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

MONTANA ENVIRONMENTAL INFORMATION CENTER,

Plaintiff,

vs.

U.S. OFFICE OF SURFACE MINING, an agency within the U.S. Department of the Interior, *et al.*,

Defendants,

and

SIGNAL PEAK ENERGY, LLC,

Defendant-Intervenor.

CV 15–106–M–DWM

ORDER

INTRODUCTION

Plaintiffs Montana Elders for a Livable Tomorrow, Montana Environmental Law Center, and Montana Chapter of the Sierra Club challenge the United States Office of Surface Mining and Enforcement's ("Enforcement Office") decision to approve Signal Peak Energy's ("Signal Peak") application for a federal mining plan modification. (Doc. 1.) After conducting an Environmental Assessment

("EA"), the Enforcement Office concluded that the modification would not have a significant impact on the human environment. AR 021642. The plaintiffs think the EA was deficient in a number of ways, and that the Enforcement Office's decision not to prepare an Environmental Impact Statement ("EIS") violated the National Environmental Policy Act ("NEPA"). (Doc. 1.) Signal Peak and the Enforcement Office (collectively "Defendants") respond that the EA and Finding of No Significant Impact ("FONSI") were sufficient. (Docs. 6, 13.) The parties have filed cross-motions for summary judgment and the matter is ripe for ruling.

For the reasons explained below, the Enforcement Office did not violate NEPA by ignoring its internal guidance (Count I), took a hard look at the potential impacts of mine dewatering on springs and wetlands (Count V), and relied on an adequate "purpose and need" statement (Count VI). Consequently, Defendants prevail as to those counts. The plaintiffs have not argued the Enforcement Office failed to consider reasonable alternatives (Count VII), which means Defendants prevail as to that count as well. But those rulings do not put the case to rest. The Enforcement Office failed to take a hard look at the indirect and cumulative effects of coal transportation and coal combustion (Count III), it failed to take a hard look at foreseeable greenhouse gas emissions (Count IV), and it made a decision without sufficient consideration for the need to produce an EIS despite significant

uncertainty about the critical issues (Count II). The plaintiffs then prevail as to those counts.

STATUTORY FRAMEWORK

Pursuant to the Mineral Leasing Act ("Leasing Act"), the Secretary of the Interior ("Secretary") may dispose of federal coal deposits to U.S. citizens, associations, or corporations. 30 U.S.C. § 181. The Leasing Act further provides that the Secretary "shall, in his discretion, upon the request of any qualified applicant or on his own motion . . . offer such lands for leasing and shall award leases thereon by competitive bidding." 30 U.S.C. § 201(a)(1). It also requires the Secretary approve of a mining operation and reclamation plan before the environment is disturbed. 30 U.S.C. § 207(c).

The Surface Mining Control and Reclamation Act (the "Surface Act"), 30 U.S.C. §§ 1201 *et seq.*, is a "comprehensive statute designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981) (quoting 30 U.S.C. § 1202(a)). The Surface Act created the Enforcement Office, 30 U.S.C. § 1211(a), through which the Secretary is charged with, *inter alia*, "administer[ing] the programs for controlling surface coal mining operations which are required by [the Surface

Act]." 30 U.S.C. § 1211(c)(1). "Surface coal mining operations" are in turn defined to include "surface operations and surface impacts incident to an underground coal mine." 30 U.S.C. § 1291(28). The Surface Act uses cooperative federalism to regulate coal mining by setting "federal minimum standards governing surface coal mining which a State may either implement itself or else yield to a federally administered regulatory program." *Hodel*, 452 U.S. at 289. To exercise primary jurisdiction, a state must submit a proposed regulatory program to the Secretary; if the Secretary approves the program, state law and regulations govern the regulation of surface coal mining in the state and state officials administer the program. 30 U.S.C. § 1253; *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 518 (D.C. Cir. 1981). Montana successfully applied for primary jurisdiction. The State exercises its regulatory authority through the Montana Department of Environmental Quality ("Montana DEQ"). 30 C.F.R. § 926.10.

The process of mining federally-leased coal in Montana requires that mine operators obtain (1) a surface mining permit from the Montana DEQ, 30 U.S.C. §§ 1253, 1273(c), and (2) the Secretary's approval of a mining plan of operations under the Leasing Act, 30 U.S.C. § 207(c); 30 C.F.R. § 746.11(a). The Secretary's decision to approve or deny a mining plan or mining plan modification is based on

a recommendation from the Enforcement Office, the operation of which is in turn governed by the Surface Act. 30 U.S.C. § 1211; 30 C.F.R. § 746.13. The legal process is not simplistic and it is designed not only to make mining opportunities available, but also to ensure the environment is protected by considerations of relevant issues and materials before a permit is issued or modified.

BACKGROUND

This case concerns the Enforcement Office's decision to approve a Federal Mining Plan Modification (the "Mining Plan") to the Bull Mountains Mine No. 1 underground coal mine (the "Mine"). The Mine is located in the Bull Mountains of central Montana, approximately 30 miles north of Billings and 20 miles southeast of Roundup. AR 004107. As part of the Pine Breaks uplands, the Bull Mountains are distinguished from the neighboring plains by a relatively abundant water supply and a more diverse ecology. AR 009440. The topography of the Bull Mountains "varies from uplands, rock outcrops, and ravines forested with ponderosa pine and Rocky Mountain juniper at higher elevations, to adjoining sagebrush and mixed prairie grassland communities on benches, slopes, and drainages where soils are deeper." AR 015127. The mountains contain a diverse ecology, ranching operations, and water resources, such as spring fed wetlands, ponds, and intermittent stream reaches. AR 015121-22, 015128-29, 015132,

015151.

The history of coal mining in the Bull Mountains reaches back to 1908. AR 014663. The Mine itself first began sporadic operation in the early 1990s, AR 000006, 001135, while current operations under Intervenor-Defendant Signal Peak Energy commenced in 2008, AR 021407. As of 2015, the Mine employed 312 people. AR 021303. In 2014, Signal Peak estimated coal production at approximately 10.5 million tons. *Id.* Current surface operation includes mine portals, run of the mine and clean coal stockpiles, coal processing facilities, a coal loadout facility and railroad loop, waste disposal area, mine shop and offices, associated water control facilities, and other associated facilities, encompassing approximately 515 acres of existing disturbance. AR 021304.

Mining takes place via a combination of continuous and longwall mining techniques. AR 021407. Continuous mining methods are used for development of production mains and longwall panels, while longwall equipment is used to extract coal in the panels between the development entries. *Id.* Continuous mining involves driving a rotating cutting drum into the coal bed to cut coal from the coal face, which is then transported out of the mine via a system of conveyor belts and shuttle cars. AR 021408-09. Longwall mining uses a large shearer to shear coal from the coal face of the panel. AR 021411. Each of the longwall panels consists

of a large block of coal, approximately 1,250 feet wide by approximately 15,000 to 23,300 feet long, and extraction thickness ranges from 8 to 13 feet. AR 021412. As the mining operation advances, hydraulic shields are used to support the roof where coal has been removed. *Id.* Once the coal has been extracted from the longwall panel, the shields are removed and the overlying strata collapses, or subsides, into the void left where coal has been removed. *Id.* Such subsidence may cause substantial cracks in the earth's surface. AR 014984, 021443. Subsidence is currently occurring above mined-out panels. AR 021309. The maximum elevation change above those panels was 8 to 9 feet, but most areas subsided less than 6 feet. *Id.*

After the coal has been extracted, it is crushed, washed, and temporarily stored onsite. AR 021415-16. Mine development and coal processing wastes are permanently disposed of at the onsite Waste Disposal Area. AR 021416. A 35-mile rail line (the "Broadview Spur") connects the Mine to the Burlington Northern/Santa Fe ("BNSF") mainline track near Broadview, Montana. AR 021420. In 2014, the majority of the coal (95%) was projected to be shipped overseas to Korea, Japan, and the Netherlands, with the remaining 5% shipped to locations in the United States such as Ohio. AR 021304.

Signal Peak owns the Mine and operates it under State of Montana mine

permit C1993017, approved by the Montana DEQ in 1993. AR 021295-96, 021642. The state permit includes federal coal reserves leased to Signal Peak under Federal Lease MTM 97988. AR 021642.

The Mine has a long regulatory history. In 1990, the Bureau of Land Management ("BLM") issued an EIS ("1990 EIS") approving a land exchange by which Meridian Mineral Company, the then-owner of the Mine, consolidated ownership of coal reserves under the Bull Mountains. AR 001459. The 1990 EIS assessed a "3.0 million tons of coal per year longwall underground mine" as the maximum development scenario under the exchange. AR 014594. In 1992, the Montana Department of State Lands issued an EIS ("1992 EIS") assessing Meridian's request for a mining permit. AR 015075. The 1992 EIS assessed an anticipated peak production of "3.3 million tons of clean coal per year" over the course of a 44-year mining operation. AR 015078.

In 2008, Signal Peak filed an application with the BLM to lease approximately 2,679.9 acres of federal coal at the Mine. AR 021295. In response to Signal Peak's application, in 2011 the BLM prepared an EA (the "Coal Lease EA") pursuant to the National Environmental Policy Act ("NEPA"). *Id.* "The Coal Lease EA analyzed the potential impacts associated with leasing five tracts of Federal coal totaling 2,679.76 acres that would allow the mine to continue

producing coal at the current rate instead of ceasing production as recoverable private coal reserves are exhausted." AR 021295. Access to the estimated 61.4 million tons of federal coal included in the lease would also allow Signal Peak to mine "much more than the federal coal." *N. Plains Res. Council Inc. v. U.S. Bureau of Land Mgmt.*, 2016 WL 1270983, at *3 (D. Mont. March 31, 2016). "Another 71.6 million tons of coal are contained on state and private property that would be accessible through the federal lease." *Id.*

In 2011, the BLM issued a Finding of No Significant Impact ("FONSI"), determining that the coal lease was not a major federal action significantly affecting the quality of the human environment. AR 021877. The BLM leased the federal coal to Signal Peak on June 1, 2012. AR 001378-87. The Enforcement Office was a cooperating agency for the Coal Lease EA. *Id.* The Coal Lease EA adopted prior environmental analyses, including the 1990 EIS and the 1992 EIS.

The Coal Lease EA was subsequently challenged in the United States District Court for the District of Montana, Billings Division. *See N. Plains Res. Council Inc.*, 2016 WL 1270983. Judge Watters found the BLM did not act arbitrarily or capriciously when it opted to forgo an EIS, but found that the Interior

Board of Land Appeals[1] erred by not addressing the plaintiff's argument that the BLM acted arbitrarily and capriciously by failing to consider an adequate range of alternative actions in the Coal Lease EA. *Id.* at *13. Judge Watters remanded the case to the Interior Board "for consideration of the argument that BLM's discussion of alternatives in the EA [was] inadequate." *Id.* at *14. The Interior Board subsequently determined the Coal Lease EA considered a reasonable range of alternatives. *N. Plains Res. Council*, 188 IBLA 19, 34 (June 14, 2016).

In 2012, Signal Peak applied to the Montana DEQ to amend its mining permit by expanding mining operation by 7,161 acres, adding 176 million tons of coal to its permitted mineable reserves. AR 011357, 011359-60. This area includes both the federal coal from the BLM lease and the adjacent state and private coal, discussed above, that could not be accessed without mining the federal coal. AR 021296-021300. After preparing a "Checklist Environmental Assessment" to supplement the 1992 EIS, AR 015472-86, the Montana DEQ approved Signal Peak's application for the mine expansion. AR 021296.

Finally, in November 2013, Signal Peak requested approval from the

[1] The Interior Board of Land Appeals is an appellate review body that exercises the delegated authority of the Secretary to issue final decisions for the Department of the Interior. Its administrative judges decide appeals from BLM decisions regarding mining, inter alia. *See* www.doi.gov/oha/organization.ibla.

Enforcement Office of a mining plan modification for its federal coal lease that would expand coal development and mining operations at the Mine into the 2,539.76 acres of remaining federal coal lands (an initial 140-acre expansion had already been approved). AR 021299. In response, the Enforcement Office prepared the Bull Mountains Mine No. 1 Federal Mining Plan Modification Environmental Assessment (the "Mining Plan EA"), the decision document at issue here. AR 021292-375. The Enforcement Office determined that approval of the federal mining plan would not have a significant impact on the quality of the human environment, and that an EIS was therefore not required. AR 021642. The plaintiffs filed suit on August 17, 2015, requesting declaratory and injunctive relief. (Doc. 1.) The suit alleges that the Enforcement Office (1) ignored its own NEPA guidance in determining that an EIS was not required; (2) was required to prepare an EIS to consider the mining plan modification; (3) failed to take a "hard look" at the indirect and cumulative effects of coal transportation, coal exports, and coal combustion; (4) failed to take a hard look at foreseeable greenhouse gas emissions; (5) failed to take a hard look at water pollution impacts; (6) unlawfully narrowed the "purpose and need" statement in the Mining Plan EA; and (7) failed to consider reasonable alternatives to the proposed action. (*Id.*) On December 11, 2015, Signal Peak was granted leave to intervene. (Doc. 12.) The parties

subsequently filed cross-motions for summary judgment. (Docs. 40, 48, 51.)

LEGAL STANDARD

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). Claims under NEPA are reviewed pursuant to the Administrative Procedures Act ("APA"). 5 U.S.C. § 702; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Under the APA, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An 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. Ass'n of U.S. , Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Id.* But it is a "foundational principle" that "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*,

135 S. Ct. 2699, 2710 (2015).

NEPA directs federal agencies to consider, "to the fullest extent possible," the environmental impacts of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA serves the twin aims of obligating agencies "to consider every significant aspect of the environmental impact of a proposed action . . . . [and] ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (internal quotations omitted). NEPA does "not require agencies to elevate environmental concerns over other appropriate considerations." *Id.* Instead, agencies must simply take a "hard look at the environmental consequences before taking a major action." *Id.* (internal quotation omitted). That "hard look" may require the preparation of an EIS. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.11. However, not every agency action requires the preparation of an EIS. 40 C.F.R. § 1501.4. To determine whether an EIS is necessary, an agency may prepare an EA. *Id.* at §§ 1501.4(b),(c), 1508.9. If, after preparing an EA, an agency concludes the impacts of its action will not be significant, it may issue a Finding of No Significant Impact ("FONSI"). *Id.* at §§ 1501.4(e), 1508.13. NEPA does not require an EIS "anytime there is *some* uncertainty, but only if the effects of the

project are 'highly' uncertain." *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006) (emphasis in original). "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential . . . effects." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) (alteration in original).

ANALYSIS

I. Standing

As a threshold matter, Defendants argue the plaintiffs lack standing to challenge the approval of the Mining Plan. (Doc. 48 at 13; Doc. 52 at 40.) Specifically, Defendants argue the plaintiffs have failed to show injury in fact because the declarations of Paul Jensen, a member of the Montana Environmental Information Center, and Paul Smith, a member of Montana Elders for a Livable Tomorrow, fail to show either individual will be harmed by approval of the Mining Plan. (Doc. 48 at 14-15; Doc. 52 at 40-41.) While Jensen alleges sufficient injury to establish standing, Smith does not.

"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 or 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) (quoting *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1225 (9th Cir. 2008)). "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). The plaintiff carries the burden of establishing standing. *WildEarth Guardians*, 795 F.3d at 1154.

Defendants argue the plaintiffs have failed to show injury in fact because they fail to allege harms with sufficient specificity. (Doc. 48 at 16; Doc. 52 at 40.) The Supreme Court has "held that 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." *Friends of the Earth*, 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). Here, the plaintiffs submitted declarations from James D. Jensen, member and Executive Director of the Montana Environmental Information Center, (Doc. 41-1), and Paul Smith, a pediatric

physician and member of Montana Elders for a Livable Tomorrow, (Doc. 41-2). Jensen states he has "spent significant time in the Bull Mountains," beginning in 1979, that he visits ranches belonging to friends in the mountains "at least once every two years," and that he "expect[s] to continue to visit . . . at least every other year for the foreseeable future." (Doc. 41-1 at ¶ 4.) Jensen further avers he "enjoy[s] the natural beauty" and "vitality" "of the Bull Mountains" which he experiences when visiting a friend's ranch that "[would] be undermined by the expansion of the Bull Mountains Mine." (*Id.* at ¶¶ 7-8.) Finally, Jensen states his "aesthetic, personal, and recreational interests in the Bull Mountains [would] certainly be lessened by the proposed expansion of the mine" because he "could not bear to see the area destroyed." (*Id.* at ¶ 11.) Jensen adequately identifies the areas he visits, the value of those areas to him, and the proximity of those areas to the mining operation as to establish injury in fact.

Defendants argue Smith's declaration fails to establish injury in fact because his allegations of injury are geographically distant from the Bull Mountain mine, (Doc. 48 at 15), and because Smith fails to allege harms to himself, (Doc. 52 at 40). Smith is a pediatric pulmonologist based in Missoula who practices throughout western Montana. (Doc. 41-2 at ¶ 4.) His declaration outlines injury flowing from (1) particulate matter in diesel emissions from coal trains, (*id.* at

¶¶ 8, 11); (2) coal dust from coal trains which may create risks to public health by destabilizing tracks and depositing toxic pollutants, (*id.* at ¶¶ 12-15); and (3) coal combustion, including its contribution to climate change and heavy metal pollution, (*id.* at ¶¶ 16-19). The bulk of his declaration focuses on injury that may impact his patients and those living in western Montana towns through which trains transporting Bull Mountain coal would likely pass, with only a brief assertion that "any additional particulate matter from additional trains could directly harm [his] respiratory health." (*Id.* at ¶ 11.) The harm Smith alleges is too attenuated to support standing here, and Montana Elders for a Livable Tomorrow is dismissed from the case.[2]

Finally, though Defendants do not raise the issue, Plaintiff Sierra Club of Montana is also dismissed for lack of standing. Neither Jensen nor Smith state they are members of the Club, and the broad assertion of standing laid out in the Complaint, (Doc. 1 at ¶ 17), does not provide the "concrete and particularized" injury in fact required under Article III. *WildEarth Guardians*, 795 F.3d at 1154.

Because Plaintiff Montana Environmental Information Center ("Plaintiff")

[2] The finding as to Smith's standing is consonant with the determination, explained below, that the Enforcement Office's decision not to consider the impacts of coal trains violated NEPA, as the latter holding is based the reasonableness of conducting such an evaluation and not on what such an evaluation might determine.

has sufficiently shown standing, Defendants' request that their case be dismissed is denied.

II. NEPA

A. Purpose and Need Statement (Count VI)

Plaintiff argues Section 1.2 of the EA, the "Purpose and Need Statement" ("Section 1.2") is arbitrary and capricious because it contains only Signal Peak's private goals of extracting Bull Mine coal while omitting congressional energy goals that were included in the draft Mining Plan EA. (Doc. 41 at 10.) "Courts review purpose and need statements for reasonableness, giving the agency considerable discretion to define a project's purpose and need. A purpose and need statement will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013) (citations omitted). Here, the reasonableness of Section 1.2 falls within the considerable discretion agencies are afforded to define a project's purpose and need.

As an initial matter (and as Defendants point out, (Doc. 52 at 13; Doc. 58 at 4)), Plaintiff conflates the "purpose and need" requirements of an EA with those of

an EIS.[3] "Purpose and need" statements in an EA and an EIS are governed by different regulations, which outline different requirements. An EA "shall include [a] brief discussion[] of the need for the proposal." 40 C.F.R. § 1508.9(b). An EIS, on the other hand, "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *Id.* at § 1502.13. Even so, district courts in the Ninth Circuit have imported the "purpose and need" analysis from an EIS to EA context, and doing so is appropriate here. *See Pac. Coast Fed. of Fishermen's Ass'ns v. U.S. Dep't of. Int.*, 996 F. Supp. 2d 887, 906 (E.D. Cal. 2014), *remanded on other grounds*; *Wild Wilderness v. Allen*, 12 F. Supp. 3d 1309, 1326 (D. Or. 2014).

"Courts review purpose and need statements for reasonableness giving the agency considerable discretion to define a project's purpose and need." *Alaska Survival*, 705 F.3d at 1084 (quotation omitted) (discussing EIS). "However, an agency cannot define its objectives in unreasonably narrow terms." *Nat'l Parks & Cons. Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) (quotations and citations omitted) (discussing EIS). "[A]n agency must consider the statutory context of the proposed action and any other congressional directives

[3] But Federal Defendants initially accepted Plaintiff's underlying assertion that the purpose and need statement requirements are the same for an EA and EIS. (Doc. 48 at 18.)