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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

WILDEARTH GUARDIANS and MONTANA ENVIRONMENTAL INFORMATION CENTER, Plaintiffs, v. DAVID BERNHARDT, Acting Secretary of the Interior, *et al*. Federal Defendants, and SPRING CREEK COAL, LLC, Intervenor Defendants.	CV 17-80-SPW-TJC **FEDERAL DEFENDANTS' RULE 72 OBJECTIONS TO FINDINGS AND RECOMMENDATIONS**

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Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72, the Acting Secretary of the Department of the Interior and other named Federal Defendants state their objections to certain aspects of the February 11, 2019 Findings and Recommendations of the Magistrate Judge. ECF No. 71 (the "Report").

The Magistrate recommended that the Court grant Plaintiffs' summary judgment motion and deny Defendants' cross-motions. He did so based on conclusions: (i) that Plaintiff Montana Environmental Information Center ("MEIC"), the only Plaintiff whose standing was challenged, had demonstrated Article III standing; (ii) that Defendants' res judicata defense was thus precluded; and (iii) that Federal Defendants had committed four specific violations of the National Environmental Policy Act ("NEPA").

For the reasons discussed below, the Court should decline to adopt the aspects of the Report specifically objected to herein, defer to the agency's exercise of expertise, embrace the principle that NEPA analysis is limited to impacts that are reasonably foreseeable, and enter judgment in favor of all Defendants.

BACKGROUND

Two conservation organizations seek to set aside a decision of the Assistant Secretary approving for the second time a mining plan modification at the Spring Creek Mine in eastern Montana.

1. Prior Proceedings.

In an earlier civil action, brought by one of the conservation organizations and concerning the same mine expansion, WildEarth Guardians contended Interior had not properly included the public in its proceedings under NEPA and had not justified its decision not to prepare an environmental impact statement ("EIS"). *WildEarth Guardians v. OSMRE*, Nos. CV 14-13-BLG-SPW, CV 14-103-BLG-SPW, 2016 WL 259285, at *3 (D. Mont. Jan. 21, 2016) ("*WEG-1*").

Without vacating the mining plan decision, which the Court recognized would cause substantial economic hardship, the Court ordered corrective NEPA analysis in the form of an updated environmental assessment ("EA"). In September 2016, Interior's Office of Surface Mining Reclamation and Enforcement ("OSMRE") completed the required EA (*see* AR10710), issued a finding on no significant impact ("FONSI") (AR10694), and recommended to the Assistant Secretary, in accord with 30 C.F.R. § 746.13, that the mining plan modification be approved. AR10640–69; AR10650. The Assistant Secretary did so on October 3, 2016. AR10635, 17182.

2. The Current Proceeding.

Plaintiffs filed suit challenging these actions on June 8, 2017, alleging five NEPA violations, and claiming in addition that the agency's conduct was ultra vires, insofar as the underlying coal lease was allegedly invalid due to supposed

defects in its execution. The parties soon thereafter completed briefing on cross-motions for summary judgment.

On February 11, 2019, the Magistrate recommended that the Court reject Defendants' asserted standing and res judicata defenses and, with respect to the merits, recommended that the Court find legal error in four instances:

- first, that Interior had failed to adequately consider the impacts of transporting mined coal to market;
- second, that Interior had failed to adequately consider the impacts of non-greenhouse gas emissions from eventual combustion of mined coal;
- third, that Interior had failed to quantify the economic costs of greenhouse gas ("GHG") emissions from combustion of mined coal; and
- fourth, that Interior was arbitrary in issuing a FONSI and deciding not to prepare an EIS when, under its internal NEPA guidelines, an EIS was presumptively required due to the expected duration and size of challenged mining operations.

Federal Defendants object to all four of these conclusions. The remainder of the Magistrate's merits recommendations—that Interior properly considered the validity of the underlying coal lease and did not improperly "segment" the proposed action—are unobjectionable. With respect to remedy, Federal Defendants do not object to the Magistrate's recommendation against vacatur,

although for the reasons explained below, they contend Plaintiffs are entitled to no remedy whatsoever.

STANDARD OF REVIEW

Federal Defendants are entitled to de novo review of the portion of the Report specifically objected to. 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made"); *McDonnell Douglas Corp. v. Commodore Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981). The court may then "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1). The court "cannot simply 'concur' in the [recommendations]," but "must conduct its own review in order to adopt the recommendations." *McCombs v. Meijer, Inc.*, 395 F.3d 346, 360 (6th Cir. 2005) (citations omitted).

DISCUSSION

The Court should reject Plaintiffs' attempt to expand the scope of this challenge by introducing a new party, MEIC, for the obvious purpose of asserting claims that WildEarth Guardians could have raised previously but did not. The record in this case amply reflects that, following entry of the Court's remedy order

in *WEG-1*, Interior proceeded swiftly and conscientiously to address the identified errors, while promoting robust public participation in the proceedings and meeting the Court's challenging 240-day deadline.

Federal Defendants respectfully request that the Court assess anew the asserted standing and res judicata defenses and recognize that Interior did not shirk its duty under NEPA when, in considering transportation and non-GHG impacts, it declined to engage in speculation that would not meaningfully assist either decision makers or the public, the twin goals of NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Interior's choice in this regard was properly based on the undisputed proposition that NEPA only requires consideration of reasonably foreseeable impacts. In addition, the Court should recognize that NEPA does not require Interior to monetize the societal costs of GHG emissions, any more than it requires Interior to monetize the costs of impacts to other resources, such as wildlife or surface waters or recreational use. NEPA creates no hierarchy that demands heightened analysis for certain resources. Finally, the Court should sustain the agency's convincing and well-stated FONSI.

1. Principles of Standing and Res Judicata Bar New Claims not Raised in *WEG-1*.

The Court should decline to adopt the recommendation that Plaintiff MEIC has demonstrated actual or imminent injury that threatens the interests of its

members. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (*Defenders*). As explained in merits briefing, *see* ECF No. 60 at 7-12, environmental plaintiffs "adequately allege injury in fact when they [or their organizational members] aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)) (*Laidlaw*).

The Report notes that Mr. Gilbert, MEIC's sole standing declarant who submitted one timely declaration,[1] attests that he has "long visited and recreated" in areas described by Mr. Gilbert as "'immediately surrounding the Spring Creek Mine.'" Report at 8 (quoting Mr. Gilbert in second instance). But the areas referred to consist of three distinct geographic settings that, in any ordinary sense of the term, do not "immediately" surround the Spring Creek mine: (1) the CX Ranch, "located on Squirrel Creek," ECF No, 38-2 at ¶ 9, which is the next drainage south of the Spring Creek drainage; (2) the Rosebud Battlefield, located in the next drainage to the north (and separated from the mine by uplands); and (3) the Tongue River Reservoir, located four miles to the east (and separated from the Spring Creek mine by the sprawling Decker Mine). Mr. Gilbert states in his

[1] *See* Fed. Defs' Reply at 4-5 (ECF No. 68) (discussing Mr. Gilbert's untimely supplemental declaration, ECF No. 64).

declaration that he has visited these sites for "many years," *id*. at ¶ 9, but he identifies no visits to the CX Ranch in over thirty years, and provides no evidence of harm to his aesthetic or recreational interests at the ranch. The ranch therefore cannot support MEIC's claim of standing.

With respect to the Rosebud Battlefield, located seven miles to the north, Mr. Gilbert asserts that he has hunted there annually since 1977 but identifies just one form of harm: that "the joy" he experiences while hunting on the battlefield "is diminished by [his] knowledge of the nearby Spring Creek Mine and its negative impacts on wildlife and their habitat." *Id*. ¶ 11. As Federal Defendants argued, this statement reflects that Mr. Gilbert's enjoyment of the Rosebud Battlefield is lessened not because of air or water or pollution, or visual impacts or noise—all commonplace assertions of harm in NEPA litigation—but because he thinks about, and is troubled by, environmental impacts occurring elsewhere, outside the range of his sensory perception, at a mining property on which he has never recreated. ECF No. 60 at 10–11. This does not satisfy the requirements of *Laidlaw* and *Sierra Club* that an environmental plaintiff demonstrate use of an affected area and a lessening of "aesthetic and recreational values," *Laidlaw*, 528 U.S. at 183 (quoting *Sierra Club*, 405 U.S. at 735), not some broadly shared objection to mining generally. "Abstract injury is not enough." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

Federal Defendants ask the Court to review this contention because the Report did not do so. Instead it concluded that the Rosebud Battlefield is sufficiently close to Spring Creek Mine to support standing, Report at 10, without any indication that it considered the nature and adequacy of the specific harm Plaintiffs actually alleged.

With respect to the Tongue River Reservoir, located three miles to the east, Mr. Gilbert similarly attests to a single harm: that when he fishes on the Tongue River "below the dam," where he is "out of sight" of the "coal trains" and the "brown haze," his enjoyment is compromised because he knows that "coal shovels are grinding away . . . just over the hill." ECF No. 38-2 ¶ 13. As with the Rosebud Battlefield, the only harm this statement reflects is that Mr. Gilbert is troubled because he thinks about impacts occurring elsewhere. This is likewise inadequate. Neither the Report nor the briefs in this case identify a single case where mere discontent about remote environmental impacts has been deemed a sufficient showing of harm to a recreational or aesthetic interest. A standing bar set so low does not ensure the "sufficient stake" necessary to establish a "justiciable controversy," susceptible to resolution by a court. *Sierra Club*, 405 U.S. at 731.

In short, MEIC has not demonstrated standing because Mr. Gilbert identifies no cognizable harm and *Laidlaw*, on which the Report relies, dictates no other conclusion. *Laidlaw* involved a citizen-suit action under the Clean Water Act

("CWA") challenging the defendant's discharge of mercury and other pollutants into South Carolina's North Tyger river, in excess of limits in the controlling CWA discharge permit. The court found standing because most of the declarants used the river for recreational purposes and stated they were discouraged from doing so in the future, due to toxic discharges; and because an additional declarant, who lived a half mile from Laidlaw's facility and occasionally crossed the North Tyger River in his vehicle, perceived the pollution firsthand. *Laidlaw*, 528 U.S. at 181 (crediting declarant's testimony that the river "looked and smelled polluted").

A similar circumstance existed in *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1148 (9th Cir. 2000) (*ERF*). Like *Laidlaw*, the case involved permitted discharges of pollutants to surface waters, *viz.*, Yager Creek in Humboldt County, California. The Ninth Circuit found standing, based on the testimony of two declarants. One stated he was "deterred from fully enjoying Yager Creek because of his concerns about pollutants discharged from Pacific Lumber's facilities adjacent to the creek . . . ." *ERF*, 230 F.3d at 1150**.** Another declarant, who also enjoyed recreating in and around Yager Creek, similarly expressed concern about pollutants and alleged that the discharges had "impaired" his enjoyment of the creek. *Id*. at 1145.

Noting the considerable distances between, on the one hand, the sources of ecologic harm and, on the other hand, the areas of recreational use in both *Laidlaw*

and *ERF* (which ranged to as high as forty miles in *Laidlaw*), the Magistrate compared the distances here and concluded that standing had been demonstrated. *See* Report at 10 (stating that Mr. Gilbert attests to "using specific areas that are within 4 to 7 miles of the mine"). However, it was not the actual distances in *Laidlaw* and *ERF* that were determinative on the question of standing, but rather the exposure to offensive pollutants. The exposure occurred because the declarants in both *Laidlaw* and *ERF* used the affected surface waters downstream of the permitted outflows. Here, no comparable exposure has been identified.

Further, while the Report makes a point of distinguishing the circumstances in this case from those in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)—and there admittedly are some differences—the circumstances here are demonstrably less similar to *Laidlaw* and *ERF*, where the declarants engaged in recreational activities directly downstream from the industrial outflows. In this case, Mr. Gilbert does not claim he is harmed because pollutants are flowing or otherwise migrating to his place of recreation. Rather, the harm asserted is that he is troubled by circumstances outside of his purview. Such harm does not support standing, and does not differentiate Mr. Gilbert's grievance from the generalized grievances of any number of citizens who might likewise object in the abstract to the mining of federal coal.

For these reasons, the Court should reject the harm alleged by MEIC member Mr. Gilbert in these remote geographic settings as inadequate to support standing, conclude that only Plaintiff WildEarth Guardians has standing, and assess anew only those claims not barred by principles of res judicata. *See* ECF No. 60 at 12-14 (discussing why res judicata bars plaintiffs' new claims concerning transportation and GHG impacts, improper segmenting of NEPA analysis, and lease validity).

2. OSMRE's Analysis of GHG Impacts was Legally Adequate.

Should the Court conclude MEIC has standing and that principles of res judicata do not bar claims not raised in *WEG-1*, it should nonetheless decline to adopt the Report's recommendation concerning analysis of GHG impacts.

Plaintiffs contended in merits briefing that Interior erred by not monetizing the impacts of carbon emissions despite monetizing some of the socioeconomic impacts of expanded coal mining. The Magistrate agreed, and concluded that Interior was obligated to calculate the economic costs of foreseeable carbon emissions by applying the Social Cost of Carbon protocol. But, notably, the Magistrate reached this conclusion despite recognizing that Interior had appropriately disclosed GHG impacts using the "proxy" methodology, whereby "expected GHG emissions are calculated and then analyzed as a percentage of national or global emission levels." Report at 25; *see also id*. at 27 (recognizing

that "the use of the proxy methodology is sufficient for considering impacts related to greenhouse gas emissions.").

As the Magistrate explained, "Plaintiffs do not argue that OSM's disclosure of greenhouse gas effects was insufficient. *If that was the extent of Plaintiff's argument, Defendants would prevail*." Report at 27 (emphasis added). Instead, Plaintiffs argued—and the Magistrate agreed—that Interior's decision to describe only some impacts in monetary terms violated NEPA, separate and apart from Interior's "hard look" obligation under NEPA. Specifically, the Magistrate stated, "[b]ecause OSM quantified the benefits of the proposed action, it must also quantify the associated costs or offer non-arbitrary reasons for its decision not to." *Id*. The Magistrate then went on to conclude that Interior's reasons for not using the protocol were arbitrary. *Id*. at 28.

The Court should decline to adopt this aspect of the Magistrate's Report because it is contrary to NEPA's implementing regulations and improperly intrudes on the agency's choice of methodology. First, nothing in the statute or its implementing regulations requires that agencies weigh the economic costs and benefits of a proposed action. To the contrary, 40 C.F.R. § 1502.23 specifically provides that agencies need not do so, and in fact should avoid such comparisons when, as here, the NEPA analysis in question involves important qualitative considerations.

There is similarly nothing in the statute or regulations stating that an agency can monetize some impacts only if it is prepared to monetize all of them. Quite the contrary, Section 1502.23 assumes cost-benefit analyses will *not* be comprehensive, and provides that an agency need only "discuss the relationship between that [cost-benefit] analysis and any analyses of unquantified environmental impacts, values, and amenities." 40 C.F.R. § 1502.23. This flexibility makes sense because the NEPA regulations require agencies to consider a broad range of "effects," including "ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative." 40 C.F.R. § 1508.8(b). Some of these effects—*e.g.*, tax revenue, royalty revenue, and other socioeconomic effects—are more easily analyzed and understood by the public when described using monetary terms. Other environmental effects—*e.g.*, impacts to aesthetic or ecological values—are more easily understood and analyzed using qualitative terms. The regulations preserve ample decision space for federal agencies to use the metrics and methodologies best suited to the issues at hand, consistent with the broad discretion typically afforded to an agency's choice of methodology. *See Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1109-10 (9th Cir. 2016) ("[I]n the face of competing reasonable methodologies, we do not substitute our judgment for that of the agency."); *accord Comm. To Pres. Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1553 (10th Cir. 1993).

The Magistrate's decision improperly intrudes on that discretion by effectively concluding that an agency must attempt to discuss adverse environmental impacts in monetary terms anytime it chooses to discuss positive socioeconomic impacts in monetary terms. This aspect of the Magistrate's Recommendation has no apparent limit, and would undermine NEPA's goals and lead to absurd results if taken to its logical end. While Plaintiffs in this particular case argued only that Interior should be forced to monetize GHG emissions, the reasoning underlying the Magistrate's Recommendation could apply with equal force to almost any environmental impact within the scope of a given NEPA analysis, because many environmental impacts could theoretically be monetized, to varying degrees of reliability and utility. *See*, *e.g.*, 43 C.F.R. § 11.83(b), (c) (describing numerous valuation methodologies for restoring, rehabilitating, or replacing injured natural resources, and for compensating temporary loss of enjoyment of those natural resources).

Thus, under the Magistrate's reasoning, an agency opting to describe socioeconomic impacts in monetary terms would have the burden of also monetizing all other impacts addressed in an EA or EIS, or explaining as to each category of impacts why monetization is not possible (effectively flipping the presumption against monetary cost-benefit analyses in 40 C.F.R. §1502.23). Alternatively, agencies might seek to avoid this new burden by describing even

socioeconomic impacts—e.g., royalty and tax revenues—in purely qualitative terms, thus degrading the quality of their analyses. Either scenario would frustrate NEPA's twin goals of ensuring informed decision-making and effective public involvement in the decision process.

The holding in *High Country Conservation Advocates v. U.S. Forest Service*, 52 F.Supp.3d 1174 (D. Colo. 2014), which the Magistrate cites in support of his conclusion, does not require a different conclusion, and is of limited applicability here for two reasons. First, the court in that case acknowledged that the defendant agencies had "quantif[ied] the amount of emissions relative to state and national emissions and giv[en] general discussion to the impacts of global climate change," but nonetheless found the analysis wanting because the agencies "did not discuss the impacts caused by these emissions." *Id.* at 1190. As the Magistrate here has recognized, no further discussion of GHG impacts should have been required because, under the proxy methodology, an agency's need to consider effects is fully satisfied once it calculates expected project emissions and compares them to national or global emission levels. *See* Report at 25 (discussing the "consideration of effects cases"). Thus, while the *High Country* court incorrectly perceived a gap in the agencies' effects analysis and sought to fill it with the protocol, there was no gap to fill here; Interior's use of the proxy methodology fully satisfied NEPA's hard look requirement.

The *High Country* case is also distinguishable because the court's finding of arbitrary decision making turned on its finding that "the [Final] []EIS, on its face, offer[ed] a factually inaccurate justification for why it omitted the social cost of carbon protocol." *High Country*, 52 F. Supp. 3d at 1191. Specifically, while the Final EIS stated that it was impossible to predict the degree of any single project's impact on global climate change, the court noted that a methodology existed for quantifying a project's contribution to costs associated with climate change, *id.* at 1190, and that the agencies had included a discussion of that methodology in their draft EIS only to abandon it later without adequate explanation. *Id.* at 1191. None of those circumstance exist here.

To the extent *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F.Supp.3d 1074 (D. Mont. 2017) ("*MEIC*"), or *High Country*, could be read to require that an agency must "quantify costs" anytime it quantifies the socioeconomic impacts of a proposed action, *see* Report at 26, Defendants respectfully submit that the cases were wrongly decided. Agencies will always assess meaningful socioeconomic impacts under NEPA, because 40 C.F.R. § 1508.8(b) requires it. And, in most instances, it will be necessary to discuss at least some of those impacts in monetary terms. Thus, in *High Country*, the agencies necessarily assigned dollar figures to expected revenues, royalties, salaries, and other such effects. 52 F.Supp.3d at 1191. Similarly in *MEIC*, the

agency necessarily assigned dollar figures to the anticipated salaries and revenues. In the challenged EA, Interior assigned dollar figures to state and federal royalty and tax revenues, AR10766, 100810, as well as to historic annual payrolls. AR10766. But it would be incongruous and counterproductive for courts to conclude, as the Magistrate did, that this alone necessitates a quantitative (rather than qualitative) discussion of all other categories of impacts. While it would certainly be improper for an agency to place its "thumb on the scale by inflating the benefits of the action while minimizing its impacts," *see* Report at 26 (quoting *MEIC*, 274 F. Supp. 3d at 1098), there is no reason to fear that result where an agency presents a robust qualitative discussion of adverse environmental effects, as the Magistrate concedes occurred in this case. Report at 27 (recognizing that Defendants would prevail if only the sufficiency of Interior's disclosure of GHG impacts were at issue).

Further, even if the Magistrate were correct that Interior was required to provide a reasonable explanation for declining to use the protocol, it certainly did so here. Interior explained that it would not be appropriate to employ the protocol in lieu of a qualitative analysis because the protocol expresses costs using a wide (and thus unreliable) range of values—spanning from $12 to $123 per metric ton. AR10786. In rejecting this explanation, the Magistrate adopted the view that declining to quantify costs was effectively the same as assigning them a value of

"zero." *See* Report at 29-30. That view is incorrect, however, because Interior explicitly did *not* assign a value of zero or any other figure to the cost of GHG emissions; it opted instead to provide a more nuanced, qualitative, and comprehensive description of those costs after noting the protocols' shortcomings. The Magistrate should have deferred to that decision. *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 922 (9th Cir. 2018) (deferring to the agency's choice of methodology in its analysis) (*citing Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007)).

Finally, as exhibit 1 reflects, the President issued an Executive Order on March 28, 2017, No. 13783, rescinding use of the protocol and directing federal agencies, when performing regulatory analysis, to conform to the guidance contained in OMB Circular A–4 (Sept. 17, 2003) (Regulatory Analysis), "which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis." It would be incongruous for the Court to adopt a recommendation that directs agencies to use a particular methodology in contravention of an Executive Order that directs use of another methodology.[2]

[2] Federal Defendants respectfully ask the Court to take judicial notice of the Executive Order. It may do so under Fed. R. Evid. 201, as to "matters of public record." *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

3. Interior's Analysis of the Impacts of Coal Transportation and Non-GHG Emissions from Coal Combustion was Adequate.

The Court should decline to adopt the Report's recommendation of error in the agency's analysis of the impacts of coal transportation and non-GHG emissions. As Federal Defendants explained in merits briefing, ECF No. 60 at 14-17, the EA appropriately considered and disclosed impacts that could reasonably be ascertained and declined to examine those requiring speculation, because such speculation would not meaningfully inform decision makers and the public. The EA and other record evidence reflect a reasonably detailed examination of the impacts of transportation[3] and non-GHG emissions.[4]

[3] *See e.g.*, AR10775 (air quality impacts); AR10744 (same); AR17488 (air impacts); AR10798 (wildlife); AR10807 (noise); AR10808–09 (accidents and delays from rail shipments). In addition, Table 4.4 predicted (based on an annual production of 18 million tons of coal over a six-year period) that rail transport would produce 695,000 metric tons of CO_2-equivalent. AR10783. Table 4-1 acknowledged the potential for regional air quality impacts from transportation and characterized the effects as "moderate to minor" and "short term." AR10771. The EA also disclosed (based on the same production rate) that the action would result in 1,164 train-trips/year (one-way) at 15,470 tons per train, AR10808.

[4] *See, e.g.*, AR10749; AR10780–81 (providing air quality values for coal combustion); AR17417 (identifying air quality as a potential impact); AR10742 (table); AR10740 (air quality discussion); AR17470 (additional sources of information on cumulative air impacts), AR10782; AR10778 (particulates), AR10744 (particulates); AR10740 (NOx and Ozone). OSMRE also provided links to other sources with further detail on the health and environmental impacts of relevant pollutants. AR10817; AR10822.

Despite this, the Report concluded with respect to transportation impacts that the facts of this case are "strikingly similar" to those in *MEIC*, Report at 17, in which the court faulted the agency for not considering transportation impacts beyond the immediate vicinity of the mine. Federal Defendants ask the Court to reassess this conclusion. In *MEIC*, 95% of the mined coal was to be exported, in predictable quantities (based on projected mining rates), through ports in Vancouver, Duluth, and Quebec. In this case, however, the same certainty does not exist. As Federal Defendants noted in briefing, "the transportation destinations are diverse and numerous." ECF No. 68 at 11 (citing AR17325, 10724); *see also* AR10724 (stating that coal is shipped "to electric utilities and industrial customers in the northwest, midwest, northeast, and southwest United States, various Canadian provinces, and exported to Asian utility customers via the Westshore Terminal in British Columbia, Canada"). The EA also noted that in 2015, the majority of coal mined at the Spring Creek Mine was "shipped to coal-fired power plants in seven states, including Washington, Montana, Wyoming, Arizona, Minnesota, and Illinois." AR10738. Finally, Intervenor Spring Creek Mine has pointed out, ECF No. 76 at 12-13, these destinations vary from year to year.

The Report incorrectly presumed that these destinations are known and, based thereon, concluded that the agency could reasonably be expected to forecast transportation impacts in some meaningful way. Specifically, the Magistrate stated

that "like *MEIC*, [OSMRE] used its knowledge of destinations and routes to calculate [GHG] emissions from coal trains." Report at 18 (citing AR10751). It is true that the analysis at AR10751 stated a figure for GHG emissions attributable to "rail transport" (i.e., 634,896 metric tons of carbon dioxide equivalent (CO_2e)), but this was not, as the Report concluded, based on knowledge of destinations and routes; rather, it was estimated based on historic shipping data from 2015. As the EA explains,

> CO_2e emissions generated by transporting the coal via rail to final destinations at power plants and loading terminals are also estimated, which were calculated using an average of 1,100 rail miles from the [Spring Creek Mine] to final destinations. The average haul distance was calculated using the weighted average of haul distances for 2015 coal sales from the [Spring Creek Mine] . . . .

Id. Thus, the Report's conclusion that OSMRE knew the destinations and routes is incorrect, as is the resulting assumption that OSMRE can meaningfully assess transportation impacts over the life of the mine.

The Court should likewise reassess and decline to adopt the Report's recommendation of error in OSMRE's analysis of the impacts of non-GHG emissions. The same uncertainty that renders forecasting of transportation impacts (to the degree of specificity contemplated in the Report) speculative also renders forecasting of non-GHG emissions speculative. As with transportation impacts, OSMRE did not ignore these impacts. The agency disclosed the mine's historic

emissions of particulate matter (PM_{10} and $PM_{2.5}$), sulfur-dioxide, nitrogen oxides, and mercury, from 2012 to 2015, AR10781, and explained that these are "criteria" pollutants that "cause or contribute to air pollution" and that "may reasonably be anticipated to endanger public health or welfare." AR10741. In addition, the agency projected, based on expected future mining rates, emissions of these criteria pollutants during the six-year period ending in 2021.

Despite this, the Report faulted the agency for assessing in close detail the effect of emissions during mining operations on the local environs of the Spring Creek mine, including compliance with National Ambient Air Quality Standards ("NAAQS"), and then not applying that same level of analysis for indirect combustion effects in the numerous destinations where coal might be burned over the life of the mine. This would require the agency to know the coal's destinations, the Clean Air Act air quality "attainment" status for criteria pollutants in each of those destinations, and the applicable NAAQS in each locale. Speculation by OSMRE in this regard would not provide a basis for a meaningful assessment of these non-GHG impacts. Further, power plants are subject to local air quality regulation, including local air quality standards. *See Sierra Club v. U.S. Dep't of Transp.*, 310 F. Supp. 2d 1168, 1202 (D. Nev. 2004) (EPA is "statutorily commanded to set NAAQS at a level sufficient to protect human health. [An agency] does not act arbitrarily and capriciously by relying on the prevailing

NAAQS standard EPA has set") (citations omitted). Agencies are entitled to rely on local regulators to do their duty to ensure compliance with applicable air quality standards. *See New Mexico ex rel. Richardson v. BLM*, 459 F. Supp. 2d 1102, 1114 (D.N.M. 2006), *aff'd in part, vacated in part, and rev'd in part*, 565 F.3d 683 (10th Cir. 2009) (sustaining agency's conclusion that aquifer contamination was unlikely based on assumption that "existing governmental regulations [would be] enforced correctly").

For all these reasons, the Court should conclude that the EA's air quality analysis satisfied NEPA.

4. An EIS was not Required.

Finally, the Court should decline to adopt the Report's recommendation of error in the agency's issuance of a FONSI and sustain the decision to forego an EIS. In merits briefing, Plaintiffs argued that OSMRE's decision not to prepare an EIS was arbitrary because there were substantial questions about whether mine expansion may cause significant impacts. ECF No. 38 at 20-23. Plaintiffs also contended that OSMRE should have prepared an EIS because the mine expansion, given its size and expected operational timeframe, is the type of project that normally requires an EIS under agency guidance. *Id.* at 23–24.

On the first point, the Report concluded that because OSMRE had failed to adequately analyze (i) the impacts of coal transportation, (ii) non-GHG emissions,

and (iii) the costs of GHG emissions, the decision not to prepare an EIS was arbitrary. Report at 34-35. In doing so, the Report did not address the agency's rationale for its FONSI. *Id*. at 36. The Report also concluded that because OSMRE did not specifically mention its guidelines in the FONSI, it acted arbitrarily. *Id*.

Federal Defendants noted in briefing that, in a case challenging a FONSI, the Court must ensure "that an agency has taken the requisite 'hard look' at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors." ECF No. 60 at 28-29, citing *Swan View Coalition v. Weber*, 52 F. Supp. 3d 1133, 1156 (D. Mont. 2014) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)). They also noted that an "agency's decision to issue a FONSI is entitled to 'substantial deference.'" *Id*. (citing *Mont. Wilderness Ass'n v. Fry*, 10 F.Supp.2d 1127, 1145 (D. Mont. 2004) (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 372 (1989)). In addition, Federal Defendants pointed out that OSMRE had examined the ten significance factors in 40 C.F.R. § 1508.27 and concluded, with an appropriate level of analysis, that none of them required an EIS. For the reasons explained in Arguments 2 and 3, *supra*, the agency's findings were appropriate and were convincingly explained. Its decision not to prepare an EIS should be sustained.

The Court should also decline to adopt the Report's conclusion that agency guidelines were contravened. Report at 37. The relevant provision states that actions "normally requir[ing]" an EIS include mining plans that meet three criteria:

> 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.

Id. (quoting *Department of Interior, Department Manual*, at 516 DM § 13.4A(4) (May 27, 2004) ("*Manual*")).

On the plain language, these must *all* be satisfied. Here, element (a) is not satisfied because the foreseeable environmental impacts of the proposed mining operation were in fact adequately analyzed in the EA, as discussed in Arguments 2 and 3, *supra*. Moreover, additional analysis occurred at the leasing stage (in the form of an EA and FONSI prepared by the Bureau of Land Management and not challenged by plaintiffs). OSMRE tiered to that analysis and incorporated it by reference in the challenged EA. AR10722. This satisfies element (a), and thus the guideline, by its own terms, does not apply.

Further, the provision at issue makes clear that an EIS is not mandatory, providing "[i]f for any of these actions it is proposed not to prepare an EIS, an EA

will be prepared and handled in accordance with [40 C.F.R. 1501.4(e)(2)]." *Manual* at 516 DM § 13.4B. The agency here did exactly that and thus complied with the guidance. Additionally, the Report faults the agency for not mentioning the guidelines in its FONSI, Report at 36, but the EA does mention the guidance. Specifically, the agency stated that, in addition to following NEPA's requirements, the EA also follows the guidance set forth in DM Part 516, the section of the Departmental Manual that encompasses 516 DM § 13.4A(4). AR10722. The agency also addressed comments to the effect that an EIS was required, though none of them mentioned this provision of the guidelines. AR10914; AR10920 (responses to public comments).

In sum, the FONSI and the responses to comments amply demonstrate why an EIS was not required and eclipse any technical deficiency in not specifically discussing, in the FONSI itself, the provision of the guidelines at issue. The agency need not explicitly address why a departure from non-binding agency guidelines on EIS preparation is appropriate when the FONSI itself effectively does that very thing, explaining why an EIS is not required. Even if the FONSI's analysis could be deemed of "less than ideal clarity" in regard to this relatively minor consideration, the agency's path in this case "may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quoting

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974)). Accordingly, the Court should sustain the decision to forego an EIS.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court decline to adopt the aspects of the Report specifically objected to herein, dismiss MEIC, and enter judgment in favor of all Defendants.

Respectfully submitted this 21st day of March, 2019,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being filed with the Clerk of the Court using the Court's CM/ECF system, thereby serving it on all parties of record on March 21, 2019.

/s/ *John S. Most*
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