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Sent via e-mail and U.S. Mail

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Re: Public Comments on the Draft Environmental Assessment for the John Henry No. 1 Coal Mine Permit Revision

Dear Mr. Wilcox:

Thank you for the opportunity to submit comments on the Draft Environmental Assessment (EA) for the proposed John Henry coal mine permit modification. These comments are submitted on behalf of the Sierra Club, Earthjustice, Climate Solutions, and Puget Soundkeeper Alliance. Based on the many errors and omissions in the EA, the and potentially significant impacts that would accompany reopening what would be Washington's only active surface coal mine, we urge OSM to reject the proposal in favor of the "no action" alternative.

I. INTRODUCTION

Our organizations continue to have serious concerns about the proposed mining and its environmental impacts. The purpose of the NEPA review process is two-fold: "First, it places upon [the action] agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Kern v. BLM*, 284 F.3d 1062, 1066 (9th Cir. 2002).

As described in detail below, the EA does not adequately address the full suite of environmental impacts from the proposed mine, and in several places downplays the impact of the proposed action compared to the "no action" alternative. In doing so, the analysis undermines the EA's fundamental role in informing the agency and the public of the likely environmental impacts; it prevents the agency from making a fully informed decision and denies the public a meaningful opportunity to comment on the likely environmental impacts of the proposed project.

The most significant flaws in the EA relate to the undisclosed history of waste disposal at the mine, the woefully incomplete analysis of transportation impacts, the failure to consider reasonable alternatives tied to mine reclamation, and the repeated and unsupported (often contradicted) assertions that the "no action" alternative would have *greater* environmental impacts than the proposed action. In order to ensure compliance with the National Environmental Policy Act (NEPA), OSM should either reject the proposed permit revision application or begin preparation of a full environmental impact statement (EIS) that adequately considers and discloses all environmental impacts associated with the proposed project.

II. HISTORY OF THE MINE

As background for the discussion of likely environmental impacts from the proposed mining, it is useful to outline the relevant history of the John Henry Mine and the past conduct of applicant Pacific Coast Coal Company (PCC). As will no doubt be familiar to OSM, but was not disclosed to the public in the EA, PCC has what the U.S. Department of Interior's Interior Board of Land Appeals (IBLA) calls a troubling "history of indifference to compliance with Federal regulations, disregard for specific orders from OSM to cease its practice of unauthorized disposal of waste materials, and disregard of its permit terms regarding disposal activities." *Pacific Coast Coal Company v. OSM*, 174 IBLA 265 (quoting *PCC v. OSM*, 158 IBLA 115, 129 (2003)).

PCC began mining operations at the John Henry No. 1 coal mine in 1985. Although the mine ceased operations in 1999 because of poor market conditions, the company left in its wake two open mine pits (referred to as Pit 1 and Pit 2) and four open piles of mining spoil that have not yet been reclaimed even though it has been roughly 15 years since any mining took place. OSM News Release (Sept. 2, 2010). OSM has allowed the pits to remain open and unreclaimed to accommodate PCC's desire to mine in the future, if the coal market improves. The result is that PCC has egregiously violated the clear "contemporaneous reclamation" obligations imposed on mine operators by federal surface mining regulations. *See* 30 C.F.R. § 816.100.

In 1999, PCC began importing off-site waste for permanent disposal at the mine without OSM's knowledge or permission. *PCC v. OSM*, 174 IBLA 264. In 2001, PCC applied to OSM for, and received, a permit revision that allowed the company to bring in and dispose of up to 500,000 cubic yards of off-site waste and fill material in Pit 1. *See PCC*, IBLA 2011-91, Order at 2 (Sept. 23, 2011). That fact is not disclosed in the EA, nor does the EA disclose several important factors that are relevant to the potential impact of storing off-site waste in a mine pit, including

but not limited to the following: the actual quantity of off-site waste deposited at the mine, where it was deposited, the origin and content of that waste, its toxicity, its leaching properties, whether additional mining or reclamation activities will facilitate movement of the waste outside the mine boundary, whether current bonding is adequate to cover the cost of reclamation given this outside waste, and whether the unlined mine pit and surrounding geology make it likely that some of this waste may have already migrated off site.

Beginning in 2002, PCC communicated to OSM that it intended to resume mining, though it never did. In April 2009—approximately ten years after the end of mining—OSM gave the company a final opportunity to establish that it intended to restart mining by producing a coal contract. More than a year later, the company finally responded, agreeing with OSM in May 2010 to begin reclamation at the mine. Two months later, PCC backed off that commitment, seeking permitting to mine an additional 3.5 acres and conduct "test burns" of roughly 26,000 tons of coal. OSM saw through the blatant attempt to mine an insignificant amount of coal in order to simply postpone the mine's obligation to pay for reclamation. As OSM stated at the time, "After eleven years with no mining activity or reclamation, the company must be held to a reasonable standard, which is why OSM has denied Pacific Coast's permit." OSM News Release (Sept. 2, 2010).

Three and a half years later and still PCC has neither mined any coal nor begun meaningful reclamation efforts. OSM has a mandate to ensure that coal mining is conducted in a manner that protects citizens and the environment and to ensure that land is restored to beneficial reuse after mining has ended. OSM should adhere to those mandates by denying the proposed permit modification request, as it is simply one more attempt to put off legally required reclamation.

III. THE ENVIRONMENTAL ASSESSMENT DOES NOT COMPLY WITH NEPA.

NEPA, 42 U.S.C. §§ 4321-43709, "is our basic national charter for the protection of the environment." 40 C.F.R. § 1500.1(a). NEPA "promotes its sweeping commitment to 'prevent or eliminate damage to the environment' . . . by focusing Government and public attention on the environmental effects of proposed agency action." *Marsh v. ONRC*, 490 U.S. 360, 371 (1989).

One of NEPA's primary purposes is to ensure that an agency, "in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA also "guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience," including the public, "that may also play a role in the decisionmaking process and the implementation of the decision.'" *Id.*

OSM has failed to comply with its NEPA mandate in key respects, including the failure to take a hard look at likely environmental consequences, the failure to consider a reasonable range of alternatives, the failure to identify and evaluate potential mitigation measures, and the failure to prepare a full EIS.

A. The EA Fails to Take a Hard Look at Environmental Impacts.

NEPA requires agencies take a "hard look" and the environmental impacts of their decisions. *See, e.g.*, *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2004); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 711 (10th Cir. 2010). *See also* 40 C.F.R. § 1502.16 (requiring consideration of direct and indirect effects of agency action); 40 C.F.R. § 1502.2(g) (stating that NEPA reviews "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.").

The EA prepared for the proposed action at the John Henry No. 1 mine fails the basic informational disclosure requirement of NEPA. The U.S. Supreme Court has called the disclosure of impacts the "key requirement of NEPA" and held that agencies must "consider and disclose the actual environmental effects" of a proposed project in a way that "brings those effects to bear on [an agency's] decisions." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 96 (1983). NEPA regulations require agencies to provide "a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14.

1. Undisclosed History of Waste Disposal at the Mine

One of the most troubling aspects of OSM's EA is its total failure to analyze or disclose to the public PCC's history of using Pit 1 at the John Henry No. 1 coal mine for disposal of off-site wastes. This failure is particularly disconcerting because the proposed mining operations would entail mining and reclamation activities in Pit 1, and it could potentially affect the migration of this waste. *See* OSM, Environmental Assessment for the Proposed Revision and Renewal of Permit WA0007D for Resumption of Mining, pp. 8-9 (March 2014) (hereafter cited as "EA at __") (discussing the mining and reclamation as occurring in both Pit 1 and Pit 2).

OSM is clearly aware of PCC's practice of dumping off-site waste in the unlined Pit 1 at the John Henry mine, since in 2001 OSM authorized PCC to dispose of up to 500,000 cubic feet of off-site wastes at the mine. *PCC v. OSM*, 174 IBLA 262, 265 (2008). Five years later, OSM rejected PCC's request to deposit another 500,000 cubic feet of wastes at the site. Moreover, as the cited IBLA decision makes clear, OSM has long recognized PCC compliance problems specifically related to these waste disposal practices: "Over the course of a number of years, OSM issued a series of three notices of violation (NOVs) and a permit revision order (PRO) concerning PCC's waste disposal operations." *Id.* at 264. It appears from various IBLA decisions—though not the EA—that PCC engaged in "the unauthorized disposal of waste materials" at the mine, *id*. at 265, calling into question whether OSM or any other government agency has ever studied the precise content, quantity, or location of off-site waste trucked in and dumped at the John Henry No. 1 mine.

OSM has explicitly recognized that mining and reclamation activities at this mine could affect these wastes imported from unspecified, off-site locations. In *PCC v. OSM*, 158 IBLA 115, 125-30 (2003) the IBLA affirmed OSM's determination that it had jurisdiction under the Surface

Mining Control & Reclamation Act to regulate PCC's waste disposal practices since OSM had a duty under that statute to ensure that the mine's reclamation activities met applicable performance standards and did not endanger public health and safety. Other regulatory agencies that oversee mining have taken a firm stance when it comes to evaluating the impact of off-site wastes that are affected by coal mining or reclamation activities. For example, in December 2009 an administrative law judge (ALJ) with the Indiana Natural Resources Commission found that in the 1960s and 70s Squaw Creek Coal Company had participated in the burial of smelting wastes "at depths that it reasonably knew would result in contact with water" and that reclamation activities resulted in mining spoil that facilitated the lateral movement of waste by creating an "unconfined aquifer." Ind. Natural Res. Comm'n, Findings of Fact and Conclusions of Law, 31-32, Admin. Cause No. 08-034R (Dec. 28, 2009). OSM has an obligation to evaluate whether similar impacts could occur here, and then it must disclose those impacts to decision-makers and the public in order to comply with its NEPA mandates.

Impacts that OSM must evaluate and disclose include, but are not limited, to the following:

- the actual quantity of off-site waste deposited at the mine;
- where the waste was deposited;
- the origin and content of that waste;
- its toxicity;
- its leaching properties;
- whether additional mining or reclamation activities will facilitate movement of the waste outside the mine boundary;
- whether current bonding is adequate to cover the cost of reclamation given this outside waste; and
- whether the unlined mine pit and surrounding geology make it likely that some of this waste may have already migrated off site.

2. Transportation Impacts

NEPA mandates that agencies disclose all reasonably foreseeable impacts of a proposed action. 40 C.F.R. § 1502.22*; Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 963 (9th Cir. 2002) ("NEPA regulations and caselaw require disclosure of all foreseeable direct and indirect impacts" of a proposed action.).

Here, the EA fails to adequate disclose the full range of potential environmental impacts by either ignoring or down-playing potential transportation impacts associated with the mining and hauling of coal over a six year period. The EA states that "[c]oal will be hauled out at the average rate of ten (10) trucks per day five days a week.") EA at 44. The EA then concludes that this is roughly a third of past truck traffic from the mine, and that impacts are "relatively insignificant." *Id.* There are multiple problems with the EA's analysis on this point.

First, the EA appears to downplay the potential number of truck trips by disclosing only the low estimate of trips specified by the applicant. The reality is that PCC's "permit application

package" or "PAP" states that the number of truck trips could be three times the amount listed in the EA: "Truck traffic leaving the mine site is in the range of 10-30 truck-loads per day at full operation." PAP at 3-7 (April 18, 2011). The significant difference between 30 truck trips a day and 10, considered over six years of proposed mining, must be disclosed to residents of Black Diamond, WA and other members of the community.

Second, the EA labels the impact of truck traffic "negligible" for both the "action" and "no action" alternative, leaving the reader with the impression that the impacts are the same for the two options considered. EA at 44. The impacts are not the same. As the EA recognizes, under the "no action" alternative, "[n]o coal will leave the mine site." *Id.* Under the "action alternative" between 10 and 30 trucks will leave the mine loaded with coal—every day, five days a week, for six years. Moreover, as the EA notes, State Route 169 is the only regional north-south roadway that connects areas with high levels of employment and service. EA at 44. Despite the fact that the proposed mining would entail thousands of truck trips over a six year period on the only main commuter thoroughfare, the EA provides no information as to the emissions or public safety impacts those trips would cause, and provides only the most cursory of dismissals over traffic congestion concerns. By providing the public with only the low estimate for traffic, and then classifying those traffic impacts as having the identical impacts as the "no action" alternative, the EA has prevented the public from the opportunity to fully understand and comment on the proposed project. This violates NEPA.

In *Wildlands v. U.S. Forest Service*, 791 F.Supp.2d 979, 991 (D. Or. 2011), the court found that "[t]he public evaluation process of the proposed agency action and its impact on the environment was skewed by the inaccurate and misleading 'not likely to adversely impact' determination in the EA." The court then concluded that "the public is entitled to be accurately informed of the impact of the proposed action . . . and to have a meaningful opportunity to weigh in on the proposal during the period for public review and comment." *Id.* Through its limited analysis, OSM's approach here has totally foreclosed the public's opportunity to comment on the true impacts of this project, as compared to the "no action" alternative.

3. Air Quality Impacts

The EA fails to adequately address the air quality impacts associated with truck or barge transport of the John Henry No. 1 coal. As an initial matter, the EA does not even disclose that coal will travel by barge and makes no mention of the environmental impacts associated with barge loading, unloading, and transport. Notably, although use of barges to transport coal is not contemplated in the EA, it is discussed in PCC's permit application package, which provides, "[c]oal from the John Henry No. 1 mine is transported to consumers in the Pacific Northwest by truck and truck/barge combinations." PAP at 3-7. The permit application even specifies the quantity of coal that will be shipped by barge (74,000 tons per year) and the barge location (Tacoma, WA). *Id.* Given that OSM has this information, including the identity and location of the Lehigh Cement plant in Canada that will purportedly buy all of the coal produced at the mine, OSM must evaluate these impacts and disclose them to the public.

Although the EA notes that air quality modelling was conducted in 1984 and again in 2010, these models looked only at direct air quality impacts from mining, totally ignoring the potentially significant air quality impacts that may arise from coal transport. EA at 23-30.

Instead, the EA claims—wrongly—that it does not have an obligation to look at impacts associated with coal transportation. The EA provides:

> OSMRE did not evaluate emissions generated by the transporting of or the use of coal once it leaves the mine site. Although there is a contract to use the coal by a cement plant, once the coal enters the market it will likely also be utilized in other ways. It could be utilized overseas, in a power plant, in another cement plant, or for any other number of purposes. Therefore, any estimate of downstream impacts caused by coal mining at the John Henry No. 1 Mine would likely be inaccurate, and is therefore not considered in this document.

EA at 30.

NEPA's governing regulations define what "range of actions, alternatives, and impacts [must] be considered in an environmental impact statement." 40 C.F.R. § 1508.25. The EIS must consider both direct and indirect effects. The direct effects of an action are those effects "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). The indirect effects are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

Notably, agencies cannot avoid their responsibility to consider such future effects simply by claiming that they are uncertain. *See City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) ("Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling and all discussion of future environmental effects as 'crystal ball inquiry'.")

In this instance, no guesswork is required. OSM knows how much coal is going, where it's going, and how it's getting there. These indirect impacts are reasonably foreseeable consequences of the proposed re-opening of the John Henry No. 1 mine, and must be analyzed and disclosed by OSM as required by NEPA.

4. <u>Water Quality Impacts</u>

The EA improperly downplays the water quality impacts of the proposed project, falsely equating impacts under the "action" and "no action" alternatives, similar to the approach to transportation impacts noted above. The EA first explains that "[d]ischarge from the mine was higher during the mining years (up to 1999)" and that "resumption of mining at the John Henry Mine will likely result in a similar scenario as was observed in the previous mining phase." EA at 18. This disclosure is what one would expect, as surface mining often entails water discharges.

The EA follows this statement, curiously, by asserting that impacts from the "action" alternative would be smaller than impacts associated with the "no action" alternative. EA at 19.

This dubious assertion is based on the premise that the volume of material and distance it has to be moved—during the reclamation phase only—would be greater under the "no action" alternative, and that conducting reclamation year round would present additional problems. *Id.* This statement ignores the reality that active mining operations create water discharges and that these discharges impact the quality of nearby waters. OSM makes no attempt to compare the "no action" reclamation impacts with impacts from mining and reclamation of the "action" alternative. Moreover, OSM's statements provide no reference to comparable reclamation plans in a way that would allow the public or decision-makers to assess the accuracy of such statements. For instance, the statements assume that reclamation called for under the proposed action shifts reclamation to a seasonal, rather than year round approach called for by the "no action" reclamation plan. If this is true, then OSM must explain the reason for the difference and disclose how that results in different impacts. This has not been done in the EA, and OSM has thus fallen short of giving the public and decision-makers a full and fair picture of the impacts of the "action" alternative when compared to a "no action" alternative.

5. Climate Impacts

In its analysis of the mine's climate impacts, the EA references seriously outdated information on the climate disrupting effects of methane. The EA discloses that coal cleaning plants such as the one proposed as part of this project release methane. EA at 22. The EA then cites the Intergovernmental Panel on Climate Change (IPCC) 2006 report as stating that the global warming influence of methane is 21 times that of carbon dioxide. *Id.*

While it is true that methane is a potent greenhouse gas, the figures cited in the EA are outdated. The Intergovernmental Panel on Climate Change's Fifth Assessment Report, released in September 2013, estimates that methane has 34 times the global warming potential of carbon dioxide over a 100 year time frame and at least 86 times the global warming potential of carbon dioxide over a 20-year time frame. Intergovernmental Panel on Climate Change (IPCC), Climate Change 2013, p. 714, (available at https://www.ipcc.ch/report/ar5/wg1/#.Uxs205zpiqY (last accessed May 12, 2014). OSM must revise the climate analysis section to reflect this new information, and further account for the climate impacts of direct methane emissions, direct carbon dioxide emissions, and indirect carbon dioxide emissions from the mined coal's use in cement plants or coal-fired power plants.

B. The EA Fails to Consider Reasonable Alternatives.

The alternatives analysis is "the heart" of any environmental review. 40 C.F.R. § 1502.14. NEPA requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E), (2)(C). An EA must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a).

In this instance, the EA only considers two options: a "no action" alternative and the proposed alternative. EA at 9. The result is that OSM has unnecessarily constrained its review.

Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an agency's environmental review to inform agency deliberation and facilitate public involvement is greatly degraded. *See Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 97 (1983). While NEPA "does not require agencies to analyze the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or impractical or ineffective," it does require the development of "information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned." *Colorado Envtl. Coal. v. Dombeck*, 85 F.3d 1162, 1174 (10th Cir. 1999) (quotations and alteration omitted).

Here, OSM erred by not considering an alternative that requires phased reclamation rather than allowing all reclamation to occur at the end of mining in 2017 and 2018. EA at 5. As discussed above, this mine has been closed since 1999, *id*., but the EA provides no information on the current extent of reclamation at the mine, or whether *any* reclamation has occurred at all. Federal surface mining regulations require mine operators to reclaim lands "as contemporaneously as practicable." 30 C.F.R. § 816.100 provides: "[r]eclamation efforts, including but not limited to backfilling, grading, topsoil replacement, and revegetation, on all land that is disturbed by surface mining activities shall occur as contemporaneously as practicable with mining operations.").

Not only does OSM have an obligation to consider reasonable alternatives, which the phased alternative is, a phased reclamation alternative would help address the significant possibility that PCC is only proposing mining as a way to put off the significant cost of reclamation. In communications with PCC, OSM has recently estimated reclamation costs to be $6,200,000, far higher than PCC acknowledged in its permit application, which pegged reclamation at $4,356,280. *Cf.* OSM Letters to PCC (Aug. 23, 2013) and (Oct. 28, 2013) *with* Permit Application Package at 3-85 (April 18, 2011). Moreover, as OSM stated so aptly in 2010, SMCRA "requires OSM to help ensure that the Nation's energy needs [sic] while protecting the environment from the adverse effects of surface coal mining. After eleven years with no mining activity or reclamation, the company must be held to a reasonable standard, which is why OSM has denied Pacific Coast's permit." OSM News Release (Sept. 2, 2010).

Given the long history of inactivity at the mine—both in terms of mining and reclamation—the proposed action should be a serious concern for nearby residents and OSM. Not only has PCC successfully put off OSM attempts to require contemporaneous reclamation for more than a decade, it has left the community with two open pits and four spoil piles. Federal law requires this land to be reclaimed, but so far those legal requirements have not resulted in real world protections for the surrounding community.

C. The EA Fails to Identify Mitigation Measures.

The EA violates NEPA by failing to discuss mitigation measures for all but five of the fifteen impacts identified and studied in the EA. NEPA regulations require that an OSM include here: (1) "appropriate mitigation measures not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f); and (2) "discussions of: … Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f))." 40 C.F.R. § 1502.16(h).

To be sure, each identified impact has a header reading "Environmental Consequence/ Mitigation Measures," but the text that follows most of the headers ignores potential mitigation measures for the impact identified. In most instances, the section fails to even mention mitigation. For those five impacts where mitigation is discussed (water, noise, species, traffic, and visual impacts), only the most cursory discussion of potential mitigation is provided, with no analysis of whether and to what extent mitigation measures will be successful. In any subsequently prepared NEPA document on the John Henry No. 1 Mine, OSM disclose must disclose potential mitigation measures and describe their effectiveness in order to comply with its mandates under NEPA.

That agencies will mitigate the adverse environmental impacts of their actions is implicit in NEPA's statutory language. *Robertson,* 490 U.S. at 351-52 (1989); *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992), and mitigation measures are required by NEPA's implementing regulations. 40 C.F.R. §§ 1502.14(f), 1502.16(h).

The Council on Environmental Quality (CEQ), which prepares and updates NEPA regulations, has stated: "All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperation agencies ...." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18031 (March 23, 1981). According to the CEQ, "[a]ny such measures that are adopted must be explained and committed in the ROD." Forty Questions, 46 Fed. Reg. at 18036.

Federal courts have long held that an agency's analysis of mitigation measures "must be 'reasonably complete' in order to 'properly evaluate the severity of the adverse effects' of a proposed project prior to making a final decision." *Colo. Envt'l Coalition v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999) (quoting *Robertson,* 490 U.S. at 352). Mitigation "must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (quoting *Robertson*, 490 U.S. at 353).

"[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson*, 490 U.S. at 353. A "perfunctory description," of mitigation, without "supporting analytical data" analyzing their efficacy, is inadequate to satisfy NEPA's requirements that an agency take a "hard look" at possible mitigating measures. *Neighbors of*

Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998). An agency's "broad generalizations and vague references to mitigation measures ... do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide." *Id.* at 1380-81. *See also Northwest Indian Cemetery Protective Association v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), rev'd on other grounds, 485 U.S. 439 (1988) ("A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA."); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1988) ("Without analytical data to support the proposed mitigation measures, we are not persuaded that they amount to anything more than a 'mere listing' of good management practices."). Moreover, in its final decision documents, an agency must "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." 40 C.F.R. § 1505.2(c).

D. An Environmental Impact Statement Is Required.

OSM's decision to prepare only a limited EA evaluating the proposed mining's environmental impacts is not supported either by the 1986 EIS that the EA tiers to or by any reasonable consideration of the potential significance of the project's likely impacts.

1. <u>Tiering to the 1986 EIS</u>

In preparing the EA, OSM relies on a 1986 EIS that the agency prepared for the John Henry mine nearly thirty years ago. EA at 8. The EA notes that the 1986 EIS provides a "clear and concise" description of the environmental conditions and impacts and that "[w]here changes have occurred since 1986 they are noted and discussed." *Id.*

This statement is simply not true. The 1986 EIS could not have provided any assessment of the state of off-site waste that PCC began hauling in and disposing of at the site in 2001. NEPA regulations provide that federal agencies must supplement prior environmental review where there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact." 40 C.F.R. § 1502.9(c).

Although tiering to an earlier environmental review is appropriate where the initial EIS provided a programmatic review or addressed a different stage of the process (i.e., site selection vis-a-vis mitigation), neither are present here. 40 C.F.R. § 1502.20. CEQ provides that "[a]s a rule of thumb . . . EISs that are more than 5 years old should be carefully examined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement." CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (March 23, 1981) at Question 32.

2. <u>Significant Impacts</u>

An EIS is further required here because the impacts of the proposed project may be significant. Under NEPA, significance is determined by context and intensity. 40 C.F.R. § 1508.27(a). The

evaluation of the project's intensity is determined by consideration of adverse impacts, degree of impacts to public health or safety, unique characteristics of the impacted area, and the degree to which impacts will be highly controversial, among others. 40 C.F.R. §§ 1508.27(b)(1)-(10). "[T]he existence of one of these factors may be sufficient to require preparation of an EIS." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

Many of these factors for the context and intensity are inter-related and direct OSM to require an EIS before moving forward with the project under NEPA. As noted, the undisclosed dumping of outside wastes at the mine and the impact this waste may have on the surrounding community presents major concerns. These concerns are far too serious to simply dismiss potential impacts as "insignificant" or "negligible" without adequate study. For instance, the EA notes that Black Diamond Elementary School is located approximately 2,000 feet from the permit boundary. EA at 45. The EA nonetheless concludes that any impacts from the "action" or "no action" alternatives are "negligible"—a determination that was apparently made without any regard to the undisclosed, unidentified, or unaccounted for outside waste that PCC began dumping at the mine as early as 1999.

Public controversy similarly directs OSM to prepare an EIS here. More than 1,300 members of the Sierra Club recently submitted comments on the proposed mine project, noting that there are no active coal mines in Washington and that they have major concerns about the proposed mine's impact on their community. There can be no serious debate that the extraction, transportation, and combustion of coal are primary drivers of man-made climate disruption. At the federal level, President Obama released a Climate Action Plan in June 2013, among several other actions, directing federal agencies to consider ways to reduce climate impacts in their decision-making. *Available at* http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf (last visited May 12, 2014). More recently, in April 2014 Washington Governor Jay Inslee reiterated the importance of forward thinking climate policies with the issuance of Executive Order 14-04, which creates a carbon emissions task force to help design and implement a carbon emissions limits and market mechanism program for the state. *Available at* http://www.governor.wa.gov/office/execorders/documents/14-04.pdf (last visited May 12, 2014). Now is not the time to reopen a long-dormant coal mine in Washington. If OSM is determined to press forward with this misguided proposal, NEPA regulations and the increasing public controversy over climate disruption at the national, state, and local level all dictate that OSM prepare an EIS to fully evaluate all environmental impacts of such a decision.

IV. CONCLUSION

For all of the foregoing reasons, the EA prepared by OSM does not comply with NEPA and OSM should reject the proposal in favor of the "no action" alternative.

Submitted on behalf of:

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