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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

MONTANA ELDERS FOR A LIVABLE TOMORROW, MONTANA ENVIRONMENTAL INFORMATION CENTER, and the MONTANA CHAPTER OF THE SIERRA CLUB,	)	Case No. CV-15-106-M-DWM
Plaintiffs,	)	**SIGNAL PEAK ENERGY, LLC'S BRIEF IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
vs.	)	
U.S. OFFICE OF SURFACE MINING, an agency within the U.S. Department of the Interior; U.S.	)	

DEPARTMENT OF THE INTERIOR, a federal agency, ROBERT POSTLE, in his official capacity as Program Support Division Manager of U.S. Office of Surface Mining Western Region; DAVID BERRY, in his official capacity as Regional Director of U.S. Office of Surface Mining Western Region; JOSEPH PIZARCHIK, in his official capacity as Director of U.S. Office of Surface Mining; JANICE SCHNEIDER, in her official capacity as Assistant Secretary of Land and Minerals Management of the U.S.,

Defendants,

and

SIGNAL PEAK ENERGY, LLC,

Intervenor.

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Intervenor Signal Peak Energy, LLC ("Signal Peak"), pursuant to Rule 56.1 of the Local Rules of Civil Procedure and the Court's Order dated December 16, 2016 (Docket No. 46), hereby files this Brief in Support of its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

On August 17, 2015, Montana Elders for a Livable Tomorrow, Montana Environmental Information Center, and the Montana Chapter of the Sierra Club, (collectively, "Plaintiffs") filed a Complaint requesting that this Court set aside a decision of the Office of Surface Mining Reclamation and Enforcement ("Office of Surface Mining" or "Office") and Assistant Secretary of the Land and Minerals Management of the U.S. Department of the Interior ("Secretary") (collectively, with the other Defendants, "Federal Defendants"), which approved a mining plan modification ("Mining Plan Modification") that would authorize the natural extension of the Bull Mountains Mine No. 1 ("Mine") to include 2,539.76 acres of federal coal.

Specifically, Plaintiffs challenge the Office's decision-making process and conclusions under the United States National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), and the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*. ("APA"). Under applicable law, determinations of the Office must be

upheld unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The agency determinations challenged in this action are none of the above.

By way of background, and as more fully discussed in the accompanying Statement of Undisputed Facts ("SOF"), on March 19, 2008, Signal Peak filed with the Bureau of Land Management ("Bureau of Land Management" or "Bureau") a coal lease-by application to naturally extend the life of the Mine, which is an underground, longwall coal mine located in Musselshell County, Montana. (SOF ¶ 32). On April 15, 2011, the Bureau of Land Management issued an over 200-page Environmental Assessment ("Lease EA") that addressed the potential environmental impacts of leasing the Federal coal adjacent to the mine, and a no action alternative. (SOF ¶ 34). The Mine was previously analyzed in several prior NEPA and Montana Environmental Policy Act reviews to which the 2011 EA was tiered. (SOF § IV). In April 2011, after the issuance of the Lease EA, the Deputy State Director of the Bureau issued a Finding of No Significant Impact and Decision Record ("Lease FONSI") approving the Federal lease. (SOF ¶ 35). Both the Lease EA and FONSI were subsequently upheld by the Billings Division of this Court in *Northern Plains Resource Council Inc. v. U.S. Bureau of Land Management*, CV-14-60, 2016 WL 1270983 (D. Mont. March 31, 2016).

After obtaining Federal lease approval, Signal Peak applied to the Office for approval of the Mining Plan Modification to allow it to expand operations and recover coal in the lands covered by the Federal lease. (SOF ¶ 8). As part of the approval process, the Office prepared a new Environmental Assessment, which tiered to and incorporated, *inter alia*, the Lease EA as well as two prior Environmental Impact Statements analyzing the impacts of mining within the Life of Mine area. (SOF ¶¶ 9, 21). On January 27, 2015, the Office issued the final Environmental Assessment ("2015 EA") and a Finding of No Significant Impact ("2015 FONSI"), which recommended approval of the Mining Plan Modification. (SOF ¶ 9). On February 24, 2015, the Secretary approved the Mining Plan Modification. (SOF ¶ 11). It is from this decision that Plaintiffs bring the instant challenge.

DEFERENTIAL STANDARD OF REVIEW

NEPA does not supply a separate standard of review, so claims under NEPA must be reviewed under the standards of the APA. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Where an agency has taken final action, a court may set aside that action under the APA only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Although this review is "searching and careful," the arbitrary and capricious standard is "narrow, and [the Court] cannot substitute [its] own judgment for that of the [agency]." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005) (citations omitted). An agency's decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 (9th Cir. 2007) (citations omitted). The burden is on the plaintiff to demonstrate an action is arbitrary and capricious. *State v. U.S. Dep't of Agriculture*, 661 F.3d 1209, 1227 (10th Cir. 2011).

"In general, a court will uphold agency decisions so long as the agencies have considered the relevant factors and articulated a rational connection between the factors found and the choices made. This deference is particularly appropriate when a court is reviewing issues of fact, where analysis of the documents requires a high level of technical expertise." *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 578 (9th Cir. 2016) (citations omitted). Accordingly, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a

court might find contrary views more persuasive." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (citations omitted). "[D]eference to an agency's technical expertise and experience is particularly warranted with respect to questions involving engineering and scientific matters." *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989). Similarly, courts "must give substantial deference to an agency's interpretation of its own regulations." *Akootchook v. U.S.*, 271 F. 3d 1160, 1167 (9th Cir. 2001). Where the agency has relied on "relevant evidence [such that] a reasonable mind might accept as adequate to support a conclusion," its decision is supported by "substantial evidence." *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003). Even "[i]f the evidence is susceptible of more than one rational interpretation, [the court] must uphold [the agency's] finding." *Id.*

In reviewing an administrative agency decision under the APA, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *City & County of San Francisco v. U.S.*, 130 F.3d 873, 877 (9th Cir. 1997) (citations omitted). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.*

ARGUMENT

I. The Purpose and Need Statement Was Not Arbitrary and Capricious

Plaintiffs contend in Count VI of their Complaint that the purpose and need statement in the 2015 EA was "unlawful" under NEPA. However, while NEPA requires a purpose and need statement for an EIS,[1] it does not for an EA. Rather, 40 C.F.R. § 1508.9 states that an Environmental Assessment shall "include brief discussions of the need for the proposal...." The 2015 EA clearly satisfies this requirement and, even if applicable, also satisfies the requirements for an EIS under 40 C.F.R. § 1502.13.

As an initial matter, Section 1.2 of the 2015 EA clearly defines a valid purpose for the proposed action. Pursuant to 30 C.F.R. § 746, the Office is responsible for reviewing plans to conduct coal mining and reclamation operations on lands containing leased Federal coal. It "shall prepare and submit to the Secretary a decision document recommending approval, disapproval or conditional approval of the mining plan to the Secretary." 30 C.F.R. § 746.13. This statutory objective is clearly recognized in Section 1.2, which states that the Office shall "recommend approval, disapproval, or approval with conditions of the proposed mining plan modification...." (SOF ¶ 42).

[1] *See* 40 C.F.R. § 1502.13.

Further, as set forth in Federal Defendants' Brief, agencies enjoy "considerable discretion" to define the purpose and need of a project. (Docket No. 48, p. 12). In so doing, an agency may consider both public and private interests that will be advanced by the proposed action.[2] The 2015 EA does just that.

Like the Lease EA that preceded it and is incorporated therein, the 2015 EA clearly considers not only Signal Peak's private objectives, but also the substantial public interest in the continued development of the Mine. The purpose and need statement specifically recognizes that the Mine will close absent approval of the mining plan modification, as approval of the proposed action is necessary to "extend the life of the mine by 9 years." (SOF ¶ 43). Indeed, Signal Peak currently employs 312 people, and the early cessation of mining would have substantial and negative socioeconomic consequences. (SOF ¶ 44). As set forth in Signal Peak's accompanying Statement of Facts, absent approval of the mining plan modification, hundreds of current employees will lose their jobs and millions of dollars will be removed from the federal, state, and local economies. (SOF ¶¶ 44-47).

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[2] *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013) ("An agency must look hard at the factors relevant to definition of purpose, ***which can include private goals, especially when the agency is determining whether to issue a permit or license.***") (emphasis added). Plaintiffs rely heavily on *National Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d 1058 (9th Cir. 2009). However, that case did not involve the approval or disapproval of a permit or license, but rather a proposed land exchange between a private corporation and the Bureau.

Ignoring the costs of a mine closure, Plaintiffs' instead claim that the Mining Plan Modification is "antithetical to congressional energy policy." Specifically, one of the stated purposes of the Surface Mining Control and Reclamation Act is to assure a coal supply meeting the Nation's needs, and because a majority of coal produced from the Mine was being exported at the time the 2015 EA was completed, Plaintiffs contend that the Mining Plan Modification violates this objective. (Docket No. 41, p.4 (citing 30 U.S.C. § 1202(f)).

As an initial matter, there is no suggestion that the export of coal from the Mine will result in an insufficient supply of coal domestically. Further, neither NEPA nor the Surface Mining Control and Reclamation Act prohibit the export of coal. Had Congress intended to prohibit the export of coal, it could have easily done so. In fact, this is precisely what Congress did in 1975 when it, with limited exemptions, prohibited the export of U.S.-produced crude oil. *See* 42 U.S.C. § 6212 (repealed 2015). Moreover, the assurance of a sufficiently robust domestic coal supply is just one of the Act's many stated "purposes," and there is no suggestion that continued mining contradicts any of the other stated purposes. Just by way of example, continued mining clearly satisfies Section 1202(k), which provides that a stated purpose of the Act is to "encourage the full utilization of coal resources through the development and application of underground extraction

technologies." 30 U.S.C. § 1202(k). The Mining Plan Modification does just that. (SOF ¶ 47).

II. The Office Took a Hard Look at Indirect and Cumulative Effects of Coal Transportation, Coal Exports, and Coal Combustion

In Counts III and IV of the Complaint, Plaintiffs allege that the Office failed to take a hard look at the indirect and cumulative effects of coal transportation, coal exports, and coal combustion. However, as the record shows, the Office clearly took a hard look at all reasonably foreseeable indirect and cumulative effects potentially arising from the Mining Plan Modification.

"Agencies conducting NEPA review must...consider the indirect effects of the proposed project." *Center for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1011 (9th Cir. 2011). Indirect effects are those effects "caused by the [agency] action [that] are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). "Agencies must consider only those indirect effects that are 'reasonably foreseeable.' They need not consider potential effects that are ***highly speculative or indefinite***." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998) (emphasis added). The test for whether an effect is reasonably foreseeable is considered similarly to that of tort law's proximate cause doctrine—whether there is a "reasonably close causal relationship" between the agency's action and the environmental effect. *Metropolitan Edison Co. v. People Against Nuclear Energy,*

460 U.S. 766, 774 (1983). This is because "[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of ensuring a fully informed and well considered decision is to be accomplished." *Id*. at 776 (citations omitted).

NEPA also requires an agency to consider cumulative impacts of a proposed action. *Center for Envtl. Law & Policy*, 655 F.3d at 1009. A "[c]umulative impact 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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions…" 40 C.F.R. § 1508.7. Like indirect effects, an agency's obligation under NEPA to consider cumulative impacts is confined to impacts that are "reasonably foreseeable." *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (*citing* 40 C.F.R. § 1508.7). Although "[i]t is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now, ***nor do we require the government to do the impractical, if not enough information is available to permit meaningful consideration***." *Environmental Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006) (citations omitted) (emphasis added).

A. Indirect and Cumulative Effects of Coal Transportation

Plaintiffs argue that the Office did not adequately assess the indirect and cumulative effects of coal trains used to transport coal from the Mine. The effects

of coal trains, however, are discussed at length in the prior analyses that were tiered to the 2015 EA. (SOF ¶ 54). Accordingly, the Office notes that the 2015 EA does "not re-analyze the impacts of rail transport since the number of trains per day would not increase from the current condition and the duration would be less than the 30-year duration identified in MDSL's 1992 EIS." (SOF ¶ 55). Given that NEPA does not require the preparation of an EIS where there is no change to the status quo, the Office was justified in omitting further discussion of the impacts of coal trains. *See Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990) ("An EIS need not discuss the environmental effects of mere continued operation of a facility.") (*citing Burbank Anti–Noise Group v. Goldschmidt,* 623 F.2d 115, 116 (9th Cir. 1980) (holding that where a proposed project does not alter the status quo then it does not have a significant impact)).

Even assuming, *arguendo*, that the Mining Plan Modification would result in a change to the status quo regarding coal transportation, the indirect and cumulative effects of coal trains traveling beyond the Broadview Station are highly speculative and would "require the government to do the impractical" by asking the Office to evaluate the future effects of coal trains which have unknown routes and destinations. *See Presidio Golf Club*, 155 F.3d at 1153; *Environmental Prot. Info. Ctr.*, 451 F.3d at 1014.

Plaintiffs attempt to rebut this fact by incorrectly declaring that Federal Defendants know "exactly where Signal Peak's coal trains are traveling, the routes they are taking now, and the routes they will be able to take in the future." (Docket No. 41, p. 9). As the 2015 EA explains, however, current coal transportation destinations and amounts are estimates "because [Signal Peak] does not own or control the coal commodity once it leaves the mine site. Future coal sales and destinations may or may not reflect 2014 values or destinations and are subject to change due to market conditions." (SOF¶ 56). While coal produced from the Mine may have been shipped primarily to two destinations in 2014 for export, a terminal in British Columbia and one in Duluth, Minnesota, there is no guarantee or even reasonably foreseeable likelihood that this will continue to occur. (SOF ¶ 57).[3] After the coal leaves Broadview, the rail lines have independent utility and Signal Peak has no control over how and to whom the coal is transported. *Id*. Again, any attempt by the Office to analyze the impacts of coal trains beyond Broadview would be impractical given the indefinite information currently available. *See Envtl. Prot. Info. Ctr.*, 451 F.3d at 1014.

[3] In fact, although the coal was primarily exported in 2014, there is a history of it being used domestically. (SOF ¶ 57).

B. Indirect and Cumulative Effects of Non-Greenhouse Gas Emissions from Combustion of Coal

Plaintiffs contend that the Office failed to adequately assess the indirect and cumulative impacts of non-greenhouse gas emissions from the combustion of coal. Likening the matter to evaluating the non-local effects of trains carrying coal from the Mine, however, the Office reasonably determined that evaluating non-local effects from non-greenhouse gas emissions would be just as speculative due to the uncertainty of combustion locations, emissions controls, and an absence of methods to reasonably evaluate specific impacts associated with the proposed action. (SOF ¶ 58).

Thus, while impacts of local non-greenhouse gas emissions are discussed in the 2015 EA, emissions beyond the train station in Broadview are not evaluated because they are "highly speculative." *See Presidio Golf Club*, 155 F.3d at 1153. Indeed, evaluating the impacts of non-greenhouse gas emissions from combustion is not "manageable," and does not allow for a meaningful NEPA analysis. *See Metropolitan Edison Co*, 460 U.S. at 775. To expect the Office to hypothesize as to the actual end use of each ton of coal produced at the Mine and meaningfully calculate the impact of non-greenhouse emissions resulting therefrom is unreasonable given that there is no longer a "reasonably close causal relationship" between the mining of the coal and environmental impacts after the coal is shipped from the Mine. *Id*. at 774.

C. Indirect and Cumulative Impacts of Greenhouse Gas Emissions

The Office discusses its conclusions regarding the science of greenhouse gas emissions and climate change at length in the 2015 EA. (SOF ¶ 59). Additionally, the 2015 EA also evaluates and quantifies the specific greenhouse gases released from various sources at and around the Mine during the mining and transportation of coal. (SOF ¶ 60). It estimates and quantifies the release of CO2-equivilent emissions from the generation of electricity used to power the Mine, as well as, from vehicles, machinery, mobile sources, and equipment use in preparing coal for shipment. *Id*.

The 2015 EA goes on to quantify (i) the estimated annual CO2 equivalent emissions associated with the combustion of coal shipped from the Mine in 2014; (ii) what those emissions would have been at an annual mining rate of 12 million tons of raw coal (8.5 million tons of clean coal); and (iii) what the ***combined*** annual estimated CO2-equivalent emissions from the mine operations, coal transportation and combustion would be under the proposed action. (SOF ¶¶ 61-62). However, while concluding that total emissions are quantifiable, the Office explains that the same is not true with respect to the specific impacts of greenhouse gas emissions on global warming.

> Although total emissions resulting from mining, processing, transporting and burning are quantifiable, it is not possible to accurately assess the effects of a specific amount of CO2-equivalent emissions on global warming and climate change

> (CEQ 2010).... It is reasonable to assume that the impact of CO2-equivalent emissions from annual operation of the Bull Mountains Mine No. 1 on climate change would be approximately 0.35 percent of the total U.S. emissions.
>
> …
>
> The level and duration of emissions from the Proposed Action has been quantified, but the state of climate change science does not allow any given level of emissions to be tied back to a quantifiable effect on climate change.

(SOF ¶ 63).

Thus, the 2015 EA: (i) discusses at length the current state of science surrounding global warming and climate change, including the specific impacts of greenhouse gas emissions; (ii) quantifies both current and projected greenhouse gas emissions from the combustion of coal produced from the Mine; (iii) explains why quantifying the specific impacts of the greenhouse gas emissions is not possible; and (iv) discloses the proposed project's greenhouse gas emissions as a percentage of total U.S. greenhouse gas emissions.

This is precisely the type of NEPA greenhouse gas analysis that has been upheld by multiple courts. *See Wild Earth Guardians v. United States Forest Serv.*, 120 F. Supp. 3d 1237, 1271 (D. Wyo. 2015) ("[I]t is sufficient to demonstrate that GHG emissions were evaluated and attempts to quantify as a percentage of state and nationwide emissions were made. NEPA requires that foreseeable effects of proposed actions be disclosed and evaluated… The FEIS adequately disclosed the effects of GHG emissions. Based on the then-available

information, BLM explored and discussed impacts of global climate change, but indicated that the impacts of the proposed LBA leases could not be reliably calculated with precision."); *WildEarth Guardians v. Bureau of Land Mgmt*., 8 F. Supp. 3d 17, 35 (D.D.C. 2014) ("[I]t is precisely because current climate science is uncertain (and does not allow for specific linkage between particular GHG emissions and particular climate impacts) that evaluating GHG emissions as a percentage of state-wide and nation-wide emissions, as BLM did here, is a permissible and adequate approach"); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) ("Because current science does not allow for the specificity demanded by the Appellants, the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS."); *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1139 (9th Cir. 2011) (holding that, because "the effect of [GHGs] on climate is a global problem[,] a discussion in terms of percentages is therefore adequate for [greenhouse gas] effects").

As in the above cases, the Office conducted a full and thorough analysis of the greenhouse gas emissions from the Mine. This was not a mere "soft touch or brush-off of negative effects" by the Office. *See Native Ecosystems Council*, 428 F.3d at 1241. Rather, it was a "hard look" that ensured both the agency and the public were well informed. *Id.*

Nevertheless, Plaintiffs contend that analysis in the 2015 EA is insufficient because it does not utilize the so-called "Social Cost of Carbon Protocol" in analyzing the potential impact of greenhouse gas emissions. In support of this argument, Plaintiffs rely heavily on the holding in *High Country Conservation Advocates v. U.S. Forest Serv*., 52 F. Supp. 3d 1174 (D. Colo. 2014). In addition to being an outlier from the cases cited above, *High Country* is readily distinguishable from the instant case. In *High Country*, the court held that the Bureau of Land Management failed to take a hard look at greenhouse gas emissions resulting from a coal leasing decision. This holding was based, in part, on the Bureau providing nothing more than arbitrary, post-hac rationalizations for its decision not to utilize the Social Cost of Carbon Protocol to quantify the social and economic costs of greenhouse gas emissions caused by methane released from a coal mine. *Id*. at 1192-93.

Notably, the court in *High Country* did not mandate the use of the Social Cost of Carbon Protocol for all agency decisions that involve the emissions of greenhouse gases.[4] Rather, the court explained:

> The agencies, of course, might have been able to offer non-arbitrary reasons why the protocol should not have been included in the FEIS. They did not. Any post-hoc rationalizations provided by the agencies in this litigation are

[4] As Federal Defendants correctly note in their Brief, "it is not the role of the Court to choose between differing methodologies." (Docket No. 48, p. 24) (citations omitted).

> irrelevant to the question of whether the agencies complied with NEPA at the time they made their respective decisions.

Id. at 1192-93. This observation is entirely consistent with a recent holding in the D.C. Circuit Court of Appeals, wherein the court deferred to an agency's reasoned decision not to utilize the Social Cost of Carbon Protocol. *See EarthReports, Inc. v. Fed. Energy Regulatory Comm'n*, 828 F.3d 949, 956 (D.C. Cir. 2016).

In the current case, the Office did not provide "arbitrary" or "post hoc rationalizations" for not using the Social Cost of Carbon protocol. Rather, it provided reasoned justifications in Appendix C to the 2015 EA, including the following:

- The protocol was "developed to assist agencies in meeting Executive Order (EO) 12866's requirement to assess costs and benefits during the development of regulations" and not for agency permit specific decisions.
- "NEPA does not require a cost benefit analysis…The Coal Lease EA, which is adopted and incorporated by reference to the Federal Mining Plan EA includes an economic impact assessment, to be distinguished from a cost-benefit analysis…The economic impact assessment in the Coal Lease EA evaluated the economic impacts to Musselshell County for different alternatives. However, this economic impact analysis was not a cost-benefit analysis, nor was it intended to quantify the social costs or benefits of fossil fuel development. Presenting the SCC cost estimates quantitatively, without a complete monetary cost-benefit analysis which includes the social benefits of energy production, would be misleading."
- "The agencies did not ignore the effects or costs of carbon emissions. Both the Coal Lease and the Federal Mining Plan EAs evaluated the climate change impacts of the proposed action in qualitative terms."

(SOF ¶ 64).

Therefore, the Office did not provide "post hoc rationalizations," as the agency did in *High Country*, but rather explained that a cost-benefit analysis was not required and why one was not performed. Moreover, in *High Country*, the agency omitted "any estimate of [greenhouse gas] emissions associated with the combustion of coal," only performing greenhouse gas analysis of the methane to be released from the mine itself. *High Country*, 52 F. Supp. 3d at 1190, 1196. In contrast, here the analysis was exhaustive, taking into account not only greenhouse gas emissions the Office projected to be released at the Mine, but also those emissions it estimated to be released through the combustion of coal produced therefrom. (SOF ¶¶ 61-62)

The facts at issue in this case are more akin to those in *Wild Earth Guardians v. United States Forest Serv.*, 120 F. Supp. 3d 1237 (D. Wyo. 2015). There, as in the current case, "emissions were evaluated and attempts to quantify as a percentage of state and nationwide emissions were made." *Id.* at 1271. Similar factors existed that made reliably calculating the impacts of greenhouse gas emissions difficult, most notably the fact that the coal was "destined for sale in the open market and was not delivered to, for example, a single power plant where the same variables might permit quantification of climate impacts with greater precision." *Id*. at 1272. The court recognized that, even though the costs of greenhouse gas emissions were not monetized, the agency adequately disclosed the

costs of the emissions by discussing the effects of greenhouse gases on climate change and quantifying the amount of greenhouse gases that were expected to be emitted. *Id*. at 1273. As in the current case, "the analysis was sufficient to satisfy the goals of NEPA, public participation and informed decision making, and thus, the agencies' actions [were] not arbitrary and capricious." *Id*.

III. The Office Took a Hard Look at Water Pollution Impacts

In Count V of their Complaint, Plaintiffs allege that "Federal Defendants failed to take a hard look at the direct, indirect, and cumulative impacts of water pollution from the mine plan modification...." (Docket No. 1, ¶ 152). As an initial matter, Plaintiffs entirely fail to address this purported cause of action in their Summary Judgment filing. Accordingly, this claim is waived, and should be dismissed by the Court. *See Center for Envtl. Sci. Accuracy & Reliability v. Nat'l Park Serv*., 1:14-cv-02063-LJO-MJS, 2016 WL 4524758, at *9 (E.D. Cal. Aug. 29, 2016) (dismissing plaintiffs' NEPA claims raised in complaint because plaintiffs failed to move for summary judgment thereon); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238, 1249 (N.D. Cal. 2015) (finding failure to raise a claim on summary judgment constitutes a waiver and dismissing waived claim for failure to prosecute under Rule 41(b)).[5] However,

[5] To the extent that Count V should be procedurally dismissed under Rule 41(b) for failure to prosecute, rather than Rule 56, Signal Peak hereby moves for such dismissal. Signal Peak does likewise with respect to Count VII, which is discussed in the following Section.

even if the Court were to consider the merits of this claim, it should be dismissed. Indeed, this claim has already been rejected by the Billings Division of this Court with respect to the Lease EA in *Northern Plains Resource Council, Inc. v. U.S. Bureau of Land Mgt.*, No. CV-14-60, 2016 WL 1270983 (D. Mont. March 31, 2016).

There, Northern Plains claimed that the water quality analysis in the Lease EA was insufficient. The Court disagreed, holding that the Lease EA "took the requisite 'hard look' at the impact on water quality." *Id*. at *10. The 2015 EA "updates expected impacts to water quantity and quality based on monitoring and modeling completed since the Coal Lease EA was prepared." (SOF ¶ 69). As was the case with the Environmental Assessment affirmed in *Northern Plains*, the 2015 EA provides a detailed and thorough consideration of potential impacts to water quantity and quality, evaluating, *inter alia*, potential impacts to each of four hydrologic units of the groundwater system (alluvium, overburden, Mammoth coal, and underburden), springs, and surface water. (*See* SOF ¶¶ 71-77). Accordingly, Count V of the Complaint should be dismissed as a matter of law.

IV. The Office's Consideration of Alternatives Satisfies NEPA

Count VII of the Complaint faults the Office for considering "only the alternatives of approval and disapproval, but not conditional approval." (Docket No. 1, ¶ 164). Plaintiffs' Complaint, however, fails to provide any further

explanation of the "conditional approval" that the Office should have considered, and their Summary Judgment filing ***does not address this claim at all.*** Accordingly, like Count V of their Complaint, Plaintiffs have waived any claim that Federal Defendants failed to consider reasonable alternatives to the mining plan modification. Further, even assuming, *arguendo*, that Plaintiffs did not waive this claim, it should nonetheless be dismissed by the Court.

An Environmental Assessment must discuss alternatives to the planned action, but need not discuss all proposed alternatives. NEPA does not require consideration of alternatives "whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990) (citations omitted). Furthermore, the Ninth Circuit has expressly rejected challenges to Environmental Assessments on the basis that they only offered two alternatives. In *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233 (9th Cir. 2005), the Ninth Circuit explained that "an agency's obligation to consider alternatives under an EA is lesser than under an EIS." *Id.* at 1246. "In rejecting any alternatives, the agency must only include 'brief discussion of the need for the proposal, of alternatives required by [42 U.S.C. § 4332(2)(E)], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."

Id. (citing 40 C.F.R. § 1508.9(b)). With respect to an Environmental Assessment having only two alternatives, the Ninth Circuit stated as follows:

> To the extent that [plaintiff] alleges that the EA only having two final alternatives – no action and a preferred alternative – violates the regulatory scheme, a plain reading of the regulations dooms that argument. So long as "all reasonable alternatives" have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied. In short, the regulation does not impose a numerical floor on alternatives to be considered.

Native Ecosystems, 428 F.3d at 1246. The Ninth Circuit reached the same conclusion in *Center for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000 (9th Cir. 2011). There, the Environmental Assessment discussed two alternatives, one of which was a no action alternative. *Id*. at 1012. Although the plaintiff challenged the selection of alternatives as being "overly constrained, the Court held that "[i]nsofar as [the plaintiff] simply argues that two alternatives is too few, its challenge must be rejected." *Id.*

Based on the above case law, consideration of two alternatives does not violate NEPA. In fact, the Interior Board of Land Appeal recently reaffirmed this approach in upholding the Lease EA. (SOF ¶ 41). Further, with respect to Plaintiffs' unexplained claim that approval should have been "conditional," this claim ignores that Signal Peak's mining activities are in fact subject to a litany of permit stipulations and approved mitigation measures, as summarized in Table 2.1-

1 of the Lease EA. (SOF ¶ 49). And, as the 2015 EA notes, the "mitigation measures and stipulations presented in the Coal Lease EA remain in effect." *Id.* In short, because the Office "did not identify impacts warranting additional mitigation beyond that which would be employed in accordance with the existing mine permit...conditional approval was not analyzed as an alternative." *Id.*

V. Plaintiffs Fail to Establish that the Mining Plan Modification Requires an EIS

NEPA requires agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment…." 42 U.S.C. § 4332(2)(C). NEPA's implementing regulations provide that an agency shall prepare an Environmental Assessment to determine whether a proposed federal action will have a significant impact, thus necessitating an EIS. *Native Ecosystems*, 428 F.3d at 1241 (citing 40 C.F.R. § 1508.9).

"An EA is a 'concise public document' that "include[s] a brief discussion of the need for the proposal, of alternatives as required by [42 U.S.C.§ 4332(2)(E)], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.'" *Id*. (quoting 40 C.F.R. §§ 1508.9(a), (b)). If the agency concludes in the Environmental Assessment that there is no significant effect associated with the proposed project, it may issue a Finding of No Significant Impact in lieu of preparing an EIS. *Id*. (citing 40 C.F.R. § 1508.9(a)(1)). Here, the Office concluded that there was no significant effect

associated with the Mining Plan Modification, and issued the 2015 FONSI as a result. (SOF ¶ 10).

A. The Office Properly Tiered to Prior Environmental Reviews and its Determination to Prepare an Environmental Assessment is Not a Violation of its Manual

In Count I of their Complaint, Plaintiffs contend that "OSM failed to consider its own criteria in 516 DM 13.4 for proposals that normally require an EIS." (Docket No. 1, ¶ 123). As a threshold matter, for the reasons stated by Federal Defendants, the Manual (defined below) does not have the force or effect of law. (Docket No. 48, p. 28). And, even if it did, an EIS was not required in this case.

The Department of the Interior, Departmental Manual ("Manual"), Part 516, Chapter 13, provides that "[t]he following OSM actions will ***normally*** require the preparation of an EIS:"

> (4) Approval of a proposed mining and reclamation plan for a surface mining operation that meets the following:
>
> (a) ***The environmental impacts of the proposed mining operation are not adequately analyzed in an earlier environmental document covering the specific leases or mining activity; and***
>
> (b) The area to be mined is 1280 acres or more, or the annual full production level is 5 million tons or more; and
>
> (c) Mining and reclamation operations will occur for 15 years or more.

516 DM 13.4(A)(4) (emphasis added).

First, use of the word "normally" clearly shows that this guidance is not mandatory. Second, an EIS would not even "normally" be required in this case because the Mine has already been analyzed in several prior NEPA and Montana Environmental Policy Act reviews to which the 2015 EA was tiered, including, *inter alia*, the Lease EA, the 1992 EIS, and the 1990 EIS. (SOF ¶ 21). Notably, the Lease EA covers all of the acreage at issue in the 2015 EA. (SOF ¶ 32). Additionally, the 1992 EIS and 1990 EIS encompassed far broader activity than that contemplated from the mining of the Federal coal. Notably, the 1992 EIS covered the mine permit area, proposed surface facilities at the Mine, the Huntley load-out facilities in Billings, Montana, and the railroad spur to Broadview Montana. (SOF ¶ 25). Additionally, at that time, the entire Life of Mine area, including the lands subject to the Mining Plan Modification, was analyzed as a foreseeable development, and detailed studies were included in the analysis presented in the 1992 EIS. *Id*.

Not only do these prior environmental reviews demonstrate that an EIS was in no way required under the Manual, but the presence of these earlier studies weigh heavily against requiring yet another, duplicative, EIS here. In order to avoid this scenario, the 2015 EA properly tiered to, inter alia, the Lease EA, 1992 EIS, and 1990 EIS. (SOF ¶ 21). Tiering is defined as "the coverage of general matters in broader environmental impact statements…with subsequent narrower

statements or environmental analyses." 40 C.F.R. § 1508.28. Tiering is appropriate "[f]rom a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis." *Id.* Requiring the preparation of yet another EIS evaluating the same acreage and Mine would, in fact, be contrary to NEPA rules, which are designed to "reduce excessive paperwork" by avoiding "encyclopedic" NEPA documents; make greater use of environmental assessments and "a finding of no significant impact when an action… will not have a significant effect on the human environment;" and avoid "[v]erbose descriptions of the affected environment." 40 C.F.R. §§ 1501.4, 1501.5, 1502.15, 1508.27.

B. The Office's Determination that the Mining Plan Modification Will Have No Significant Impact was Not Arbitrary or Capricious

To determine whether environmental effects of the proposal are "significant," the agency looks to the regulations propounded by the Council on Environmental Quality. *Ocean Advocates*, 402 F.3d at 865. These regulations identify ten criteria for determining whether an agency action "significantly" affects the quality of the human environment. 40 C.F.R. § 1508.27. Nothing in NEPA however, "contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions" – the "only role for a court is to ensure that the agency has taken a 'hard look' at environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Taxpayers*

of Michigan Against Casinos v. Norton, 433 F.3d 854, 861 (D.C. Cir. 2006). The Office has done so here.

Indeed, the question of whether there would be a "significant" environmental effect "implicates substantial agency expertise." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 (1989). Unless the agency's judgment is proven to be "arbitrary or capricious, it should not be set aside," and the "agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.* at 377-78. Utilizing its considerable expertise, and based on the extensive administrative record before it, the Office reasonably concluded that, as was the case for the Federal lease itself, the Mining Plan Modification that would authorize mining of the leased coal will result in no significant impacts. (SOF § V.B). Plaintiffs have failed to sustain their heavy burden of establishing that this conclusion was in any way arbitrary or capricious.

Based upon the 2015 EA and supporting documents, the Office determined that "approval of the Federal mining plan modification authorizing expanded underground mining operations into 2,539.76 acres of Federal Lease MTM 97988 would not have a significant impact on the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), and therefore, an Environmental Impact Statement is not

required." (SOF ¶ 50). The finding is based on both the context and intensity of the proposed action. *Id*.

Further, the Office expressly considered and provided a "discussion organized around the 10 Significance Criteria described within the federal regulations at 40 CFR 1508.27." (SOF ¶ 51). While recognizing that the expansion of the Mine will result in certain environmental impacts, it concluded that "[n]one of the environmental effects discussed in the EA are considered to be significant." (SOF ¶ 52). This finding is consistent with the Lease FONSI evaluating the Lease EA, as well as the Lease EA itself. In reaching its conclusion, the Office also considered Signal Peak's considerable mitigation obligations, noting that "[m]itigating measures to reduce potential-short-term and long-term adverse impacts to topography, geology, air quality, water resources, soils, vegetation, wildlife, sensitive species, ownership and use of land, cultural resources, noise, visual resources, transportation facilities, and hazardous and solid waste were incorporated in the design of the Proposed Action and are required by the State-approved mine permit and stipulations to the Federal coal lease." (SOF ¶ 53).

In their Brief, Plaintiffs focus on three topics – coal trains, air pollution, and wetlands – in support of their claim that the Office's determination not to prepare an EIS was arbitrary and capricious. (Docket No. 41, pp. 24-28). Plaintiffs'

complaints on this score simply do not rise to the level required to overturn the 2015 EA and FONSI.

First, Plaintiffs contend that "the FONSI ignored the firestorm of controversy surrounding coal trains." *Id*. at p. 24. Plaintiffs likewise claim impacts from "air pollution" are "highly controversial." *Id*. at p. 26. For the purpose of gauging "significance" under NEPA, "[t]he term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010) (citations omitted). Accordingly, as the Federal Defendants correctly observe in their Brief, merely pointing out opposition to an activity, which is all Plaintiffs have done here, will not render a project "highly controversial" under 40 C.F.R. § 1508.27(b)(4). (*See* Docket No. 48, pp. 31-32). In fact, the Court already addressed this claim in evaluating the Lease FONSI for the Lease EA, and rejected Northern Plains' contention that continued mining was "highly controversial," noting that "[t]here is no dispute about the size and nature of the lease." *Northern Plains*, 2016 WL 1270983, at *8.

Second, Plaintiffs summarily claim that "expected coal trains from the mine expansion" raise questions regarding "impacts to public health," "uncertain or unknown risks," "potential cumulatively significant impacts," and "potential

adverse effects to endangered species." (Docket No. 41, p. 25). Plaintiffs lodge a similar complaint with respect to "air pollution emissions," the impact from which they claim is "highly uncertain." *Id*. at p. 26. Again, however, as noted in the Office's response to public comments, "[e]valuating non-local effects of non-GHG emissions from transport and combustion would be speculative due to the uncertainty regarding combustion locations, transport routes, and emissions controls and an absence of methods to reasonably evaluate specific impacts associated with the Proposed Action." (SOF ¶ 58). And, as discussed previously, with respect to the impacts of greenhouse gas emissions from coal transportation and combustion, the Office quantified these impacts in the 2015 EA. (SOF ¶ 62). That the Office considered, but did not utilize the social cost of carbon, does not render its analysis infirm. As specifically recognized by the Office, "[t]he agencies did not ignore the effects or costs of carbon emissions. Both the Coal Lease and the Federal Mining Plan EAs evaluated the climate change impacts of the proposed action in qualitative terms." (SOF ¶ 64).

Further, that the Office recognized that there is a degree of uncertainty with respect to the impacts of emissions does not invalidate its conclusions regarding the same. NEPA "does not require an 'EIS anytime there is ***some*** uncertainty, but only if the effects of the project are highly uncertain.'" *Northern Plains*, 2016 WL2170983, at *7 (quoting *Environmental Prot. Info. Ctr.* 451 F.3d at 1011

(emphasis in original). If this were not the case, it would be hard to imagine a project that would not require an EIS. Moreover, as noted by the Federal Defendants, despite some uncertainties, the 2015 EA considered that cumulative emissions from greenhouse gases would be reduced by technology and emission control developments, and the Office ultimately concluded that the rate of contribution to the cumulative impact during mining of the Federal coal would remain relatively constant, with the primary difference between the proposed action and no action alternatives being the duration of the contribution. (Docket No. 48, pp. 32-33).

Finally, Plaintiffs claim that the Office failed to adequately address the mine expansion's potential impact on wetlands. (Docket No. 41, p. 27). This is demonstrably false. The Lease EA specifically states that surface and groundwater flow will be monitored on a regular basis, "and if water flow to wetlands is disrupted, the water flow would be restored and replaced." (SOF ¶ 77). Rehabilitating potential impacts to wetlands is included in Signal Peak's mitigation strategy. (SOF ¶¶ 67, 77). In finding no significant impacts, the Lease FONSI similarly concluded that the "Proposed Action includes mitigation measures to minimize any effects to small areas of wetlands in the lease areas." (SOF ¶ 77). In the 2015 EA, the Office concludes that most of the sites that would satisfy the criteria for wetlands under the Clean Water Act are expected to occur at the springs

and ponds and downgradient positions receiving water from these hydrologic features. (SOF ¶ 78). And, in reaching its no significant impact determination, the Office observed in the 2015 FONSI that mitigation measures to reduce potential impacts to, *inter alia*, water resources are required under the state permit and stipulations to the coal lease. *Id.* In short, Plaintiffs' claim that impacts to spring-fed wetlands were ignored is contrary to the record, which includes the Office's conclusion that "all water sources necessary to support the post-mine land uses would be replaced in accordance with applicable regulations." (SOF ¶ 75).

VI. Plaintiffs Lack Standing

For the reasons discussed in Federal Defendants' Brief, and as set forth below, Plaintiffs lack Article III standing to bring the instant action. Specifically, the affidavits provided by Plaintiffs – *i.e.*, the James Jensen affidavit and Dr. Paul Smith affidavit (Docket Nos. 41-1, 41-2) – do not establish standing.

Without repeating herein the arguments asserted by the Federal Defendants, Signal Peak notes that the Smith affidavit does little more than speculate regarding health impacts to third parties, primarily to children, in "western Montana." (Docket No. 41-2, ¶ 7). Jensen's affidavit is similarly vague, as it is based on intermittent visits to unidentified locations in the Bull Mountains, and alleged harms to unidentified ranches operated by unidentified friends. In short, both affidavits: (1) impermissibly assert speculative alleged harms to third parties; and

(2) fail to establish a geographic nexus with the Proposed Action. *See Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978).

CONCLUSION

For the reasons stated herein and in the accompanying Statement of Undisputed Facts and Statement of Disputed Facts, the agency decisions under review by this Court are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and Plaintiffs lack standing to challenge the same. Accordingly, Signal Peak respectfully requests that this Court grant its Cross-Motion for Summary Judgment, deny Plaintiffs' Motion for Summary Judgment and dismiss each Count of the Complaint with prejudice.

DATED this 1st day of March, 2017.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By /s/ *W. John Tietz*
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CERTIFICATE OF COMPLIANCE WITH D. MONT. L. R. 7.1(d)(2)

I hereby certify that the foregoing Brief in Support of Signal Peak, LLC's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment is in Compliance with D. Mont. L. R. 7.1(d)(2), as the number of words therein, excluding caption, certificate of service, and table of contents and authorities, totals 7,989 words.

/s/ *W. John Tietz*
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that on this 1st day of March, 2017, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

/s/ *W. John Tietz*
BROWNING, KALECZYC, BERRY & HOVEN, P.C.