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

MONTANA ENVIRONMENTAL)	No. 1:19-cv-00130-SPW-TJC
INFORMATION CENTER, et al.,)	
)	
Plaintiffs,)	
)	
v.)	FEDERAL DEFENDANTS'
)	OBJECTIONS TO THE
DEBRA HAALAND, in her official)	FINDINGS AND
capacity as Secretary of the United States)	RECOMMENDATIONS OF
Department of the Interior, et al.,)	U.S. MAGISTRATE JUDGE
)	CAVAN
Federal Defendants,)	
)	
and)	
)	
WESTMORELAND ROSEBUD)	
MINING, LLC,)	

Defendant-Intervenor.

INTRODUCTION

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and D. Mont. L. R. 72.3, Federal Defendants submit an objection to Magistrate Judge Timothy J. Cavan’s February 11, 2022, Findings and Recommendations, ECF No. 177. Defendants object solely to the recommended time period of 365 days for the agency to correct the NEPA violations outlined in Magistrate Judge Cavan’s findings. *See id.* at 37 (recommending that “vacatur be deferred for a period of 365 days from the date of a final order on the pending motions for summary judgment”). Because the Office of Surface Mining Reclamation and Enforcement’s (“OSMRE”) regional office currently has numerous other projects that require National Environmental Policy Act of 1969 (“NEPA”) analysis to complete with limited resources, the recommended deadline of one year for corrective NEPA analysis is insufficient and unduly burdens OSMRE. Rather, OSMRE believes that it needs until November 3, 2023 (approximately 19 months) to complete new NEPA analysis.

BACKGROUND

This case concerns Federal Defendants’ approval of a Mining Plan Modification for “Area F” of the Rosebud Mine located near Colstrip, Montana. In

November 2011, Westmoreland Rosebud Mining LLC (“Westmoreland”) submitted a mine permit application package to the Montana Department of Environmental Quality (“MDEQ”) seeking a permit under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”) to expand the existing Rosebud Mine into a new area (“Area F”). *Id.* at 2. Because some of the coal in Area F is Federal coal that had been previously leased by the Bureau of Land Management, Westmoreland also requested that the Department of the Interior approve a Mining Plan Modification, which is required under the Mineral Leasing Act of 1920 before Westmoreland can exercise its existing lease rights in Area F. *Id.* at 3. In November 2018, OSMRE and MDEQ issued a joint Final Environmental Impact Statement (“FEIS”) analyzing the environmental impacts of the proposed Area F expansion. *Id.* MDEQ issued a Record of Decision (“ROD”) in April 2019, approving Westmoreland’s SMCRA permit, modified to exclude 74 acres in Area F. *Id.* In June 2019, OSMRE issued its ROD for the Area F expansion (less the 74 acres). *Id.* at 4. Interior’s Assistant Secretary for Land and Minerals Management then approved the Mining Plan Modification consistent with OSMRE’s ROD. Administrative Record, AR-143-037778-037779.

On November 18, 2019, Plaintiffs filed this action challenging Federal Defendants’ approval of Westmoreland’s Mining Plan Modification. ECF No. 1. Plaintiffs allege that Federal Defendants violated NEPA by failing to adequately

consider the mine expansion's cumulative effects on surface water, the adverse impacts of greenhouse gas emissions, the effects of water withdrawals from the Yellowstone River, and a reasonable range of alternatives. ECF No. 98. Plaintiffs also contend that Federal Defendants violated the Endangered Species Act ("ESA") by failing to properly consider and consult with the United States Fish and Wildlife Service on the effects of water withdrawals from the Yellowstone River on pallid sturgeon. *Id.*

On February 11, 2022, Magistrate Judge Cavan issued his Finding and Recommendations on the parties' cross-motions for summary judgment. ECF No. 177. Judge Cavan found that OSMRE failed to: take a "hard look" at cumulative impacts to surface waters, take a "hard look" at the costs of greenhouse gas emissions, and address water withdrawals from the Yellowstone River in the FEIS or explain why it did not do so. *Id.* at 18, 23, 31-32. Judge Cavan also found that OSMRE's alternatives analysis satisfied NEPA. *Id.* at 36. Finally, Judge Cavan recommended that this court should direct Federal Defendants to correct the outlined NEPA violations and should defer vacatur of the mining plan modification for a period of 365 days from the date of a final order on the pending motions for summary judgment. *Id.* at 37.

LEGAL STANDARD

Pursuant to 28 U.S.C. § 636(b)(1)(A) a district court judge “may designate a magistrate judge to hear and determine any pretrial matter pending before the court,” including dispositive motions. A party may file specific written objections to the proposed findings and recommendations of the magistrate judge. Fed. R. Civ. P. 72(b)(2). For dispositive motions, “a judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636 (2009); *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (“the district judge must review the magistrate judge's findings and recommendations *de novo* if objection is made”).

ARGUMENT

OSMRE should be afforded more than the recommended 365 days to undertake the corrective NEPA analysis before the Mining Plan Modification for Area F is vacated because OSMRE’s small regional office has limited resources and staff to complete the analysis in addition to the seven other pending NEPA projects it has planned. Declaration of Marcelo Calle (“Calle Decl.”) ¶ 3 (attached as Exhibit A). For example, OSMRE is preparing an environmental impact statement (“EIS”) for the Spring Creek Mine in Montana as a result of this Court’s

September 10, 2021, order in *WildEarth Guardians v. Haaland*, No. CV 17-80-BLG-SPW, 2021 WL 4133949 (D. Mont. Sept. 10, 2021). Calle Decl. ¶ 4.

Pursuant to that order, OSMRE's EIS for the Spring Creek Mine must be completed by April 1, 2023, or that mining plan modification will be vacated. *Id.* Therefore, if Judge Cavan's proposed timeline is adopted, preparation of a new NEPA document in this case would overlap almost entirely with the timeframe OSMRE has to complete the EIS for the Spring Creek Mine. *Id.* ¶ 5. These overlapping deadlines would significantly burden OSMRE's limited resources. *Id.*

Moreover, OSMRE requests additional time because it will likely need to coordinate with MDEQ in the preparation of a corrective NEPA document, especially on issues related to surface water hydrology where MDEQ is the SMCRA regulatory authority. *Id.* ¶ 6. OSMRE also needs more time to consider how best to address Judge Cavan's findings on OSMRE's analysis of greenhouse gases given recent litigation challenging federal agencies' use of the Social Cost of Carbon protocol. *See, e.g., State of Louisiana v. Biden*, No. 2:21-CV-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022) (preliminary injunction issued restricting federal agencies' use of the Social Cost of Carbon protocol), *injunction stayed pending appeal*, No. 22-30087 (5th Cir. Mar. 16, 2022); *see also State of Missouri v. Biden*, No. 4:21-cv-00287, 2021 WL 3885590 (E.D. Mo. Aug. 31, 2021) (dismissing plaintiffs' challenge of federal agencies' use of the Social Cost of

Carbon protocol) , *appeal docketed*, No. 21-3013 (8th Cir. Sept. 8, 2021). And ultimately, OSMRE should be afforded discretion in determining how long it will take to complete the corrective NEPA analysis given the complex scientific and technical issues involved. *See Ctr. for Sci. in the Pub. Int. v. United States Food & Drug Admin.*, 74 F. Supp. 3d 295, 301 (D.D.C. 2014) (“Courts, moreover, routinely defer to the judgment of agencies when assessing timelines that involve complex scientific and technical questions.”).

The additional time that OSMRE is requesting is consistent with, or shorter than, the time typically required for the completion of analogous NEPA documents. It is not unusual for it to take more than two years for federal agencies to complete an EIS.¹ In other cases, this court and other courts have granted OSMRE similar extensions. *See, e.g., WildEarth Guardians*, 2021 WL 4133949, at *1-2 (granting OSMRE’s motion to extend a deferred vacatur to prepare an EIS over an approximately 20-month time period from the date of OSMRE’s decision to prepare an EIS); *WildEarth Guardians v. OSMRE*, No. 1:14-cv-00112, at 9 (D.N.M. Aug. 31, 2016) (ECF No. 98) (granting OSMRE’s motion for voluntary

¹ A June 2020 report by the Council on Environmental Quality found that for EISs published between January 2010 and December 2018, the average EIS completion time was 4.5 years. Executive Office of the President Council on Environmental Quality, *Environmental Impact Statement Timelines (2010-2018)*, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

remand and deferred vacatur to prepare an EIS within three years “to avoid adverse work force impacts and revenue disruptions affecting the State of New Mexico and the federal government.”).

Finally, Federal Defendants seek to defer vacatur of the Mining Plan Modification approval for Area F only for an additional seven months beyond Judge Cavan’s recommendation. Calle Decl. ¶ 7 (“I do think it is possible for us to complete a [Supplemental EIS] to address any issues with the prior Rosebud EIS identified by this Court within approximately 19 months of the date of the final order on the pending motions for summary judgment.”). And the same equities that Judge Cavan found weighing in favor of deferred vacatur will continue to exist throughout the additional seven months. ECF No. 177 at 37 (finding “the equities weigh in favor of remanding without immediate vacatur”).

CONCLUSION

For the foregoing reasons, Federal Defendants object to Magistrate Judge Cavan’s recommendation “that vacatur be deferred for a period of 365 days from the date of a final order on the pending motions for summary judgment” and respectfully request that the Court instead defer vacatur through November 3, 2023 to allow Federal Defendants sufficient time to complete the corrective NEPA analysis.

Respectfully submitted this 18th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that on March 18, 2022, I electronically filed the foregoing Objections using the CM/ECF system, which will send notification of this filing to the attorneys of record.

DATED this 18th day of March, 2022.

/s/ Shannon Boylan
Shannon Boylan