, (d) environmental regulation will ensure that any ozone problems are addressed, and (e) modeling shows ozone-causing emissions falling, even with significantly increased oil-and-gas development. WildEarth has therefore failed to make an "affirmative showing that BLM failed to consider a substantial environmental question of material significance."⁷¹

3. WildEarth's Criticisms of the EA's Alternatives Analysis Are Conclusory and Unsupported.

WildEarth complains that BLM failed to respond to recommendations WildEarth made in its January 11, 2012 *scoping comments* as to additional alternatives WildEarth believes BLM should have considered.⁷² But WildEarth did not make any complaint about BLM's failure to address alternatives in its October 5, 2012 *comments on the Draft EA*. It is hardly surprising therefore that in the final EA, BLM did not respond to comments on the draft EA that WildEarth did not make.

In any event, WildEarth's substantive objections to BLM's alternatives analysis must fail. Under NEPA, federal agencies must only "study, develop, and describe appropriate alternatives

⁷¹ *WildEarth Guardians and Sierra Club*, 182 IBLA at 106 (quoting *Arizona Zoological Society*, 167 IBLA 347, 357-58 (2006) (in turn quoting *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004); see also *id.* at 105 (appellant of an EA "must carry its burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2) (C) of NEPA.")).

⁷² SOR at 20-21.

to recommended courses of action.”⁷³ Although this requirement applies whether the agency prepares an EIS or an EA, the agency's obligation to consider alternatives in an EA “‘is a lesser one than under an EIS.’”⁷⁴ An EA must discuss alternatives to the planned action, but need not discuss all proposed alternatives.⁷⁵ WildEarth complains that BLM considered only an action and no-action alternative.⁷⁶ But the Ninth Circuit, which frequently reviews NEPA cases, recently noted, “we are aware of no Ninth Circuit case where an EA was found arbitrary and capricious when it considered both a no-action and preferred action alternative.”⁷⁷

Moreover, neither WildEarth’s discussion of alternatives in its SOR nor in its January 11, 2012 comments is anything more than cursory. Under 42 U.S.C. § 4332(2)(E), BLM was only required to consider alternatives that are “appropriate” and that are “technically and economically feasible.”⁷⁸ WildEarth utterly fails to meet its burden of showing that any of the alternatives it suggests meet these standards. The only alternative to which WildEarth devotes more than a paragraph is its second recommended alternative regarding methane emissions.⁷⁹ But the EA does have an extended discussion of why it rejected measures to reduce methane

⁷³ 42 U.S.C. § 4332(2)(E).

⁷⁴ *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012) (quoting *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005)).

⁷⁵ See 40 C.F.R. § 1508.9(b) (assessment “[s]hall include brief discussions of the need for the proposal, of alternatives . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted”); see also *La. Crawfish Prods. Ass’n v. Rowan*, 463 F.3d 352, 356 (5th Cir. 2006) (NEPA “does not require that *all* proposed alternatives, no matter their merit, be discussed in the EA.”).

⁷⁶ SOR at 20-21.

⁷⁷ *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010 (9th Cir. 2012); *Ctr. for Biological Diversity*, 695 F.3d at 91 (“We have previously upheld EAs that gave detailed consideration to only two alternatives.”).

⁷⁸ *WildEarth Guardians and Sierra Club*, 182 IBLA at 107; see also EA at 8 (discussing rejection of alternatives that are “technically or economically infeasible” or where implementation is “remote or speculative.”).

⁷⁹ Letter from WildEarth Guardians to Paul Daggett, BLM (Jan. 11, 2012) at 10-11, item b.

emissions.⁸⁰ Most of the rest of WildEarth’s alternatives address actions that apply to the Bonanza power station⁸¹ and are therefore beyond the scope of the EA. WildEarth never explains how BLM could have authority, as an alternative to approving the Blue Mountain LBA, to require the owners of the Bonanza power station or those agencies that regulate the Bonanza Station to take any particular action. Nor does WildEarth even begin to explain how such schemes as “BLM or DG&T [the owner of the Bonanza Station] securing commitments from oil and gas operators in the White River or Vernal Field Office to reduce their emissions,” or DG&T “us[ing] renewable energy to power the Deserado mine and rail system,” could be remotely feasible.⁸² The courts have been clear that an agency is only required to study “reasonable” alternatives and “may eliminate alternatives that are ‘too remote, speculative, impractical, or ineffective.’”⁸³

The same failures infect the few alternatives that WildEarth suggests that apply to the Mine. WildEarth complains that BLM should have considered providing lower coal tonnages for lease, “potentially providing time for DG&T to find alternative means of generating electricity.”⁸⁴ As stated, however, as BLM found, any coal not provided from the new lease will be replaced by other coal. WildEarth doesn’t even begin to provide economic and technical analyses showing that reduced coal production at Deserado would cause DG&T to purchase more renewable resources. Moreover, an “appropriate” alternative is one that “responds to the

⁸⁰ EA at 8-9.

⁸¹ See Letter from WildEarth Guardians at 10-11, items c-e.

⁸² *Id.*

⁸³ See *Biodiversity Conservation Alliance v. Bureau of Land Mgmt.*, 608 F.3d 709, 714-715 (10th Cir. 2010) (citing *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d, 683, 708-09 & n.30).

⁸⁴ Letter from WildEarth Guardians at 10, item a.

purpose and need.”⁸⁵ The EA correctly defined the purpose and need of the proposed LBA approval as allowing Blue Mountain to continue to logically sequence its mining through the new coal reserves and to extend mining operations through 2032.⁸⁶ WildEarth fails to explain how this purpose and need could be met by some unspecified and arbitrary reduction in the coal offered for lease.

WildEarth’s other alternatives related to mining, including the use of low-emitting vehicles (WildEarth never identifies what these vehicles would be) and low-carbon fuels in the mining equipment (WildEarth never says what type of fuels it has in mind) are equally speculative. Under this Board’s rules, “[i]t is an appellant’s burden to affirmatively demonstrate error in the decision on appeal.”⁸⁷ WildEarth’s “[c]onclusory allegations, unsupported by evidence showing error, do not suffice.”⁸⁸

4. WildEarth’s FLPMA Argument Should Be Summarily Dismissed.

WildEarth’s FLPMA arguments have already been rejected by this Board, most recently in *Powder River Basin Resource Council*, 183 IBLA 83, 93-95 (2012), and by the United States District Court for the District of Columbia District, *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 94-95 (D.D.C. 2012). Since WildEarth doesn’t even bother to mention, much less distinguish, these cases, the Board should summarily reject its arguments here. As this Board recently stated, “[w]hen the arguments raised by an appellant have been expressly addressed in

⁸⁵ 40 C.F.R. § 1502.13-1502.14.

⁸⁶ EA at 7-8.

⁸⁷ *Powder River Basin Resource Council*, 183 IBLA at 89; 2012 IBLA LEXIS 40, at*14 citing *NWF*, 170 IBLA at 251; *Great Basin Mine Watch*, 159 IBLA 325, 353 (2003); *Southern Utah Wilderness Alliance*, 158 IBLA 212, 219-20 (2003); *The Ecology Center*, 140 IBLA 269, 271 (1997); *United States v. De Fisher*, 92 IBLA 226, 227 (1986)).

⁸⁸ *Id.* (citing, *J. W. Weaver*, 124 IBLA 29, 31 (1992); *Glanville Farms, Inc. v. BLM*, 122 IBLA at 85; *Shama Minerals*, 119 IBLA 152, 155 (1991)).

other Board decisions or by Federal courts, whether the appellant was a party thereto or not, and the appellant fails to show that those arguments remain viable in the pending appeal and warrant a different outcome, the Board may dispose of such arguments in summary fashion.”⁸⁹

Conclusion

For the reasons stated above, Blue Mountain respectfully requests that WildEarth’s appeal be rejected.

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Respectfully submitted,

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⁸⁹ *Powder River Basin Resource Council*, 183 IBLA at 93, 2012 IBLA LEXIS 40 at *22-23 .