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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

WESTERN ORGANIZATION OF RESOURCE COUNCILS, *et al.* Plaintiffs, v. U.S. BUREAU OF LAND MANAGEMENT, *et al.*, Federal Defendants, and CLOUD PEAK ENERGY INC., *et al.*, Intervenor-Defendants.	)	Cause No. CV 16-21-GF-BMM **PEABODY CABALLO MINING, LLC AND BTU WESTERN RESOURCES, INC'S BRIEF IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs (collectively, "WORC") moved for summary judgment to overturn decisions by the Bureau of Land Management ("BLM") to approve resource management plans ("RMPs") for the Miles City (Montana) and Buffalo (Wyoming) planning areas, claiming that they violate the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). Mem. Supp. Pls.' Mot. Summ. J. ("WORC Br.") (ECF 72-1). Here, Intervenor-Defendants Peabody Caballo Mining, LLC and BTU Western Resources, Inc. (together, "Peabody") respond to WORC's Motion and also seek partial summary judgment affirming the validity of the Buffalo RMP.[1]

WORC primarily takes issue with BLM's decisions with respect to coal leasing and oil and gas drilling, arguing that BLM's analyses of alternatives and air impacts were deficient. WORC misses the forest for the trees. RMPs are landscape-scale documents that identify priorities for the protection and exploration of resources as varying as cultural landmarks and soil management, and identify the reasonably foreseeable impacts of those priorities. The level of

[1] Peabody's intervention in this case is based upon its coal operations in Wyoming and their relationship to the Buffalo RMP. *See* ECF 53. Peabody's summary judgment papers are thus tailored to the Buffalo RMP – the challenged federal agency action that could affect its interest in coal mining on federal lands in Wyoming.

review for an RMP is necessarily more general because of the breadth of topics assessed. Nevertheless, the Buffalo RMP and Final Environmental Impact Statement combined total more than 3,600 pages, by any measure far exceeding the succinct review NEPA envisions. The Buffalo RMP represents a reasonable exercise of discretion that complies with NEPA. Federal Defendants ably refute WORC's arguments, and Peabody joins in and incorporates those arguments by reference, seeking only to emphasize the following:

First, WORC lacks standing to challenge the Buffalo RMP. Providing just one declaration with "someday" intentions but lacking a concrete injury traceable to BLM's action, WORC falls short of satisfying the Article III standing requirements.

Second, WORC's argument that BLM considered inadequate alternatives with respect to coal leasing in the Buffalo RMP (1) misunderstands the purpose and need of the RMP with respect to coal and (2) willfully ignores the genuine differences between the alternatives. BLM reasonably determined that it was proper to carry forward prior decisions with respect to the amount of land available for coal leasing, while considering alternatives that have meaningful differences beyond raw numbers.

Third, WORC is wrong that BLM must assess climate change and cumulative climate impacts in the detail they request. As a practical matter, the

Buffalo RMP standing alone authorizes no coal leasing or surface disturbance, and therefore a detailed, quantitative analysis of impacts would be too speculative to be meaningful. Moreover, BLM has no authority to influence how or where coal is used. In any event, the mining of coal would only shift elsewhere if it is prohibited here, and that demand for coal and its combustion operate entirely independently of BLM's decision here.

Fourth, WORC's challenge to BLM's air quality analysis fails. WORC ignores the thorough analysis BLM conducted and would require more detail from BLM in a large-scale planning document than NEPA or case law support.

For all these reasons, the Court should deny Plaintiffs' Motion as to the Buffalo RMP and grant this Motion for Partial Summary Judgment.

STATUTORY AND REGULATORY BACKGROUND

Peabody incorporates by reference Federal Defendants' Statutory and Regulatory Background. Mem. Supp. Fed. Defs.' Cross-Mot. (ECF 79) 1-5.

STATEMENT OF FACTS

As described in the Statement of Undisputed Facts filed herewith ("SOF"), Peabody adopts Federal Defendants' Statement of Undisputed Facts ("Fed. Defs.' SOF") (ECF 80).

STANDARD OF REVIEW

Peabody incorporates by reference Federal Defendants' Standard of Review. Mem. Supp. Fed. Defs.' Cross-Mot. 5 ("Administrative Procedure Act").

ARGUMENT

I. WORC LACKS STANDING TO CHALLENGE THE BUFFALO RMP.

To maintain an action in federal court, a plaintiff must demonstrate each of the three elements that make up the "irreducible constitutional minimum of standing:" (1) an "injury in fact" that is "(a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical;'" (2) a causal connection between the alleged injury and the conduct complained of, such that the injury is "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;" and (3) it must be "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The challenged action must therefore be one that "substantially increases the risk of" injury to the plaintiff "compared to the existing . . . systems." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 915 (D.C. Cir. 2015).

The party invoking federal jurisdiction bears the burden of establishing standing. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Standing must exist at the time of filing the complaint, and must continue to exist throughout the lawsuit. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732-33 (2008); *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("'[S]tanding is assessed as of the time a suit commences.'" (quoting *Del Monte*

Fresh Produce Co. v. United States, 570 F.3d 316, 324 (D.C. Cir. 2009))). If a plaintiff cannot demonstrate standing, a court must dismiss the case. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

WORC asserts it has standing to challenge the Buffalo RMP[2] both on its own behalf and on behalf of its members. WORC Br. 5-7. WORC is wrong. Its claim of standing is based upon one declaration from one member that does not demonstrate any concrete, particularized injury that existed at the time of filing the complaint, much less an injury caused by the approval of the Buffalo RMP. Thus, WORC lacks standing to bring this action, depriving this Court of jurisdiction to hear the challenge to the Buffalo RMP.

A. WORC Has Not Identified An Imminent, Concrete, And Particularized Injury.

WORC submitted one declaration in support of its standing to challenge the Buffalo RMP. Declaration of Shannon Anderson ("Anderson Decl.") (ECF 72-5). This declaration does not allege an injury that is either concrete and particularized or actual or imminent. Instead, the declaration asserts that the Buffalo RMP "will negatively impact [her] ability to enjoy the area and its wildlife and natural

[2] Because Peabody's interest as intervenor relates solely to the Buffalo RMP, we do not address standing to challenge the Miles City RMP, which is not to say that Peabody concedes WORC has standing as to Miles City, or that any of WORC's arguments related to the Miles City RMP have merit.

resources *in the future*." *Id.* ¶ 5 (emphasis added). The declaration also asserts an intention to return to an area the declarant fears will be negatively impacted by the decision "in the months and years to come." *Id.* ¶¶ 6, 10. These "'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury." *Lujan*, 504 U.S. at 564.

The only other assertion that could potentially be construed as an injury is the declarant's reference to and concern about "leasing new oil and gas parcels adjacent to BLM's Wilderness Study Area in February 2017." Anderson Decl. ¶ 7. Significantly, the leasing occurred in *February 2017*, post-dating the complaint. This asserted injury, therefore, cannot support WORC's standing. *Chamber of Commerce*, 642 F.3d at 199.

B. WORC's Alleged Injury Is Not Fairly Traceable To BLM's Approval Of The Buffalo RMP.

The Powder River Basin has been the locus of mineral extraction for decades. SOF ¶ 2. Indeed, more coal is produced in this region than anywhere else in the United States, and the coal is used locally and elsewhere. *Id.* WORC fails to demonstrate how its alleged injury stems from BLM's approval of the Buffalo RMP, instead of any other land-management decision made years ago. Although the requirement to demonstrate causation and redressability may be relaxed in the case of an alleged procedural violation such as NEPA, *Lujan*, 504

U.S. at 572 n.7, it is not eliminated altogether. The declarant alleges that the RMP "continues an old policy," Anderson Decl. ¶ 11, and that the "mines will *continue to cause* aesthetic and other adverse impacts." *Id.* (emphasis added). That statement highlights the fallacy of WORC's complaint: the RMP is not material to WORC's grievance; what WORC really objects to is the status quo, *i.e.*, that BLM did not change course. Because the future injury claimed by WORC is no different from the injury it purports to experience under the "existing . . . system[]," WORC lacks standing. *Food & Water Watch, Inc.*, 808 F.3d at 915.

Even if the declarant's injury were not preexisting, too many "links in the causal chain" separate BLM's action from WORC's alleged future injury to satisfy Article III standing requirements. *See Attias v. Carefirst, Inc.*, No. 16-7108, 2017 WL 3254941, at *4 (D.C. Cir. Aug. 1, 2017); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013) (finding alleged injury too speculative because it required several intervening discretionary actions). Plaintiffs do not establish that the Buffalo RMP approved a specific leasing decision that produced on-the-ground impacts injuring their members. Indeed, they make no attempt whatsoever to separate the Buffalo RMP from the status quo. For example, though the declaration asserts that "[o]ne of the first implementing actions of the plan was leasing new oil and gas parcels adjacent to BLM's Wilderness Study Area," Anderson Decl. ¶ 7 (which as noted above is an impermissible post-complaint

allegation), the declaration does not establish that the action was a result of this RMP, instead of preexisting management decisions. *See Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669-70 (D.C. Cir. 1996) (injury caused by challenged action must be "demonstrably more damaging" than status quo).

In any event, even if the asserted injuries sufficed to demonstrate standing to challenge on-the-ground impacts in the Buffalo planning area, WORC's contention that its purported injuries allow it to challenge BLM's consideration of climate change lacks merit. The Anderson Declaration makes a passing reference to "impacts to our climate" that "greatly concern[]" her. Anderson Decl. ¶ 15. Neither this nor the other, location-based allegations suffice to challenge BLM's analysis with respect to climate change. The assertions are not concrete or particularized; to the contrary, the effects of climate change – whatever those might be – are at most general to the entire population, and allegations of general or abstract harms flowing from government action and common to all have never been sufficient to demonstrate standing. *See Defs. of Wildlife*, 504 U.S. at 573-576 (making the point and citing cases); *accord, Ctr. for Biological Diversity v. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (finding climate change a harm "shared by humanity at large").

The cases WORC cited do not support its claim of standing. In *WildEarth Guardians v. Jewell*, the plaintiffs challenged the lease of a particular parcel, and

claimed injury based on BLM's failure to consider the *particularized local impacts* of the lease, in addition to climate change impacts. 738 F.3d 298, 304 (D.C. Cir. 2013). In *Montana Environmental Information Center v. BLM*, there again plaintiffs challenged a particular lease sale. 615 F. App'x 431, 432 (9th Cir. 2015). In both cases, the alleged impacts of the challenged actions to the plaintiffs' interests were direct. Here, in contrast, WORC challenges a broad planning document that on its own carries only the most speculative potential for injury related to climate change. Because the claimed injury – even if assumed to be meritorious for purposes of deciding this motion – is not particularized as to any of WORC's members, WORC lacks standing to challenge BLM's consideration of climate change. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."); *see also id.* ("We have insisted, for instance, that 'a plaintiff must demonstrate standing separately for each form of relief sought.'" (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

II. BLM APPROPRIATELY CONSIDERED A RANGE OF COAL LEASING ALTERNATIVES CONSISTENT WITH THE GOALS OF THE BUFFALO RMP.

WORC claims that BLM erred in not taking its suggestion to consider alternatives that would have closed for coal leasing some or all of the land

previously determined to be suitable for it. WORC Br. 7. This argument misapprehends both the facts and the law. First, WORC's superficial assessment of the alternatives overlooks real variations among them that would have resulted in different amounts of land being available for coal development in practice. Second, BLM had no duty to consider alternatives reducing the amount of land available for leasing, both because such alternatives would not have accomplished the purpose and need of the RMP, and because a reduced-acreage alternative would not reflect the current management direction upon which the RMP was based.

A. The Alternatives BLM Considered Had Real, Substantive Differences.

WORC's argument that BLM should have considered alternatives that lessened the acreage available for leasing superficially presumes that more acres equates to more leasing, which equates to more climate change. But this analysis is overly simplistic, because availability for leasing, *in vacuo*, means nothing. Rather, the conditions attached to resource development are what will have on-the-ground effects on the lands actually leased and developed. The alternatives BLM considered explored those conditions, and BLM made a reasonable selection from those alternatives.

WORC ignores genuine differences in the alternatives with respect to coal management, too narrowly focusing just on the raw number of acres available for

leasing. Although nominally the same amount of land was considered available for leasing, in practice the effectively available acreage would likely have differed, due to restrictions on other aspects of coal development. In this regard, it is important to note that BLM proposed alternatives for coal exploration – the process of identifying where to mine – that is a predicate to future leasing. *See* SOF ¶¶ 5, 10. Examples of restrictions to coal exploration include occupancy prohibitions, seasonal restrictions, and surface use restrictions. SOF ¶ 11. Alternative A would have made no change to current coal exploration, allowing "coal exploration on all federal coal lands, subject to license stipulations necessary to protect other resource values." SOF ¶ 12. Alternative B, emphasizing resource conservation, would have allowed coal exploration only "on federal coal lands in the two high-potential areas, subject to license stipulations necessary to protect other resource values." SOF ¶ 13. This alternative would "remove an extensive portion of the national coal resource from non-conventional conversion." *Id*. Alternative C, emphasizing resource use, would have allowed coal exploration "on all federal coal lands." SOF ¶ 14. Alternative D would allow coal exploration "on all federal coal lands, subject to license stipulations necessary to protect other resource values." SOF ¶ 15. Although the same amount of land would be technically available to lease, the ability to explore makes a real difference in practice, because leases must contain detailed data regarding coal, data that comes

from exploration. SOF ¶ 5. These differences are meaningful, and BLM reasonably considered them.

B. BLM's Decision To Maintain Existing Available Acreage And Evaluate Alternatives From That Baseline Conforms With NEPA And Warrants Deference.

Courts review the NEPA alternatives an agency considers under a rule of reason, consistent with the "basic policy objectives" of a project. *Pac. Coast Fed'n of Fishermen's Ass'ns. v. Blank*, 693 F.3d 1084, 1099-1100 (9th Cir. 2012) (internal quotation marks and citation omitted). It is not reasonable to require an agency to "embrace the range of options an agency can lawfully pursue under its substantive mandates." *Id.* at 1100. Rather, an agency need only set forth sufficient alternatives to "permit a reasoned choice." *Id.* at 1099 (internal quotation marks and citation omitted).

The alternatives BLM considered here reflect both the purpose and need of the RMP revision, *inter alia*, to "[r]ecognize the Nation's needs for domestic sources of minerals," SOF ¶ 9, and BLM's specific goals with respect to coal resources, to "[m]aintain coal leasing and exploration[] while minimizing impacts to other resource values," and to "[m]anage opportunities for exploration and development of coal resources." Fed. Defs.' SOF ¶ 18. Beginning from a baseline of the existing acreage available for leasing and considering alternatives from there appropriately incorporates alternatives that meet the needs of the project. This

approach comports with the Council on Environmental Quality's ("CEQ") guidance with respect to using current land management plans as a baseline when updating them – "'no action' is 'no change' from current management direction or level of management intensity." 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). This guidance reflects the common-sense notion that land use plans should be mindful of the facts on the ground.

The case law WORC cites is inapposite. The Ninth Circuit's decision in *ONDA* has no bearing here. In that case, the challenge to the RMP under review concerned the ability to use off-road vehicles in a planning area. In contrast with the consideration of coal leasing in an RMP, which has no on-the-ground impacts prior to actual leasing, an RMP's conclusions with respect to off-road vehicle use are definitive, having immediate effect. 43 C.F.R. § 8342.2(b) (describing RMP as "formal designation of off-road vehicle use areas"). And in contrast with *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024 (9th Cir. 2008), where the district court found that the no action alternative was not actually "no action" because it was premised upon a different baseline that had been invalidated in a legal challenge, here the environmental baseline has not been found to be erroneous. And, as discussed above, the alternatives were not "virtually indistinguishable" when looking beyond raw numbers.

And as a practical matter, it makes sense to continue existing leasing within the Buffalo RMP. The companies there have already invested significant resources in building the infrastructure necessary for mining. The area is already disturbed, and coal companies are already subject to the reclamation requirements for the parcels leased. Reducing available acreage in the Powder River Basin would only push development to new areas, requiring more surface disturbance, infrastructure development, and cost. It was thus entirely reasonable for BLM to reaffirm its prior analysis and evaluate alternatives from a baseline of the already-open acreage. WORC has utterly failed to meet its burden to show that BLM's alternatives were anything but reasonable.

III. BLM TOOK A "HARD LOOK" AT CLIMATE CHANGE AND AIR EMISSIONS TO THE EXTENT REQUIRED FOR A WIDE-RANGING LAND USE PLAN.

NEPA's "hard look" requirement means only that an agency must fairly assess the environmental consequences of its action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). WORC argues that BLM's consideration of greenhouse gas and climate change impacts of the RMP was inadequate. Once again, WORC ignores both the context and scope of BLM's action here. BLM assessed the direct greenhouse gas impacts of its action and those indirect effects that it determined were reasonably foreseeable and within its

authority to influence, which were understandably limited given the early-stage nature of an RMP. BLM need do no more.

A. BLM Appropriately Assessed The Greenhouse Gas Impacts Of Its Action.

WORC's argument boils down to a simple premise: that BLM should have attempted to evaluate the effects of coal *combustion*, which occurs in an unknown location, at an unknowable time, through an unknowable method, and subject to unknown regulations, as opposed to coal *extraction*, which takes place in the Buffalo planning area under the supervision and regulation of BLM and other federal agencies.[3] WORC demands the impossible, and far more than what NEPA requires.

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[3] Importantly, the environmental impact of the coal mining process in the Powder River Basin is less than it would be elsewhere, because the coal exists "at or near the surface" in much of the planning area and just below the surface in the remainder, SOF ¶ 1, meaning less effort (and therefore fewer greenhouse gas emissions) is required to mine it. Powder River Basin coal is also "lower in sulfur than most coal, contains less fly ash when burned and can be mined using surface mining methods that are generally safer and less labor intensive than underground mining." *WildEarth Guardians v. Jewell*, 738 F.3d at 304; *see also* SOF ¶ 1. The harm from any defects in BLM's analysis is similarly absent because in the Powder River Basin "it costs less to reduce SO2 emissions, the coals are surface mined in high volume (efficient mines resulting in low production costs), and reclamation has been demonstrated effective and reliable." SOF ¶ 3. Because consumer demand drives coal extraction, coal will be mined whether in the Powder River Basin or elsewhere. Ultimately, some impact will occur. That the mining occurs in the Powder River Basin is therefore no more – and in fact less – impactful than mining elsewhere.

The Supreme Court has explained that "but for" causation is insufficient to make an agency responsible for an effect that it must evaluate under NEPA, particularly when "the agency has no authority to prevent the effect." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).[4] In the Buffalo RMP, the only aspect of the fossil fuel cycle BLM has any control over is the amount and location of land *available* for leasing. BLM is not even the last word with respect to coal extraction: other agencies, such as the Office of Surface Mining Reclamation and Enforcement, must weigh in, and the regulatory environment in place at the time of any future permitting for mining is unknown. *See* SOF ¶¶ 4-8. Neither does BLM control consumer demand for coal, which is what drives its extraction from the Powder River Basin. *See* SOF ¶ 2. Although BLM can include stipulations to protect resources within the Buffalo planning area, BLM cannot, through this action or any other downstream approval, prevent resources extracted from being transported, processed, or consumed.

Even if it were required, an analysis at the RMP stage of all the various permutations vis-à-vis emissions from coal combustion is not only unhelpful, but

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[4] Similar to one of the reasons WORC lacks standing, WORC has also not demonstrated that the GHG emissions it demands BLM estimate actually result from this agency action, as opposed to previous decisions and approvals. *See* WORC Br. 19 (acknowledging that "all coal production is likely to come from a small handful of already operating mines").

also inappropriate, because it results in impact estimates with no linkage to facts on the ground, and because it requires the agency to expend finite resources on an analysis that is highly speculative and therefore of limited utility. For example, to arrive at its conclusions, WORC presumes, without factual basis, that all of the coal will be mined, shipped, processed, and burned all at once. WORC also presumes methods of extracting, shipping, processing, and using the coal that are as yet uncertain. WORC Br. 17-18. Further, that all coal that is possible to extract from the PRB will eventually be extracted is wildly speculative, because the proportion of coal leasing and oil and gas leasing is unknown, and because future economic and market forces are unpredictable. That an RMP from a different planning area undertook an analysis that was not required does not render BLM's Buffalo RMP decision at the time to be unreasonable. *See* WORC Br. 20.

The case law WORC cites is similarly unpersuasive. In *Mid-States Coalition for Progress v. Surface Transportation Board*, the Eighth Circuit rejected an agency action that disregarded the potential for an increase in coal demand resulting from a new railway supply line. *See* 345 F.3d 520, 548-50 (8th Cir. 2003). The agency action directly facilitated the generation and use of energy from fossil fuels. Not so here, where the lands were already open to leasing, and BLM's goal is simply to allow production at continued rates. Similarly, in *High Country Conservation Advocates v. U.S. Forest Service*, the court ruled that

additional coal use required the evaluation of greenhouse gas emissions. 52 F. Supp. 3d 1174, 1184, 1189-90 (D. Colo. 2014). Here, we have BLM making a decision that anticipates nothing more – and possibly less – than maintaining the status quo. In any case, neither ruling is binding on this Court.

B. The Cumulative Climate Impacts Analysis Plaintiffs Demand Is Not Required For A Landscape-Scale Planning Document.

WORC asserts that BLM erroneously omitted an analysis of the cumulative impacts with respect to climate change. WORC Br. 21. WORC's arguments miss the mark. No one disputes that NEPA requires a cumulative impacts analysis. 40 C.F.R. § 1508.25(a)(2). But WORC overreaches when suggesting that BLM had a duty to consider cumulative impacts "across the 700 million acres of mineral estate that BLM manages." WORC Br. 23. Nor was BLM required to assess cumulative impacts for all eight plans under review in the Rocky Mountain Region. WORC Br. 24. Instead, BLM reasonably assessed cumulative impacts in line with CEQ guidance. WORC's disagreement with BLM's conclusion is not a reason to find it arbitrary and capricious.

Neither NEPA, CEQ's regulations, nor CEQ guidance require the use of the social cost of carbon or carbon budgeting, tools that WORC would have BLM use. For example, although the final version of CEQ's guidance on considering greenhouse gas emissions and climate change was recently withdrawn, *see* 82 Fed. Reg. 16,576 (Apr. 5, 2017), draft guidance published prior to the decision here, 79

Fed. Reg. 77,802, 77,823 (Dec. 24, 2014), provides discretion to agencies when evaluating how best to consider climate change in planning documents. CEQ noted that the analysis in an EIS "should be proportionate to the effects of the proposed action." *Id.* at 77,824. Where, as here, the activity actually permitted by the plan – as opposed to future approvals – is minimal, it is reasonable for BLM to limit its analysis accordingly.

BLM therefore retains the discretion to decide not to use the estimation tools WORC advocates: carbon budgeting or the social cost of carbon. First, CEQ guidance expressly counsels against using cost-benefit analyses such as the social cost of carbon when an agency undertakes a qualitative analysis, as BLM did here. *See* 79 Fed. Reg. at 77,827; *see also* 40 C.F.R. § 1502.23. Second, CEQ counsels that "[a]gencies should exercise their discretion to select and utilize the tools, methodologies, and scientific and research . . . *most appropriate for level of analysis and the decisions being made*." 79 Fed. Reg. at 77,830 (emphasis added). CEQ also spoke specifically to wide-ranging decisions such as RMPs: "an agency may decide that it would be useful and efficient to provide an aggregate analysis of GHG emissions or climate change effects in a programmatic analysis and then incorporate by reference that analysis into future NEPA reviews." *Id.* Indeed, CEQ noted that such an approach could be "particularly relevant" for RMPs. *Id.* CEQ recommended using projected greenhouse gas emissions "as the proxy for

assessing a proposed action's potential climate change impacts," 79 Fed. Reg. at 77,825, and that is just what BLM did, Fed. Defs.' SOF ¶¶ 34 (cumulative greenhouse gas emissions), 41 (aggregated projected emissions by source). *See WildEarth Guardians v.* Jewell, No. 16-0605, 2017 WL 3442922, at *12-13 (D.N.M. Feb. 16, 2017) (upholding use of CEQ guidance with respect to use of greenhouse gas emissions as a proxy and decision not to use social cost of carbon method). BLM's decision to assess climate change impacts in this way had a rational basis, which is enough to defeat WORC's challenge. *Mora-Meraz v. Thomas*, 601 F.3d 933, 941 (9th Cir. 2010).

The cases WORC cites in support of its argument do not remedy its deficiencies. They all have to do either with specific project-level NEPA review with on-the-ground impact, *Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002) (timber sale); *Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001) (land exchange); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998) (timber sale); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 802-03 (9th Cir. 1999) (land exchange); or NEPA review attendant to the promulgation of a regulation with direct impact on GHG emissions, *Ctr. for*

Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1217 (9th Cir. 2008).[5]

IV. BLM EVALUATED AIR QUALITY IMPACTS TO THE EXTENT NEPA REQUIRES.

Perhaps in an attempt to connect its standing allegations to BLM's action, WORC makes a half-hearted argument that BLM failed to assess cumulative air quality impacts of resource development on health and non-health values. WORC Br. 32. WORC both misstates what NEPA requires of BLM and ignores the record. In fact, BLM evaluated impacts in a manner consistent with the requirements for a broad scale, land-use planning evaluation.

WORC errs in its cramped view of BLM's air quality analysis. In evaluating air quality impacts, BLM prepared an Air Resource Plan for the Buffalo RMP, collaborating with EPA Region 8 and the Wyoming Department of Environmental Quality. Fed. Defs.' SOF ¶¶ 41, 43. WORC ignores this analysis entirely when discussing air impacts. Had it given that plan and support document a hard look, it would have noticed that BLM describes impacts to vegetation from

[5] A recent decision from this District, ruling that the Office of Surface Mining had a duty to assess the indirect and cumulative impacts of coal transportation and combustion when approving a mining plan – another project-specific agency action with on-the-ground impacts – is no more applicable here. *See Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, Civ. No. 15-106, 2017 WL 3480262, at *9 (D. Mont. Aug. 14, 2017).

atmospheric deposition. *Id.* ¶ 41. BLM also describes how the action could affect visibility, *id.*, contrary to WORC's assertion that BLM ignored those impacts, WORC Br. 32-33. WORC identified no authority requiring a greater level of particularity in such a broad-ranging planning document. Besides, it does not require leaps of logic to determine the impacts of the different alternatives from looking at the data BLM compiled – the alternatives either increase or decrease emissions, and the downstream effects that flow from that are not a mystery.[6] Therefore, BLM appropriately concentrated on "the issues that are truly significant to the action in question, rather than amassing needless detail." 40 C.F.R. § 1500.1(b).

Finally, WORC provides no support for the assertion that BLM should have assessed actions outside of a reasonable distance beyond the planning area, or actions over which it had no control, to discern cumulative impacts. Again, the Supreme Court does not require such a detailed analysis, *supra* 17, and this Court

[6] To the extent WORC argues that BLM had a duty to extract coal and oil and gas impacts and assess those combined impacts separately from the rest of the analysis, again, no authority exists to require that. BLM appropriately considered the cumulative impact of the federal action which included much *more* than just coal and oil and gas impacts. For example, BLM included such impacts as trail management and grazing, but reasonably excluded emissions from minimally impactful activities such as invasive species and pest management. And BLM provided the estimated cumulative impact of those activities for each alternative in both 2015 and 2024. SOF ¶ 16.

should not either. BLM explained that "[t]he RMP does not address emission sources that the BLM has no authority or responsibility for managing, such as existing power plants." SOF ¶ 17. This makes eminent sense, given that such sources are subject to other regulations from other agencies, making it nearly impossible for BLM to project emissions with any accuracy. As above, the cumulative impacts WORC seeks BLM to address with respect to air quality are simply not required in a plan of this scope and scale. It was eminently reasonable, in a decision covering everything from socioeconomic impacts to soil resources, for BLM to limit the scope of its air quality impacts review to the reasonably foreseeable impacts from work on the ground in the Buffalo planning area, and to assess them in a qualitative way.

CONCLUSION

Because WORC lacks standing to challenge the Buffalo RMP, and because BLM complied with NEPA when approving the Buffalo RMP, this Court should grant Peabody's Motion for Partial Summary Judgment.

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