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

WILDEARTH GUARDIANS and MONTANA ENVIRONMENTAL INFORMATION CENTER, Plaintiffs,	Case No. CV 17-80-BLG-SPW-TJC **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

vs.

RYAN ZINKE, et al.

Defendants.

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ABBREVIATIONS AND SHORT FORMS

BLM	U.S. Bureau of Land Management
CO_2	Carbon dioxide
Coal company	Spring Creek Coal, LLC
EA	Environmental assessment
EIS	Environmental impact statement
FONSI	Finding of no significant impacts
IBLA	Interior Board of Land Appeals
Mine expansion	Mining plan modification for coal lease MTM 94378
NEPA	National Environmental Policy Act
OSM	U.S. Office of Surface Mining
Secretary	U.S. Secretary of the Interior
TR1	TR1 Major Permit Revision

INTRODUCTION

Plaintiffs WildEarth Guardians and Montana Environmental Information Center (collectively, Conservation Groups) challenge Federal Defendants' decision to approve a mining plan modification for Federal Coal Lease MTM 94378 (mine expansion) for the Spring Creek Mine in southeastern Montana. Federal Defendants concluded that the modification would not significantly impact the environment. In so doing, the agencies failed to tell the public the whole environmental truth about numerous harmful consequences of stripping, shipping, and burning over 100 million tons of coal, in violation of the National Environmental Policy Act (NEPA), and failed to consider compelling evidence that the underlying coal lease may, in fact, be void.

FACTS

I. The Spring Creek Strip-Mine Has Evaded NEPA for Forty Years.

The Spring Creek Mine is a sprawling coal strip-mine located in the Powder River Basin in southeastern Montana. AR:2-664-10723, 10725 (map), 10748 (map).[1] The mine pits and associated infrastructure lie adjacent to the Tongue River Reservoir. AR:2-664-10725 (map). The area surrounding the mine is

[1] Citations to the administrative record are formatted as AR:(disc number)-(document number)-(Bates number).

beautiful and varied, including pine hills, sagebrush, grasslands, and breaks. AR:2-796-17442, 17477.

The Spring Creek Mine is the seventh largest coal strip-mine by production in the United States. AR:2-785-17287. It strips and ships approximately 18 million tons of sub-bituminous coal each year. AR:2-664-10724. The strip-mine began operations in 1979 through a lease of state coal, has grown incrementally through eight lease expansions involving a mixture of state, private, and federal coal, and now covers nearly 7,000 acres. AR:2-664-10723 to -10726, 10735; AR:2-796-17390. Despite its sprawling size, it has never been subject to a comprehensive environmental impact statement (EIS). AR:2-796-17390 (identifying all prior environmental analyses).

II. This Court Initially Deemed the Mine Expansion Unlawful.

The U.S. Bureau of Land Management (BLM) leased the federal coal at issue—1,207 acres containing 151 million tons of federal coal—to Spring Creek Coal, LLC (coal company), in 2007. AR:2-664-10694; AR:2-796-17390. An accompanying environmental assessment (EA) emphasized that the lease did not authorize strip-mining and that an "analysis of a detailed site-specific mining and reclamation plan" would precede mining authorization. AR:2-796-17393. The coal company obtained a strip-mining permit from the Montana Department of

Environmental Quality (Department) in 2011. AR:2-664-10690. The Department prepared a nine-page checklist EA for the expansion. AR:2-629-10340.

In 2012 Federal Defendants approved the mine expansion—1,224 acres containing approximately 103 million tons of recoverable coal—into the leased federal coal. AR:2-664-10690 to -10694, 10727.[2] Federal Defendants did not conduct any additional NEPA analysis, but issued a finding of no significant impact (FONSI) containing a single sentence of analysis. *Wildearth Guardians*, 2015 WL 6442724, at *2. Moreover, other than placing the approval documents in their Denver office, Federal Defendants did not notify the public of their decision. *Id.* at *7. Conservation groups sued, and this Court held that Federal Defendants' actions violated NEPA's public notice and "hard look" requirements. *Id.* at **7-9; *Guardians*, 2016 WL 259285, at *3. This Court remanded the matter to Federal Defendants to comply with NEPA, but allowed mining to continue pending remand. *Guardians*, 2016 WL 259285, at *3.

[2] Because the expansion involved federal coal, Federal Defendants retain ultimate authority to approve or deny mining, pursuant to the Mineral Leasing Act and the Surface Mining Control and Reclamation Act. *See Wildearth Guardians v. OSM*, No. CV 14-103-BLG-SPW, 2015 WL 6442724, at **5-6 (D. Mont. Oct. 23, 2015) (explaining statutory scheme), *report and recommendation adopted in part, rejected in part sub nom. Guardians v. OSM*, No. CV 14-103-BLG-SPW, 2016 WL 259285 (D. Mont. Jan. 21, 2016).

III. Federal Defendants' Approval of the Mine Expansion on Remand Was Again Unlawful.

On remand, Federal Defendants again approved the mine expansion, issuing a final EA and FONSI in September and October 2016, respectively. AR:2-664-10673, 10692, 10710. The expansion adds 1,224 acres of disturbance, 1,117 acres of federal coal, and approximately 103 million tons of coal to the existing mine. AR:2-664-10728. However, because mining continued during remand, only 503 acres of undisturbed land remained, containing 89 million tons of federal coal. AR:2-664-10728. The coal company plans to strip-mine this coal at a rate of approximately 18 million tons per year. AR:2-664-10728.

Most of the strip-mined coal is shipped by rail to power plants in the upper Midwest, Arizona, and Washington to be burned to generate electricity. AR:2-664-10724, 10738. Some of the coal is exported via the Westshore Terminal in British Columbia, Canada. AR:2-663-10724. The expansion will result in more than 2,300 coal trains traveling to and from the mine annually for nearly a decade. AR:2-664-10808.

When burned, the coal will annually emit tens of millions of tons of carbon dioxide (CO_2), aggravating climate change; thousands of tons of particulate matter, causing sickness and premature deaths; tens of thousands of tons of sulfur dioxide, causing acid rain; tens of thousands of tons of nitrogen oxides, creating smog and

ozone pollution; and hundreds of pounds of toxic mercury, harming brain development of children and fetuses. AR:2-664-10781, 10783; *see* AR:2-827-18256 to -18259.

STANDARD OF REVIEW

A party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Courts reviewing claims under NEPA pursuant to the Administrative Procedure Act (APA) "shall hold unlawful and set aside agency action . . . found to be . . . arbitrary [or] capricious." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious:

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. v. State Farm, 463 U.S. 29, 43 (1983).

ARGUMENT

I. Conservation Groups Have Standing.

To establish standing a plaintiff must show that "(1) he or she has suffered an injury in fact that is concrete and particularized, and actual and imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely

to be redressed by a favorable court decision." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015).

> Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. Once plaintiffs seeking to enforce a procedural requirement establish a concrete injury, the causation and redressability requirements are relaxed.

Id. (internal quotations and citations omitted). An association has standing to sue when members would have standing in their own right. *Id.*

Here, the Conservation Groups have standing based on the standing of their members Steve Gilbert and Jeremy Nichols. *See* Nichols Decl. ¶¶ 9-22; Gilbert Decl. ¶¶ 9-20.

II. Federal Defendants Failed to Take a Hard Look at Indirect and Cumulative Effects of Coal Transportation.

Federal Defendants failed to analyze the indirect and cumulative impacts to human health and the environment caused by coal trains including diesel fumes, noise, vibrations, rail congestion, dust, derailments, impacts to protected species, water, and environmentally sensitive areas such as Glacier National Park. AR:2-785-17292; AR:2-827-18257; AR:2-839-18755; AR:2-840-18832. These harms are a foreseeable consequence of the mine expansion because the mine's coal is shipped by rail. AR:2-664-10808.

This Court recently held that transporting coal is a foreseeable indirect effect of mining that must be analyzed under NEPA. *Montana Envtl. Info. Ctr. v. OSM* (*MEIC*), 274 F. Supp. 3d 1074, 1091-93 (D. Mont. 2017); *accord S. Fork Band Council v. BLM*, 588 F.3d 718, 725-26 (9th Cir. 2009). Despite this, Federal Defendants ignored coal trains' myriad environmental and health impacts.

Here, just as in *MEIC*, 274 F. Supp. 3d at 1092, the agencies acknowledged that trains transporting coal from the mine are foreseeable and quantifiable,[3] and that travel routes and destinations are known. AR:2-664-10808 (over 2,300 total trains annually); 10724 (noting shipping destinations), 10725 (map of rail routes from the mine); AR:2-737-15459 (mapping destinations); AR:2-785-17287 (identifying coal plants receiving coal from mine). The vast majority of coal ships to the upper Midwest, Washington, or coal export terminals in British Columbia, Canada. AR:2-737-15459. There are limited rail routes across Montana to these destinations. AR:2-839-18732 (map). As in *MEIC*, 274 F. Supp. 3d at 1092, Federal Defendants used their knowledge of destinations and routes to calculate greenhouse gas emissions from coal trains. AR:2-664-10751.

[3] It is not enough for an agency to quantify the number of coal trains; it must also evaluate the "actual environmental effects" of the trains. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 995 (9th Cir. 2004).

Nevertheless, the agencies failed to take the required hard look at the indirect and cumulative environmental impacts of coal trains. As in *MEIC*, 274 F. Supp. 3d at 1092-93, aside from calculating greenhouse gas emissions from trains, Federal Defendants considered only one impact—traffic accidents and delays—at one location—the grade crossing on Highway 314 four miles south of the strip-mine. AR:2-664-10808 to -10809, 10812; *see* AR:2-664-10725 (local map). Federal Defendants' failure to consider diesel fumes, noise, vibrations, rail congestion, dust, derailments, and impacts to protected species, water, and environmentally sensitive areas at any location beyond the one grade crossing was arbitrary and capricious. *MEIC*, 274 F. Supp. 3d at 1093 (agencies' failure to consider "indirect or cumulative effects of the transportation of Bull Mountains coal beyond the Broadview Spur" was "arbitrary and capricious").

III. Federal Defendants Failed to Take a Hard Look at Non-Greenhouse Gas Effects of Coal Combustion.

When coal is burned to produce electricity, it releases not just harmful greenhouse gases, but also non-greenhouse gas air pollution, such as mercury that settles into waterbodies and particulate matter that we inhale. Agencies preparing an EA must consider "indirect effects," which are "caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). "Indirect effects may include . . . related effects on air and

water and other natural systems, including ecosystems." *Id.* The non-greenhouse gas pollution from coal combustion is "an important aspect of the problem [the agency] is required to consider." *MEIC*, 274 F. Supp. 3d at 1093-94.

Here, Federal Defendants acknowledge that the coal will be burned, releasing great clouds of pollution. AR:2-664-10780 to -17081. The EA states that this coal combustion will annually cause 74,000 tons of sulfur dioxide, 28,000 tons of oxides of nitrogen, 4,000 tons of PM_{10}, 1,200 tons of $PM_{2.5}$, and 580 pounds of mercury pollution. AR:2-664-10781. Conservation Groups presented evidence that such pollution has widespread, deleterious impacts on human health and costs the public billions of dollars annually. AR:2-827-18257 to -18258.

Under NEPA, agencies must do more than merely tally pollution. They must also describe the *effects* of the pollution on human and environmental health. *Ctr. for Biological Diversity*, 538 F.3d at 1216 (while agency "quantifies the expected amount of CO_2 emitted from light trucks … the EA does not discuss the *actual* environmental effects resulting from those emissions"); *accord Klamath-Siskiyou*, 387 F.3d at 995.

Federal Defendants arbitrarily dismissed this pollution as minor because it is less than one percent of U.S. emissions. AR:2-664-10781. But rather than diluting effects using a national view, the agencies were required to evaluate whether the

pollution would have significant effects in the locations where it is burned. *Pac. Coast Fed'n of Fishermen's Ass'ns v. NMFS*, 265 F.3d 1028, 1035-37 (9th Cir. 2001) (recognizing broad scale of analysis marginalized local impacts); *see also Oregon Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1130 (9th Cir. 2007) (concluding it is "unreasonable" for an agency to "dilute[] to insignificance" adverse environmental effects (quoting *Pac. Coast Fed'n*, 264 F.3d at 1036)).

Here, coal combustion will not be dispersed evenly across the United States, but will occur at specific plants, causing specific localized impacts, AR:2-827-18249 to -18250—as Federal Defendants were aware. AR:2-664-10738, 10751; AR:2-737-15459. Federal Defendants' failure to take a hard look at these deleterious, indirect impacts of coal combustion was arbitrary and capricious. *MEIC*, 274 F. Supp. 3d at 1093.[4]

[4] *Accord S. Fork Band*, 588 F.3d at 725 (failure to consider air pollution from transportation and processing of ore from mine violated NEPA); *W. Organization of Res. Councils v. BLM* (*WORC*), No. CV-16-21-GF-BMM, 2018 WL 1475470, at **11-13 (D. Mont. Mar. 26, 2018) (failure to consider downstream combustion of coal violated NEPA); *Diné CARE v. OSM*, 82 F. Supp. 3d 1201, 1214, 1218 (D. Colo. 2015), *vacated as moot*, 643 Fed. App'x 799 (10th Cir. 2016) (failure of EA to consider mercury emissions from coal combustion violated NEPA); *accord WildEarth Guardians v. OSM*, 104 F. Supp. 3d 1208, 1229-31 (D. Colo. 2015), *vacated as moot*, 652 Fed. App'x 717 (10th Cir. 2016); *see also High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1189-1193 (D. Colo. 2014).

IV. Federal Defendants Failed to Take a Hard Look at Greenhouse Gas Effects of Coal Combustion.

Federal Defendants arbitrarily failed to take a hard look at the indirect and cumulative impacts of greenhouse gas emissions resulting from the mine expansion, as required under NEPA. *MEIC*, 274 F. Supp. 3d at 1099; *High Country*, 52 F. Supp. 3d at 1189-90. The EA estimated that mining, transporting, and combusting the coal would result in 146 million metric tons of CO_2. AR:2-761-17032. Again, Federal Defendants failed to meet their obligation to not just quantify emissions but also evaluate the *impact* of those emissions. *Ctr. for Biological Diversity*, 538 F.3d at 1216.

While NEPA does not require cost-benefit analysis, 40 C.F.R. § 1502.23, it is arbitrary for an agency to quantify the *benefits* of an action, but fail to analyze the *costs* when such analysis is feasible. *MEIC*, 274 F. Supp. 3d at 1098; *High Country*, 52 F. Supp. 3d at 1191.[5] Here, Federal Defendants knew that the social cost of carbon protocol was available to quantify the economic costs of greenhouse gas emissions. AR:2-827-18265 to -18271. The use of this rigorous methodology

[5] *Johnston v. Davis*, 698 F.2d 1088, 1094-95 (10th Cir. 1983) (agency may not give impression that benefits exceed costs, when evidence suggests the contrary); *accord Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446-48 (4th Cir. 1996); *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983); *see also Ctr. for Biological Diversity*, 538 F.3d at 1200 (misleading to present economic analysis without assigning any cost to greenhouse gas emissions).

has been upheld in federal court. *Zero Zone Inc. v. Dept. of Energy*, 832 F.3d 654, 677-78 (7th Cir. 2016). Nevertheless, Federal Defendants refused to use the protocol to analyze the economic costs of emissions—even as they touted the economic benefits of the mine expansion, including taxes and royalties, in exhaustive detail. AR:2-761-17059. Federal Defendants thus improperly "inflat[ed] the benefits of the action while minimizing its impacts." *MEIC*, 274 F. Supp. 3d at 1098 (quoting *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir. 2005)).[6] The agency "acted arbitrarily and capriciously by quantifying the benefits of the mine expansion while failing to account for the costs, even though a tool was available to do so." *Id.* at 1094.

Federal Defendants' one-sided economic analysis misleadingly "zeroed the climate change impacts." *Id.* As federal courts have recognized, while there is disagreement about the value to use for the social cost of carbon, it is not zero. *High Country*, 52 F. Supp. 3d at 1192; *see also Ctr. for Biological Diversity*, 538 F.3d at 1200. In fact, it is substantial: the U.S. Interagency Working Group on the

[6] An agency comment on an undated draft of the environmental assessment suggests that Federal Defendants intentionally emphasized the mine's economic benefits: "Interesting choice to use cumulative royalties paid. *I guess it make*[s] *the total numbers bigger*, but with its relatively later and slow start, it moves SCM [Spring Creek Mine] down the list. If you look at recent years, I'm pretty sure you would find SCM by far the largest coal mine monetary payer in the State of Montana." AR:2-870-20270 (emphasis added).

Social Cost of Carbon most recently estimated that the damage from each ton of CO_2 costs society up to $123, with a central value of $43. AR:2-827-18270 to -18271. Notably, these values likely *underestimate* costs because the methodology excludes important climate damages. AR:2-827-18269.

Federal Defendants' excuses for not using the social cost of carbon lack merit. They first claim "there is no consensus on the appropriate fraction of social cost of carbon tied to electricity generation that should be assigned to the coal producer." AR:2-664-10786. This argument misunderstands NEPA's mandate that agencies account for the indirect and cumulative impacts of greenhouse gas emissions, 40 C.F.R. § 1508.8(b), i.e., impacts of coal combustion. *MEIC*, 274 F. Supp. 3d at 1099; *High Country*, 52 F. Supp. 3d at 1189-90. It also misunderstands the protocol's purpose, which is to quantify—not apportion responsibility for—climate costs. AR:2-693-12437. Again, agencies must quantify the environmental costs of a project, if, as here, they choose to trumpet its economic benefits. *MEIC*, 274 F. Supp. 3d at 1098-99; *High Country*, 52 F. Supp. 3d at 1189-90.[7]

Federal Defendants next claim uncertainty that indirect greenhouse gas emissions "would actually be reduced if the federal coal associated with the

[7] *See* 42 U.S.C. § 4332(2)(B); *Calvert Cliffs v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (noting that 42 U.S.C. § 4332(2)(B) "mandates a rather finely tuned and 'systematic' balancing" of "environmental costs" and "economic and technical benefits").

Proposed Action was not mined," given that power plants have alternative sources of coal, including non-federal coal reserves at the Spring Creek strip-mine. AR:2-665-10786. This "perfect substitution" argument fails. First, tools do exist to determine the effects of taking coal off the market, such as the National Energy Modeling System developed by the federal Energy Information Administration, and ICF International's Integrated Planning Model, which has been used to evaluate market responses to numerous federal proposals in recent years. AR:2-774-17214.

Second, Federal Defendants may not assume substitution of costs but not benefits, as they did here. AR:2-664-10811 (asserting that all economic benefits—revenue and jobs—would disappear if the mine expansion was denied). As this Court observed in *MEIC*, 274 F. Supp. 3d at 1096-99, Federal Defendants cannot have it both ways: if they assume coal production will shift just elsewhere (making emissions a wash), they must assume that economic benefits will shift there as well (making them a wash too). To do otherwise, as Judge Molloy explained, "places the [agencies'] thumb on the scale by inflating the benefits of the action while minimizing impacts." *Id.* at 1098.

Moreover, courts have rejected this "perfect substitution" argument as arbitrary "because the assumption itself is irrational (i.e., contrary to basic supply

and demand principles)." *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1236 (10th Cir. 2017); *accord Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003). This Court rejected the exact argument Federal Defendants make here—that a mine expansion may not increase greenhouse gas emissions because the receiving "power plant(s) would obtain coal from alternate sources"—as "illogical." *MEIC*, 274 F. Supp. 3d at 1098.

Finally, Federal Defendants also fail in their attempt to avoid using the social cost of carbon due to "uncertainties." Agencies cannot ignore the social cost of carbon—which is clearly greater than zero—simply because it can be expressed in a range of values. *High Country*, 52 F. Supp. 3d at 1192; *see also Ctr. for Biological Diversity*, 538 F.3d at 1200. The agencies also claim that the social cost of carbon would not "provide any meaningful insight . . . [unless it is] viewed in context with other costs and benefits." AR:2-664-10786. Again, this argument misses the mark, given that the agencies did quantify benefits. Cost-benefit analysis is not required under NEPA, 40 C.F.R. § 1502.23, but it is nonetheless arbitrary for agencies to quantify economic benefits while ignoring environmental costs where a protocol exists to quantify such costs. *MEIC*, 274 F. Supp. 3d at 1098; *High Country*, 52 F. Supp. 3d at 1191.

Federal Defendants' misleading economic analysis deprived the public of critical information that should have been included in the EA. If the agencies had used even the lowest estimate of the social cost of carbon ($12 per metric ton), the climate costs of the mine expansion would still be *an order of magnitude* greater than the economic benefits.[8] Federal Defendants' failure to take a hard look at the social costs of the mine expansion's greenhouse gas emissions was arbitrary. *MEIC*, 274 F. Supp. 3d at 1098-99; *High Country*, 52 F. Supp. 3d at 1191.

V. Federal Defendants Improperly Piecemealed Their Analysis of the Spring Creek Mine.

The Spring Creek mine is the seventh largest coal mine by production in the United States and has been operating for four decades, yet it has evaded an EIS by expanding incrementally. The mine expansion here is just one small piece of a nearly 7,000-acre puzzle. An agency may not avoid preparation of an EIS by "breaking [an action] down into small component parts." 40 C.F.R. § 1508.27(b)(7). Nor may an agency allow project proponents to evade preparation

[8] *See* AR:2-664-10783 (anticipating 146 million tons of CO_2 emissions from expansion); AR:2-829-18301 (lowest estimate of social cost of carbon is $12 per ton); *cf.* AR:2-664-10810 to -10811 (calculating total state revenues from expansion of $236 million and federal revenues of $143 million). Thus, the low estimate of harm from greenhouse gas emissions is $1.7 billion; total revenues from the expansion are $379 million. Under the highest estimate for the social cost of carbon ($123 per ton), AR:2-829-18301, the public harm from burning 146 tons of CO_2 is $18 billion.

of an EIS "by submitting a gerrymandered series of permit applications." *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005). Even if projects are framed as distinct, "[a] single NEPA review is required . . . when there is a single proposal governing the projects or when the projects are connected, cumulative, or similar actions under the regulations implementing NEPA." *Earth Island Instit. v. U.S. Forest Serv.*, 351 F.3d 1291, 1304 (9th Cir. 2003) (internal citations omitted); *see* 40 C.F.R. § 1508.25(a)(2) (defining cumulative actions).

The Ninth Circuit specifically prohibits segmentation of coal mines, as here, noting that "[w]hile . . . each mining plan prepared for tracts within the leased area is to a significant degree an independent project," nevertheless the plans require "comprehensive study," especially in light of a coal company's "massive capital investment and extended contractual commitments [which] present a situation in which 'it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.'" *Cady v. Morton*, 527 F.2d 786, 795 (9th Cir. 1975) (internal citation omitted).[9]

[9] *See also Bragg v. Robertson*, 54 F. Supp. 2d 635, 649-51 (S.D. W. Va. 1999) (finding "paradigmatic example of illegal segmentation" where company split coal mine operations into two phases, requiring separate permits, though each might have independent utility, neither could support the "vast dedication of resources" at the larger mine); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998) (requiring related logging projects to be included in single EIS).

Here, Federal Defendants analyzed only the expansion of the mine onto four parcels of federal land, ignoring ongoing mining on intertwined private and state land and pending proposals for mine expansions into federal coal. When the coal company leased the coal at issue in 2007, it planned to mine 15 million tons per year for 25 years—a large, long-term mining operation. AR:2-796-17393. This overall plan has been—and continues to be—carried out in segments. For instance, while the agencies were assessing whether to prepare an EIS for this expansion, they were simultaneously considering another mine expansion proposal (referred to as TR1), involving 500 acres containing 48 million tons of federal coal, which would extend mining for 3 more years. AR:2-664-10769; AR:2-785-17288 to -17289. The coal company also applied to lease additional adjacent lands for further strip-mining. AR:2-785-17290.

This case is on all fours with *Cady*. Here, as in *Cady*, 527 F.2d at 790, the agencies isolated the impacts of an incremental expansion from those of the larger, long-term mining operation. Also as in *Cady*, the coal company's massive capital investment in the mine suggests that it will carry out the larger operation. *Id.* at 795.

Additionally, the broader mining operation may result in significant cumulative impacts. U.S. Office of Surface Mining (OSM) guidelines provide that

the agency should "normally" prepare an EIS for mining operations greater than 1,280 acres. 516 DM 13.4(A)(4). Here, the coal company sought to expand the mine by 1,117 acres. AR:2-664-10728; *see also* AR:2-796-17408 (lease was for 1,207 acres). If combined with the 500-acre TR1 expansion the coal company is proposing simultaneously, AR:2-664-10769; AR:2-785-17288 to -17289, the mine expansion would exceed the 1,280-acre threshold beyond which a mine operation is normally considered to have "significant" impacts. 516 DM 13.4(A)(4); 42 U.S.C. 4332(2)(C). Notably, although the mine has increased incrementally to over 6,000 acres over four decades (well over the EIS threshold), it has never been subject to an EIS. *See* AR:2-796-17390 (identifying all prior environmental analyses); *Diné CARE v. Klein*, 747 F. Supp. 2d 1234, 1240-41 (D. Colo. 2010) (similar large strip-mine "evaded meaningful review for much of its early existence" through multiple incremental expansions). The Ninth Circuit forbids such evasion of NEPA through piecemeal development. *Cady*, 527 F.2d at 790; *accord* 40 C.F.R. §§ 1508.25(a)(2), 1508.27(b)(7). Here, Federal Defendants illegally segmented the NEPA analysis of the Spring Creek Mine and, at a minimum, should prepare an EIS considering both the current and TR1 expansions.

VI. Federal Defendants' Determination Not to Prepare an EIS Was Arbitrary and Capricious.

OSM decided not to prepare an EIS despite substantial questions about whether the mine expansion may cause significant impacts. Moreover, the mine expansion is the type of project that normally requires an EIS under agency guidance.

A. There Are Substantial Questions that the Mine Expansion May Have Significant Effects.

A federal agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). "An agency *must* prepare an EIS if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor" *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (quoting *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988) (internal quotation and ellipse omitted, first emphasis added).

Whether an action is "significant" turns on its "context" and "intensity." 40 C.F.R. § 1508.27(a)-(b). Context requires consideration of the action in various contexts, including "society as a whole . . . , the affected region, the affected interests, and the locality," as well as consideration of short- and long-term effects. *Id.* § 1508.27(a). To assess the intensity of the impact, agencies must address a

non-exclusive list of factors. *Id.* § 1508.27(b). The presence of "one of these factors may be sufficient to require preparation of an EIS." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

Conservation Groups raised substantial questions relating to the mine expansion's significant impacts. First, the agencies failed to adequately assess the mine expansion in its proper context. As in *MEIC*, 274 F. Supp. 3d at 1101-02, it was improper for Federal Defendants to label the mine expansion a "site specific action," AR:2-664-10696, and only consider local impacts of the more than 2,300 coal trains traveling to and from the mine each year, even though the agencies knew the trains' destinations and routes. Further, also as in *MEIC*, 274 F. Supp. 3d at 1102-03, the agencies' failure to assess non-local coal train impacts ignored the controversial nature of coal trains, their public health impacts, and potential cumulative impacts when combined with other coal and oil trains. *See supra* Part II; 40 C.F.R. § 1508.27(b)(2), (4), (7).

Second, as in *MEIC*, 274 F. Supp. 3d at 1103-04, there is controversy and uncertainty regarding the impact of greenhouse gas emissions from the expansion. Federal Defendants stated that the impacts of greenhouse gas emissions are "minor and short term." AR:2-664-10784. Conservation Groups, however, presented evidence that greenhouse gas emissions from the expansion will cause $1.7 to $18

billion in harm to the public, which *exceeds* the total economic benefits of the expansion *by orders of magnitude*. *See supra* note 8. Federal Defendants, in turn, asserted there is "no consensus" and "no certainty" regarding the social cost of carbon. AR:2-664-10786. "Therein lay the controversy." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 737 (9th Cir. 2001) (mandating EIS due to uncertainty and controversy in light of dispute over project's impacts). This Court reached the same conclusion on the same issue in *MEIC*, 274 F. Supp. 3d at 1104-05 ("uncertainty" over greenhouse gas emissions "militates in favor of an EIS, not against it").

Third, there are substantial questions about cumulative impacts. *See* 40 C.F.R. § 1508.27(b)(7). "Significance may not be avoided by terming an action temporary or by breaking it down into small component parts." *Id.* The Spring Creek Mine has successfully evaded NEPA for four decades through a series of incremental expansions, including the TR1 expansion pending at the same time as the mine expansion at issue here. *See supra* Part V. The combined size of the mine expansion and the TR1 expansion would normally require an EIS under agency regulations. *See infra* Part VI.B.

Finally, there is a substantial question whether approval of the mine expansion violates federal law, in light of the apparent invalidity of the underlying lease. 40 C.F.R. § 1508.27(b)(10); s*ee infra* Part VII.

B. Federal Defendants Failed to Consider Their Own Procedures for Assessing Significance.

Agencies must "[d]etermine under its procedures supplementing these regulations . . . whether the proposal is one which: (1) [n]ormally requires an [EIS]." 40 C.F.R. § 1501.4(a). OSM's NEPA procedures normally require an EIS when:

> (a) The environmental impacts of the proposed mining operation are not adequately analyzed in an earlier environmental document covering the specific leases or mining activity; and
>
> (b) The area to be mined is 1280 acres or more, or the annual full production level is 5 million tons or more; and
>
> (c) Mining and reclamation operations will occur for 15 years or more.

516 DM 13.4(A)(4).

Contrary to the mandate of § 1501.4(a), OSM never made such a determination. Yet, here, the requirements of 516 DM 13.4(A)(4) are plainly met. This Court already determined that the prior BLM EA for the lease did not adequately address the impacts of mining. *WildEarth Guardians*, 2016 WL 259285, at *2. Annual production will triple the 5-million-ton threshold. AR:2-

664-10724 (expected production 18 million tons per year). And mining and reclamation operations will occur over 15 years. AR:2-796-17404 (showing mining cuts beginning in 2010 and ending in 2029); *see also* Mont. Code Ann. § 82-4-235 (requiring at least ten years for reclamation).

When an agency's own NEPA procedures indicate that an EIS should "normally" be prepared, it creates a presumption that the agency should prepare an EIS. *Davis v. Mineta*, 302 F.3d 1104, 1117 (10th Cir. 2002), *abrogated on different grounds*, *Diné CARE v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *Diné CARE*, 747 F. Supp. 2d at 1253. If an agency "arbitrarily and capriciously failed to follow its own regulation, its decision must be reversed." *Davis*, 302 F.3d at 1117. Here, Federal Defendants' failure to even consider their own NEPA procedures was unlawful.[10]

VII. Federal Defendants Failed to Consider the Validity of the Federal Coal Lease Underlying the Mining Plan.

The Secretary of the Interior is responsible for authorizing the mining of federal coal through approval of a mining plan. 30 U.S.C. § 207(c); 30 U.S.C. § 1273(c); 30 C.F.R. § 746.14. A lawful mining plan is a prerequisite to an entity's

[10] In *MEIC*, 274 F. Supp. 3d at 1101, Judge Molloy rejected a similar claim but there the agencies specifically referenced their NEPA procedures in their FONSI. *Cf.* AR:2-664-10694 to -10699 (failing entirely to determine whether expansion would "normally" require an EIS).

ability to mine leased federal coal. 30 C.F.R. § 746.11(a). Although the Secretary is charged with approving or disapproving a mining plan, OSM is charged with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval [or] disapproval." 30 C.F.R. § 746.13; 30 C.F.R. § 740.4(b)(1). This decision document is based on consideration of the factors found at 30 C.F.R. § 746.13, and must include *inter alia* documentation "assuring compliance with the applicable requirements of other Federal laws, regulations and executive orders" and "findings and recommendations of OSM with respect to the additional requirements" of Part 746. 30 C.F.R. § 746.13(c), (g). Thus, OSM plays a critical role in adequately informing the Secretary by considering the relevant factors enumerated in the regulations.

OSM violated the APA by failing to consider a "relevant factor" encompassed by 30 C.F.R. § 746.13—the validity of the coal lease underlying the proposed mining plan. Here, there is a cloud over the underlying lease's validity because it was authorized by BLM personnel lacking delegated authority.

The Interior Board of Land Appeals (IBLA) sets aside BLM coal leases approved by BLM employees who lack delegated authority. *See WildEarth Guardians*, 187 IBLA 349, 352-54 (May 6, 2016); *WildEarth Guardians*, 189 IBLA 274, 279-83 (Feb. 7, 2017). In both cases, the IBLA found that delegated

authority to approve coal leases did not extend below the level of the Deputy State Director. 187 IBLA at 351; 189 IBLA at 278. Thus, where a leasing decision "is not issued by an employee with delegated authority, the decision has no legal effect." 189 IBLA at 275. The lease underlying the mining plan modification challenged here was approved by the Acting Miles City Field Manager. AR:2-850-18959. The lease approval is therefore invalid.

Conservation Groups notified OSM on July 19, 2016, August 2, 2016, and September 26, 2016, that the lease underlying the mine expansion was invalid because it was authorized by a BLM Field Manager without delegated authority. AR:2-784-17286, AR:2-789-17333, AR:2-791-17371, AR:2-850-18959. Under 30 C.F.R. § 746.13, OSM had a duty to disclose this issue to the Secretary in its recommendation for approval. Instead, OSM summarily dismissed this issue, responding that "OSMRE has no authority to determine the validity of the federal coal lease." AR:2-664-10920. But this crabbed response misconstrues OSM's duty. Although OSM lacks authority to void a coal lease, OSM must "assure compliance" with applicable "Federal laws" and "regulations" when recommending approval or disapproval of a mining plan. 30 C.F.R. § 746.13(c).

Upon receiving notice that the coal lease was likely invalid, OSM had a duty under 30 C.F.R. § 746.13 to take a meaningful look at the issue of lease validity,

consider its implications, and include this information in its recommendation to the Secretary. OSM's recommendation did not inform the Secretary that the underlying federal coal lease could be invalid. OSM's arbitrary withholding of this information from the Secretary violated 30 C.F.R. § 746.13 and the APA, 5 U.S.C. § 706(2)(A). *State Farm*, 463 U.S. at 43 (failure to consider important aspect of problem is arbitrary and capricious).

Second, the Secretary's mining plan approval is *ultra vires* because the Secretary exceeded the scope of his authority under 30 C.F.R. § 746.11(a). The Secretary's authority to authorize mining plans is tied to the existence of leased federal coal. 30 C.F.R. §§ 740.4(a)(1), 746.11(a). If the underlying federal coal lease is invalid, then there is no "leased Federal coal," which is the necessary predicate for any approval of a mining plan. As noted, BLM Field Managers lack delegated authority to approve coal leases. Here, the lease underlying the mining plan was approved by a field manager rather than the Deputy State Director. AR:2-850-18959. Such approval of a mining plan in which the underlying lease is invalid is *ultra vires*. The APA directs courts to set aside agency actions taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C); *see also Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008) (recognizing 5 U.S.C. § 706(2)(C) as basis for *ultra vires* claim).

REMEDY[11]

Absent exceptional circumstances not present here, "[v]acatur is the standard remedy for violation of the APA." *California v. BLM*, 277 F. Supp. 3d 1106, 1125 (N.D. Cal. 2017). This Court should vacate Federal Defendants' unlawful EA, FONSI, and approval of the mine expansion. *Diné CARE v. OSM*, No. 12-cv-1275 JLK, 2015 WL 1593995, at *3 (D. Colo. Apr. 6, 2015), *vacated as moot*, 643 Fed. App'x 799 (10th Cir. 2016).

The Court should further enjoin strip-mining in the expansion area. Strip-mining causes irreparable damage for which there is no adequate remedy at law. *Mont. Envtl. Info. Ctr. v. OSM* (*MEIC II*), No. CV-15-106-M-DWM, 2017 WL 5047901, at *3 (D. Mont. Nov. 3, 2017); Nichols Decl. ¶ 20; Gilbert Decl. ¶ 21.

The public interest supports an injunction because the harm from greenhouse gas emissions from the expansion *exceeds* any benefits *by orders of magnitude*. *MEIC II*, 2017 WL 5047901, at *5; *see supra* note 8. The tens of thousands of tons of non-greenhouse gas pollution and toxics from the expansion will cause premature mortality and sickness, imposing significant costs on the public. *See supra* Part III; AR:2-827-18257 to -18258. Finally, because the public harm from

[11] Conservation Groups request leave to fully brief remedies in the event of a favorable merits ruling. *See WORC*, 2018 WL 1475470, at **18-19. Federal Defendants agree with this approach. The coal company does not.

the expansion so greatly outstrips any benefits, the equities support an injunction pending compliance with NEPA. *Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 359 (D.D.C. 2012) ("balance of equities tips" in favor of enjoining federal support of coal plant pending compliance with NEPA).

CONCLUSION

In approving the mine expansion, Federal Defendants failed to take a hard look at the annual impacts of over 2,300 coal trains bisecting Montana's communities; tens of thousands of tons of air pollution and toxics harming communities near power plants fed by the mine expansion; and the expansion's prodigious climate costs. The agencies unlawfully refused to prepare an EIS, despite substantial questions about significant impacts and OSM's own guidance normally requiring an EIS in such circumstances, thus allowing the seventh largest coal mine in the nation to continue to evade NEPA. The agencies also unlawfully failed to consider that the coal lease underlying the expansion may be void.

Conservation Groups respectfully request that this Court grant them summary judgment, set aside Federal Defendants' actions, and enjoin strip-mining in the expansion area pending compliance with NEPA.

Respectfully submitted this 6th day of April, 2018.

/s/ Shiloh Hernandez
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CERTIFICATE OF SERVICE

I, the undersigned counsel of record, hereby certify that on this 6th day of April, 2018, I filed a copy of this document electronically through the CM/ECF system, which caused all parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing.

/s/ Shiloh Hernandez
Shiloh S. Hernandez

CERTIFICATE OF COMPLIANCE

I, the undersigned counsel of record, hereby certify that this brief is doublespaced, has a typeface of 14 points or more, and contains 6,500 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index. I relied on Microsoft Word to obtain the word count.

/s/ Shiloh Hernandez
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