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WildEarth Guardians v. Jewell, 738 F.3d 298 (D.C. Cir. 2013)

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ABSTRACT

As part of a comprehensive strategy to keep coal "in the ground," environmental plaintiffs challenged the BLM's leasing of federally owned coal tracts in the Powder River Basin in 2010 on climate change grounds.[1] *WildEarth Guardians* was the first suit to reach a federal circuit court, where the District of Columbia Circuit Court affirmed that the BLM's environmental analysis of the climate change impacts of the leased coal was adequate under NEPA. Notably, in reversing the district court, the circuit court found that the plaintiffs had procedural standing.

I. INTRODUCTION

The Bureau of Land Management ("BLM") approved the lease of the coal tracts on March 25, 2010.[2] WildEarth Guardians, joined with Defenders of Wildlife and the Sierra Club, and the Powder River Basin Resource Council ("Plaintiffs") filed separate complaints, which were consolidated.[3] They raised several challenges to the sufficiency of the BLM's Final Environmental Impact Statement ("FEIS"), but the United States Court of Appeals for the District of Columbia only found "two worthy of discussion:" global climate change, and local pollution.[4]

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[1] Juliet Eilperin, *Coal Extraction Poses Climate Change Challenge For Obama Administration*, Washington Post, http://www.washingtonpost.com/national/health-science/coal-extraction-poses-climate-challenge-for-obama-administration/2011/12/20/gIQAYKHvHP_story.html (Dec. 25, 2011) (accessed Mar. 20, 2014).
[2] *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013).
[3] *Id.* at 304.
[4] *Id.* at 308.

II. FACTUAL AND PROCEDURAL BACKGROUND

Antelope Coal, a strip mine near Wright, WY, submitted a request to the BLM to lease the Antelope II coal tracts located to the west of the coal mine in 2005.[5] The tracts cover 4,109 acres and contain approximately 429.7 million tons of coal.[6] The BLM issued its Record of Decision ("ROD") in March of 2010, which was supported by an accompanying FEIS.[7]

The Antelope II coal tracts are located within Wyoming's Powder River Basin, the largest source of coal in the United States.[8] The Powder River Basin accounted for over one third of mined United States' coal in 2003, and the basin's share of coal production continues to increase.[9] In 2006, the Antelope Mine accounted for 7.9% of the basin's coal production, which represented an estimated 1.1% of the United States' total carbon emissions.[10] The Antelope Mine is scheduled to complete mining its current lease in the next decade, and needs the Antelope II lease to continue operations.[11]

Following the BLM's approval of the ROD, plaintiffs sought a stay with the Board of Land Appeals. No action was taken by that Board, which resulted in a final ROD. The district court, upon cross motions for summary judgment, granted the defendant's motion on all claims on July 30, 2012.[12]

III. ANALYSIS

A. Standing

The court found that the district court "sliced the salami too thin" with respect to standing, by requiring that members of the plaintiffs establish injury, independently from local

[5] *Id.* at 302.
[6] *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77, 80 (D.D.C. 2012).
[7] *WildEarth Guardians*, 738 F.3d at 302.
[8] *Id.* at 304.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

pollution, with global climate change.[13] Standing, as framed by the court, requires an "injury in fact" that is casually connected to the conduct complained of. In the context of environmental plaintiffs challenging the adequacy of an FEIS, the groups are an "association" which can stand in the place of their members, and an "agency's failure to prepare (or adequately prepare) an EIS before taking action" is an "archetypal procedural injury."[14] The court therefore found that the local pollution caused by the leasing would injure the plaintiff's "aesthetic and recreational" use of the Antelope II coal tracts and surrounding lands.[15]

The district court's independence requirement, that standing for global climate change must be unique from local pollution, seems to flow from its interpretation of *Center for Biological Diversity v. U.S. Department of Interior*[16] (and the analogous 9th Circuit precedent, *Washington Environmental Council v. Bellon*[17]).[18] There the court found that the petitioners failed to show adequate Article III standing, with its claim that expanded drilling would contribute to global climate change, "in turn … threaten[ing] their members enjoyment of the area and indigenous animal species."[19]

In a perhaps critical move for future environmental plaintiffs, this court found that once one injury was sufficient for standing, the plaintiff is entitled to raise other inadequacies on a FEIS, per *Sierra Club v. Adams*.[20, 21] As applied, the plaintiffs' "aesthetic injury follows from an inadequate FEIS whether or not the inadequacy concerns the same environmental issue that

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[13] *Id.* at 307.
[14] *Id.* at 305.
[15] *Id.* at 305-306.
[16] 563 F.3d 466 (D.C. Cir 2009).
[17] 732 F.3d 1131, 1141-46 (9th Cir. 2013).
[18] *WildEarth Guardians*, 738 F.3d at 307 (*citing Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1141-46 "finding no causal link between regulatory failure and assumed injury from climate change").
[19] *Id.* at 307.
[20] 578 F.2d 389, 392 (D.C. Cir 1978).
[21] *WildEarth Guardians*, 732 F.3d at 307.

causes their injury."[22] In reaching this decision, the court noted that it was "expressing no opinion" as to whether the concept of "public interest" standing remained cognizable, which was the resulting outcome of *Sierra Club,*[23] but has been questioned by the United States Supreme Court in *DaimlerChrysler*.[24, 25]

B. Merits

The court's opinion offers guidance on what constitutes a "hard look" at global climate change under NEPA's substantive requirement, and the analysis required for contributions to local ozone levels. The court ultimately found that "uncertainty" limits the scope of an FEIS.[26]

Plaintiffs advanced a requirement that the agency analyze the marginal climate change impact of the leasing of the Antelope II coal tracts.[27] The court found that the BLM's approach of "discuss[ing] at length the prevailing scientific consensus on global climate change and coal mining's contribution to it" was adequate. This approach included projections of the increase in Wyoming's carbon emission—0.63 per cent, and a direct identification of "considerable uncertainty" about carbon emission.[28] The court thus held that "because current science does not allow for the specificity demanded by the [plaintiffs], the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS."[29]

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[22] *Id.*
[23] *Id* at 307 (*quoting Sierra Club v. Adams,* 578 F.2d 389, 392 "having established standing to challenge the adequacy of the FEIS on at least one ground, [plaintiffs] are entitled to raise other inadequacies in the FEIS").
[24] 547 U.S. 332. 353, 126 S.Ct. 1854 (2006).
[25] *WildEarth Guardians*, 738 F.3d 307 (citing *DaimlerChrysler*, 547 U.S at 351-53 ("rejecting 'cumulative' theory of standing whereby standing as to one claim would suffice for all claims arising from the same nucleus of operative fact")).
[26] *Id.* 310, 313 (in fn. 4 the court notes that it is appropriate to resolve this issue now, though it was not considered by the district court—which dismissed the case for lack of standing).
[27] *Id.* at 309.
[28] *Id.*
[29] *Id.*

The court also rejected a joint review of carbon emissions from other pending leases.[30] The court found that plaintiffs had not demonstrated that the approval of these leases was "reasonably foreseeable."[31] This conclusion seems to acknowledge that plaintiffs' original complaint met the reasonable foreseeable standard, but that hindsight has demonstrated that such an analysis was unnecessary—as only four of the eleven leases have advanced to scoping.[32] Further, the court suggested that the evaluation of each lease's specific contribution to carbon emission is probably sufficient, even if other leasing is "reasonably foreseeable."[33]

The court also determined that the FEIS sufficiently analyzed the effect that increased nitrogen oxides and volatile organic compounds emission would have on ground ozone levels. The conclusion is technical, and rests on deference to the BLM for not modeling at the FEIS stage the formation of nitrogen oxide and its contribution to ground-level ozone—instead relying on projections for the Powder River Basin. [34] The court noted that even though it may have "been possible or even prudent for the BLM to separately model future ozone levels" that the "limitations on such modeling" excused the BLM from utilizing area wide projections and discussion to analyze the issue in the FEIS.[35]

Other concerns by plaintiffs—compliance with NEPA, the Federal Land Policy and Management Act of 1976, and the Mineral Leasing Act—were summarily dismissed along with plaintiffs' suggestion of alternative ideas in "a single paragraph," which the court categorized as "sandbagging."[36]

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[30] *Id.* at 310.
[31] *Id.*
[32] *Id.*
[33] *Id.* ("Instead of assuming, as the Appellants do, that every pending lease application will be approved, the BLM evaluated GHG emissions as a percentage of state—and nation-wide emissions. We think this approach suffices.")
[34] *Id.* at 311.
[35] *Id.* at 313.
[36] *Id.* at 310, 313.