LAWRENCE VANDYKE
Deputy Assistant Attorney General
MICHELLE-ANN C. WILLIAMS
Trial Attorney, Natural Resources Section
H. HUBERT YANG
Senior Trial Attorney, Wildlife & Marine Resources Section
Environment & Natural Resources Division
United States Department of Justice
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0420
Fax: (202) 305-0506
E-mail: michelle-ann.williams@usdoj.gov

Attorneys for Federal Defendants

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

INTRODUCTION

Plaintiffs challenge a decision of the Assistant Secretary approving a mining plan modification at the Bull Mountains Mine No. 1 in Montana. As addressed below, the Office of Surface Mining, Reclamation and Enforcement ("the Office") complied with the Endangered Species Act ("ESA") and National Environmental Policy Act ("NEPA") in all respects, and thus the Court should enter judgment for Federal Defendants on all counts, and deny Plaintiffs' motion for summary judgment and request for injunctive relief.

ARGUMENT

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

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

Regarding the action area, Plaintiffs' Opposition is most notable for what it does not say.[1] Nowhere in their Opposition do Plaintiffs acknowledge there are limits in defining an action area. As relevant here, the ESA's regulations require an action area to encompass only those indirect effects "caused by the proposed action" and "later in time" that "are reasonably certain to occur." 50 C.F.R. § 402.02 (emphasis added).

[1] Plaintiffs again assert no ESA arguments regarding the Service, and therefore have waived any possible ESA claims against the Service. *See Husyev v. Mukasey*, 528 F.3d 1172, 1183 (9th Cir. 2008).

This latter limit is significant here, because, at bottom, Plaintiffs fail to show that grizzly bear mortalities from train strikes outside the vicinity of the mine area are "reasonably certain to occur" as a result of the rail traffic from this particular mine. *Id*. Instead, Plaintiffs surmise there must necessarily be a greater likelihood of train strikes beyond the mine area as a result of continued rail traffic. *See* Pls.' Opp. at 25.[2] But this is an inferential leap too far. Tellingly, the only support that Plaintiffs cite for their conclusory supposition that rail traffic from this mine "will likely cause grizzly mortalities," *id*., is extra-record and/or not specific to the mine expansion.[3] At most, Plaintiffs' allegations suggest only that a future train strike connected to this particular mine is conceivable – not that such incidents are "reasonably certain to occur." 50 C.F.R. § 402.02.

Plaintiffs' related argument – that the Office "never considered [such] indirect effects," Pls.' Opp. at 25 – also falters. The Office considered historical information showing that train strikes from all rail traffic presented only a limited risk of grizzly bear mortalities. *See* OSM:012841 (averaging one mortality per decade attributable

[2] Plaintiffs also allege – for the first time – that continued rail traffic will adversely impact grizzly bear habitat by creating "fracture zones." Pls.' Opp. at 25. But this argument was never raised in Plaintiffs' opening brief, so it is not properly before this Court. *See Husyev*, 528 F.3d at 1183.

[3] As addressed further *infra*, consideration of these extra-record documents is "not permitted." *Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

to train strikes in the Cabinet-Yaak); *see also* Defs.' Mem. at 8-9. Additionally, the Office examined the extent to which the rail traffic along the track segment at issue might be attributable to this mine, finding that at least 75 percent of rail traffic would not be linked to this mine. *See* OSM:016787. While Plaintiffs may disagree with the agency's weighing of this information, the record shows that the Office accounted for the risk of train strikes in outlying areas, and reasonably determined that such incidents are not reasonably certain to occur as a result of the proposed expansion, so there was no need to enlarge the action area to include potentially hundreds of miles of track beyond the vicinity of the mine. Other courts in this Circuit have held effects that are "too attenuated" do not fall "under the definition of indirect effects." *Ctr. for Biological Diversity v. U.S. Dept. of Hous. & Urban Dev.*, 541 F.Supp.2d 1091, 1100-01 (D. Ariz. 2008). The same reasoning should apply here.

Lastly, Plaintiffs fault the Office for considering the allegedly "uncertain and contingent" efforts of the railroad operator to mitigate the risk of train strikes. Pls.' Opp. at 27. But this would compel the Office to "ignore the reality on the ground." *Nw. Envtl. Def. Ctr. v. Nat'l Marine Fisheries Serv.*, 647 F.Supp.2d 1221, 1232 (D. Or. 2009) (rejecting action area challenge, in part, because agency considered the extent to which purchased materials would limit potential effects). While it is true that these efforts are "in progress," OSM:016925, this does not preclude the Office from weighing these ongoing efforts, among other factors, in assessing whether the

proposed expansion is reasonably certain to result in grizzly bear mortalities. *See Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 881 (9th Cir. 2009) (finding agency "did not err" by considering agreement despite its "slow and still incomplete implementation").

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

No northern long-eared bats have been observed, much less captured, near the mine. Nor does the area contain any of the habitat characteristics (*e.g.*, hibernacula or roost trees) required for the species. Nevertheless, Plaintiffs assert that the Office erred in its assessment that no northern long-eared bats are present in the mine area, suggesting other information supports their opinion that the species may be present. *See* Pls.' Opp. at 27-28.[4] But their argument turns entirely on preliminary acoustic recordings that, upon further review, do not appear to even pertain to this species.

First, Plaintiffs point to an "acoustic detection" of the species in survey data from 2006. OSM:016775. But as the Office explained, because this detection was based on an "acoustic survey only," it was, at most, a "questionable identification." OSM:016907. It also was inconsistent with the "known and predicted range" of the species, OSM:016775, and further undercut by "inadequate suitable habitat" in the

[4] Plaintiffs press no further arguments regarding the "lack of suitable habitat" in the mine area, OSM:017016, so their challenge to this finding is waived. *See Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005).

mine area. OSM:017016. All these factors thus supported the Office's finding that this acoustic recording was "a misidentification," OSM:016775, and nowhere in their Opposition do Plaintiffs squarely address this finding.[5]

Second, Plaintiffs rely on extra-record documents – a log of bat calls and an accompanying analysis by Plaintiffs' consultant – that are not properly before this Court. Plaintiffs do not appear to dispute that the documents are extra-record, but instead insist that *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011), allows them to submit such materials. *See* Pls.' Opp. at 27. Not so. To start, this is the first time that Plaintiffs have made this argument, *see Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998), and it also is inconsistent with the parties' prior agreement that "review in this case will be based on an administrative record." Dkt. 28 ¶2. Furthermore, to the extent that *Kraayenbrink* created any ambiguity regarding extra-record materials, the Ninth Circuit has since clarified that an ESA citizen-suit claim must be resolved in "a record review case." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (*en banc*).

In any event, Plaintiffs considerably overstate the significance of these extra-record documents. Importantly, Plaintiffs do not contend that either document was

[5] Plaintiffs point to earlier documents that reference the 2006 recording, Pls.' Opp. at 28, but subsequent information indicated no observations in the mine area as of April 2018. OSM:019164. The Office also flagged the recording as "questionable" in earlier documents. OSM:014415.

actually available to the Office at the time of its decision, so it is unclear how, if at all, these documents might even be relevant to the agency's decision-making. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 604 (9th Cir. 2014) (limiting review to materials "considered in making [the] decision").

Alternatively, if this Court decides to consider this extra-record information, then it should similarly consider the attached declaration from the Montana Natural Heritage Program ("Natural Heritage") for the purposes of "explain[ing] technical terms or complex subject matter." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). As relevant here, Natural Heritage has provided information that is directly responsive to Plaintiffs' extra-record allegations, explaining, *inter alia*, (1) the limitations of relying on acoustic recordings without additional review; (2) its analysis of the specific call data cited by Plaintiffs – finding that the recordings auto-identified as northern long-eared bats appear to be an indeterminate species; and (3) its concerns with making raw acoustic data publicly available due to the risk of misinterpretation. *See* Decl. of Bryce Maxwell ¶¶3-6 (attached as Ex. 1).[6]

[6] Plaintiffs' reliance on *Alliance for Wild Rockies v. Kruger*, 950 F.Supp.2d 1172 (D. Mont. 2013), *see* Pls.' Opp. at 29, is misplaced. While "verified sightings or occupancy are not required," Plaintiffs must still identify evidence showing that the species may be present. *Kruger*, 950 F.Supp.2d at 1181. Where, as here, no showing is made to refute the "foundation that no [individuals] had been found to live within [the] project area," the agency's determination should be upheld. *Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (9th Cir. 2005). Furthermore, the Service also did not

II. The Office Complied With NEPA

A. The Agency Adequately Assessed the Impacts of Coal Trains

1. Wildlife

Although the Office reasonably considered the indirect and cumulative impacts of the proposed action on wildlife, *see* OSM:016801-04, Plaintiffs nevertheless insist that the agency failed to analyze the impacts of coal trains on wildlife, particularly grizzly bears. Pls.' Opp'n at 1-5. But this assertion is misleading. First, the 2018 environmental assessment ("2018 EA") addressed the impacts of the proposed action and determined that there would be "no effect" on listed species. *See* 016775-76, 016804, 016925. Second, apart from their focus on impacts to grizzly bears, Plaintiffs do not identify any other wildlife species that the agency failed to consider. Third, Plaintiffs failed to sufficiently refute Federal Defendants' argument that the agency was not required to consider the impacts of coal trains on grizzly bears because they do not occur in the vicinity of the mine or along the Spur. *See* Pls.' Opp'n at 15-17; *see also* OSM:016925. Plaintiffs did not identify any evidence in the record establishing a reasonable causal link between the infrequent grizzly bear mortalities beyond the Spur and increased coal train traffic from the mine. *See* Pls.' Opp'n at 16-17. Instead, Plaintiffs recite statistics and news

---

identify the northern long-eared bat as a species that may be present in the two-county vicinity. USFWS:000170.

articles on grizzly bear mortalities, none of which show that those mortalities were the result of coal train traffic from the mine or elsewhere.

Insofar as Plaintiffs allege deficiency in the Office's cumulative impacts analysis, Plaintiffs' argument is flawed. Plaintiffs inflate the risk of impact to wildlife by giving the misleading impression that the proposed action will cause 12,000 coal trains to traverse the rail route all at once, or that this rate of rail traffic will remain the same for the entire life of the mine. The 2018 EA also demonstrates that even the 3.6 roundtrips per day that Plaintiffs use to calculate their 12,000 figure amounts to only a very small fraction of total rail traffic. For example, "[b]etween Sandpoint, Idaho and Pasco, Washington where forecasted rail utilization is highest," the Office determined that the Proposed Action's 3.6 roundtrips per day would represent less than 8% of current traffic. *See* OSM:016789 (stating also that the portion of mine-related traffic would "decline from the current condition" as non-mine related traffic is expected to increase). While Plaintiffs seem to suggest that 12,000 trains must cause significant wildlife impacts because it seems like a large number on its face, that number must be viewed in context, as only a small fraction of the total volume of rail traffic, and as a number that only accumulates over the course of many years, such that any corresponding impacts would be diluted over many years. *See* 40 C.F.R. § 1508.27(a).

2. Public Health

The Office reasonably considered the health impacts from coal train emissions. Plaintiffs err in their criticism of the Office's discussion of the "transitory and distributed nature of locomotive emissions," *see* OSM:016836—a discussion Plaintiffs contend is misleading because "locomotive emissions in fact 'accumulate[] in the local airshed,'" Pls.' Opp'n at 5. The basis for Plaintiffs' contention however, is a study (supported by financial contributions from Plaintiff Sierra Club, *see* OSM:006130) that was prepared utilizing methodology that is not particularly meaningful here. The locations studied had been selected because they exhibited an already high concentration of $PM_{2.5}$—the highest in the Seattle area—and that the pollution in those locations flowed from a "heavy concentration of diesel trucks, trains and ships." OSM:006125. The selected sites were also characterized by "higher wind speeds," and local topography likely "create[d] a greater barrier to dilution of the train emissions." OSM:006129; *see also* OSM:006130 (topography may also exacerbate the accumulation of $PM_{2.5}$ from trains). Because the study did not undermine the Office's conclusion regarding the transitory and distributed nature of locomotive emissions in the proposed action, Plaintiffs' argument falls flat.

Plaintiffs' argument that the analysis in the 2018 EA should somehow mirror the Washington study also withers under close scrutiny. As an initial matter, the Office reasonably articulated the shortcomings with the Washington study in light

of the proposed action in this litigation; it explained that the proposed action in the study vastly differed in purpose and scope from the one at issue here. *See* Defs.' Mem. at 17-18. Undeterred, Plaintiffs falsely contend that the cumulative train traffic in Montana communities is "equivalent to the number of trains that the Washington study found would 'significantly increase cancer risk in communities along the tracks.'" Pls.' Opp'n at 6. But the record shows that the proposed action in the Washington study would result in sixteen trains per day (as opposed to 3.6 trains daily, here, *see* OSM:016981), and that the cumulative train traffic, based on a 20-year projection, would be 147 trains daily. *See* OSM:004798, 004045. In short, the Washington study is not a useful tool for assessing project-related public health risks because it addresses conditions not present here, and Plaintiffs' reliance on the study is therefore misplaced.

Next, Plaintiffs are wrong that the Office applied the incorrect standard for 24-hour $PM_{2.5}$ concentrations. *See* Pls.' Opp'n at 6-7. Federal Defendants acknowledge that Table B-1 contains a typographical error, stating the 24-hour $PM_{2.5}$ concentrations (as established under the National Ambient Air Quality Standard ("national standard")) as 65µg/m3 instead of the current 35µg/m3, *see* OSM:016832, but the Office later corrected its mistake, *see e.g.* OSM:016835 (Table B-3). The Court should disregard Plaintiffs' attempts to grandstand over this simple mistake and deem the argument waived because Plaintiffs never alerted the agency to the

error during the comment period and raised it for the first time on reply. *See Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 725-26 (9th Cir. 1992). Furthermore, Plaintiffs have failed to show that the Office actually *applied* the incorrect standard in its analysis.

As for Plaintiffs' contention that areas along the train-route have registered exceedances, Plaintiffs ignore the fact that the Montana Department of Environmental Quality is in the process of redesignating most communities along the train-route as "attainment." *See* Defs.' Mem. at 19. Insofar as Plaintiffs contend that communities along the railroad are *presently* in non-attainment, they rely on an American Lung Association publication containing outdated air quality statistics from 2013-2015, *see* OSM:017196. Moreover, Plaintiffs have not identified any recent regulatory determination by the Environmental Protection Agency that the communities they have listed in their response brief, *see* Pls.' Opp'n at 7, have not attained the national standard. *See* OSM:16994 (2018 $PM_{2.5}$ Design Value Report disclaimer that "the information listed in this report . . . does not constitute a regulatory determination by EPA as [to] whether an area has a attained a NAAQS").

3. Derailments

In their opening brief, Plaintiffs generally asserted that the Office failed to assess impacts from coal train derailments. *See* Br. in Supp. of Pls.' Mot. for Summ. J. at 13-14, ECF No. 37. But the record demonstrates otherwise. *See* Defs.' Mem. at

21-22. Plaintiffs now attempt to move the goal post by vaguely asserting that the Office failed to address the "overall risks from derailments." Pls.' Opp'n at 10-11. Because Plaintiffs do not specifically identify the "overall risks" the agency purportedly failed to consider, the Court should disregard their argument.

B. The Office Took a Hard Look at Impacts from Greenhouse Gas Emissions

The Office's analysis of the impacts of the proposed action from greenhouse gas ("GHG") emissions is sound. Plaintiffs nevertheless insist that the agency violated NEPA by not monetizing the impacts of carbon emissions despite monetizing some of the socioeconomic impacts of the proposed action. *See id.* at 12-16. However, nothing in NEPA or its implementing regulations requires that agencies weigh the economic costs and benefits of a proposed action. To the contrary, 40 C.F.R. § 1502.23 specifically provides that agencies need not do so, and in fact should avoid such comparisons when, as here, the NEPA analysis in question involves important qualitative considerations.

There is similarly nothing in the statute or regulations stating that an agency can monetize some impacts only if it is prepared to monetize all of them. Quite the contrary, Section 1502.23 assumes cost-benefit analyses will *not* be comprehensive, and provides that an agency need only "discuss the relationship between that [cost-benefit] analysis and any analyses of unquantified environmental impacts, values, and amenities." 40 C.F.R. § 1502.23. This flexibility makes sense because the

NEPA regulations require agencies to consider a broad range of "effects," including "ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8(b). Some of these effects—*e.g.*, tax revenue, royalty revenue, and other socioeconomic effects—are more easily analyzed and understood by the public when described using monetary terms. *See WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77 (D.D.C. 2019). Other environmental effects—*e.g.*, impacts to aesthetic or ecological values—are more easily understood and analyzed using qualitative terms. The regulations preserve ample decision space for federal agencies to use the metrics and methodologies best suited to the issues at hand, consistent with the broad discretion typically afforded to an agency's choice of methodology. *See Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1110 (9th Cir. 2016).

To determine otherwise would intrude on the Office's discretion because it would be required to attempt to discuss adverse environmental impacts in monetary terms anytime it chooses to discuss positive socioeconomic impacts in monetary terms. An agency opting to describe socioeconomic impacts in monetary terms would have the burden of also monetizing all other impacts addressed in an EA or environmental impact assessment ("EIS"), or explaining as to each category of impacts why monetization is not possible (effectively flipping the presumption against monetary cost-benefit analyses in 40 C.F.R. §1502.23). And while agencies

might avoid this new burden by describing even socioeconomic impacts—e.g., royalty and tax revenues—in purely qualitative terms, doing so would degrade the quality of their analyses. Either scenario would frustrate NEPA's twin goals of ensuring informed decision-making and effective public involvement in the decision process.

The holding in *High Country Conservation Advocates v. U.S. Forest Service*, 52 F. Supp. 3d 1174 (D. Colo. 2014), does not require a different conclusion, and is of limited applicability here for two reasons. First, the court in that case acknowledged that the defendant agencies had "quantif[ied] the amount of emissions relative to state and national emissions . . . and giv[en] general discussion to the impacts of global climate change," but nonetheless found the analysis wanting because the agencies "did not discuss the impacts caused by these emissions." *Id.* at 1190. Here, however, the 2018 EA applied a proxy methodology by calculating expected GHG emissions from the proposed action and then analyzing them in the context of global, national and state projections, and also assessed the downstream impacts of coal combustion. *See* Final Guidance for Federal Departments and Agencies on Consideration of GHG Emissions, 81 Fed. Reg. 51,866-01 (Aug. 5, 2016) (recommendation that agency's use the proxy methodology); *see also* Findings & Recommendations at 24-25 *WildEarth Guardians v. Zinke*, No. 17-cv-00080-SPW (D. Mont. Feb. 11, 2019), ECF No. 71 (approving use of proxy

method); *W. Org. of Res. Councils v. Bureau of Land Mgm't.*, No. 16-21-GF-BMM, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018) (same) ; *see also* OSM:016766-69, 016878-80, 016794. Thus, while the *High Country* court perceived a gap in the agencies' effects analysis and sought to fill it with the social cost of carbon methodology ("the protocol"), there was no gap to fill here. The Office's use of the proxy methodology thus fully satisfied NEPA's hard look requirement.

High Country is also distinguishable because the court's finding of arbitrary decision making turned on its finding that "the [Final] []EIS, on its face, offer[ed] a factually inaccurate justification for why it omitted the [] protocol." *High Country*, 52 F. Supp. 3d at 1191. Specifically, while the Final EIS stated that it was impossible to predict the degree of any single project's impact on global climate change, the court noted that a methodology existed for quantifying a project's contribution to costs associated with climate change, *id.* at 1190, and that the agencies had included a discussion of that methodology in their draft EIS only to abandon it later without adequate explanation. *Id.* at 1191. None of those circumstance exist here. Indeed, the 2018 EA directly addressed the utility of the protocol and explained why the Office declined to use it. *See* OSM:016881-82; *see also* OSM:016918 (" very limited utility to the decision maker"); *see* OSM:016952-54 (response to Comment 76 noting the Office's consideration of Signal Peak's completed social cost of carbon analysis and that the variation in the numbers produced "supports OSMRE's

decision not to complete the analysis because of its limited utility to the decision maker"). Because the Office provided a reasonable explanation for declining to use the protocol, its decision is entitled to deference, *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), and the Court should thus reject any arguments by Plaintiffs to the contrary.

C. An EIS Was Not Required

Plaintiffs assert that the "record showed substantial questions about adverse effects to the environment and to public health," yet they fail to provide any citations to the record in support of this contention. Pls.' Opp'n at 16. Moreover, the Office adequately considered air quality impacts on public health from locomotive emissions, including the question of increased cancer risks in communities along the tracks. *See* supra Part II.A.2; *see also* Defs. Mem. at 17-22; OSM:016727-28; OSM:018637, 016947-48.

Insofar as Plaintiffs argue that their consultants' strident advocacy of the protocol somehow demonstrates controversy or an uncertainty that requires the preparation of an EIS, *see* Pls.' Opp'n at 17-22, their argument is unavailing. "When 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." *Lands Council v. McNair*, 537 F.3d

981, 1000 (9th Cir. 2008) (en banc). Here, the Office reasonably explained that the protocol was of limited utility in its decision-making. *See supra* Part II.B; *see also* Defs.' Mem. at 22-25. The Office also addressed each contention raised by Plaintiffs' consultants, explaining why they were untenable, and this is all NEPA requires. *See Lands Council v. McNair*, 537 F.3d at 1000; *see also* OSM:016952-54; OSM:016971-75; OSM:016931-42.

The Office's analysis of the cumulative impacts from GHG emissions further supports the FONSI. *See* Defs.' Mem. at 28-29. Plaintiffs argue that the Office failed to consider the impacts from the proposed action as it "is related to other actions with individually insignificant but cumulatively significant impacts." Pls.' Opp'n at 22. But this is false because the Office analyzed the cumulative impacts of the proposed action, specifically within the context of climate change, estimating emissions from the mine, in the context of global, national and state projections, and assessing the downstream impacts of coal combustion. *See* OSM:016766-69, 016878-80, 016793-95. It found that the proposed action's GHG emissions would be less than one percent of global emissions. OSM:016794. Moreover, the Office's disclosure of regional, state, or national GHG emissions sufficiently satisfies NEPA, because the geographic scope of the cumulative impacts analysis is necessarily global, and it would be impractical to try to inventory all GHG emitters within that scope of analysis.

Equally meritless is Plaintiffs' argument that the Office failed to analyze impacts to wildlife, including threatened species. *See supra* Parts I.A, II.A; *see also* Defs.' Mem. at 15-17, 29. The Office's FONSI regarding wildlife was well-supported by the record, and as such the Office was not required to prepare an EIS. *See Monsanto v. Geerston Seed Farms*, 561 U.S. 139, 145 (2010).

Finally, the Court should reject Plaintiffs' argument that the Office failed to adequately address threatened violations of the Clean Water Act. *See* Pls.' Opp'n at 23-24. 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. Plaintiffs' failure to cite to any authority that the Office is required to monitor threatened violations of the Clean Water Act, or that the approval of the mining plan modification would necessarily result in violations of the statute, further weakens their argument. *See* Defs.' Mem. at 29-30. Furthermore, the record clearly shows that the agency provided a well-reasoned discussion on the impacts and mitigation measures concerning the discharge of fugitive coal dust into waters. *See e.g.* OSM:016968-69 (response to Comment 112); OSM:016924 (response to Comment 22). The Court should therefore deny Plaintiffs' motion for summary judgment.

III. Remedy

A. No Injunctive Relief is Warranted for Alleged NEPA Violations

Even if the Court determined that the Office failed to comply with NEPA, Plaintiffs would not be entitled to the injunctive relief they request. Injunctive relief should not be awarded as a matter of course, and Plaintiffs must satisfy the four-factor test articulated in *Monsanto v. Geerston*, 561 U.S. at 157-58. Here, Plaintiffs have neither established that they would suffer irreparable harm nor shown that the public interest and equities favor the grant of injunctive relief. As to irreparable harm to health and grizzly bears, Plaintiffs fail to respond to Federal Defendants' contention that federal and state laws already regulate and impose penalties for the violation of air quality standards and protections for threatened species. *See* Defs.' Mem. at 31. Furthermore, the 2018 EA demonstrates that Plaintiffs' assertions of significant impacts from coal trains on public health and wildlife are unfounded. *See* supra Part II.A. The Court should also reject Plaintiffs' contention of irreparable harm to perennial streams from long-wall mining, as waived because Plaintiffs failed to raise it in their opening brief. *See Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d at 725-26. Moreover, the agency considered the impacts of the proposed action on perennial streams and reasonably determined that they would not be significant. *See* OSM:016796-71, 016891-98, 016959-60 (noting mitigation measures).

Plaintiffs allege that the public interest and equities favor injunctive relief because the cost of the harm significantly outweighs the benefits. *See* Pls.' Opp'n at 34. But this is simply another attempt by Plaintiffs to shoehorn further consideration of the protocol which was roundly rejected by the Office as unworkable. Plaintiffs also attempt to minimize the devastating impacts injunctive relief would have on families and communities dependent on the mine, focusing instead on alleged benefits to Signal Peak if the mine expansion were to move forward. *Id.* at 34-35; OSM:016779-81 (local economy); *see also* OSM:016745 (approximately 260 miners depend on the mine). However, considering those profound adverse impacts, the public interest and equities favor denying the requested injunction and awarding alternate relief, if any at all.

In sum, even if the Court determined that the Office violated NEPA, the Court should decline to enjoin the Office and instead remand without vacatur (or order deferred vacatur)[7] for the reasons articulated in Federal Defendants' cross-motion for summary judgment.

[7] Plaintiffs do not respond to Federal Defendants' argument that should the Court find a NEPA violation it should defer vacatur, and as such the Court should consider the point conceded. *See Chubbuck v. Industrial Indem.*, No. 91–35091, 1992 WL 11294 (9th Cir. Jan. 28, 1992).

B. No Injunction Is Warranted For Alleged ESA Violations

At most, Plaintiffs' allegations suggest only a possibility of harm that might affect individual grizzly bears in certain outlying areas, as discussed *supra*.[8] Such scant allegations do not demonstrate "that irreparable injury is likely," as required to justify an injunction. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). Plaintiffs further assert that harm to individual grizzly bears is irreparable, arguing that such harm would interfere with the ESA's objectives "to protect and recover species." Pls.' Opp. at 31. Plaintiffs, however, fail to explain how, if at all, the potential loss of individuals might affect the status of the larger species. Further, as this Court has recognized, "the death of a small number of individuals may constitute irreparable harm," if such a loss would be significant for the "species as a whole." *Defenders of Wildlife v. Salazar*, 812 F.Supp.2d 1205, 1210 (D. Mont. 2009). But there is no basis – and Plaintiffs point to none – for such a finding here.[9]

[8] While Plaintiffs refer to "likely harm" to "bats," Pls.' Opp. at 32, they present no specific remedy arguments regarding this species.

[9] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803 (9th Cir. 2018), is inapposite because the plaintiffs were able to demonstrate "the highly precarious status" of the species. *Id*. at 820. No such showing is made here.

CONCLUSION

For the foregoing reasons, the Court should grant Federal Defendants' cross-motion for summary judgment and deny Plaintiffs' motion for summary judgment on all counts.

Respectfully submitted this 30th day of August, 2019

/s/ Michelle-Ann C. Williams
MICHELLE-ANN C. WILLIAMS
Trial Attorney
Natural Resources Section

/s/ H. Hubert Yang
H. HUBERT YANG
Senior Trial Attorney
Wildlife & Marine Resources Section
Environment & Natural Resources Division
United States Department of Justice
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0420
Fax: (202) 305-0275
E-mail: hubert.yang@usdoj.gov
michelle-ann.williams@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(A), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 4,994 words, excluding the caption, signature block, tables, and certificates of service and compliance.

/s/ Michelle-Ann C. Williams
MICHELLE-ANN C. WILLIAMS
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0420
E-mail: michelle-ann.williams@usdoj.gov

Attorney for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2019, I electronically filed the foregoing Reply Memorandum in support of Federal Defendants' Cross-Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Michelle-Ann C. Williams
MICHELLE-ANN C. WILLIAMS
Trial Attorney
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0420
E-mail: michelle-ann.williams@usdoj.gov

Attorney for Federal Defendants