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ATTORNEYS FOR SIGNAL PEAK ENERGY, LLC

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

350 MONTANA, MONTANA ENVIRONMENTAL INFORMATION CENTER, SIERRA CLUB, WILDEARTH GUARDIANS, Plaintiffs, vs. DAVID BERNHARDT, in his official capacity as Acting Secretary of the Department of the Interior, UNITED STATES OFFICE OF SURFACE MINING, an agency within the U.S. Department of Interior, et al, Defendants. and SIGNAL PEAK ENERGY, LLC, Defendant-Intervenor.	Case No. 9:19-cv-00012-DWM **SIGNAL PEAK ENERGY'S REPLY BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This case concerns the Office of Surface Mining Reclamation and Enforcement's ("Office of Surface Mining's") satisfaction of its obligations under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") in authorizing the Bull Mountain Mine expansion permit ("AM3"). This case is not about whether the agency has met Plaintiffs' escalating demands for "amassing needless detail" on remote and speculative impacts and outcomes over which the Office of Surface Mining has no control. 40 C.F.R. § 1500.1(b). Accordingly, Plaintiffs' strained attempt to find fault with the agency's sound analysis should be rejected.

ARGUMENT

I. THE EA COMPLIES WITH NEPA'S REQUIREMENTS.

NEPA's disclosure requirement is rooted in a desire for better decision-making. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989); 40 C.F.R. § 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."). Thus, agencies must focus on impacts specific to the proposed action and examine them in proportion to their significance. 40 C.F.R. §§ 1500.1(b), 1502.2(b). Where impacts are anticipated to be less likely or less substantial, NEPA regulations direct that the analysis be similarly less detailed. *Id*. § 1502.15. The Court must make a "pragmatic

judgment" whether the EA fosters informed decision-making; *i.e.*, whether it includes "a *reasonably thorough* discussion of the *significant aspects* of the *probable* environmental consequences." *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1150-51 (9th Cir. 1997) (emphasis added) (citation and quotations omitted, emphasis added); *see San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 621 (9th Cir. 2014) ("[T]he fact that the [agency's] explanation for its choices does not fully address every possible issue that flows from that choice does not render the [agency's] determination unreasonable or unsupported."); *Alliance for Wild Rockies v. Bradford*, 864 F. Supp. 2d 1011, 1021 (D. Mont. 2012).

A. The Office of Surface Mining Took a Hard Look at Coal Train Impacts.

1. Grizzly Bears

Plaintiffs argue the Office of Surface Mining should have analyzed the impacts of train traffic on wildlife, and grizzly bears in particular. Pl. Resp. at 1-5. Yet, they do not demonstrate that the agency's analysis was arbitrary and capricious given the remote and speculative nature of the alleged impacts.

First, despite making only a passing reference to wildlife other than bears in their opening brief (Pl. Br. at 6), Plaintiffs now demand a detailed analysis of train and wildlife interactions, citing the Washington Department of Ecology's

Environmental Impact Statement ("EIS") for the Millennium Bulk Terminals. Pl. Resp. at 2 (citing AR004481). But that EIS merely notes the possibility of train strikes and reaches the unremarkable conclusion that increased train traffic increases the risk to wildlife. AR004481. Plaintiffs cite no mine-specific information the Office of Surface Mining should have considered.

Second, Plaintiffs offer no new information on grizzly bear strikes, citing the same references showing three strikes in 30 years in the Cabinet-Yaak Ecosystem, and one additional bear mortality in the Selkirk range in 2016. AR012825-26,[1] 12841; AR017589. NEPA regulations restrict the depth of the agency's analysis of such remote impacts, and this Court did not change that limitation. While this Court identified train traffic as an indirect effect of the mine expansion, it did not designate the "importance" of each aspect of train traffic to the agency's decision, leaving that determination to the agency.[2] *MEIC v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1091-93 (D. Mont. 2017). The agency's decision not to

[1] Plaintiffs state that the data shows 3 mortalities since 2001 but leave out the fact that from 1982-2001, not one grizzly bear strike was recorded. *See* AR01285.

[2] Notably, Plaintiffs did not raise these arguments in their original lawsuit, perhaps signaling their insignificance and perhaps pointing out Plaintiffs' unthinking opposition to this mine. *See Montana Elders for a Livable Tomorrow v. U.S. Office of Surface Mining*, No. 9:15-cv-00106-DWM (D. Mont.), Doc. 1(Complaint); Doc. 41 (Pl. Br. in Support of Mot. for Sum. Jud.); Doc. 55 (Pl. Resp./Reply).

analyze train strikes to grizzly bears was reasoned in light of the remote nature of the impacts and the agency's lack of control over the train traffic, speeds, and routes. AR000199.

2. Coal Train Locomotives

Plaintiffs continue to flyspeck the EA's analysis of coal locomotive emissions. *First*, defendants did not concede that $PM_{2.5}$ emissions are not transitory and that they accumulate in local airsheds. The only authority Plaintiffs cited on this point is a geographically-specific air study where the author admits that the topography and orientation of train traffic "in the Puget Sound region may also exacerbate the accumulation of $PM_{2.5}$ from trains." AR006130. Nor was the study designed to address "the health effects . . . from rail traffic." AR006130. This inconclusive and site-specific study does not undermine the agency's analysis. Regardless of whether train locomotive emissions are transitory, the agency calculated them and considered their impacts. *See infra* at 5.

Second, Plaintiffs cite the Millennium Bulk Terminals EIS as the standard to which the EA should be held. Pl. Resp. at 5-6. That EIS, however, was prepared by a state agency to meet the requirements of the Washington State Environmental Policy Act, not NEPA. AR003983. And the action under review was an export terminal specifically designed to offload coal from rail (up to eight trains per day) that would otherwise not be traveling the tracks. AR003985. Here, the agency's

discussion of Environmental Protection Agency findings on the carcinogenic effects of diesel particulate matter was reasonable given the attenuated nature of the alleged impacts. *See* Doc. 42 at 10-12; *San Luis*, 747 F.3d at 621.

Third, regardless of whether the agency mis-stated the 24-hour $PM_{2.5}$ standard in one table, its analysis of $PM_{2.5}$ emissions was adequate.[3] The Office of Surface Mining calculated the $PM_{2.5}$ emissions for each roundtrip train carrying coal from the Mine (approximately 42 tons). AR000112. Then the agency acknowledged that particulate emissions such as $PM_{2.5}$ and PM_{10} "can affect the heart and lungs and cause serious health effects," AR000041, describing those effects in greater detail in Appendix B, which is devoted to air quality impacts, AR000110-14. This analysis reflects the agency's "hard look," and one typo does not render the agency's decision arbitrary and capricious. *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir 1998).

Finally, the scope of the Office of Surface Mining's authority is entirely relevant to the scope of the NEPA analysis. While NEPA requires consideration of indirect impacts, even where they may be beyond the agency's control, the Supreme Court's decision in *Department of Transportation v. Public Citizen*, 541

[3] The $PM_{2.5}$ standard was correctly stated elsewhere in the EA. *See* AR000110 (Table B-3).

U.S. 752, 770 (2004), identified an important limitation on that review. *Public Citizen* requires the court to determine first whether the agency action is a "legally relevant" cause of the downstream effect. If the agency's action is not a legally relevant cause—i.e., "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," it need not be analyzed. *Id*. The "touchstone" of *Public Citizen* and the subsequent cases applying this principle is that "an agency need not consider environmental effects that cannot influence its decision." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73 (D.D.C. 2019).

For instance, in *WildEarth Guardians*, the Bureau of Land Management had authority to choose either to lease or to decline to lease the public lands on the basis of environmental impacts; thus, its leasing decision was a legally relevant cause that required analysis of downstream indirect effects. *Id*. at 73. Similarly, in *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017), because FERC could decline to authorize a natural gas pipeline "on the ground that [it] would be too harmful to the environment," downstream environmental effects had to be considered. By contrast, where an agency cannot refuse to approve a proposed action based on the effects of other activities "over which [it] has no regulatory authority," those effects need not be considered. *Sierra Club v. FERC*, 827 F.3d 36, 48 (D.C. Cir. 2016).

Here, the Office of Surface Mining has no regulatory authority to either deny the mine permit or condition it based on environmental impacts over which it has no control. *See* Doc. 42 at 14-15.[4] The scope of the Office of Surface Mining's authority is circumscribed by the Mineral Leasing Act and Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 201(a)(3)(C), 1211(c)(1), 1273(c); 30 C.F.R. § 746.13, and the agency cannot deny a mine permit on the basis of downstream transportation effects.[5] Thus, the agency's analysis of those effects far exceeded NEPA's requirements.

3. Train Derailments

Plaintiffs assert the Office of Surface Mining should have considered causes of train derailment other than coal dust deposition, but they decline to identify any causal factors the agency overlooked. Pl. Resp. at 10-12.

Standing Rock Sioux Tribe v. Army Corps of Eng'rs, 255 F. Supp. 3d 101 (D.D.C. 2017), is inapposite. There, the alleged deficiency in the agency's review

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[4] The Magistrate Judge's findings in *WildEarth Guardians v. Zinke*, 2019 WL 2404860 (D. Mont. Feb. 11, 2019) do not address this issue. The decision cites to requirements that the agency consider "information prepared in compliance with [NEPA]." *Id.* at *18. Of course, NEPA alone cannot expand an agency's statutory authority. *See Pub. Citizen*, 541 U.S. at 770. In any event, the Magistrate Judge's recommendations have not yet been accepted the by District Court Judge and are currently being challenged by the parties in that case.

[5] Compare 30 U.S.C. § 201(a)(3)(C) requiring the Secretary to consider "impacts on the environment" *prior to* issuing a coal lease.

– risk of spill on a specific section of pipeline – was central to the agency's decision, which approved precisely that section of pipeline. *Id*. at 125-26. And the court held that the agency's conclusion was supported by the record. *Id*. at 126-27. Here the alleged deficiency – analysis of train derailments – is far outside of the Office of Surface Mining's authority to control. Nevertheless, the agency considered the effects of coal dust deposition, acknowledged that excessive emissions can potentially increase the risk of derailment, and described existing mitigation measures. AR000039, AR000065, AR000222-23, AR0000243-44. This analysis was proportional to the remote and speculative nature of the impact and the agency's authority.

B. The Office of Surface Mining Considered the Social Costs of Carbon.

Inexplicably, Plaintiffs persist in ignoring that the Office of Surface Mining considered the quantified social costs associated with downstream greenhouse gas emissions from overseas combustion of Bull Mountain coal—the very calculations they claim should have been done. Pl. Resp. at 12-16. The agency acknowledged that application of the social cost of carbon metric showed costs ranging from $247 million to $10.5 billion, but determined that for all the reasons articulated in the EA and response to comments, the calculations were not helpful to its decision-

making. AR000192, AR000226-28; *see also* Doc. 42 at 17-18. It is unclear what more Plaintiffs would have the agency do.

Further, the Office of Surface Mining did not attempt a cost-benefit analysis of the mine expansion.[6] AR000155-56, AR000205-207, AR014076-86. As the Council on Environmental Quality's recent draft guidance provides, "Monetization or quantification of some aspects of an agency's analysis does not require that all effects, including potential effects of [greenhouse gas] emissions, be monetized or quantified." 84 Fed. Reg. 30,097, 30,099 (June 26, 2019). While the agency calculated the estimated gross revenues from the mine expansion, as agencies almost invariably do for socio-economic analyses, AR000187 (estimating revenues of $957 million),[7] that analysis did not trigger a requirement to monetize environmental impacts.

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[6] Nor did the agency "zero" the social costs of its decision. The EA did not assume that the no action alternative would result in the same quantity of coal combustion—i.e., that Bull Mountain Coal would be replaced in the market, AR000225—even though unrebutted expert analysis demonstrates that it likely would be replaced, AR000192, AR000226, AR005514-16.

[7] Plaintiffs question the difference in socio-economic impacts between $23 million in the prior analysis and approximately $957 million in the current EA. First, the 2015 EA did not quantify socio-economic impacts *at all*, determining that there would be no new impacts. 2016 AR at 004214. The $23 million figure cited by the Plaintiffs actually appeared in the 2011 Leasing EA and was a reference to *annual state* tax revenues only. 2016 AR at 004485. By contrast, the revenue figure in the current EA includes local, state, and federal wages, business transactions, royalties and taxes for the entire nine years. AR000187.

The agency's decision to calculate cumulative project emissions and compare these to global emissions was well within its discretion. 84 Fed. Reg. at 30,099; *WildEarth Guardians*, 368 F. Supp. 3d at 78. Plaintiffs' claim that this comparison was misleading is not credible. The Bull Mountain coal is shipped to Asia; it is not consumed locally, regionally, or even nationally. Thus, to the extent Plaintiffs experience any effects of those emissions, they will be as a miniscule contribution to *global* climate change. AR000070, AR000247.

C. The Office of Surface Mining's Finding of No Significant Impact Was Not Arbitrary and Capricious, and No EIS Is Required.

As before, Plaintiffs rely heavily on their allegations of inadequately detailed NEPA analyses as the basis for asserting an EIS was required. Their claims fail for the following reasons.

First, contrary expert opinions do not mandate an EIS. Plaintiffs argue that by submitting reports disagreeing with the Office of Surface Mining's choice of climate change methodology and analysis, they have generated controversy sufficient to require an EIS. Pl. Resp. at 17-20. Not so. It is axiomatic that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Nat. Res. Council,* 490 U.S. 360, 378 (1989); *see also Bradford*, 864 F. Supp. 2d at

1021. Further, while Plaintiffs tout their experts' opinions on the utility of the social cost of carbon methodology, they again bypass the fact that the agency actually considered its outputs. AR000192. So if there is any controversy or uncertainty over whether the calculations should be done or considered by the agency, it has been resolved in Plaintiffs' favor—Plaintiffs just disagree with the agency's ultimate decision to permit the mine expansion in spite of those alleged impacts, which is not a basis for rejecting an agency's NEPA decision. *Nat'l Parks & Conservation Ass'n v. U.S. Dept. of Transp.*, 222 F.3d 677, 682 (9th Cir. 2000); *WildEarth Guardians*, 368 F. Supp. 2d at 81-82.[8]

Second, the agency did not avoid consideration of climate change impacts. *See supra* at I.B. Further, Signal Peak's concern is not that consideration of uncertain climate change impacts will "prolong NEPA reviews." Pl. Resp. at 21 (citing Doc. 42 at 22). Rather, if the inherent and inevitable uncertainties around modeling global climate change impacts are enough to trigger an EIS, then no project touching on climate change concerns will ever be able to make use of an EA. This is not the purpose of the NEPA regulations, which is to address proposed

[8] Plaintiffs' attempt to distinguish *WildEarth Guardians* is unavailing. In that case, BLM had not prepared *any* calculation of downstream combustion emissions, and the "less than one ton" figure that Plaintiffs cite was for emissions from *drilling* a single oil and gas well. 368 F. Supp. 3d at 55-56.

actions that are novel to the agency or for which the impacts are not yet known. *See Conservation Congress v. U.S. Forest Serv.*, 235 F. Supp. 3d 1189, 1204 (E.D. Cal. 2017) (proposed action did not use new techniques, was not unique to the region, and was not experimental). The Office of Surface Mining has authorized hundreds of mine plans, and the environmental impacts of doing so are well understood.

Third, Plaintiffs double down on their argument that the significant consequences of cumulative global climate change require an EIS. Pl. Resp. at 22-23. However, the significant concern raised by global greenhouse emissions does not render *every* project related to such emissions significant by virtue of global cumulative effects. Doc. 42 at 22. While some projects may have cumulatively significant impacts on climate change, minor or negligible contributions (0.04% of global annual emissions) to a problem of global proportions are not a basis for requiring an EIS. This is particularly so when the authorizing agency cannot base its decision on these effects.

Fourth, impacts to bats and bears do not warrant an EIS. *See supra*, at I.A.1, and *infra* at II.

Finally, Signal Peak did not dispute whether coal trains require Clean Water Act permits because, ultimately, it is irrelevant to the action under NEPA review – the mine expansion permit. To be sure, there is substantial litigation over whether

the Clean Water Act's discharge permit requirements apply to indirect conveyance of pollutants to waters of the United States. *See, e.g.*, Brief for Petitioner, *County of Maui v. Hawai'i Wildlife Fund,* No. 18-260 (U.S. Supreme Court, On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit) (May 20, 2019), *available at*: https://www.supremecourt.gov/DocketPDF/18/18-260/99095/20190509124241199_BriefForPetitioner050919.pdf. This Court need not address that issue, which is well beyond the Office of Surface Mining's purview. *See* Doc. 42 at 23.

II. NORTHERN LONG-EARED BATS AND GRIZZLY BEARS WILL NOT BE ADVERSELY AFFECTED BY THE PROPOSED ACTION; THE ESA DOES NOT REQUIRE CONSULTATION.

Courts in this district have long held that Endangered Species Act ("ESA") "claims are reviewed under the Administrative Procedural Act ("APA") irrespective of whether an ESA claim is brought under the APA or the citizen suit provision." *Native Ecosystems Council v. Marten*, 334 F. Supp. 3d 1124, 1129 (D. Mont. 2018) (citation and quotations omitted). Thus, the APA's "highly deferential" arbitrary and capricious standard applies. *See Bradford*, 864 F. Supp. 2d at 1018-19. This standard "presum[es] the agency action to be valid and requires affirming the agency action if a reasonable basis exists for its decision." *Id*. (quoting *Kern Co. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006)).

A. Plaintiffs May Not Rely on Extra-Record Evidence.

The Court's review is, with four exceptions, confined to the agency's record. *Marten*, 334 F. Supp. 3d at 1129. Plaintiffs claim they may submit extra-record evidence to support an ESA claim (Pl. Resp. at 27-28), citing an interpretation of *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011), that courts in this district have repeatedly rejected. *See Marten*, 334 F. Supp. 3d at 1129. The courts concluded that "the better view . . . is that the traditional four exceptions still apply to plaintiffs' requests for supplementation of the administrative record for ESA claims, but the narrowness of the construction of these exceptions . . . should be relaxed for such claims." *Alliance for the Wild Rockies v. Kruger*, 950 F. Supp. 2d 1172, 1177 (D. Mont. 2013).

Plaintiffs agreed to a briefing schedule with an opportunity to move to supplement the record – they chose not to do so.[9] Despite now relying on extra-record evidence, they do not even attempt to argue the evidence meets one of the four traditional exceptions. *See* Pl. Resp. at 27-28. As they have provided no basis to include the information, the Court should not consider it.

[9] Some documents Plaintiffs cite were included, at their request, with the Administrative Record, but the Plaintiffs' documents are not part of the agency's record. *See* FWS Administrative Record Index, Row 25 (noting the information "post-dates OSM's decision"). It cannot be argued that the post-decisional information submitted by the Plaintiffs was "directly or indirectly considered by agency decision-makers." *Marten*, 334 F. Supp. 3d at 1129.

B. Plaintiffs Do Not Provide Evidence of Northern Long-Eared Bats Sufficient to Override the Expert Agencies' Determination that They are Not Present.

Plaintiffs mischaracterize the legal standard the agency applied, calling it a "confirmed observation" standard. Pl. Resp. at 29. To the contrary, the agency considered multiple lines of evidence including observational data and habitat suitability to determine that the species is not in the action area. AR016583. Indeed, Montana Natural Heritage Program's species profile, cited in the EA, includes multiple models to identify *potential* habitat for the northern long-eared bat in the state, each concluding that the *only* potential habitat is on the North Dakota border. *See* Montana Natural Heritage Program, Northern Myotis (*Myotis septentrionlis*) Predicted Suitable Habitat Modeling, available at http://mtnhp.org/models/files/Northern_Myotis_AMACC01150_20181107.pdf.

Plaintiffs dispute the agency's conclusion, but "[w]hen there are differing views as to the impact of an agency action on a protected species, . . . an agency has 'discretion to rely on the reasonable opinions of its own qualified experts.'" *Bradford*, 864 F. Supp. 2d at 1021 (quoting *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (en banc)). Following the Ninth Circuit's instruction to "stay out of scientific debates," this Court upheld an agency's determination that a species is not within the action area where "there had been neither any credible grizzly sightings nor evidence of grizzly habitation" in over 7 years. *Id.* at 1020.

Another court in this district similarly upheld an agency determination that a species was not present in the action area against "unconfirmed sightings documented in the EIS from an unknown time outside of the Project area." *Kruger*, 950 F. Supp. 2d at 1181. The court noted that there, and in *Bradford*, the action agency had "inter-agency support" in the form of the Service's list identifying species that may be present in the action area. *Id.*

So too here. The Office of Surface Mining, Service, and Montana Natural Heritage Program agree, based upon survey data and habitat analysis, that northern long-eared bats are not present in the action area. *See* AR016598; AR000052. The Plaintiffs' argument to the contrary – based on post-decisional, extra-record information – is at most a difference of opinion. *See* Doc. 42 at 25-28. Even though Plaintiffs' identified experts are willing to opine (months after the agency made its decision) that unverified acoustic records *could* be northern long-eared bats, it was not clear error for the Office of Surface Mining to concur with the determination of expert agencies that the species is not present in the action area.

C. Grizzly Bears Are Not in the Action Area and Any Effects Are Not Reasonably Certain to Occur.

Plaintiffs' argument that the Office of Surface Mining should have considered the potential for grizzly collisions with coal trains is premised on the assertion that such incidents qualify as indirect effects requiring consultation as

part of the "action area."[10] Pl. Resp. at 24-27. The record before the agency amply demonstrates that train strikes are extremely rare (*see supra* I.A.1) and thus do not meet the regulatory definition of an "indirect effect" – one that is "reasonably certain to occur" – requiring consultation as part of the action area. 50 C.F.R. § 402.02.

Nevertheless, Plaintiffs argue that such incidents are common enough to be "reasonably certain to occur." Their argument rests on the post-decisional declaration and non-peer reviewed report of retired biologist David Mattson (dated at least five months *after* the Office of Surface Mining made its decision). *See* Pl. Resp. at 25-26 (citing Mattson Declaration (Doc. 37-4)). The declaration betrays a fundamental misunderstanding of the proposed action. Mr. Mattson assumes AM3 will *increase* the trains crossing grizzly habitat. *See* Mattson Decl. ¶¶ 9, 15-16. However, the agency found that AM3 will *not* increase the rate of coal removal. AR000031. Further, Mr. Mattson uses inconsistent numbers, making it difficult, if not impossible to verify his claims. *See id.* ¶ 8.[11] Finally, Mr. Mattson seems to

[10] Plaintiffs also claim that the record "shows" that the Office of Surface Mining confined the action area to the area around the Mine. However, the Service stated that its identification of species would include species "that exist in another geographical area" if the project "could affect" such species. AR016605. The Service did not identify grizzly bears as a such a downstream species. *Id.*

[11] Mr. Mattson claims there have been 56 train-caused mortalities on Burlington Northern Railway track since 1997. Mattson Decl. ¶ 8. The report does not

have focused his analysis of train impacts on more "heavily used" rail segments in Canada and attempted to extrapolate that experience to the admittedly less trafficked, U.S.-regulated rail system. *See id.* Appendix 2 at 2-3, 5-13.

Plaintiffs have not argued that Mr. Mattson's opinion meets any of the traditional four factors to override the presumption that the agency properly designated the administrative record. *See Kruger*, 950 F. Supp. 2d at 1177-78. Therefore, his opinion should not be considered, and Plaintiffs offer nothing else to support their claim that grizzly mortalities are "reasonably certain to occur."

III. PLAINTIFFS' CLAIMS ARE NOT ELIGIBLE FOR INJUNCTION AND VACATUR IS NOT THE DEFAULT REMEDY.

A. Injunction

1. No Injunction is Justified for Alleged ESA Violations.

Plaintiffs do not contest that they have not met the injury requirement as to the northern long-eared bat. Pl. Resp. at 31-32. Thus, they are not eligible for injunctive relief for any violations related to that species. Further, Plaintiffs' evidence of injury to grizzly bears is not relevant because, as discussed *supra* II.C,

include a table of his data or explain how he derived it from the original sources. *Id.* Appendix 2 at 4. He further asserts the rate of deaths along that track from 2000 to 2019 ranged from 1.2/year to 1.9/year, for a total of, at most 38 mortalities. *Id.* ¶ 8. Thus, if his calculated rate is correct, there would have to have been approximately 18 grizzly mortalities between 1997 and 1999 to justify his claim of 56 mortalities since 1997. He provides no such evidence.

Plaintiffs incorrectly assume AM3 will cause "increased train traffic." *See* Pl. Resp. at 31. Plaintiffs have not demonstrated that the actual impacts of AM3 – *i.e.*, no increase in production – will cause the injuries they fear. Therefore, they are not eligible for injunction based upon potential grizzly injuries.

2. No Injunction is Justified for Alleged NEPA Violations.

Plaintiffs focus their NEPA argument for injunction on just two factors – injury and equities. Even if an injunction could be awarded only on those two factors (and it cannot), Plaintiffs' arguments must fail because they are misleading and, in some cases, simply false.

Plaintiffs' claims of injury are exaggerated and misleading. First, their claims of injury from greenhouse gas emissions assume zero substitution *and* do not consider injury from loss of energy supplies. *See* Decl. of James Hansen (Doc. 37-6, at 2) ("restoring a habitable climate system" is "less probable if the additional 100 million or so tons of [greenhouse gases] . . . from the Bull Mountain site is (sic) let loose"). Second, Plaintiffs have not demonstrated that denying AM3 will alleviate overall air quality impacts. Third, their arguments about grizzly impacts wrongly assume that AM3 will increase train traffic. Finally, Plaintiffs misleadingly portray surface water impacts with selective quotations. Plaintiffs imply that all stream segments above the mine will stop flowing, but the Office of Surface Mining actually concluded that, "[d]epending on the site and

degree of impact to spring discharge, *some* channel segments may not exhibit intermittent or perennial flow after mining. However, all water sources necessary to support the postmining land uses would be replaced in accordance with applicable regulations, thereby insuring long-term Mine-related impacts to hydrological conditions are not major." AR000171 (emphasis added)

Plaintiffs' arguments on equities are similarly misleading. They do not contest the potential loss of hundreds of workers' livelihoods. Decl. of Joseph Farinelli (Doc 42-1 ¶ 6). They allege that Signal Peak and the Office of Surface Mining "refused" to plan for worker retraining (Pl. Resp. at 34-35), when worker retraining and alternative energy use are not proper alternatives to the proposed action. *See* AR000035; AR013993. They also make an inflammatory claim that Signal Peak "intimidated" community members by filing a "SLAPP" suit. Pl. Resp. at 35; Decl. of James Jensen (Doc. 37-1 ¶ 6). In fact, the state district court acknowledged that Signal Peak's declaratory judgment action was "necessary" to resolve a First Amendment privilege claim raised by MEIC and the only two affected surface water users to shield them from discovery about their water use in an administrative proceeding brought by MEIC about AM3's impact on that very water use. *Signal Peak Energy, LLC v. MEIC*, No. DV-18-869 (13th Jud. Dist. Ct. Mar. 25, 2019), slip. op. at 3-5. Incorrectly believing Signal Peak could not present evidence in the contested case, the district court ordered Signal Peak to pay

attorney's fees (no sanction was awarded). Signal Peak has appealed that decision to the Montana Supreme Court. *Signal Peak Energy, LLC v. MEIC*, No. DA 19-0299 (Mont.)

Plaintiffs' hyperbolic portrayal of Signal Peak cannot obscure that the mine expansion simply extends the duration of the Mine's existing impacts, whereas the impacts of an injunction on Signal Peak, its employees, and their families would be catastrophic. *See* Doc. 42 at 34-36.

B. Vacatur is Not Warranted.

MEIC concedes that vacatur is not the default remedy. Pl. Resp. at 35-36. Given the highly disruptive impacts of vacatur and the peripheral nature of the alleged violations, this Court should not vacate the decision. If this Court identifies any violation, the remedy should be crafted to address that specific violation.

CONCLUSION

Signal Peak urges the Court to grant its cross-motion for summary judgment and deny Plaintiffs' motion.

Dated this 30th day of August, 2019.

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