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

MONTANA ENVIRONMENTAL INFORMATION CENTER, INDIAN PEOPLE'S ACTION, 350 MONTANA, SIERRA CLUB, WILDEARTH GUARDIANS, Plaintiffs, vs. DEB HAALAND, et al., Defendants, and WESTMORELAND ROSEBUD MINING LLC and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, Intervenors.	Case No. 1:19-cv-00130-SPW-TJC **INTERVENORS' OBJECTIONS TO FINDINGS AND RECOMMENDATIONS** **(ORAL ARGUMENT REQUESTED)**

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TABLE OF ACRONYMS AND ABBREVIATIONS

AR	Administrative Record
BLM	Bureau of Land Management
CHIA	Cumulative Hydrological Impact Assessment
EIS	Environmental Impact Statement
GHG	Greenhouse gas(es)
MDEQ	Montana Department of Environmental Quality
NEPA	National Environmental Policy Act
OSM	United States Office of Surface Mining, Reclamation and Enforcement
SCC	Social Cost of Carbon
Union	International Union of Operating Engineers, Local 400
Westmoreland	Westmoreland Rosebud Coal LLC

Defendant-Intervenors Westmoreland Rosebud Mining, LLC ("Westmoreland") and the International Union of Operating Engineers, Local 400 ("Westmoreland/Local 400"), submit these Objections to the February 11, 2022 Findings and Recommendations ("Proposed Order") of Magistrate Judge Timothy J. Cavan. ECF No. 177. Westmoreland/Local 400 respectfully request oral argument.

After almost a decade of review and thousands of pages of detailed, expert analyses by the Office of Surface Mining, Reclamation, and Enforcement ("OSM") and the Montana Department of Environmental Quality ("MDEQ"), Plaintiffs seek to overturn OSM's Rosebud Mine Area F approval. Plaintiffs attempt to manufacture standing, sending members who live hundreds of miles away to drive through private land in Area F in order to "fly-speck" OSM's comprehensive National Environmental Policy Act ("NEPA") review. The Proposed Order was incorrect in accepting Plaintiffs' standing allegations. Moreover, the Proposed Order erred in its merits findings because Plaintiffs fall far short of demonstrating arbitrary and capricious action.

SUMMARY ARGUMENT

Westmoreland/Local 400 object to the Magistrate Judge's determination that the three remaining Plaintiffs have carried their burden to prove standing:

- Individuals residing hundreds of miles from the Mine, with no pre-existing recreational interest in the vicinity of Area F, cannot maintain standing based on visits to areas as imprecise as "southeastern Montana" or "public lands" generally in the vicinity of the Mine.

- The witnesses do not have firm plans to recreate in the vicinity of Area F and, to the extent that they suggest otherwise, the evidence does not show such a visit in recent years or, in at least one instance, testimony demonstrates that the claimed activity never occurred. Absent specific, concrete plans to return, Plaintiffs do not have standing.

- Perhaps most importantly, Plaintiffs' self-inflicted "injury" cannot support standing. One witness has admitted his trip was intended to "document" standing, another's declaration says that his trip was taken to "monitor" the Mine as part of his employment, and the last witness, claims to have traveled over 500 miles from Colorado to visit some unspecified public land near the Rosebud Mine.

Westmoreland/Local 400 also object to findings of NEPA violations. OSM took the requisite hard look at cumulative impacts to surface waters. Plaintiffs' unfounded assertion, adopted in the Proposed Order, that the Environmental Impact Statement ("EIS") merely listed cumulative surface water impacts in a summary paragraph is demonstrably false. The EIS provides a multi-page disclosure of cumulative impacts, a discussion of the individual impacts underlying Plaintiffs' claim, and a thorough analysis of indirect effects on surface water,

including eight different drainages, which inform OSM's cumulative impacts analysis. OSM also incorporated expert agency documents supporting OSM's conclusions.

The greenhouse gas ("GHG") findings in the Proposed Order depart, without explanation, from this District's precedent. Judge Molloy rejected precisely the same "social cost of carbon" ("SCC") argument in a setting where the salient elements of the administrative record were, in every material respect, the same. *350 Montana v. Bernhardt*, 443 F. Supp. 3d 1185, 1196 (D. Mont. 2020). OSM's conclusion as to the SCC calculations' utility is well-within the agency's discretion. AR-117-31368; AR-117-31373.[1]

Lastly, the Proposed Order's conclusion that OSM must evaluate power plant water withdrawals strays well beyond precedent. The Proposed Order cites no authority supporting the proposition that an entirely separate company's action: (i) over which the Mine has no control; (ii) that is regulated by separate agencies; and (iii) that will continue regardless of a mine expansion, is an effect of Area F that OSM must evaluate in its NEPA review.

In sum, Plaintiffs failed to demonstrate that OSM's environmental review was arbitrary and capricious, and under controlling authority, this Court owes

[1] Administrative Record ("AR") documents are referenced as follows: AR-[row number where document is found in AR index]-[bates numbered page].

deference to the agency's determinations. *See Lands Council v. McNair,* 537 F.3d 981, 992-94 (9th Cir. 2008) (en banc).

ARGUMENT[2]

I. PLAINTIFFS LACK STANDING.

Plaintiffs bear the burden of proving standing. At summary judgment, plaintiffs "can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.'" *Clapper v. Amnesty Int'l*, 568 U.S. 398, 412 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Here, Plaintiffs' declarations are insufficient to prove injury.[3]

Only three standing witnesses allege even a tangential connection to the Mine or Area F. Each of them lives hundreds of miles away. Their standing rests solely on their alleged "aesthetic" interest in driving through Area F. The surface of Area F, and the vast majority of land in the relevant drainage, is privately owned. Thus, declarants' only available interest is to look at Area F lands from a

[2] Westmoreland/Local 400 incorporate by reference their merits arguments, but focus these Objections on the Proposed Order's specific findings and recommendations. *See* ECF No. 150-1 and ECF No. 161.

[3] Westmoreland first challenged Plaintiffs' standing in a Rule 12 motion to dismiss. ECF No. 32. This Court rejected the motion concluding that Westmoreland/Local 400 had advanced a "facial" challenge to Plaintiffs' allegations, and, accepting Plaintiffs' allegations, Plaintiffs alleged sufficient injury to maintain the case. ECF 93 at 7–9. Westmoreland's motion to conduct discovery into the factual basis for Plaintiffs' standing was also denied. *Id*. at 10.

single public road. Even accepting visual "injury" as sufficient, Plaintiffs only potential harm was manufactured for litigation.

A. Plaintiffs Cannot Demonstrate Injury.

None of the standing witnesses lives within 300 miles of the Mine, and none has a pre-existing recreational or aesthetic interest in the West Fork Armells Creek area. *See Ohio Valley Envt'l Coal. Inc. v. Maple Coal Co*., 808 F. Supp. 2d 868, 879 (S.D. W. Va. 2011) (requiring a pre-existing connection to or use of the affected area to avoid dismissal where standing was manufactured after the fact). Prior to litigation, *not one of the declarants claims to have ever recreated in Area F or the West Fork Armells Creek drainage, which is 95,000 acres*. Generalized interests in the vast southeastern Montana area, or areas near Colstrip but miles away, where Area F impacts are not visible cannot cause aesthetic injury. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (use of "unspecified portions of an immense tract of territory" cannot support standing). Plaintiffs' primary authority, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc*., 528 U.S. 167, 183 (2000), is distinguishable where multiple standing witnesses lived near the site and recreated on the very stream at issue.[4]

[4] The Supreme Court recounted that (i) one organization member lived "a half-mile from Laidlaw's facility" and had fished, camped and picnicked on the stream at issue; (ii) another "lived two miles from the facility" and had "picnicked, walked, birdwatched, and waded" along the stream; (iii) another member lived 20 miles away and said that she would recreate on the stream were it not for her concerns

Here, there is no factual record comparable to *Laidlaw*:

- Prior to this litigation, Mr. Gilbert *disclaimed*, under oath, any recreation on lands in the Area F vicinity. ECF No. 48 at 4–7; ECF No. 48-3 (2012 Gilbert Decl. ¶¶ 8–11).

- Mr. Gilbert testified that his hunting occurred many miles from Area F—where Area F is not visible. ECF No. 137-2, ¶ 11; ECF No. 48-5 (2014 Gilbert Dep. Tr. at 20:13–17, 28:16–33:13, 37:17–25, 38:1–18 ("I know I have not hunted [in the West Fork Armells Creek drainage]")).

- Mr. Gilbert claimed "concrete" plans to hunt near Colstrip in Spring 2018, but later admitted in sworn testimony that he did not do so. ECF No. 48-9 (2019 Gilbert Dep. Tr. at 111:14–113:6).

- Mr. Johnson claims an interest in, and previous visits to, "southeastern Montana," an area larger than most states. ECF No. 137-1, ¶ 6.

- Mr. Nichols' claims generally to have visited the area of the Mine as part of "regular trips to *southeast Montana*" every two years since 2011, but makes no claim to have visited the West Fork Armells

about illegal discharges; (iv) another member testified that her home near the Laidlaw facility had a lower value due to pollutant discharges; and (v) yet another member said that he had canoed on the stream at issue. *Id.* at 182–83. Yet, based on Plaintiffs' description, the Proposed Order mistakenly describes standing in *Laidlaw* as limited to members who "lived 20 miles and recreated up to 40 miles away from the facility at issue." ECF No. 177 at 12. (Notably, the *Laidlaw* court heard testimony.)

Creek area or the vicinity of Area F before WildEarth Guardians began its opposition to the Mine. ECF No. 137-4, ¶ 9.

Nor do Plaintiffs' witnesses present credible concrete plans for future visits:

- There is no evidence that Mr. Gilbert recreated anywhere in the Mine's vicinity (much less near Area F) in the last three years. *See* ECF No. 137-2.

- Mr. Johnson asserts plans to visit "the Colstrip region" and "Southeastern Montana" to hunt on a friend's ranch, admitting that any drive-by of Area F will be specifically to "view the current status of the Area F expansion," not to recreate in the area. ECF No. 137-1, ¶ 11.

- Mr. Nichols claimed he intended to return to "public lands in southeastern Montana" in 2021, ECF No. 137-4, ¶¶ 11, but not specifically the vicinity of Area F.

B. Plaintiffs' Self-Inflicted Injuries Do Not Support Standing.

Courts uniformly reject manufactured standing. *See, e.g., Clapper,* 568 U.S. at 416 ("an enterprising plaintiff" cannot manufacture standing by voluntarily incurring costs based upon fears of hypothetical future surveillance); *Grocery Mfrs. Ass'n v. EPA,* 693 F.3d 169, 177 (D.C. Cir. 2012) (voluntary use of a new type of fuel is "self-inflicted harm"); *Petro-Chem Processing, Inc. v. EPA,* 866 F.2d 433, 438 (D.C. Cir. 1989) (voluntary use of waste repository is "self-inflicted" and breaks "causal chain" for standing); *WaterLegacy v. U.S. Forest*

Serv., 2019 U.S. Dist. LEXIS 169350, *33-34 (D. Minn. 2019) (plaintiff who visited mine site only as part of mine-sponsored tour and then only after litigation began could not establish standing).

This principle has been applied to self-inflicted claims of "aesthetic" injury. One "who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 540 (5th Cir. 2019); *see also Ohio Valley,* 808 F. Supp. 2d at 880 (rejecting standing of members who traveled to site at direction of plaintiff organizations).[5] As the Second Circuit explained in *Mancuso v. Consolidated Edison Co.,*

> the record here demonstrates nothing more than that the Mancusos visited Echo Bay in order to prepare for this litigation. Their aesthetic sensibilities may have been injured in the course of these visits, but *the Mancusos do not currently reside, own property, or recreate in, on, or near Echo Bay*; they do not "use" Echo Bay for any purpose other than to obtain evidence to support this lawsuit. Any aesthetic injury experienced as a result of these visits is therefore simply a byproduct of this lawsuit and cannot satisfy even the minimal showing of injury-in-fact needed to meet the standing requirement

25 Fed. Appx. 12, 13 (2d Cir. Jan. 2, 2002) (emphasis added).

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[5] In *Ohio Valley,* the District Court ruled, based upon *testimony*, that two organization members could not establish standing due to the "timing of the trips, the manner in which they were planned, and the lack of prior connection to [the stream at issue] . . ." Judge Chambers explained "[t]his connection is insufficient 'to make credible the contention that the person's future life will be less enjoyable' as a result of Defendant's alleged exceedance of the selenium effluent limitations." 808 F. Supp. 2d at 880 (citation omitted).

In short, organizations cannot establish aesthetic injury by dispatching a member to investigate or monitor pollution. This Court recognized the policy underpinning this body of law in *Neighbors Against Bison Slaughter v. Nat'l Park Serv.,* when Judge Watters confronted plaintiffs' "trauma" at viewing a bison hunt: "As for the Plaintiffs' trauma, it is not irreparable because the Plaintiffs could choose not to watch the bison hunt, thereby preventing their trauma." 2019 U.S. Dist. LEXIS 207401, *14 (D. Mont. Dec. 2, 2019).

The Proposed Order's finding, ECF No. 177 at 10, does not address the overwhelming evidence that Plaintiffs' injuries are self-inflicted:

1. Mr. Gilbert

Mr. Gilbert's testimony in other proceedings demonstrates his intent to manufacture "injury" to support this case and others. Describing his daytrip to Area F, Mr. Gilbert explained that the visit was intended to "document" that he was in the area:

> Q: Why did you want to document that you were in that area [near the Area F expansion]?
>
> Gilbert: It was in anticipation of the MEIC challenge.
>
> Q: *And is it fair to say to demonstrate standing in this proceeding?*
>
> Gilbert: *I suppose so*.

ECF No. 48-9 (2019 Gilbert Dep. Tr. 70:19–25) (emphasis added); *see also* ECF No. 46 at 5-6.

Other elements of Mr. Gilbert's testimony confirm that his interest in this area was not personal, aesthetic, or recreational; rather, his visits were at the behest of counsel to advance litigation:

- Mr. Gilbert testified that his purpose in rejoining the Sierra Club was to establish standing. ECF No. 48-8 (2018 Hrg Tr. 113:5–116:8).
- In 2014, Mr. Gilbert disclaimed any recreation in the West Fork Armells Creek drainage (Area F's location); only after MEIC challenged Area F did Mr. Gilbert claim an interest in this area. ECF No. 48 at 4-7.
- MEIC and its counsel orchestrated and chaperoned Mr. Gilbert's 2019 trip to "document" Mr. Gilbert's presence in Area F. ECF No. 46-2 (2019 Gilbert Dep. Tr. at 27:17–28:7, 33:5–20, 77:2–9).
- In 2017, Mr. Gilbert asserted "concrete" plans to hunt near Colstrip in 2018 but admitted in 2019 that he had not. ECF No. 48-9 (2019 Gilbert Dep. Tr. at 112:14–113:6).

2. Mr. Johnson

MEIC's lawyer, Mr. Johnson, never claimed an interest in Area F until MEIC sought to litigate. His declaration highlights that any "injury" is self-inflicted:

- The purpose for his trips were "viewing the coal plant" and "visible portions of the Rosebud Mine." ECF No. 137-1, ¶ 7.

- In May 2020, he drove near Area F to "view potential expansion activities." ECF No. 137-1, ¶ 9.

- His visits were "part of the duties of [his] employment" for MEIC. ECF No. 137-1, ¶ 7.

3. Mr. Nichols

Mr. Nichols, an employee of WildEarth Guardians, began visiting the Mine to establish the organization's standing.

- His single visit to the West Fork Armells Creek drainage "just to the northwest of the current Rosebud mining operations," coincided with the Plaintiffs' 2018 request to OSM seeking a cessation order for the Rosebud Mine.[6] *See* ECF No. 137-4, ¶ 10; ECF No. 46 at 7-9.

- Mr. Nichols has a history of "vacationing" near coal mines and oil and gas development, ECF No. 60 at 5-7; he has been a standing witness in at least 31 cases across the West. ECF No. 60-1.

[6] That Mr. Nichols lives 500 miles away does not automatically prevent him from establishing standing. ECF No. 177 at 13. Mr. Nichols' residence in Colorado, however, is relevant to show that his visits to the area are limited, timed to coincide with this organization's opposition to the Rosebud Mine, and predicated on the desire to manufacture standing. *See Mancuso,* 25 Fed. Appx. at 13.

In sum, Plaintiffs' declarants had no preexisting interest in the Area F vicinity. Their interest now is limited to "drive-by" standing for the express purpose of litigation.

C. In the Alternative, Questions of Fact Justify Discovery.

If the District Court does not agree that summary judgment for Westmoreland/Local 400 on standing is justified, factual questions remain regarding the declarants' alleged interests, their purpose in visiting the area, and their purported intent to return. These questions of fact foreclose summary judgment, at which stage Plaintiffs must prove standing through definitive evidence. *See, e.g.*, *Lujan*, 504 U.S. at 561–63; *Leite v. Crane Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014). Plaintiffs' standing witnesses should be made available for deposition and, if factual issues remain after discovery, to testify, subject to cross-examination, at trial.

II. OSM Adequately Disclosed Cumulative Surface Water Impacts.

A. The Cumulative Impact Analysis is Not So Limited as Described in the Proposed Order.

The Proposed Order adopted Plaintiffs' assertion that the EIS's surface water cumulative impacts assessment is limited to a "three-sentence" conclusion. ECF No. 117 at 16. This is demonstrably false. This summary conclusion is preceded by three pages of cumulative impact assessment that accurately discloses the presence of potential cumulative impacts. AR-116-31106–08. In compliance

with the NEPA regulations,[7] the EIS does not repeat analyses found elsewhere in the EIS. Indeed, the EIS provides a thorough evaluation of the relevant cumulative impacts and further analyses are plainly not required.

B. The EIS Evaluated in Detail Potential Cumulative Impacts to Surface Water.

OSM took a "hard look" at Area F's cumulative surface water impacts. OSM's decision relied on and incorporated a water model and expert reports prepared as part of the underlying MDEQ permitting process. These detailed technical materials demonstrated that Area F mining would have *no overlapping effects* with mining in the East Fork Armells Creek drainage. *See* ECF No. 150-1 at 9–11. The Proposed Order's finding ignores this fundamental fact and much of the rest of OSM's analysis.

1. The EIS properly analyzed water impacts related to Area F and recognized that these impacts do not interact with surface waters from other drainages.

Area F will produce no measurable (i.e., cumulative) effects on surface water that overlap with effects from mining other areas of the Mine. This follows from the undisputed fact that Area F is the only mine area in the *West* Fork Armells Creek drainage, which is separated by a divide from mining in the *East* Fork Armells Creek drainage. *See* ECF No. 150-1 at 9–11; ECF No. 161 at 7–8.

[7] *See* 40 C.F.R. §1500.4 (reducing paperwork).

As the EIS explained, groundwater drawdown (and related effects to surface flows) does not "overlap" between Mine areas in adjacent drainages. AR-116-31109. OSM also found that Area F surface water impacts will be "indiscernible from natural variability" at the confluence of West Fork and East Fork Armells creek. AR-117-31546. This confluence is the first point at which any Area F surface water impacts could affect any other surface waters;[8] the absence of impacts at this confluence means that *there can be no incremental or additive effects*, i.e., no cumulative impacts to surface waters from Area F.

2. The EIS addressed the very impacts Plaintiffs claim are missing.

The Proposed Order also overlooks the EIS's extensive discussion of the effects of mining on surface water encompassing the very areas and issues Plaintiffs raised.[9] ECF No. 161 at 8-9. Impacts to "impaired" streams were considered extensively. AR-116-30946–47, AR-116-31106–07, AR0-116-30934–

[8] Because this confluence is the most upstream location of any potential surface water impacts from Area F, this confluence is also where the concentration of any substances from Area F mining would be the greatest. Hence, if there are no impacts here, there cannot be impacts further downstream.

[9] To the extent the Proposed Order suggests that a "detailed *quantified* analysis [is] required to satisfy NEPA," the Court misreads applicable law. In fact, "quantified data in a cumulative effects analysis is not a per se requirement." *Ctr. for Cmty. Action & Envtl. Justice v. FAA,* 18 F.4th 592, 604 (9th Cir. 2021). Rather, the detailed analysis of surface waters is plainly sufficient for the cumulative impacts assessment—whether or not the analysis is "quantitative." This EIS plainly provided the requisite analysis.

36. And the impacts of "ash ponds" were also thoroughly addressed. AR-116-30945–47. That some of these analyses fell under other headings in the EIS,[10] rather than in the "cumulative" impact section, is of no matter. *League of Wilderness Defs. v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008) ("It is not for [courts] to tell the [agency] what *specific* evidence to include, nor how *specifically* to present it."). That OSM chose not to repeat the detailed assessments of these impacts is a credit to the agency's adherence to the regulations' admonition to be "concise" and "proportional to potential environmental effects." 40 C.F.R. § 1502.2(c). Particularly, where the *cumulative* impact area encompasses the same eight surrounding watersheds as *indirect* impact area, it makes little sense for OSM to repeat its analysis of these impacts. The following map illustrates the area considered for both:

[10] "Indirect effects . . . are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include . . . related effects on . . . water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b). Thus, OSM properly characterized these impacts as indirect effects; but, regardless of the nomenclature, the important point is that the agency evaluated these impacts.

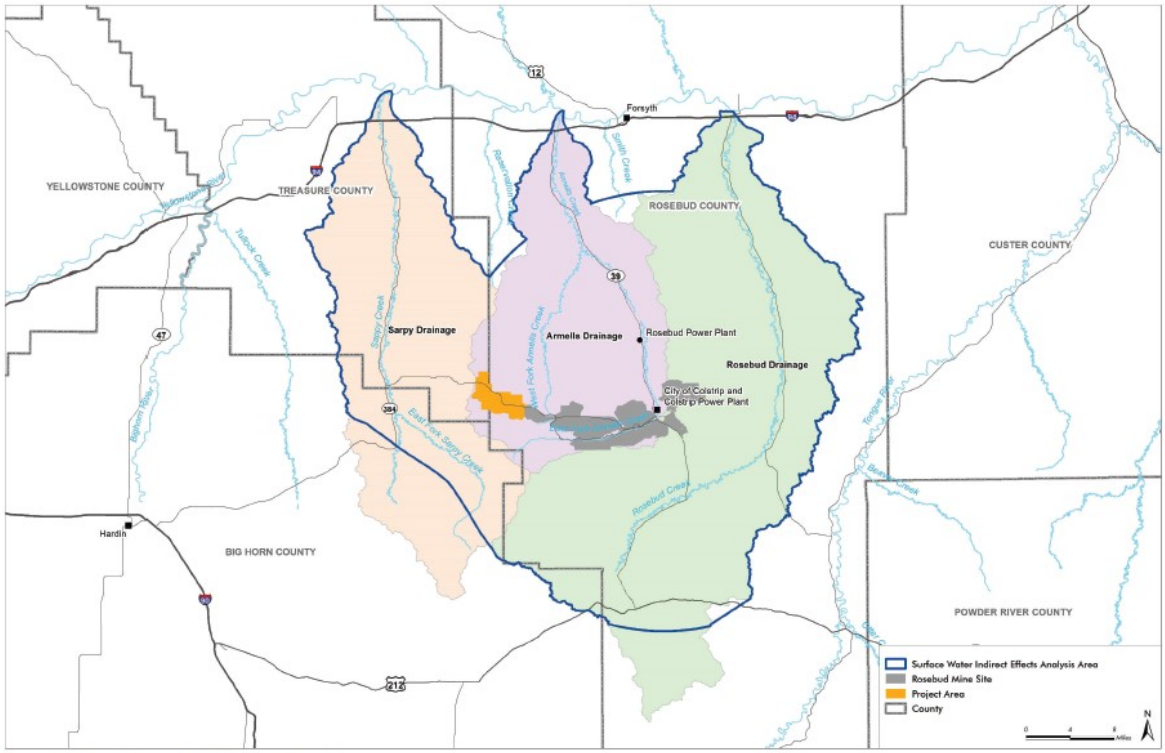

Figure 37. Surface Water Indirect Effects Analysis Area.

AR-116-30630. The EIS notes that "[t]he surface water cumulative impacts analysis area is the same as the indirect effects analysis area." AR-116-31106. Thus, the EIS, by itself, properly evaluated the cumulative impacts that were raised in Plaintiffs' arguments.

C. The EIS Properly Incorporated the Area F CHIA.

1. OSM "incorporated" the CHIA following the practice prescribed by regulation.

The Proposed Order erroneously concludes that OSM could not consider the findings of the Area F Cumulative Hydrologic Impact Assessment ("CHIA"). As an initial matter, the Proposed Order is incorrect that OSM attempted to "tier to"

the CHIA as a non-NEPA document. *See* ECF No. 177 at 18. OSM did *not* tier to the Area F CHIA—it incorporated MDEQ's analysis by reference, which analysis reinforced the conclusions in the EIS.[11] AR-202-37574. The distinction is important because agencies are encouraged to incorporate analyses from other expert agencies or scientists to avoid repetition. 40 C.F.R. §§ 1500.4(j), 1502.21. Indeed, EISs are replete with references to expert wildlife, vegetation, water, climate, and other resource studies that ought not be repeated verbatim as part of the EIS. OSM's incorporation is consistent with decades of NEPA review in referencing the CHIA's conclusions that reinforced the findings in its own cumulative impact analysis. AR-202-37574–75.

2. That the CHIA was prepared under state law does not prevent its use in the EIS.

The Area F CHIA's analysis squarely supports OSM's NEPA cumulative impact review. It does not matter that the statutory purpose of the CHIA under Montana law was to provide a basis for a determination of material damage. *See* ECF No. 177 at 17–18. The point is that this *Cumulative* Hydrologic Impact

[11] "Tiering" under NEPA is a completely different process under which an agency may examine impacts with increasing levels of specificity as different phases of agency action progress. For example, an agency may prepare a broader, "programmatic" EIS (e.g., for a long-term land management plan over a large region) and undertake site-specific or action-specific NEPA analyses when it evaluates individual project approvals (e.g., for construction of a particular road). *See, e.g.*, Mandelker, *NEPA Law and Litigation* § 9:12 (2019) (see cases cited therein).

Assessment presents a hydrological review of existing data by an expert agency, analyzes the impacts of Area F mining on surface waters, and concludes that those impacts will not extend beyond the permit boundary. *See* § 82-4-227(3)(a), MCA; ARM 17.24.314(5); AR-125-37330. This CHIA's analyses and conclusion directly address and confirm OSM's conclusions regarding the limited extent of cumulative (or indirect) impacts to surface waters. *See* ECF No. 161 at 9 (citing AR-125-37399). That the CHIA was prepared under a state statute does not matter if the underlying data and information are valid and the conclusions support OSM's impact analysis.

3. The CHIA's timing did not prevent OSM from considering it.

The fact that the CHIA was completed after the Final EIS is irrelevant. The CHIA is properly part of the record before the agency, 5 U.S.C. § 706, and merely confirms the analysis set out in the EIS. *See Protect Our Cmtys. Found. v. Lacounte*, 939 F.3d 1029, 1040 (9th Cir. 2019) (post-EIS supplemental protection plan taken into account in holding that Bureau of Indian Affairs considered plaintiffs' concerns).[12] In any case, the CHIA is by no means the only documentation or expert analysis on which the EIS relied. Indeed, OSM also incorporated by reference a "Probable Hydrological Consequences" report (AR-

[12] Plaintiffs never objected to the CHIA's inclusion in the administrative record.

1217-146109–91) a Groundwater Model report (AR-1216-146086-108), and the Area B CHIA (AR-1215-145757–6085).[13] AR-116-30933, 31107; AR-117-31546, 31551. The Proposed Order fails to consider or address these other expert analyses that provided the data for the CHIA, and which were sufficient on their own to support OSM's cumulative impact review. ECF No. 161 at 12.

All of these studies and discussions, which are overlooked or discounted by the Proposed Order support OSM's cumulative impact analysis for surface water and the conclusions set out in Section 5.3.6 of the EIS. AR-116-31106–08. The Court should reject the Proposed Order's findings on this issue and hold that the agency's analysis comports with NEPA and was not arbitrary and capricious.

III. OSM QUANTIFIED GHG EMISSIONS AND CONSIDERED THE QUANTIFIED SOCIAL COSTS OF CARBON.

A. The Proposed Order Departs from this District's Precedent on the Same Issue.

Breaking with precedent in this District, the Proposed Order held that OSM violated NEPA even though OSM had reviewed the "social cost of carbon" calculation using Plaintiffs' preferred methodology for monetizing GHG emissions. In *350 Montana v. Bernhardt*, 443 F. Supp. 3d 1185, 1196 (D. Mont.

[13] The agency's inclusion of and reliance on the Area B CHIA also reflected the resolution of early agency staff comments concerning potential cumulative impacts from other Mine areas. *See* ECF No. 150-1 at 12 (citing AR-1002-12633) (OSM agreeing to incorporate "the CHIA for the most recent Area B amendment" to address staff concerns after discussion).

2020),[14] Judge Molloy reached the opposite conclusion. He determined, based upon virtually the same administrative record,[15] that OSM acted within its discretion when it considered plaintiffs' SCC calculation, but ultimately decided that "the protocol is too uncertain and indeterminate to aid its decision-making." The Proposed Order makes no attempt to distinguish this precedent. ECF No. 177 at 21–23.

B. Contrary to the Proposed Order, OSM Did Consider the Quantified Costs Generated by the SCC Protocol.

The reality is that OSM considered both a quantitative and qualitative analysis of emissions, fully informing the public and decisionmakers of the impacts of mining, transporting, and combusting Area F coal. AR-116-30577–592, 30896–914; AR-117-31368–378 (addressing comments on GHGs and SCC); AR-117-31471–479; AR-117-31522–538. Despite this analysis, *including*

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[14] Judge Molloy's conclusions in his pre-remand (2017) and his post-remand (2020) decisions in *350 Montana* differ because the agency's actions differed. In 2017, OSM had *not* considered the SCC calculation and made no finding as to whether it would be useful to the agency's decisionmaking. *See MEIC v. OSM*, 274 F. Supp. 3d at 1095. By contrast, in 2020, after Judge Molloy's remand, OSM considered the SCC calculations and evaluated their utility, just as it did here. NEPA requires no more. Indeed, it would be arbitrary and capricious for an agency to base its analysis and decisionmaking on information that provided no meaningful utility.

[15] In *350 Montana,* plaintiffs submitted the same SCC calculation using the same methodology as was employed in this case. OSM considered Plaintiffs' calculation and, as in this case, an additional calculation submitted by the intervenor company.

quantification and consideration of the SCC using Plaintiffs' preferred methodology, the Proposed Order finds the agency erred by failing to give a "valid reason to decline to quantify the costs of greenhouse gas emissions." ECF No. 177 at 21–23.

This finding ignores the fact that OSM *did consider* the quantified costs as calculated by the SCC methodology. AR-117-31505–510 (Area F SCC calculations). This key fact renders irrelevant the cases upon which the Proposed Order relies. In both *MEIC v. OSM*, 274 F. Supp. 3d at 1095, and *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191-92 (D. Colo. 2014), the agency *refused to consider* the monetized SCC calculation. Here, OSM reviewed the quantified SCC figures, evaluated their utility, and concluded that because the Area F SCC calculations "vary by over 40-fold from a low of $319 million to as high as $12.9 billion" they are "of very limited utility to the decision maker." AR-117-31368. The SCC calculations are in the record and were considered by OSM (although the agency determined they did not ultimately change its decision). As the Ninth Circuit has long held, a court is "not free to impose on the agency [its] own notion of which procedures are 'best' or most likely to further some vague, undefined public good. Nor may [a court] impose procedural requirements [not] explicitly enumerated in the pertinent statutes." *See*

Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (en banc) (internal quotations and citations omitted).

C. NEPA Does Not Require that OSM Monetize GHG Emissions Simply Because the Agency Provided a Socioeconomic Impact Analysis.

The Proposed Order's findings suggest that the SCC calculations must appear in the socioeconomic impact chapter of the EIS in order to present a balanced cost-benefit analysis. ECF No. 177 at 22. NEPA includes no such requirement. There is no obligation for an agency to conduct a cost-benefit analysis. *MEIC v. OSM*, 274 F. Supp. 3d at 1096. And OSM did not do so here. The Proposed Order claims that OSM catalogued and quantified, in detail, various aspects of the economic benefits of the Mine expansion. ECF No. 177 at 22. But the EIS quantified only two items: annual economic output based on the number of jobs supported by the Mine and power plants (AR-116-31021–25) and government receipt of taxes and royalties from the Mine (AR-116-31025–26). Other less tangible socioeconomic impacts to the local communities and region are described only qualitatively. AR-116-31021 (describing negative population growth and increased poverty associated with post-Mine closure conditions); AR-116-31027–32 (qualitative analysis of socioeconomic impacts to environmental justice communities and public health effects). Similar socioeconomic impact analysis has been included in hundreds of EISs over the last five decades.

Considered in light of other impacts, Plaintiffs' position also imparts an illogical obligation. Agencies have often included a monetized socioeconomic impact analysis without monetizing the impacts to other resource values that are not so easily quantified, such as soils, water, vegetation, wildlife, and visual aesthetics. The presence of a monetized socioeconomic analysis has never meant that the agency must monetize other environmental impacts to balance the socioeconomic impact analysis. *See* 84 Fed. Reg. 30,097, 30,099 (June 26, 2019) (Council on Environmental Quality NEPA guidance providing that "[*m*]*onetization or quantification of some aspects of an agency's analysis does not require that all effects, including potential GHG emissions, be monetized or quantified*" (emphasis added)). Such an extreme position should be rejected, and this Court should recognize that "the protocol is too uncertain and indeterminate to aid its decision-making." *350 Montana*, 443 F. Supp. 3d at 1196.

IV. THE POWER PLANT'S WATER WITHDRAWALS ARE BEYOND THE SCOPE OF THE AREA F NEPA EVALUATION.

The Colstrip Power Plant has been withdrawing water from the Yellowstone River for operations since the 1970s. AR-1112-140394. The Proposed Order found that that these ongoing water withdrawals 30 miles away by the separately owned and regulated Colstrip Power Plant are indirect effects Area F. ECF No. 177 at 24–32. This finding exceeds existing law by extending NEPA to address

operational impacts of a wholly separate enterprise over which OSM has no authority or control.[16]

An agency is not required to "examine everything for which the [project] could conceivably be a but-for cause." *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016). NEPA requires a "reasonably close causal relationship" between agency action and impact, akin to the "doctrine of proximate cause from tort law." *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) (citations and quotations omitted). "[W]here 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." *Id*. at 770; *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225–26 (9th Cir. 2015). Further, NEPA review

[16] The Proposed Order labels Westmoreland/Local 400's arguments regarding water withdrawals as post-hoc rationalizations. But OSM discussed whether to address power plant water withdrawals in several internal meetings and reasoned that where there would be no increase in withdrawals there would be no impacts, and that, further, not every action taking place at the power plant required analysis. AR-1025-13867-68; AR-1026-13884, AR1004-13591. The Court can reasonably discern the agency's justification from the record. *See Friends of Alaska Nat'l Wildlife Refuges v. Haaland,* 2022 U.S. App. LEXIS 6753, *18 (9th Cir. Mar. 16, 2022) (A court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." (citation omitted)). Consistent with this approach, the EIS addresses the very limited effect of water withdrawals as a potential cumulative impact, i.e., as an impact from a separate entity. AR-116-31106.

need not address the indirect effects of activities that another agency "has sole authority" to regulate. *Sierra Club,* 827 F.3d at 47.

Here, following well-established case law, OSM considered the indirect effects *to air quality and GHG emissions* of combusting Area F coal. *See Sierra Club v. FERC*, 867 F.3d 1357, 1371–72 (D.C. Cir. 2017). These impacts can be tied to Area F mining because they are directly attributed to burning the actual physical Area F coal mined and sold under the approved mine plan. By contrast, in no other case has a court ordered OSM to consider the environmental impacts of other ongoing power plant operations that would occur regardless of the specific coal that is the subject to the agency's decision.[17] Indeed, the Colstrip Power Plant has been withdrawing Yellowstone River water to support power plant operations since the 1970s pursuant to valid and senior water rights. ECF No. 150-1 at 25; ECF No. 161 at 21 n.12. Those ongoing operational water withdrawals are no more an indirect effect of Area F mining than the power plant's ongoing use of paper supplies in its administrative offices or the traffic congestion on Highway 39 through Colstrip at shift change.

[17] The Proposed Order incorrectly assumes that the power plant could not continue to operate without coal from the Rosebud Mine. ECF No. 177 at 30-31. While it is true that obtaining coal from other sources would require construction of certain elements of infrastructure, the Montana legislature has specifically authorized the power plant to receive coal from sources other than the Rosebud Mine. § 75-20-228, MCA.

Further, OSM's limited authority under the Mineral Leasing Act and Surface Mining Control and Reclamation Act to deny a mine plan after a leasing decision, breaks the causal chain for purposes of NEPA's indirect effects analysis. By the time OSM reviews a mine plan modification, the Bureau of Land Management (after its own NEPA review), has long-since made its decision to lease the coal, and MDEQ, after extensive environmental review, has permitted the mining operation. The issuance of a coal lease grants both a right and an obligation under the Mineral Leasing Act to diligently mine commercial quantities of coal. 30 U.S.C. §§ 201(a)(3)(C), 207(a), (b)(1); 43 C.F.R. § 3480.0-5(a)(21). While OSM can properly condition *mining* on compliance with environmental laws, it simply lacks authority to recommend modifications to, or disapprove Westmoreland's mine plan for Area F based on indirect impacts of power plant operations, an activity over which OSM has no regulatory control. *See WildEarth Guardians v. Zinke,* 368 F. Supp. 3d 41, 65-66 (D.D.C. 2019) (holding once BLM issues an oil and gas lease under the Mineral Leasing Act it lacks authority to preclude development).

Indeed, the power plant is a separate business entity, owned and operated by a separate company. AR-116-31018 (EIS explaining that "this is not to say that the mine and power plants are dependent on one another"). And the Mine and power plant are regulated by different agencies (or departments within state agencies) and

under different statutory authority. *See* ECF No. 161 at 20-21 (listing differences in governing statutory schemes and regulatory agencies). At bottom, OSM has no control over the power plant or its operations, and lacks authority to disapprove the Area F mine plan based on impacts of power plant operations. For this reason, applying *Public Citizen* and its progeny, OSM was not required to evaluate effects of Yellowstone River water withdrawals over which it had no control. The Proposed Order's finding that OSM erred in not analyzing the effects of power plant water withdrawals should be rejected.[18]

V. NEITHER "DEFERRED" VACATUR NOR INJUNCTIVE RELIEF ARE WARRANTED.

The Proposed Order recommends that the Court vacate the mine plan after 365 days, if OSM has not corrected the identified NEPA errors. The Proposed Order found that "immediate vacatur would have detrimental consequences for the Mine, its employees and the Colstrip community." ECF No. 177 at 37. Westmoreland/Local 400 respectfully submits that if, after one year, the mine plan is vacated, the impact will be much the same: the results will be devastating to the Colstrip community and the Mine. Westmoreland/Local 400 respectfully submits

[18] The Proposed Order does not reach the Endangered Species Act claims because Judge Cavan recommends that the decision be remanded based on the NEPA claims. If this Court determines that the Proposed Order incorrectly required consideration of Yellowstone River water withdrawals, it must also reject Plaintiffs' Endangered Species Act claims. *See* ECF No. 150-1 at 27-28; ECF No. 161 at 22-24.

that the better course would be to order OSM to repair its EIS within the specified time. This approach will not punish Westmoreland/Local 400 or the Colstrip community but would provide the Court with the mechanism to assure compliance.

CONCLUSION

For the reasons discussed above, Westmoreland/Local 400 respectfully object to the Magistrate Judge's findings that (i) three of the original Plaintiffs have standing to pursue this case, ECF. No. 177 at 7–14; (ii) OSM failed to take a "hard look" at cumulative impacts to surface waters, *id*. at 14–18; (iii) OSM should have included the results of the SCC calculation as part of the socioeconomic impact analysis, *id*. at 18–23; and (iv) OSM should have accounted for water withdrawals by an entirely separate power plant as part of the indirect effects of the Area F Mine Plan approval, *id*. at 24–32. Westmoreland/Local 400, therefore, request that the Court grant the Federal Defendants' and Intervenor-Defendants' cross motions for summary judgment and affirm OSM's NEPA analysis and mine plan decision in its entirety.

Dated this 18th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to L.R. 72.3(b) the foregoing brief is double-spaced, has a typeface of 14 points or more, and contains 6,449 words exclusive of the caption, table of contents, tables of authorities, and certificates.

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2022, I filed the foregoing document electronically through the CM/ECF system, which caused all counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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