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

MONTANA ENVIRONMENTAL INFORMATION CENTER, et al.,	)	No. 1:19-cv-00130-SPW-TJC
Plaintiffs,	)	
v.	)	**FEDERAL DEFENDANTS' RESPONSE TO OBJECTIONS TO THE RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE CAVAN**
DEBRA HAALAND, in her official capacity as Secretary of the United States Department of the Interior, et al.,	)	
Federal Defendants,	)	
and	)	
WESTMORELAND ROSEBUD MINING, LLC,	)	

Defendant-Intervenor.)
)
)

INTRODUCTION

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and D. Mont. L. R. 72.3, Federal Defendants respond to Plaintiffs' Objections to Magistrate Judge Cavan's Findings and Recommendations. ECF No. 182 ("Pls.' Obj."). The Court should adopt Judge Cavan's finding that the Office of Surface Mining Reclamation and Enforcement's ("OSMRE") alternatives analysis satisfied the National Environmental Policy Act ("NEPA"). The range of alternatives considered by OSMRE was reasonable and OSMRE sufficiently explained why it did not consider in detail a "mid-range" alternative. And the Court should also adopt Judge Cavan's finding that the equities support remand without immediate vacatur.

ARGUMENT

I. OSMRE's Alternatives Analysis Satisfied NEPA

The Court should adopt Magistrate Judge Cavan's finding that OSMRE's alternatives analysis satisfied NEPA. Plaintiffs' contention that OSMRE considered identical alternatives and failed to consider a "middle-ground" alternative is based on a misreading of the facts and inapposite case law. NEPA requires agencies to consider a reasonable range of alternatives and

"reasonableness is judged with reference to an agency's objectives for a particular project." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 709 (10th Cir. 2009). "The scope of an alternatives analysis depends on the underlying 'purpose and need' specified by the agency for the proposed action . . . . The agency need only evaluate alternatives that are 'reasonably related to the purposes of the project.'" *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (citations omitted).

As Judge Cavan correctly noted, similarities between alternatives do not by themselves violate NEPA. ECF No. 177 at 34 (citing *Laguna Greenbelt Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994)). While Alternatives 2 and 3 bear similarities, they are sufficiently distinct to satisfy NEPA. OSMRE specifically designed Alternative 3 "to minimize environmental effects and to address key issues identified during the scoping process." AR-030408. And it presented the anticipated impacts of all alternatives in comparative form, thus clearly illustrating their differences and providing a clear basis for choice among them. *See* 40 C.F.R. § 1502.14; *see, e.g.*, AR-030414-21. OSMRE clearly and meaningfully described the distinctions between Alternatives 2 and 3. *See* AR-030535-42.

In support of their argument that the two alternatives were identical, Plaintiffs allege that Federal Defendants "admitted" that the mitigation measures in Alternative 3 were "negligible, ineffective, and meaningless" because Federal Defendants "concluded the package of mitigation measures [proposed in Alternative 3], taken together, was 'negligible.'" Pls.' Obj. 4-5. Plaintiffs, however, mischaracterize OSMRE's statements in the Record of Decision ("ROD") and Final Environmental Impact Statement ("FEIS"). Neither the ROD nor the FEIS describe the mitigation measures themselves as "negligible," or the differences between Alternative 2 and Alternative 3 as "negligible." And neither the ROD nor the FEIS state that such measures are "ineffective, unnecessary, or ultimately meaningless." *See* Pls.' Obj. 9. Instead, OSMRE explained in the ROD that it "chose not to select Alternative 3 as a whole or any of the individual protection measures analyzed in the EIS due to the negligible *benefit* they would provide to affected resources" as compared to Alternative 2. AR-037569 (emphasis added). The record demonstrates that the differences between Alternatives 2 and 3 were significant, even if the difference in analyzed environmental impacts turned out to be negligible.[1]

[1] For example, Alternative 3 would have "included enhancement of downstream wetland habitat through managed discharges, alternative pit water management practices, and installation of alluvial monitoring wells to be sampled monthly." AR-037569. Regarding wetland protections, Alternative 3 "included the

Moreover, the fact that OSMRE ultimately concluded that the difference in relative impacts for the two action alternatives was minor does not mean that OSMRE's selection of the range of alternatives for detailed analysis in the first place was unreasonable. Significantly, Westmoreland gradually adopted the environmental protection measures proposed under Alternative 3 throughout OSMRE's preparation of the EIS, thus, making the relevant impacts between the two action alternatives more similar over time (but still not identical). AR-037568-69. The fact that the mine operator independently included in its application package (Alternative 2) some of the mitigation measures from Alternative 3 does not undermine OSMRE's analysis because OSMRE carefully weighed the effects of each alternative in compliance with NEPA.

Plaintiffs also argue that "[m]itigation measures are not a basis for creating meaningful alternatives," without citing to any pertinent support in law. Pls.' Obj. 7. While Plaintiffs cite generally to 40 C.F.R. § 1502.14(a)-(f), (*see* Pls.' Obj. 8), the only subsection in that regulation that references mitigation is subsection (e), which requires the agency to include in the alternatives section "appropriate

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requirement that off-site mitigation areas be supported by a natural water source, be located in the same watershed as the impact, and be protected by a deed restriction or easement. Soil salvage from affected nonjurisdictional wetlands and managed discharges . . . also would have been required." AR-037570. And while the level of mining would be the same under Alternatives 2 and 3, OSMRE notes in the FEIS that "the location of the disturbance within the permit boundary may be different" under Alternative 3. AR-030528.

mitigation measures *not already included* in the proposed action or alternatives." 40 C.F.R. § 1502.14(e) (emphasis added). This provision clearly anticipates that the proposed action and alternatives may include different mitigation measures. And nothing in that regulation, or in any other law, precludes an agency from using mitigation measures as a basis for distinguishing alternatives.[2] Rather, as Judge Cavan found, "the additional mitigation measures proposed in Alternative 3 sufficiently distinguished it from Alternative 2." ECF No. 177 at 34.

Plaintiffs' citation to *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1049-52 (9th Cir. 2013), is equally inapposite because the issue in that case was whether the agency had inappropriately failed to consider certain feasible alternatives. The agency in *Abbey* considered four alternatives for grazing permits including a no action alternative, each of which would have reauthorized livestock grazing at the same level (the no action alternative in that case would have renewed the pre-existing grazing permit). The court found the agency's decision not to analyze either a no-grazing or reduced-grazing alternative unreasonable because those alternatives could feasibly have met the stated project goal "to evaluate rangeland health standards and modify current grazing practices on the

[2] The FEIS' discussion of Alternative 2 includes a section on mitigation measures. AR-030525-27. The environmental protection measures analyzed under Alternative 3 were in addition to the mitigation measures included in Alternative 2. AR-030528-31.

allotment so that progress can be made toward meeting the standards." *Id*. at 1052. The court said nothing about whether mitigation measures could be the basis for distinguishing between alternatives.[3]

Judge Cavan, on the other hand, relies in part on the most analogous case to the case at bar – *Laguna*, 42 F.3d at 524. And Plaintiffs' attempt to distinguish *Laguna* fails because they mischaracterize the relevant facts. (Pls.' Obj. 8). In *Laguna*, the agency analyzed three alternatives for a toll road—the no action alternative and two build alternatives. *Laguna*, 42 F.3d at 524. The EIS also discussed six categories of alternatives that were eliminated from more detailed analysis. *Id*. The court noted that the two build alternatives "follow[ed] the same alignment and hav[e] the same general lane configuration, but differ[] somewhat in [their] operation and method of connecting with Interstate 5." *Id*. at 524; *see also id.* at n.5 (noting the record supported that the two build alternatives had the same

[3] Plaintiffs' reliance on *Western Organization of Resource Councils v. U.S. Bureau of Land Management*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *7 (D. Mont. Mar. 26, 2018) ["*WORC*"] and *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 813-14 (9th Cir. 1999) is also unavailing. The particular circumstances in *WORC* required the agency to consider a broader range of alternatives in its preparation of a Resource Management Plan. 2018 WL1475470, at *7 (stating that an "agency must evaluate a broader range of alternatives where a proposed action constitutes 'an integral part of a coordinated plan to deal with a broad problem.'" (citation omitted)). And the issue in *Muckleshoot Indian Tribe* was not whether the consideration of "virtually identical" action alternatives violates NEPA, but rather whether the agency was required to consider specific, articulated alternatives that were both feasible and "more consistent with its basic policy objectives." *Muckleshoot Indian Tribe*, 177 F.3d at 813-14.

number of lanes, contrary to Plaintiffs' characterization). Nothing in the court's opinion discusses whether the agency found any difference in environmental impacts between the two alternatives. Rather, in finding the agency's discussion of alternatives sufficient under NEPA the court reasoned that "the EIS discusses in detail all the alternatives that were feasible and briefly discusses the reasons others were eliminated. This is all NEPA requires . . . ." *Id*. Indeed, to find otherwise would impose a requirement of prescience on agencies; to meet Plaintiffs' differential standard, agencies selecting a range of alternatives would have to know in advance that the outcome of the environmental analysis would yield sufficiently "different" impacts between alternatives.

Plaintiffs' contention that OSMRE failed to analyze a "middle-ground" alternative also fails. An agency's consideration of alternatives is necessarily cabined by the purpose and need for the proposed federal action. *League of Wilderness*, 689 F.3d at 1069. And OSMRE appropriately analyzed only those alternatives related to the project's purpose and need.[4] Consistent with NEPA's implementing regulations, *see* 40 C.F.R. § 1502.14(a), OSMRE also briefly

[4] The purpose of the project here was to "allow continued operations at the Rosebud Mine by permitting and developing a new surface-mine permit area." AR-030434. OSMRE's need for the action was "to provide Western Energy the opportunity to exercise its valid existing rights (VER) granted by BLM under federal coal lease M82186 to access and mine undeveloped federal coal resources located in the project area." *Id*.

discussed the potential alternative of mining within a smaller permit area over a shorter period of time, but explained why it eliminated this alternative from further analysis. *See* AR-030533 (including that such an alternative would not be permitted under State law).

For example, OSMRE explained that Westmoreland's surface mining permit, under state law, must include a "coal conservation plan" showing a mine proponent will extract "all of the minable and marketable coal" in a proposed area. *See* AR-030533; MONT. ADMIN. R. 17.24.322. And OSMRE explained that the Montana Department of Environmental Quality ("MDEQ")—the state regulatory agency authorized to issue surface mining permits—could not approve Westmoreland's mining permit application unless it complied with this aspect of state law. AR-030533. As Judge Cavan correctly concluded, this satisfied NEPA's requirement to briefly discuss why potential mid-range alternatives were not reasonable or feasible. ECF No. 177 at 36.

Judge Cavan's conclusion is also not undermined by the fact that OSMRE ultimately approved a mining plan with a reduced mining area. Before MDEQ modified the mining permit area to remove 74 acres to ensure compliance with state law (which occurred after publication of the FEIS), such a reduced-acreage plan was not feasible. And OSMRE is not required to consider alternatives that are not feasible. *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th

Cir. 1990) (an agency need not "consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." (citation omitted)). This includes alternatives that would not receive necessary regulatory approval in order to proceed.

Therefore, Judge Cavan was correct in finding that OSMRE considered a reasonable range of alternatives in compliance with NEPA.

II. The Appropriate Remedy Is Remand Without Vacatur

Judge Cavan properly found that the equities weigh in favor of remanding without immediate vacatur. ECF No. 177 at 37. "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (citation omitted). As Judge Cavan explained, vacatur is unnecessary here because OSMRE may be able to cure the legal deficiencies alleged by Plaintiffs through additional analyses and decision-making on remand. ECF No. 177 at 37. Under Judge Cavan's decision, OSMRE will undertake an expeditious new analysis of the proposed Area F Mine Plan Modification that will thoroughly canvass the Plan's effects on surface waters, water withdrawals, and greenhouse gas emissions, among any other relevant effects. That analysis will permit OSMRE to reach a fully informed decision regarding approval or disapproval of the proposed modification.

Numerous courts have declined vacatur under similar circumstances. *See, e.g.*, *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) (declining to vacate Spring Creek mining plan approvals during period of corrective NEPA analysis); Order, *WildEarth Guardians v. Haaland*, No. CV 17-180-BLG-SPW (D. Mont. Sept. 10, 2021) (ECF No. 152) (same); *Cook Inletkeeper v. EPA*, 400 F. App'x 239, 241 (9th Cir. 2010) (allowing continued operation of natural gas and oil extraction facilities during the remand of the challenged wastewater discharge permit). Thus, the equities support a remand without vacatur.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully ask this Court to affirm Magistrate Judge Cavan's findings and recommendations that: (1) OSMRE satisfied NEPA in its analysis of alternatives; and (2) the equities weigh in favor of remanding without immediate vacatur.

Respectfully submitted this 15th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that on April 15, 2022, I electronically filed the foregoing Objections using the CM/ECF system, which will send notification of this filing to the attorneys of record.

DATED this 15th day of April, 2022.

/s/ Shannon Boylan
Shannon Boylan