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

WESTERN ORGANIZATION OF RESOURCE COUNCILS, MONTANA ENVIRONMENTAL INFORMATION CENTER, POWDER RIVER BASIN RESOURCE COUNCIL, NORTHERN PLAINS RESOURCE COUNCIL, SIERRA CLUB, and NATURAL RESOURCES DEFENSE COUNCIL, Plaintiffs, v. U.S. BUREAU OF LAND MANAGEMENT, an agency within the U.S. Department of the Interior, RYAN	Case No. CV 16-21-GF-BMM **DEFENDANT-INTERVENOR CLOUD PEAK ENERGY INC.'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **AND** **BRIEF IN SUPPORT OF DEFENDANT-INTERVENOR CLOUD PEAK ENERGY INC.'S CROSS-MOTION FOR SUMMARY JUDGMENT**

ZINKE, in his official capacity as Secretary of the U.S. Department of the Interior, MICHAEL NEDD, in his official capacity as Acting Director of the Bureau of Land Management, and KATHARINE MACGREGOR, in her official capacity as Acting Assistant Secretary of Land and Minerals Management of the U.S. Department of the Interior, Defendants, and STATE OF WYOMING, CLOUD PEAK ENERGY INC., PEABODY CABALLO MINING, LLC, and BTU WESTERN RESOURCES, INC., Defendant-Intervenors.	)

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GLOSSARY OF ABBREVIATIONS

BLM	Bureau of Land Management
CO_2	Carbon Dioxide
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
GHG	Greenhouse Gas
GWP	Global Warming Potential for Methane
HAP	Hazardous Air Pollutant
IPCC	Intergovernmental Panel on Climate Change
MLA	Mineral Leasing Act
NEPA	National Environmental Policy Act
OSMRE	Office of Surface Mining, Reclamation, and Enforcement
RMP	Resource Management Plan
SMCRA	Surface Mining Control and Reclamation Act
SOF	Statement of Facts

INTRODUCTION

Defendant-Intervenor Cloud Peak Energy Inc. ("Cloud Peak") respectfully submits this Consolidated Response Brief in opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 72) filed by the Western Organization of Resource Councils, Montana Environmental Information Center, Powder River Basin Resource Council, Northern Plains Resource Council, Sierra Club, and Natural Resources Defense Council (collectively, "Plaintiffs"), and in support of Cloud Peak's Cross-Motion for Summary Judgment.

SUMMARY OF THE ARGUMENT

This action involves the Plaintiffs' challenge to a decision of the Bureau of Land Management ("BLM") approving two resource management plans ("RMP") for the Buffalo Field Office in northeastern Wyoming and the Miles City Field Office in southeastern Montana. The Plaintiffs contend that BLM violated the National Environmental Policy Act ("NEPA") by approving the RMPs without considering the air quality and climate change impacts associated with federal coal and fluid mineral development on BLM-administered lands. For the reasons discussed below, Plaintiffs' NEPA arguments must be rejected.

As an initial matter, Plaintiffs lack standing to challenge the RMP approvals because they have not suffered a concrete, particularized, and actual or imminent harm based on BLM's approval of the RMPs, which do not approve any specific

leasing or development of federal coal or fluid minerals. Even assuming the Plaintiffs could establish standing, BLM nevertheless took a hard look at the environmental impacts associated with the RMPs through its preparation of two detailed environmental impact statements ("EIS"). Contrary to Plaintiffs' contentions, BLM considered a reasonable range of alternatives and was not required to consider alternatives that would limit the lands available for coal development. Nor did BLM have an obligation to consider speculative and remote coal combustion impacts at the RMP planning stage. Instead, BLM took the requisite hard look at air quality and climate change under the RMPs consistent with the level of analysis required at the RMP planning stage. As a result, this Court should deny Plaintiffs' motion for summary judgment and grant summary judgment in favor of Federal Defendants and Defendant-Intervenors.

STATUTORY AND REGULATORY BACKGROUND

The Federal Defendants (at 1-5) set forth the relevant statutory and regulatory background governing NEPA, BLM's RMP planning framework under the Federal Land Policy and Management Act, and the identification of lands acceptable for further consideration for leasing under the Mineral Leasing Act ("MLA"). Cloud Peak submits the following additional statutory and regulatory background to set forth the three-stage process for a coal mine operator to obtain (1) federal coal leases, (2) mining permits, and (3) mining plan approvals.

I. First Stage: Federal Coal Leasing

In order to mine federal coal on public lands in Montana or Wyoming, a coal mine operator must first obtain a federal lease from BLM. The MLA grants the Secretary of the Interior authority to issue federal coal leases, which he has delegated to BLM. 30 U.S.C. § 201(a)(1); *see* 43 C.F.R. § 3400.0-3(a). Under BLM regulations, the leasing process begins when BLM receives an application for a federal coal lease from the prospective operator. 43 C.F.R. §§ 3425.1-1, 3432.1. BLM then undertakes an extensive NEPA review to consider the environmental impacts that would result from the proposed coal lease. *Id*. §§ 3425.3(a), 3432.3(c). Upon completion, BLM determines whether to offer the federal coal lease at public auction. *Id*. § 3425.4; *see also id.* § 3432.2 (process for issuing lease modification without competitive bidding). BLM's leasing decisions must conform with the approved RMP. *Id*. § 3425.2.

II. Second Stage: State Mining Permits

Once an operator has obtained a federal coal lease, the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") requires the operator to obtain a mining permit from the appropriate state regulatory agency (here, either the Montana Department of Environmental Quality or the Wyoming Department of Environmental Quality). 30 C.F.R. §§ 740.4(c)(1) and 740.13(a)(1).

The goal of SMCRA is to balance the nation's need for coal as an essential source of fuel with the need for national environmental regulation of coal mining. 30 U.S.C. § 1202(f). The state mining permit ensures the protection of natural resources, such as air quality, wildlife, and cultural resources. *See* 30 C.F.R. § 740.13(b).

SMCRA also recognizes that "primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations . . . should rest with the States." 30 U.S.C. § 1201(f). Accordingly, SMCRA allows states to enact their own laws incorporating SMCRA's minimum standards, as well as any more stringent, but not inconsistent, standards. *Id*. §§ 1253, 1255. The States of Montana and Wyoming have assumed the federally-delegated responsibility to regulate and issue coal mining permits on federal lands. *Id*. § 1273(c); *see also* 30 C.F.R. §§ 926.10, 950.10.

In Montana, before approving a coal mining permit, the Montana Department of Environmental Quality must also undertake a detailed site-specific environmental review under Montana's NEPA equivalent, the Montana Environmental Policy Act. *See* Mont. Code Ann. § 75-1-201(1)(b).

III. Third Stage: Federal Mining Plan Approval

Finally, the operator must obtain a federal mining plan before any surface disturbance can occur. 30 U.S.C. § 207(c); 30 C.F.R. § 746.11(a). A federal

mining plan is approved by the Secretary of the Interior based on the recommendation from the Office of Surface Mining, Reclamation, and Enforcement ("OSMRE"). 30 U.S.C. § 207(c); 30 C.F.R. §§ 740.4, 746.11. To make its recommendation, OSMRE reviews the permit application package submitted by the applicant during the state mining permit process, among other things, and recommends to the Secretary the approval, disapproval, or conditional approval of the mining plan. 30 C.F.R. § 746.13. OSMRE's recommendation is based, in part, on OSMRE's NEPA analysis at the mining plan stage. *Id*. § 746.13(b). Once an operator obtains approval of the mining plan, it may proceed with development of the leased federal coal.

DEFENDANT-INTERVENOR CLOUD PEAK

Cloud Peak is a Wyoming-headquartered, publicly-traded Delaware corporation with a demonstrated commitment to the safety of its employees, the protection of the environment, and the strength and well-being of the communities in which it operates.[1] Cloud Peak is a sustainable fuel supplier for approximately 3 percent of the nation's electricity. *See* n.1. As one of the largest coal producers in the United States, with active mines in Wyoming and Montana, Cloud Peak and its subsidiaries have a strong interest in: (1) BLM's ability to authorize coal lease

[1] *See generally* Cloud Peak 2016 Annual Corporate Report, *available at* http://investor.cloudpeakenergy.com/annual-reports.

sales in the Montana and Wyoming portions of the Powder River Basin in an economically efficient and environmentally responsible manner; and (2) the ability of the Secretary to approve mining plans for the development of federally-leased coal resources. Accordingly, Cloud Peak will address those arguments that specifically relate to federal coal.

FACTUAL BACKGROUND

Cloud Peak adopts the Statement of Undisputed Facts ("SOF"), ECF No. 80, filed by Federal Defendants with their Cross-Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment ("Fed. Br."). Cloud Peak also submits a separate SOF with additional factual information to support its Cross-Motion for Summary Judgment. Cloud Peak incorporates and relies upon the Federal Defendants' SOF ("Fed. SOF") and Cloud Peak's SOF ("CPE SOF") as the factual background in this brief.

STANDARD OF REVIEW

Cloud Peak incorporates the standard of review that governs Administrative Procedure Act cases as provided by the Federal Defendants in their Cross-Motion for Summary Judgment and Response in Opposition to Plaintiffs' Motion for Summary Judgment. Fed. Br. at 5.

ARGUMENT

I. Plaintiffs Lack Standing to Challenge the RMP Approvals Because They Cannot Show that Their Alleged Injuries are Actual or Imminent or Caused By Federal Defendants' Conduct.

To establish Article III standing, Plaintiffs "must satisfy three 'irreducible constitutional minimum' requirements: (1) he or she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139–40 (9th Cir. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

As the Federal Defendants explain (at 6-14), Plaintiffs lack standing to challenge the RMPs on a number of different grounds. Among them, Plaintiffs have failed to show that their alleged injuries are concrete, particularized, and actual or imminent. Plaintiffs' declarations allege broadly that their members' aesthetic and recreational interests in the planning areas will be harmed because BLM has not foreclosed and has "left open" the *possibility* of coal mining in the planning areas. ECF. No. 72 at 5 ("Pl. Br."); *see also* ECF No. 72-6 ¶¶ 5-9 (describing speculative injuries allegedly caused by fossil fuel development in general); ECF No. 72-7 ¶¶ 5-8 (same). But because the plans do not authorize any specific proposed developments and, instead, retain full authority for BLM and other state and federal regulators to conduct site-specific environmental reviews

when and if an applicant seeks to develop resources on these federal lands (during the three-stage process described above), Plaintiffs cannot show that their alleged procedural NEPA violations and resulting injuries are concrete, particularized, and actual or imminent. Fed. Br. at 9-10.

Moreover, Plaintiffs lack standing because they cannot demonstrate that their alleged harm—global climate change—is fairly traceable to BLM's alleged NEPA procedural violations. *See Bellon*, 732 F.3d at 1139-43. Indeed, the Ninth Circuit has found that environmental groups lack standing where they cannot trace the agency's alleged violation to their global climate change injuries: "While Plaintiffs need not connect each molecule to their injuries, simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an attenuated chain of conjecture insufficient to support standing." *Id.* at 1142-43 (internal quotation and citation omitted). As a result, Plaintiffs' challenge must be dismissed for lack of standing.

II. BLM Had No Obligation to Consider Alternatives to Limit Federal Coal Development

Plaintiffs contend that BLM failed to consider alternatives that would have limited federal coal leasing and development under the RMPs. Pl. Br. at 7-13. However, contrary to the Plaintiffs' argument, BLM had no obligation to consider

varying coal development alternatives and appropriately tailored its alternatives based on the purpose and need and planning criteria for the RMP revisions.

In preparing an EIS, an agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). An agency's development of alternatives is based on the nature and scope of the proposal and purposes of the project. *Id*. § 1502.13; *see also Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004); *City of Carmel-By-The-Sea v. U.S. Dep't of Tranp.*, 123 F.3d 1142, 1155 (9th Cir. 2005). In the RMP context, an EIS must "provide sufficient detail to foster informed decision-making, but site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development." *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (9th Cir. 2003) (internal quotations and citation omitted). Accordingly, the Ninth Circuit has upheld agency decisions not to consider alternatives that would minimize resource development at the programmatic level. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1046-47 (9th Cir. 2013); *see also W. Watersheds Project v. Kenna*, 610 Fed. App'x 604, 606-07 (9th Cir. 2015).

Plaintiffs contend that BLM was required to consider alternatives limiting coal development based on an identified purpose in the RMP revisions to address

climate change. Pl. Br. at 10-11. In doing so, Plaintiffs ignore (1) the broad and high-level purpose of the RMPs to "guide and control future management actions" (43 C.F.R. § 1601.0-2), and (2) the detailed information provided by BLM regarding its decision to carry forward lands that were identified for further coal leasing consideration in previous RMPs. Fed. SOF ¶¶ 21, 23, 57-58, 66-67. As detailed in both EISs, the purpose and need of the RMPs was to address changing conditions within the planning areas and to evaluate new information in order to guide management of BLM-administered lands. *Id*. ¶¶ 10, 56. As part of its "issue driven" process, BLM developed a range of alternatives based on the RMPs' goals and objectives, purpose and need, planning criteria, and issues raised during public scoping. *Id*. ¶¶ 2-4, 11-12, 46, 57-58; CPE SOF ¶¶ 1-2.

For the Buffalo RMP, BLM sought public submissions of coal resource information during the early stages of the planning process to determine whether BLM needed to revisit previous coal screening determinations. Fed. SOF ¶ 3. Based on information provided during public scoping,[2] BLM determined that its prior decision regarding the lands available for further coal leasing consideration in

[2] Plaintiffs argue that they asked BLM during public scoping to consider alternatives that would "reduc[e] coal development." Pl. Br. at 12-13. However, the cited letters contain no information regarding the need to reapply BLM's coal screening criteria, as specified in 43 C.F.R. § 3420.1-4(e). Instead, Plaintiffs vaguely asked BLM to reduce or slow the pace of coal development, which is a decision that properly occurs at the implementation stage. As explained by Federal Defendants (at 17), Plaintiffs have waived this argument.

the 2001 Buffalo RMP was still valid and could be carried forward in the Buffalo RMP. *Id*. ¶¶ 21, 23. As a result, BLM detailed in its planning criteria that "no additional coal planning decisions will be made for the Buffalo RMP." CPE SOF ¶ 3. Based on this determination, alternatives that were considered, but not carried forward for detailed analysis, include those that "did not meet the planning criteria or the purpose and need" or "were already part of an existing plan . . . that will continue under the revised RMP." *Id*. ¶ 4.

BLM reached a similar conclusion in the Miles City RMP. At the outset of the planning process, BLM sought "coal resource information and any information regarding resources which may affect the leasing of Federal coal or be affected by the leasing of Federal coal." Fed. SOF ¶ 47. Based on the results of public scoping, BLM decided to carry forward the lands available for further coal leasing consideration contained in the Big Dry (1996) and Powder River (1985) RMPs. Fed. SOF ¶ 66. In the EIS, BLM explained that where management actions in prior RMPs were found to meet "BLM's current goals and no issue was raised, alternatives to current management were not developed." Fed. SOF ¶ 58 (emphasis added).

Finally, as detailed by Federal Defendants (at 18-19), BLM will reapply the coal screening criteria—in which BLM determines whether certain lands are

suitable for coal leasing—and conduct additional NEPA analysis for all future coal leasing proposals within the RMP planning areas. Fed. SOF ¶¶ 24, 67.

III. BLM Took a Hard Look at Impacts Related to Greenhouse Gas Emissions and Climate Change

Plaintiffs contend that BLM failed to take a "hard look" at impacts from future energy development on greenhouse gas emissions ("GHG") and climate change. However, even assuming Plaintiffs have standing to raise their climate change arguments, Plaintiffs' arguments are wholly unsupported by the record, which demonstrates that BLM conducted a detailed and thorough analysis of GHG emissions and climate change. Fed. Br. at 22-31. Plaintiffs' arguments amount to nothing more than complaints about the level of detail or the methodologies used by BLM to conduct its analysis. As such, the Court must reject Plaintiffs' arguments and defer to BLM's exercise of its technical expertise.

A. BLM Took a Hard Look at Cumulative Climate Change Impacts

Plaintiffs argue that BLM's analysis of cumulative climate change impacts was inadequate because it failed to account for impacts from coal and fluid mineral development authorized by eight RMP revisions in the Rocky Mountain Region. Pl. Br. at 23-24. But Plaintiffs' argument ignores the detailed climate change analysis contained in both EISs and greatly overstates the geographic scope of cumulative impact analyses required under NEPA. BLM appropriately considered climate change impacts by comparing GHG emissions in the RMP planning areas

with statewide, national, or global GHG emissions, as opposed to applying the social cost of carbon or a global carbon budget.

1. BLM's Greenhouse Gas Emissions and Climate Change Analysis Satisfied NEPA

As explained in the EISs and comment responses, BLM considered cumulative climate change impacts by quantifying GHG emissions for the planning areas and comparing those emissions to statewide, nationwide, or global inventories. Fed. SOF ¶¶ 31-38, 74-82. The Ninth Circuit and other courts have held that "a discussion in terms of percentages is [] adequate for [GHG] effects." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1139 (9th Cir. 2011); *WildEarth Guardians v. BLM*, 8 F.Supp. 3d 17, 35 (D.D.C. 2014) ("because current climate science is uncertain . . . evaluating GHG emissions as a percentage of state-wide and nation-wide emissions . . . is a permissible and adequate approach"). Indeed, the United States Court of Appeals for the D.C. Circuit has previously upheld BLM's comparison of GHG emissions with statewide emissions for the issuance of a Wyoming coal lease. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013). Such an analysis is similarly appropriate at the RMP planning stage. *See* Fed. Br. at 22 (citing *Native Village of Point Hope v. Jewell*, 740 F.3d 489, 497 (9th Cir. 2014)).

BLM discussed the role of GHGs in contributing to climate change. Specifically, BLM explained in detail how increased GHG emissions trapped

within the earth's atmosphere lead to an increase in global temperature. Fed. SOF ¶¶ 31, 74. In Chapter 3 of each RMP, BLM discussed sources of GHG emissions in the planning area and their resulting impacts on climate change. *Id*. ¶¶ 33, 77. Conversely, BLM explained that climate change affects "nearly all resources at local, regional, and global levels." *Id*. ¶ 77; *see also id.* ¶ 32. BLM then provided detailed qualitative information regarding climate change impacts on resources within the planning areas. *See, e.g., id.* ¶¶ 32-33, 77-78. Finally, BLM described national actions being taken to better understand and reduce GHG emissions. *Id.* ¶ 33.

After acknowledging the current uncertainties associated with climate change science (Fed. SOF ¶¶ 33, 38, 73, 82), BLM took the requisite hard look at climate change impacts by quantifying and comparing GHG emissions in the RMP planning area with statewide, nationwide, or global GHG emissions inventories. In the Miles City RMP, BLM compared emissions for each alternative with emissions inventories for Montana, the United States, and the world and concluded that "[d]ifferences in cumulative GHG emissions impacts would be negligible among the alternatives when considered on state, national, or global scales." *Id*. ¶¶ 79-80.

BLM took a similar approach for the Buffalo RMP, comparing GHG emissions for each alternative with the statewide inventory compiled by the Center for Climate Strategies, which predicted GHG emissions for the State of Wyoming

based on actual emissions and projected emissions. Fed. SOF ¶¶ 34-35. Noting that its analysis was "based on 'worse case' estimates," BLM disclosed that the GHG emissions for each alternative in the Buffalo EIS represented approximately 13% of state-wide emissions. *Id.* ¶ 35, 37. BLM's climate change analysis satisfies NEPA. *Barnes*, 655 F.3d at 1139.

2. BLM Was Not Required to Consider Combined Cumulative Impacts From Eight RMPs in the Rocky Mountain Region

Plaintiffs contend that BLM violated NEPA by failing to consider the cumulative climate change impacts from fossil fuel development that may potentially occur in the future under eight revised RMPs in the Rocky Mountain Region. Pl. Br. 23-24. In doing so, Plaintiffs suggest that BLM was obligated under NEPA to consider cumulative climate change impacts from potential future mineral development spanning far beyond the boundaries of the individual RMPs. However, the geographic scope of a cumulative impact analysis is not limitless, as Plaintiffs appear to suggest. Moreover, BLM is entitled to substantial deference in determining the geographic scope of its cumulative impact analyses.

The scope of an agency's cumulative impact analysis is grounded in both the geographic scope and timing of environmental impacts. BLM NEPA Handbook, H-1790-1, at 58-59 (2008). Once the agency has identified the resources affected by the proposed action, the agency must identify any other past, present, or reasonably foreseeable future actions with the potential to affect the same resource,

in the same area, during the same time period. 40 C.F.R. § 1508.7; BLM NEPA Handbook, H-1790-1, at 58-59 (2008). In other words, the agency must identify actions with the potential to cause overlapping effects within the same geographic and temporal boundaries of the proposed action's effects. As such, an agency's cumulative impact analysis does not exceed the geographic scope of the action's direct and indirect impacts. BLM NEPA Handbook, H-1790-1, at 58 (2008).

Here, as detailed by the Federal Defendants, BLM considered cumulative climate change impacts by evaluating GHG emissions within the planning areas and comparing them to emission inventories with a much broader geographic scope. Fed. Br. at 25-26. Moreover, NEPA does not require BLM to consider cumulative climate change impacts across the extraordinarily broad geographic scope suggested by the Plaintiffs. Pl. Br. at 23 (suggesting BLM was required to consider impacts across all eight RMPs for the Rocky Mountain Region or the 700 million acres of mineral estate managed by BLM in the United States); *see also* Fed. Br. at 25-26. Plaintiffs provide no explanation as to how the impacts from potential future mineral development under eight RMP revisions across the entire Rocky Mountain Region would impact the same resources affected by the Buffalo and Miles City RMPs, let alone the entire 700 million acres of the BLM-managed

mineral estate.[3] *See* BLM NEPA Handbook, H-1790-1, at 58 (2008). Further, "[e]ven if environmental interrelationships could be shown conclusively to extend across" a broader geographic scope, "practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements." *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976); *see also* Fed. Br. at 26 ("NEPA does not require the government to do the impractical").

Finally, as the Federal Defendants explain (at 27), the "geographic area within which [cumulative impacts] may occur, is a task assigned to the special competency of the appropriate agencies." *Kleppe*, 427 U.S. at 414; *Sierra Club v. Fed. Energy Regulatory Comm'n*, 827 F.3d 36, 49 (D.C. Cir. 2016) ("[s]uch a determination of the size and location of the relevant geographic area requires a high level of technical expertise" (internal quotation and citation omitted)). The Plaintiffs' argument on this point must be rejected.

3. BLM Was Not Required to Utilize the Social Cost of Carbon or a Carbon Budget

Plaintiffs also argue that BLM should have employed either the social cost of carbon or a global carbon budget as an analytical tool to evaluate impacts of increased GHG emissions on climate change. Pl. Br. at 25-27. However, as discussed *supra* at 13-15, BLM's approach for analyzing climate change impacts

[3] Moreover, as discussed *infra* at 19-23, BLM was not required to include combustion impacts in its indirect effects analysis at the RMP planning stage.

comports with NEPA and has been upheld by federal courts. NEPA does not mandate that BLM utilize the social cost of carbon or a global carbon budget as part of its climate change impact analyses.

Social Cost of Carbon. Neither CEQ regulations nor guidance requires federal agencies to employ the social cost of carbon protocol. In fact, CEQ's regulations state that cost-benefit analyses are not appropriate when important qualitative considerations are involved (40 C.F.R. § 1502.23), such as those associated with climate change. For this reason, among others, courts have rejected the suggestion that agencies be required to use the social cost of carbon. *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016); *WildEarth Guardians v. Jewell*, 1:16-cv-605-RJ-SCY, at 23-24 (D. N.M. Feb. 16, 2017), attached to Federal Defendants' brief as Exhibit 3.

Moreover, the social cost of carbon does not apply to BLM's RMP approvals. Rather, the social cost of carbon was designed to provide informal agency guidance related to assessing "the costs and the benefits of . . . intended regulation," consistent with Executive Order 12866. BUF:2157-135738; MC:2356-76616. Finally, the social cost of carbon no longer serves as a relevant analytical tool because the federal government rescinded the Technical Support Documents via an Executive Order dated March 28, 2017. *See* Executive Order No. 13783 (Mar. 28, 2017), *available at* https://www.whitehouse.gov/briefing-

room/presidential-actions/executive-orders (last visited Aug. 17, 2017); *see also* 82 Fed. Reg. 16576 (Apr. 5, 2017) (withdrawing the Council on Environmental Quality's final GHG emissions guidance referencing the social cost of carbon).

Carbon Budget. Nor was BLM required to use a carbon budget in its analysis. Plaintiffs provide no reasoned explanation, legal or otherwise, as to why BLM had an obligation under NEPA to analyze climate change impacts using a carbon budget, as opposed to quantifying identifiable GHG emissions and comparing them to statewide, nationwide, or global inventories. *See* Pl. Br. at 25 (arguing only that a carbon budget is a "measuring standard[] available to BLM"). While Plaintiffs may prefer that BLM employ their suggested methodologies, BLM was entitled to adopt its own reasonable approach to evaluate climate change impacts within the RMP planning areas. *Prot. Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 584-85 (9th Cir. 2016) ("BLM was entitled to choose among various reasonable methodologies . . . when estimating [GHG] emissions generated by the Project"); *see also* Fed. Br. at 27.

B. BLM Had No Obligation to Consider Indirect Combustion Impacts at the RMP Planning Stage

Plaintiffs argue that BLM failed to consider indirect effects of coal combustion at the RMP planning stage. Pl. Br. at 16-21. However, BLM is not required to consider the speculative effects of third-party coal combustion at the

time it merely designates lands as acceptable for further coal leasing consideration. Plaintiffs' claim must be rejected.

NEPA requires that an agency consider the direct and indirect effects of its proposed action. 40 C.F.R. § 1502.16(a)-(b). Indirect effects are ones that are "caused by the action and are later in time or farther removed in distance [than direct effects], but are still reasonably foreseeable." *Id*. § 1508.8(b). The Ninth Circuit has held that agencies need not consider "highly speculative or indefinite" indirect effects that are based on a "highly attenuated chain of causation." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998); *see also Ctr. for Envt'l Law & Policy v. Bureau of Reclamation*, 655 F.3d 1000, 1011-12 (9th Cir. 2011) (indirect effects analysis not required where effects "cannot occur unless at least three other events take place").

Here, numerous intervening events between BLM's decision to make lands available for further coal leasing consideration and the ultimate downstream combustion of coal that may occur many years in the future make an analysis of combustion impacts remote and untenable at the RMP planning stage. As discussed *supra* at 3, coal leasing is an applicant-driven process that depends on the market and demand for coal at a particular time and the operational needs of a particular mine. Once it receives an application for a federal coal lease, BLM conducts a thorough analysis of environmental impacts at the leasing stage and

ultimately determines, in its discretion, whether to issue the coal lease. *Id*. Once the operator obtains a lease, it must then obtain a state mining permit and federal mining plan before commencing mining operations and ultimately selling the coal, which is then transported for combustion at facilities across the United States and abroad. *Id*. at 3-5.

More importantly, BLM lacks adequate information as to the timing, location, and method of coal combustion at the RMP planning stage. A number of variables affect these determinations, including price, demand, quality, quantity, transportation, and technological advances in emission controls. *See* CPE SOF ¶ 5 (acknowledging coal within the planning area "will be used across the entire United States and internationally as demand and prices dictate"). A federal court recently recognized that even at the leasing stage "[i]t is not known where the coal may be sold; there is uncertainty as to the location and the method or timing of the combustion." *WildEarth Guardians v. U.S. Forest Serv.*, 120 F.Supp. 3d 1237, 1273 (D. Wyo. 2015). Thus, once "coal . . . enter[s] the free marketplace, [it] diminishes the agencies' abilities to foresee the effects of coal combustion." *Id*.

At the RMP planning stage, indirect coal combustion impacts are too remote and speculative for BLM to engage in meaningful analysis. The RMPs do not authorize any federal coal leases, but merely make lands available for leasing consideration in the future. ECF No. 79-1, ¶ 8; ECF No. 79-2, ¶ 8. The analysis

requested by Plaintiffs would result in nothing more than speculation, which is inconsistent with BLM's obligation to undertake sound, objective, environmental analysis under NEPA. 40 C.F.R. § 1500.1(b) (requiring information used in NEPA analyses to be of "high quality" and further declaring "[a]ccurate scientific analysis" as "essential to implementing NEPA").[4]

Plaintiffs disregard these inherent uncertainties at the RMP planning stage and suggest that BLM could quantify the emissions from coal combustion based on the projected coal tonnage that BLM estimates will be produced over the life of the RMPs. Pl. Br. at 17-18. In doing so, Plaintiffs ignore the above-discussed NEPA principles and mistakenly fault BLM for failing to comply with NEPA's regulation governing incomplete or unavailable information, which requires BLM to explain why certain information cannot be provided in an EIS, among other things. 40 C.F.R. § 1502.22. However, that regulation is inapplicable because it only applies to "reasonably foreseeable significant adverse effects." *Id*. As discussed above, coal combustion is too speculative to compel such an analysis at the RMP planning stage, particularly where the RMP does not authorize any coal leasing or development.

Plaintiffs fail to cite a single case to support that BLM must consider combustion impacts at the RMP planning stage, and instead rely on factually

[4] This uncertainty only further highlights why Plaintiffs lack standing to challenge BLM's climate change analysis.

distinguishable cases from other Circuits. Pl. Br. at 17 (citing *High Cty. Conservation Advocates v. U.S. Forest Serv.*, 52 F.Supp. 3d 1174 (D. Colo. 2014) and *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003)). Both cited cases involved effects generated by activities analyzed in site-specific NEPA documents, not RMP approvals like those at issue in this case. Similarly, Plaintiffs cite to an inapplicable EIS involving a coal lease application that estimated emissions from coal combustion (Wright Area EIS),[5] not an RMP that merely designated lands as acceptable for further coal leasing consideration. Pl. Br. at 19. Finally, the Uncompahgre Draft EIS/RMP—released one year after the RMPs challenged in this case were finalized—has no bearing on BLM's legal obligation under NEPA to include such an analysis in the EISs for the RMPs. Fed. Br. at 33.

C. BLM Properly Analyzed Impacts of Methane Emissions

Plaintiffs' claim regarding the global warming potential ("GWP") for methane must also be rejected because it amounts to nothing more than a mere disagreement with BLM's exercise of its technical expertise. Pl. Br. at 27-32. Specifically, Plaintiffs fault BLM for using a GWP of 21 over a 100-year

[5] Wright Area Coal Lease Applications EIS, 4-138 to 4-140 (2010) (estimating "combustion of the coal produced from each of the six [lease] tracts as applied for" (emphasis added)), *available at https://eplanning.blm.gov/epl-front-office/eplanning/docset_view.do?projectId=67033&currentPageId=96927&documentId=82290* (last visited Aug. 17, 2017).

timeframe to analyze impacts from methane emissions, as opposed to more recent iterations of the GWP standard contained in the Environmental Protection Agency's ("EPA") updated GHG reporting regulations and reports published by the Intergovernmental Panel on Climate Change ("IPCC"). However, BLM took the requisite hard look at methane emissions by calculating its carbon dioxide ("CO_2") equivalent using EPA's adopted GWP in its GHG reporting regulations at the time BLM issued the Draft EISs.

As an initial matter, Plaintiffs' argument is based on the flawed premise that NEPA requires agencies to utilize the "best available science." Pl. Br. at 28. The Ninth Circuit has consistently held that "NEPA does not require [courts] to decide whether an EIS is based on the best scientific methodology available." *Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (en banc) (original brackets and internal quotations omitted); *see also Laguna Greenbelt, Inc. v. Dep't of Transp.*, 42 F.3d 517, 526 (9th Cir. 1994). Rather, "[b]ecause analysis of scientific data requires a high level of technical expertise, courts must defer to the informed discretion of the responsible federal agencies." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003).

In both EISs, BLM explained its decision to use a GWP of 21, which was employed by EPA in its GHG reporting regulations. Fed. SOF ¶ 75 ("BLM uses the [methane GWPs] that are specified in USEPA regulations . . . under 40 Code of

Regulations Part 98 as of November 1, 2013"); *see also id*. ¶ 36. By multiplying methane emissions by the GWP of 21, BLM obtained a CO_2 equivalent that could be added to, and compared with, other GHGs in the planning area.[6] *Id*. ¶¶ 36, 75. BLM's methodology was reasonable because "data referenced for comparison purposes are based on these values" and using the GWP of 21 "allows for consistent comparisons with state and national GHG emission inventories." Fed. SOF ¶ 76 (quoting the Miles City EIS at MC:7-2712).

Plaintiffs appear to argue that BLM should have applied EPA's updated GWP of 25, which went into effect after BLM issued the draft EISs, but before the final EISs. Pl. Br. at 29. Yet, such an analysis would have conflicted with BLM's above-stated rationale for using the GWP of 21, which was to evaluate methane impacts associated with the RMP approvals in comparison with existing data and emissions inventories that used the same GWP. Nor was BLM obligated to supplement its analysis to incorporate EPA's updated GWP standard, because new analytical tools do not reflect the sort of new circumstances or information that trigger an agency's duty to supplement under NEPA. 40 C.F.R. § 1502.9(c)(1)(ii) (requiring supplementation only where "significant new circumstances or

[6] Plaintiffs' citations to EPA's comments on the EISs for the Buffalo and Miles City RMPs have no bearing on BLM's evaluation of methane impacts. EPA's comments had nothing to do with BLM's selected GWP. *See* BUF:1660-98326; MC:316-13994.

information relevant to environmental concerns and bearing on the proposed action or its impacts" (emphasis added)).

Plaintiffs also take issue with BLM's use of the 100-year timeframe, as opposed to the 20-year timeframe contained in the IPCC reports. Pl. Br. at 31-32. Again, BLM used the 100-year timeframe because that is the timeframe used by EPA in its GHG reporting regulations. *See* 40 C.F.R. Part 98, Subpt. A, Table A-1. As explained above, BLM's use of EPA's GWP of 21 is entitled to deference. *Earth Island Inst.*, 351 F.3d at 1301; *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012) (mere "disagree[ment] with the methodology does not constitute a NEPA violation").

IV. BLM Adequately Considered Cumulative Air Quality Impacts

As explained by the Federal Defendants (at 31-33), Plaintiffs' argument that BLM failed to consider cumulative air quality impacts lacks merit. Plaintiffs contend that BLM conducted a "cursory assessment" that failed to account for cumulative impacts from coal mining and fluid mineral development on air quality. Pl. Br. at 32-33. Plaintiffs also argue that BLM failed to evaluate existing regional emissions from coal-fired power plants. *Id*. at 33. Plaintiffs are wrong on both counts.

First, BLM explained in both EISs that mineral exploration and development from oil and gas, coal, and renewable energy would continue on federal, state, and

private lands over the life of the RMPs and that such actions would be considered in its cumulative impact analyses. CPE SOF ¶ 6. In the Buffalo RMP, BLM calculated the emissions from BLM and non-BLM activities within the planning area for each alternative and compared them to the Wyoming statewide emissions inventory, which included emissions from all anthropogenic sources. *See* Fed. SOF ¶ 42; *see also id*. ¶ 41 (citing Appendix M, which discloses the emissions underlying BLM's analysis, along with assumptions and uncertainties that precluded modeling at the RMP planning stage). Based on this analysis, BLM concluded that cumulative emissions may increase levels of certain pollutants in the planning area, but "would not likely contribute to exceedances of the air quality standards." Fed. SOF ¶ 43.

In the Miles City RMP, BLM provided charts for each alternative identifying the estimated cumulative emissions for criteria pollutants and hazardous air pollutants ("HAPs") based on BLM and non-BLM activities. CPE SOF ¶ 7. BLM also prepared a detailed emissions inventory to inform its analysis. Fed. SOF ¶ 84. BLM reasonably determined that cumulative pollutant concentrations would remain below federal and state air quality standards and that

pollution concentrations would continue to be monitored and assessed via the Air Resources and Climate Appendix.[7] *Id*. ¶ 85.

Second, Plaintiffs' assertions regarding BLM's consideration of regional pollution from power plants are conclusory and belied by the record. Pl. Br. at 33. As explained by Federal Defendants, BLM analyzed air quality in both the planning area and surrounding areas. Fed. SOF ¶¶ 39-40, 83. In the Buffalo RMP, BLM discussed the past and present activities affecting air quality in its discussion of baseline conditions in Chapter 3. CPE SOF ¶ 8 ("impacts from all past and present actions are captured in the baseline conditions presented in Chapter 3"). BLM also acknowledged that "[e]xisting sources of HAPs, criteria pollutants, and GHGs in the planning area include fossil fuel combustion . . ." *Id*. (emphasis added); *see also* Fed. SOF ¶ 40 (citing previous air quality modeling efforts, which included emissions from power plants).

Similarly, in the Miles City EIS, BLM discussed current air quality conditions in the RMP planning area and surrounding areas for each criteria pollutant. Fed. SOF ¶ 83. Moreover, BLM explained that power plants contribute to nitrogen dioxide, ozone, sulfur dioxide, and HAPs. CPE SOF ¶ 9. As explained in its response to comments, BLM considered emissions from the Colstrip power plant in its cumulative impact analysis, despite its apparent incorrect reference to

[7] Contrary to Plaintiffs' suggestion (at 33), BLM discussed non-health related air quality impacts associated with ozone. CPE SOF ¶ 11.

the Nelson Creek Project. CPE SOF ¶ 10. In sum, Plaintiffs have not shown that BLM failed to address cumulative air quality impacts.

CONCLUSION

For the foregoing reasons, Cloud Peak respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment, grant Cloud Peak's Cross-Motion for Summary Judgment, and affirm BLM's September 21, 2015 approval of the challenged Buffalo and Miles City RMPs.

Respectfully submitted this 18th day of August, 2017.

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