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## WildEarth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement

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***WildEarth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement*, No. 1:13-cv-00518-RBJ, \_\_\_ F. Supp. 3d \_\_\_, 2015 U.S. Dist. LEXIS 60617, 2015 WL 2207834 (D. Colo. May 8, 2015)**

**Erick Valencia**

The Colorado District Court in *WildEarth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement* ordered the United States Office of Surface Mining to reevaluate the environmental impact of an approved mining modification plan for the Colowyo Mine after the Office failed to involve the public in the approval process and did not take a “hard look” at the modification’s effects on the environment as required by NEPA. Even though the Office of Surface Mining also approved the Trapper Mine’s modification plan without fulfilling NEPA’s requirements, WildEarth Guardians was left without a remedy regarding that mine because the coal that was affected by the modification had already been removed.

I. INTRODUCTION

The dispute in *WildEarth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement* dealt with the approval of mining plan modifications for the Colowyo and Trapper coal mines located south of Craig, Colorado.<sup>1</sup> The question before the Court was whether the United States Office of Surface Mining, Reclamation, and Enforcement (“OSM”) failed to comply with the National Environmental Policy Act (“NEPA”).<sup>2</sup> Plaintiff WildEarth Guardians (“Guardians”) alleged (1) that the OSM failed to take a “hard look” at the environmental impacts of two proposed mining modifications; (2) that the OSM did not involve the public in the review process; and (3) that the OSM did not notify the public once its Environmental Assessments (“EA”) and Findings of No Significant Impact (“FONSI”) were complete.<sup>3</sup> In its complaint, Guardians sought *vacatur* of the approved mining plan modifications and an order both enjoining the approval of the modifications and prohibiting future mining operations until the OSM demonstrated compliance with NEPA and the Administrative Procedures Act (“APA”).<sup>4</sup> The court agreed with Guardians on both allegations but determined that *vacatur* was not an appropriate remedy for either mine. Instead, the court granted the OSM 120 days to take a “hard look” at the environmental effects of the mining plan modification for the Colowyo Mine and to provide public notice about the modification.<sup>5</sup>

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<sup>1</sup> *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation and Enforcement*, No. 1:13-cv-00518-RBJ, \_\_\_ F. Supp. 3d \_\_\_, 2015 U.S. Dist. LEXIS 60617, at \*7 (D. Colo. May 8, 2015) (The court misspelled “Guardians” as “Guradians.” This summary, however, cites the plaintiff’s name as “WildEarth Guardians”).

<sup>2</sup> *Id.* at \*1.

<sup>3</sup> *Id.* at \*12.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*49.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The two mines central to the dispute, the Colowyo Mine and the Trapper Mine, are located south of Craig, Colorado, and have operated since the 1970s.<sup>6</sup> The Colowyo Mine sought to increase its mining area by 6,050 acres to recover an additional 5,219 acres of coal.<sup>7</sup> It submitted a permit application on July 3, 2006, and published notice of its application in two local newspapers on August 18, 2006.<sup>8</sup> The Trapper Mine submitted an application on November 5, 2007, to recover 8.1 million tons of coal on 312 additional acres.<sup>9</sup> The Trapper Mine published notice of its permit application on February 19, 2009, and again in July 2009.<sup>10</sup> Both mines have intervened in this case.<sup>11</sup>

The State of Colorado, through the Colorado Division of Reclamation, Mining and Safety (“CDRMS”), has the authority to regulate coal mining within the State.<sup>12</sup> The CDRMS approved both mining plan modifications after thirty-day comment periods elapsed without requests for public hearings.<sup>13</sup> The OSM required both mines to submit mining plan modifications because of the changes in location and the amount of coal proposed to be mined.<sup>14</sup> The OSM prepared an EA for each mine and concluded that neither would result in significant environmental impacts.<sup>15</sup> The OSM issued a FONSI for the Colowyo Mine on May 8, 2007, recommending the modification’s approval, and the modification was approved on June 15, 2007.<sup>16</sup> A FONSI was issued for the Trapper Mine on October 26, 2009, and the modification was approved on November 27, 2009.<sup>17</sup>

Guardians filed this suit seeking (1) a declaration that OSM had violated NEPA and the APA; (2) *vacatur* of the approved mining plan modifications; and (3) an order enjoining the OSM and the Secretary of the Interior from reissuing mining plan modifications until they could demonstrate compliance with NEPA.<sup>18</sup>

## III. ANALYSIS

NEPA requires that government agencies inform interested parties of “NEPA-related hearings, public meetings, and the availability of environmental

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<sup>6</sup> *Id.* at \*7, \*9.

<sup>7</sup> *Id.* at \*8.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at \*10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*3.

<sup>12</sup> *Id.* at \*7 (citing 30 C.F.R. § 906.10 (2015)).

<sup>13</sup> *Id.* at \*8, \*11.

<sup>14</sup> *Id.* at \*9, \*11.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at \*9.

<sup>17</sup> *Id.* at \*11.

<sup>18</sup> *Id.* at \*12.

documents”<sup>19</sup> by providing public notice “before decisions are made[,] and before actions are taken.”<sup>20</sup> The OSM is required to notify the public once EAs and FONSI are completed.<sup>21</sup> Additionally, NEPA requires that agencies take a “hard look” at the possible environmental impacts of approving a mining plan modification.<sup>22</sup> The agreement allowing the State of Colorado to regulate coal mining within the state does not relieve the OSM of its duties under NEPA, as the agreement requires each to “concurrently carry out its responsibilities.”<sup>23</sup> The agency must provide enough evidence to support its determination of whether to prepare an Environmental Impact Statement or a FONSI.<sup>24</sup>

The court first concluded that the OSM failed to even minimally involve the public before issuing its decision.<sup>25</sup> Although the CDRMS published notice of its proposed decisions for both mines in local newspapers, the Court determined that the OSM failed to notify the public before it made its decision.<sup>26</sup> Additionally, the court determined that the OSM failed to provide notice once its EA and FONSI were complete and became available to the public.<sup>27</sup>

The court then addressed the OSM’s failure to take a hard look at the proposed modifications’ environmental impacts, concluding that the OSM had not sufficiently considered the direct and indirect environmental effects that the modifications would create.<sup>28</sup> The court determined that the OSM failed to adequately review the CDRMS’s mining plan approvals, suggesting that the OSM merely “rubber-stamped” them.<sup>29</sup>

Upon reviewing the OSM’s contention that it took a sufficiently hard look at the direct impact of the modifications on air quality, the court found that the OSM had relied on substantially outdated reports.<sup>30</sup> The pollutant concentrations in the report had been compared to air quality standards from 1979 and were only supposed to provide an analysis of coal development through 1990.<sup>31</sup> The court reasoned that since air quality standards have become more stringent since 1979, the OSM should have considered the new standards in its analysis of the modifications’ impact.<sup>32</sup>

The court dismissed Colowyo’s argument that coal combustion was not an indirect effect of the modification because the plan did not cause coal

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<sup>19</sup> *Id.* at \*26 (citing 40 C.F.R. § 1506.6(b) (2015)).

<sup>20</sup> *Id.* (citing 40 C.F.R. § 1500.1(b) (2015)).

<sup>21</sup> *Id.* at \*28 (citing 43 C.F.R. § 46.305(c) (2014)).

<sup>22</sup> *Id.* at \*30.

<sup>23</sup> *Id.* at \*35 (quoting 30 C.F.R. § 906.30, art. VI(8) (2015)).

<sup>24</sup> *Id.* at \*30 (citing 40 C.F.R. § 1508.9(a)(1) (2015)).

<sup>25</sup> *Id.* at \*27.

<sup>26</sup> *Id.* at \*9-10.

<sup>27</sup> *Id.* at \*28.

<sup>28</sup> *Id.* at \*47.

<sup>29</sup> *Id.* at \*34.

<sup>30</sup> *Id.* at \*37-38.

<sup>31</sup> *Id.* at \*38.

<sup>32</sup> *Id.* at \*39.

combustion.<sup>33</sup> The court reasoned that since the plan increased the amount of coal available for combustion, combustion was an indirect effect of the modification approval.<sup>34</sup> The court determined that the OSM would not be, as it argued, impermissibly directing the combustion of coal, but rather would simply be considering the environmental impact of the increase in combustion resulting from the additional availability of coal.<sup>35</sup> Furthermore, both mines estimated the amount of coal to be mined and used solely by the Craig Power Plant, thus making it reasonable to expect the OSM to predict the impact on the environment due to the combustion of coal.<sup>36</sup> In coming to this conclusion, the court reaffirmed its holding in *High Country Conservation Advocates v. United States Forest Service*,<sup>37</sup> stating that if the amount of coal to be mined could be estimated, then the OSM “could likewise predict the environmental effects of the combustion of that coal.”<sup>38</sup>

Ultimately, the court declared that the OSM violated NEPA by failing to take a hard look at the environmental impacts of the modifications before issuing its FONISs; by failing to involve the public in the preparation of its EAs; and by failing to notify the public once its EAs were completed.<sup>39</sup> The court found that *vacatur* was not appropriate with regard to the Trapper Mine because the coal affected by the modification had already been mined. However, the court concluded that *vacatur* of the Colowyo modification was timely.<sup>40</sup> Even so, the court did not order *vacatur* of the Colowyo modification plan because the benefits did not outweigh the potential costs.<sup>41</sup> The court instead provided a 120-day period during which the OSM would be required to take a hard look at the environmental impacts of the Colowyo modification and provide proper public notice and opportunity for involvement.<sup>42</sup> If after the 120-day period the OSM had not yet completed the process, *vacatur* would then be ordered.<sup>43</sup>

#### IV. CONCLUSION

The Court ruled that OSM had failed to fulfill its requirements under NEPA, but after a cost-benefit analysis it concluded that immediate *vacatur* was not appropriate. The Court noted two costly effects of vacating the Colowyo modification: the possible layoff of mine employees and significant hardship for the power plant.<sup>44</sup> Although *vacatur* of the modification, possible layoffs, and

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<sup>33</sup> *Id.* at \*42.

<sup>34</sup> *Id.* at \*40, \*42.

<sup>35</sup> *Id.* at \*43.

<sup>36</sup> *Id.* at \*44-45.

<sup>37</sup> 52 F. Supp. 3d 1174 (D. Colo. 2014).

<sup>38</sup> *WildEarth Guardians*, 2015 U.S. Dist. LEXIS 60617, at \*45 (citing *High Country*, 52 F. Supp. 3d at 1196).

<sup>39</sup> *Id.* at \*47.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at \*48.

<sup>42</sup> *Id.* at \*48-49.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*48.

power plant hardship continues to remain one possible scenario, the more likely alternative seems to be that the OSM will fulfill its notice requirements and satisfy the court that it has taken a hard look at the modification's environmental impacts. Indeed, the OSM has already taken significant steps toward fulfilling its obligations. The OSM hired a consultant to help it prepare its EA and received over 1,000 comments.<sup>45</sup> The EA was published, and became available to the public, on July 27, 2015.<sup>46</sup> The OSM also issued a Finding of No Significant Impact for the Colowyo modification plan.<sup>47</sup>

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<sup>45</sup> Fed. Defs.' Status Report at 2, *WildEarth Guardians v. United States Office of Surface Mining, Reclamation and Enforcement*, 2015 U.S. Dist. LEXIS 60617 (D. Colo. May 8, 2015) (No. 1:13-cv-00518-RBJ).

<sup>46</sup> U.S. DEP'T OF THE INTERIOR, U.S. OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT, COLOWYO COAL MINE SOUTH TAYLOR/LOWER WILSON PERMIT EXPANSION AREA PROJECT FEDERAL MINING PLAN MODIFICATION: ENVIRONMENTAL ASSESSMENT (July 27, 2015), *available at* [http://www.wrcc.osmre.gov/initiatives/colowyoMineSouthTaylor/documents/Colowyo\\_SouthTaylor\\_LowerWilson\\_EA\\_20150727.pdf](http://www.wrcc.osmre.gov/initiatives/colowyoMineSouthTaylor/documents/Colowyo_SouthTaylor_LowerWilson_EA_20150727.pdf).

<sup>47</sup> U.S. DEP'T OF THE INTERIOR, U.S. OFFICE OF SURFACE MINING, RECLAMATION AND ENFORCEMENT, COLOWYO COAL MINE SOUTH TAYLOR/LOWER WILSON PERMIT EXPANSION AREA PROJECT FEDERAL MINING PLAN MODIFICATION: UNSIGNED FINDING OF NO SIGNIFICANT IMPACT (July 27, 2015), *available at* [http://www.wrcc.osmre.gov/initiatives/colowyoMineSouthTaylor/documents/Colowyo\\_SouthTaylor\\_LowerWilson\\_unsigned\\_FONS I\\_20150727.pdf](http://www.wrcc.osmre.gov/initiatives/colowyoMineSouthTaylor/documents/Colowyo_SouthTaylor_LowerWilson_unsigned_FONS I_20150727.pdf).