

No. DA 23-0575

IN THE
SUPREME COURT OF THE STATE OF MONTANA

RIKKI HELD, et al.,

Plaintiffs and Appellees,

v.

THE STATE OF MONTANA, et al.,

Defendants and Appellants.

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY
THE HONORABLE KATHY SEELEY, PRESIDING
CASE NO. CDV-2020-307

**BRIEF *AMICI CURIAE* OF THE NAVAJO TRANSITIONAL ENERGY
COMPANY**

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INTEREST OF AMICI CURIAE

I. Navajo Transitional Energy Company Provides Economic Contributions to the Navajo Nation and Big Horn County.

The Navajo Transitional Energy Company (“NTEC”) owns and operates the Spring Creek Mine (“SCM”) in Decker, Montana. NTEC is wholly owned by the Navajo Nation and incorporated under the laws of the Navajo Nation—a sovereign, federally recognized Indian Tribe. NTEC was formed to promote the economic and financial interest of the Navajo Nation and its members, while remaining dedicated to responsible management of the Navajo Nation’s natural resources. NTEC makes significant contributions to the Navajo Nation General Fund and improves the economic interests and well-being of the Navajo People. NTEC provides in excess of 40% of the Navajo Nation’s General Fund annually. The Navajo Nation is one of the poorest demographics in the Country. The physical and mental health of its members are at significant risk of harm without the financial contributions from NTEC.

Part of NTEC’s established purpose is to develop energy resources within and outside the boundaries of the Navajo Nation. NTEC’s energy portfolio includes several coal mines, among other assets, on the Navajo Nation (Navajo Mine) and in Montana (Spring Creek Mine) and Wyoming (Antelope Mine, Cordero Rojo Mine, and Youngs Creek Mine). Through the development of its energy portfolio, NTEC

honors its responsibility to improve the economic interests and well-being of the Navajo People and support their right of self-determination. NTEC invests in diverse assets that create balanced profits and reclaim natural resources to ensure their value for generations to come. NTEC's operations have and will continue to provide for multi-generational solutions as it responsibly mines the assets in its trust while investing in the energy of tomorrow.

Spring Creek Mine has been in active, continuous production since December 1980. NTEC acquired SCM from Cloud Peak Energy in 2019. SCM currently employs about 250 people in various roles ranging from administration, environmental compliance, mineral production, finance, and mine and reclamation engineering. In 2022, SCM shipped approximately 11.6 million tons of coal. SCM paid approximately \$48 million in local, state, and federal taxes and made another \$117.9 million in economic contributions to the regional economy in goods and services. Nearly 60% of SCM's coal is sold to customers outside of Montana. Approximately 40% of SCM's coal is sold to customers in Asia.¹ The coal sent to Asia is shipped via rail from SCM to Canada, where it is loaded on vessels at the Westshore Terminal just outside Vancouver.

A closure of SCM, and the consequential loss of revenue, would risk the financial viability of NTEC. If severe enough, the loss of revenue could potentially

¹ SCM sells a de minimis amount of coal to customers within the state of Montana.

bankrupt NTEC and thereby jeopardize the company's existing support for the Navajo Nation. A closure of SCM would also lead to a significant loss of income to Big Horn County, Montana.

II. Organizations Allege DEQ's Recent Approval of SCM's AM5 Mine Permit Amendment Violates the Right to a Clean and Healthful Environment Citing the District Court's Decision.

Coal mining is one of the most regulated business activities in the country. A coal mine requires a complex set of Montana-issued environmental permits and approvals such as a mining permit pursuant the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"), MCA § 82-4-201, *et seq.*; a Montana Clean Air Act permit (MCA § 75-2-101, *et seq.*); a Montana Pollution Discharge Elimination System (MPDES) permit (MCA § 75-5-101, *et seq.*); and it must obtain state leases for both surface and mineral interests from the Department of Natural Resources and Conservation ("DNRC") (MCA § 77-3-201, *et seq.*). Generally, many of these approvals trigger the Montana Environmental Policy Act ("MEPA") and require an environmental assessment ("EA") or an environmental impact statement ("EIS").

If federal lands are involved, then SCM obtains a federal coal lease from the Bureau of Land Management and its state-approved mine permit amendments on federal lands must be approved by the Office of Surface Mining Reclamation and Enforcement under the Surface Mining Reclamation and Enforcement Act

(“SMCRA”), 30 U.S.C. § 1201 *et seq.* These federal actions trigger the National Environmental Policy Act (“NEPA”), which requires either an EA or an EIS.

SCM’s most recent mine permit amendment was AM5. The AM5 amendment added 4,334 acres of land to the existing mine permit boundary. The purpose of the amendment is to build a haul road to the Wyoming border. NTEC owns the Youngs Creek Mine immediately across the border in Wyoming. When Youngs Creek Mine is producing coal, the coal will be hauled from Youngs Creek to existing processing and transportation infrastructure at SCM.²

The AM5 amendment was submitted to DEQ on December 30, 2015. On September 25, 2023, after nearly a decade of permitting, Montana’s Department of Environmental Quality (“DEQ”) approved the AM5 amendment under MSUMRA.

Prior to issuing its decision, DEQ published a draft EIS, which was available for a 45 day public review and comment period, conducted a public meeting at the Big Horn County Extension Office in Hardin, Montana, and extended the public comment period until August 16, 2018. DEQ issued a Final EIS on August 11, 2023.

With the Final EIS complete, on August 11, 2023, DEQ determined the AM5 amendment was acceptable since it complied with all the substantive provisions of MSUMRA.³ DEQ published its determination of acceptability for public review and

² Young’s Creek Mine is not currently producing coal.

³ “A complete application is considered acceptable when the application is in compliance with all of the applicable requirements of this part and the regulatory program pursuant to this part.” MCA

comment for two weeks.

On September 5, 2023, after publishing the Final EIS, DEQ received a letter from non-governmental organizations and individuals objecting to the AM5 amendment.⁴ The letter states, citing the instant litigation, that DEQ must deny the AM5 amendment because it contends greenhouse gas (“GHG”) emissions from coal combustion at SCM’s customers’ facilities cause climate change impacts. The letter states, in pertinent part:

DEQ issued the Final EIS and Notice of Acceptability on August 11, 2023. Notably, this is not a final agency action. DEQ must still decide whether or not to approve AM5, and will set forth its final decision in a Record of Decision and Written Findings. As the department is aware, on August 14, 2023, Montana District Court Judge Kathy Seeley found the limitations on the ability and duty of the DEQ to evaluate climate change passed by the 2023 legislature to be unconstitutional. *Held v. Montana*, Montana First Judicial District, Cause No. CDV 202-1307. The Order specifically noted that “Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life support system (emphasis added).” *Id.* at 102. The order permanently enjoined the language from both HB 971 and SB 557 and further prohibited DEQ from acting in accordance with the statutes declared unconstitutional.

(Appendix, p. 6). It concludes by stating:

In order to remedy these considerations, DEQ must conduct a supplemental EIS analysis that fully considers GHG impacts, and provides a range of alternatives that are informed by this analysis. Ultimately, DEQ must deny this mine expansion, which is inconsistent with the fundamental rights of all Montanans.

82-4-231(8)(a).

⁴ A copy of the letter is enclosed with this Amicus Brief as Appendix A.

(Id.). Simply stated, the letter contends that according to the District Court’s decision, DEQ cannot issue a mining permit in Montana due to GHG emissions that will occur outside the jurisdictional bounds of Montana agencies.

On September 25, 2023, DEQ issued its Record of Decision, which officially issued the AM5 amendment. Neither the Final EIS nor DEQ’s Record of Decision were timely challenged so the decision is final.

SUMMARY OF ARGUMENT

First, the 2023 MEPA Limitation (§ 75-1-201(2)(a) MCA) codified existing MEPA case law that the agency is not required to analyze impacts that it cannot lawfully prevent. *Montana Wilderness Ass’n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 485, 559 P.2d 1157 (1976); *Bitterrooters for Planning, Inc. v. Montana Dep’t of Env’tl. Quality*, 2017 MT 222, ¶ 33, 388 Mont. 453, 401 P.3d 712. Neither MEPA nor substantive coal mining statutes authorize Montana agencies to deny a permit for GHG emissions that occur outside the mine boundary. Yet, the District Court wrongly concluded that these statutes provide substantive authority to deny permits at coal mines. Therefore, Conclusions of Law Nos. 22 and 23 are fundamentally incorrect.

Second, the District Court improperly held that the MEPA Limitation is facially invalid when there is a set of facts—when applied to a coal mine—where the MEPA Limitation complies with the Constitution. The facts here demonstrate

the MEPA Limitation may be constitutionally applied, and Appellees failed to show it is facially unconstitutional.

Finally, a state law that regulates commerce occurring wholly outside the State's borders—as stated by the District Court and applied to SCM's AM5 Amendment—violates the dormant Commerce Clause. The District Court's conclusion that the State may deny permits for GHG emissions occurring outside the state violates the dormant Commerce Clause.

ARGUMENT

I. Neither MEPA nor the Substantive Statutes Governing Coal Mines Give Montana Agencies Authority to Deny Permits for GHG Emissions Occurring Outside a Mine.

The District Court's Conclusions of Law Nos. 22 and 23 states that either MEPA or the underlying substantive statutes grant state agencies authority to deny coal mining permits for GHG emissions outside the mine. The standard of review for the District Court's conclusions of law is whether they are correct. *Conagra, Inc. v. Nierenberg*, 2000 MT 213, ¶ 23, 301 Mont. 55, 7 P.3d 369. Here, the District Court's conclusions are incorrect because neither MEPA nor the underlying substantive statutes give Montana agencies such authority.

A. MEPA is procedural and does not provide grounds to deny a permit under permitting statutes.

“The Montana Environmental Policy Act is procedural” § 75-1-102(1), MCA. In fact, “it is not the purpose of [MEPA] to provide for regulatory authority,

beyond authority explicitly provided for in existing statute, to a state agency.” § 75-1-102(3)(b), MCA.

MEPA is triggered when there is a proposed project that will “significantly affect[] the quality of the human environment in Montana.” § 75-1-201(1)(b)(iv), MCA. MEPA requires that an agency determine the environmental impact of the proposed action. § 75-1-201(b)(iv), MCA. The significance of the impact is determined, in part, by: the duration of the impact, the quality and quantity of each environmental resource affected, and the importance to the state and to society of each environmental resource affected. § 17.4.608(1), ARM.

The impact analysis may be either an EA or an EIS. §§ 17.4.607(1)(b), (2), (4), ARM. If an EIS is required, it must evaluate the cumulative impacts in the affected area. § 17.4.617(4)(a), ARM. “Cumulative impact” is “the collective impacts on the human environment within the borders of Montana of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type.” § 75-1-220(4), MCA. The agency will utilize the EA or EIS to inform its decision if the evaluated environmental impact(s) is lawfully within the agency’s authority to evaluate. § 17.4.629, MCA.

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B. MEPA review is limited to environmental impacts that the agency conducting the analysis may lawfully prevent.

MEPA's requirement to evaluate environmental impacts is rooted in the procedural, rather than substantive, nature of the statute. *Montana Wilderness Ass'n v. Board of Health and Environmental Sciences*, 171 Mont. 477, 485, 559 P.2d 1157 (1976). Since MEPA cannot compel an outcome in any particular permitting decision, it is reasonable to limit the environmental impacts analyzed to those impacts that are governed by the underlying substantive statutory scheme. § 75-1-201(4)(a), MCA; *Montana Wilderness Ass'n*, 171 Mont. at 485; *Bitterrooters for Planning, Inc. v. Montana Dep't of Env'tl. Quality*, 2017 MT 222, ¶ 33, 388 Mont. 453, 401 P.3d 712; *Park County Environmental Council v. Montana Dep't of Env'tl. Quality*, 2020 MT 303, ¶ 14, 402 Mont. 168, 477 P.3d 288 ("MEPA requires a reasonably close causal relationship between triggering state action and the subject environmental effect."); *Water for Flathead's Future, Inc. v. Montana Dep't of Env'tl. Quality*, 2023 MT 86, ¶ 33, 412 Mont. 258, 530 P.3d 790 ("DEQ had no authority at this juncture to assess or 'lawfully prevent' environmental impacts associated with the discharge of Artesian's fully operational facility."). For SCM, the 2023 MEPA Limitation appropriately codified principles that existed in MEPA for decades because GHG emissions occurring outside of a coal mine are not within DEQ's substantive regulatory authority in this context.

As discussed in *Montana Wilderness*, this Court adopted MEPA shortly after

Montana's Constitutional Convention. In *Montana Wilderness*, the Board of Health was required to approve the water supply, sewage, and solid waste disposal methods for a local development. All other permits were entirely controlled by the local jurisdiction. The plaintiffs challenged the Board's EIS for failing to analyze environmental impacts outside of water supply, sewage, and solid waste disposal. This Court held the EIS was adequate because the Board lacked statutory authority to regulate environmental impacts outside its limited authority. *Montana Wilderness*, 171 Mont. at 485.

Neither the courts nor the Legislature took action to amend MEPA or raise constitutional concerns after *Montana Wilderness* until this Court decided *Bitterrooters*. In *Bitterrooters*, plaintiffs challenged the MEPA analysis for a developer's permit to discharge domestic wastewater to groundwater alleging that it failed to analyze the broader effects of the construction and operation of the facility distinct from potential groundwater impacts addressed by the underlying permit. The Court held that "MEPA, like NEPA, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect." *Bitterrooters*, ¶ 33. The causal relationship between the groundwater permit and the broader effects of the development were too attenuated to require MEPA review. *Id.*

Similarly, the Court in *Park County* rejected a claim that DEQ must analyze

the environmental effects of a full scale mining operation when issuing an exploration license. *Park County*, ¶ 32 (“MEPA requires a reasonably close causal relationship between triggering state action and the subject environmental effect.”). The Court again affirmed *Montana Wilderness* and *Bitterrooters* holding that MEPA does not demand all conceivable environmental impacts when the agency cannot “lawfully prevent” those impacts. *Water for Flathead’s Future*, ¶ 33 (“DEQ had no authority at this juncture to assess or ‘lawfully prevent’ environmental impacts associated with the discharge of Artesian’s fully operational facility.”).

The District Court’s decision to the contrary undermines over 40 years of MEPA precedent by concluding that MEPA has substantive authority to deny coal mining permits for GHG emissions that the state of Montana has no authority to regulate. *See* Order at 89-90, ¶¶ 22-23. The District Court’s decision, and its application in comments to SCM’s AM5 Amendment that “DEQ must deny [SCM’s] mine expansion” is contrary to MEPA because a permit to mine coal is too attenuated from GHG emissions occurring wholly outside DEQ’s regulatory authority.

C. DEQ does not have authority to prevent GHG emissions that do not occur at a coal mine.

The District Court’s Conclusions of Law Nos. 22 and 23 reflect a fundamental misunderstanding of Montana’s statutory scheme affecting coal mines. MSUMRA,

like its federal counterpart SMCRA, governs coal mining, it does not govern the combustion of coal within our outside the state. The purpose of SMCRA is to balance environmental protection with the orderly development of coal resources that are essential to the nation's energy requirements. *See* 30 U.S.C. § 1202(a), (d), (f); *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 288 (2001) (“strike a balance between the nation's interests in protecting the environment from the adverse effects of surface coal mining and in assuring the coal supply essential to the nation's energy requirements.”).

MSUMRA implements SMCRA's concept of cooperative federalism so that Montana can permit coal mining within its borders. § 82-4-202, MCA; *Bragg*, 248 F.3d at 288. MSUMRA, like SMCRA, seeks to balance environmental protection with coal production. *Compare* § 82-4-202(2)(a), MCA (“maintain and improve the state's clean and healthful environment) and § 82-4-202(2)(g), MCA (“provide for the orderly development of coal resources . . . to ensure the wise use of these resources and prevent the failure to conserve coal.”).

To this end, an MSUMRA permit shall be issued and subsequently renewed so long as “the operator is in compliance with the requirements of this part, the rules adopted to implement this part, the reclamation plan . . . and agrees to comply with all applicable laws and rules in effect[.]” § 82-4-221, MCA. MSUMRA requires a mine plan, reclamation plan, revegetation standards, and protections for water and

air quality. § 82-4-222, MCA. None of these standards discuss GHG emissions from coal combustion outside the mine.

MSUMRA's air quality standards address dust control and compliance with a separately issued air permit. § 17.24.761, ARM. Water quality standards address impacts to the hydrologic balance and applicable water quality standards. § 17.24.314, ARM. Reclamation is intended to restore the land to the post mining land use and associated environmental conditions. § 17.24.313, ARM. Further, MSUMRA provides standards for revegetation (§ 17.24.724, ARM); wildlife (§ 17.24.312, ARM); and topography (§ 17.24.501, ARM). It strains reason to read controls on GHG emissions at a coal mine into MSUMRA's comprehensive statutory and regulatory scheme.

Statutory construction cannot lead to absurd results. *City of Missoula v. Fox*, 2019 MT 250, ¶18, 397 Mont. 388, 450 P.3d 898. Statutory construction is a “holistic endeavor” considering the statute’s language, text, structure, and object. *Id.* It is impossible to align MSUMRA’s stated purpose of resource development with the District Court’s conclusion to prohibit mining from subsequent, and geographically attenuated, combustion. MSUMRA is entirely meaningless if it is intended to govern responsible coal development, but prohibit a byproduct of its intended use that has nothing to do with the physical act of mining.⁵ Reading such

⁵ Notably, the original text of MSUMRA was adopted in 1973 just one year after Montana’s 1972

a conflict of purpose into MSUMRA leads to absurd results because it renders MSUMRA's development objectives entirely superfluous. *See City of Missoula*, 2019 MT 250, ¶ 22.

The other statutory schemes cited by the District Court similarly do not give the State discretion to deny permits at a coal mine for subsequent coal combustion. Under the Clean Air Act of Montana, DEQ can only set emission limits for pollutants to the extent such a facility is a source of those pollutants. § 75-2-203(1), MCA (“The department may establish limitations . . . of emissions of various pollutants from any **source**[.]” [emphasis added]). A coal mine is not a source of air emissions from coal combustion. A coal mine is no more a source of GHG emissions than a standing forest or a pool of hydrocarbons underground.⁶

D. MEPA does not require agencies to analyze GHG emissions that such agencies cannot lawfully prevent under their substantive authority.

MEPA does not control the State's decision to permit coal mines. DEQ's MSUMRA authority, like the Department of Health in *Montana Wilderness*, does not regulate coal combustion outside the mine. SCM's air permit, like the groundwater discharge permit in *Bitterrooters*, does not regulate the broader effects

Constitutional Convention. MSUMRA (Enacted by Chapter 325, 1973 Session Laws of the Forty-Third legislative assembly).

⁶ NTEC concedes that if it burned coal for power or heat at its mine, then it may need an air permit for pollutants emitted for coal combustion.

of GHG emissions from steam electric power. With respect to SCM, until the District Court's decision, the 2011 and 2023 MEPA Limitations simply codified MEPA's scope as it was announced in 1976 in *Montana Wilderness*, in 2017 in *Bitterrooters*, and affirmed in both *Park County* and *Water for Flathead's Future*.

The Legislature is squarely within its authority to limit the scope of agency review to those environmental effects that are subject to state control. It would be an overreach of agency authority to unilaterally decide which environmental policies it wants to pursue without oversight by the Legislature. The District Court's decision grants agencies policy making authority that the Court in *Montana Wilderness* expressly reserved to the Legislature.

II. The District Court Improperly Framed Appellees' Claims as a Facial Challenge to the Constitutionality of §§ 75-1-201(2)(a) and -201(6)(a)(ii), MCA.

The District Court improperly held that the MEPA Limitation is facially invalid because there are no set of facts that support its validity. *See* Order at 92, ¶ 29. The 2023 MEPA Limitation, however, is entirely aligned with decades of MEPA precedent when applied to a mine. As a result, even assuming Appellees establish a constitutional claim, it is not properly framed as a facial constitutional challenge. At a coal mine like SCM, there is a set of facts where the 2023 MEPA Limitation applies without offending the obligation to provide adequate remedies for the protection of the environmental life support system from degradation under Mont. Const. Art. IX,

§ 1.

A facial challenge requires a plaintiff to demonstrate that “no set of circumstances exists under which the [challenged sections] would be valid, *i.e.*, that the law is unconstitutional in all its applications.” *Montana Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (citation omitted). A statute’s facial invalidity is “not dependent on the facts of a particular case because the statute would be unconstitutional in all cases.” *Broad Reach Power, LLC v. Montana Dep’t of Pub. Serv. Regulation, Pub. Serv. Comm’n*, 2022 MT 227, ¶ 11, 410 Mont. 450, 520 P.3d 301. This is a heavy burden as statutes are presumed to be constitutional and the “challenger bears the burden of proving a conflict beyond a reasonable doubt.” *Montana Cannabis Indus. Ass’n*, ¶ 12; *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 21, 391 Mont. 422, 419 P.3d 685.

In *City of Missoula*, the challenger alleged that a statutory cap on attorney’s rates in a condemnation action was facially unconstitutional. The Court rejected this argument because a condemnee could incur costs from counsel that fell below the cap. The Court held that in this instance “the statute could be constitutionally applied, defeating a facial challenge.” *City of Missoula*, ¶ 22.

Moreover, the Court’s holding in *Park County* is not instructive.. In *Park County* the Court held that a bar to injunctive relief for MEPA violations was facially unconstitutional. *Park County Environmental Council*, 202 MT 303, ¶ 303, 402

Mont. 168, 477 P.3d 288. In *Park County*, DEQ conceded the Final EA was insufficient, yet there was no remedy. Here, unlike in *Park County*, a Final EIS without analysis of GHG emissions for a coal mine permit is in fact sufficient so the 2023 MEPA Limitation may be constitutionally applied. *Montana Wilderness Ass'n*, 171 Mont. at 485; *Bitterrooters*, ¶ 33.

An as-applied challenge alleges that a particular application of a statute is unconstitutional under the facts. *City of Missoula*, ¶ 25. The facts here are important. The MEPA Limitation applied to a coal mine simply codifies long standing MEPA case law. These facts were never developed by Appellees yet it is Appellee's burden to show that the statute is unconstitutional in all circumstances beyond reasonable doubt. The Appellees cannot make this prima facie showing here so their claims are legally incorrect.

III. The Dormant Commerce Clause Prohibits Montana From Denying Permits for Activities that Result in GHG Emissions Wholly Outside the State.

The District Court improperly concluded that Montana has the authority to deny permits for fossil fuel activities when the activities would result in GHG emissions elsewhere. Order at 90, ¶¶ 23-24. This issue was not before the District Court. The narrow question before the District Court was whether MCA § 75-1-201(2)(a), not the substantive statutes, is unconstitutional. Notwithstanding, if the District Court's decision is upheld, it raises significant Commerce Clause concerns.

A. Montana cannot regulate activities that occur wholly outside the state.

The Commerce Clause precludes state agencies from “exerting extraterritorial control over ‘commerce that takes place wholly outside of the State’s borders.’” *North Dakota v. Heydinger*, 825 F.3d 912, 919 (8th Cir. 2016) (hereafter, “*Heydinger*”) (invalid statutes “seek to reduce emissions that occur outside Minnesota by prohibiting transactions that originate outside Minnesota.”). Congress has the exclusive power to regulate commerce among the states. U.S. Const., Art. I, § 8, cl. 3. The Commerce Clause also applies when Congress does not act which prohibits “certain state [economic regulations] even when Congress has failed to legislate on the subject.” *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1145 (2023) (citation omitted) (“dormant Commerce Clause”).

Under the dormant Commerce Clause, “[a] state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid” regardless of whether the state intended the law to have extraterritorial reach. *Heydinger*, 825 F.3d at 922; *Healy v. Beer Inst.*, 491 U.S. 324, 332, 335-37 (1989). The critical inquiry under the dormant Commerce Clause is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. *Heydinger*, 825 F.3d at 922.

Under the dormant Commerce Clause, the question is whether Montana’s decision to deny coal mine permits because of GHG emissions from combustion that

occurs wholly outside the state has the practical effect of impermissibly regulating extraterritorial energy policy. A state statute has extraterritorial reach when “it requires people or businesses to conduct their out-of-state commerce in a certain way.” *Heydinger*, 825 F.3d at 919 (internal citation omitted). The District Court’s decision has a direct and practical effect on the business of, and in regulating energy policy for, NTEC’s customers in other states and abroad.

B. Montana’s decision to deny coal mine permits for GHG emissions that occur outside the State regulates energy policy in other states and abroad.

The District Court’s conclusion that the State has the authority to deny permits for activities that would result in unconstitutional GHG emissions or else the permitting statutes are unconstitutional runs afoul of the dormant Commerce Clause. *See* Order at 90, ¶¶ 23-24. The District Court’s decision unlawfully regulates extraterritorial activities because it affects the legitimate energy policies of other states (and countries). For example, another state may prefer inexpensive coal power to lower GHG emitting sources because its citizen demographic needs cheaper energy. In *Heydinger*, like the District Court’s decision here, Minnesota’s law affecting non-GHG emitting energy preference was unlawful because other states “have not adopted Minnesota’s policy of increasing the cost of electricity by restricting use of the currently most cost-efficient sources[.]”. *Heydinger*, 825 F.3d at 922.

Similarly, another state may focus its environmental policy on other issues affecting its population like chemicals in the environment, water quality concerns, or waste disposal. As a result, the state may direct its regulations toward these issues rather than GHG emissions within their state. All of these decisions are squarely within the province of the individual states, not Montana.

In addition, the District Court's decision improperly benefits in-state customers over out of state customers by favoring sales in the state where Montana can control GHG's from its emitters. For SCM, however, GHG emissions data may not be available in other states or countries; alternatively, Montana may make different policy decisions than other states on GHG standards. Just as Minnesota's law, in *Heydinger*, unlawfully regulated policy in neighboring states by preventing utilities in those states from adding capacity at the risk of losing the Minnesota marketplace, Montana state agencies cannot be required to use GHG emissions to deny permits because it will deprive customers in other states from buying Montana coal if the receiving state's policy on GHG emissions occurring in the state is different than Montana's. *See Heydinger*, 825 F.3d at 921-22. This will favor in-state customers and burden out of state customers who cannot buy coal without Montana making policy decisions about another state's emissions standards. These types of extraterritorial effects unlawfully burden interstate and foreign commerce.

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In sum, the District Court's decision will directly regulate interstate commerce, which Montana cannot do.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed.

Dated this 23rd day of February, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that the attached Brief *Amici Curiae* of The Navajo Transitional Energy Company complies with Montana Rule of Appellate Procedure 11(4) because the amicus brief is proportionally spaced using Microsoft Word 2016 in 14-point Times New Roman font and contains 4,706 words.

Dated this 23rd day of February, 2024.

Respectfully submitted,

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APPENDIX A

September 5, 2023

Montana Department of Environmental Quality
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RE: Formal Objections to Montana DEQ's Acceptability Determination for the Spring Creek Coal Mine AM5 Amendment for Permit C1979012

To Whom it May Concern,

Please accept the attached comments on the Montana Department of Environmental Quality's (DEQ) acceptability determination for Spring Creek Coal Mine's AM5 permit application for Permit C1979012, pursuant to Mont. Code Ann. § 82-4-231(8)(e). These comments are submitted on behalf of the Montana Environmental Information Center, Art Hayes (Tongue River rancher and irrigator), the Western Organization of Resource Councils, Sierra Club, Northern Plains Resource Council, WildEarth Guardians, and 350 Montana. For the foregoing reasons, DEQ must withhold approval of the permit amendment unless and until the application complies with Mont. Code Ann. § 82-4-222 and all corresponding laws and regulations.

I. A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED FOR THE AM5 AMENDMENT

As a threshold matter, DEQ's acceptability determination for the AM5 permit amendment for the Spring Creek Mine (SCM) is flawed because the environmental impact statement (EIS) associated with the application, required under the Montana Environmental Policy Act (MEPA) fails to disclose or analyze essential information required by law. Notably, the initial draft EIS was released more than five years ago, on July 2, 2018. Since that time, significant new circumstances have arisen that were not addressed in the final EIS and which compel DEQ to prepare a supplemental analysis. The Department's administrative rules specify when a supplemental EIS is required as well as its contents:

17.4.621 SUPPLEMENTS TO ENVIRONMENTAL IMPACT STATEMENTS

(1) The agency shall prepare supplements to either draft or final environmental impact statements whenever:

- (a) the agency or the applicant makes a substantial change in a proposed action;
- (b) there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision; or
- (c) following preparation of a draft EIS and prior to completion of a final EIS, the agency determines that there is a need for substantial, additional information to evaluate the impacts of a proposed action or reasonable alternatives.

(2) A supplement must include, but is not limited to, a description of the following:

- (a) an explanation of the need for the supplement;
 - (b) the proposed action; and
 - (c) any impacts, alternatives or other items required by ARM 17.4.617 for a draft EIS or ARM 17.4.619 for a final EIS that were either not covered in the original statement or that must be revised based on new information or circumstances concerning the proposed action.
- (3) The same time periods applicable to draft and final EISs apply to the circulation and review of supplements.

Because the Montana Legislature modeled MEPA after the National Environmental Policy Act (NEPA), federal authority construing NEPA is persuasive guidance for construing similar MEPA provisions. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality*, 2017 MT 222, P. 18, 388 Mont. 453, 401 P.3d 712. In deciding whether to supplement an EIS, DEQ must make “a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information”. *Mont. Env'tl. Info. Center. v. Mont. Dep't of Transp.*, 2000 MT 5, ¶ 27, 298 Mont. 1, 994 P.2d 681, citing *Marsh v. Oregon Natural Resources Council* (1989), 490 U.S.360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377. The Council for Environmental Quality has adopted guidance on “when changes to a proposed action will require preparation of a supplemental EIS” that provide additional guidance for determining whether a supplemental EIS is required. *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011).

A. Climate Change Must be Considered as Part of the MEPA Process

As outlined in MEIC’s comments on the draft EIS, the climate is changing, it is caused by human activity such as the permitting action here, and the changing climate will have enormous, negative impacts for Montana and the world. Montana Department of Environmental Quality, Final Environmental Impact Statement for the Proposed Addition of a Haul Road to the Spring Creek Mine, August 2023, 9-42 through 47 (hereinafter referred to as Final EIS). Additionally, the 2018 comments alerted DEQ to the climate crisis and called upon DEQ to conduct a thorough and lawful MEPA analysis that “address[ed] the externalities of coal generation, including a pathway toward mitigating climate change.” *Id.* at 9-44.

Since the draft EIS was released in 2018, significant and material changes have occurred regarding our understanding of anthropogenic changes to our climate and the dire and immediate necessity to act. In March of this year the International Panel on Climate Change (IPCC) released its sixth Synthesis Report, which provides a comprehensive assessment on the scientific, technical and socio-economic knowledge on climate change, its impacts and future risks, and options for reducing the rate at which climate change is taking place.”¹ The Summary for Policymakers of the 2023 IPCC Report²

¹ IPCC, 2023: Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, (in press) [available online: <https://www.ipcc.ch/>].

² IPCC, 2023: Summary for Policymakers. In: Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, (in press).[available online: https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf].

provides clear, concise, high-confidence conclusions regarding the state of climate change and the necessity to act, including:

Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals (high confidence).³

Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (high confidence).⁴

Continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards (high confidence). Deep, rapid, and sustained reductions in greenhouse gas emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years (high confidence).⁵

Montana is not immune from these significant changes, but rather is especially vulnerable to the changing climate. *Held v. Montana*, Montana First Judicial District, Cause No. CDV 2020-1307, ¶¶ 79-80. Dr. Cathy Whitlock, a renowned expert on climate change and its specific impacts on Montana, notes that "Montana's climate has been warming steadily as the result of burning fossil fuels." She has further explained that the state's average temperature has risen 2.7 degrees Fahrenheit since 1950 — a faster rate than that of the whole country (in general, areas at high latitudes and those further from an ocean are warming faster).⁶ Indeed, evidence of the impacts of climate change to Montana and its people is abundant. The Montana Climate Assessment⁷ provides ample evidence of the broad impacts of climate change in Montana. Notably, a recent analysis focuses on the impacts of climate change on human health, finding that:

³ *Id.*, at 4.

⁴ *Id.*, 5.

⁵ *Id.*, 12.

⁶ Aron, Hilel. Youth-led climate change trial in Montana continues, *Courthouse News Service* (August 23, 2023) [available online: <https://www.courthousenews.com/youth-led-climate-change-trial-in-montana-continues/>].

⁷ Whitlock C, Cross W, Maxwell B, Silverman N, Wade AA. 2017. 2017 Montana Climate Assessment. Bozeman and Missoula MT: Montana State University and University of Montana, Montana Institute on Ecosystems. 318 p. doi:10.15788/m2ww8w. [Available online: <http://live-mca-site.pantheonsite.io/sites/default/files/thumbnails/image/2017-Montana-Climate-Assessment-lr.pdf>]

Three aspects of projected climate change are of greatest concern for human health in Montana: 1) increased summer temperatures and periods of extreme heat, with many days over 90°F (32°C); 2) reduced air quality from smoke, as wildfires will increase in size and frequency in the coming decades; and 3) more unexpected climate-related weather events (i.e., climate surprises), including rapid spring snowmelt and flooding, severe summer drought, and more extreme storms. [high agreement, robust evidence]

The most vulnerable individuals to the combined effects of heat, smoke, and climate surprises will be those with existing chronic physical and mental health conditions, as well as individuals who are very young, very old, or pregnant. Montana's at-risk populations include those exposed to prolonged heat and smoke, living in poverty, having limited access to health services, and/or lacking adequate health insurance. [high agreement, robust evidence]

Projected increased summer temperatures and wildfire occurrence will worsen heat- and smoke-related health problems such as respiratory and cardiopulmonary illness, and these potential problems are of most immediate concern. [high agreement, robust evidence]

Earlier snowmelt, more intense precipitation events, and projected increases in floods will endanger lives and lead to more gastrointestinal disease due to contaminated water supplies, as well as increased opportunities for other water-borne, food-borne, and mold-related diseases. [high agreement, moderate evidence]

Increased summer drought will likely increase cases of West Nile virus in Montana, but the impact of climate change on other vector-borne diseases is less clear. [high agreement, moderate evidence]

Longer growing seasons, warmer temperatures and elevated carbon dioxide (CO₂) levels are leading to increased pollen levels, worsening allergies and asthma. [high agreement, moderate evidence]

Summer drought poses challenges to local agriculture, resulting in decreased food availability and nutritional quality, and to the safety and availability of public and private water supplies, especially for individuals and communities relying on surface water and shallow groundwater. [high agreement, robust evidence]

Climate changes, acting alone or in combination, are reducing the availability of wild game, fish,⁸ and many subsistence, ceremonial, and medicinal plants, which threatens food security, community health, and cultural well-being, particularly for tribal communities. [high agreement, moderate evidence]

Increased stress and increased mental illness are under recognized but serious health consequences of climate change. [high agreement, robust evidence].

⁸ Adams et al., Montana Climate Assessment, Climate Change and Human Health in Montana (Jan. 2021) [available online: http://live-mca-site.pantheonsite.io/sites/default/files/thumbnails/image/2021_C2H2inMT_final.pdf].

These impacts threaten Montanans fundamental right to a clean and healthful environment and implicate DEQ's responsibility to protect this right. Mont. Const. art. II, § 3, art. IX, § 1. DEQ is complicit in harming the health and violating the rights of all Montanans by continuing to permit unabated coal strip-mining and coal combustion in this state. DEQ must disclose these impacts in its EIS for this proposed expansion.

The Final EIS notes in the "purpose and need" section that the purpose of the document is for "DEQ to assess the impacts of the corridor segment of a haul truck transportation corridor from the Spring Creek Mine in Montana to the border of Montana" and that the "transportation corridor would provide a means to move coal for processing and equipment between the Youngs Creek Mine (YCM) in Wyoming and the SCM in Montana." Final EIS at i-ii.

The Youngs Creek Mine (YCM) is owned by the Navajo Transitional Energy Company (NTEC) and is located in Wyoming, approximately 7 miles southwest of the SCM. It encompasses approximately 7,822 acres of coal resources and surface rights. Estimated recoverable coal resources are 291 million tons of coal⁹. The mine is permitted, but there are no current mining operations. SCM proposes to haul coal on the haul road for 24 hours a day, seven days a week, 365 days per year. Final EIS at 2-10. The Final EIS predicts, at a production rate of 5 million tons per year at the YCM, the average daily traffic for the haul route would include four haul trucks per hour and one to two support vehicles per hour for a total of approximately 120 to 145 vehicle trips per day *Id.* at 2-10, Table 2.3-2.

Once the coal travels by truck to SCM, it will be processed and then transported by rail to coal-fired power plants and burned, releasing greenhouse gas (GHG) emissions and other air pollutants. Under the proposed action alternative identified by DEQ, it's clear that the coal mined at YCM would be processed *in addition* to any coal mined at the Spring Creek Mine proper, which would correspondingly increase emissions at SCM by the amount of coal processed and shipped emanating from YCM. In addition, the proposed alternative is predicted to "extend the life of SCM," a facility that is the largest coal mine in terms of production and likely Montana's largest polluter of GHG emissions. *Id.* 2-10.

However, it is clear that the DEQ does not know the actual or even approximate amount of coal tonnage that would be hauled and processed from YCM to SCM and, subsequently, shipped and burned – should the haul road be permitted – as DEQ has not done the required analysis. Nor does DEQ have any understanding of the emissions that will result from this action, as DEQ has refused to evaluate the climate impacts associated with this action. Finally, DEQ does not know the environmental and social impacts associated with the emissions, as it has not done the required analysis. There does not appear to be any capacity constraints associated with the SCM processing facility, and the "SCM permit for the processing facility does not stipulate a rate of coal production." *Id.* 9-79.

In response to comments concerning the impacts on the climate from the AM5 permit expansion, DEQ states that:

Response 56

Montana HB 971 amended 75-1-201 (2) (a) of MEPA to provide: "Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include

⁹ Fugleberg, Jeremy. Cloud Peak buys Powder River Basin site for \$300M, *Billings Gazette* (July 2, 2012) [available online: https://billingsgazette.com/news/state-and-regional/wyoming/cloud-peak-buys-powder-river-basin-site-for-300m/article_22abd0be-12c8-5999-88ad-fd6d6fe8aa34.html#tncms-source=login].

an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.” The agency thus did not undertake such a review.

Response 57

Because the Montana Legislature modeled MEPA after NEPA, federal authority construing NEPA is generally persuasive guidance for construing similar MEPA provisions. *Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’tl. Quality*, 2017 MT 222, P. 18, 388 Mont. 453, 401 P.3d 712. Here, however, DEQ’s analysis under MEPA is distinct from any climate analysis required under NEPA given HB 971 and the corresponding amendments to 75-1-201(2)(a), which prohibit an evaluation of greenhouse gas emissions and corresponding impacts to the climate in Montana or beyond its borders.

Final EIS, 9-79 through 9-80.

DEQ issued the Final EIS and Notice of Acceptability on August 11, 2023. Notably, this is not a final agency action. DEQ must still decide whether or not to approve AM5, and will set forth its final decision in a Record of Decision and Written Findings. As the Department is aware, on August 14, 2023, Montana District Court Judge Kathy Seeley found the limitations on the ability and duty of the DEQ to evaluate climate change passed by the 2023 legislature to be unconstitutional. *Held v. Montana*, Montana First Judicial District, Cause No. CDV 2020-1307. The Order specifically noted that “Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes *climate* as part of the environmental life support system (emphasis added). *Id.* at 102. The order permanently enjoined the language from both HB 971 and SB 557 and further prohibited DEQ from acting in accordance with the statutes declared unconstitutional. *Id.*

DEQ is mandated to comply with Montana’s Constitution and state law. *Held* at ¶ 28. As such, to comply with DEQ’s own regulations in determining when a supplemental EIS process must be performed, as well as the explicit direction of *Held v. Montana*, which prohibited DEQ from acting in accordance with the unconstitutional statutes, DEQ must re-open up the EIS process and perform a supplemental analysis. Specifically, DEQ must consider the combined climate implications of burning the coal produced at the Youngs Creek Mine and the Spring Creek Mine as well as the climate implications of the proposed haul road. As the court found in the *Held* case, every additional ton of CO₂ matters,¹⁰ Montana is a major emitter of GHG emissions, and its contribution to the climate crisis is significant.¹¹ These issues must be disclosed and analyzed in a supplemental EIS.

When analyzing the climate impacts, DEQ must consider the financial impact from these emissions as well as the benefits of a no action alternative. DEQ should rely on the best available science to consider the impacts of this haul road on the climate, including the recently updated analysis by the federal government on the social cost of GHG emissions.¹² While there are many available resources discussing the impacts of climate change on Montana's environment as well as the resulting financial impacts, DEQ should consider the two economic analyses of climate change impacts to agriculture and

¹⁰ *Held v. Montana* at ¶ 92.

¹¹ *Id.*, at ¶ 222, 237.

¹² Draft Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances. U.S. Environmental Protection Agency, Washington, D.C. (May 10, 2022) [(available online: <https://www.epa.gov/environmental-economics/scghg>)].

the outdoor economy, conducted by Dr. Thomas Power.¹³ DEQ has tools to assess the environmental, social, and economic impacts of climate change in Montana and it must incorporate such analyses in a supplemental EIS.

Further, the U.S. Supreme Court has called the disclosure of impacts the “key requirement of NEPA,” and held that agencies must “consider and disclose the actual environmental effects” of a proposed project in a way that “brings those effects to bear on [the agency’s] decisions.” *Baltimore Gas & Elec. Co. V. Natural Res. Def. Council*, 462 U.S. 87, 96 (1983). Courts have repeatedly concluded that an EIS must disclose relevant climate effects.¹⁴

A failure of DEQ to issue the permit based upon a Final EIS that does not include an analysis of the GHG contribution and climate change impacts associated with the AM5 permit is arbitrary, capricious, and legally insufficient to comply with Montana’s fundamental constitutional right to a clean and healthful environment and law under NEPA. In order to remedy these considerations, DEQ must conduct a supplemental EIS analysis that fully considers GHG impacts, and provides a range of alternatives that are informed by this analysis. Ultimately DEQ must deny this mine expansion, which is inconsistent with the fundamental rights of all Montanans.

B. Water Quality

An EIS must consider the direct, indirect, and cumulative impacts of the action, along with connected, similar, and cumulative actions. 40 C.F.R. § 1508.25. Here, the Final EIS fails to take a hard look at important impacts to water resources. Actions are connected if, among other circumstances, the actions are interdependent parts of a larger action and depend on the larger action for their justification. *Id.* at (a)(1)(iii). The Final EIS fails to consider any impacts to the Tongue River or aquatic life in the Tongue River from the road construction and cumulative impacts of the Youngs Creek coal mine.

The Tongue River drainage has unique, protective water quality standards. The reason for the establishment of a strict water quality standard, which was set in the early 2000s for the tributaries of the Tongue River, is that the tributaries were being impacted by coalbed methane (CBM) development and its wastewater discharges. Salinity levels accumulate and compound as water flows downstream. Thus, what happens in the upper reaches of a watershed will impact water quality standards downstream in regard to salinity. Some of the best quality water in the Tongue River system comes from the Bighorn Mountains as well as from rain and snowmelt. Some of the worst quality water comes from the small tributaries to the Tongue River that originate in Wyoming, significantly affected by CBM development. Wyoming has breached many of the old CBM ponds, and the salts coming from them are making their way today into the Tongue River.

¹³The Impact of Climate Change on Montana’s Outdoor Economy, Prepared for the Montana Wildlife Federation, Power Consulting (Dec. 2015). [available online: <https://montanawildlife.org/wp-content/uploads/2015/12/Impact-of-Climate-Change-on-the-Montana-Outdoor-Economy-Dec-2015-Final-Report.pdf?c6b026&c6b026>]; The Impact of Climate Change on Montana’s Agriculture Economy, Prepared for the Montana Farmers Union (Jan. 2015) [available online: https://legacy-assets.eenews.net/open_files/assets/2017/07/03/document_gw_01.pdf].

¹⁴ As the Ninth Circuit has held: “[T]he fact that climate change is largely a global phenomenon that includes actions that are outside of [the agency’s] control ... does not release the agency from the duty of assessing the effects of its actions on global warming within the context of other actions that also affect global warming.” *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); See also *Border Power Plant Working Grp. v. U.S. Dep’t of Energy*, 260 F. Supp. 2d 997, 1028-29 (S.D. Cal 2003) (failure to disclose project’s indirect carbon dioxide emissions violates NEPA).

The Tongue River drainage is already failing to meet water quality standards due to excess salinity and/or specific conductivity (salts) throughout the watershed.¹⁵ DEQ is conducting an analysis of the watershed due to its importance to agriculture, which is threatened by the use of high saline waters on irrigated agriculture. Coal mining and CBM have and continue to increase the load of salts in the impaired watershed. Adding even more salts to an already impacted watershed would harm area resources, aquatic life, and agriculture.

The purpose of the haul road is to allow for coal hauled from Youngs Creek to access the rail infrastructure at Spring Creek. The purpose and need section notes that the purpose of the road is in “connecting the Youngs Creek Mine in Wyoming to the Spring Creek Mine in Montana.” Final EIS at 1.2. NTEC is clearly relying upon the AM5 amendment to haul coal from the YCM to market, and the final EIS and alternatives analysis makes clear that the most economic and realistic way to haul coal from YCM is by the haul road. *Id.* at 2.6. Clearly, the haul road and the YCM are connected actions. The building of the haul road would make the development of the YCM reasonably foreseeable, and there is no question that water pollution from the SCM and YCM would interact in the Tongue River. As such, DEQ must fully evaluate the cumulative water pollution and environmental impacts associated with the Youngs Creek Mine and Spring Creek mine, including potential contributions of salinity and/or specific conductivity. ARM 17.24.301(32). Undoubtedly, DEQ has (or could easily get) information available on the permitting of the YCM, and it's clear that DEQ anticipates the operation of the YCM, being that the mine is fully permitted and now that the application for its transportation system has been deemed acceptable. This clearly falls within the definition of “anticipated mining,” which requires DEQ to conduct a cumulative analysis. *Id.*

Coal mining at YCM (which is within the upper Tongue River watershed) would likely increase salinity levels in the watershed. Surface disturbance at the Wyoming YCM and from the proposed AM5 haul road would also likely increase runoff and, thus, increase the salinity impacts to the Tongue River via its tributaries. The alterations in natural runoff that the proposed AM5 haul road would create may also add to an increase in salt load into the Tongue River drainage, making compliance with water quality standards even more difficult to attain and further jeopardize agriculture in the area.

The failure of the EIS to include the cumulative impacts to water quality from outside of the state border undermines the agency's ability to use the EIS to make an informed decision on the AM5 permit. Without a complete analysis, it is impossible to discern whether or not there may be material damage to the water quality from coal mining. 30 CFR § 816.41(a). DEQ acknowledges, at least in part, this insufficiency in the EIS, noting that the SCM “CHIA was completed prior to the submittal of permit materials for the proposed action so it did not include an analysis of the proposed action. An updated CHIA, analyzing the effects of the proposed action in combination with all previous, existing, and anticipated mining in the Cumulative Impact Area (CIA), will be prepared prior to any final permit decision.” Final EIS at 9-72. Truncating or limiting the CHIA analysis simply to the haul road as the proposed action, without fully considering the YCM as a connected action and its likely impacts to the water quality in the Tongue River from anticipated mining would be arbitrary and capricious and lead the department to make uninformed decisions about the permitting of the haul road.

¹⁵ Staten, Christina, Tongue River Watershed Water Quality Planning Project, *Montana Department of Environmental Quality* (Last updated May 24, 2023), [available online: <http://mtwaterqualityprojects.pbworks.com/w/page/108535963/Tongue%20River%20Watershed%20Water%20Quality%20Planning%20Project>].

Conclusion

To conclude, final agency action has not yet occurred on the AM5 permit and consequently a supplemental EIS is timely and required to disclose and analyze critical issues, such as climate change and water quality impacts, as required by law.

II. NTEC MUST BE ISSUED A NEW OR AMENDED AIR QUALITY PERMIT FOR THE YOUNGS CREEK EXPANSION BEFORE AM5 PERMIT APPROVAL

The approval of the AM5 permit would authorize NTEC to process coal from the proposed YCM in the crusher and rail facility at the SCM. The volume of additional coal that would be processed at the facility is unclear, but could potentially increase the volume of coal processed at the SCM coal crusher by millions of tons. SCM currently operates under Montana Air Quality Permit #1120-12 (AQP), issued on October 16, 2014. DEQ has erroneously concluded that the permitting action will consist solely of construction and use of a road and has determined it will not require the SCM to modify its permit. Final EIS 2-22.

In applying for and receiving a reclamation plan, an operator must “set forth in detail the manner in which the applicant intends” to comply with applicable air quality laws. Mont. Code Ann. § 82-4-231(2). During an application for an air quality permit, an applicant must provide information relevant to determine the air quality impacts and proposed control measures, including a:

17.8.748(d) a description of the composition, volume and temperatures of the effluent stream, including the nature and extent of air contaminants emitted, quantities and means of disposal of collected contaminants, and the air quality relationship of these factors to conditions created by existing stacks or emitting units or stacks associated with the proposed new or modified emitting unit(s) ;

DEQ has entirely ignored the potential impacts that the addition of Youngs Creek coal will cause to the surrounding air quality, in particular in regard to the crushing and loading facility, the baghouse associated with the rail load-out facility, and other facilities associated with the stockpile of coal pending its export. The air quality permit for the SCM is devoid of *any* analysis associated with the addition of or content of coal from the YCM. The Source Description in the permit describes that the “The coal mined is from the Anderson-Dietz coal seam” Coal quality and composition varies dramatically depending on the source of the coal, its moisture content during processing, and other factors. No effort has been made to determine the potential operational changes and potential for compliance by SCM with its air quality permit with the introduction of YCM coal into its facility.

Further, the AQP analyzes the cumulative impacts to air quality, in part, by conducting an Ambient Air Quality Impact Analysis. AQP at 17. The AAQIA concludes that the dispersion modeling results indicate the proposed increase in production will not likely cause or contribute to a violation of the federal or state ambient air quality standards. However, the modeling did not include any analysis of the haul road impacts associated with 280 ton vehicles moving coal on dusty roads for 24 hours a day, seven days a week, and 365 days per year (up to 145 vehicle trips per day). Final EIS at 2-10. The Final EIS also assumed a production rate of 5 million tons per year at the YCM, all of which would be processed and loaded onto rail facilities at SCM. Id. at 2-10, Table 2.3-2.

In order to deem the application complete, DEQ must require that SCM receive a new or revised air quality permit that adequately considers adding a larger quantity and different quality of coal into the air quality management system (Youngs Creek Coal) and its impacts on air quality. ARM 17.24.405(6)(g).

Conclusion

The proposed amendment, the AM5 haul road, to mining permit C1979012, which would allow construction of a haul road to bring YCM coal to SCM, needs a thorough, honest, and critical analysis. By failing to consider climate impacts, as well as the limited air and water quality analysis, DEQ must reject the application for construction of a haul road until a supplemental EIS has been conducted and the necessary permits (or amendments) have been issued in order to assure that the impacts of AM5 are sufficiently examined and the AM5 amendment is lawful.

Sincerely,

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