WESTERN ENVIRONMENTAL LAW CENTER

EARTHJUSTICE

July 7, 2025

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Solid Minerals Branch
Bureau of Land Management
5001 Southgate Drive
Billings, MT 59101

RE: Public Comments on Draft Environmental Assessment, Maximum Economic Recovery, and Fair Market Value for the Falkirk Mining Company Proposed Emergency Federal Coal Lease by Application and Mining Plan for NDM 111489, McLean County, ND

Ms. Wallace:

Please accept the following comments on the draft environmental assessment (EA) for the Falkirk Mining Company (Falkirk) proposed federal coal lease by application NDM 111489. We are submitting these comments on behalf of the Dakota Resource Council, Sierra Club, Center for Biological Diversity, CURE, and Montana Environmental Information Center. The draft EA is procedurally and substantively deficient. As a result, the Bureau of Land Management (BLM) and Office of Surface Mining Reclamation and Enforcement (OSMRE) must prepare an environmental impact statement (EIS) in compliance with the National Environmental Policy Act (NEPA) and biological opinion (BiOp) prior to issuing any decision on the proposed coal lease.

INTERIOR'S EMERGENCY NEPA PROCEDURES ARE UNLAWFUL.

BLM failed to provide the public with notice and an opportunity to meaningfully comment on this project through its reliance on the Department of the Interior's adoption of the unlawful "Alternative Arrangements for NEPA

Compliance." The "Alternative Arrangements For NEPA Compliance"[1] announced by the Department of the Interior on April 23, 2025, and the Council on Environmental Quality (CEQ) letter[2] of the same date authorizing those alternative arrangements (collectively, the "Emergency Procedures") are unlawful, as is BLM's reliance on it for purposes of reviewing the Falkirk Mining Company proposed federal coal lease by application. The Emergency Procedures adopt astonishingly short time frames for completing NEPA analyses and eliminate opportunities for public comment on most of these analyses. The Emergency Procedures attempt to circumvent NEPA and shut the public out of approval processes for energy project, thus compromising the quality and integrity of the Department's decision-making and leading to worse outcomes for communities and the environment.

Specifically, the Emergency Procedures are unlawful because they: (1) are premised on a baseless and unsupported declaration of a "national energy emergency" in Executive Order 14,156, 90 Fed. Reg. 8,433 (Jan. 29, 2025); (2) conflict with the Department of Interior's NEPA regulation on emergency responses; (3) violate the Department's public participation obligations; (4) fail to conform to the requirements for Administrative Procedure Act (APA) notice and comment rulemaking; (5) are inconsistent with the timeframes and participation periods mandated by the Bureau of Land Management's (BLM) coal leasing regulations; and (6) violate the major questions doctrine. Accordingly, the undersigned organizations request that the Secretary immediately withdraw the Emergency Procedures and that BLM undertake a thorough review of the Falkirk Mining Company proposed coal lease by application as mandated by NEPA.

I. THERE IS NO NATIONAL ENERGY EMERGENCY.

As an initial matter, Executive Order 14,156 and the Emergency Procedures are a transparent pretext to exempt fossil fuel development from environmental

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[1] Dep't of the Interior, *Alternative Arrangements for NEPA Compliance: Alternative Arrangements for Compliance with the National Environmental Policy Act Amid the National Energy Emergency* (Apr. 23, 2025), https://www.doi.gov/sites/default/files/documents/2025-04/alternative-arrangements-nepa-during-national-energy-emergency-2025-04-23-signed_1.pdf [hereinafter *Alternative Arrangements for NEPA Compliance*].

[2] Letter from Katherine R. Scarlett, Chief of Staff, Council on Environmental Quality, to Karen Budd-Falen, Acting Deputy Secretary, Dep't of the Interior (Apr. 23, 2025), https://www.whitehouse.gov/wp-content/uploads/2025/04/CEQ-to-DOI-re-Alternative-Arrangement_04.23.25.pdf.

laws rather than a response to an actual energy emergency. There is no urgent need to immediately increase coal mining on public lands. Moreover, a rational response to an energy emergency would not exclude renewable energy or allow companies to decide whether they will "opt in" to the relevant procedures.

As the Department has recognized, an "emergency" refers to "a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action," or "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[3] None of the concerns identified in the Executive Order meet this definition.

The Executive Order raises longstanding energy policy issues like energy prices and security but fails to identify any sudden or unforeseen new circumstances that might require deviation from existing laws and regulations.[4] Instead, the Executive Order borrows talking points that the fossil fuel industry has offered for years when seeking to increase production. These are nothing new and because these concerns involve long-term national energy policy, they cannot be resolved through short-term steps expediting approvals of leases and permits.

The details of the Executive Order and Emergency Procedures also illustrate the pretextual nature of the alleged "emergency." The Executive Order's exclusion of renewable energy, and the "opt in" nature of the Emergency Procedures, reflect an effort to exempt favored (i.e., fossil fuel) energy producers from federal environmental law rather than to respond to an emergency.

First, the Executive Order defines "energy" to exclude wind, solar and many other renewable sources.[5] If there were a genuine energy emergency, the United States would be expected to take an "all of the above" approach to increasing energy supplies. The Executive Order itself recognizes the importance of a "diversified" energy supply,[6] and all the concerns listed in the Executive Order can be addressed

[3] 73 Fed. Reg. 61292, 61301 (Oct. 15, 2008) (applying dictionary definition of "emergency").

[4] *See* Exec. Order No. 14,156, 90 Fed. Reg. 8,433 (Jan. 29, 2025).

[5] *Id.* § 8(a).

[6] *Id.* § 1.

by increasing renewable energy production.[7] Clean energy is already fueling more and more of our economy, helping to make the United States more energy independent and meeting future growth in electricity demand.

Second, the "opt in" structure of the Emergency Procedures—they apply only where the "project applicant . . . want[s] the review of their project to be covered by the alternative arrangements"[8]—undercuts the Department's claim to be responding to an emergency. If the United States genuinely requires an immediate increase in energy production, expediting that production cannot be left to the business decisions of individual energy companies. The stated goals of the Executive Order are not contingent on whether each operator chooses to seek expedited approvals.

Ultimately, the administration has not demonstrated any basis for an energy emergency.

II. EXECUTIVE ORDER 14,156 DOES NOT ACTIVATE ANY EMERGENCY POWERS UNDER NEPA.

President Trump's Executive Order relied on the National Emergencies Act (NEA)[9] for authority to declare a national energy emergency.[10] The NEA authorizes the President to declare a national emergency, which allows him to exercise "any special or extraordinary power" that is authorized by an Act of Congress "during the period of a national emergency."[11]

The NEA does not give the President free rein to disregard the law, however. Rather, an emergency declaration only applies to statutes "conferring powers and authorities to be exercised during a national emergency."[12] As Congress explained:

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[7] Further undercutting the claimed emergency, the Executive Order also ignores energy conservation and efficiency. On the contrary, the Trump administration plans to halt the Environmental Protection Agency's energy-saving Energy Star Program. *See, e.g.*, Stephanie Pappas, *Shuttering of EPA's Energy Star Program Would Affect Electric Bills and the Environment*, Scientific Am., May 8, 2025, https://www.scientificamerican.com/article/the-epa-plans-to-terminate-the-energy-star-program-heres-what-that-means/.

[8] *Alternative Arrangements for NEPA Compliance*, *supra* note 1, at 1.

[9] 50 U.S.C. §§ 1601–1651.

[10] Exec. Order No. 14,156, 90 Fed. Reg. 8,433 (Jan. 29, 2025).

[11] 50 U.S.C. § 1621(a).

[12] *Id.* § 1621(b).

the "National Emergencies Act is not intended to enlarge or add to Executive power. Rather, the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes."[13]

The NEA also imposes requirements for reporting to Congress and procedures for terminating emergencies.[14] In particular, the NEA requires the President to "specif[y] the provisions of law under which he proposes that he, or other officers will act" in exercising emergency powers.[15] This specification must be made in the emergency declaration, or in "subsequent Executive orders published in the Federal Register and transmitted to the Congress."[16]

Unlike some other statutes, NEPA does not give the President any "special or extraordinary power" to waive its requirements during national emergencies.[17] Moreover, President Trump's Executive Order makes no mention of NEPA—much less "specif[ying] the provisions" of that statute under which he wants to act during the emergency.[18]

As a result, the fact that President Trump has declared a purported "emergency" does not give the Department any additional power to disregard the ordinary requirements of NEPA. The Department must look elsewhere for authority to issue the Emergency Procedures.

III. AN EMERGENCY DOES NOT EXIST WITHIN THE SCOPE OF NEPA REGULATIONS.

The Department relies on one of its NEPA regulations, 43 C.F.R. § 46.150, for authority to issue the Emergency Procedures. That regulation allows emergency actions to be taken under certain circumstances, but it does not authorize the Emergency Procedures, or their application to the issuance of oil and gas leases or drilling permits.

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[13] Sen. Rep. No. 94-1168, at 3 (1976).

[14] 50 U.S.C. §§ 1621–1631.

[15] *Id.* § 1631.

[16] *Id.*

[17] *Id.* § 1621(a); *see* 42 U.S.C. §§ 4321–4370 (NEPA).

[18] 50 U.S.C. § 1631.

The Department must make a reasoned determination, supported by record evidence, that: (a) emergency circumstances actually exist within the meaning of the NEPA regulation, and (b) responding to that emergency requires issuance of a permit or lease prior to NEPA compliance. The Department cannot make those findings.

A. The Administration's Goal of Increasing Energy Production Does Not Represent an Emergency for Purposes of NEPA.

The Department's NEPA regulation, 43 C.F.R. § 46.150, only applies where an emergency "makes it necessary to take urgently needed actions before preparing a NEPA analysis and documentation" in compliance with the regular NEPA procedures.[19] In issuing the regulation, Interior explained that an "emergency" means "a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action," or "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[20] BLM's NEPA Handbook offers the following examples of typical emergencies: a "hazardous materials spill . . . ongoing wildland fires . . . [and] emergency stabilization actions following wildland fires or other disasters"[21] where stabilization is "immediately needed to protect public health and safety or important resources."[22]

As one court noted, findings of "emergency circumstances" under NEPA have been upheld where they serve to "avert imminent crises outside the agency's control."[23] For example, federal land managers have used emergency procedures to

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[19] 43 C.F.R. § 46.150.

[20] 73 Fed. Reg. 61292, 61301 (Oct. 15, 2008) (first quoting *Random House Dictionary Of The English Language* (2ed. 1987); and then quoting *Webster's Third New International Dictionary Of The English Language 1961 and Merriam-Webster's Collegiate Dictionary* (11th ed. 2004)) (applying dictionary definition of "emergency").

[21] Bureau of Land Mgmt., H-1790-1, *National Environmental Policy Act Handbook* (2008) at 10, https://www.blm.gov/sites/blm.gov/files/uploads/Media_Library_BLM_Policy_Handbook_h1790-1.pdf.

[22] *Id.* at 11.

[23] *NRDC v. Winter*, 518 F.3d 658, 683 (9th Cir. 2008), *rev'd on other grounds*, 555 U.S. 7 (2008).

relocate wild horses that were left without forage or water following a wildfire[24] or when immediate steps were needed to contain an ongoing wildfire[25]. In other contexts, altering operations of a water control project to prevent the extinction of an endangered species has been classified as an emergency for purposes of invoking NEPA emergency procedures.[26] And urgent transport operations in support of an active military conflict in the Middle East have been held to be an emergency for purposes of NEPA compliance.[27]

The administration's policy goal of increasing domestic energy production does not qualify as an emergency for NEPA purposes. The concerns described by the Executive Order all involve long-standing policy and market issues that have existed, and which the federal government has engaged with, for years. They do not involve a "sudden," "urgent," or "unexpected" event, or "require[e] immediate action" prior to complying with NEPA.[28]

For example, the desire to export American energy to advance foreign policy goals, and for the United States to enjoy an "affordable and reliable domestic supply of energy," have been policy goals for many decades and are already being implemented.[29] Nor do any new developments suddenly or unexpectedly threaten those goals. While fossil fuel advocates have claimed for years that grid stability could suffer as renewable energy sources become a larger part of the country's

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[24] *Friends of Animals v. BLM*, No. 2:16–cv–1670–SI, 2018 WL 1612836, *8 (D. Or. April 2, 2018).

[25] *Forest Serv. Employees for Env't Ethics v. U.S. Forest Serv.*, 2:16-cv-0293-TOR, 2017 WL 2962771, *1-4 and n. 7 (E.D. Wa. July 11, 2017) (similar Forest Service regulation invoked for cutting trees to create a fire line).

[26] *Miccosukee Tribe of Indians v. U.S.*, 420 F. Supp. 2d 1324, 1329-30 (S.D. Fla. 2006).

[27] *Valley Citizens for a Safe Env't v. Vest*, Civ. A. No. 91–30077–F, 1991 WL 330963 (D. Mass. May 30, 1991) (affirming alternative NEPA arrangements for nighttime military flights needed to support Operation Desert Storm, which responded to Iraq's unexpected invasion of Kuwait). The Council on Environmental Quality (CEQ) regulations provided for NEPA compliance in emergencies, 40 C.F.R. § 1506.11 (2023), and Section 46.150 "supplements, and is to be used in conjunction with" the CEQ regulation. 43 C.F.R. § 46.20; *see also* 73 Fed. Reg. 61292, 61301 (Oct. 15, 2008) (Section 46.150 "codifies . . . CEQ guidance for emergency actions"). Interior is one of many federal agencies following the approach to emergencies outlined in the CEQ regulation.

[28] 73 Fed. Reg. 61292, 61301 (Oct. 15, 2008).

[29] *See* Exec. Order No. 14,156, 90 Fed. Reg. 8,433 (Jan. 29, 2025).

energy supply, the electrical grid remains very reliable.[30] There is no rational basis for invoking NEPA's emergency procedures here.

B. Issuing Coal Leases Prior to NEPA Compliance Is Not Required to Address Any Alleged Energy Emergency.

Even if the energy policy concerns raised in the Executive Order could qualify as an emergency for NEPA purposes, the Department regulation does not allow "alternative arrangements" to be used for issuing new leases. "Alternative arrangements" for NEPA compliance may be applied in two situations:

- If an action won't have a significant impact on the environment, alternative arrangements are available only where "the nature and scope of the subsequent actions related to the emergency require taking such proposed actions prior to completing an environmental assessment and a finding of no significant impact"[31]; or
- If an action is likely to have a significant impact, any alternative arrangements can "apply only to the proposed actions necessary to control the immediate impacts of the emergency."[32]

Approval of leases and drilling permits with the goal of increasing energy production is much different from containing wildfire, responding to a toxic spill, or getting supplies to troops during an active military conflict. Routine leasing and

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[30] Paul Denholm, *Top 10 Things to Know About Power Grid Reliability*, Nat'l Renewable Energy Lab'y (Jan. 26, 2024), https://www.nrel.gov/news/detail/program/2024/top-10-things-to-know-about-power-grid-reliability; Steve Hanley, *California Smashes Myth That Renewables Aren't Reliable*, CleanTechnica (Jan. 24, 2025), https://cleantechnica.com/2025/01/24/california-smashes-myth-that-renewables-arent-reliable/.

[31] 43 C.F.R. § 46.150(c).

[32] *Id.* § 46.150(d). The regulation also provides for "actions necessary to control the immediate impacts of the emergency that are urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources." *Id.* § 46.150(a)–(b). The Emergency Procedures do not invoke this provision, further undercutting any claim that an energy emergency actually exists.

permitting are not emergency responses that "require taking such proposed actions prior to completing an environmental assessment."[33]

IV. THE EMERGENCY PROCEDURES VIOLATE STATUTORY REQUIREMENTS FOR PUBLIC PARTICIPATION.

The Emergency Procedures are also flawed because they attempt to constrain or outright eliminate any opportunity for public involvement in Interior Department energy and mineral permitting and leasing decisions. This attempt to restrict public input is arbitrary, capricious, and contrary to the Department's legal obligations under the Federal Land Policy and Management Act (FLPMA) and NEPA.

FLPMA broadly requires the Secretary of Interior to "give Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands."[34] FLPMA defines "public involvement" as "the opportunity for participation by affected citizens in rule making, decision making, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance."[35] Courts have confirmed that 43 U.S.C. § 1739(e) requires BLM to provide opportunities for

[33] *Id.* § 46.150(c); *see NRDC*, 518 F.3d at 682 (holding that naval training exercises were not NEPA emergencies when they "were planned well in advance and with sufficient time to follow the regular [NEPA] process").

[34] 43 U.S.C. § 1739(e).

[35] *Id.* § 1702(d).

public involvement in both land-use planning *and* later management decisions implementing such plans, such as mineral leasing or permitting decisions.[36]

The Emergency Procedures violate this statutory requirement by directing staff to severely constrain or outright eliminate public participation for energy and mineral leasing and permitting decisions. Like NEPA, FLPMA contains no emergency exception. As a result, the Department cannot simply dispense with this public participation mandate in the name of a supposed "National Energy Emergency."

Public input is separately required under NEPA. The Department of Interior's regulations implementing NEPA require a public comment period as part of the Notice of Intent to prepare an EIS *and* notice of availability for a draft EIS. Even when preparing an EA, agencies "must, to the extent practicable, provide for public notification and public involvement."[37] "A complete failure to involve" the public in the environmental review process thus violates NEPA.[38] The Emergency Procedures violate these standards by eliminating the requirement that officials circulate or allow comment on a draft EIS *and* by allowing projects approved with an EA to be approved without any public input. This attempt to curtail public

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[36] *See Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 40 (9th Cir. 2025) (holding that the Department of Interior "has a duty under FLPMA to involve the public in those decisions [regarding the management of public lands]"); *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 322 (D.C. Cir. 1987) (affirming the district court's conclusion that the government violated FLPMA when it failed to offer public participation opportunities related to the department's decision to revoke protective restrictions pertaining to particular federal lands); *W. Watersheds Project v. Kraayenbrink*, No. 4:05-cv-297, 2006 WL 2348080, at *7 (D. Id. 2006) ("This statutory language values public input on long-range issues . . . as well as on day-to-day issues"); *see also Nat'l Parks and Conservation Ass'n v. FAA*, 998 F.2d 1523, 1531 (10th Cir. 1993) ("Congress, through FLPMA . . . , has determined that the public has a right to participate in actions affecting public lands").

[37] 43 C.F.R. § 46.305(a).

[38] *Citizens for Better Forestry v. U.S. Dep't Agric.*, 341 F.3d 961, 970 (9th Cir. 2003); *see also Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008) ("An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process."); *Mont. Wildlife Fed'n*, 127 F.4th at 37–38.

comment in the NEPA process cannot be justified under the Department's regulation governing emergency situations.[39]

Even assuming the Department of Interior could lawfully constrain or eliminate public involvement in permitting decisions, it failed to provide a reasoned explanation for doing so here. There is no urgent need to increase energy production on federal public lands, and there has also been no reasonable explanation given as to why the energy policy concerns raised in Executive Order 14,156 are so urgent that they require the Department of Interior to dispense with ordinary procedures for public involvement. Moreover, in deciding to hasten permitting, the Department entirely failed to consider an important factor: the *cost* of limiting public input. There are numerous benefits to public participation—including increased accountability; additional scientific, technical, on-the-ground, or local expertise; and increased public buy-in—that the Department entirely failed to consider in adopting its Emergency Procedures. This alone violates the Department's APA duty to act reasonably.[40]

V. INTERIOR FAILED TO USE NOTICE AND COMMENT RULEMAKING TO ADOPT THE EMERGENCY PROCEDURES.

The Emergency Procedures are invalid because the Department of Interior improperly promulgated them without adhering to notice-and-comment rulemaking procedures required under both the APA and FLPMA.

Under the APA, agencies may promulgate rules only after providing notice and an opportunity for public comment.[41] The Emergency Procedures constitute a substantive rule subject to the APA's notice-and-comment procedures, because they are a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements" for reviewing energy projects.[42] Although the Department of Interior has provided no justification for bypassing notice-and-comment procedures, we also note that the "rule of agency organization, procedure, or practice" exception also does not apply.[43] That exception does not include any

[39] 43 C.F.R. § 46.150.

[40] *See Mont. Wildlife Fed'n*, 127 F.4th at 37–41.

[41] 5 U.S.C. § 553(b)–(c).

[42] *Id.* § 551(4) (APA definition of a "rule").

[43] *Id.* § 553(b).

action that "substantially affects the rights of those over whom the agency exercises authority."[44] The Emergency Procedures here go far beyond mere internal procedures and substantially affect the right of third parties to comment, consult, and otherwise participate in the covered decisions.[45]

Likewise, FLPMA requires the Department to use notice and comment rulemaking when establishing procedures for public involvement in land management decisions. Specifically, FLPMA Section 309 states that "the Secretary, by regulation, shall establish procedures . . . to give the Federal, State, and local governments and the public adequate notice and an opportunity to . . . participate in, the preparation and execution of plans and programs for, and the management of, the public lands."[46] FLPMA Section 310 further directs BLM to follow APA rulemaking procedures.[47] The Emergency Procedures constitute procedures for public notice and participation subject to Section 309. Accordingly, the Department of Interior was required to promulgate them through notice-and-comment procedures. Where Congress explicitly directs an agency to proceed "by regulation" on some subject, the agency has no discretion to use a less formal method.[48]

In short, the Department of Interior's issuance of the Emergency Procedures without notice and comment process violated the procedural requirements of both the APA and FLPMA.

VI. THE EMERGENCY PROCEDURES RUN AFOUL OF THE MAJOR QUESTIONS DOCTRINE.

Interior's apparent invocation of 43 C.F.R. § 46.150 to implement sweeping Emergency Procedures during a purported "National Energy Emergency" violates

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[44] *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974).

[45] *See Western Energy All. v. Salazar*, No. 10-cv-237F, 2011 WL 3738240, **1, 7 (D. Wyo. Aug. 12, 2011) (instruction memorandum changing implementation of NEPA required notice-and-comment rulemaking).

[46] 43 U.S.C. § 1739(e) (emphasis added).

[47] *Id.* § 1740.

[48] *See MST Express v. Dep't of Transp.*, 108 F.3d 401 (D.C. Cir. 1997) (vacating guidance on vehicle safety rating procedures, because the agency "failed to carry out its statutory obligation" to establish these procedures "by regulation"); *Ethyl Corp. v. EPA*, 306 F.3d 1144 (D.C. Cir. 2002) (vacating an EPA guidance document because Congress explicitly directed EPA to proceed "by regulation" on that subject).

the major questions doctrine because it asserts unprecedented agency authority over environmental review processes without clear congressional authorization. While § 46.150 permits modified NEPA procedures during emergencies "that are urgently needed to mitigate harm to life, property, or important natural, cultural, or historic resources," it has never been used to justify a wholesale override of standard NEPA procedures for broad classes of energy projects.[49] Nor does NEPA's statutory scheme contemplate such systemic circumvention in the name of expedited fossil fuel development. Historical precedent, reflected in decades of narrowly tailored alternative arrangements approved by CEQ, shows that emergency NEPA deviations have been limited to urgent, site-specific actions where immediate threats to life, safety, or critical infrastructure existed. In contrast, DOI's current approach twists § 46.150 into a new and sweeping authority aimed at transforming environmental review regimes nationwide, under vague executive direction, and without the clear statutory mandate the major questions doctrine demands.

EMERGENCY LEASING IS NOT WARRANTED.

BLM's proposed reliance on the "emergency leasing" provisions under the Mineral Leasing Act and its implementing regulations, 43 C.F.R. § 3425.1-4, would be arbitrary and unlawful. The emergency leasing provisions provide:

> (a) An emergency lease sale may be held in response to an application under this subpart if the applicant shows:
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> (1) That the coal reserves applied for shall be mined as part of a mining operation that is producing coal on the date of the application, and either:
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> (i) The Federal coal is needed within 3 years (A) to maintain an existing mining operation at its current average annual level of production on the date of application or (B) to supply coal for contracts signed prior to July 19, 1979, as substantiated by a complete copy of the supply or delivery contract, or both; or

[49] *See* 43 C.F.R. § 46.150.

(ii) If the coal deposits are not leased, they would be bypassed in the reasonably foreseeable future, and if leased, some portion of the tract applied for would be used within 3 years; and

(2) That the need for the coal deposits shall have resulted from circumstances that were either beyond the control of the applicant or could not have been reasonably foreseen and planned for in time to allow for consideration of leasing the tract under the provisions of § 3420.3 of this title.

(b) The extent of any lease issued under this section shall not exceed 8 years of recoverable reserves at the rate of production under which the applicant qualified in paragraph (a)(1) of this section. If the applicant qualifies under both paragraphs (a)(1)(A) and (B) of this section, the higher rate applies.[50]

This provision clearly does not apply to the proposed lease for Falkirk Mining Company. The draft EA repeatedly states that Falkirk can meet its existing contract obligations to the Coal Creek Station without federal coal.[51] As a result, Falkirk does not qualify for the emergency procedures outlined in 43 C.F.R. § 3425.1(a)(1)(i) because the federal coal is not necessary "to maintain an existing mining operation at its current average annual level of production on the date of application" and there is no indication in the draft EA that a contract signed prior to July 19, 1979 is at issue.[52]

Furthermore, the draft EA fails to provide any information to support its conclusion that the federal coal will be "bypassed in the reasonably foreseeable

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[50] *Id.* § 3425.1-4(a)–(b).

[51] *See, e.g.*, U.S. Dep't of Interior, Bureau of Land Mgmt., Off. of Surface Mining Reclamation & Enf't, *Falkirk Mining Company Proposed Federal Coal Lease-by-Application NDM 111489 McLean County, North Dakota: Environmental Assessment DOI-BLM-MT-0000-2025-0005-EA* (Apr. 2025) at 1 [hereinafter Draft EA] ("Falkirk has non-Federal coal leases sufficient to supply Coal Creek Station through 2045."); *id.* at 75 (same); *id.* at 47 ("[T]he projected life of the Falkirk Mine would not change under the No Action Alternative and is anticipated to continue through 2045 regardless of whether the Federal coal is leased and mined."); *id.* at 75 ("The Falkirk Mine is expected to have a mining rate of approximately 7.4 million tons per year and the life of the mine is planned through 2045, regardless of whether the Proposed Action is approved or not.").

[52] *See* 43 C.F.R. § 3425.1-4(a)(1)(i).

future" if not leased.[53] In fact, the draft EA suggests that Falkirk only submitted an emergency federal coal lease by application (LBA) to improve the "efficiency" of its operations.[54] Even assuming Falkirk relies on the bypass provision of § 3425.1-4(a)(ii), there is no evidence that each of the five tracts for which Falkirk seeks emergency leases will be mined within three years. Instead, the draft EA provides a cursory discussion of the expected start date.[55]

Nor is there any indication of emergency resulting "from circumstances that were either beyond the control of the applicant or could not have reasonably been foreseen and planned for."[56] The draft EA does not mention an emergency nor one that has persisted since 2019 when Falkirk initially submitted its application.[57]

Consequently, BLM fails to demonstrate in the draft EA that the Falkirk application meets the requirements to be considered under the emergency leasing regulations.

FALKIRK'S APPLICATION SHOULD BE DENIED BECAUSE THE LEASE IS SUBJECT TO THE 2016 JEWELL ORDER LEASING MORATORIUM.

BLM and OSMRE cannot approve Falkirk's application because the agencies are still operating under a moratorium on federal coal leasing. In 2016, Interior Secretary Sally Jewell issued an order (Jewell Order) enacting a moratorium on most new coal leasing while the Interior Department studied the impacts of and alternatives to the federal coal leasing program.[58] In 2017, Interior Secretary Ryan Zinke issued a Secretarial Order (Zinke Order) reversing the Jewell Order without

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[53] *See id.* § 3425.1-4(a)(1)(ii).

[54] Draft EA, *supra* note 51, at 75 ("Although Falkirk Mine could supply Coal Creek Station with non-Federal coal sources, Falkirk Mine has applied to mine coal within Federal leases through 2045 because this would make for a more efficient mine plan.").

[55] *Id.* at 5 ("Over the last five years the federal leasing application process faced numerous delays. Due to these delays, the lease application is now within 3 years of the expected start date.").

[56] 43 C.F.R. § 3425.1-4(a)(2).

[57] Draft EA, *supra* note 51, at 1.

[58] U.S. Dep't of the Interior, Secretarial Order No. 3338 (Jan. 15, 2016), https://www.doi.gov/sites/doi.gov/files/elips/documents/archived-3338_-discretionary_programmatic_environmental_impact_statement_to_modernize_the_federal_coal_program.pdf (submitted as Ex. 1).

any accompanying environmental review.[59] A federal district court found, the Zinke Order has potentially significant environmental consequences that must be studied under NEPA.[60] In response to the court's order, in 2020, BLM prepared a post-hoc environmental assessment for the moratorium rescission.[61] In a second ruling considering a challenge to the adequacy of the EA, the district court found that "[t]he EA did not take the 'hard look' NEPA requires with respect to restarting the federal coal leasing program."[62] Pursuant to the district court's 2022 ruling, in 2023, BLM published a notice of intent to prepare an EIS to analyze the potential environmental effects from maintaining or rescinding the coal-leasing moratorium.[63]

In 2021, Interior Secretary Deb Haaland issued Secretarial Order 3398 (Haaland Order), rescinding the Zinke Order.[64] On appeal from the district court's 2022 decision, the Ninth Circuit Court of Appeals dismissed the case as moot. Citing the Haaland Order that "definitively 'revoked'" the Zinke Order, the Court found that "[n]othing about the Zinke Order can be changed through further NEPA analysis when the Zinke Order is legally non-existent."[65] In other words, the action that purportedly terminated the federal coal-leasing moratorium—the Zinke Order—has no legal effect, and the moratorium thus remains in place. The agencies cannot revoke the Haaland revocation and lift the moratorium without first completing a NEPA review, which has not occurred.

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[59] U.S. Dep't of the Interior, Secretarial Order No. 3348 (Mar. 29, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3348_coal_moratorium.pdf (submitted as Ex. 2).

[60] *See Citizens for Clean Energy v. U.S. Dep't of the Interior*, 384 F. Supp. 3d 1264 (D. Mont. 2019).

[61] Bureau of Land Mgmt., *Lifting the Pause on the Issuance of New Federal Coal Leases for Thermal (Steam) Coal: Final Environmental Assessment*, DOI-BLM-WO-WO2100-2019-0001-EA (Feb. 25, 2020).

[62] *Citizens for Clean Energy v. U.S. Dep't of the Interior*, 621 F. Supp. 3d 1165, 1173 (D. Mont. 2022), vacated and remanded, No. 22-35789, 2024 WL 702312 (9th Cir. Feb. 21, 2024).

[63] 88 Fed. Reg. 26,588 (May 1, 2023).

[64] U.S. Dep't of the Interior, Secretarial Order No. 3398 (Apr. 16, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3398-508_0.pdf (submitted as Ex. 3).

[65] *Citizens for Clean Energy v. U.S. Dep't of the Interior*, No. 22-35789, 2024 WL 702312, at *1 (9th Cir. Feb. 21, 2024).

BLM and OSMRE must deny the Falkirk application because the 2016 coal moratorium applicable to non-emergency leases is in effect.[66]

APPLICABLE LAW

The National Environmental Policy Act gives the public a voice in environmental decision-making and helps agencies account for the impact of proposed projects. In enacting NEPA, Congress declared a national policy "to promote efforts which will prevent or eliminate damage to the environment."[67] NEPA requires agencies to consider the "reasonably foreseeable environmental effects" of their actions before taking them.[68] If the federal action would have significant impacts on the environment, the agency is required to prepare a formal environmental impact analysis that discloses those impacts to the public and considers alternative options.[69] NEPA requires federal agencies take a "hard look" at the environmental consequences of their actions.[70] "NEPA itself does not mandate particular results, but simply prescribes the necessary process."[71]

NEPA has two primary aims. First, it requires agencies "consider every significant aspect of the environmental impact of a proposed action."[72] Second, it "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."[73]

Like BLM, in the absence of codified regulations implementing NEPA,[74] we also find the 2020 regulations from the Council on Environmental Quality to be instructive.[75]

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[66] *Id.* (holding that Secretary Haaland revoked prior Secretary Zinke's revocation of the moratorium).

[67] 42 U.S.C. § 4321.

[68] *Id.* § 4332(C)(i).

[69] *Id.* § 4332(2)(C).

[70] *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

[71] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

[72] *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978).

[73] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[74] 90 Fed. Reg. 10,610 (Feb. 25, 2025).

[75] *See* Draft EA, *supra* note 51, at 9.

BLM AND OSMRE FAILED TO MAKE ALL NECESSARY INFORMATION AVAILABLE FOR PUBLIC COMMENT.

BLM and OSMRE have thwarted the requisite opportunity for meaningful public comment on the Falkirk proposal by: (1) not making the permit application package available for public review; (2) holding a public comment period when the Section 106 consultation under the National Historic Preservation Act is still ongoing; and (3) unlawfully relying on NEPA alternative procedures to condense the timeline for public review.

Under governing regulations, OSMRE and the Assistant Secretary of Land and Minerals' decision on Falkirk's mining plan modification must be based on, among other things, the permit application package (PAP).[76] Accordingly, all such materials are essential to understanding the project under consideration. The PAP, however, has not been made available to the public for review on eplanning. Without the ability to review this critical material the public cannot meaningfully assess the adequacy of the application.[77]

Further, federal agencies are required to consider the effects of their actions on cultural resources under Section 106 of the National Historic Preservation Act.[78] The draft EA notes that this process is separate but often conducted concurrently with the preparation of a draft EA.[79] This is more than mere coincidence: information from the Section 106 process informs the agency's consideration of cultural impacts from its decisions, as well as the public's understanding of such impacts. Here, the draft EA's brief discussion of the Section 106 consultation merely indicates that it is "ongoing,"[80] unlawfully depriving the public of the requisite opportunity to understand and comment those impacts.

Compounding these errors that frustrate public review and comment of the proposed action, as discussed above, the Emergency Procedures for complying with NEPA attempt to constrain or outright eliminate any opportunity for public

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[76] 30 C.F.R. § 746.13.

[77] *See WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 927 (9th Cir. 2015) (holding the agency violated NEPA because "the EIS does not provide the public adequate access to information about the impact" to determine the extent of impacts).

[78] 54 U.S.C. § 306108.

[79] *See* Draft EA, *supra* note 51, at 7.

[80] *Id.* at 124.

involvement in leasing decisions. This attempt to restrict public input is arbitrary, capricious, and contrary to the Department's legal obligations under FLPMA and NEPA.

In order to comply with NEPA, BLM and OSMRE must provide all required information to the public, followed by another opportunity to review the application materials in accordance with the timelines required by NEPA.

IF BLM AND OSMRE PROCEED WITH EMERGENCY REVIEW FOR THE FALKIRK MINE, THE AGENCIES MUST STILL COMPLY WITH NEPA.

If, despite the illegality of the Emergency Procedures, BLM nonetheless proceeds to review this lease using that authority, the agency must still fulfill NEPA's mandates. This includes analyzing a reasonable range of alternatives, completing a "hard look" review of the environmental consequences of the proposed lease, preparing an EIS rather than just an EA, engaging in a meaningful consultation process with affected tribes, and engaging in a more thorough analysis of certain issues.

I. BLM AND OSMRE MUST ANALYZE A REASONABLE RANGE OF ALTERNATIVES TO THE PROPOSED ACTION.

The draft EA unlawfully fails to consider alternatives to the proposed federal action that are meaningfully different. NEPA requires federal agencies to consider "a reasonable range of alternatives" to its proposed action.[81] Courts have invalidated an EA where the alternatives considered "hardly differ[ed] from the option [the agency] ultimately adopted."[82] Courts have also ruled that a NEPA analysis is invalid where the studied "alternatives were not varied enough to allow for a real, informed choice."[83] Specific to leases for fossil fuel extraction, courts have

[81] 42 U.S.C. § 4332(C)(iii).

[82] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218 (9th Cir. 2008).

[83] *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1039 (9th Cir. 2008).

found that environmental assessments violate NEPA when all options are based on the assumption that leasing will take place.[84]

Here, BLM considered three alternatives that hardly differed from each other or the proposed action: (A) no action with respect to the federal mining plan, but Falkirk would continue to mine private coal at the same rate as the proposed action; (B) the proposed action; and (C) the approval of the mining plan would be conditioned to only allow development of the two tracts with split mineral ownership (fifty percent federal and fifty percent private).[85] Under each of these alternatives, the draft EA assumes the same amount of mining will occur.[86] The draft EA explicitly states that "[t]he Falkirk Mine is expected to have a mining rate of approximately 7.4 million tons per year and the life of the mine is planned through 2045, regardless of whether the Proposed Action is approved or not."[87] None of the alternatives consider a decrease or even maintenance of a status quo in the mining rate. Nor does the draft EA present any alternatives that are "varied enough to allow for a real, informed choice."[88] The draft EA, therefore, violates the fundamental requirements of NEPA to demonstrate a consideration of reasonable alternatives to the proposed action. The agencies must present the public with a range of reasonable alternatives to the proposed action.

II. THE AGENCIES ARE REQUIRED TO COMPLETE AN ENVIRONMENTAL IMPACT STATEMENT BECAUSE THIS IS A MAJOR ACTION.

To comply with NEPA, BLM and OSMRE must prepare an EIS for the proposed federal lease and expansion of mining operations at Falkirk. NEPA provides that environmental impact statements must be prepared by federal

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[84] *See W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *9 (D. Mont. Mar. 26, 2018) (finding that BLM violated NEPA by "fail[ing] to consider any alternative that would decrease the amount of extractable coal available for leasing"); *Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1145–46 (D. Mont. 2004) (holding that the alternatives analysis in an EA was insufficient where all options analyzed were "based on the assumption that oil and gas leasing will take place").

[85] Draft EA, *supra* note 51, at 18–19.

[86] *Id.*

[87] *Id.* at 1.

[88] *Friends of Yosemite Valley*, 520 F.3d at 1039.

agencies on "proposals for . . . major Federal actions significantly affecting the quality of the human environment."[89] "An EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'"[90]

Guidance documents from the Interior Department provide further clarity on when an EIS is required. The Department of the Interior provides the following criteria for major actions requiring an EIS in its Department Manual:

> A. An EIS level analysis should be completed when an action meets either of the two following criteria.
> (1) If the impacts of a proposed action are expected to be significant; or
> (2) In circumstances where a proposed action is directly related to another action(s), and cumulatively the effects of the actions taken together would be significant, even if the effects of the actions taken separately would not be significant,
> B. The following types of BLM actions will normally require the preparation of an EIS:
> (1) Approval of Resource Management Plans.
> (2) Proposals for Wild and Scenic Rivers and National Scenic and Historic Trails.
> (3) Approval of regional coal lease sales in a coal production region.
> (4) Decisions to issue a coal preference right lease.
> (5) Approval of applications to the BLM for major actions in the following categories:
> (a) Sites for steam-electric powerplants, petroleum refineries, synfuel plants, and industrial facilities; and
> (b) Rights-of-way for major reservoirs, canals, pipelines, transmission lines, highways, and railroads.
> (6) Approval of operations that would result in liberation of radioactive tracer materials or nuclear stimulation.

[89] 42 U.S.C. § 4332(2)(C).

[90] *City & Cnty. of San Francisco v. United States,* 615 F.2d 498, 500 (9th Cir. 1980) (quoting *City of Davis v. Coleman*, 521 F.2d 661, 673 (9th Cir. 1975)).

(7) Approval of any mining operations where the area to be mined, including any area of disturbance, over the life of the mining plan, is 640 acres or larger in size.

C. If potentially significant impacts are not anticipated for these actions, an EA will be prepared.[91]

With respect to OSMRE, the Department Manual provides the following criteria for the preparation of an EIS:

A. The following OSM actions will normally require the preparation of an EIS:

(1) Approval of the Abandoned Mine Lands Reclamation Program, (SMCRA, Title IV). Completed in March 1980.

(2) Promulgation of the permanent regulatory program for surface coal mining and reclamation operations (SMCRA, Title V). Completed in February 1979.

(3) Approval of a proposed mining and reclamation plan that includes any of the following:

(a) Mountaintop removal operations.

(b) Mining within high use recreation areas.

(c) Mining that will cause population increases that exceed the community's ability to absorb the growth.

(d) Mining that would require a major change in existing coal transportation facilities.

(4) Approval of a proposed mining and reclamation plan for a surface mining operation that meets the following:

(a) The environmental impacts of the proposed mining operation are not adequately analyzed in an earlier environmental document covering the specific leases or mining activity; and

(b) The area to be mined is 1280 acres or more, or the annual full production level is 5 million tons or more; and

(c) Mining and reclamation operations will occur for 15 years or more.

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[91] U.S. Dep't of the Interior, *Managing the NEPA Process – Bureau of Land Management*, 516 DM 11 § 11.8 (Dec. 10, 2020), https://www.doi.gov/document-library/departmental-manual/516-dm-11-managing-nepa-process-bureau-land-management [hereinafter 516 DM 11].

> B. If for any of these actions it is proposed not to prepare an EIS, an EA will be prepared and handled in accordance with Section 1501.4(e)(2).[92]

Here, BLM and OSMRE have not reasonably concluded that the Falkirk Mine will have no significant adverse environmental consequences. The impacts of the proposed action are, by any account, significant, and warrant preparation of an EIS. Agencies have typically assessed the significance of agency actions by assessing the context and intensity of the action. Context relates to the scope and duration of the proposed action. In this case, the context indicates significance. The draft EA projects that "[t]he Falkirk Mine is expected to have a mining rate of approximately 7.4 million tons per year and the life of the mine is planned through 2045."[93] The proposed lease tracts for the Falkirk Mine total 800 acres.[94] Falkirk mines coal through conventional surface mining methods.[95] Therefore, the project meets the criteria for an EIS under the OSMRE guidance and Interior guidance.[96] The agencies must prepare an EIS and seek public comment on the draft in accordance with the timelines demanded by NEPA and FLMPA.

III. BLM AND OSMRE MUST CONSIDER THE DIRECT, INDIRECT, AND CUMULATIVE IMPACTS OF THE PROPOSED ACTION.

In completing its EIS for the proposed action, BLM and OSMRE are required by NEPA to consider direct, indirect, and cumulative impacts of the proposed coal mining at the Falkirk Mine and combustion of that coal at the Coal Creek Station. It is well established that two closely related project that are dependent upon each other—like a road to a logging project and the logging project—are connected

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[92] U.S. Dep't of the Interior, *Managing the NEPA Process – Office of Surface Mining*, 516 DM 13 § 13.4 (May 27, 2004), https://www.doi.gov/sites/doi.gov/files/elips/documents/516-dm-13.pdf [hereinafter 516 DM 13].

[93] Draft EA, *supra* note 51, at 1.

[94] *Id.* at 2.

[95] *Id.* at 2.

[96] *See* 516 DM 13, *supra* note 92, at § 13.4(A)(4); 516 DM 11, *supra* note 91, at § 11.8(B)(7).

actions that must be analyzed in a single EIS.[97] The Falkirk Mine operation supplies fuel to the Coal Creek power plant adjacent to the mine, the impacts associated with the combustion of that fuel are part of the proposed action and must be analyzed.[98] Falkirk Mine supplies coal to the Coal Creek Station plant pursuant to coal supply agreements.[99] The draft EA itself recognizes that combustion of the coal at these plants is a foreseeable, indeed inevitable, effect of the mine expansion.[100] Accordingly, combustion and disposal of coal at the Coal Creek Station is a connected action that the agencies must assess in the draft EA.

The entire energy complex constitutes a federal action. Non-federal actions that cannot move forward without federal action or that are intertwined with federal actions may be considered connected actions.[101] As the draft EA notes, the plant requires a federal Title V permit to operate.[102]

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[97] *E.g.*, *Thomas v. Peterson*, 754 F.2 754, 758 (9th Cir. 1988) ("It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales.").

[98] *E.g.*, *Dine Citizens Against Ruining Our Env't v. United States Off. of Surface Mining Reclamation & Enf't*, 82 F. Supp. 3d 1201, 1212 (D. Colo. 2015), *order vacated in part on other grounds*, 643 F. App'x 799 (10th Cir. 2016) ("The Navajo Mine and the Four Corners Power Plant are unusually interconnected; indeed, as Petitioners argue, they are interdependent."); *Montana Env't Info. Ctr. v. Haaland*, No. CV19130BLGSPWTJC, 2022 WL 2466794, at *10 (D. Mont. Feb. 11, 2022), *report and recommendation adopted in part, rejected in part*, No. CV 19-130-BLG-SPW, 2022 WL 4592071 (D. Mont. Sept. 30, 2022) ("OSM's decision will determine the availability of coal to be combusted at the Colstrip Power Plant and, in turn, the water withdrawals from the Yellowstone River necessary for that process. Therefore, because OSM has the authority to act on information it compiles under its NEPA analysis, *Public Citizen* does not excuse it from considering the reasonably foreseeable indirect effects of the mining plans it approves.").

[99] Draft EA, *supra* note 51, at 1.

[100] *Id.*

[101] *Friends of the Earth v. Coleman*, 513 F.2d 295 (9th Cir. 1975) ("There are limits to the required scope of consideration of one project which may be remotely connected with, or have some effect upon, another. The proper test, we believe, does not depend upon the interrelation of the projects per se. Rather it depends upon whether completion of one project will inevitably involve an 'irreversible and irretrievable commitment of resources' to the second.").

[102] Draft EA, *supra* note 51, at 45.

At a minimum, if the agencies assert that emissions from the Coal Creek Station are an indirect effect of the proposed action, those emissions must still be included in a NEPA analysis as cumulative impacts that are immediate in time and location.[103] The U.S. Supreme Court recently emphasized how predictable indirect impacts may fall within the scope of NEPA:

> [T]he environmental effects of the project at issue may fall within NEPA even if those effects might extend outside the geographical territory of the project or might materialize later in time—for example, run-off into a river that flows many miles from the project and affects fish populations elsewhere, or emissions that travel downwind and predictably pollute other areas. Those so-called indirect effects can sometimes fall within NEPA.[104]

Like the example provided by the Supreme Court of emissions downwind that pollute other areas, there is no doubt that emissions from the Coal Creek Station originate with the mining activities at Falkirk.

Under NEPA, BLM and OSMRE are also required to consider the "cumulative impacts" of the proposed action.[105] The Department of the Interior's NEPA regulations, BLM's Department Manual, and OSMRE's NEPA Handbook

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[103] *Friends of the Earth v. Coleman*, 513 F.2d 295 (9th Cir. 1975) ("There are limits to the required scope of consideration of one project which may be remotely connected with, or have some effect upon, another. The proper test, we believe, does not depend upon the interrelation of the projects per se. Rather it depends upon whether completion of one project will inevitably involve an 'irreversible and irretrievable commitment of resources' to the second.").

[104] *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado*, 145 S. Ct. 1497, 1515 (2025).

[105] *See Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976) ("Cumulative impacts are, indeed, what require a comprehensive impact statement.").

each direct the agencies to assess "cumulative impacts" in NEPA analyses.[106] A final EIS must consider the cumulative impacts of air pollution, surface water pollution, groundwater pollution. Additionally, these cumulative impacts must be placed within the context of climate change and consider the effects on human health, land use, wildlife, and cultural resources.

IV. CERTAIN ISSUES REQUIRE FURTHER ANALYSIS BY BLM AND OSMRE AS PART OF THE "HARD LOOK" REVIEW REQUIRED BY NEPA.

In conducting the required EIS for Falkirk Mine, the agencies must take a "hard look" at certain issues that were either inadequately addressed or neglected in the draft EA. Courts have consistently concluded that NEPA requires agencies to take a "hard look" at the environmental consequences of major federal government actions.[107] The U.S. Supreme Court has described 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."[108] This "hard look" review helps ensure "that environmental concerns [will] be integrated into the very process of agency decision-making."[109] In preparing the required EIS, BLM and OSMRE must conduct a "hard look" review of the following issues.

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[106] U.S. Dep't of the Interior, 516 DM 11, *Departmental Manual Managing the NEPA Process–Bureau of Land Management* (2020), https://www.doi.gov/document-library/departmental-manual/516-dm-11-managing-nepa-process-bureau-land-management; U.S. Dep't of the Interior, Off. of Surface Mining Reclamation & Enf't, *Handbook on Procedures for Implementing the National Environmental Policy Act* (July 2019), https://www.osmre.gov/sites/default/files/pdfs/directive995_NEPAHandbook.pdf.

[107] *See, e.g.*, *Kleppe*, 427 U.S. at 410 n.21; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983); *350 Montana v. Haaland*, 50 F.4th 1254, 1265 (9th Cir. 2022) (quotation marks omitted) (noting NEPA requires federal agencies proposing a major action affecting the environment to "undertake a full and fair analysis," constituting a "hard look at environmental consequences of their proposed actions").

[108] *Baltimore Gas & Elec. Co.*, 462 U.S. at 96 (emphasis added).

[109] *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).

A. Water

The draft EA fails to adequately address the direct, indirect, and cumulative impacts to surface and ground water quality and quantity. The draft EA fails to clearly delineate the impacted area and improperly excludes from its analysis any of the impacts on water resulting from the acknowledged foreseeable use of the coal at Coal Creek Station. This is arbitrary and capricious.

First, the draft EA insufficiently evaluates foreseeable water quality impacts from the mining of leased coal at Falkirk. Nor, even, does the draft EA make data available to the public to assess even water impacts in the mine area. There are no maps identifying the locations of the coal ash disposal sites or their pollution plumes. Without more granular information it is impossible to assess the magnitude of the impacts from the action.[110] This failure is egregious because the Surface Mining Control and Reclamation Act (SMCRA) requires extensive monitoring that must be sufficient to identify impacts to surface and groundwater quantity and quality.[111]

Second, the draft EA must assess whether the proposed mine expansion will violate the buffer zone protections provided by North Dakota's surface mining regulations. In particular, North Dakota regulations prohibit strip-mining within 100 feet of any intermittent or perennial stream:

> Performance standards - Hydrologic balance - Stream buffer zones. 1. The operator may not disturb land within one hundred feet [30.48 meters] of an intermittent or perennial stream unless the commission, after consulting the state engineer and the department of environmental quality, specifically authorizes surface mining activities closer to, or through, the stream, after finding that: a. Surface mining activities will not cause or contribute to the violation of applicable state or federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and b. If there will be a temporary or permanent stream

[110] *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 927 (9th Cir. 2015) (noting the agency violated NEPA because "the EIS does not provide the public adequate access to information about the impact" to determine the extent of impacts).

[111] *See* 30 U.S.C. § 1267.

> channel diversion, it will comply with section 69-05.2-16-07. 2. Areas not to be disturbed must be designated buffer zones and marked according to section 69-05.2-13-04.[112]

The draft EA only notes that "[t]here are a number of minor or intermittently flowing watercourses . . . which are not listed in Appendix I or Appendix II."[113] These streams are not identified on any map, not does the EA state whether they will be disturbed by mining. This is insufficient. BLM and OSMRE must provide this information.[114] No mining may occur within 100 feet of these streams.[115] The draft EA, however, provides no assurances that such impacts will not occur.

In addition to direct water quality impacts from mining, the draft EA omits analysis of the combined impacts to surface and groundwater from Falkirk Mine and adjacent Coal Creek Station, North Dakota's largest coal-fired power plant. Coal Creek has contaminated water with a suite of toxic pollutants, including arsenic, boron, cobalt, lead, lithium, and sulfate.[116] These pollutants are significant, especially cumulatively, because the lignite triangle in North Dakota is home to many of the largest mercury emitters in the nation and its waters are polluted with mercury. Coal Creek's mercury emissions contribute to Minnesota's continuing challenges in managing mercury contamination.[117]

The draft EA also discounts the impacts of mercury deposition on the basis that it will not increase and because regulatory requirements will cause emissions to decrease. This analysis is flawed because it is the *cumulative* impacts of mercury and bioaccumulation that is the problem, which is why North Dakota has so many fish consumption advisories and waters that are impaired for mercury. Almost all

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[112] N.D. Admin. Code 69-05.2-16-20 (1992).

[113] Draft EA, *supra* note 51, at 102.

[114] *WildEarth Guardians*, 790 F.3d at 927.

[115] N.D. Admin. Code 69-05.2-16-20 (1992).

[116] Earthjustice, *Toxic Coal Ash in North Dakota: Addressing Coal Plants Hazardous Legacy* (Apr. 2023), at 2 (submitted as Ex. 4).

[117] *See Statewide Mercury TMDL*, Minn. Pollution Control Agency, https://www.pca.state.mn.us/business-with-us/statewide-mercury-tmdl; *Reducing Mercury* Releases, Minn. Pollution Control Agency, https://www.pca.state.mn.us/air-water-land-climate/reducing-mercury-releases; *Statewide Mercury TMDL Emissions Inventory*, Minn. Pollution Control Agency 19 (Sept. 21, 2023), http://pca.state.mn.us/sites/default/files/wq-iw4-02k5.pdf (submitted as Ex. 5).

waters in North Dakota are subject to fish consumption advisories due to excessive mercury contamination of fish.[118]

The water withdrawals required to burn coal at these plants also have significant impacts. For example, the water intake for Coal Creek Station withdraws approximately 25.7 million gallons of water per day.[119] The draft EA has not assessed the impacts of these water withdrawals. The impacts of these withdrawals could be significant, as endangered Pallid Sturgeon (*Scaphirhynchus albus*) is native to the Missouri River.[120] These impacts could be intensified given the expected reduction in water availability and increased regional drought due to climate change by mid-century.[121]

Ultimately, BLM and OSMRE's failed to conduct the required "hard look" review of impacts of both the mining operations and the connected impacts from the plant operations at Coal Creek Station on water quality and quantity. These direct, indirect, and cumulative impacts must be analyzed in the agencies' EIS for the proposed action.

B. Land Use, Soil, and Vegetation

The draft EA also fails to take the required "hard look" at impacts to prime farmlands, soil, and vegetation. In fact, the draft EA expressly refuses to conduct a detailed analysis of impacts to prime farmland.[122] The absence of this analysis is in direct conflict with the SMCRA, which provides special protections to prime farmlands:

> (1) In addition to finding the application in compliance with subsection (b) of this section, if the area proposed to be mined contains prime farmland pursuant to section 1257(b)(16) of this

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[118] N.D. Dep't of Env't Quality, *Integrated Report* (2020) (submitted as Ex. 6); N.D. Dep't of Env't Quality, *A Guide to Safe Eating of Fish Caught in North Dakota* (2003) (submitted as Ex. 7).

[119] N.D. Dep't of Env't Quality, *Fact Sheet for NDPDES Permit ND0026930* (submitted as Ex. 8).

[120] U.S. Dep't of the Interior, *Final Biological Assessment for the Falkirk Mine Lease-by-Application of Federal Coal, McLean County, North Dakota* (May 2021), at 25 [hereinafter BA].

[121] *See infra* note 209.

[122] Draft EA, *supra* note 51, at 14.

> title, the regulatory authority shall, after consultation with the Secretary of Agriculture, and pursuant to regulations issued hereunder by the Secretary of[2] Interior with the concurrence of the Secretary of Agriculture, grant a permit to mine on prime farmland if the regulatory authority finds in writing that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in section 1265(b)(7) of this title. Except for compliance with subsection (b), the requirements of this paragraph (1) shall apply to all permits issued after August 3, 1977.
>
> (2) Nothing in this subsection shall apply to any permit issued prior to August 3, 1977, or to any revisions or renewals thereof, or to any existing surface mining operations for which a permit was issued prior to August 3, 1977.[123]

Two areas of prime farmland are included in the proposed federal lease tracts.[124] The draft EA acknowledges that this prime farmland will be destroyed by the proposed mining but denies that there will be any significant impacts because the land will simply be reclaimed.[125] The draft EA, however, suggests that the proposal to destroy prime farmland and then use reclamation methods is acceptable because the Soil Conservation Service approved a similar proposal for the North American Coal Company's Freedom Mine project.[126] Whether a similar proposal was accepted in another mining project is irrelevant to the project at hand. Further, any reclamation of the prime farmland would be challenged by the worsening impacts of climate change, which, will result in less soil moisture, increased evapotranspiration, evaporative demand, less snowpack, and increased likelihood and severity of summer droughts.[127] Given the extensive time-frame of the action—20 years of mining, followed by at least 10 years for reclamation, the impacts of

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[123] 30 U.S.C. § 1260(d).

[124] Draft EA, *supra* note 51, at 14.

[125] *Id.*

[126] *Id.*

[127] *See infra* note 209.

climate change will be significantly worse when reclamation is required—it is imperative that BLM and OSMRE assess these impacts prior to approving additional mining.

Additionally, the draft EA neglects to engage in any substantive analysis with respect to soil quality and vegetation. Instead, the draft EA notes in passing that Falkirk will submit a suitable plant growth material plan prior to each removal season.[128] The lack of substantive information about such plans in advance of mining limits the scope of public review and comment. The draft EA also asserts that soil resources "would not be affected because of the reclamation requirements."[129] Like the assessment of prime farmlands, here too BLM and OSMRE fail to consider the impacts of climate change on soil quality and vegetation.[130]

BLM and OSMRE must take a "hard look" at prime farmland, soil quality, and vegetation issues in the required EIS.

C. Wildlife

The draft EA's analysis of impacts on wildlife is also inadequate and arbitrary. First, the draft EA and the biological assessment (BA) fail to include any assessment of impacts on wildlife from the foreseeable combustion and use of the coal at Coal Creek Station. Coal Creek Station causes groundwater contamination where the levels of arsenic, boron, cobalt, lead, lithium, and sulfate all exceed federal health-based guidelines.[131] There is no analysis in the draft EA of pollution deposition on fish and wildlife, aside from a brief, and as noted above, inadequate assessment of the impacts of mercury. These pollutants are harmful to wildlife, including fish, such as the endangered Pallid Sturgeon.[132] As demonstrated by the Pallid Sturgeon Contaminants Assessment discussion of the widespread mercury contamination of fish in North Dakota, atmospheric deposition of mercury and other toxics is a likely source of contaminants in the Great Plains Management Unit for

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[128] Draft EA, *supra* note 51, at 15.

[129] *Id.*

[130] *Id.* at 15.

[131] Ex. 4, *Toxic Coal Ash in North Dakota* at 2.

[132] Webb et al., *Pallid Sturgeon Basin-Wide Contaminants Assessment* (2019) (submitted as Ex. 9).

Pallid Sturgeon.[133] There is no assessment of the cumulative impacts of the suite of pollutants from coal combustion on wildlife, together with other pollutants, such as pesticides and herbicides. For many species, like sturgeon, pollutants accumulate over time, causing significant impacts.[134] Further, it appears that the BA's no effects conclusion is based on "[a] simplified mercury depositional analysis for the Coal Creek Station" which was not included for public comment.[135] Furthermore, the BA assumes that the proposed action would not have direct impacts on Pallid Sturgeon or their habitat because "[t]he Missouri River is within the action area but not within the Federal lease tracts themselves."[136] This is an error. BLM and OSMRE may not delineate the action area in such a way that it only embraces the direct effects of the project, rather than including also the indirect effects. The action area must be established to include the indirect effects resulting from coal combustion and use at the plants. The action area must include the deposition area for miles around the power plants, not just the immediate area of the mine. Additionally, there is no meaningful analysis of impacts to insects from the mine and the foreseeable combustion and use of the coal. Insects are known to be in significant decline due to habitat conversion, pollution, and climate change impacts, all of which will be worsened by the proposed mine expansion.[137]

Second, the BA fails to consider meaningfully consider the potential harm of the proposed action on the habitat of the Northern Long-eared Bat (*Myotis septentrionalis*), Whooping Crane (*Grus americana*), and Pallid Sturgeon (*Scaphirhynchus albus*). The BA references protective measures that BLM and OSMRE have identified "to avoid and minimize adverse effects" to each of the species but have not provided any specific details in the BA nor the draft EA.[138] The agencies have therefore failed to provide a meaningful opportunity for public comment or reassurance that habitat loss will not be significant for the endangered species.

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[133] *Id.*

[134] *Id.* at 4.

[135] BA, *supra* note 120, at 26.

[136] *Id.*

[137] Sánchez-Bayo & Wyckhuys, *Worldwide Decline of Entomofauna: A Review of Its Drivers*, Biological Conservation (2019) (submitted as Ex. 10).

[138] BA, *supra* note 120, at 21 (Northern Long-eared Bat); *id.* at 24 (Whooping Crane); *id.* at 26 (Pallid Sturgeon).

Third, the draft EA's excuse for not taking a hard look at impacts on migratory birds is also arbitrary. The draft EA asserts that although the proposed action will destroy bird habitat, birds can simply move to other places.[139] This analysis ignores that there may not be other areas for disturbed birds to move to. Recent research shows that birds are in broad decline across North America, with declines notably large for grassland and wetland birds in North Dakota and along the Missouri River in North Dakota.[140] The causes for the decline appear to be "environmental changes," such as "land conversion" and "climate."[141] Thus, it is wrong to simply assume that impacted birds can respond to the conversion of habitat by migrating elsewhere.

BLM and OSMRE must assess these deficiencies to comply with their mandate to conduct a "hard look" review when completing the required EIS.

D. Tribal Consultation and Cultural Resources

The draft EA fails to demonstrate adequate consultation with affected Tribal Nations. In establishing "Uniform Standards for Tribal Consultation" in 2022, the federal government recognized:

> The United States has a unique, legally affirmed Nation-to-Nation relationship with American Indian and Alaska Native Tribal Nations, which is recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. The United States recognizes the right of Tribal governments to self-govern and supports Tribal sovereignty and self-determination. The United States also has a unique trust relationship with and responsibility to protect and support Tribal Nations. . . . Tribal consultation is a two-way, Nation to-Nation exchange of information and dialogue between official representatives of the United States and of Tribal Nations regarding Federal policies that have Tribal implications. Consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribal

[139] Draft EA, *supra* note 51, at 17.

[140] Johnston et al., *North American Bird Declines Are Greatest Where Species Are Most Abundant*, Science (2025) (submitted as Ex. 11).

[141] *Id.*

> Nations, and acknowledges that the United States maintains certain treaty and trust responsibilities to Tribal Nations. Consultation requires that information obtained from Tribes be given meaningful consideration, and agencies should strive for consensus with Tribes or a mutually desired outcome.[142]

Here, the draft EA notes that BLM sent consultation letters to 19 Tribes—the Cheyenne River Sioux Tribe; the Crow Tribe of Montana; the Crow Creek Sioux Tribe; the Flandreau Santee Sioux Tribe; the Fort Belknap Indian Community; the Fort Peck Tribes; the Lower Brule Sioux Tribe; the Three Affiliated Tribes: Mandan, Hidatsa, and Arikara Nation; the Northern Cheyenne Tribe; the Oglala Sioux Tribe; the Rosebud Sioux Tribe; the Standing Rock Sioux Tribe; the Turtle Mountain Band of Chippewa; the Yankton Sioux Tribe; the Santee Sioux Nation of Nebraska; the Lower Sioux Indian Community; the Northern Arapaho Tribe; the Spirit Lake Sioux Tribe; and the Sisseton-Wahpeton Oyate Tribes—for consultation during the thirty-day scoping period.[143] The draft EA indicates that the agencies received responses from the Santee Sioux Nation of Nebraska and the Northern Cheyenne Tribe.[144] The draft EA, however, fails to describe "how Tribal input influenced or was incorporated into the agency action."[145]

At a minimum, BLM and OSMRE must assess an alternative that preserves, mitigates, and minimizes impacts to Tribal cultural resources. BLM and OSMRE should consider an alternative that donates lands to a cultural trust that ensures permanent protection and access by interested Tribes. BLM and OSMRE have considered such alternatives in other environmental assessments in the past.

The draft EA also fails to demonstrate a sufficient assessment of significant cultural resources in the project area. The draft EA suggests that a survey was not even fully completed "because of land access issues and the presence of crops that obscured the ground."[146] The draft EA notes that "23 prehistoric archeological sites remain unevaluated."[147] In fact, the agencies acknowledge how fluid their evaluation of cultural resources is by suggesting that "BLM may require

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[142] 87 Fed. Reg. 74,479 (Dec. 5, 2022).

[143] Draft EA, *supra* note 51, at 124.

[144] *Id.*

[145] 87 Fed. Reg. 74,481 (Dec. 5, 2022).

[146] Draft EA, *supra* note 51, at 75.

[147] *Id.* at 76.

modification to the development of the proposed tracts to protect" cultural resources.[148] This makes the agencies' assessment that "[n]o impacts to cultural resources would occur from the leasing action" appear to be an empty promise insufficient for public review and comment.

If any burial sites are located within the lease or mining plan modification tracts, then no mining may occur there.[149] The draft EA briefly mentions the presence of "cemeteries" and burial sites.[150] Of course, the presence of burial sites in the mining area underscores the necessity of full consultation, site visit, and disclosure in an EIS prior to any decision on the proposed mine expansion.

Furthermore, BLM states that Section 106 consultation under the National Historic Preservation Act is ongoing and that the information will be made available prior to the lease sale.[151] This is insufficient. The purpose of NEPA is disclosure of impacts and mitigation of any impacts that cannot be avoided. BLM may not shield the consultation information and any associated mitigation from public view, only to make the information available after the period for public comment has passed.[152] This information must be made available to the public during the period of public comment.

In preparing the required EIS, the agencies must engage in a meaningful consultation process with Tribal Nations, consider an alternative that donates lands to a cultural trust that ensures permanent protection and access by interested Tribes, and complete required assessments of cultural resources.

E. Air Quality and Public Health

The draft EA's assessment of air quality impacts, which concludes that air pollution from mining, processing, and combustion of the federal coal will not be significant[153]—is also insufficient. The final EIS must address these deficiencies

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[148] *Id.* at 77.

[149] 30 U.S.C. § 1272(e)(5) (providing that no surface mining may occur "within one hundred feet of a cemetery").

[150] Draft EA, *supra* note 51, at 7, 75.

[151] *Id.* at 77, 124.

[152] *See Diné Citizens Against Ruining our Env't v. Klein*, 747 F. Supp. 2d 1234, 1258 (D. Colo. 2010) (noting that reliance on an incomplete ethnographic study failed to provide necessary "hard look" at environmental impacts).

[153] Draft EA, *supra* note 51, at 53.

with a robust analysis of the effects of emissions from both the Falkirk Mine and the connected emissions from coal combustion at the Coal Creek Station.

1. The Draft EA Inadequately Evaluates Coal-Mining Emissions

BLM and OSMRE failed to take the required "hard look" review of air emissions from mining federal coal. The agencies reached a conclusion that "[n]o impacts to air quality would occur from the leasing action," by suggesting that emissions generated from the proposed action would be the same as under the no action alternative.[154]

First, the draft EA demonstrates an over-reliance on existing air quality permits in its analysis. Rather than considering the new emissions associated with mining previous unmined federal coal, here, the agencies choose to rely on the fact that Falkirk has a current air quality permit.[155] An existing permit, however, does not mean that the proposed action will not result in emissions. In fact, the agencies acknowledge that the proposed action will result in fugitive dust, criteria pollutants, and hazardous air pollutants.[156] Instead, it only means that Falkirk will comply with the Clean Air Act when releasing those emissions. By basing their entire conclusion on the issuance of an existing air quality permit, the agencies failed to meaningfully assess the known emissions that will occur as a result of mining operations under a federal lease.

Second, the draft EA fails to substantively assess the impacts of emissions from coal mining. The agencies simply listed the way emissions would be generated from surface mining operations.[157] This is not the first time that the agencies have failed to consider the direct impacts of emissions from coal mining.[158] Listing impacts of a proposed action does not constitute taking a "hard look." When completing the required EIS, the agencies must conduct a quantitative and qualitative analysis of the direct effects to air quality from mining, transportation, and reclamation activities.

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[154] *Id.* at 51.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See, e.g.*, U.S. Dep't of Interior, OSMRE, NDM 107039, *The Falkirk Mining Company ½ Section 10 Federal Coal Mining Plan Supplemental Environmental Assessment* (March 2018), https://www.osmre.gov/sites/default/files/inline-files/NEPA_FalkirkMine_Environmental_Assessment.pdf (submitted as Ex. 12).

2. The Draft EA Inadequately Evaluates Inevitable Emissions from Burning Falkirk Coal

In addition to the air pollution from mining, the draft EA fails to adequately assess the air pollution impacts of combusting and processing of Falkirk's coal. It omits discussion of major toxins released when the coal is burned, including arsenic, chromium, and nickel. The assessment also fails to convey the magnitude of climate change and contextualize the potential emissions from the proposed action within the scope of global greenhouse gas emissions.[159] Instead, the draft EA only provides a cursory two-paragraph review of emissions from coal combustion, which is insufficient to satisfy the agency's "hard look" obligations under NEPA.[160]

The draft EA fails to meaningfully consider the public health impacts of combustion of Falkirk's coal at the Coal Creek Station. The Coal Creek Station is among the most polluting power plants in the nation, in terms of arsenic, mercury, chromium, and nickel pollution.[161] The Clean Air Task Force's Toll from Coal database finds that pollution from the Coal Creek Station power plant causes 47 deaths, 5 hospital admissions, 10 ER visits for asthma, 19 heart attacks, 27 cases of acute bronchitis, 513 asthma attacks, and 2,407 lost workdays each year.[162] These numbers are consistent with peer-reviewed research into the harmful impacts of pollution from coal plants. Recent research published in *Science* concluded that particulate matter from coal plants in the United States caused 460,000 deaths from 1999 to 2020.[163] Data from the study shows that the Coal Creek Station caused 700 deaths during this period.[164]

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[159] *See* Draft EA, *supra* note 51, at 66.

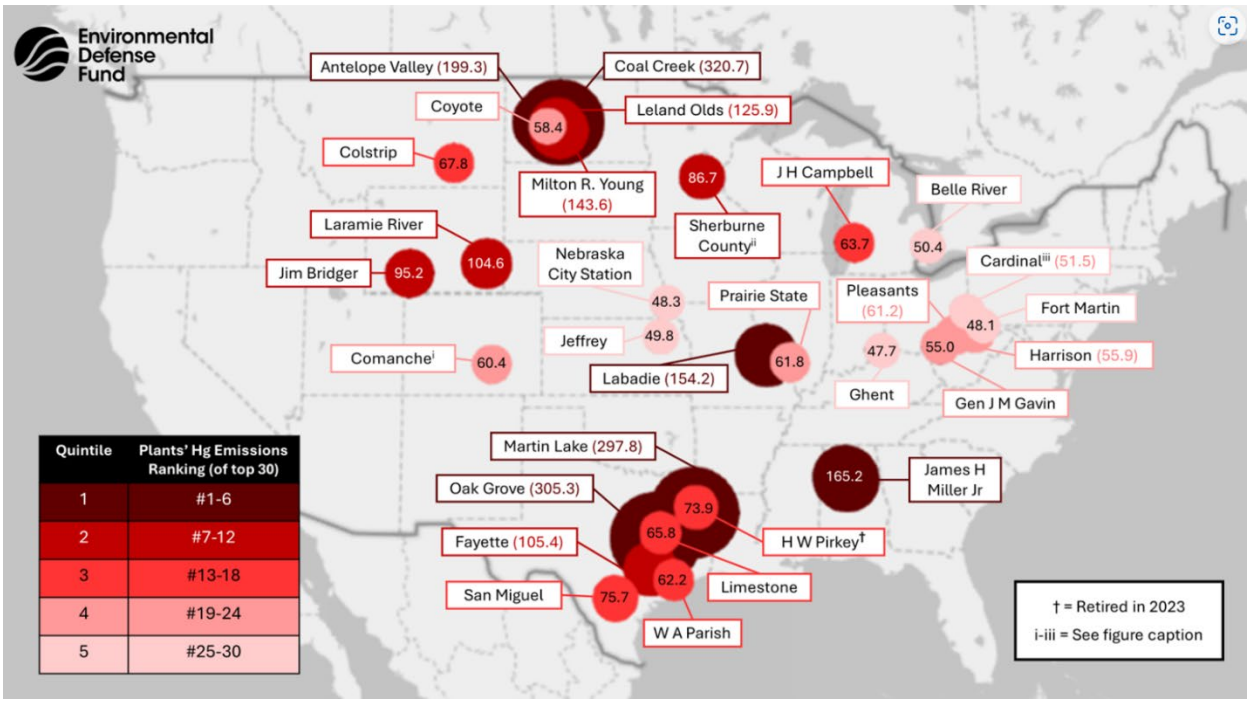
[160] *Id.*

[161] Env't Integrity Project, *America's Top Power Plant Toxic Air Polluters* (2011) (submitted as Ex. 13); EDF, *Mercury Map* (2022) (submitted as Ex. 14); Jolie Villegas, EDF, *We Need to Close a Mercury Pollution Loophole for Lignite Coal Plants* (2024) (submitted as Ex. 15).

[162] Toll from Coal, https://www.tollfromcoal.org/#/map/(title:6030//detail:6030//map:6030/ND).

[163] Henneman et al., *Mortality Risk from United States Coal Electricity Generation*, Science (2023) (submitted as Ex. 16).

[164] *Coal Pollution Impacts Explorer*, https://cpieatgt.github.io/cpie/.



The draft EA, however, dismisses any indirect emissions from combustion because combustion of coal would occur under any of the three alternatives as an authorized operation of the Coal Creek facility.[165] This assessment is entirely inadequate given the significant public health risks associated with combustion of all coal, and the public data available regarding the specific risks from Coal Creek Station. The agencies failed to take the "hard look" review of the emissions and air quality concerns from combustion of Falkirk's coal under the proposed lease.

These Coal Creek emissions include excessive mercury pollution. The draft EA dismisses the effects of mercury deposition and HAPs emitted by Coal Creek Station by simply asserting that mercury emissions are regulated by the MATS rule and the plant has installed control technologies to comply with that rule.[166] The strengthened MATS rule reduced the mercury emissions standards for lignite plants, such as Coal Creek, by two-thirds.[167] However, on April 8, 2025, Coal Creek obtained an exemption from compliance with the recently strengthened MATS

[165] Draft EA, *supra* note 51, at 66.

[166] *Id.* at 57.

[167] National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review, 89 Fed. Reg. 38,508 (May 7, 2024).

requirements through a Presidential proclamation.[168] Thus, while Coal Creek may indeed have the capacity to meet the new standard, Coal Creek currently is not obligated to do so. As EPA found, "many [lignite] units are able to achieve a Hg emission rate that is much lower than the current standard" through improvements in sorbent.[169] But Coal Creek currently does not meet the current standard and has been exempted from operational changes that would allow it to do so. Accordingly, the draft EA's reliance on a mercury emissions standard the Coal Creek plant has not met and is not required to meet is arbitrary.

The draft EA further overlooks the impacts of the Falkirk lease on regional haze, which is caused by emissions of particulate matter, sulfur dioxide, and nitrogen oxides that impair visibility in the region's national parks and wilderness areas.[170] North Dakota sources of haze pollution impair visibility in Theodore Roosevelt National Park and the Lostwood Wildlife Refuge Area in North Dakota, as well as iconic national parks in nearby states, such as Wind Cave National Park in South Dakota, Badlands National Park in South Dakota, Glacier National Park in Montana, and Yellowstone National Park, located in Wyoming, Montana and Idaho.[171] To effectively address such haze pollution, sources in North Dakota must take steps to reduce their haze-causing emissions. The draft EA attempts to dismiss these impacts from the proposed Falkirk lease by asserting that "surface coal mines are not the typical contributors to regional haze."[172] However, the EA dismisses such impacts from the Coal Creek Station, which ranks among the worst haze polluters in the nation.[173] Without assessing the regional haze impacts from combusting the Falkirk mine's coal at Coal Creek, the EA cannot pass legal muster.

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[168] Regulatory Relief for Certain Stationary Sources to Promote American Energy, 90 Fed. Reg. 16,777 (Apr. 21, 2025).

[169] Env't Prot. Agency, *Regulatory Impact Analysis for the Final National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units Review of the Residual Risk and Technology Review ES-10* (Apr. 2024), at https://www.regulations.gov/document/EPA-HQ-OAR-2018-0794-6966.

[170] EPA, *Basic Information about Visibility*, https://www.epa.gov/visibility/basic-information-about-visibility.

[171] Nat'l Parks Conservation Ass'n, *Sources of Visibility Impairing Pollution*, https://npca.maps.arcgis.com/apps/MapSeries/index.html?appid=73a82ae150df4d5a8160a2275591e45d.

[172] Draft EA, *supra* note 51, at 52.

[173] Nat'l Parks Conservation Ass'n, *Top 50 Worst Regional Haze Polluters* (Jan. 23, 2025), https://www.npca.org/resources/3351-top-50-worst-regional-haze-polluters.

Further, the draft EA's assessment of air quality impacts fails to take account of the cumulative effects of climate change on air quality. Coal Creek's emissions are large even compared with other coal plants—it emits roughly twenty percent of North Dakota's stationary source carbon dioxide emissions, according to the University of North Dakota's Energy and Environmental Research Center.[174] Wildfire, which is becoming more prevalent due to climate change, is another major source of particulate matter. For example, the American Thoracic Society (ATS) found: "Overall, it is clear that the magnitude of adverse health impacts from wildland fires constitutes a serious, and likely increasing, problem for much of the United States. This is particularly true for the western and southern regions of the country, where wildland fires contribute a sizeable portion of $PM_{2.5}$."[175] The ATS concluded that smoke from wildfires causes 4,000 to 28,000 mortalities, thousands of cases of lung cancer and emergency room visits, and approximately 395,000 cases of asthma onset.[176] These impacts are most significant in the West.[177] These impacts are not captured in analyses of national ambient air quality standards because wildfire smoke is excluded from attainment analyses. The American Lung Association has reached the same conclusion:

> Over the last decade, however, the findings of the report have added to the extensive evidence that a changing climate is making it harder to protect this hard-fought progress on air quality and human health. Increases in high ozone days and spikes in particle pollution related to extreme heat, drought and wildfires are putting millions of people at risk and adding

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[174] *Bipartisan Infrastructure Law (BIL): Coal Creek Carbon Capture: Site Characterization and Permitting*, https://www.netl.doe.gov/projects/project-information.aspx?p=FE0032331; Univ. N.D. Energy & Env't Rsch. Ctr., *Coal Creek Carbon Capture: Site Characterization and Permitting DOE Kickoff Meeting* (Jan 2024), at 10, https://netl.doe.gov/projects/plp-download.aspx?id=16972&filename=Coal+Creek+Carbon+Capture+Site+Characterization+and+Permitting+DOE+Kickoff+Meeting.pptx%27.

[175] Cromar et al., *Adverse Health Impacts of Outdoor Air Pollution, Including from Wildland Fires in the United States: "Health of the Air," 2018–2020* (2023) (submitted as Ex. 17).

[176] *Id.*

[177] *Id.*

> challenges to the work that states and cities are doing across the nation to clean up air pollution.[178]

The American Lung Association's 2025 report notes that air quality for particulate matter has worsened and that wildfire, worsened by climate change, is now a principal driver of unhealthy air across the country:

> Even compared with the past several years of "State of the Air" reports—in which many cities and counties experienced their highest weighted average number of days ever reported for fine particle pollution—results this year are again worse…. Wildfire has clearly emerged as a major driving factor in determining where in the country people are being exposed to unhealthy spikes in particle pollution.[179]

Rather than meaningfully considering the best available science on climate change, here, the agencies dismissed any potential increase in greenhouse gas emissions in a single paragraph.[180]

Furthermore, the draft EA improperly dismisses the impacts of direct, indirect, and cumulative air emissions as insignificant. This is inconsistent with the body of independent research showing that air pollution from Falkirk's coal combustion at the Coal Creek Station causes significant mortality and morbidity each year, and that this pollution is impacting some of the most polluted areas in the country (due to the increasing impacts of wildfire and climate change). The draft EA evades this conclusion by improperly relying on national ambient air quality standards (NAAQS) and their related design values, which do not account for wildfire and therefore masks the true cumulative impacts of pollution from the mine and the power plants it supplies.[181] Furthermore, while relying on NAAQS, the draft EA notes that there are no air quality monitoring stations in McLean County[182] and data from the closest monitoring station (Hannover) has indicated an

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[178] American Lung Ass'n, *State of the Air* (2025) (submitted as Ex. 18).

[179] *Id.* at 16.

[180] Draft EA, *supra* note 51, at 66.

[181] *Id.* at 53; Ex. 17, Cromar et al.

[182] Draft EA, *supra* note 51, at 28.

exceedance of $PM_{2.5}$[183]. Including this data shows that ambient air quality in North Dakota is often unhealthy or unmonitored.[184] Further, using NAAQS as the measurement of the significance of impacts is, itself, problematic. The American Thoracic Society has shown that significantly lower thresholds are needed to protect people from air pollution.[185] The agencies' final EIS must assess how the emissions at Coal Creek Station from the combustion of federal coal exacerbate public health risks and the climate crisis.

F. Coal Ash

The draft EA arbitrarily eliminates hazardous and solid waste from a detailed analysis.[186] The draft EA correctly recognizes that waste generated from combustion and use of coal from the mine at the Coal Creek Station is an "indirect effect of leasing and mining."[187] The draft EA acknowledges that processing of coal at the plants will create waste and that the waste is, in theory regulated, but then, inexplicably, it asserts that detailed analysis is not required.[188] This is insufficient.

While the waste from these plants is regulated, it is also causing serious toxic pollution problems. Coal ash is one of the "Nation's largest toxic industrial waste streams."[189] North Dakota, in particular, is one of the top coal ash generating states, with numerous landfills and ponds containing over 58 million cubic yards of this toxic waste.[190] "Coal ash has caused significant groundwater contamination" in North Dakota plants.[191]

Waste from the Coal Creek Station also is causing serious toxic pollution problems.[192] Coal Creek specifically has failed to document key groundwater

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[183] *Id.* at 29.

[184] Ex. 18, American Lung Ass'n.

[185] Ex. 17, Cromar et al.

[186] Draft EA, *supra* note 51, at 16.

[187] *Id.*

[188] *Id.*

[189] Ex. 4, *Toxic Coal Ash in North Dakota* at 1.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 2.

monitoring benchmarks, document issues with its coal ash pond liners, and generally comply with federal requirements.[193]

The draft EA's reliance on the fact of regulation is, therefore, no guarantee that significant environmental impacts are not occurring. They are. The draft EA fails to provide any baseline water quality and no information about the extent to which the pollution from the plants is affecting water quality. Nor does the draft EA make any effort to address the cumulative impacts of the toxic ash pollution at the power plants. There are no maps indicating if and where it is migrating. Nor is there any analysis of the combined water pollution impacts from the mine and the Coal Creek Station. There is no monitoring data about the waste disposal sites or any information about historical waste disposal at the site. The final EIS must thoroughly assess the impact of coal ash rather than dismissing the issue as one that is already regulated.

G. Climate Change

The draft EA also fails adequately to evaluate the climate change impacts of the proposed lease, which BLM and OSMRE have substantive authority to consider as a matter related to public interest under the Mineral Leasing Act, FLPMA, and SMCRA. The draft EA fails to convey the magnitude of unabated climate change. The draft EA only briefly addresses the current and projected impacts elaborated in the IPCC Sixth Assessment Report and the Fifth National Climate Assessment from the U.S. Global Change Research Program. In particular, the draft EA fails to convey the truly catastrophic impacts associated with unabated climate change, the globally agreed upon limits to continued warming, the risk of global tipping points, or current global GHG concentrations. The grim and catastrophic impacts of unabated climate change are summarized well in the IPCC's Technical Summary for the Sixth Assessment Report.[194]

> Climate change has altered marine, terrestrial and freshwater ecosystems all around the world (very high confidence). Effects

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[193] *See generally* Comments of Earthjustice, Sierra Club, and CURE, *Proposed Denial of the CCR Part B Alternate Liner Demonstration Application, Great River Energy Coal Creek Station, Upstream Raise 91, Underwood, North Dakota*, Env't Prot. Agency, Docket ID No: EPA-HQ-OLEM-2021-0280 (Apr. 10, 2023) (submitted as Ex. 19).

[194] IPCC, *Technical Summary for the Working Group II Sixth Assessment Report* (2022) (submitted as Ex. 20).

have been experienced earlier, are more widespread and with further reaching consequences than anticipated (medium confidence). Biological responses including changes in physiology, growth, abundances, geographic placement and shifting seasonal timing are often not sufficient to cope with recent climate change (very high confidence). Climate change has caused local species losses, increases in disease (high confidence), mass mortality events of plants and animals (very high confidence), resulting in the first climate driven extinctions (medium confidence), ecosystem restructuring, increases in areas burned by wildfire (high confidence), and declines in key ecosystem services (high confidence). Climate-driven impacts on ecosystems have caused measurable economic and livelihood losses and altered cultural practices and recreational activities around the world (high confidence).[195]

Human communities, especially Indigenous Peoples and those more directly reliant on the environment for subsistence, are already negatively impacted by the loss of ecosystem functions, replacement of endemic species, and regime shifts across landscapes and seascapes (high confidence). Indigenous knowledge contains unique information sources about past changes and potential solutions to present issues (medium confidence). Tangible heritage such as traditional harvesting sites or species and archaeological and cultural heritage sites, and intangible heritage such as festivals and rites associated with nature-based activities, endemic knowledge and unique insights about plants and animals, are being lost (high confidence). As 80% of the world's remaining biodiversity is on Indigenous homelands, these losses have cascading impacts on cultural and linguistic diversity and Indigenous knowledge systems, food security, health, and livelihoods, often with irreparable damages and consequences (medium evidence, high agreement). Cultural losses threaten adaptive capacity and may accumulate into intergenerational trauma and irrevocable losses

[195] *Id.* at TS-9.

of sense of belonging, valued cultural practices, identity and home (medium confidence).[196]

Widespread and severe loss and damage to human and natural systems are being driven by human-induced climate changes increasing the frequency and/or intensity and/or duration of extreme weather events, including droughts, wildfires, terrestrial and marine heatwaves, cyclones (high confidence), and flood (low confidence). Extremes are surpassing the resilience of some ecological and human systems, and challenging the adaptation capacities of others, including impacts with irreversible consequences (high confidence). Vulnerable people and human systems, and climate sensitive species and ecosystems, are most at risk (very high confidence).[197]

Climate-related extremes have affected the productivity of agricultural, forestry and fishery sectors (high confidence). Droughts, floods, wildfires and marine heatwaves contribute to reduced food availability and increased food prices, threatening food security, nutrition, and livelihoods of millions of people across regions (high confidence). Extreme events caused economic losses in forest productivity and crops and livestock farming, including losses in wheat production in 2012, 2016, 2018, with the severity of impacts from extreme heat and drought tripling over last 50 years in Europe (high confidence) Forests were impacted by extreme heat and drought impacting timber sales for example in Europe (high confidence) Marine heatwaves, including well-documented events along the west coast of North America (2013–2016) and east coast of Australia (2015–2016, 2016–2017 and 2020) have caused the collapse of regional fisheries and aquaculture (high confidence.) Human populations exposed to extreme weather and climate events are at risk of food insecurity with lower diversity in diets, leading to

[196] *Id.* at TS-10.

[197] *Id.* at TS-13.

malnutrition and increasing the risk of disease (high confidence).[198]

Extreme climatic events have been observed in all inhabited regions, with many regions experiencing unprecedented consequences, particularly when multiple hazards occur in the same time or space (very high confidence). Since AR5, the impacts of climate change and extreme weather events such as wildfires, extreme heat, cyclones, storms, and floods have adversely affected or caused loss and damage to human health; shelter; displacement; incomes and livelihoods; security; and inequality (high confidence). Over 20 million people have been internally displaced annually by weather-related extreme events since 2008, with storms and floods the most common drivers (high confidence). Climate-related extreme events are followed by negative impacts on mental health, wellbeing, life satisfaction, happiness, cognitive performance, and aggression in exposed populations (very high confidence).[199]

Climate change is already stressing food and forestry systems, with negative consequences for livelihoods, food security and nutrition of hundreds of millions of people, especially in low and midlatitudes (high confidence). The global food system is failing to address food insecurity and malnutrition in an environmentally sustainable way.[200]

Currently, roughly half of the world's population are experiencing severe water scarcity for at least one month per year due to climatic and other factors (medium confidence). Water insecurity is manifested through climate-induced water scarcity and hazards and is further exacerbated due to inadequate water governance (high confidence). Extreme events and underlying vulnerabilities have intensified the societal impacts of droughts and floods and have negatively impacted agriculture, energy production and increased the incidence of

[198] *Id.* at TS-13.

[199] *Id.* at TS-14.

[200] *Id.* at TS-15.

water-borne diseases. Economic and societal impacts of water insecurity are more pronounced in low-income countries than in the middle- and high-income ones (high confidence).

Without urgent and ambitious emissions reductions, more terrestrial, marine and freshwater species and ecosystems face conditions that approach or exceed the limits of their historical experience (very high confidence). Threats to species and ecosystems in oceans, coastal regions, and on land, particularly in biodiversity hotspots, present a global risk that will increase with every additional tenth of a degree of warming (high confidence). The transformation of terrestrial and ocean/coastal ecosystems and loss of biodiversity, exacerbated by pollution, habitat fragmentation and land-use changes, will threaten livelihoods and food security (high confidence).[201]

Climate change will increasingly add pressure on food production systems, undermining food security (high confidence). With every increment of warming, exposure to climate hazards will grow substantially (high confidence), and adverse impacts on all food sectors will become prevalent, further stressing food security (high confidence). Regional disparity in risks to food security will grow with warming levels, increasing poverty traps, particularly in regions characterized by a high level of human vulnerability (high confidence).[202]

Water-related risks are projected to increase at all warming levels with risks being proportionally lower at 1.5°C than higher degrees of warming (high confidence). Regions and populations with higher exposure and vulnerability are projected to face greater risks than others (medium confidence). Projected changes in water cycle, water quality, cryosphere changes, drought and flood will negatively impact natural and human systems (high confidence).[203]

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[201] *Id.* at TS-23.

[202] *Id.* at TS-26.

[203] *Id.* at TS-30.

> Climate change will increase the number of deaths and the global burden of noncommunicable and infectious diseases (high confidence). Over 9 million climate-related deaths per year are projected by the end of the century, under a high emissions scenario and accounting for population growth, economic development, and adaptation. Health risks will be differentiated by gender, age, income, social status and region (high confidence).[204]
>
> Migration patterns due to climate change are difficult to project as they depend on patterns of population growth, adaptive capacity of exposed populations, and socioeconomic development and migration policies (high confidence). In many regions, the frequency and/or severity of floods, extreme storms, and droughts is projected to increase in coming decades, especially under high-emissions scenarios, raising future risk of displacement in the most exposed areas (high confidence). Under all global warming levels, some regions that are presently densely populated will become unsafe or uninhabitable with movement from these regions occurring autonomously or through planned relocation (high confidence).[205]
>
> Warming pathways which imply a temporary temperature increase over "well below 2°C above pre-industrial" for multi-decadal time spans imply severe risks and irreversible impacts in many natural and human systems (e.g. glacier melt, loss of coral reefs, loss of human lives due to heat) even if the temperature goals are reached later (high confidence).[206]
>
> There is increasing evidence on limits to adaptation which result from the interaction of adaptation constraints and the speed of change (high confidence). In some natural systems, hard limits have been reached (high confidence) and more will be reached beyond 1.5°C (medium confidence). Surpassing such hard, evolutionary limits cause local species extinctions and

[204] *Id.* at TS-33.

[205] *Id.* at TS-34.

[206] *Id.* at TS-42.

displacements if suitable habitats exist (high confidence). Otherwise, species existence is at very high risk (high confidence). In human, managed and natural systems soft limits are already being experienced (high confidence). Financial constraints are key determinants of adaptation limits in human and managed systems, particularly in low-income settings (high confidence), while in natural systems key determinants for limits are inherent traits of the species or ecosystem (very high confidence).[207]

Limits to adaptation will be reached in more systems, including, for example, coastal communities, water security, agricultural production, and human health, as global warming increases (medium confidence). Hard limits beginning at 1.5°C are also projected for coastal communities reliant on nature-based coastal protection (medium confidence). Adaptation to address risks of heat stress, heat mortality and reduced capacities for outdoor work for humans, face soft and hard limits across regions become significantly more severe at 1.5°C, and are particularly relevant for regions with warm climates (high confidence). Beginning at 3°C, hard limits are projected for water management measures, leading to decreased water quality and availability, negative impacts on health and well-being, economic losses in water and energy dependent sectors and potential migration of communities (medium confidence). Soft and hard limits for agricultural production are related to water availability and the uptake and effectiveness of climate-resilient crops which are constrained by socio-economic and political challenges (medium confidence). In terms of settlements, limits to adaptation are often most pronounced in smaller and rapidly.[208]

Indigenous Peoples and disadvantaged groups such as low-income households and ethnic minorities, are especially adversely affected by maladaptation, which often deprives them of food and livelihoods and reinforces and entrenches existing

[207] *Id.* at TS-57.

[208] *Id.*

> inequalities (high confidence). Rights-based approaches to adaptation, participatory methodologies and inclusion of local and Indigenous knowledge combined with informed consent deliver mechanisms to avoid these pitfalls (medium confidence). Adaptation solutions benefit from engagement with Indigenous and marginalized groups, solve past equity and justice issues and offer novel approaches (medium confidence). Indigenous knowledge is a powerful tool to assess interlinked ecosystem functions across terrestrial, marine and freshwater systems, bypassing siloed approaches and sectoral problems (high confidence). Lastly, engagement with Indigenous knowledge and marginalized groups often offers an intergenerational context for adaptation solutions, needed to avoid maladaptation (high confidence).[209]

These impacts—including extinction, loss of food security, loss of water security, extreme weather, communities becoming uninhabitable, and natural and human systems being stressed past the point of adaptation—are momentous and should be acknowledged and disclosed. This is especially the case since these impacts are expected to be felt most acutely by indigenous communities, rural communities, and communities with limited financial resources. North Dakota has disproportionate populations of all of these demographics. The final EIS must also address the potential of incremental emissions leading to tipping points or passing "critical thresholds."[210]

The final EIS must also assess the combined impacts of climate change and continued mining and combustion of coal, including impacts on reclamation of vegetation and water resources. The U.S. Global Change Research Program's Fifth National Climate Assessment discusses the impacts of climate change on hydrology in the Northern Great Plains. Climate change does not simply alter precipitation, it is driving more severe drought and causing increased evapotranspiration:

> The Northern Great Plains region is experiencing unprecedented extremes related to changes in climate, including severe droughts (likely, high confidence), increases in hail frequency and size (medium confidence), floods (very likely, high

[209] *Id.* at TS-59.

[210] *Id.* at TS-42.

> confidence), and wildfire (likely, high confidence). Rising temperatures across the region are expected to lead to increased evapotranspiration (very likely, very high confidence), as well as greater variability in precipitation (very likely, high confidence).[211]

Increased temperatures are causing deceased snowpack, affecting irrigation, causing increased aridity, and likely will cause increased pressure on groundwater: "Decreasing snowpack will alter surface water availability for irrigation and may increase pressure on groundwater resources. Overall aridity has increased and is projected to continue to do so because of increases in potential evapotranspiration."[212] Increased temperatures is causing more evaporation, which is also decreasing stream flows: "Increases in evaporative demand (the loss of water from Earth's surface to the atmosphere . . .) have decreased runoff efficiencies, meaning that less rain and melted snow end up reaching the streams that feed the Colorado River."[213]

Drought is also expected to increase:

> Drought is projected to increase in the region, with localized droughts increasing by 2040 and more widespread regional droughts by 2070, under intermediate (RCP4.5), high (RCP6.0), and very high (RCP8.5) scenarios across wet or dry global climate models. After precipitation, the most significant component of the water budget is evapotranspiration—the moisture transfer from Earth's surface and plants to the atmosphere. Projected warming is expected to increase evapotranspiration . . ., which may lead to drier soils later in the growing season . . . . Summer drought will be more probable than spring drought. Multiple future climate scenarios indicate future increases in moderate, severe, and extreme drought, occurring approximately 10% and 20% more frequently by 2050 and 2100, respectively. Recent droughts in the upper Missouri River basin between 2000 and 2010 were the most severe in the

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[211] *Northern Great Plains*, *in* U.S. Global Change Research Program, *Fifth National Climate Assessment* 25-8 [hereinafter *Northern Great Plains*] (submitted as Ex. 21).

[212] *Id.* at 25-9

[213] *Id.*

> instrumental record, and flash droughts are a growing concern.[214]

Recent research shows that soil moisture globally and in the great plains has declined dramatically over the past two decades, supporting the analyses of the IPCC and the National Climate Assessment[215].

Climate change impacts to water quantity will also affect water quality, which the draft EA fails to consider:

> Excess contributions of nutrients, such as nitrogen and phosphorus from agricultural runoff or point sources such as wastewater treatment plants, can cause water quality issues, which are expected to be exacerbated by climate change. Nutrient loads (the total amount of a nutrient transported past a single location over a set period of time) can increase after droughts, when sediment is flushed in subsequent runoff events. Nutrient runoff from agricultural land spikes after heavy rain and contributes to harmful algal blooms and transport of nutrients to the Gulf of Mexico (KM 25.5). Climate change has long been hypothesized as a driver of harmful algal blooms; supporting these hypotheses with observations has been challenging because of gaps in monitoring, lack of long-term algae data, and changes in laboratory and remote-sensing methods.[216]

Moreover, the draft EA fails to identify what levels of global warming and increased temperatures are considered safe. It is illogical and irrational to discuss pollution impacts without also discussing what amounts of pollution are deemed safe. The global community has agreed that climate change should be limited to 2°C in order to avoid the most dangerous impacts of climate change. Thus, in the Paris Agreement, the world community, including the United States, agreed to limit "the increase in the global average temperature to well below 2°C above pre-industrial

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[214] *Id.* at 25-11.

[215] Seo et al., *Abrupt Sea Level Rise and Earth's Gradual Pole Shift Reveal Permanent Hydrological Regime Changes in the 21st Century*, Science (Mar. 2025) (submitted as Ex. 22).

[216] *Id.*

levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[217] The global commitment to these limits were subsequently affirmed at COP 26, COP 27, and COP 28.

The draft EA fails to explain how continued coal mining at Falkirk Mine is consistent with limiting climate change to well below 2°C. The draft EA contains no analysis of the remaining global or domestic carbon budget or how mining at the Falkirk Mine is consistent with safe climate conditions for the public and the world.

To maintain a chance of limiting global temperatures to even 2°C will require immediate and significant emissions reductions.[218] It is not clear how continued large scale GHG emissions from the Falkirk Mine and Coal Creek Station through 2045 are consistent with a safe climate. The draft EA must address this issue.

The draft EA's qualitative analysis is confined to a vague discussion of potential future impacts on the scale of the Northern Great Plains region and the nation. The agencies do not analyze—or even acknowledge—the significant impacts already being felt in North Dakota from climate change and make no effort at meaningful discussion of how projected future impacts will affect this existing baseline. Without acknowledging the current status quo, a "hard look" at climate impacts is impossible and for the same reason, as is an adequate cumulative impacts analysis.

North Dakota's average annual temperature has increased by 0.2°F per decade, resulting in a 2.6°F increase since the beginning of the twentieth century.[219] Indeed, the first two decades of the current century represent one of the warmest periods ever recorded in North Dakota, with several years in those decades meeting or exceeding the extreme heat that characterized the dust bowl years in the 1930s.[220]

Warming in North Dakota has occurred in all seasons but has been most prevalent in the winter, increasing temperatures have been more than double those

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[217] Adoption of the Paris Agreement, art. 2.1(a) (2015) FCCC/CP/2015/L.9 http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf.

[218] United Nations Env't Programme, *Emissions Gap Report 2024* (2024), https://doi.org/10.59117/20.500.11822/46404 (submitted as Ex. 23).

[219] NOAA, Nat'l Ctrs. for Env't Info., *State Climate Summaries: State Climate Summary for North Dakota (2022)* [hereinafter *State Climate Summary for North Dakota*] (submitted as Ex. 24); *see also* Ex. 21, *Northern Great Plains*.

[220] Ex. 24, *State Climate Summary for North Dakota*, at 1.

experienced in the other seasons and greater than in any other state, resulting in an increase in winter temperatures of 4.5°F over the past century.[221]

These "baseline" conditions of existing climate impacts are critical to any analysis of future impacts, and this is especially true in North Dakota, because many areas of the state are highly vulnerable to both flooding and drought.[222] Such analysis is almost entirely lacking from the draft EA.

The increases in extreme weather already occurring and expected to increase as a result of increasing climate impacts will exacerbate both flood and drought occurrences, causing related impacts to North Dakota government and industries. For example, in the past thirty years, more than $3.2 billion has been spent on flood mitigation efforts,[223] and drought has been a regular occurrence in the state, with the 2017 Northern Plains drought causing crop, stock, and wildfire damage in excess of $2.5 billion.[224] The intensity of droughts is expected to increase as a result of climate change, while possible increases in winter precipitation could potentially increase agricultural productivity, severe winter storms may also bring economic impacts to the state's agricultural economy.[225]

The agencies ignore this reality and persist in casting climate change as a global problem over which their actions have no influence. This attitude not only ignores BLM's responsibilities under NEPA but also its duties to avoid, minimize, or mitigate harm to public lands and "atmospheric resources" under the Federal Land Policy and Management Act.[226] These are precisely the types of climate impacts—both present and future—that the agencies must acknowledge and discuss in greater detail in the final EIS in order to take the requisite "hard look" NEPA requires.

H. Social Cost of Greenhouse Gases

The agencies simply ignore the best available tool to assess the significance of the project's climate effects: the social cost of greenhouse gases (SC-GHG). The SC-

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[221] *Id.* at 1–2.

[222] *Id.*

[223] Ex. 21, *Northern Great Plains*.

[224] Ex. 24, *State Climate Summary for North Dakota*, at 3.

[225] *Id.*; *see also* Univ. of Md. Ctr. for Integrative Env't Rsch., *Economic Impacts of Climate Change on North Dakota* (2008) (submitted as Ex. 25).

[226] 43 U.S.C. §§ 1702(c), 1732(b).

GHG is the single most scientifically accepted and widespread methodology for *quantifying* climate change impacts.[227] The SC-GHG "reflects the net social cost of emitting, or the net social benefit of reducing emissions of, one metric ton of greenhouse gases in a given year,"[228] enabling decisionmakers and the public to readily understand the scope of the project's climate impacts and contextualize them against other effects.

Federal agencies began developing estimates of the social cost of greenhouse gases based on then-available literature.[229] In 2009, the White House convened the first Interagency Working Group on the Social Cost of Carbon (Working Group)[230] to ensure that the federal government used consistent, scientifically rigorous values to estimate climate damages. The Working Group released climate-damage estimates in 2010, updated them in 2013, updated their presentation and technical documentation in 2016, and readopted them on an interim basis in 2021.[231] The Working Group based these estimates on three independent and widely used climate-economic models, known as integrated assessment models.[232]

The Working Group long recognized that its valuations likely understated the true value of climate damages because they omitted many key climate impacts.[233]

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[227] Although the Interagency Working Group that established the SC-GHG was recently disbanded through Executive Order 14154 § 6(b), 90 Fed. Reg. 8353 (Jan. 29, 2025), this does not affect Interior's obligations to take a hard look at climate impacts under NEPA using high-quality scientific methods, for multiple reasons.

[228] Office of Mgmt. & Budget, *Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act: Fiscal Year 2023*, at 20 (2024), https://bidenwhitehouse.archives.gov/wp-content/uploads/2025/01/FY23-Benefit-Cost-Report.pdf.

[229] Notably, in the George W. Bush administration, EPA endorsed the use of a climate-damage value that captures the total damages from a ton of emissions, regardless of whether those damages occur inside or outside the United States, using discount rates of two to three percent. Env't Prot. Agency, *Technical Support Document on Benefits of Reducing GHG Emissions* 13 (2008).

[230] This group later changed its name to the Interagency Working Group on the Social Cost of Greenhouse Gases.

[231] Interagency Working Grp. on Soc. Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide* 2 (2021) [hereinafter 2021 TSD].

[232] *Id.* at 2–3.

[233] *Id.* at 31.

Starting in 2010, it therefore noted the importance of updating the SC-GHG over time "to reflect increasing knowledge of the science and economics of climate impacts."[234] In 2016, the National Academies largely endorsed the Working Group's approach.[235] In 2017, it provided recommendations for improvement and called for future updates consistent with those recommendations.[236]

Since the Working Group last substantively updated its climate-damage estimates in 2016, there have been many developments in the economic and scientific literature on the proper valuation of climate damages.[237] The National Center for Environmental Economics, a division of the Environmental Protection Agency (EPA), sought to fill this analytical gap through updated SC-GHG estimates. That update sought to reflect the recommendations of the National Academies, along with other recent updates in science and economics. EPA released draft estimates in December 2022 through a technical report from NCEE.[238] Following publication, those draft estimates underwent public comment and expert peer review.

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[234] Interagency Working Grp. on Soc. Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis* 1 (2010) [hereinafter 2010 TSD].

[235] Nat'l Acads. of Scis., Eng'g & Med., *Assessment of Approaches to Updating the Social Cost of Carbon: Phase 1 Report on a Near-Term Update* (2016).

[236] Nat'l Acads. of Scis., Eng'g & Med., *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* 2 (2017). Rather than address those recommendations, however, President Trump disbanded the Working Group in 2017 and withdrew its technical support documents. Exec. Order No. 13,783 §§ 5(b)–(c), 82 Fed. Reg. 16,093, 16,095–96 (Mar. 28, 2017); *see also* U.S. Gov't Accountability Off., *Social Cost of Carbon: Identifying a Federal Entity to Address the National Academies' Recommendations Could Strengthen Regulatory Analysis GAO-20-254* (2020) (stating that the federal government under the first Trump administration "ha[d] no plans to address the recommendations of the National Academies").

[237] *See, e.g.*, Env't Prot. Agency, *Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances* 46 fig.2.3.1 (2023) (showing a surge in research that was not incorporated into the Working Group's estimates) [hereinafter Greenhouse Gas Report] (submitted as Ex. 26).

[238] *See* Env't Prot. Agency, *EPA External Review Draft of Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances* (2022) [hereinafter Peer Review Report].

Numerous departments, including Interior, and agencies, including BLM, have used the SC-GHG to contextualize and assess the significance of climate impacts in NEPA reviews. Interior has used the SC-GHG on many occasions in recent years in NEPA reviews.

In 2021, an Interior secretarial order recognized that the SC-GHG provides "a useful measure to assess the climate impacts of GHG emission changes for Federal proposed actions, in addition to rulemakings," as it can serve as "an essential tool to quantify the costs and benefits associated with a proposed action's GHG emissions and relevant to the choice among different alternatives being considered."[239] Following that memorandum, the agency used the SC-GHG repeatedly in NEPA analysis, including for Bureau of Land Management and Bureau of Ocean Energy Management fossil-fuel leasing and management decisions.[240] After the October 2024 memorandum discussed above, the agency began applying EPA's updated SC-GHG estimates in its NEPA reviews.[241]

The Council on Environmental Quality (CEQ) has also previously endorsed the use of the SC-GHG in NEPA analysis.[242] In a 2023 guidance document, CEQ explained that the SC-GHG "can assist agencies and the public in assessing the significance of climate impacts."[243] CEQ also explained that the SC-GHG "provides an appropriate and valuable metric that gives decision makers and the public useful information and context about a proposed action's climate effects even if no other costs or benefits are monetized, because metric tons of GHGs can be difficult to understand and assess the significance of in the abstract."[244]

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[239] U.S. Dep't of the Interior, Secretarial Order 3399 § 5(b), Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process (Apr. 16, 2021) (submitted as Ex. 27).

[240] *E.g.* Bureau of Ocean Energy Mgmt., *2024–2029 National Outer Continental Shelf Oil and Gas Leasing Proposed Final Program* 5-24–5-25 (2023) (calculating the climate costs of offshore leasing program); Bureau of Land Mgmt., *Willow Master Development Plan: Supplemental Environmental Impact Statement* 46–52 (2023).

[241] *E.g.* Bureau of Land Mgmt., *Coastal Plain Oil and Gas Leasing Program Supplemental Environmental Impact Statement* G-3 tbl.G-1 (2024) (calculating climate costs of future potential development using EPA SC-GHG estimates).

[242] National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1198 (Jan. 9, 2023).

[243] *Id.* at 1202–03.

[244] *Id* at 1202.

The SC-GHG enables decisionmakers to rationally consider climate impacts in a manner that satisfies NEPA's requirements. Disregarding the SC-GHG risks violating NEPA, particularly if the agency does not otherwise assess climate effects in a way that rationally brings those effects to bear on the agency's decisions.

When a project or plan has climate consequences that must be assessed under NEPA, monetizing climate damage fulfills an agency's legal obligations under NEPA in ways that simple quantification of tons of greenhouse gas emissions cannot. Such an analysis must be added to the meaningful qualitative discussion addressed above, and is particularly critical in this instance, given the agencies' failure on that front. NEPA requires "hard look" consideration of the environmental effects of major federal government actions. 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."[245]

The tons of greenhouse gases emitted by a project are not the "actual environmental effects" under NEPA. Merely listing the quantity of emissions is insufficient if the agency "does not reveal the meaning of those impacts in terms of human health or other environmental values," since "it is not releases of [pollution] that Congress wanted disclosed" but rather "the effects, or environmental significance, of those releases."[246] In other words, the actual effects and relevant factors that must be analyzed and disclosed to the public are the incremental climate impacts caused by a project's greenhouse gas emissions, including: property lost or damaged by sea-level rise; changes in energy demand; lost productivity and other impacts to agriculture; and human health impacts, including cardiovascular and respiratory mortality from heat-related illnesses, changing disease vectors like malaria and dengue fever, increased diarrhea, and changes in associated pollution. These impacts are all included to some degree in the different assessment models used by the Working Group and EPA in developing their SC-GHG estimates.[247]

By monetizing climate damages using the SC-GHG, the agencies can satisfy NEPA's legal obligations and statutory goals to assess the incremental and actual

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[245] *Baltimore Gas & Elec. Co.*, 462 U.S. at 96 (emphasis added).

[246] *NRDC v. NRC*, 685 F.2d 459, 486–87 (D.C. Cir. 1982), *rev'd on other grounds*, *Baltimore Gas & Elec. Co.*, 462 U.S. at 106–07.

[247] For a description of what is included in the Working Group's integrated assessment models, see 2010 TSD, *supra* note 234, at 6–8, 29–33. For a description of what is included in the EPA integrated assessment models, see Ex. 26, Greenhouse Gas Report at 47–62.

effects bearing on the public interest. The social cost of greenhouse gases methodology calculates how the emission of an additional unit of greenhouse gases affects atmospheric greenhouse concentrations, how that change in atmospheric concentrations changes temperature, and how that change in temperature incrementally contributes to the above list of economic damages, including property damages, energy demand effects, lost agricultural productivity, human mortality and morbidity, lost ecosystem services and non-market amenities, and so forth.[248] The SC-GHG therefore captures the factors that actually affect public welfare and assesses the degree of impact to each factor, in ways that just estimating the volume of emissions cannot.

NEPA requires agencies to provide sufficient informational context on environmental impacts. The SC-GHG provides that context, allowing decisionmakers and the public "to translate climate impacts into the more accessible metric of dollars, allow decision makers and the public to make comparisons, help evaluate the significance of an action's climate change effects, and better understand the tradeoffs associated with an action and its alternatives."[249]

Although NEPA does not typically require a full and formal cost-benefit analysis, agencies must assess beneficial and adverse effects in a balanced and reasonable manner.[250] Some courts have warned, for example, that an agency cannot selectively monetize benefits in support of its decision while refusing to

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[248] 2010 TSD, *supra* note 234, at 5.

[249] 88 Fed. Reg. 1196, 1198 (Jan. 9, 2023).

[250] *Sierra Club v. Sigler*, 695 F.2d 957, 978–79 (5th Cir. 1983) (holding that NEPA "mandates at least a broad, informal cost-benefit analysis," and so agencies must "fully and accurately" and "objectively" assess environmental, economic, and technical costs); *Chelsea Neighborhood Ass'ns v. U.S. Postal Serv.*, 516 F.2d 378, 386 (2d Cir. 1975) ("NEPA, in effect, requires a broadly defined cost-benefit analysis of major federal activities."); *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1113 (D.C. Cir. 1971) ("NEPA mandates a rather finely tuned and 'systematic' balancing analysis" of "environmental costs" against "economic and technical benefits").

monetize the costs of its action.[251] Here, the draft EA does include an analysis of economic benefits from coal production.[252]

In one case, for instance, the U.S. District Court for the District of Colorado found that it was "arbitrary and capricious to quantify the *benefits* of the lease modifications and then explain that a similar analysis of the *costs* was impossible when such an analysis was in fact possible."[253] The court explained that, to support a decision on coal mining activity, the agencies had "weighed several specific economic benefits—coal recovered, payroll, associated purchases of supplies and services, and royalties"—but arbitrarily failed to monetize climate costs using the SC-GHG.[254] Similarly, in another case, the U.S. District Court for the District of Montana held an environmental assessment to be arbitrary and capricious because it quantified the benefits of action (such as employment payroll, tax revenue, and royalties) while failing to use the SC-GHG to quantify the climate costs.[255]

These two decisions follow a broader line of case law in which courts find it arbitrary and capricious to apply inconsistent protocols for analyzing some effects compared to others, especially when the inconsistency obscures some of the most significant effects. For example, in *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the U.S. Court of Appeals for the Ninth Circuit ruled that, because the agency had monetized other uncertain costs and benefits of its vehicle fuel efficiency standard—like traffic congestion and noise costs—its "decision not to monetize the benefit of carbon emissions reduction was

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[251] *High Country Conservation Advocs. v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014); *accord MT Env't Info. Ctr. (MEIC) v. Off. of Surface Mining*, 274 F. Supp. 3d 1074, 1094–99 (D. Mont. 2017) (holding it was arbitrary for the agency to quantify benefits in an EIS while failing to use the social cost of carbon to quantify costs).

[252] *See generally* Draft EA, *supra* note 51.

[253] *High Country Conservation Advocs. v. USFS*, 52 F. Supp. 3d at 1191.

[254] *Id.* at 1190.

[255] *MEIC*, 274 F. Supp. 3d at 1094–99 (holding that it was arbitrary to imply that there would be zero effects from greenhouse gas emissions). In a recent case from the Northern District of California, moreover, the court found that it violated NEPA for an agency to monetize economic benefits while only accounting for a slim fraction of global climate damages. *California v. Bernhardt*, 472 F. Supp. 3d 573, 623 (N.D. Cal. 2020) ("It is arbitrary for an agency to quantify an action's benefits while ignoring its costs where tools exist to calculate those costs.").

arbitrary and capricious."[256] More generally, when an agency bases a decision on cost-benefit analysis, it is arbitrary to "put a thumb on the scale" of the analysis.[257] Similarly, the U.S. Court of Appeals for the D.C. Circuit has criticized agencies for "inconsistently and opportunistically fram[ing] the costs and benefits of the rule [and] fail[ing] adequately to quantify the certain costs or to explain why those costs could not be quantified."[258]

As discussed in this letter, the SC-GHG presents a readily available tool to monetize the effects of greenhouse gas emissions based on peer-reviewed inputs and widely accepted assumptions. Agencies are every bit as capable of monetizing climate damage as they are of monetizing socioeconomic impacts. It is thus arbitrary to monetize social and economic benefits in a NEPA analysis while refusing to monetize climate costs.

Using the SC-GHG in NEPA analysis is preferable for another reason: It captures the fact that the climate damage generated by each additional ton of greenhouse gas emissions depends on the background concentration of greenhouse gases in the global atmosphere. Once emitted, greenhouse gases can linger in the atmosphere for centuries, building up the concentration of radiative-forcing pollution and affecting the climate in cumulative, non-linear ways. As physical and economic systems become increasingly stressed by climate change, each marginal additional ton of emissions has a greater, non-linear impact. The climate damage generated by a given amount of greenhouse gas pollution is therefore a function not just of the pollution's total volume but also the year of emission, and with every passing year an additional ton of emissions inflicts greater damage.[259]

A "hard look" requires more than simply stating the amount of emissions.[260] The proposed action's contribution to climate change must be evaluated in a

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[256] 538 F.3d 1172, 1203 (9th Cir. 2008).

[257] *Id.* at 1198.

[258] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011); *see also Johnston v. Davis*, 698 F.2d 1088, 1094–95 (10th Cir. 1983) (remanding an environmental impact statement because "unrealistic" assumptions "misleading[ly]" skewed comparison of the project's positive and negative effects).

[259] Ex. 26, Greenhouse Gas Report at 78 (explaining that the SC-GHG grows over time); 2010 TSD, *supra* note 234, at 33 (same).

[260] *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198–1204 (9th Cir., 2008); *Bernhardt*, 472 F. Supp. 3d at 623; *Ctr. for Biological Diversity v. U.S. Forest Service*, 687 F. Supp. 3d 1053, 1077 (D. Mont. 2023).

meaningful context, which cannot be centered in statements that emissions from the proposed action represent only a small fraction of global, national, or regional emissions. Such analyses do no more than attempt to minimize the actual effect of such actions and their associated emissions.

Importantly, the SC-GHG metric is not solely an economic analysis, but rather, it is a tool that allows agencies to meet their statutory obligation to describe a project's incremental environmental harm that is otherwise difficult to quantify. Indeed, the Interior Department is no stranger to the use of this tool, which its agencies have regularly employed in the context of decisionmaking both nationally and within the Montana/Dakotas field office.[261]

Finally, the agencies must adopt an appropriate scope of analysis for direct effects that fully captures the reasonably foreseeable consequences of the proposed action's GHG emissions.[262] A single vague sentence stating a few general impacts regionally from climate change, as reflected in the draft EA, is simply insufficient.

I. Black Lung Disease

BLM and OSMRE need to fully discuss miners' occupational risks, especially the risks of black lung disease. The draft EA fails entirely to address this significant issue. Multiple recent reports indicate that black lung disease, a debilitating and fatal disease for coal miners, is making a resurgence, including at surface mines in the western United States.

On April 22, 2025, *Wyoming Public Radio* published a story on black lung disease.[263] Scholarly research supports the article's conclusions that black lung is

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[261] *See, e.g.*, SEIS, *Miles City Field Office* (2024), https://eplanning.blm.gov/public_projects/2021155/200534253/20110900/251010891/MCFO_Final%20SEIS_Proposed%20RMPA_508.pdf.

[262] *See* National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023).

[263] Chris Clemens, *As Black Lung Increases in Wyoming, Some Worry Federal Cuts Will Hinder Detection*, Wyo. Pub. Radio (Apr. 22, 2025), https://www.wyomingpublicmedia.org/natural-resources-energy/2025-04-22/as-black-lung-increases-in-wyoming-some-worry-federal-cuts-will-hinder-detection (submitted as Ex. 28).

again resurgent, including at surface mines in the west.[264] The risk appears to be greatest among surface miners working in drilling and blasting.[265] The prevalence of black lung disease among surface coal miners has not been extensively studied. One CDC study found that approximately 1.1% of surface miners in non-Appalachian states had coal workers' pneumoconiosis, due to respiration of dust at coal mines.[266] North Dakota appears to have received 172 black lung claims as of 2021.[267] The conditions of black lung develop later in life.

Black lung disease has emerged as a major problem on the Navajo Nation, which, like the Northern Cheyenne Reservation, is surrounded by coal mines.[268] One study finds higher rates of black lung disease among native coal miners and greater odds that native coal miners have a greater likelihood of suffering black lung disease than non-native coal miners.[269]. It is not clear why native miners are more likely to suffer from black lung disease, but the statistics are troubling and should be assessed in the NEPA review. The draft EA's complete failure to assess impacts on public health is arbitrary and must be corrected.

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[264] Halldin et al., *Debilitating Lung Disease Among Surface Coal Miners with No Underground Tenure*, J. of Occupational Environ. Med. (2015) (submitted as Ex. 29); Ctrs. for Disease Control and Prevention, *Morbidity and Mortality Weekly Report*, *Pneumoconiosis and Advanced Occupational Lung Disease Among Surface Coal Miners—16 States, 2010—2011* (2012) (submitted as Ex. 30).

[265] Ex. 29, Halldin et al.

[266] Ex. 30, *Morbidity & Mortality Weekly Report*.

[267] U.S. Dep't of Labor, *Black Lung Program Statistics*, https://www.dol.gov/agencies/owcp/dcmwc/statistics/bls2021/DistributionOfClaimsByState2021.

[268] Chris Clements, *Retired Navajo Coal Miners Say They Have Black Lung Disease from Working in the Navajo Mine*, Aspen Pub. Radio (Apr. 14, 2023), https://www.aspenpublicradio.org/2023-04-14/retired-navajo-coal-miners-say-they-have-black-lung-disease-from-working-in-mines-in-the-navajo-nation; Joshua Vorse, Chris Clements, & Zach Ben-Amots, *Cases of Black Lung are Surging on the Navajo Nation, But Miners Lack Access to Care*, Rocky Mountain PBS (Feb. 22, 2024), https://www.rmpbs.org/blogs/news/black-lung-navajo-nation-miners.

[269] Jeremy T Hua, Lauren M Zell-Baran, Camille M Moore, & Cecile S Rose, *Racial Differences in Respiratory Impairment, Pneumoconiosis, and Federal Compensation for Western U.S. Indigenous Coal Miners*, Annals ATS (Apr. 2024) (submitted as Ex. 31)

CONCLUSION

In sum, BLM and OSMRE cannot legally use the Interior Department's Emergency Procedures for NEPA compliance nor the emergency regulations for issuing a coal lease for the proposed federal action for Falkirk Mine. We urge you to rectify the identified errors in your NEPA analysis, prepare an EIS and BiOp, and deny the proposed coal lease and mining plan modification. Please do not hesitate to contact us if you have any questions.

Sincerely,

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On behalf of Dakota Resource Council, Sierra Club, Center for Biological Diversity, CURE, and Montana Environmental Information Center