Shiloh S. Hernandez
Earthjustice
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
T: 406.586.9692 ext. 1929
shernandez@earthjustice.org

Melissa A. Hornbein
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
(406) 204-4861
hornbein@westernlaw.org

Attorneys for Plaintiffs

Nathaniel Shoaff (*pro hac vice*)
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5610
nathaniel.shoaff@sierraclub.org

Attorney for Plaintiff Sierra Club

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

MONTANA ENVIRONMENTAL INFORMATION CENTER, *et al.*,

Plaintiffs,

vs.

DEB HAALAND *et al.*,

Defendants.

Case No. 1:19-cv-00130-SPW-TJC

PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS

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INTRODUCTION

Plaintiffs Montana Environmental Information Center (MEIC) et al. (collectively, "Conservation Groups") generally support the well-reasoned Findings and Recommendation (Findings) of Magistrate Judge Cavan (Doc. 177), with two exceptions: (1) alternatives and (2) remedy.

Regarding alternatives, the Findings mistakenly conclude that various mitigation measures sufficiently distinguished the two action alternatives, even though Federal Defendants themselves found those mitigation measures to be negligible, ineffective, unnecessary, and ultimately meaningless. The Findings also mistakenly credit Federal Defendants' refusal to analyze a middle-ground alternative, without scrutinizing Federal Defendants' excuses for their refusal, and without addressing the fact that Federal Defendants disproved each of their excuses by ultimately and arbitrarily selecting an unanalyzed middle-ground alternative as their preferred action.

Regarding remedy, the Findings correctly recognize "serious and significant environmental concerns associated with mining and combusting Area F coal"—there is no question that burning Area F coal will cause many deaths. Nevertheless, the Findings err in concluding that unspecified harm to mine employees and the community from vacatur would outweigh these environmental consequences. The Findings ignore that the mining company, Westmoreland Rosebud Mining LLC

(Westmoreland), itself insisted that temporary cessation of mining in Area F would cause no harm to employees or the community during the one-year remand period.

For these reasons, this Court should adopt the Findings, subject to the following two exceptions. First, this Court should reject the Findings' analysis of alternatives and hold that Federal Defendants' alternatives analysis was arbitrary and violated NEPA. Second, this Court should modify the remedy, find vacatur warranted in light of the equities, and require Westmoreland to wind down operations in Area F.

LEGAL STANDARDS

I. Review of Findings and Recommendation.

This Court reviews the findings of a magistrate judge *do novo*, and "may accept, reject, or modify" the findings "in whole or in part." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

II. NEPA Alternatives.

NEPA is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA requires agencies to consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). This is the "heart" of the NEPA process and mandates agencies to "rigorously explore and objectively evaluate *all* reasonable alternatives." 40 C.F.R. § 1502.14 (emphasis added). "An agency first violates this provision of NEPA where it considers 'essentially identical'

alternatives." *W. Org. of Res. Councils v. BLM* (*WORC*), No. CV 16-21-GF-BMM, 2018 WL 1475470, at *7 (D. Mont. Mar. 26, 2018) (quoting *Friends of Yosemite v. Kempthorne*, 520 F.3d 1024, 1039 (9th Cir. 2008)); *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 813-14 (9th Cir. 1999) (considering only "no action" and "virtually identical" action alternatives violates NEPA). "An agency also may violate NEPA when it fails to examine all reasonable alternatives." *WORC*, 2018 WL 1475470, at *7. "The existence of reasonable but unexamined alternatives renders an EIS [environmental impact statement] inadequate." *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006).

III. Vacatur of Unlawful Agency Action.

Vacatur is the presumptive remedy for agency action found to be arbitrary and capricious. 5 U.S.C. § 706(2)(A) (emphasis added); *All. for the Wild Rockies v. USFS*, 907 F.3d 1105, 1121 (9th Cir. 2018). It is only in "rare circumstances" that this presumption can be overcome. *Ksanka Kupaqa Xa'lcin v. USFS*, 534 F. Supp. 3d 1261, 1273-74 (D. Mont. 2021) (quoting *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010)). Vacatur is especially appropriate in NEPA cases, as here, because "[i]f you can build first and consider environmental consequences later, NEPA's action forcing purpose loses its bite." *Standing Rock Sioux Tribe v. USACE*, 985 F.3d 1032, 1051 (D.C. Cir. 2021) (quoting *Standing Rock Sioux Tribe v. USACE*, 471 F. Supp. 3d 71, 85 (D.D.C. 2020)).

To determine whether to vacate unlawful agency action, courts weigh the "seriousness of the agency's errors against 'the disruptive consequences of an interim change that may itself be changed.'" *Pollinator Stewardship All. v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Cal. Cmties. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012)).

ARGUMENT

I. Federal Defendants violated NEPA by failing to evaluate all reasonable alternatives.

The analysis of alternatives in the Findings contains two critical errors. First, in concluding that the action alternatives were meaningfully different, the Findings rely on so-called mitigation measures that Federal Defendants themselves dismissed as "negligible" and meaningless. Second, the Findings accept Federal Defendants' excuses without scrutiny that a middle-ground alternative was infeasible and unlawful, and would cause environmental impacts substantially similar to those of the alternatives considered. In fact, Federal Defendants disproved each of these excuses by ultimately selecting an unanalyzed middle-ground alternative, which was inconsistent and arbitrary.

A. Federal Defendants admitted that the mitigation measures that supposedly distinguished the alternatives were negligible, ineffective, and meaningless.

The Findings conclude that the "additional mitigation measures proposed in Alternative 3 sufficiently distinguished it from Alternative 2," so as to avoid a

violation of NEPA. (Doc. 177 at 34.) The Findings then cite five of the proposed mitigation measures: "a water management plan, additional wetlands mitigation requirements, modified reclamation and revegetation efforts, a geological survey, and paleontology mitigations." (*Id.*) These mitigation measures did not, however, create any meaningful difference between the action alternatives—Federal Defendants themselves specifically dismissed each mitigation measure cited by the Findings in their record of decision (ROD) and concluded the package of mitigation measures, taken together, was "negligible." By definition, "negligible" differences between alternative are not meaningful, but "so small or unimportant or of so little consequence as to warrant little or no attention: trifling."[1]

Federal Defendants fully considered only three alternatives: Alternative 1 (no action), Alternative 2 (the proposed action), and Alternative 3 (the proposed action with mitigation measures). AR-143-37564 to -37568. The ROD provided the following rationale for dismissing Alternative 3, the proposed action with mitigation measures: "OSMRE [the Office of Surface Mining Reclamation and Enforcement] chose not to select Alternative 3 as a whole or any of the individual protection measures analyzed in the EIS due to the *negligible benefit* they would provide to affected resources." AR-143-37569 (emphasis added). Moreover, the

[1] Negligible, *Merriam-Webster's Online Dictionary*, www.merriam-webster.com (last visited Mar. 17, 2022).

ROD specifically dismissed each mitigation measure relied on by the Findings. Thus, the proposed water management plan "would not measurably reduce the intensity of impacts on surface and ground water." AR-143-37569. Federal Defendants dismissed the supposed wetland mitigation requirements as "unnecessary," "temporary," of "limited benefit," and "already covered" by Alternative 2. AR-143-37569 to -37570. The modified reclamation and revegetation practices "would not measurably reduce the intensity of impacts to the project area nor measurably improve revegetation." AR-143-37571 to -37572. The geological survey was in fact incorporated into Alternative 2, and was thus not a difference at all. AR-143-37572. Finally, Federal Defendants dismissed the proposed paleontology mitigation as having "limited benefit" and being beyond Federal Defendants' authority. AR-143-37572. It therefore "would not effectively reduce impacts on paleontological resources." AR-143-37572.

These so-called mitigation measures—which Federal Defendants themselves dismissed as "negligible," "limited," "unnecessary," ineffective, and "already covered"—are insufficient to create any meaningful distinction between action alternatives. *Muckleshoot Indian Tribe*, 177 F.3d at 813-14 (considering only "no action" and "virtually identical" action alternatives violates NEPA); *WORC*, 2018 WL 1475470, at *7.

This error—the reliance on mitigation measures to differentiate alternatives—is closely analogous to the error identified in *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1049-52 (9th Cir. 2013). There, the Ninth Circuit rejected the U.S. Bureau of Land Management's (BLM) alternatives analysis for a grazing allotment in the Upper Missouri River Breaks where all alternatives authorized the "exact same level" of grazing. *Id.* at 1051. The Court rejected BLM's argument that differing "terms and conditions" related to changes in grazing boundaries, additional barriers, and adjusted riparian objectives—akin to Federal Defendants' mitigation measures here—constituted a "meaningful difference" between the alternatives. *Id.* The fundamental problem was that despite the various mitigation measures, the alternatives all involved the "same underlying action." *Id.* So too here.

Not only is *Abbey* closely analogous to and therefore controlling in the instant case,[2] its analysis demonstrates the role mitigation measures play in NEPA. Mitigation measures are not a basis for creating meaningful alternatives, but instead are included after the "rigorous[]" process of developing reasonable

[2] If anything, Federal Defendants' analysis here is more egregious. In *Abbey*, the Court "d[id] not question the environmental soundness" of the mitigation measures BLM offered to distinguish the alternatives. 719 F.3d at 1051. Here, by contrast, Federal Defendants themselves admit that the proffered mitigation measures are "negligible" and, effectively, meaningless.

alternatives is completed. 40 C.F.R. § 1502.14(a)-(f). Agency staff identified this problem with the EIS's alternatives: "[t]he EIS confuses the description of alternatives with mitigation measures. Mitigation measures are added after analysis of impacts and are in addition to items which are already required under regulatory compliance with other laws." AR-1002-12637.[3] Staff, thus, explained that the so-called mitigated alternative (Alternative 3) was inadequate to comply with NEPA: "To be a true alternative under NEPA, an alternative would need to have an actual change to the mine plan (which is rare). The 'agency-mitigated' alternative contains no actual change to the mine plans, but rather is just a list of mitigations, which would be unenforceable." AR-1002-12632.[4]

The Findings relied on *Laguna Greenbelt, Inc. v. U.S. Department of Transportation*, 42 F.3d 517, 524 (9th Cir. 1994), but that case is distinguishable. There, the action alternatives—related to the construction of a multilane highway—were similar but not "virtually identical" or the "same underlying action," as here and as in *Abbey*. The action alternatives in *Laguna Greenbelt, Inc.*,

[3] Another agency expert added: "Mitigation measures in and of themselves do not change the alternatives being evaluated in the EIS if they do not represent a different decision being made by the agencies involved." AR-1002-12637.

[4] After this discussion, the agency recognized that the EIS, in fact, contained "[o]nly two alternatives"—the action alternative and the no action alternative. AR-1002-12633.

had different operations, different connections to an adjoining interstate highway, and may have had different numbers of lanes (though the record was unclear on that point). 42 F.3d at 524 & n.5. There was no suggestion that those differences were negligible, trifling, or meaningless. *See id.* Here, by contrast, the underlying action alternatives were essentially identical, AR-116-30528 (acknowledging "level of mining would be the same"), with the only supposed difference being mitigation measures, which Federal Defendants themselves dismissed as "negligible," ineffective, unnecessary, and ultimately meaningless. AR-143-37569 to -37572. If such admittedly negligible distinctions suffice under NEPA, the requirement to "rigorously explore" alternatives means nothing. 40 C.F.R. § 1502.14(a).

In sum, the "negligible" mitigation measures in Alternative 3 did not constitute a "meaningful difference" or a distinct alternative. *Abbey*, 719 F.3d at 1051; 40 C.F.R. § 1502.14(a)-(f) (mitigation measures added after alternatives are developed). As such, the two action alternatives (Alternative 2 and Alternative 3) were "virtually identical," in violation of NEPA. *Muckleshoot Indian Tribe*, 177 F.3d at 813-14; *WORC*, 2018 WL 1475470, at *7. This Court should, accordingly, reject the Findings' analysis of this issue and hold that Federal Defendants violated NEPA.

B. Federal Defendants demonstrated that a middle-ground alternative was feasible, lawful, and would cause significantly less environmental harm.

The Findings conclude that Federal Defendants correctly rejected a mid-range alternative because it "would not be operationally feasible, would have substantially similar effects to the action alternatives, and would run afoul of the BLM regulations and Montana state laws that require full recovery of coal." (Doc. 177 at 36.) Federal Defendants' EIS, however, did not provide any details to substantiate these excuses. AR-116-30533. And, worse, Federal Defendants' own ROD then proved each of these excuses to be patently false—because it ultimately approved an action that reduced the amount of coal mined and reduced the period of time over which the coal would be mined, and did so on the basis of a substantial reduction in environmental impacts.

The ROD approved the Area F expansion, but with a reduction of the amount and acreage of coal in order to meaningfully reduce environmental impacts:

> Removing 74 acres of Federal coal from the selected alternative would reduce the duration of mining in Area F by approximately six months to one year and would prevent the release of coal combustion emissions and residue associated with burning approximately 1.9 tons of Federal coal. Therefore, the intensity of direct, indirect, and cumulative impacts to all resources analyzed in the FEIS would generally be reduced as a result of selecting Alternative 2—Proposed Action as the agency's preferred alternative.

AR-143-37563. Federal Defendants asserted that this reduction was necessary to avoid "material damage" to groundwater quality outside the permit boundary. AR-143-37563. Federal Defendants admitted that this change in the amount and duration of mining would "reduce[]" the "intensity" of all environmental effects—"direct, indirect, and cumulative"—to "all resources." AR-143-37563.

As such, the ROD demonstrated that a reduced mining alternative would be "operationally feasible"—disproving Federal Defendants' first excuse for rejecting consideration of a middle-ground alternative. *Compare* AR-143-37563, *with* AR-116-30533. Moreover, Federal Defendants selected this action because it would avoid "material damage" to groundwater, and the agencies noted that the reduction in mining would "reduce[]" the "intensity" of all environmental impacts. AR-143-37563. This disproves their excuse that a middle-ground alternative would have "substantially similar" effects. AR-116-30533. Finally, the approval of reduced coal mining refuted Federal Defendants' excuse that any reduction in mining would somehow violate state coal-mining laws. *Cf.* AR-116-30533. While the approved action only reduced coal mining by 74 acres, more recent action by the Montana Department of Environmental Quality reduced another proposed expansion at the Rosebud Mine by nearly half of the proposed acreage, plainly giving the lie to Federal Defendants' contention that they are somehow proscribed from considering or approving reduced mining alternatives. (Doc. 169-2 at 1-2.)

This point is critical because, if Federal Defendants' demonstrably inaccurate argument were to be accepted, it would effectively nullify any meaningful alternatives analysis in federal decision-making related to coal mining plans. This would be a significant reversal in federal law, which courts have repeatedly construed to require consideration of middle-ground coal development alternatives. *E.g.*, *High Country Conservation Advocates v. USFS*, 951 F.3d 1217, 1224 (10th Cir. 2020); *WORC*, 2018 WL 1475470, at *7.

Here, Federal Defendants inconsistent statements and analysis with respect to the feasibility, harmfulness, and legality of a reduced-mining alternative is plainly arbitrary and capricious. *See Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("[A]n internally inconsistent analysis is arbitrary and capricious."). Indeed, courts have repeatedly reversed agency analyses that refuse to analyze middle-ground alternatives, but then, as here, eventually select an unanalyzed middle-ground action. *Rocky Mountain Wild v. Bernhardt*, 506 F. Supp. 3d 1169, 1185-87 (D. Utah Dec. 10, 2020) (overturning analysis where agency asserted that only full development alternatives would meet purpose and need, but then approved middle ground action); *Diné Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234, 1256 (D. Colo. 2010) (same).

This is especially problematic because it "stifle[s]" "[p]ublic knowledge and participation." *Rocky Mountain Wild*, 506 F. Supp. 3d at 1187. The public cannot

meaningfully participate in the NEPA process, including the development of reasonable alternatives, if Federal Defendants mislead the public about what alternatives are feasible, lawful, and harmful. Here, Federal Defendants told the public in their EIS that an alternative involving "a [s]maller disturbance [a]rea, for a [s]horter [d]uration" (i.e., a middle-ground alternative) was infeasible, unlawful, and would result in essentially the same environmental impacts. AR-116-30533. But then Federal Defendants' ROD approved an action with a smaller disturbance area and shorter duration on the basis of a meaningful difference in environmental impacts. AR-143-37563. Regardless whether this deceptive and inconsistent analysis was intentional, it certainly impaired public participation in the NEPA process.[5]

In sum, Federal Defendants' refusal to consider a mid-range alternative was inconsistent and arbitrary and violated NEPA. *Nat'l Parks Conservation Ass'n*,

[5] The Findings also suggest that a middle-ground alternative would not have been consistent with Federal Defendants' purpose and need statement. (Doc. 177 at 35.) Because this was not a basis on which Federal Defendants rejected the middle-ground alternative. AR-116-30533. As such, it is not a basis on which Federal Defendants' analysis may be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). And even if this excuse were available, it would be mistaken. As noted, Federal Defendants ultimately selected an action (unanalyzed in the EIS) that entailed reduced mining over a shortened period of time. AR-143-37563. As such, a middle-ground alternative was necessarily consistent with the purpose and need.

788 F.3d at 1141; *Rocky Mountain Wild*, 506 F. Supp. 3d at 1185-87; *Diné Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d at 1256. This Court should, accordingly, reject the Findings' analysis of this issue and hold that Federal Defendants violated NEPA.

II. The equities support vacatur because the Area F expansion will cause "serious and significant harm" and, as Westmoreland admits, vacatur will not impact employees or the community during the 12-month remand period.

Here, the equities strongly support modifying the Finding's proposed remedy to impose immediate vacatur because mining and burning coal from Area F will cause "serious and significant" harm to people and the environment (Doc. 177 at 37), while, by Westmoreland's own admission, vacatur will cause no harm to mine employees or the Colstrip and Lame Deer communities during the period of remand.

Except in rare circumstances, not present here, vacatur is the presumptive remedy for unlawful agency action. 5 U.S.C. § 706(2)(A); *All. for the Wild Rockies*, 907 F.3d at 1121; *Ksanka Kupaqa Xa'lcin*, 534 F. Supp. 3d at 1273-74. Courts assess vacatur by weighing the seriousness of the agency's errors against the disruptive consequences of vacatur. *Pollinator Stewardship All.*, 806 F.3d at 533.

Here, vacatur is warranted because the harms from mining and burning coal in Area F are "serious and significant,"[6] as the Findings correctly conclude (Doc. 177 at 37),[7] and because Westmoreland itself admitted that vacatur would have no disruptive consequences for the 12-month remand period. While the Findings reasoned that "immediate vacatur would have detrimental consequences for the Mine, its employees, and the Colstrip community" (Doc. 177 at 37), Westmoreland itself admitted that vacatur "would have no immediate effect on mine operations." (Doc. 150-1 at 32.) This is because Westmoreland would continue to supply coal to the Colstrip Power Plant "until other mine areas are depleted." (*Id.*) Westmoreland's erstwhile general manager, Jack Standa, stated in September 2020 that the mine had approximately 30 million tons of permitted reserves outside of Area F, sufficient to maintain operations and coal supply to the plant for 3-5 years.

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[6] One academic commenter recently described the lopsided harm caused by strip-mining federal coal, in which mining companies profit at the great expense of the public and the environment: "Public lands lessees quite simply externalize their environmental costs onto the government—the lessor—and ultimately on American citizens, taxpayers and voters. All of which is to say: it's a bad deal. A terrible deal. We are being utterly and completely taken." Michael Burger, *A Carbon Fee As Mitigation for Fossil Fuel Extraction on Federal Lands*, 42 Colum. J. Envtl. L. 295, 301 (2017).

[7] So too are the numerous errors in Federal Defendants' NEPA analysis. *Standing Rock Sioux Tribe*, 985 F.3d at 1053 (explaining that "NEPA violations are serious" and that in NEPA cases "refusing to vacate the corresponding agency action would 'vitiate' the statute" (quoting *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 536 (D.C. Cir. 2018))).

(Doc. 73-2 ¶¶ 3, 7.) Accordingly, if Federal Defendants correct their NEPA violations during the 365-day period as directed by the Findings (Doc. 177 at 37), there will be no disruptive consequences to mine employees or the Colstrip community. Westmoreland will simply move its operations to other permitted reserves. As such, the balancing of the equities tilts in only one direction—toward vacatur.

In addition to ascribing unwarranted weight to the impacts of vacatur—which Westmoreland insisted would be non-existent[8]—the Findings note that immediate vacatur "would not have an immediate effect on harms such as greenhouse gas emissions or water withdrawals because those harms will continue at least until other areas of the Mine are depleted." (Doc. 177 at 37.) However, even setting aside the impacts related to coal combustion, mining operations in Area F alone will cause significant harm. For example, Federal Defendants themselves acknowledge that mining will have "major" cumulative impacts on surface waters, permanently precluding existing uses. AR-116-31108; AR-116-30932. These impacts will cause irreparable harm to Conservation Groups' members. (*See* Doc. 137-1 ¶¶ 9-13, Doc. 137-2 ¶¶ 12-17, Doc. 137-4 ¶¶ 13-15.)

[8] The Findings correctly note that Westmoreland "made inconsistent statements … about whether barring Area F mining could lead to closure of the Power Plant." (Doc. 177 at 31.) As such, Westmoreland is not credible.

Finally, the Findings state that "additional analyses and decision-making on remand … may be able to cure the deficiencies in the EIS." (Doc. 177 at 37.) While this may be true, "the point of NEPA is to require an adequate EIS before a project goes forward." *Oglala Sioux Tribe*, 896 F.3d at 536. The "harm NEPA attempts to prevent" is harm resulting from uninformed decision-making. *Id.* (quoting *Winter v. NRDC*, 555 U.S. 7, 23 (2008)). This harm is unavoidable if Westmoreland is allowed to continue strip-mining during remand, heedless of what environmental harms may result from its actions.

In sum, the presumptive remedy of vacatur is warranted here, where Federal Defendants' errors are serious and no significant disruption would result from vacatur.

CONCLUSION

For the foregoing reasons, Conservation Groups respectfully ask this Court to affirm Magistrate Judge Cavan's Findings and Recommendations in all respects save two: (1) the Court should first reject the Findings' analysis of alternatives and hold that Federal Defendants' analysis of alternatives was arbitrary and in violation of NEPA; and (2) the Court should vacate Federal Defendants approval of the Area F expansion.

Respectfully submitted this 18th day of March, 2022.

/s/ Shiloh Hernandez
Shiloh S. Hernandez

Earthjustice
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
T: 406.586.9692 ext. 1929
shernandez@earthjustice.org

Melissa A. Hornbein
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
(406) 204-4861
hornbein@westernlaw.org

Attorneys for Plaintiffs

Nathaniel Shoaff (*pro hac vice*)
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5610
nathaniel.shoaff@sierraclub.org

Attorney for Plaintiff Sierra Club

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I hereby certify that the brief, excluding caption, certificates, tables, exhibit index, and signature block, contains 3,688 words. I relied on a word-processing system to obtain this word count.

/s/ Nathaniel Shoaff
Nathaniel Shoaff