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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

WILDEARTH GUARDIANS and MONTANA ENVIRONMENTAL INFORMATION CENTER, Plaintiffs, vs. RYAN ZINKE, et al. Defendants.	Case No. CV 17-80-BLG-SPW-TJC **PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO FINDINGS AND RECOMMENDATIONS**

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TABLE OF AUTHORITIES

Cases

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ABBREVIATIONS AND SHORT FORMS

2006 EA	2006 Environmental assessment by BLM for Lease MTM94378
Coal company	Spring Creek Coal, LLC
EA	Environmental assessment
EIS	Environmental impact statement
FONSI	Finding of no significant impact
GHGs	Greenhouse gases
Hg	Mercury
Mine expansion	Mining plan modification for coal lease MTM 94378
NEPA	National Environmental Policy Act
NO_x	Nitrogen oxides
$PM_{2.5}$	Particulate matter 2.5 micrometers in diameter or smaller
PM_{10}	Particulate matter 10 micrometers in diameter or smaller
SO_2	Sulfur dioxide

INTRODUCTION

Magistrate Judge Cavan's Findings and Recommendations (Findings) correctly determined that both Conservation Groups have standing and that *res judicata* does not bar the Conservation Groups' claims. The Findings also correctly determined that Federal Defendants violated NEPA by (1) failing to adequately assess the indirect and cumulative impacts of shipping and burning approximately 100 million tons of coal; (2) employing a misleading analysis that masked billions of dollars in harm to society from the mine expansion's greenhouse gas emissions (GHGs), while trumpeting purported economic benefits; and (3) failing to prepare an environmental impact statement (EIS).

This Court should reject the Defendants' objections and adopt Magistrate Judge Cavan's detailed Findings on standing, *res judicata*, and the agencies' NEPA violations.

ARGUMENT

I. The Findings correctly rejected Federal Defendants' arguments about standing and *res judicata*.

The Findings' careful and detailed analysis of MEIC's standing based on the declaration of Steve Gilbert was correct and should not be disturbed. (Doc. 71 at 7-12.) Further, because Mr. Gilbert and therefore MEIC have standing, the Findings correctly rejected Federal Defendants' res judicata arguments. (*Id.* at 13-14.)

Federal Defendants' standing objection boils down to their complaint that declarant Steve Gilbert's asserted harm is limited to his "th[oughts] about impacts occurring elsewhere." (Doc. 77 at 8-12.) The argument is unavailing, because as the Findings recognize, Mr. Gilbert's concerns about the mine are not purely psychological, but are, in fact, based on his personal observations of the mine and its impacts. (Doc. 71 at 10 (noting that Mr. Gilbert "indicates that he has seen the mine and observes coal trains leaving the mine"); *id.* at 11-12 n. 1 (noting that Mr. Gilbert would like to hunt on land adjacent to the mine but "the view of the mine and coal trains dissuades him").) In the four decades he has spent visiting and recreating on public lands immediately to the north, south, and east of the strip-mine, Mr. Gilbert has viewed the mine from multiple vantage points, including from Highway 314, on which he travels when visiting the area. (Doc. 38-2 at 3-6, ¶¶ 9-15; Doc. 64-1 at 2-5, ¶¶ 3-9.[1])

[1] Federal Defendants' objection to Mr. Gilbert's supplemental declaration has no merit. (*See* Doc. 71, at 11-12 n.1 (noting objection).) The supplemental declaration properly responded to arguments raised in Federal Defendants' cross-motion for summary judgment, and Federal Defendants had ample opportunity to respond in their reply brief. *See Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068 n.5 (9th Cir. 1997) ("The Fishermen ask us not to rely on the affidavits because they were submitted with plaintiffs' reply brief in the district court. However, plaintiffs were not required to submit the affidavits before their standing was challenged."); *Idaho Conservation League v. U.S. Forest Serv.*, No. 2:12-CV-00004-REB, 2014 WL 912244, at *2 (D. Idaho Mar. 10, 2014) (holding plaintiff was entitled to file affidavits to support standing in combined response-reply brief, as here).

(Doc. 64-1, at 3, ¶ 3; *see also* Doc. 38-1, at 10-11, ¶ 12 (additional photos of mine).)

For Mr. Gilbert, the Spring Creek Mine is a "hideous scar upon the earth that has caused great harm to the surrounding area and wildlife, which I cannot help thinking about every time I glimpse the mine or coal trains leaving the mine." (Doc. 38-2 at 5-6, ¶ 14.) As the Supreme Court held in *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000), such concrete injury satisfies the requirements of standing.[2]

[2] *Accord Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000) (standing for people recreating downstream of lumber mill); *Sierra Club v. Jewell*, 764 F.3d 1, 5-6 (D.C. Cir. 2014) (standing for people who enjoy viewing

Further, when Mr. Gilbert recreates in the areas immediately adjacent to the mine, he is concerned about the mine's impacts to wildlife that use the broader area and have been displaced by the mine. (Doc. 38-2, at 4-6, ¶¶ 11, 14-15.) This is an additional foundation for standing. *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 657 (7th Cir. 2011) (Posner, J.) (finding standing for people concerned with landfill impacts to birds in park one-half mile away); *accord Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001).

In sum, the Findings correctly determined that Mr. Gilbert and MEIC have standing. This defeats any *res judicata* concerns because there is no identity of parties. (Doc. 71 at 13-14 (citing *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 888 (9th Cir. 2000).) In all events, Federal Defendants' *res judicata* arguments are misplaced. (*See* Doc. 64 at 4-5.)

II. The Findings correctly determined that Federal Defendants failed to take a hard look at the foreseeable indirect and cumulative impacts of coal trains and pollution from coal combustion.

A. Federal Defendants ignored the impacts of coal trains.

The Findings correctly determined that Federal Defendants failed to take a hard look at the foreseeable indirect and cumulative impacts of the 2,300 coal-trains that will issue from and return to the strip-mine each year. Federal

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area threatened by mining from public road); *accord Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985); *United States v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989).

Defendants and Spring Creek Coal, LLC, (Coal company) are mistaken in their objections to the Findings and the well-reasoned analysis of Judge Molloy in *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074 (D. Mont. 2017), on which the Findings relied.

The Coal company's rehashed argument that Federal Defendants did not have discretion to deny its mining plan modification was appropriately rejected in the Findings. (Doc. 76 at 8-11; *cf.* Doc. 71 at 15-17.) As the Findings explain, *Department of Transportation v. Public Citizen* held that "where an agency has *no ability* to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. 752, 770 (2004) (emphasis added). In that case, the federal agency was *required* by law to register motor carriers who met certain conditions, none of which related to the environment. *Id.* at 766 (emphasis added).

By contrast, here, Federal Defendants have broad discretion—unbounded by any express statutory or regulatory provision—to approve *or deny* a mining plan modification, which the Coal company seeks. 30 U.S.C. § 207(c) ("The Secretary shall approve or disapprove the plan or require that it be modified."); 30 C.F.R. § 746.13 (providing that Office of Surface Mining must "recommend[] approval, disapproval, or conditional approval" of mining plan based on, among other things, "[i]nformation prepared in compliance with the National Environmental Policy Act

of 1969," consideration of compliance with other federal laws, and "[c]omments and recommendations . . . of . . . the public"). Accordingly, contrary to the Coal company's assertion, Federal Defendants have broad discretion to deny the mining plan modification based on concerns about harm to the public and the environment. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1213 (9th Cir. 2008) (holding that rule from *Public Citizen* did not apply where agency had authority to impose more stringent standards based on information from NEPA review). Thus, all courts to address this issue with respect to coal mine expansions have rejected the Coal company's argument.[3] As the Findings observed (Doc. 71 at 15 n.3), Federal Defendants apparently do not agree with the Coal company's efforts to circumscribe their authority.

[3] *Diné Citizens Against Ruining Our Env't v. U.S. Office of Surface Mining* (*Diné CARE*), 82 F. Supp. 3d 1201, 1217 (D. Colo. 2015), *vacated as moot*, 643 F. App'x 799 (10th Cir. 2016) (rejecting *Public Citizen* argument and holding that "[b]ecause OSM has the authority to deny [the coal company's] Permit Revision Application based on its consideration of combustion-related effects, it was obligated to consider the combustion-related effects in its EA for the proposed expansion"); *accord WildEarth Guardians v. U.S. Office of Surface Mining* (*WildEarth*), 104 F. Supp. 3d 1208, 1230 (D. Colo. 2015), *vacated as moot*, 652 F. App'x 717 (10th Cir. 2016); *see also San Juan Citizens Alliance v. BLM*, 326 F. Supp. 3d 1227, 1242 (D.N.M. 2018) (rejecting similar "proximate cause" argument and collecting cases).

WildEarth Guardians v. Zinke, No. CV 16-2019 (RC), 2019 WL 1273181 (D.D.C. Mar. 19, 2019), cited by the Coal company, dealt with distinct federal regulations governing oil and gas leasing and development and is, therefore, inapposite. In particular, there the court's conclusion rested on the language of 43 C.F.R. § 3101.1-2, which expressly limits federal discretion to prevent development of oil and gas leases. *Zinke*, 2019 WL 1273181, at *12-13. As noted, no such limitation applies to federal discretion to approve or deny mining plan modifications for coal mines. *See* 30 U.S.C. § 207(c); 30 C.F.R. § 746.13; *Diné CARE*, 82 F. Supp. 3d at 1217; *WildEarth*, 104 F. Supp. 3d at 1230.

Defendants' arguments that coal train impacts are not reasonably foreseeable largely rehash arguments rejected in the Findings and in *Montana Environmental Information Center*, 274 F. Supp. 3d at 1091-93. At bottom, Defendants contend that because the destinations of the 2,300 coal trains traveling to and from the mine each year are not known *with certainty*, no analysis of their impacts was required. (*See* Doc. 77 at 21 (asserting that "certainty does not exist" for coal destinations); Doc. 76 at 12-16 (similar argument).[4]) But, as the Findings explain (Doc. 71 at 17),

[4] The Coal company's eleventh-hour attempt to inject the post-decisional and extra-record declaration of its mine manager, David Schwend (Doc. 76-1), into this case is improper. *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1104 (9th Cir. 2016) ("[A] post-EIS analysis—conducted without any input from the public—cannot cure deficiencies in an EIS."); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (explaining that "post decision information . . . may not be advanced as a new rationalization either for sustaining

NEPA only requires indirect impacts to be "reasonably foreseeable." 40 C.F.R. § 1508.8(b). Accordingly, courts have long emphasized: "Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.'" *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *accord Kern v. BLM*, 284 F.3d 1062, 1072 (9th Cir. 2002).

Here, as the Findings lay out (Doc. 71 at 18) and as Federal Defendants now admit (Doc. 77 at 22), the agencies knew the historical destinations of coal trains from the Spring Creek Mine. In fact, the record demonstrates that the agencies, the Coal company, and the public all knew the destinations of the coal and the rail routes to those destinations. AR:2-664-10724, -10725, -10808 (noting coal destinations and routes); AR:2-737-15459 (mapping routes); AR:2-785-17287 (identifying coal plants burning coal); AR:2-839-18732 (map of train routes across Montana and Pacific Northwest). Most of the coal goes to the upper-Midwest (North Dakota, Minnesota, Wisconsin, and Michigan) or Washington state (to the

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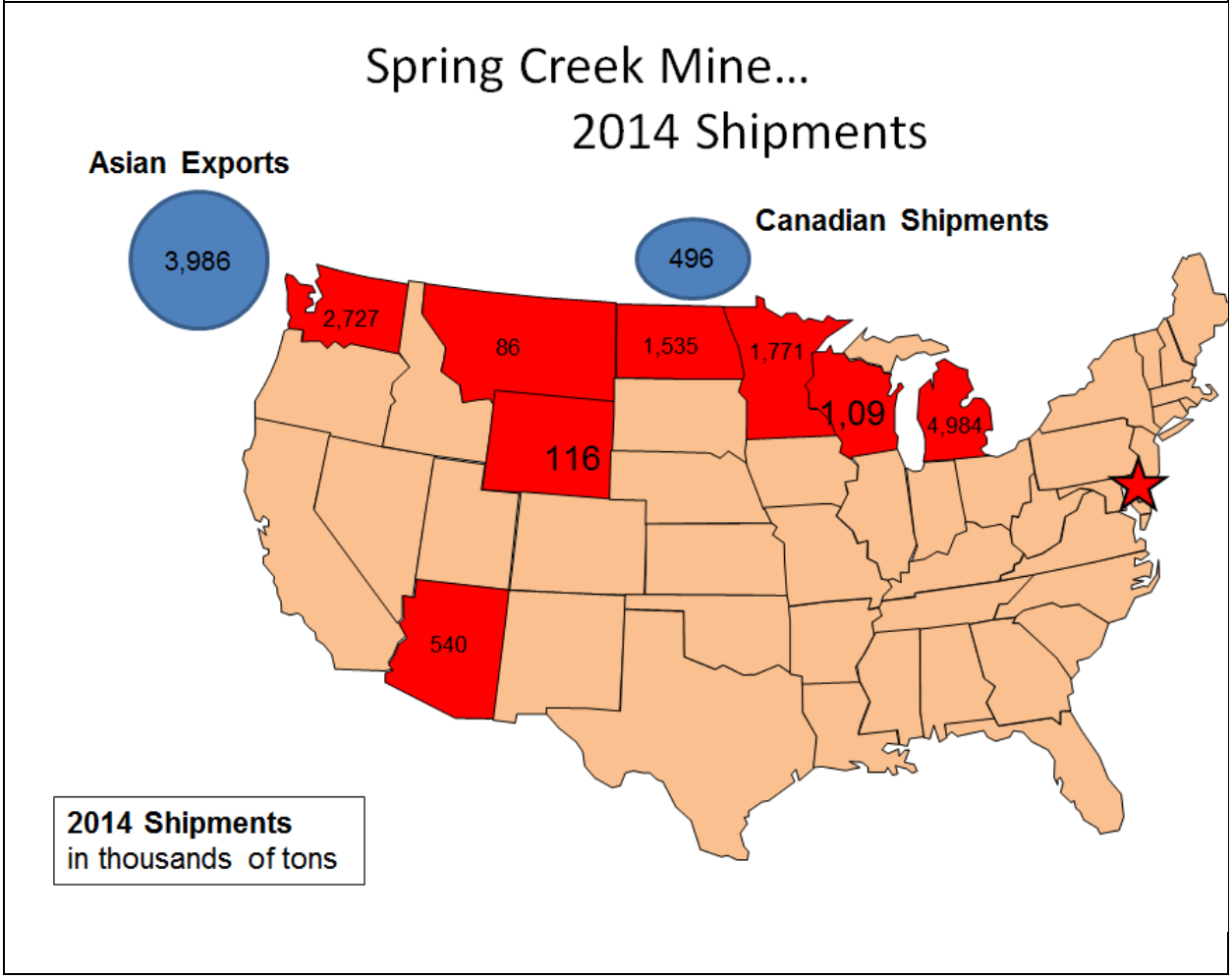
or attacking an agency's decision"). The declaration should be stricken and should not considered by this Court. *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450 (affirming district court's decision to strike extra-record documents). And even if it were considered, it merely evidences Defendants' ability to gather and disclose to the public significant information about the indirect and cumulative impacts of shipping coal by rail.

coal plant in Centralia or the Westshore coal export terminal in British Columbia, Canada), and a small amount goes to the Coronado coal plant in Arizona. Federal Defendants used this historical information to calculate and project GHG emissions from coal trains. AR:2-664-10751; AR:2-737-15458 to -15459.

Figure 1: Coal destinations from 2014, provided by Coal company to Federal Defendants to calculate GHG emissions from coal trains. AR:2-737-15459.



Contrary to Defendants' contentions, this case is virtually identical to *Montana Environmental Information Center*. In that case, nearly all of the coal was shipped west to Washington state and then Canada to export or east to the upper-

Midwest and then to export. 274 F. Supp. 3d at 1092. The federal agencies used their knowledge of these historical destinations to calculate GHG emissions from the coal trains. *Id.* So too here. Nearly all coal goes west across Montana to the Pacific Northwest or east across Montana to the upper-Midwest (with a small amount going to the Coronado coal plant in Arizona), and the Federal Defendants used their knowledge of these historical destinations to calculate GHG emissions from the coal trains. AR:2-737-15485 to -15459; AR:2-785-17287. Accordingly, as in *Montana Environmental Information Center*, coal transportation was "reasonably foreseeable" and should have been analyzed. 274 F. Supp. 3d at 1092-93.

Finally, the Coal company's attempt to analogize this case to *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 776 (1983), is unavailing—the cases share no resemblance. In that case, residents of Harrisburg, Pennsylvania, objected to the federal approval of restarting the Three Mile Island nuclear plant. *Id.* at 768-69. The issue was whether federal regulators violated NEPA by not addressing the psychological impacts to the residents caused by the residents' perception of risks associated with continued operations of the nuclear plant. *Id.* at 775. The Court held that NEPA does not embrace these perceptions of risk that did not result from changes in the physical environmental caused by the regulators' decision. *Id.* at 774-76. If anything *Metropolitan Edison* demonstrates

the correctness of the Findings on in this case. Unlike the subjective perceptions of risk in *Metropolitan Edison*, the 2,300 coal trains issuing from and returning to the strip-mine each year will result in impacts to the physical environment, *e.g.*, AR:2-839-18755 to -18756, -18764; AR:2-840-18820 (detailing impacts to Billings), which must be assessed under NEPA, as the Findings correctly determined.

B. Federal Defendants failed to disclose the impacts to human health and the environment from significant amounts of non-GHG air pollution from coal combustion.

The Findings correctly determined that Federal Defendants failed to take a hard look at the impacts of the 74,000 tons of sulfur dioxide (SO_2), 28,000 tons of nitrogen oxides (NO_x), 5,000 tons of particulate matter (PM_{10} and $PM_{2.5}$), and 580 pounds of toxic mercury (Hg), that will be emitted each year when power plants burn the coal from the mine expansion. (Doc. 71 at 22-24; AR:2-664-10781.) Defendants' arguments to the contrary are unavailing.

Federal Defendants first repeat their argument about their analysis of air pollution from *coal mining*. (Doc. 77 at 22-23.) But as the Findings explained, that point is non-responsive and not relevant to the agencies' inadequate analysis of the foreseeable impacts of *coal combustion*. (Doc. 71 at 22.) Second, Defendants mistakenly contend that the Findings mandated the agencies to conduct specific analyses of the effects of the vast amounts of pollution that will be emitted in coal combustion. (Doc. 77 at 24-25; Doc. 76 at 16-20.) But the Findings did not

mandate any specific analysis. Instead, the Findings correctly noted that simply tallying tons of pollution, as the agencies did here, is insufficient—because NEPA requires an analysis of "*actual* environmental effects." (Doc. 71 at 20 (quoting *Ctr. for Biological Diversity*, 538 F.3d at 1216).) The Findings then determined the agencies' comparison of the tallied combustion emissions to *total* air pollution emissions for the entire United States improperly diluted these impacts to insignificance. (Doc. 71 at 22-23 (citing *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1036-37 (9th Cir. 2001) (agencies may not "dilute[] to insignificance" the "effects of individual projects")).) Regardless of which analysis they ultimately select on remand, Federal Defendants may not obscure the hard fact that pollution from coal combustion—and the Spring Creek Mine is the seventh largest producer of coal combusted in the Nation, AR:2-827-18249—kills thousands of people each year and sickens tens of thousands more. AR:2-827-18257 to -18258.

As the Findings explained, there is no question that the agencies could have analyzed the indirect and cumulative impacts of this air pollution at more granular level. (Doc. 71 at 23-24.) Federal Defendants could have compared the amounts of pollution to the total burden of pollution in the handful of known historic locations where the coal is burned. *See* AR:2-737-15459 (identifying eight states where coal is shipped); AR:2-827-18249 to -18250 (identifying nine individual plants where

coal is burned). As the Findings note, the environmental assessment (EA) conducted this type of analysis with respect to GHG emissions. (Doc. 71 at 23-24 (citing AR:2-664-10785).) Similarly, the agencies could have reasonably assessed ambient air quality in the handful of locations where the coal has been historically burned to determine if it meets national standards, as the EA did at the mine. AR:2-664-10741 to -10748. Of course, the agencies could also simply admit to the public that the huge quantities of air pollution from burning coal from the Spring Creek Mine will kill and sicken many, many people. AR:2-827-18257 to -18258; *see Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1082 (D.C. Cir. 2019) (NEPA requires agencies to "take a hard and *honest* look at the environmental consequences of their decisions" (emphasis added)). Defendants' suggestion that any such analysis is not possible or is "unwieldy" is, as the Findings demonstrate, contradicted by the record. (*Compare* Doc. 77 at 23 *and* Doc. 76 at 19-20 *with* Doc. 71 at 23-24.[5])

Federal Defendants further miss the mark in their suggestion that because air pollution is regulated under the Clean Air Act, the agencies can *assume* that the

[5] Simply by way of further illustration, in minutes one can view on-line the annual emissions and associated human health impacts (premature deaths and sicknesses) of each coal plant supplied with coal from the Spring Creek Mine. Clean Air Task Force, Toll from Coal Interactive Map, *available at* https://www.catf.us/educational/coal-plant-pollution/; AR:2-827-18249 to -18250 (identifying plants supplied by mine).

tens of thousands of tons of SO_2, NO_x, $PM_{2.5}$, PM_{10}, and mercury from combustion of coal from the mine will have no significant effects. (Doc. 77 at 23-24.) This contention, which would largely vitiate NEPA, has long been rejected. *See Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-27 (D.C. Cir. 1971) (rejecting agency argument that it could "defer [NEPA analysis] totally to water quality standards devised . . . by state agencies" and noting that the argument would cause "NEPA procedures . . . to wither away"). The contention has gained no merit with the passage of time. *S. Fork Band v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (rejecting argument that agency did not have to analyze indirect air pollution impacts of hard rock mine because ore processing facility "operates pursuant to a state permit under the Clean Air Act").[6] In fact, the case on which Federal Defendants rely, *New Mexico ex rel. Richardson v. BLM*, 459 F. Supp. 2d 1102, 1114 (D.N.M. 2006), was reversed on this very point. *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 715 (10th Cir. 2009). The Tenth Circuit held that the agency's uncritical reliance on the assumed

[6] *Accord The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1394 (9th Cir. 1985) ("The agency must independently assess the consequences of a project."); *Oregon Envtl. Council v. Kunzman*, 714 F.2d 901, 905 (9th Cir. 1983) ("One agency cannot rely on another's examination of environmental effects under NEPA."); *San Juan Citizens Alliance*, 326 F. Supp. 3d at 1253 n.10 (requiring NEPA analysis of water impacts "regardless of whether water rights are established and controlled by a state")

effectiveness of state and federal regulations was unwarranted because "the record contains evidence that, despite this regulatory scheme, groundwater contamination from gas wells has happened frequently throughout New Mexico in the past." *Id.*; *see also Calvert Cliffs*, 449 F.2d at 1123 (noting that the mere existence of regulation "does not mean" that there is "no environmental damage whatever"). Here, as in *New Mexico ex rel. Richardson*, record evidence shows that despite regulation under the Clean Air Act, air pollution from coal kills thousands and sickens tens of thousands of people every year. AR:2-827-18257 to -18258.

For this same reason, the Coal company's harmless error argument has no merit. (Doc. 76 at 18.) The record shows that the tens of thousands of tons of annual non-GHG air pollution from burning coal from the strip-mine will cause significant, irreparable harm to human health. AR:2-827-18257 to -18258 (widespread health impacts from coal combustion); AR:2-664-10781 (annual non-GHG emissions); AR:2-827-18249 (mine is seventh largest source of coal in nation). The company's repeated *Public Citizen* argument lacks merit for the reasons stated above, *supra* Part II.A., and in the Findings. (Doc. 71 at 15-17.) The Coal company's citations to *WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013), and *Mayo Foundation v. Surface Transportation Board*, 472 F.3d 545, 555 (8th Cir. 2006), are also unavailing. Unlike here, in both of those cases the agencies assessed emissions on *both* national and *regional levels*. (Doc. 71 at

23 (citing *WildEarth Guardians*, 738 F.3d at 310, and *Mayo Found.*, 472 F.3d at 555).) Equally important, no more localized analysis was possible in *WildEarth Guardians*, 738 F.3d at 310, because that case involved GHG pollution, which does not cause the localized harmful impacts of non-GHG air pollution. *See* AR:2-664-10751 (noting that GHGs' "status as a pollutant is not related to their toxicity but is instead due to the added long-term impacts they have on climate because of their increased incremental levels in the earth's atmosphere"). And in *Mayo Foundation*, 472 F.3d at 555, unlike here, the agency developed and ran a computerized analysis of the anticipated air pollution impacts and then followed NEPA's procedures (40 C.F.R. § 1502.22(b)) to explain why a more localized analysis was not possible. Finally, the company's argument, relying on *Zinke*, 2019 WL 1273181, at *12, that downstream emissions cannot be quantified (Doc. 76 at 19-20) fails because here the agencies did, in fact, *quantify* downstream non-GHG emissions. AR:2-664-10781.

Ultimately, the thousands of coal trains and tens of thousands of tons of non-GHG air pollution that the strip-mine expansion will generate each year will cause widespread harm to human health and the environment. The sheer magnitude of the impacts emanating from this strip-mine is no reason to abbreviate the NEPA analysis, as Defendants contend. It is reason to make the analysis more robust.

C. Federal Defendants' analysis misled the public about the impacts of GHG pollution.

The Findings' detailed and incisive analysis of GHG emissions was correct. Defendants' objections, on the other hand, are not well taken. Defendants' basic contention is that Federal Defendants should be able to present a skewed and misleading analysis of the monetary costs and benefits of the mine expansion. NEPA was enacted, however, to prevent such one-sided analysis that grossly undervalues environmental impacts. 42 U.S.C. § 4332(2)(b) (requiring agencies to develop methods to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations"); *see Sierra Club v. Morton*, 510 F.2d 813, 826 (5th Cir. 1975) (NEPA "bring[s] environmental factors to *peer status* with . . . economic costs considerations" (emphasis added)).

While it is true, as Defendants note (Doc. 77 at 13-14; Doc. 76 at 21-22), that NEPA does not *always* require agencies to conduct a cost-benefit analysis, 40 C.F.R. § 1502.23,[7] it is equally true that a *misleading* economic analysis violates NEPA:

[7] *But see Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 594 (9th Cir. 1981) ("The law in this Circuit is clear that a formal and mathematically expressed cost-benefit analysis is not always a required part of an EIS. This is not to say that a mathematical cost-benefit analysis is never required. If an alternative mode of EIS evaluation is insufficiently detailed to aid the decision-makers in deciding whether to proceed, or to provide the information the public needs to

> NEPA requires agencies to balance a project's economic benefits against its adverse environmental effects. The use of inflated economic benefits in this balancing process may result in approval of a project that otherwise would not have been approved because of its adverse environmental effects. Similarly, misleading economic assumptions can also defeat the second function of an EIS by skewing the public's evaluation of the project.

Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996) (internal citation omitted).[8] In other words, an agency may not place a "thumb on the scale by inflating the benefits of the action while minimizing its impacts." *Mont. Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1098. Here, citing *Montana Environmental Information Center*, 274 F. Supp. 3d at 1094-99, and *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174, 1189-93 (D. Colo. 2014), the Findings correctly determined that Federal Defendants presented a misleading analysis by quantifying the benefits of the mine expansion, while ignoring the significant economic costs of the expansion's GHG emissions. (Doc. 71 at 26-30.)

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evaluate the project effectively, then the absence of a numerically expressed cost-benefit analysis may be fatal." (internal citation omitted)).

[8] *Accord NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 811-12 (9th Cir. 2005); *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983) (agency violated NEPA by conducting economic analysis that misleadingly suggested that project "will produce net economic benefits"); *see also Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (agency "cannot tip the scales of an EIS by promoting possible benefits while ignoring their costs").

As the Findings explained, the Social Cost of Carbon Protocol (social cost of carbon or Protocol) allows agencies to monetize the climate change impacts caused by each additional ton of carbon dioxide (CO_2) emissions. (Doc. 71 at 24; Doc. 51 at 8-9 (explanation by Dr. Michael Greenstone, leading expert on the social cost of carbon).) The Protocol was developed by the Federal Government (Doc. 71 at 24), based on years of scientific and economic research, has been employed in dozens of federal rulemakings (Doc. 51 at 9), and has been upheld in federal court. *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677-78 (7th Cir. 2016). While it is true that the Protocol offers a range of values based on a range of discount rates, under no circumstance is the value zero, as Federal Defendants effectively and arbitrarily concluded. *Cf. Ctr. for Biological Diversity*, 538 F.3d at 1200; *Mont. Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1104; *High Country*, 52 F. Supp. 3d at 1192.

Critically, using even the *lowest* value for the social cost of carbon, the cost of the climate change impacts from coal combustion will exceed the *total value* of the coal in the mine expansion.[9] Worse, using the *central* value for the social cost of carbon, $39.60/ton CO_2, "reveals that the Expansion will cost society well over

[9] The average value of one ton of coal in Montana in 2015 was $16.41. AR:2-664-10765. Combustion of one ton of coal from the Spring Creek Mine emits 1.675 tons of CO_2. AR:2-664-10928. Under the Protocol the *lowest* value for one ton of CO_2 was $11/ton. AR:2-829-18301. Thus, the CO_2 from one ton of coal will cause $18.43 in harm (1.675 x 11), exceeding the value of the coal.

$5 billion from climate related impacts." (Doc. 51 at 9, 11 (citing AR:2-829-18301).) This dwarfs, *by an order of magnitude*, the purported public revenues that the EA trumpeted ($379.3 million) and relied on to approve the expansion. AR:2-664-10697, -10810. It is fundamentally misleading and arbitrary for an agency to assert that a project will produce economic benefits, when in fact it will result in a significant public[10] loss. *Johnston*, 698 F.2d at 1094-95 (overturning decision where a "realistic" evaluation showed that "costs would outweigh the benefits over the life of the project," yet agency's EIS suggested "without qualification that the project will produce net economic benefits").

Contrary to the Coal company's argument (Doc. 76 at 21), the instant case is not like *Zinke*, 2019 WL 1273181 at *22, where federal agencies "briefly mention[ed] the economic benefit[s]" of oil and gas leases with "little quantification." Instead, here, as in *High Country*, 52 F. Supp. 3d at 1191, Federal Defendants "relied on the anticipated economic benefits . . . in justifying their approval." AR:2-664-10697 (trumpeting "considerable beneficial impacts" to approve expansion), -10810 (touting "substantial economic benefits" of the expansion). Indeed, Federal Defendants intentionally presented economic benefits in a manner that inflated them. AR:2-870-20270 (noting that use of cumulative

[10] Because the Coal company does not pay for (i.e., externalizes) its GHG pollution, it stands to make a *private* profit from the expansion.

royalty payments "make[s] the total [economic] numbers bigger"); *see* AR:2-664-10765 (using cumulative payments in EA, which made the "total numbers bigger"). NEPA prohibits agencies from presenting such a misleading analysis by trumpeting economic benefits, while ignoring costs, as the Findings correctly explained. (Doc. 71 at 26, 30.)

Federal Defendants' mistakenly contend that the Findings' analysis "has no apparent limit" and will "lead to absurd results" by requiring agencies to monetize all environmental impacts if they ever identify economic benefits. (Doc. 77 at 14-16.) As *Zinke*, 2019 WL 1273181 at *22, demonstrates, however, where an agency does not trumpet or rely on economic benefits as the basis for its decision (as Federal Defendants did here) or where the unaccounted environmental costs are trivial, it is not error for the agency to fail to monetize the costs. It is, however, error if the agency's analysis is *misleading*. *Hughes River*, 81 F.3d at 446-48; *NDRC*, 421 F.3d at 811-13. An analysis is misleading if it prevents "the decisionmaker and the public" from "mak[ing] an informed comparison of the alternatives," *NDRC*, 421 F.3d at 811 (quoting *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988)); *Johnston*, 698 F.2d at 1092-95, as Federal Defendants' benefits-only analysis did here. (*See* Doc. 51 at 4-6.) And it is unquestionably misleading for an agency to omit monetizable environmental costs,

which, if considered, would reveal that the federal action will produce, not a net benefit, but a *net loss* for society, as here. *Johnston*, 698 F.2d at 1094-95.

For these same reasons, Federal Defendants' argument about deference to an agency's methodology is unavailing. (Doc. 77 at 14-15.) Courts will not defer to any agency's analysis of benefits if it is misleading or it improperly omits significant environmental costs. *Hughes River*, 81 F.3d at 446-48; *NDRC*, 421 F.3d at 811-13; *Sigler*, 695 F.2d at 979; *Mont. Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1098-99; *High Country*, 52 F. Supp. 3d at 1190-93. Federal Defendants contradict their contention that a "qualitative" assessment of environmental impacts is "more easily understood and analyzed," when they candidly acknowledge that analyzing economics in "purely qualitative terms" would "degrad[e] the quality of their analysis." (Doc. 77 at 14, 16.) The EA's disparate analyses of economic benefits and GHG emissions demonstrate the inadequacy of the "qualitative" assessment: the EA found that the expansion's $379.3 million in public revenues, considered on their own, would be "substantial" and their loss would be "significant," AR:2-664-10810 to -10811. On the other hand, employing its "qualitative" assessment, the EA compared the 146 million tons of CO_2 from the expansion to *total* CO_2 emissions in the United States ("only 0.54 percent") and thereby deemed the impacts to be "minor," "negligible," and similar to those of the no action alternative. AR:2-664-10698, -10782 to -10783. Had the EA compared the

purported economic benefits to the national economy, they too surely would have appeared "minor" and "negligible." Such skewed assessment of costs and benefits was misleading and arbitrary. *Mont. Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1098.

Finally, the President's Executive Order disbanding the Interagency Working Groups on the Social Cost of Greenhouse Gases and "withdrawing" their technical support documents—purely political decisions—in no way discharges Federal Defendants' obligation under NEPA to conduct "[a]ccurate scientific analysis," 40 C.F.R. § 1500.1(b), as the Findings explained. (Doc. 71 at 30 n. 7.) *Johnston*, 698 F.2d at 1092-95, elucidates this point. In that case, federal agencies prepared an EIS for a dam-reservoir project. *Id.* at 1090 & n.1. Congress had required agencies to use an unrealistically low discount rate for calculating the economic value of the project. *Id.* at 1093-94. The low discount rate made the project appear to produce "net economic benefits," but under a more realistic discount rate the project's "costs would outweigh the benefits." *Id.* 1094-95. The agencies prepared an EIS that used the unrealistically low, but congressionally mandated, discount rate, stating "without qualification that the project will produce net economic benefits." *Id.* at 1095. The Tenth Circuit concluded that the EIS was "clearly misleading," creating an "unreasonable comparison of alternatives," in violation of NEPA. *Id.* Accordingly, the court remanded the matter to the agencies, requiring them to acknowledge in the EIS that the congressionally mandated

discount rate was unrealistic and that use of a more realistic discount rate would show that the project's costs would outweigh its benefits. *Id.* Thus, while it may be current administration policy to ignore the science and economics about the significant costs of GHG emissions, NEPA prohibits the administration from misleading the public about these costs in its NEPA analyses.

In sum, the Findings correctly sanctioned the agencies for improperly misleading decision-makers and the public by inflating economic benefits, while ignoring the significant environmental costs of GHG emissions.

III. The Findings correctly determined that Federal Defendants' decision to forego an EIS was arbitrary.

The Findings determined that Federal Defendants' decision to forego an EIS was arbitrary because, first, the agencies failed to adequately assess impacts of coal transportation and coal combustion and, second, they failed to follow their own NEPA guidelines. (Doc. 71 at 35-38.) Defendants dispute the first point, referencing their arguments that the EA adequately assessed transportation and combustion impacts. (Doc. 77 at 25; Doc. 76 at 23.) The Defendants' arguments are inconsistent and self-defeating. The crux of their arguments about coal transportation and combustion is that such impacts are uncertain and that the social cost of carbon is controversial. (*See* Doc. 77 at 19, 21-22 (stating that "certainty does not exist" and citing "uncertainty" about impacts of trains and combustion and citing political decision to disband social cost of carbon work group and

withdraw technical documents); Doc. 76 at 20-21 (stating that downstream impacts "cannot be quantified with any degree of certainty" and citing record statement about uncertainties about social cost of carbon). However, if this is the case, as this Court observed in *Montana Environmental Information Center*, 274 F. Supp. 3d at 1104, when it comes to deciding whether to prepare an EIS, "such uncertainty militates in favor of an EIS, not against it." *See also* 40 C.F.R. § 1508.27(b)(5). "Indeed, Congress created the EIS process to provide robust information in situations precisely like this one, where, following an environmental assessment, the scope of the project's impacts remains both uncertain and controversial." *Semonite*, 916 F.3d at 1088-89. Thus, the Defendants' insistence on uncertainty and controversy underscores the correctness of the Findings' determination that the agencies' finding of no significant impact (FONSI) was arbitrary.[11]

Defendants' efforts to excuse their failure to follow their own guidelines fare no better. First, because the Conservation Groups raised this issue in comments, AR:2-827-18250 to -18251, and Federal Defendants admit that they never addressed it in the administrative record (Doc. 77 at 27), their various arguments on the subject are improper *post hoc* rationalizations. *Mont. Envtl. Info. Ctr.*, 274

[11] *Ctr. for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140, 1159 (N.D. Cal. 2013) ("Ultimately, BLM argues that the effects of fracking on the parcels at issue are largely unknown. The court agrees. But this is precisely why proper investigation was so crucial in this case.").

F. Supp. 3d at 1100-01 (refusing to address *post hoc* arguments). Further, while the guidelines do not mandate preparation of an EIS, Defendants ignore that NEPA's implementing regulations expressly *mandate* that agencies consult their own guidelines when determining whether to prepare an EIS. 40 C.F.R. § 1501.4(a). Here, the record is devoid of any instance where Federal Defendants assessed whether their own guidelines would normally require an EIS. *See Davis v. Mineta*, 302 F.3d 1104, 1117 (10th Cir. 2002), *abrogated on different grounds*, *Diné CARE v. Jewell*, 839 F.3d 1276 (10th Cir. 2016) (if agency "arbitrarily and capriciously failed to follow its own regulation, its decision must be reversed").

Federal Defendants' further contend that the guidelines' standard for preparation of an EIS was not met because the expansions' impacts were analyzed in an earlier environmental document—the 2006 Lease EA. (Doc. 77 at 26; *see also* Doc. 76 at 25-26.) The Findings correctly rejected this argument because this Court "previously determined the prior BLM EA . . . did not adequately address the impacts of the proposed mining plan modification." (Doc. 71 at 37.) The Coal company further contends that the third factor does not apply because the expansion "added only 5.2 years to Spring Creek's approved mining operations." (Doc. 76 at 26.) But this is just another instance of the company's manipulating the scope of the operation for its own tactical advantage. (*See* Doc. 78 at 5; Doc. 63-2 at 3-5, ¶¶ 9, 14 (arguing that all operations are interrelated).) While the Coal

company might in theory be able to strip-mine all the coal in the expansion areas in 5.2 years if it were mining that coal in isolation, AR:2-664-10728, as the Findings recognized (Doc. 71 at 37) and the Coal company admitted (Doc. 63-2 at 3-5, ¶¶ 9, 14), the coal in the expansion area will be mined in sequence with existing operations such that the strip-mining process will take over 15 years. AR:2-796-17404. Moreover, the Coal company ignores that guidelines refer to mining "*and reclamation operations*." 516 DM 13.4(A)(4)(c) (emphasis added). In Montana, by law, reclamation cannot be complete until at least ten years *after* the mine pit is backfilled and revegetated, Mont. Code Ann. § 82-4-235(2). In the 40 years of operations of the Spring Creek Mine, zero of the 4,626.8 acres disturbed by strip-mining have been fully reclaimed. AR:2-664-10739.

CONCLUSION

For the foregoing reasons and those stated in the Conservation Groups' summary judgment briefing, this Court should adopt the Findings' determinations that Steve Gilbert and MEIC have standing and that *res judicata* does not bar the groups' claims.

The Court should further adopt the Findings' determination that Federal Defendants violated NEPA by (1) failing to adequately assess the indirect and cumulative impacts of coal transportation and combustion, (2) employing a misleading analysis of GHG emissions, and (3) failing to prepare an EIS.

Finally, for the reasons stated in the Conservation Groups' objections, this Court should determine that Federal Defendants improperly segmented their assessment of the mine expansion and issue an appropriately tailored injunction.

Respectfully submitted this 22nd day of April, 2019.

/s/ Shiloh Hernandez
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E) and Local Rule 72.3(b), I hereby certify that the foregoing objection, excluding caption, tables, signatures, and this certificate contains 6,500 words.

/s/ Shiloh Hernandez
Shiloh Hernandez