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

350 MONTANA, et al.,	)	No. 9:19-cv-00012-DWM
	)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT
	)	OF FEDERAL DEFENDANTS'
v.	)	CROSS-MOTION FOR
	)	SUMMARY JUDGMENT AND IN
DAVID BERNHARDT, in his official	)	OPPOSITION TO PLAINTIFFS'
capacity as Secretary of the United States	)	MOTION FOR SUMMARY
Department of the Interior, et al.,	)	JUDGMENT
	)	
Federal Defendants,	)	
	)	
and	)	
	)	
SIGNAL PEAK ENERGY, LLC,	)	
	)	
Defendant-Intervenor.	)	
______________________________________	)	

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INTRODUCTION

In *MEIC v. OSMRE*, 274 F. Supp. 3d 1074 (D. Mont.), *amended in part, adhered to in part,* No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017), this Court granted the plaintiffs partial summary judgment on grounds that the Office of Surface Mining, Reclamation, and Enforcement ("the Office"), violated the National Environmental Policy Act ("NEPA") when it failed to quantify the costs of mine expansion while touting its benefits, and adequately assess the greenhouse and non-greenhouse gas ("GHG" and "non-GHG") impacts from increased coal transportation and combustion. The Court determined that these deficiencies were arbitrary and capricious and ordered the agency to conduct new analysis in compliance with NEPA.

On remand, the Office prepared an environmental assessment ("2018 EA") in compliance with NEPA. The Office took a "hard look" at impacts of increased coal transportation on wildlife and public health, explained why the social cost of carbon should not be applied to the proposed action, and articulated sound reasons why the proposed action would not significantly impact the human environment.

As to Plaintiffs' Endangered Species Act ("ESA") claims, they are without merit because Plaintiffs have waived any ESA claims against the United States Fish and Wildlife Service ("the Service"), and the Office's "no effect" determinations complied with the ESA.

Because Federal Defendants complied with NEPA and the ESA, the Court should deny Plaintiffs' Motion for Summary Judgment, and grant Federal Defendants' Cross-Motion for Summary Judgment.

LEGAL BACKGROUND

I. NEPA

NEPA serves the dual purpose of informing agency decision makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

NEPA thus requires the preparation of an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. The EIS must examine, *inter alia*, the project's impacts. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.16, 1508.7. However, not every major Federal action requires an EIS. If an agency prepares an Environmental Assessment ("EA"), *see* 40 C.F.R. § 1508.9, and concludes that project impacts will not be significant, it may issue a Finding of No Significant Impact ("FONSI") and forego preparation of an EIS. *See* 40 C.F.R. §§ 1501.3(a), 1501.4(c), (e), 1508.9.

II. ESA

In accordance with ESA Section 7(a)(2), each federal agency must insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat for such species. *Id*. § 1536(a)(2). If the agency proposing the action ("action agency") determines its action "may affect" a listed terrestrial species or critical habitat, then the agency must consult informally or formally with the Service. 50 C.F.R. § 402.14(a)-(b). If, however, the action agency finds its action will have "no effect" on listed species or critical habitat, no consultation is required. *Id*. § 402.14(a).

FACTUAL BACKGROUND

The Bull Mountains Mine No. 1 is an underground coal mine in Musselshell and Yellowstone counties in south central Montana that is owned and operated by Defendant-Intervenor Signal Peak Energy, LLC ("Signal Peak"). OSM:016736. In 2011, the Bureau of Land Management approved Signal Peak's application to lease federal coal totaling approximately 2,680 acres. *Id.*[1] In 2013, the Secretary approved Signal Peak's mining plan modification for 140 acres of leased federal coal, OSM:016737, and in 2015, the Secretary approved another mining plan

[1] This decision was upheld in subsequent litigation. *See N. Plains Res. Council, Inc. v. Bureau of Land Mgmt.*, 725 F. App'x 527 (9th Cir. 2018).

modification for the remaining 2,540 acres of federal coal ("Amendment 3 area), OSM:016738. The Secretary's approval of the mining plan modification for Amendment 3 was challenged on grounds that it violated NEPA. *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d at 1081. On August 14, 2017, this Court granted summary judgment to the plaintiff on certain claims. *Id.* at 1105. The Court also vacated the Secretary's approval of the mining plan modification and remanded for further NEPA review. *Id.* Further, the Court enjoined "mining of the federal coal within the Amendment 3 permit boundary . . . pending compliance with NEPA." *Id.*[2]

As discussed below, the Office prepared an EA, finding that the mining plan modification "would not have a significant impact on the quality of the human environment," OSM:016729, and concluded that it would have "no effect" on listed species, OSM:016804. On August 3, 2018, the Secretary approved the mining plan modification for the Amendment 3 area. OSM:017025.

STANDARD OF REVIEW

Plaintiffs' NEPA and ESA claims are subject to the judicial review standards of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). This

[2] Subsequent orders permitted Signal Peak to conduct limited development work as to the federal coal. OSM:016738.

standard of review is "highly deferential," and an "agency's decision is 'entitled to a presumption of regularity'" in the first instance. *San Luis v. Jewell*, 747 F.3d at 601 (9th Cir. 2014) (quotation omitted).

ARGUMENT

I. Plaintiffs Have Waived Any ESA Claims Against The Service

As an initial matter, Plaintiffs present no arguments regarding the Service. This is significant because courts "will not ordinarily consider matters . . . not specifically and distinctly argued" in an opening brief. *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998). In this case, Plaintiffs assert no ESA arguments regarding any action undertaken by the Service, focusing instead only on the Office's alleged actions. *See* Pls.' Mem. at 27. Because Plaintiffs' ESA arguments pertain only to the Office – and not at all to the Service – Plaintiffs have waived any ESA claims against the Service. *See Husyev v. Mukasey*, 528 F.3d 1172, 1183 (9th Cir. 2008).

II. The Office's No Effect Determinations Comply With The ESA

Regarding Plaintiffs' ESA arguments against the Office, it is important to clarify what is – and is not – in dispute. In all, the Office considered more than 265 species, including listed species, in evaluating the impacts of the proposed mining activities on wildlife. OSM:016899-907. Significantly, Plaintiffs raise no challenge to the Office's assessment for the overwhelming majority of these species. Plaintiffs only object to narrow aspects of the Office's analysis with respect to two species,

alleging that the Office (1) failed to consider the "indirect effects of coal trains" traveling outside the mine area as a "source[] of grizzly mortality" in evaluating the action area, Pls.' Mem. at 29-30; and (2) failed to consider the "best available science" in finding that the northern long-eared bat was not present in the mine area and that the area lacked suitable habitat. *Id*. at 31. Neither argument withstands scrutiny, as discussed *infra*.

A. The Office's No Effect Determination For Grizzly Bears Was Reasonable

Regarding the "action area" examined by the Office – *i.e.*, "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action," 50 C.F.R. § 402.02 – the ESA regulations require an action area to encompass indirect effects that are "caused by the proposed action" and "later in time, but still are <u>reasonably certain</u> to occur." *Id*. (emphasis added).[1] This latter limit – requiring "reasonably certain" indirect effects – marks the outer bound of an action area, and thus an action area need only extend as far as effects from the proposed action are reasonably certain to occur.

Here, consistent with this limit, the Office examined the potential effects of the proposed mining activities over an area covering more than 1,800 acres. *See*

[1] This "reasonably certain to occur" standard demands a higher degree of certainty than the "broader 'reasonably foreseeable' standard" under NEPA, which itself "requires a substantial degree of certainty." *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 702 (5th Cir. 2010).

OSM:016754. However, Plaintiffs argue that the Office should have expanded the action area to include potentially hundreds of miles of unspecified railroad track – all outside the vicinity of the mine – to account for the risk of train strikes, which Plaintiffs describe as "one of the leading sources of grizzly mortality" in outlying areas. Pls.' Mem. at 29.

Plaintiffs overreach. There is no dispute that grizzly bear mortalities have occurred in the Northern Continental Divide, Cabinet-Yaak, and Selkirk areas as a result of train strikes, among other causes. However, Plaintiffs fail to connect the dots between the risk of such train strikes in these outlying areas and the mining activities approved by the Office. It is not enough to point to a possibility that train strikes might occur as a result of rail traffic in these areas. Rather, to be considered an indirect effect of the challenged decision, Plaintiffs must show that grizzly bear mortalities from train strikes are "reasonably certain to occur" as a result of the rail traffic from this particular mine. 50 C.F.R. § 402.02.

Plaintiffs make no such showing. Plaintiffs, for example, identify no grizzly bear mortalities connected to rail traffic from the mine over its previous eight years of operation. Plaintiffs also make no specific allegations as to the future likelihood that rail traffic from this mine – as compared to rail traffic generally – will result in train strikes. Instead, Plaintiffs only point to the number of trains that are expected to be needed for shipping coal from the mine, inferring that the chances of a train

strike beyond the mine area must be higher as a result of the continued rail traffic. *See* Pls.' Mem. at 29-30. But such wholly probabilistic allegations only show, at most, that a future train strike outside the action area linked to this particular mine is conceivable – not that such events are "reasonably certain to occur." 50 C.F.R. § 402.02; *see also Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, No. 15-cv-27-BU-BMM, 2015 WL 4528611, at *11 (D. Mont. July 27, 2015) (rejecting challenge to action area because the plaintiff "failed to point to any effects" that were "likely to occur outside of the analysis area"); *Oceana, Inc. v. Evans*, 384 F.Supp.2d 203, 228 (D.D.C. 2005) (finding challenged plan would have no effect on the species outside the "area in which the scallop fishery operates").[2]

The record also bears out this point. To start, it is important to place the risk of train strikes in proper context. For example, Plaintiffs point to three grizzly bear mortalities in the Cabinet-Yaak attributable to train strikes, Pls.' Mem. at 6-7, but overlook that these mortalities occurred over a 30-year period – *i.e.*, accounting, on average, for one mortality every decade. OSM:012841. Likewise, Plaintiffs cite to an article that referred to train strikes in the Northern Continental Divide resulting in the deaths of "about 35 grizzlies," but omit that this estimate covered a 20-year

[2] Plaintiffs cite to their own extra-record declarations in support of this and other non-standing arguments, Pls.' Mem. at 30, 37, 38, 39, 40, but the "[c]onsideration of [extra-record] evidence to determine the correctness or wisdom of the agency's decision is not permitted." *Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

period. OSM:016591. Further, Plaintiffs identify only one grizzly bear mortality caused by a train strike in the Selkirk area. OSM:017589. Hence, taken together, the record indicates that train strikes – from all the rail traffic through these areas – caused no more than 39 grizzly bear mortalities over a period of 20 years or more.

This risk decreases even further when only rail traffic connected to this mine is considered. Specifically, regarding the track segment between Laurel, Montana, and Vancouver, Canada – which includes the areas that account for all the grizzly bear mortalities identified by Plaintiffs, *see* Pls.' Mem. at 38 – the Office estimated that "up to 25 percent" of rail traffic on that segment would be attributable to the mine. OSM:016787. Stated differently, at least 75 percent of rail traffic would not be connected to this mine, which makes the purported linkage between train strikes and this mine even more attenuated. *See Ctr. for Biological Diversity v. U.S. Dep't of Hous. & Urban Dev.*, 541 F.Supp.2d 1091, 1100-01 (D. Ariz. 2008) (finding linkage between agency action and alleged harm to species was "too attenuated"), *aff'd*, 359 F. App'x 781 (9th Cir. 2009).

Underscoring the tenuous connection between train strikes and this mine, the Office also considered the ongoing efforts of the railroad operator (BNSF Railway) to implement measures to mitigate the risk of train strikes. OSM:016925; *see also* OSM:016591. Since "rail operations . . . are outside of [the Office's] jurisdiction," it was entirely reasonable for the Office to account for these efforts undertaken by

other parties to mitigate the risk. *Cf. Nw. Envtl. Def. Ctr. v. Nat'l Marine Fisheries Serv.*, 647 F.Supp.2d 1221, 1232 (D. Or. 2009) (concluding "[i]t was reasonable for [the agency] to rely on information" that the construction materials used would limit the extent of potential effects).

B. The Office's No Effect Determination For Northern Long-Eared Bats Was Reasonable

Plaintiffs' challenge to the Office's no effect determination for the northern long-eared bat fares no better. As relevant here, the Office reached this conclusion based on its two-part finding of "no species present" and "lack of suitable habitat" in the mine area. OSM:017016. Plaintiffs second-guess both parts, alleging that the "best available science" compelled a finding that the species may be present, Pls.' Mem. at 31-32; and that suitable habitat exists within the mine area. *Id*. at 34. Plaintiffs' only support, however, is scant and based on a misreading of the record, or relies on extra-record and post-decisional materials that are not properly before this Court.

To start, Plaintiffs object to the Office's assessment of acoustic survey data collected in 2006, alleging that the agency disregarded the best available science in concluding the potential recording of the species was likely "a misidentification." OSM:016775; *see* Pls.' Mem. at 34. As the Ninth Circuit has explained, however, an agency is entitled to "disagree[]" with or "discredit[]" the available information

without running afoul of the "best available science standard." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014).

Furthermore, Plaintiffs' argument relies on the faulty premise that acoustic recordings are determinative regarding the presence of the species. Not so. While recordings may be indicative of a potential occurrence, additional acoustic analysis and non-acoustic investigation is frequently required to corroborate recordings. *Cf. Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F.Supp.2d 540, 570 (D. Md. 2009) (noting disagreement on "whether individual bat species can be accurately identified from acoustic data" alone and, "if acoustic data suggests that a particular species is present but [it] has not been captured in mist nets, then additional mist-netting is necessary"). Indeed, underscoring the difficulty of identification, further analysis may be necessary – even after a specimen is captured. *See* 80 Fed. Reg. 17,974, 17,983 (Apr. 2, 2015) (noting that a 1976 specimen is "undergoing genetic testing" to confirm identification)

Here, while the Office acknowledged that the 2006 survey data included an "acoustic detection" of the species, OSM:016775, it was also careful to qualify this recording as a "questionable identification," and based on "acoustic survey only." OSM:016906-07. That is, without more, this recording was insufficient to confirm the species' presence. *See* OSM:016775 (finding "[n]o confirmed observations" of listed species). Nevertheless, the Office still considered whether this data, in spite

of its limitations, might speak to the likelihood of the species' presence. However, as the Office explained, this recording was at odds with the "known and predicted range" of the species, *id.*, which indicated that the limited number of observations of the species in the state (five total) had occurred only in the northeastern portion of Montana – hundreds of miles from the mine area. OSM:019163-64 (showing observations from the Montana Natural Heritage Program ("Natural Heritage")). Further, as discussed *infra*, the Office found "inadequate suitable habitat" in the mine area. OSM:017016. Both points thus supported the Office's assessment that the recording was likely "a misidentification," OSM:016775, and Plaintiffs fail to show any error in the agency's judgment.

Plaintiffs' reliance on "bat calls collected from the mine area from 2015-18 by state agencies" Pls.' Mem. at 32, is equally unavailing. Plaintiffs describe these calls as "potential northern long-eared bat calls," and fault the Office for failing to consider these calls, *id.* at 33, but their arguments are both factually incorrect and legally irrelevant. To start, these arguments are based on two documents – a log of bat calls and an "expert analysis" of these calls by Plaintiffs' own consultant, *id.* at 32 – that are extra-record and post-decisional. Both extra-record documents were exhibits to Plaintiffs' notice of intent to sue, *see* Exs. 2 and 3 to USFWS:000137, and only included at Plaintiffs' request. *See* Dkt. 31 at 2; Dkt. 31-2 at 3 (notation – "post-dates [Office's] decision; added at Plaintiffs' request"). Further, the analysis

prepared by Plaintiffs' consultant post-dates the challenged decision by more than four months, and Plaintiffs present no date-related information for the call data to indicate that it was available to the Office at the time of its decision. Hence, since these documents are not properly before this Court, Plaintiffs' arguments based on the documents should be rejected on these grounds alone. *See, e.g.*, *San Luis*, 776 F.3d at 993.

In any event, even if this Court decides to reach these arguments, Plaintiffs' arguments still falter because their underlying premise – that these bat calls were identified by "state agencies" as "likely . . . produced by northern long-eared bats," Pls.' Mem. at 32 – overstates the case. To be clear, although some calls collected by Natural Heritage were initially indicative of a potential observation of northern long-eared bats, Natural Heritage conducted further analysis, and <u>none</u> of the calls has resulted in a confirmed observation of the species. *See* OSM:019164 (showing no observations near the mine area as of April 2018).[3] Plaintiffs also contend that the Office erred because certain reports considered by the agency did not describe

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[3] The acoustic analysis of bat calls is considerably more involved than Plaintiffs suggest. *Cf. Animal Welfare Inst.*, 675 F.Supp.2d at 571-75 (describing testing protocols). However, since these documents are extra-record and post-decisional, there is no need for this Court to delve further into this technical subject. But if Plaintiffs continue to press for review of these materials, the Office may seek to submit extra-record materials in subsequent briefing for the limited purpose of "explain[ing] technical terms or complex subject matter." *San Luis*, 776 F.3d at 992 (citations omitted).

their results "at the species level." Pls.' Mem. at 33. But if such results were not available, the Office was not required to undertake new analyses. *See San Luis*, 776 F.3d at 995. The ESA only instructs an agency to consider the best scientific data available, which "does not mean the best scientific data possible,'" *San Luis*, 747 F.3d at 602, and the Office complied with that command.

Finally, Plaintiffs point out that the species has been observed in portions of Wyoming and South Dakota in ponderosa pine forests, and that the mine area also includes ponderosa pine forests – inferring that these habitat characteristics in other states must be representative of suitable habitat in Montana. *See* Pls.' Mem. at 34-35. But as Natural Heritage has explained, all captured specimens within Montana "have been in or near riparian forest dominated by cottonwood [] and green ash []." OSM:019165. These habitat characteristics do not occur within the mine area. *See* OSM:016772-73. Plaintiffs thus present no compelling grounds for displacing the Office's habitat assessment.

III. The Office Complied with NEPA

NEPA requires agencies to take a "hard look" at the environmental consequences of a proposed action and consider the relevant factors. *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66-67 (D.C. Cir. 1987). Here, the Office analyzed the impacts of the proposed action, including to air quality, health, and wildlife, and determined that they would not significantly affect the quality of the

human environment, and this complied with NEPA. OSM:016724-29, 016730-17050.

A. The Office's Analysis of the Impacts of Coal Trains Was Reasonable

Plaintiffs argue that the Office violated NEPA by failing to analyze the impacts of coal trains on wildlife, public health and from derailments. These arguments lack merit.

1. Wildlife

Plaintiffs contend that the Office failed to consider the indirect and cumulative impacts of increased coal train traffic on grizzly bear mortality, beyond the Spur. This argument is unavailing.

As an initial matter, the 2018 EA included extensive analysis on the impacts of the proposed action on wildlife. *See supra* Part II.A; *see also* OSM:016773-76, 016800-04, 016899-07. Plaintiffs nevertheless assert that the Office failed to consider the impacts to grizzly bears specifically, from increased coal train traffic along and beyond the Spur. *See* Pls.' Mem. at 29.

Under NEPA, "indirect effects" are those "caused by the [proposed] action and are later in time or farther removed in distance [than direct impacts], but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (emphasis added). "Cumulative impacts" are those "impact[s] on the environment which result[] from the

incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . ." 40 C.F.R. § 1508.7. NEPA requires agencies to engage in "'reasonable forecasting and speculation,' . . . with reasonable being the operative word." *Sierra Club v. U.S. Dep't of Energy (Sierra Club I),* 867 F.3d 189, 198 (D.C. Cir. 2017). Indeed, "NEPA . . . 'requires a reasonably close causal relationship between the environmental effect and the alleged cause,' analogous to proximate causation from tort law." *Id*. (quotation omitted).

Here, as articulated above, *supra* Part II.A, Plaintiffs have failed to establish a reasonable causal link between grizzly bear mortalities and increased coal train traffic to and from the Mine. As a general matter, "grizzly bears do not occur in the vicinity of the mine and ail spur." OSM:016925 (response to Comment 23). There is also no support in the record that coal train traffic to and from the Mine has ever resulted in grizzly bear deaths along and beyond the Spur, or that increased coal train traffic from the mine would invariably result in increased grizzly bear mortality, such that the Office would be required to take a "hard look" at this occurrence. In fact, the record indicates the opposite: grizzly bear strikes occur infrequently and are likely due to other rail traffic that traverses the routes more frequently. *See* OSM:012841 (one mortality every 10 years in the Cabinet Yaak area); *see also* OSM:016591 (35 grizzly bear deaths over a 20-year period); OSM:016787 (coal trains from the mine would account for only 25% of rail traffic between Laurel,

Montana, and Westshore Terminal, Vancouver); OSM:016925 (explaining that "[t]he rail line beyond Broadview is an existing independent utility that is also used by other rail customers[.]"). Because Plaintiffs have failed to establish a reasonable causal link between infrequent grizzly bear mortalities beyond the Spur and increased coal train traffic from the mine, the Office was not required to predict and assess hypothetical mine-related mortalities.

2. Public Health

Contrary to Plaintiffs' contention, Pls.' Mem. at 11-12, the Office thoroughly analyzed the impacts to public health along and beyond the Spur, including "increased particulate matter levels" from coal train and other locomotive emissions in non-attainment areas along the Spur. *See* OSM: 016762-64, 016790-93, 016835-37, 016848. It specifically discussed coal dust impacts on public health, relying on dispersion modeling data from the Surface Transportation Board and Environmental Protect Agency screening levels. The 2018 EA explained the potential for particulate emissions (i.e., PM10 and PM2.5) to cause serious health and environmental effects, *see* OSM:016763, and discussed the various potential exposure pathways for coal dust, including through inhalation and ingestion, *see* OSM:016837-39.

While Plaintiffs concede that the Office considered that diesel exhaust contains compounds that are likely carcinogenic to humans, *see* Pls.' Mem. at 11;

OSM:018637, 016947, they complain that the Office's analysis did not go far enough. Plaintiffs assert that the Office "failed to address whether these carcinogenic emissions from [the] coal trains would increase the cancer risk along the rail line, as the Washington Department of Ecology recently did for a project . . . ." Pls.' Mem. at 11. This argument is flawed for several reasons.

Fundamental differences between the proposed action at issue in the Washington study and the proposed action here support the Office's conclusion that approval of the mining plan modification would not result in increased cancer-risk in communities along the Spur. The Office explained that the air quality impacts analysis in the Washington study pertained to the construction and "full operation of the export terminal combined with operations from coal handling, hauling, and vessel transport," and that the EA here did not analyze the proposed action in the Washington study "as a reasonably foreseeable project because of the recent permit denial and litigation surrounding the project." OSM:016948 (response to Comment 64). The Office further articulated that "the related rail traffic analyzed in this EA [] is appreciably less and also below previously identified STB thresholds for analysis." OSM:016981 (response to Comment 150). Moreover, Plaintiffs have failed to show a reasonable causal link between the exhaust from coal trains traveling from the mine and any occurrences of cancer in communities along the Spur, that would require further study by the agency. *See Sierra Club*, 867 F.3d at 198.

Next, Plaintiffs falsely contend that the Office failed to consider air quality violations for PM2.5 in Montana communities along the Spur. As a general matter, the Office considered concentration levels of criteria pollutants—including particulate matter with aerodynamic diameters less than or equal to 2.5 microns—as established under the Clean Air Act, *see* OSM:016831-32, 016762-63, and analyzed them in the context of national and state ambient air quality standards. *See id*.

Moreover, the Office specifically considered the impacts of PM2.5 concentrations from locomotive emissions in communities along the Spur and discussed concrete measures that have been established to reduce those impacts. The rail route taken by coal trains from the mine passes through Montana counties that have been designated "non-attainment," but as the Office explained, "[n]one of these nonattainment areas have recorded a certified NAAQS exceedance for at least the last five years (EPA 2018c) and MDEQ is in the process of redesignating most of them to 'attainment'." OSM:016835-36. Plaintiffs do not (and could not) contend that Missoula, Ravalli, and Lincoln counties therefore, which are among those areas along the route, have registered exceedances for any particulate matter, including PM2.5.

They nevertheless suggest that PM 2.5 concentrations will worsen with increased locomotive emissions from increased coal train traffic from the mine, but fail to acknowledge measures implemented by the Environmental Protection Agency

and local governments to mitigate such impacts. *See* Pls. Mem. at 12; *see also* OSM:016835-36 (noting that although EPA has sole authority to "adopt and enforce locomotive emissions standards," counties like Missoula have developed projects to reduce locomotive emissions). The Office also specifically discussed the Environmental Protection Agency's evaluation of the toxic effects of diesel exhaust on human health, which includes PM2.5 concentrations, and its conclusion that "the PM2.5 NAAQS 'would be expected to offer a measure of protection from effects associated with DPM.'" OSM:016837.

Equally unsound is Plaintiffs' assertion that the Office failed to consider cumulative impacts of increased coal train traffic from the proposed action and other trains transporting coal to the same port and coal plants. *See* Pls.' Mem. at 13. Plaintiffs' argument is flawed because the Office adequately analyzed the cumulative impacts of emissions from increased coal trains from the Mine, and concluded that they would be "minor and short term." *See* OSM:016793 (noting that "[i]ncreases to port capacity are not foreseeable, so the future rate of coal transport on the Main Line would not change significantly from recent shipping rates"); *see also* OSM:016850-51. Furthermore, the Office considered evaluations of other rail transport projects and concluded that "project-related coal dust emissions, dispersion and deposition would result in negligible long-term cumulative effects to air quality and the environment." OSM:016793.

3. Derailments

The Court should dismiss Plaintiffs' argument that the agency failed to consider the impacts from coal train derailments. *See* Pls.' Mem. at 13.

The 2018 EA discussed coal train derailments in the context of its analysis on impacts from coal dust emissions, and for good reason. Reports on coal dust emissions, prepared by the Burlington Northern and Santa Fe Railway and Surface Transportation Board, state that coal dust degrades track stability. OSM:016761. In consideration of not only this risk, but also from coal dust emissions generally, the EA addressed current mitigation measures aimed at reducing coal dust emissions. OSM:016948-49, 016969-70 (Comments 65, 66 and 113). The Office then reasonably determined that conducting an analysis of the location and effects from derailments would be highly speculative because, although derailments do occur, "they are not a normal part of rail operation." OSM:016949 (response to Comment 66).

Plaintiffs disagree, insisting that impacts are not speculative because the Washington Study assessed impacts from derailments. *See* Pls.' Mem. at 14. But Plaintiffs fails to account for the significant differences between the project in the Washington study and the proposed action here, which would render such an analysis reasonable in the former and unreasonably speculative in the latter. *See*

supra Part II.A.2; *see also* OSM:016948, 016981 (response to Comment 150 noting that the project in the Washington study would involve almost eight times the daily rail traffic from the Mine).

B. The Office's Analysis of the Impacts of GHG Emissions Was Reasonable

The Court determined in its August 14, 2017 Order, that the Office's analysis of GHG emissions from coal combustion was deficient because it "quantif[ied] the benefits of the mine expansion while failing to account for the costs," although the social cost of carbon "was an available tool." *MEIC,* 274 F. Supp. 3d at 1094. Although the Court recognized that NEPA (40 C.F.R. § 1502.23) does not require agencies to conduct a cost-benefit analysis or incorporate it in an EA, it held that once an agency monetizes the benefits of a proposed action, it would be arbitrary and capricious to not also monetize the costs if there are available methods for doing so. *Id*. at 1096. To be clear, the Court did not order the Office to prepare, on remand, a cost-benefit analysis, or to use the social cost methodology[4] if it chose to conduct such an analysis.

Plaintiffs take no issue with the adequacy of the Office's disclosure of project-related (direct and downstream) GHG emissions or the Office's quantification of those emissions. They complain instead that the Office violated NEPA by not

[4] This is a tool that "attempts to value in dollars the long-term harm done by each ton of carbon emitted." *Sierra Club I*, 867 F.3d at 1375.

converting that quantity of GHG emissions to a dollar figure. Plaintiffs contend that the Office's analysis of GHG emissions was inadequate because it failed to conduct a cost-benefit analysis using the social cost of carbon. Pls.' Mem. at 15-20. They assert that the social cost of carbon is "the best available science for assessing the actual effects of GHG pollution," and the agency failed to use it. *Id*. at 16 (emphasis omitted). Plaintiffs' are wrong for a number of reasons.

First, the 2018 EA included only a brief discussion on the benefits of mine expansion. Plaintiffs nevertheless argue, incorrectly, that the agency "inflated the economic benefits" of mine expansion "while 'zero[ing]' the enormous costs of GHG emissions," because the EA mentioned that mine expansion would result in $1.39 billion in revenue. Pls.' Mem. at 15-16 (alteration in original) (quotation omitted). The Office, in its qualitative analysis of socioeconomic impacts, provided an abbreviated quantification of three benefits of mine expansion: revenue to be generated from expansion, payroll for Mine employees, and state-tax revenue, and this complied with NEPA. *See* OSM:016908-11; see also *WildEarth Guardians v. Zinke,* 368 F. Supp. 3d at 78 (distinguishing the brief discussion of economic benefits in that case with the discussion in *High Country Conservation Advocates v. United States Forest Service*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014), and opining that "the Court does not agree that the EA's cursory discussion of the economic benefits of oil and gas development obligated BLM to specifically monetize climate

change[.]"); *see also* 40 C.F.R. § 1502.23 ("[T]he weighing of the merits and drawbacks of the various [NEPA] alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations.")

Second, the Office reasonably articulated why it declined to use the social cost of carbon. It explained that "the SCC protocol does not measure the actual incremental impacts at the project-level on the environment and does not include all costs or benefits from carbon emissions." OSM:016881-82. The Office also stated why its socioeconomic impacts assessment, as required by NEPA, does not amount to a cost-benefit analysis, *see id.*, distinguishing economic impact from economic benefit, and explaining that NEPA requires a socioeconomic analysis. *See* OSM:016918 (explaining that "the social cost of carbon without a full cost-benefit analysis is of very limited utility to the decisionmaker").

Third, the Office's well-reasoned explanation is entitled to deference. *See WildEarth Guardians v. Zinke,* 368 F. Supp. 3d at 79 (citing *EarthReports, Inc. v. F.E.R.C.*, 828 F.3d 949, 956 (D.C. Cir. 2016)). It is not the role of the Court to choose between differing methodologies, but simply to determine whether the agency's chosen methodology was rational. *See Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005) (courts should defer to

agency's scientific and technical expertise). Here, Plaintiffs have failed to cite to any authority that an agency violates NEPA by not including the social cost of carbon in its NEPA analysis. *MEIC,* 247 F. Supp. 3d at 1095-96 (stating that NEPA does not require a cost-benefit analysis or the use of the social cost of carbon protocol); *see also WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 79 (citing *W. Org. of Res. Councils v. BLM*, No. 16-21-GF-BMM, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018), *appeal dismissed,* Nos. 18-35836, 18-35847, 18-35849, 18-35869, 18-35870, 2019 WL 141346 (9th Cir. Jan. 2, 2019)). Moreover, although Plaintiffs believe the social cost of carbon is the "best science available," (which is debatable) the methodology to be applied is within the agency's expertise and discretion. *See Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 922 (9th Cir. 2018) (deferring to agency's methodology).

Fourth, the social cost of carbon was designed to inform rulemakings, and not adjudications. "The technical supporting documents and associated guidance"—which were specifically geared toward regulatory impacts analyses for the now rescinded Executive Order 12866—"have been withdrawn," OSM:016922, and thus the agency was not required to consider them during the decision-making process for the proposed action. Moreover, Plaintiffs have failed to cite to any authority that the Office was required to consider the analyses in those documents.

C. The Office is Not Required to Prepare An EIS

In a case challenging a FONSI the Court must ensure "that an agency has taken the requisite 'hard look' at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors." *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1133, 1156 (D. Mont. 2014) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)), *on partial reconsideration,* 52 F. Supp. 3d 1160 (D. Mont. 2014), *appeal filed,* No. 19-35004 (9th Cir. Jan. 4, 2019). An agency's decision to issue a FONSI is entitled to "substantial deference." *Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1145 (D. Mont. 2004).

The FONSI in this case examined the ten significance factors in 40 C.F.R. § 1508.27 and reasonably concluded that none of them requires an EIS. *See* OSM:016726-29. Yet Plaintiffs complain that the Office failed to provide a convincing statement of reasons why impacts to public health would not be significant. *See* Pls.' Mem. at 21-22. The record belies this complaint. As articulated above, it shows that the agency adequately considered impacts of the proposed action on public health, including the question of increased cancer risks along the Spur, and reasonably concluded that the impacts would be negligible to minor. *See* supra Part III.A.2; *see also* OSM:016727-28; OSM:018637, 016947-48.

Next, Plaintiffs argue that impacts from coal transportation and combustion are highly controversial based on statements from scientists and economists,[5] thus requiring the preparation of an EIS. *See* Pls.' Mem at 24. But "controversy is not [to be] equated with opposition to use." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997); *see also WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 81 ("Controversy in this context is not measured by the intensity of the opposition"). "Rather, an action is highly controversial only if there is, at minimum, 'a substantial dispute . . . as to the size, nature, or effect of the major federal action.'" *Id.* (alteration in original) (internal citation omitted). Some courts have even suggested "that even a substantial dispute may not suffice; there must be 'scientific or other evidence that reveals flaws in the methods or data relied upon by the agency in reaching its conclusions.'" *Id.* (quotation omitted). Here, the 2018 EA's clear articulation of the effects of the proposed action supports its conclusion that "[t]here is little scientific controversy over the nature of the impacts" from the proposed action." *See* OSM:016727-28. And Plaintiffs' disagreement with the Office's chosen methodology for assessing impacts is insufficient to render the proposed action controversial. *See Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 871-72 (9th Cir. 2004) (deference is due to the agencies'

[5] Plaintiffs' contention that the Office failed to address the issues raised in their consultants' declarations, *see* Pls.' Mem. at 23, is false. *See* OSM:016917-016984 (App. I responding to Plaintiffs' declarants).

scientific and technical expertise); *see also Friends of Santa Clara River*, 887 F.3d at 922 (deferring to agency's chosen methodology); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 235 (D.D.C. 2003) ("While plaintiffs have identified serious gaps in defendants' assessment of the local effects of the proposed action, they do not appear to have identified any scientific controversy *per se* as to the extent of the effects . . . ."). Moreover, Plaintiffs have failed to show that "the magnitude" of the effects identified by their experts, "is significantly higher than [the Office] represented . . . [or that the Office] faced opposition from other government agencies with stakes or 'special expertise' in [the proposed action]," such as to require the preparation of an EIS. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 82.

Furthermore, although the agency stated that there is "some uncertainty about the long-term cumulative effects of GHGs and how these effects can be managed when not currently quantifiable or predictable," OSM:016728, this uncertainty does not require the preparation of a more detailed impact statement because the proposed action does not "involve unique or unknown risks," *id*. The uncertainty factor is generally implicated "when an action involves new science . . . ." *WildEarth Guardians v. Zinke,* 368 F. Supp. 3d at 82. This is not the case here because coal mining is commonplace in the mountain west and the uncertainties Plaintiffs point to concerning the quantification of GHG and non-GHG emissions do not establish uncertainty as to the effect of those emissions. *See id*. at 82-83.

Plaintiffs further contend that a more convincing statement of reasons is required because GHG emissions from the proposed action will have cumulatively significant impacts. *See* Pls.' Mem. at 24-25. But this assertion is unavailing. The Office estimated the emissions from the mine, in the context of global, national and state projections, and assessed the downstream impacts of coal combustion. *See* OSM:016766-69, 016878-80. It found that the proposed action would emit only "0.04 percent of annual US GHG emissions, and 6.43 percent of annual projected Montana emissions," and thus the "[i]ncremental effects of the proposed action . . . on climate are expected to be minor in the short and long-term[.]" OSM:016794. Plaintiffs' claim that the agency merely provided a conclusory statement on the cumulative impacts from GHG emissions is therefore unsubstantiated.

Equally unsound is Plaintiffs' assertion that an EIS is required because coal trains and mining operations may adversely affect grizzly bears and northern long-eared bats. *See* Pls.' Mem. at 25. However, as explained above, the 2018 EA's analysis of impacts to these species was adequate. *See supra* Part II.

Finally, Plaintiffs argue that any potential discharge of coal dust into surface waters is a threatened violation of federal law (specifically, the Clean Water Act) under 40 C.F.R. § 1508.27(b)(10), and as such an EIS is required. *See* Pls.' Mem. at 25. Plaintiffs' contention is fundamentally flawed. Rail operations are outside the jurisdiction of the Office and it is the responsibility of rail operators to comply

with federal law. *See* OSM:016924 (response to Comment 22). Plaintiffs fail to cite to any authority that Office is required to monitor or otherwise account for threatened violations of the Clean Water Act. Moreover, Plaintiffs do not argue that the approval of the proposed action would itself constitute a violation of the Clean Water Act, and they could not because the 2018 EA was prepared in consultation with various stakeholders, including the Environmental Protection Agency which has responsibility for enforcing the Clean Water Act. *See* OSM:0106729. There is no suggestion in the record that the Environmental Protection Agency ever contended that the proposed action constitutes or otherwise threatens a violation of the Clean Water Act. The Court should therefore deny Plaintiffs' motion for summary judgment.

IV. Plaintiffs Fail to Justify Their Request For Injunctive Relief

A. Injunctive Relief for NEPA Violations Is Inappropriate

Even if the Court determines that the 2018 EA is inadequate, Plaintiffs have not demonstrated that a wholesale injunction prohibiting the mining of federal coal in the Amendment 3 area is warranted. There is no presumption of an injunction for NEPA violations, *see Montsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010), and a determination on the propriety of awarding injunctive relief should be based on the four-factor test articulated in *Montsanto*. Plaintiffs must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as

monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 156-57 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Here, Plaintiffs have failed to discharge their burden under *Monsanto*.

1. No evidence of irreparable harm

Plaintiffs claim that once land subsides, it cannot be undone, and that pollution from coal trains inflict permanent harm on children and wildlife. *See* Pls.' Mem. at 39-40. However, federal surface mining regulations require that operators repair damage to surface lands, 30 C.F.R. § 817.121(c)(1),[6] and, federal and state law regulate and impose penalties for violations of air quality standards.

2. Neither the equities nor the public interest support injunctive relief

Plaintiffs have failed to establish that the public interest and the equities demand a broad injunction on the mining of federal coal in the Amendment 3 area. They contend that the social cost of carbon methodology demonstrates that

[6] Because Montana is the primary surface mining regulatory authority, State law, not this Federal regulation, is operative in Montana; however, the Montana State law must be consistent with the Federal regulation. 30 U.S.C. § 1255(a); 30 C.F.R. §§ 730.5, 926.10.

"continued coal combustion" would ultimately result in economic harm to the public. Pls.' Mem. at 41. But, as discussed above, NEPA does not require the Office to conduct a cost-benefit analysis, and the Office reasonably articulated why the methodology is unworkable. *See supra* Part III.B. Moreover, considering the adverse impacts injunctive relief would have on local communities dependent on the mine, the public interest and equities support alternate relief. *See* OSM:016779-81 (discussing the local economy); OSM:016745 (noting that approximately 260 miners depend on the mine).

B. No Injunction Is Warranted For Alleged ESA Violations

While the Ninth Circuit has held that three of the four factors considered for injunctive relief are presumed to apply in the context of the ESA, *see Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018) (citation omitted), it has also emphasized that no such presumption applies to the remaining factor – irreparable harm. *Id.* at 818. Hence, even under the ESA, a plaintiff must show "that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22.

Plaintiffs make no such showing here. Their wholly speculative allegations of harm only show, at most, that harm may be possible – not that harm is likely, as discussed *supra*. Moreover, while the Ninth Circuit has held an injunction may be based on a "lesser magnitude of harm" than a "short-term extinction-level threat,"

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803, 819 (9th Cir. 2018), to count "any taking of a listed species as irreparable harm would produce an irrational result." *Defenders of Wildlife v. Salazar*, 812 F.Supp.2d 1205, 1209 (D. Mont. 2009). Rather, as this Court has held, "irreparable injury requires harm 'significant' to the 'overall population.'" *Id*. at 1210. No such harm is shown – or alleged – here.

C. Remand Should Be Without Vacatur, Or in the Alternative, Deferred Vacatur

"Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action. . . . In other words, a court should 'vacate the agency's action and remand to the agency to act in compliance with its statutory obligations.'" *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) (internal citations omitted), *rev'd and remanded sub nom. Coeur Alaska, Inc. v. Se. Alaska Conservation Council,* 557 U.S. 261 (2009). But vacatur is not required in every case. "'[W]hen equity demands, [a flawed action] can be left in place while the agency follows the necessary procedures' to correct its action." *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (internal quotation omitted). When determining whether to vacate an agency decision, courts in the Ninth Circuit consider the seriousness of an agency's errors and the disruptive consequences that would result from vacatur. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Here, Plaintiffs' brief

suggest that the agency's most serious error is the failure to conduct a cost-benefit analysis using the social cost of carbon, which the Office was not required to do under NEPA. Moreover, the most disruptive consequences from vacatur would be the socio-economic fallout from the loss of approximately 260 mining jobs. Remand without vacatur would have less devastating impacts on communities that depend on the mine.

In the alternative, the Court could defer vacatur, thus giving the Office time to correct any deficiencies in the NEPA analysis without impacting the operations of the mine. *See WildEarth Guardians v. Zinke*, No. CV 17-80-BLG-SPW-TJC, 2019 WL 2404860, at *16 (D. Mont. Feb. 11, 2019); *WildEarth Guardians v. OSMRE*, Nos. CV 14-13-BLG-SPW-CSO, CV 14-103-BLG-SPW-CSO, 2015 WL 6442724, at *9 (D. Mont. Oct. 23, 2015), Nos. CV 14-13-BLG-SPW-CSO, CV 14-103-BLG-SPW.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion for Summary Judgment, and grant Federal Defendants' Cross-Motion for Summary Judgment.

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Respectfully submitted,

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