

**ORAL ARGUMENT NOT YET SCHEDULED**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 15-5294**

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WESTERN ORGANIZATION OF RESOURCE COUNCILS;  
FRIENDS OF THE EARTH,  
*Plaintiffs-Appellants,*

v.

RYAN ZINKE, ET AL.,  
*Defendants-Appellees,*

STATE OF WYOMING; WYOMING MINING ASSOCIATION;  
STATE OF NORTH DAKOTA,  
*Intervenors.*

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On Appeal from the United States District Court  
for the District of Columbia (No. 1:14-cv-01993-RBW)

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## GLOSSARY

APA	Administrative Procedure Act
BLM	U.S. Bureau of Land Management
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FEIS	Final Environmental Impact Statement
NEPA	National Environmental Policy Act of 1969
PEIS	Programmatic Environmental Impact Statement

## INTRODUCTION & SUMMARY OF ARGUMENT

The Bureau of Land Management (BLM) does not dispute that its Programmatic Environmental Impact Statement (PEIS) for the federal coal-leasing program is badly outdated with respect to climate-change concerns. It also does not dispute that countless important decisions remain to be made in its discretionary control over that program—including the different decisions two recent Secretaries of the Interior have made about whether to issue new leases at all before updating its analysis. That makes this case easy. The Supreme Court has explained that, “[i]f there remains ‘major Federal action’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent *not already considered*, a supplemental EIS *must* be prepared.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989) (quoting 42 U.S.C. §4332(2)(C)) (emphasis added). Accordingly, when promulgating the very PEIS at issue in this case, BLM *itself* recognized its obligation under the National Environmental Policy Act (NEPA) to “revise or update the Program EIS when its assumptions, analyses and

conclusions are no longer valid,” 47 Fed. Reg. 33,114, 33,115 (July 30, 1982)—as BLM acknowledges. *See* Zinke-Br. 8.

BLM is no doubt entitled to substantial flexibility in choosing how to comply with *Marsh*'s command that EISs for ongoing programs remain up-to-date in light of changing circumstances or information. But given what we now know—and what the government's own Environmental Protection Agency (EPA) has now recognized—about the disruptive effect on the world's climate of mining and burning coal, the time has plainly come for BLM to account for how the coal-leasing program contributes to those serious social costs.

The agency does not see it that way. Instead, it now rejects its own prior understanding of NEPA and claims that the Administrative Procedure Act (APA) shields it from *ever* having to “revise or update the Program EIS”—even when its “assumptions, analyses and conclusions are no longer valid”—so long as it refrains from changing any of the underlying program regulations. In the absence of such a change, the agency says, there is no “final agency action” to review. *See* Zinke-Br. 13-18.

This is not and cannot be correct. BLM’s argument is that the failure to issue a post-decision supplemental EIS is not reviewable as final action absent some proposed change to the regulations it enacted when it last updated its PEIS three decades ago. But the whole “subject” of *Marsh* is “*postdecision* supplemental environmental impact statements,” and it expressly subjects an agency determination not to perform such an analysis to judicial review under the APA—specifying both the rule for when supplementation is required and the standard under which courts should “review[] a decision not to supplement an EIS.” 490 U.S. at 373-74, 378 (emphasis added). BLM’s effort to distill from this Court’s precedents a contrary rule that prohibits courts from reviewing “a decision not to supplement an EIS” is in the teeth of *Marsh* and wrenches this Court’s dicta out of context. In fact, the cases BLM cites from this Court suggest that where (as here) there is a continuing, major federal activity, the APA’s final action requirement is satisfied.

That makes sense, because if the rule were otherwise, NEPA would not serve its purpose here or in general. As the Supreme Court explained in *Marsh*, “[i]t would be incongruous ... with the Act’s manifest concern with preventing uninformed action, for the blinders to adverse

environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.” 490 U.S. at 371. But, despite its passing protestations to the contrary (at 25), that is exactly the result BLM seeks here. By failing to update its programmatic EIS, it has rendered itself blind to the programmatic contributions of coal leasing to climate change, and perhaps more importantly, it has neglected to consider any *programmatic* alternatives that might ameliorate the environmental harms associated with the “social cost of carbon.” Accordingly, while BLM itself acknowledges that consideration of alternatives is the “heart of the environmental impact statement,” Zinke-Br. 15 (quoting 40 C.F.R. §1502.14), it does not even try to show where a consideration of lower-carbon-cost alternatives to federal coal leasing can be found in anything the agency has promulgated since 1985.

That includes the site-specific EISs, which BLM relies heavily upon (at 11, 24-25) to back up its suggestion that no programmatic update is necessary. In essence, BLM’s brief concedes that it is engaged in continuing, major activities under the coal-leasing program, but excuses the lack of a programmatic EIS update because it “prepares an EIS ... for

every coal lease it issues, and it examines climate change impacts in those documents” on an individual basis. Zinke-Br. 24-25. Unlike appellants’ opening brief (at 48-53), however, BLM does not even attempt to discuss *how* those site-specific EISs discuss climate change, because the answer is quite unhelpful to the government. BLM’s site-specific EISs discuss the general phenomenon of global warming and its relationship to carbon dioxide, but they (1) make no effort to account for the contribution of the coal-leasing program as a whole, (2) consider no programmatic alternatives, and (3) consistently assert that there is no meaningful contribution or relevant analysis to be made at the scale of an individual lease. See Op.-Br. 48-53. This is precisely why a supplemental *programmatic* EIS is necessary here.

The arbitrariness of the agency’s actions runs even deeper than ignoring NEPA’s supplementation requirement. When BLM amended its regulations in 1982, it expressly told its commenters and the courts that it was *not* changing its obligation to update its “*Program EIS* when its assumptions, analyses, and conclusions are no longer valid.” 47 Fed. Reg. at 33,115 (emphasis added). Yet BLM now takes literally the opposite position—namely, that the effect of its 1982 amendment *was* to abrogate

any commitment to update stale analysis in the PEIS when those conditions are met. *See* Zinke-Br. 29.

This is archetypical arbitrary action under the APA. Having promised in 1979 and then *reaffirmed* in 1982 that it had an obligation to update this PEIS when its analyses became outdated, BLM must do so. It surely cannot now contend that it meant the opposite of what it said. Allowing it to do so not only permits the exact kind of agency inconsistency this Court routinely rejects as arbitrary and capricious, but threatens the long-term vitality of APA review itself.

## ARGUMENT

### **I. Failure To Update An EIS When NEPA Requires It Is Reviewable Agency Action.**

Having dispensed with any substantive defense of its current PEIS for the coal-leasing program, the government's primary argument is that, even if NEPA requires updating the PEIS, there is no "final agency action" here through which its failure can be challenged. This procedural objection is demonstrably incorrect.

A. As an initial matter, review of an agency's failure to perform an update that NEPA requires fits comfortably within the text of the APA. Section 706 provides courts with the power to "compel agency

action unlawfully withheld or unreasonably delayed”; Section 702 provides a “[r]ight of review” that includes cases where an agency has “failed to act”; and the Act defines “agency action” to include the “failure to act” as well. 5 U.S.C. §§706(1), 702, and 551(13). Contrary to BLM’s passing suggestion (at 12), there is nothing “vague” about appellants’ reliance on these sources of authority for their APA cause of action: The complaint expressly alleged that, “[i]n failing to issue a supplemental PEIS in response to the significant new information and changed circumstances outlined above, BLM has unlawfully withheld and unreasonably delayed ... the issuance of a supplemental PEIS.” Compl. ¶196. The complaint did so after explaining clearly that NEPA and its implementing regulations required an updated PEIS in light of new information and the many leasing and other ongoing decisions that BLM was still making under the program. *See id.* ¶¶194-95. This is a paradigmatic application of the statutory text: The complaint explains that the failure to update the PEIS is a violation of a legal requirement imposed by NEPA, and the APA provides a cause of action for agency action or inaction that is “not in accordance with law” or “unlawfully withheld.” 5 U.S.C. §§551(13), 702, 706(1), 706(2)(A).

To be sure, there are circumstances where an APA claim is not yet fit for judicial review because it is not yet clear exactly how an agency will act or that it has fact declined to take an action that the law allegedly requires. Notably, however, BLM makes no argument that this is that kind of case—it raises neither ripeness nor exhaustion defenses, nor does it identify any uncertainty about its refusal to update its PEIS. Nor could it make such arguments: It is now uncontested that BLM will not update the coal-leasing program's PEIS to account for climate-change concerns, and it is that inaction that precipitated this suit. More than three decades have elapsed since the last update; eight years have elapsed since the EPA officially recognized that carbon dioxide is a pollutant that endangers the welfare of current and future generations; eighteen years have elapsed since the Intergovernmental Panel on Climate Change issued its first report, and it has issued four more since—even winning the Nobel Prize for its work. And were there any doubt that BLM has conclusively refused to update its PEIS to account for the program-level impacts of coal leasing on climate change, Secretary Zinke eliminated it when he cancelled the recent leasing moratorium and directed the agency immediately to cease all activities associated with the preparation of a

program-level supplemental EIS. *See* Op.-Br. 28. Simply put, BLM does not and cannot argue that this is a case in which it is unclear whether it is withholding agency action; the question, instead, is whether withholding that discrete action and refusing to update the PEIS is unlawful under NEPA. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (*SUWA*) (holding that APA permits claim that “an agency failed to take a discrete agency action that it is required to take”) (emphasis omitted).

B. Despite the clear fit between its refusal to act and the terms of the APA’s grant of judicial review, BLM argues that APA review is unavailable here because “refusal to prepare an EIS is not itself a final agency action for purposes of APA review,” Zinke-Br. 13 (quoting *Pub. Citizen v. Office of the U.S. Trade Representatives*, 970 F.2d 916, 918-19 (D.C. Cir. 1992)). BLM pulls this dictum from this Court’s NEPA cases about *initial* (not *supplemental* or *post-decision*) EISs, however, and that change in context critically distorts the principles underlying these precedents. In their proper context, these cases only undermine BLM’s argument.

In *Public Citizen*, the plaintiff sought review for an alleged NEPA violation relating to the negotiation of the North American Free Trade Agreement. 970 F.2d at 918-19. The Trade Representative was mid-negotiation, but the plaintiffs nonetheless asked this Court “to intervene ... on the ground that the Trade Representative has already stated that she will not prepare EISs.” *Id.* at 919. This Court refused, holding that until the agency finally decides to undertake the major federal action for which NEPA requires an EIS, APA review for NEPA compliance is “premature[.]” *Id.* That is because *pre*-decision review sometimes puts the cart before the horse in just the way that administrative finality rules seek to avoid: At the time the plaintiffs sued in *Public Citizen*, there was still “uncertainty not only about the precise terms of any final agreements, but, more fundamentally, about whether there will ever be any final agreements at all.” *Id.* at 923.

Accordingly, when this Court said in *Public Citizen* that the Trade Representative’s “refusal to prepare an EIS [wa]s not itself a final agency action for purposes of APA review,” 970 F.2d at 918, it was not because refusal to prepare an EIS can *never* constitute reviewable agency inaction, but rather because, in that case, “[n]o final agreement ha[d] yet

been produced ..., and it [wa]s unclear whether [negotiations] w[ould] *ever* produce a final agreement for the President to submit to Congress.” *Id.* at 919. Indeed, every case or principle of APA review that BLM identifies in this section of its brief involves this *pre*-decision context, *see* *Zinke-Br.* 13-16. Among other things, BLM’s complaint that a NEPA claim must look to a “record of decision” and so cannot be brought “until the agency sets forth its final, substantive choice among alternatives in a record of decision consummating its process,” *id.* at 16, only makes sense if a record of decision is *yet to come*. It is necessarily impossible to apply such a requirement to a case like this one (or *Marsh*), where the allegation is that NEPA requires a “*postdecision* supplemental environmental impact statement” to account for changed circumstances or new information. 490 U.S. at 370 (emphasis added).

In fact, were such a principle accepted outside the pre-decision context, *Marsh* itself would be incorrect. Every “postdecision supplemental” EIS necessarily comes *after* a record of decision—not before (which, as this Court found in *Public Citizen*, would be premature); and not contemporaneous with a new record of decision (in which case no question of post-decision supplementation would arise at all).

Notably, the underlying precedent of this Court on which BLM and *Public Citizen* relied for the proposition that refusal to issue an EIS is not itself final agency action means essentially the opposite of what BLM says. Both BLM's brief and the relevant sentence from *Public Citizen* cite *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 85 (D.C. Cir. 1991), for the proposition that a plaintiff must identify something more than the failure to prepare an EIS to make review available under the APA. The relevant discussion in context makes it quite clear, however, that the APA's limit on judicial review to final agency action does not present an independent bar to review where there is "major federal action" at issue sufficient to trigger a NEPA obligation on the merits:

[To obtain review,] plaintiffs in NEPA cases must point to "action" at least arguably triggering the agency's obligation to prepare an impact statement. ... [T]he "identifiable action or event," in the context of NEPA, [must] be a "major Federal action[] significantly affecting the quality of the human environment," within the meaning of 42 U.S.C. §4332(2)(C). *We recognize that this tends to merge standing under the APA with the merits of a plaintiff's NEPA claim.* But such a result is not an uncommon consequence of applying the standing test for APA review[.]

*Id.* at 85-86 (emphasis added). In other words, if NEPA requires an update because major federal action affecting the environment remains

ongoing, and the agency has unlawfully withheld that update while continuing to engage in major federal action, the APA permits review.

It is unsurprising that this Court has adopted this approach, because it follows directly from *Marsh*. That case concerned an Army Corps of Engineers project for which a final EIS was completed in 1980, a formal decision to proceed with construction was made in 1982, and funds were appropriated in 1985. 490 U.S. at 365, 367. The *Marsh* plaintiffs sued in 1985, seeking an injunction against construction of the dam based in part on the failure to “prepare a second supplemental EIS to review information developed after 1980.” *Id.* at 368. The Court did not hold that review of that claim was unavailable *under the APA* because the formal decision to proceed was already completed in 1982, years before the relevant new information became available. Instead, it held that the plaintiffs’ claim that NEPA mandated an updated EIS *was* cognizable under the APA and should be reviewed under its familiar arbitrary-and-capricious standard. *See id.* at 375-78. The Supreme Court ultimately held that a supplemental EIS was not necessary there *not* because the APA precluded review and *not* because the agency had already made a final, formal decision to proceed years earlier, but

because the supposed new information was not sufficiently significant—a point BLM does not contest here. *Id.* at 379-85.

Put otherwise, the *Marsh* plaintiffs were just like plaintiffs here: They did not challenge some new agency proposal; they sought an injunction against the agency continuing forward with the plan already adopted and considered in the agency's existing EIS once that statement failed to reflect current information about the consequences of its continuing action. The Supreme Court entertained their claim and tested it against NEPA's supplementation standard. This Court must do the same here and so, as *Lyng* makes clear, BLM's APA argument adds nothing beyond the NEPA merits. *See supra* pp. 12-13.

BLM attempts to avoid *Marsh* by contending that the action associated with the allegedly outdated EIS in *Marsh* was still in progress, while the creation of the coal-leasing program at issue here is complete. *See Zinke-Br.* 21-22. But that is merely an argument about the agency's substantive obligations under NEPA; indeed, the Court addressed that issue in the portion of its opinion discussing NEPA's substantive "rule of reason" standard for when supplemental EISs are required. 490 U.S. at 373-74. Conversely, BLM's argument provides no answer whatsoever to

*Marsh's* administrative-law holding that an agency's decision not to supplement an EIS is reviewable agency action judged under the arbitrary-and-capricious standard in 5 U.S.C. §706(2)(A).

Finally, it is worth emphasizing that denying appellants the right to challenge an agency's failure to *update* a PEIS respecting ongoing actions under previously adopted regulations would severely frustrate the fulfillment of NEPA's "action-forcing' purpose." *See Marsh*, 490 U.S. at 371. In fact, BLM's strained reading of the APA creates a double bind that would eviscerate NEPA with respect to programmatic action. According to BLM, a plaintiff cannot challenge an agency's failure to perform pre-decisional, NEPA-mandated environmental review of a programmatic action until after the agency has taken or committed to take final action. But at the same time, BLM would have this Court hold that a plaintiff cannot challenge an agency's failure to perform NEPA-mandated environmental review of a programmatic action *after* that action becomes final, even when the pre-decisional review is no longer adequate. That approach flies in the face of NEPA's "manifest concern with preventing uninformed action" because it necessarily permits the agency to "restore[]" the "blindens ... once unequivocally removed" and

carry on conducting major, ongoing programs involving discretionary decisionmaking without taking account of newly revealed environmental problems. *Marsh* does not sanction this NEPA-defeating vision of APA review, and neither should this Court.

## **II. NEPA Requires BLM To Update The 1979 PEIS With Climate-Change Analysis.**

Accordingly, when it comes to the NEPA merits, this Court should reject BLM's attempt to evade NEPA's supplementation obligation by characterizing the agency action at issue here as the promulgation of regulations rather than as the operation of an ongoing program. The 1979 regulations authorized and established parameters for the coal-leasing *program*—just as a record of decision in any run-of-the-mill BLM final agency action authorizes and establishes parameters for a particular site-specific project. BLM could not avoid its obligation to supplement an EIS associated with an ongoing site-specific project by arguing that the original EIS was associated with the previous record of decision and need not be updated unless or until the agency decides to prepare a new record of decision. What is relevant for NEPA purposes is the *action* at issue, not the documents authorizing it and dictating its scope. So, too, with the 1979 regulations governing the coal program:

Because the *programmatic actions* authorized and circumscribed by the regulations are ongoing, BLM is obligated to supplement the programmatic EIS when significant new information comes to light.

A. BLM does not contest that NEPA regulations require an agency to supplement an EIS when there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. §1502.9(c)(1)(ii). Nor does BLM contest the significance of what we now know about the climate-change-related costs of mining and consuming coal from federal land. Instead, BLM seeks to evade the plain import of the regulation by contending that the relevant “agency action” here was the promulgation of the 1979 regulations, not the continued operation of the coal-leasing program. That argument must fail.

The 1979 regulations established a coal-leasing program that continues in effect today. The associated PEIS evaluated the environmental impacts of that *program*, not simply the effects of adopting the regulations. That much is apparent from BLM’s own commitment in 1979 to update the environmental analysis of national and interregional impacts in that document to address changing

conditions—a commitment that mirrors the supplementation obligation in the regulations and reflects the agency’s own view of the relevant agency action as an ongoing program. *See* BLM, Final Environmental Statement: Federal Coal Management Program 3-7, 3-9, 3-68 (1979) (1979 PEIS).

Recognizing that the relevant major federal action is the program and not the wholly bureaucratic act of enacting its governing regulations makes it clear that NEPA requires an update here. *Marsh* holds that NEPA requires an agency to supplement an EIS when significant new information comes to light and additional major federal action has yet to occur—so that the new information could still influence federal decisionmaking. 490 U.S. at 374; *Op.-Br.* 32-34. BLM does not seriously contest that significant NEPA-triggering federal action remains under the program. In fact, BLM concedes that each lease issued pursuant to the program is itself major federal action that requires NEPA analysis. *Zinke-Br.* 23-24. Although BLM attempts to paint each lease decision as an isolated NEPA-triggering event that is unconnected to the larger coal-leasing program, each lease approval is in reality part and parcel of a larger program. That much is apparent from Secretary Zinke’s order

revoking the moratorium on issuing coal leases, where he emphasized the importance of the “coal leasing program” and explained that he intended to “enhance and improve the Federal coal leasing program” by directing BLM to immediately resume issuing coal leases writ large. Secretarial Order No. 3348, at 1 (Mar. 29, 2017).

Moreover, beyond considering and approving individual leases, BLM also actively and concretely manages other aspects of the leasing program on an ongoing basis. As appellants’ opening brief explained (at 18-19), the agency continues to update and audit its guidance and procedures under the program. BLM also makes ongoing large-scale decisions about how much coal to lease and at what prices. *Id.* at 18. The agency also engages in various pre- and post-lease actions under the program, including reviewing and approving operations and reclamation activities, conducting regular mine inspections, and approving lease-modification applications. Each of those actions reflects an exercise of agency discretion that could be influenced by a programmatic accounting of climate-change impacts. BLM’s insistence that it can continue to make those decisions and take the associated actions without such an

accounting simply rejects NEPA's goal of environmentally informed decisionmaking.

BLM is correct that NEPA does not dictate the substantive result of agency decisionmaking. But NEPA does require that an agency both base its decisions on “[c]omplete information” about “the environmental effects of proposed agency action” and disseminate that complete information to allow the public to react to the effects of a proposed action “at a meaningful time.” *Marsh*, 490 U.S. at 371. Neither of those important goals can be realized where, as here, an agency refuses to update concededly outdated environmental analysis for an ongoing program that yields a stream of major federal actions.

BLM's reliance on *SUWA*, 542 U.S. at 73, to support a contrary conclusion is misplaced. *SUWA* held that NEPA did not require the Forest Service to update the EIS for a land-use plan because Forest Service regulations defined the approval of the land-use plan itself as the major federal action triggering NEPA duties. *Id.* No similar regulation defines the establishment of the coal program as a discrete—and complete—agency action that would be immune from NEPA's supplementation obligation. Indeed, the Court in *SUWA* reaffirmed

*Marsh*'s holding that NEPA's supplementation obligation applies where "there remains major Federal action to occur." *Id.* (internal quotation marks and alterations omitted). As demonstrated above, that standard is easily satisfied here.

B. In any event, BLM concedes (at 24) that it must account for climate change in its site-specific EISs, and that because its PEIS is silent on the matter, it cannot "tier" to that document to discharge this NEPA duty. *See id.* Given that concession, the district court's decision can be upheld *only* if BLM's site-specific EISs are sufficient to discharge its program-level NEPA obligations with respect to climate-change impacts. They are not; in fact, BLM has not even meaningfully attempted to demonstrate that they are.

1. The inadequacy of BLM's site-specific climate-change analysis as a substitute for a programmatic-level analysis is apparent in the Tenth Circuit's recent decision in *WildEarth Guardians v. BLM*, 870 F.3d 1222 (10th Cir. 2017). The court in that case reviewed the adequacy of the agency's EIS supporting its decision to authorize four coal leases in Wyoming, and held that the agency abused its discretion when it authorized the leases in reliance on the climate-change analysis

in the associated EIS. *Id.* at 1232-38. In that EIS, BLM avoided engaging in a meaningful analysis of the leases' contribution to climate change by asserting that there was no appreciable difference between authorizing the four leases and taking no action at all. *Id.* at 1228. The agency relied on a "perfect substitution" theory, reasoning that, if the agency did not approve the leases, non-federal coal sources would fill the gap by permitting the same amount of coal to be sourced from elsewhere, thus resulting in no difference in greenhouse gas emissions. *Id.* at 1228, 1234-38.

The Tenth Circuit rejected that evasion of the agency's NEPA duties as arbitrary and capricious because it lacked record support and relied on an "irrational (i.e., contrary to basic supply and demand principles)" "assumption [that] was key to the ultimate decision to open bidding on the leases." 870 F.3d at 1235-37. The court concluded that the agency's faulty logic prevented BLM from adequately distinguishing between the climate-change effects of the various alternatives identified in the EIS and thereby "defeated NEPA's purpose" of "informed decisionmaking and public comment." *Id.* at 1237. Because BLM appears to have relied on the same "perfect substitution" theory in all

coal-leasing EISs that contain any discussion of climate change, the Tenth Circuit's holding in *WildEarth Guardians* would apply to (and invalidate) each of those EISs and associated lease approvals. *See, e.g.*, Final EIS (FEIS) for Buckskin Mine Hay Creek II Coal Lease Application 4-130 (2011); FEIS for Wright Area Coal Lease Applications 4-141 (2010); FEIS for South Gillette Area Coal Lease Applications 4-120 to 4-121 (2009); FEIS for East Lynn Lake Coal Lease 266 (2009); FEIS for West Antelope II Coal Lease Application 4-109 to 4-110 (2008); FEIS for Maysdorf Coal Lease Application 3-161 (2007).

2. In addition, BLM's reliance (at 25) on this Court's decision in *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013), is misplaced because that decision only further highlights the inadequacy of the agency's site-specific approach to climate-change analysis. Although that decision upheld the adequacy of the climate-change analysis in the EIS associated with a site-specific coal lease decision, it did not hold that the site-specific analysis was a substitute for the type of programmatic analysis at issue here. Quite the opposite.

First, the Court accepted BLM's contention that "it is not possible to associate specific actions" such as the approval of a single lease "with

the specific global impacts such as potential climate effects.” 738 F.3d at 309 (internal quotation marks omitted). If that is true, then site-specific EISs can *never* substitute for a supplemental PEIS, because they necessarily fail to address the cumulative impact of all leases approved under the ongoing program. An agency has discretion about when and how to examine the cumulative effects of a program that comprises a number of discrete agency actions—but it must do that analysis at some point. The NEPA regulations make clear that the “[s]ignificance” of the environmental effect of a particular action “cannot be avoided by ... breaking it down into small component parts.” 40 C.F.R. §1508.27(b)(7). BLM’s insistence in site-specific EISs that it cannot assess the impact on global warming of a single coal lease thus may be defensible with respect to its obligations for *that lease*, but it cannot excuse the agency from finding *some* way to discharge its obligation to examine the significance of the program’s aggregate effect on climate change.

Second, this Court did not hold in *WildEarth Guardians* that the EIS at issue satisfied the full extent of NEPA’s cumulative-impacts analysis. Whether analyzed at the programmatic level or at the site-specific level, NEPA’s implementing regulations require an agency to

consider “cumulative” “[i]mpacts,” 40 C.F.R. §1508.25(c)(3), including “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts,” 40 C.F.R. §1508.27(b)(7). The regulations explain that the cumulative impact that must be analyzed “is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” and note that “[c]umulative impacts can result from individually minor but collectively significant actions taking place over time.” 40 C.F.R. §1508.7. Aggregate climate-change effects from individual coal-mining operations are exactly the type of cumulative effects that NEPA requires an agency to address. Contrary to BLM’s suggestion, this Court in *WildEarth Guardians* did not hold that the EIS adequately considered the cumulative effects of leases issued under the coal program. Rather, the Court held that BLM was not required to examine the cumulative effects of the particular lease at issue, in combination with 11 other specific leases that had not yet reached a planning stage that would trigger a need for site-specific NEPA analysis. 738 F.3d at 309-10. The decision includes *no* discussion of the need to examine the cumulative effects on climate change of the coal

program as a whole, which is the subject of the instant litigation. It therefore fails to support BLM's contention that its site-specific climate-change analysis is an adequate substitute for supplementing the PEIS.

3. As reflected in these cases, the inadequacy of a site-specific EIS as a substitute for a supplemental PEIS is underscored by the different purposes of each type of environmental analysis. The agency itself recognized the division of labor in the 1979 PEIS, explaining that the PEIS would analyze (and be updated to account for) the “[n]ational and interregional impacts” of the program, while site-specific EISs would analyze more narrow impacts directly attributable to individual decisions. 1979 PEIS at 3-9. Agencies have substantial flexibility in this area, and NEPA regulations often require an agency to analyze cumulative impacts in a site-specific EIS, but BLM's lease-specific EISs here only illustrate the difficulty of fully discharging NEPA's obligations when the underlying programmatic EIS is inadequate. The purpose of a programmatic EIS is to consider the environmental impacts of the entire program—and, critically, to consider *programmatic* alternatives. See 40 C.F.R. §1502.14. The best (and only permissible) way to examine whether the current form of the ongoing coal program remains the

preferred alternative in light of significant new information about the climate-change consequences of mining, transporting, and consuming coal, is to examine programmatic alternatives in a programmatic EIS.

As noted, BLM has repeatedly stated in leasing EISs that a site-specific EIS is *not* the place to consider programmatic alternatives to the coal program, using the “perfect substitution” theory, *supra* pp. 21-23, and other excuses, Op.-Br. 48-53. We take them at their word. But this inadequacy of site-specific analysis does not excuse BLM from its NEPA obligation to refrain from further agency action under the coal program until it has completed an adequate review of the program’s cumulative effect on climate change and the effects of potential programmatic alternatives. BLM admits that it cannot tier to the PEIS’s climate-change analysis (because there is none), and contends that it cannot address the cumulative climate-change effects of the program in a site-specific EIS, so the only remaining option is for BLM to supplement the PEIS. NEPA thus requires that result, and the district court erred in concluding otherwise.

### III. BLM's Commitments To Update The 1979 PEIS Are Binding.

As the opening brief explained (at 64-69), BLM has an independent obligation under the APA and NEPA to honor its own express commitment, going back to the 1979 PEIS, to update the PEIS as necessary to account for changing circumstances or substantial new information. Indeed, the basic APA principle that agency commitments bind an agency until it makes and explains a policy change applies with special force in the NEPA context, as the governing regulations expressly provide that “[m]itigation and *other conditions* established in the [EIS] or during its review and committed to as part of the decision *shall be implemented.*” 40 C.F.R. §1505.3 (emphasis added). The government’s less-than-two-page response should not ease APA concerns about the agency saying one thing and doing another; if anything, it makes the problem worse.

First, BLM mischaracterizes the agency’s commitment in describing it as only an off-hand statement in the 1979 PEIS. As the opening brief explained, BLM repeated its commitment to update the PEIS in the 1979 PEIS *and* the 1979 Record of Decision, *see* Op.-Br. 64 (citing Interior, Secretarial Issue Document, Federal Coal Management

Program 97-98 (1979)). Nor were these statements about the scope of the PEIS and the need to update it confined to regional leasing, as BLM suggests (at 28); the 1979 Record of Decision says: “*National and interregional impacts of the Federal coal management program are analyzed in the programmatic environmental impact statement. The document would be updated when conditions change sufficiently to require new analyses of those impacts.*” 1979 Secretarial Issue Document at 98. An equally stark commitment appears in the 1982 Record of Decision, where BLM explained that it would update the PEIS “when its assumptions, analyses, and conclusions are no longer valid.” *See Op.-Br. 12, 15* (quoting 47 Fed. Reg. at 33,115). BLM’s argument (at 29) that this Court’s precedents require complying only with commitments made in a record of decision is thus affirmatively fatal to its position and, in any event, ignores decisions requiring that agencies comply with commitments made in NEPA documents as well. *Op.-Br. 66-67.*

BLM’s sole additional argument is that these statements amount to nothing more than a commitment to follow NEPA. *See Zinke-Br. 29.* It infers this from 1982 amendments that removed certain regulations from 1979 that required particular updates. But that is *our point*: When

it removed those regulations in 1982, BLM justified its action by informing commenters that its NEPA obligations made those regulations essentially redundant—it said that, because of NEPA, “[r]egardless of whether this provision is deleted or retained, the Department must revise or update the Program EIS when its assumptions, analyses and conclusions are no longer valid.” 47 Fed. Reg. at 33,115. BLM’s current position is that this justification is not true now and never was, because NEPA does not require updating stale programmatic EISs at any time, and only requires updates when new program regulations are proposed. *See* Zinke-Br. 28-30. Put otherwise, BLM now attributes a limiting effect to the 1982 change when it affirmatively told commenters, citizens, and courts who would review the 1982 amendments that it was *not* making this substantive change.

This kind of argument should be particularly troubling to this Court. Faced with this Court’s review, agencies frequently promise that a regulation or amendment will be interpreted or implemented in a particular way. This is, in fact, the very point of the APA’s largely procedural focus and this Court’s largely procedure-enforcing review—to clarify and test the agency’s position and its justifications, rather than to

second-guess the action itself. The agency's view that it cannot be held to the commitment it made in its 1979 Record of Decision *or* the justification it gave for amending its regulations in the 1982 Record of Decision thus threatens the core engine of APA review. If neither the citizenry nor this Court can trust the word of agencies explaining the effects of the changes they make and why they are making them, then there is no point in making them explain those changes at all.

It is an APA violation to say one thing in the record of decision that justifies a rule change and then do the opposite. This Court should so hold and require BLM to perform the PEIS update it repeatedly promised.

#### **IV. The 1979 PEIS Evaluated The Coal-Leasing Program At Issue.**

Finally, this Court should reject intervenors' specious argument that the 1979 PEIS does not even evaluate the coal-leasing program that is currently in operation. Even BLM agrees (Zinke-Br. 6) that the 1979 PEIS governed the establishment of "two leasing mechanisms": a regional coal leasing option and the "lease by application" option at issue here. Intervenors' contentions conflate the mechanism BLM uses to issue new leases with the comprehensive program itself, which is made up of

an array of elements in addition to the leasing mechanisms that the 1979 PEIS examined. More fundamentally, it finds no support in the PEIS itself. The opening words of the document summarize the major federal action under analysis as a coal-management program made up of many elements, one of which is the leasing mechanism. 1979 PEIS at iv (explaining that “the program would establish standards and procedures for determining when, where, and in what manner the right to mine coal owned by the United States government should, through competitive sales, be leased to parties”).

Ultimately, BLM chose a mix of two alternatives analyzed by the 1979 PEIS, adopting a hybrid of regional leasing and lease-by-application. *See* 44 Fed. Reg. 42,584 (July 19, 1979). That program, adopted by rule in 1979, remains in place today.

The district court in *WildEarth Guardians v. Salazar* considered and rejected the argument that the program created by the 1979 Final Rule focused exclusively—or even primarily—on regional leasing. 783 F. Supp. 2d 61, 63 (D.D.C. 2011). That court explained that the program created by the final rule “contemplate[d] two separate coal leasing processes—specifically, the “competitive regional leasing” process

and the “leasing-by-application” process. *Id.* (citing 43 C.F.R. pt. 3420). Moreover, the court rejected the notion, repeated here by Intervenor, that the regional leasing program was intended to be the primary focus of the 1979 rulemaking or the default mechanism for leasing coal on federal land, concluding that “[t]here simply is no indication—none—that the BLM intended to ... prioritize the competitive regional application process over the leasing-for-application process.” *Id.* at 73. This Court should similarly reject Intervenor’s arguments to the contrary.

### CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

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January 12, 2018

/s/ Eric F. Citron

Eric F. Citron

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on January 12, 2018. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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Eric F. Citron