

Northern Plains Resource Council
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December 6, 2004

Surface Transportation Board
Case Control Unit
Washington, DC 20423
Attention: Kenneth Blodgett
STB Docket No. FD 30186 (Sub-No. 3)

Re: Northern Plains Resource Council comments on Draft Supplemental Environmental Impact Statement (STB Finance Docket No. 30186 (Sub-No. 3) Tongue River III

I. Northern Plains Resource Council

Northern Plains Resource Council (Northern Plains) is a grassroots conservation and family agriculture non-profit corporation organized under the laws of the State of Montana. Northern Plains was founded in 1972. Northern Plains maintains its principal office in Billings, Montana. Northern Plains organizes Montana citizens to protect our water quality, family farms and ranches, and unique quality of life. Northern Plains is dedicated to providing the information and tools necessary to give citizens an effective voice in decisions that affect their lives.

Northern Plains' members live in the Tongue River valley. Our members live within the valley that will be adversely impacted by the proposed Tongue River Railroad (TRR) and coal bed methane (methane) development. Our members own farms and

ranches in the valley, irrigate with the surface waters, and depend on the land, vegetation, ground water, and air that will be adversely affected by this energy development. They recreate by fishing, hunting, rafting, and hiking on the lands and waters that will be adversely impacted by such development.

Many Northern Plains' members including the Musgraves, Art Hayes, and Jeanie Alderson, and other families own farms and ranches that will be crossed by the TRR and where most of the oil and gas estate is owned by the Federal government. The Bureau of Land Management (BLM) has leased and committed many of these federal resources to methane development.

Northern Plains submits declarations from Roger Muggli, Art Hayes, Jr., Jeanie Alderson, William and Judith Musgrave, Leona Waldhausen, and Amy Frykman to demonstrate how methane development will have real impacts on real people in the Tongue River valley. The TRR will have cumulative environmental impacts on these same resources-impacts the Surface Transportation Board and other federal and state agencies have systematically ignored in the Supplemental Draft Environmental Impact Statement (SDEIS).¹ See Exhibits A and B, Declarations in Support of Plaintiff Northern Plains Motion for Summary Judgment in CV-01-185-BLG-RWA and CV-03-69-BLW-RWA respectively.²

¹ Hereinafter, Northern Plains refers to all the state and federal cooperating and lead agencies in the SDEIS process as the STB for convenience.

² Northern Plains submits numerous exhibits to support its comments. Northern Plains requests that the STB incorporate all these exhibits into the administrative record for this decision. Northern Plains has attempted to provide the STB with an electronic copy of exhibits when possible but some documents are provided in paper format. If you have any questions regarding any of these exhibits or have trouble opening any exhibits submitted in electronic format, please contact Michael Reisner at Northern Plains at 406.248.1154.

For over two decades, Northern Plains and other parties have opposed the TRR because it is contrary to the public need and will devastating environmental impacts on the Tongue River valley. The TRR and methane development will change the landscape, community, economy, and environment of this farming and ranching valley for generations to come.

II. Background

The ill-conceived TRR has been hanging over the heads of the farmers and ranchers of the Tongue River valley for over two decades. A brief discussion of this history is necessary to establish some context for this latest proposal.

In 1983, Tongue River Railroad Company (TRRC) filed its original application with the Interstate Commerce Commission (ICC), the Surface Transportation Board's (STB), to construct and operate an 89-mile railroad between Miles City and Ashland, Montana. This proceeding is referred to as Finance Docket No. 30186 (Sub-No. 1) (hereinafter referred to as TRR I). On May 9, 1986, the ICC issued a decision approving the construction and operation of the railroad. Despite the ICC's determination of the overwhelming public need for this segment of the railroad, the TRRC has not moved a single ounce of dirt much less laid any track despite being authorized to commence construction for almost twenty years. To say the environmental analysis in the Final Environmental Impact Statement (EIS) prepared for TRR I is stale is an understatement- the ICC's analysis of the environmental and socioeconomic impacts of the railroad and consideration of alternatives is useless in light of developments during the last twenty years.

In 1989, TRRC submitted an application to extend the railroad another 41 miles from Ashland to Decker. Over six years later, on November 8, 1996, and after

considering several alternatives for the southern-most segment of the 41-mile route, the STB issued a decision authorizing TRRC to construct and operate the 41-mile line including the Four Mile Creek Alternative. The STB also imposed a condition requiring the TRRC to complete construction of the entire line between Miles City and Decker within three years. *Tongue River Railroad Company-Rail Construction and Operation-Ashland to Decker, Montana, Finance Docket No. 30186 (Sub-No. 2)*(TRR II). On January 7, 1997, Northern Plains, Native Action, and the United Transportation Union-General Committee on Adjustment (UTU) filed petitions for review of TRR II in the United States Court of Appeals for the Ninth Circuit. These petitions are stayed pending the completion of this process.³

On April 27, 1998, TRRC submitted an application for an alternative route for the southern most 17.1 mile segment of the railroad, which become known as the “Western Alignment” as an alternative to the route approved by the STB in its November 1999 decision (hereinafter referred to as “TRR III”).

On March 23, 1999 and over the objections of Northern Plains and other parties, the STB dissolved the condition requiring TRRC to complete construction of the railroad within three years.

On March 2, 2000, the TRRC asked the STB to suspend work on the Supplemental EIS. The STB suspended such work. On December 19, 2002, the TRRC asked the STB to recommence the Supplemental EIS process.

Shortly thereafter, on January 17, 2003, the TRRC requested permission to file supplemental evidence in order to provide a limited update of the record concerning the

³ Northern Plains incorporates by reference all previous economic analyses of the proposed railroad in TRR I and TRR II proceedings.

transportation aspects of this case.⁴ The STB resumed work on the Supplemental EIS and on March 11, 2003, issued a decision allowing the TRRC to supplement its application filed on April 27, 1998. The STB published an Amended Notice of Intent in the Federal Register on March 26, 2003 asking for public comment on the scope of the Supplemental EIS.

During this inexcusable eight year delay, the farmers and ranchers of the Tongue River valley have come face-to-face with potentially devastating impacts of methane development in the Powder River Basin of Montana and Wyoming. The State of Montana and Bureau of Land Management (BLM), both co-lead agencies in this NEPA process, completed an EIS allegedly analyzing the environmental impacts of methane development in the Powder River Basin of Montana. This analysis was completed in 2003 and is entitled *Montana Final Statewide Oil and Gas Environmental Impact Statement and Amendment of Power River and Billings Resource Management Plans* (January 2003) (Montana Methane FEIS). A complete electronic copy of the administrative record for the Montana Methane FEIS is included as Exhibit C. At the same time, federal and state agencies completed an EIS analyzing the environmental impacts of methane development on the Wyoming portion of the Powder River Basin. A complete electronic copy of the administrative record for the *Final Environmental Impact Statement and Proposed Plan Amendment for the Powder River Basin Oil and Gas Project* (January 2003)(Wyoming Methane FEIS) is included as Exhibit D.

The cumulative impacts of methane development and the TRR will forever change the landscape of the Tongue River valley. The STB has either downplayed or systematically ignored many of these cumulative impacts in the Draft Supplemental

⁴ Tongue River Railroad Company-Rail Construction and Operations-Western Alignment in Rosebud and Big Horn Counties, Montana, Petition for Leave to File Supplemental Evidence, January 17, 2003. A copy of the transcript of the deposition of Mike Gustafson taken on November 19, 2003 is included as Exhibit N.

Environmental Impact Statement (SDEIS). Northern Plains submits these comments on the SDEIS.⁵

TRR I, TRR II, and TRR III are connected and cumulative actions. The lack of construction of TRR I since its approval in the 1980s shows that it has no independent utility from TRR II and TRR III. TRR I, TRR II, and TRR III have no independent utility and are thus connected actions. NEPA requires that the STB complete a single EIS analyzing the cumulative impacts of the entire railroad. 40 C.F.R. §1508.25(a); *Kleppe v. Sierra Club*, 427 U.S. 380, 410 (1976). The STB must request that TRRC submit a unified application for the entire length of the railroad.

III. STB Decision to Separate its Public Convenience and Necessity Analysis from its Analysis of Environmental Impacts is Arbitrary and Capricious

Northern Plains and the United Transportation Union have repeatedly expressed opposition to the STB's decision-making process that allows the public convenience and necessity determination to precede the required analysis of environmental and socioeconomic impacts under the National Environmental Policy Act (NEPA). This decision-making process predisposes the final decision because the STB has preliminarily determined that the project is in the public need before it has even completed its environmental analysis.

IV. The TRR III Proceedings are Governed by the Interstate Commerce Commission Termination Act Savings Clauses and

⁵ Northern Plains has joins and incorporates by reference the comments submitted by Gordon MacDougall, Attorney for the United Transportation Union, General Committee of Adjustment on the Burlington Northern and Santa Fe Railway Company, and Montana State Legislative Board. Northern Plains also incorporates by reference comments and information submitted by Northern Plains in all the TRR II proceedings and the pending TRR III proceedings (emphasis added).

there is no Presumption that a Proposed Railroad is in the Public Need

Northern Plains joined a March 31, 2003 Petition for Consideration filed by the United Transportation Union. In that petition, Northern Plains and the Union took the position that this case, along with TRR II, is governed by the §204 of the Interstate Commerce Commission Termination Act of 1995 (ICCTA). TRR II was pending in 1995 and TRR sought to reopen the case in 1997, while judicial review was pending. Instead, the STB assigned a new docket number to TRR III. A manipulation of docket numbers by the STB cannot erase the rights preserved by §204 (savings clause) of the ICCTA of 1995. In a decision dated May 15, 2003, the STB rejected Northern Plains' and the Union's argument. Northern Plains goes on record to reaffirm its position that both TRR II and TRR III fall within the savings clause of the ICCTA of 1995 (emphasis added).

The current STB enabling act, 49 U.S.C. §10901(c), provides that the STB shall issue construction licenses “unless the Board finds that such activities are inconsistent with the public convenience and necessity.” While the “public convenience and necessity” is not defined by statute, the STB in its TRR II decision broke with prior precedent and adopted a radical re-interpretation of its enabling act. In TRR II, the STB considered three factors in making this determination. First, the STB inquires as to whether there is a public demand or need for the proposed service. Second, the STB determines whether the applicant is financially capable of constructing the railroad and providing service. Third, the STB decides if the railroad is in the public interest and whether it would unduly harm existing services. The STB also used this new three-pronged test in its decision in *Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, Finance Docket No. 33407*. The STB has never explained the rationale behind this interpretation of the statute especially in light of the departure from the STB's prior precedent in interpreting this requirement. Northern

Plains' renews its objection to this three-part test articulated for the first time in TRR II-a decision that is pending judicial review. The STB has decided that this new statutory language creates a presumption that proposed railroads are in the public need and thus a presumption favoring approval of such railroads. Northern Plains renews its objection to this statutory interpretation because it is inconsistent with the plain language of the law.

V. STB Reliance on the Development of the Otter Creek Coal tracts and Coal-fired Power Plants near Ashland to Justify the Public Need for the Railroad and Simultaneous Finding that the same development is Not Reasonably Foreseeable and Thus Need Not be Considered in its Cumulative Environmental Impacts Analysis is Arbitrary and Capricious

In its preliminary determination that the TRR is in the public need, the STB relies, at least in part, on the development of coal tracts along Otter Creek and the development of coal-fired power plants near Ashland, Montana. The STB contends that the TRR is needed to provide a means of hauling coal from yet-to-be leased much less permitted coal tracts. Yet in the SDEIS, the STB concludes that the proposed coal mines and power plants are too speculative to be considered reasonably foreseeable future actions. Consequently, the STB failed to evaluate the potential cumulative impacts of this development on the human environment. This STB decision is disingenuous, implausible, and a textbook example of arbitrary and capricious decision-making. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

VI. Clean Water Act Issues

Nowhere in the SDEIS does the STB disclose the need for it to obtain certification from the State of Montana that the construction and operation of the TRR will not violate Montana water quality standards as required by Section 401 of the Clean Water Act.

Many of Montana's numeric and narrative water quality standards are directly applicable to the construction and operations of the railroad including narrative standards that prohibit changes in water quality that will adversely impact aquatic life and other beneficial uses. The SDEIS does not even mention any of these applicable water quality standards. Furthermore, the discussion of the status of Tongue River as it relates to the State of Montana TMDL process is completely out of date. 4-28.

In response to the potential impacts from methane development, the State of Montana has spent millions of dollars over the last 24 months to reassess the entire Tongue River and its tributaries. Electronic copies of the *Total Maximum Daily Load Status Report for the Tongue River Planning Area* (March 14, 2003) and the power-point presentation summarizing the most recent findings of the re-assessment process for the Tongue River from an August 2004 Technical Working Group meeting are attached as Exhibits E and F respectively. These documents contain critical baseline water quality and aquatic resources (macroinvertebrates, periphyton, and fisheries) that the STB has failed to provide and consider in the SDEIS. The STB needs to use the most up-to-date information to identify and discuss the status of the Tongue River and its tributaries for the entire length of the railroad; discuss the magnitude and sources of impairment, and discuss how such impairments could be worsened by the construction of the railroad, and propose and evaluate the effectiveness of mitigation measures to prevent further degradation of such waters caused by the construction of the railroad.

Furthermore, the Montana Water Quality Act requires that new non-point sources of pollution implement "reasonable soil, land, and water conservation practices." MCA §75-5-702. These practices must include "methods, measures, or practices that protect present and reasonably anticipated beneficial uses." ARM §17.30.602. The SDEIS fails to mention any of these requirements.

VII. STB Ignored the Requirements of the Montana Constitution

Nowhere in the entire SDEIS does the STB discuss its obligations under the Montana Constitution, Article II, Section 3, and Article IX, Section I, that guarantees every citizen a fundamental right to a clean and healthful environment. In *Montana Environmental Information Center v. Department of Environmental Quality*, 1999 Mont. 248, 988 P.2d 1236, the Montana Supreme Court rules that infringement of this fundamental constitutional right would be subject to strict scrutiny and that an infringement on that right would require a compelling state interest achieved by means narrowly tailored to meet that state interest. The STB is bound by the Montana Constitution. Pursuant to the Administrative Procedures Act, the STB decision must be in accordance with the law. The STB fails to mention, much less discuss, whether the TRR violates this provision of the Montana Constitution.

Further, the Montana Constitutional right to a clean and healthful environment is intertwined with environmental considerations, which in Montana means that the environmental analysis must be part and parcel of a permitting decision.

VIII. STB Failed to Take the Hard Look Required by NEPA

A. Purposes of NEPA

The Supreme Court has declared that NEPA is an environmental full disclosure law. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). NEPA “does not set out substantive environmental standards, but instead establishes ‘action-forcing’ procedures that require agencies to take a ‘hard look’ at environmental consequences.” NEPA’s action-forcing procedural requirements serve two central purposes. First, they provide decision makers with environmental disclosure

sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences. Second, they make available to the public, information on the proposed project's environmental impact and encourage public participation in the development of that information. These twin informative purposes foster environmental awareness, the ultimate purpose of NEPA, by integrating environmental concerns into the agency decision-making chain and by ensuring the public that the agency is complying with its NEPA mandate.

When an agency violates NEPA's procedural requirements, the result is environmentally blind decision-making, the precise type of agency behavior NEPA was designed to curtail. As the Ninth Circuit Court of Appeals recently stated, "we have characterized the statute as 'primarily procedural' and held that agency action taken without observance of the procedures required by law will be set aside." *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).

The very purpose of NEPA's EIS requirement "is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action. *Foundation for North American Wild Sheep v. United States Department of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982). After all, once a project begins, the pre-project environment becomes a thing of the past and valuating the project's effect on pre-project resources is simply impossible.

NEPA requires the STB to take a hard look at the environmental impacts of the TRR.

An agency decision is arbitrary and capricious if:

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

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

B. Scope of EIS is Unlawfully Narrow-STB Must Re-examine the Alternatives, Environmental Consequences, and Mitigation for the Entire Length of the TRR in a single EIS in Light of the Significant New Information and Changes in Circumstances

STB's discretion to define the scope of an EIS does not permit the agency to do so in a manner to evade NEPA's requirements. An agency's discretion to determine the purpose and need of a project is not unfettered. Courts require an agency's definition of purpose to be reasonable. City of Carmel-by-the-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-96 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991).

Courts impose this standard to ensure that agencies do not avoid NEPA's requirements by defining a project's purpose so narrowly as to preclude consideration of reasonable alternatives. Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997); City of New York v. United States Dep't of Transp., 715 F.2d 732, 743 (2d Cir. 1983), cert. denied, 456 U.S. 1005 (1984); Citizens Against Burlington, 938 F.2d at 196.

A recent case in the Seventh Circuit explained the fundamental importance of ensuring that agencies do not avoid NEPA's requirements by unreasonably restricting the statement of purpose:

One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. § 4332(2)(E).

Simmons, 120 F.3d at 666. See also City of Carmel, 123 F.3d at 1155 (“an agency cannot define its objectives in unreasonably narrow terms”); City of New York, 715 F.2d at 743 (“an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered”); Citizens Against Burlington, 938 F.2d at 196 (“an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action”).

On its face it appears that the STB made the right decision and decided to prepare a supplemental EIS. In reality, the STB has circumvented NEPA by unlawfully narrowing the scope of the supplement to an examination of the environmental consequences of the 17.1-mile Western Alignment and a focused review of TRR I and II, which was limited to examining the potential impacts of changes in the alignment of the proposed railroad and proposed mitigation measures. 31 thru 3-9.

Once an agency decides to prepare a supplement, NEPA requires that the agency prepare and file a supplement in the same fashion as a draft and final statement. 40 C.F.R. §1502.9(c)(4). A supplemental EIS, just like a draft or final EIS, must cover the same topics as outlined in the NEPA regulations-examine alternatives, consider the direct, indirect, and cumulative environmental impacts of the identified alternatives, and consider mitigation measures that might avoid or minimize identified impacts. The purpose of a supplemental EIS is to re-examine these topics in light of substantial changes in the proposed actions or significant new information or circumstances relevant

to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. §1502.9(c).

By impermissibly narrowing the scope of the supplement to an examination of the environmental consequences of the 17.1-mile Western Alignment and a focused review of TRR I and II (limited to examining the potential impacts of changes in the alignment of the proposed railroad and proposed mitigation measures), the STB evades its NEPA obligation to re-examine its environmental analysis and decisions in TRR I and TRII. For example, the STB failed to re-examine alternative route locations for the Miles City to Ashland segment of the railroad in light of the cumulative impacts caused by methane development. The TRR I FEIS is over two decades old and the TRR II FEIS is almost a decade old. The STB's analysis of alternatives, environmental impacts, and mitigation in these documents is meaningless considering the emergence of methane development and its predicted significant environmental impacts on virtually every resource in the Tongue River valley.

The STB also failed to consider a true "no action" alternative-not building any portion of the proposed TRR in light of the cumulative impacts caused by methane development. The STB's failure to consider a true "no action" alternative violated NEPA. 40 C.F.R. §1502.14(d).

C. STB has unlawfully tiered to other NEPA documents

On page 1-17, the STB states that it intends to rely upon several Environmental Impact Statements to support its environmental analysis. To the extent that the STB is attempting to tier to these documents, 40 C.F.R. §1502.20 of the Council of Environmental Quality (CEQ) regulations governs and encourages agencies to tier their

EISs to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review. The purpose of the regulation is to encourage tiering in two specific contexts: (1) when a broad programmatic statement has been prepared and a later site-specific analysis is being produced and (2) when analyses are prepared for different stages of a proposed action.

None of the five documents cited by the STB fit either of these categories of documents. Three of the documents analyze the impacts of leasing federal coal tracts and developing two proposed coal mines. The fourth document analyzes the impacts of the improvement and expansion of the Tongue River Reservoir dam. Several of these documents are over twenty years old and all of them were prepared prior to start of coal bed methane development in the Powder River Basin of Montana and Wyoming. Consequently, none of the documents considers the cumulative impacts of methane development. The fifth document is the Statewide Methane FEIS-a document that is the subject of pending litigation.⁶

Even if it were appropriate to tier to these outdated EISs, the STB violated NEPA by failing to provide any summary of the analyses contained in those documents as required by 40 C.F.R. 1502.20. For example, the discussion of the environmental impacts identified in the Statewide Methane FEIS is limited to eight bullets on page 6-10. These eight bullets mischaracterize the impacts predicted by the inadequate document.

D. STB violated NEPA because the description of affected environment (baseline conditions) is inadequate and does not allow for a meaningful evaluation of the potential environmental consequences of the TRR

⁶ The adequacy of the Montana Methane FEIS is the subject of five separate lawsuits in Montana federal district court.

40 C.F.R. §1502.15 requires agencies to “describe the environment of the areas to be affected or created by the alternatives under consideration.” Establishment of baseline conditions is a requirement of NEPA. In Half Moon Bay Fisherman’s Marketing Ass’n v. Carlucci, 857 F.2d 505, 510 (9th Cir. 1988), the Ninth Circuit stated that “without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” “The concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process.”

The STB has failed to provide an adequate description of baseline conditions for virtually every single resource. Thus, it is not surprising that the STB’s analysis of the environmental impacts of the TRR is inadequate.

As discussed previously, the STB’s description of baseline water quality conditions of the Tongue River and its tributaries is out-of-date and inadequate. The STB’s description of baseline conditions of aquatic resources (macroinvertebrates, periphyton, and fisheries resources is also inadequate). Attached as Exhibit G, is a *Confluence Consulting Assessment of Tongue River Water Chemistry and Aquatic Life* (2003) prepared by BLM. See also Exhibit C, E, and F.

The STB has provided no baseline data on wildlife populations and habitat within the Tongue River valley-STB provides no baseline wildlife data for any species, including threatened and endangered species and species of special concern, no estimates of current population numbers, population trends (or causes for those trends), habitat

requirements, habitat conditions, or identification of critical wildlife habitat (winter range, calving ranges, nesting sites, etc.).

The STB does not provide data or information on current population numbers or trends or geographic distribution or any quantifiable information on the amount and quality of existing habitat for a single wildlife species, including 50 species of special concern including ESA listed and candidate species. The SDEIS does not even list all the species of wildlife that are found in the valley, which include 76 species of mammals, 250 species of birds, 9 species of amphibians, and 14 species of reptiles. See Exhibit C.

The Montana Methane FEIS admits that “several species of concern have suffered substantial habitat loss and population declines and are considered to be rare or are protected by federal statutes. There are 50 species of concern listed in the Wildlife Appendix, yet the SDEIS contains no data regarding existing population levels, existing distribution, existing trends and reasons for trends, habitat requirements including critical habitat requirements, habitat conditions, and identify uncertainty of it. The SDEIS does not contain a single map showing the distribution of a single species in the valley.

There are 250 species of birds in the Tongue River valley including numerous species of concern. The Montana Methane FEIS states that there are 137 species of songbirds and that species richness and breeding bird densities are highest in riparian woodlands and wetland habitats but provides no baseline information for any of the 137 species. The Montana Methane FEIS admits that burrowing owls are of particular interest because of the rapid decline in their numbers and because they appear to be totally dependent on mammal burrows with prairie dog towns providing prime habitat and admits that

ferruginous hawks and merlins have suffered substantial population declines in the planning area. Yet the SDEIS provides no baseline data on these species.

A wide variety of neotropical migrants pass through or breed in the planning areas and that many of these species are declining throughout their range. The SDEIS fails to identify each species of neotropical migrant that occurs in the planning area, identify existing population levels, existing distribution, existing trends (increasing, decreasing, steady) reasons for trends, habitat requirements including critical habitat requirements, and habitat conditions.

The SDEIS provides no baseline data on between 6-9 species of amphibians and 12-14 species of reptiles in the valley despite the fact that leopard frogs have declined substantially in western and to a somewhat lesser extent, central Montana. The SDEIS does not provide baseline information on any of these species.

The SDEIS provides no baseline data for the mountain plover, prairie dog, sage grouse (candidate species under the ESA), or bald eagles (threatened species under the ESA). The Montana Bald Eagle Working Group, as well as several coal bed methane companies, has collected baseline data on bald eagle nesting sites and habitat along the entire length of the Tongue River. Attached as Exhibits H and I are copies of the BLM's *Environmental Assessments and supporting technical documents for Fidelity Exploration and Production Company's (Fidelity) Badger Hills Expansion Project and Powder River Gas Company's Coal Creek Project*. The data collected by the Bald Eagle Working Groups is readily available and the STB has an obligation to collect such data and use it to analyze the potential impacts of the construction and operation of the entire railroad line based on current baseline conditions.

The SDEIS contains no baseline data on the number of acres and locations of prime farmland in relation to the proposed railroad. The SDEIS contains no baseline information on the productivity of such prime farmlands and the importance of such irrigated lands to the farms and ranches of the valley. Without this information, there is no way to quantify the cumulative impacts of the construction of the TRR and methane development on this critical resource.

The SDEIS contains no baseline air quality data for the valley. The SDEIS inventory of potential past, present, and reasonably foreseeable pollution emission sources is incomplete. See Exhibit J for a complete list and location of such emission sources and summary of current air quality problems ignored by the STB.

The SDEIS contains no baseline data on the number of railroad jobs in Forsyth, Montana or Sheridan, Wyoming that could be impacted by the construction of the TRR. The SDEIS contains no baseline data on the number of jobs at the existing coal mines that could be impacted by the construction of the TRR. The SDEIS contains no information on the number of agricultural sector jobs that could be lost because of the cumulative impacts of the TRR and methane development.

One of the pervading flaws of the SDEIS is the STB's failure to require TRR to collect required baseline data including but not limited to wildlife inventories and aquatic resources inventories for this NEPA process. Time and time again the STB defers the collection of such critical baseline data to the construction phase in the form of mitigation measures. The very purpose of NEPA's EIS requirement "is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action. *Foundation for North American Wild Sheep v.*

United States Department of Agriculture, 681 F.2d 1172, 1179 (9th Cir. 1982). After all, once a project begins, the pre-project environment becomes a thing of the past and valuating the project's effect on pre-project resources is simply impossible.

Furthermore, the STB repeatedly states that access to conduct necessary surveys and collect baseline data was impossible because of private property. The STB never explains whether it attempted to negotiate such access or why such access could not be acquired. The STB has an obligation to collect such baseline information for inclusion in its NEPA analysis. 40 C.F.R. §1502.22 (emphasis added). The BLM and other state and federal agencies have conducted numerous inventories on private lands to collect data in anticipation of methane development. See Exhibit K.⁷ There is no reason that the STB and TRRC cannot do the same.

E. STB violated NEPA by not Considering a Reasonable Range of Alternatives For the Entire Length of the Railroad in Light of the Cumulative Impacts of Methane Development

NEPA requires that federal agencies provide a detailed evaluation of alternatives to the proposed action in every environmental impact statement. 42 U.S.C. § 4332(C)(iii); 40 C.F.R. § 1502.14(a). This discussion of alternatives is essential to NEPA's statutory scheme and underlying purpose:

The goal of the statute is to ensure “that federal agencies infuse in project planning a thorough consideration of environmental values.” The consideration of alternatives requirement furthers that goal by guaranteeing that agency decision-makers “[have] before [them] and take into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance.” NEPA's requirement that alternatives be studied, developed, and described both

⁷ Exhibit K includes numerous studies collecting baseline data and evaluating the environmental impacts of methane development on numerous resources. For the most part, the STB failed to consider most of the impacts of methane development discussed in these various studies.

guides the substance of environmental decision-making and provides evidence that the mandated decision-making process has actually taken place. Informed and meaningful consideration of alternatives -- including the no action alternative -- is thus an integral part of the statutory scheme.

Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989) (citations and emphasis omitted), cited in Alaska Wilderness, 67 F.3d at 729. Indeed, NEPA's implementing regulations recognize that the consideration of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14, quoted in Alaska Wilderness, 67 F.3d at 729, 730.

Accordingly, the regulations and cases set high standards for considering alternatives in an environmental impact statement and define the range of alternatives that must be considered. The agency must "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action. 40 C.F.R. § 1502.14(a) (emphasis added); see City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9th Cir. 1990). The Ninth Circuit has strictly enforced this requirement in numerous cases:

To be adequate, an environmental impact statement must consider every reasonable alternative. An EIS is rendered inadequate by the existence of a viable but unexamined alternative. . . . Thus, the range of alternatives considered must be sufficient to permit a reasoned choice.

Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815 (9th Cir. 1987) (citations omitted), rev'd on other grounds sub nom. Robertson v. Methow Valley Citizens Council, 490 U.S.

The CEQ regulations emphasize that:

[The alternatives] section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment and Environmental Consequences, it should present the environmental impacts of the proposal and the alternatives in comparative form,

thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public. In this section, agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 CFR 1502.14

The STB failed to re-examine alternative routes for the entire length of the TRR in light of the cumulative impacts caused by methane development and thus violated NEPA.

F. The STB Violated NEPA by not Considering Numerous Direct and Indirect Impacts

After establishing baseline conditions for the resources likely to be impacted, NEPA requires agencies to consider the direct, indirect, and cumulative impacts (see Section VIII, §G) on the environment. 40 C.F.R §1508.8; 40 C.F.R. §1508.25(c); 40 C.F.R §1502.16 Direct effects are those “caused by the action and occur at the same time and place” and indirect effects are those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. §1508.8(a) and (b).

General statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided. *Neighbors of Cuddy Mountain v. USFS*, 137 F.3d 1372, 1380 (9th Cir. 1998). *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1999)

Courts have repeatedly emphasized that merely identifying "risks" of adverse impacts, without including an analysis of the nature and extent of the resulting impacts is

insufficient for purposes of NEPA. *See, e.g., Defenders of Wildlife*, 130 F. Supp. 2d 121, 128 (D. D.C. 2001)(setting aside agency's EIS where it "states that noise would be increased and both the pronghorn and their habitat would be disturbed" but contained "no analysis of what the nature and extent of the[se] impacts will be"); *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 743 (9th Cir. 2001) ("Before one brings about a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges.").Therefore, without an analysis of the on-the-ground effects that are likely to flow from the various "risks" identified in the EIS, there is no way for either the agency or the public to make a meaningful evaluation of competing alternatives which, after all, is the core purpose of preparing a NEPA document in the first place.

NEPA requires, to the point reasonably ascertainable, analyzing and disclosing the DEGREE of impacts to resources, not just merely stating the obvious. E.g., how will fragmented wildlife habitat affect each species by location and distinct population, how will soil loss encourage weed infestation by new species invading and change in vegetative community (which in turn will affect wildlife, soils, biomass accumulation, ecological processes, etc.).

Conclusory statements which do not refer to scientific or objective data supporting them do not satisfy NEPA's requirement for a "detailed" environmental impact statement. *Citizens Against Toxic Sprays, Inc. v. Bergeland*, 428 F.Supp. 908 (1977). NEPA's implementing regulations require agencies to:

[I]nsure the professional integrity, including scientific integrity of the discussions and analysis in environmental impact statements. [Agencies] shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement.

40 CFR 1502.24 (Methodology and Scientific Accuracy).

In *Idaho Sporting Congress v. Thomas*, the Ninth Circuit addressed the issue of agency expert opinion of scientific data in the NEPA context and held:

Since [the EA] relies solely on Forest Service hydrologist expert opinion, a successful challenge to the [EA] would entail challenging his expertise and opinions, yet, this is the type of challenge we have found impermissible under arbitrary and capricious review. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992) (finding that an agency is entitled to rely on its own scientific opinion of data). As a result, allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second-guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion (citing for authority 40 CFR 1502.24)

NEPA, 40 C.F.R. §1502.1, mandates that EIS conclusions be “supported by evidence that the agency has made the necessary environmental analysis.” Agencies must disclose the underlying scientific data and rationale supporting the conclusions and assumptions of the EIS. As a preliminary matter, the SDEIS is riddled with innumerable examples of broad, unsupported assumptions and conclusions regarding the environmental impacts or lack thereof of the proposed railroad.

The list of direct and indirect impacts not considered in the SDEIS is almost endless, but the following discussion discusses the most significant omissions.

- The impacts of increased rail traffic through Miles City. The STB failed to consider the impacts of increased train traffic through Miles City on traffic and safety at railroad crossings in town. STB failed to consider the impacts of increased train traffic on noise levels within Miles City and on residences near the railroad tracks.

- The SDEIS fails to discuss the impacts of the TRR on the Amish settlement north of Ashland, Montana and fails to discuss whether the small community will be disproportionately impacted by the railroad.
- The SDEIS surface water quality analysis does not even use the most recent information available from the State of Montana and Environmental Protection Agency. As part of its Total Maximum Daily Load (TMDL) process, the agencies have reassessed the Tongue River-none of this data is in the SDEIS.
- The SDEIS does to quantify the number of acres of prime farmland and range land that will be lost to the TRR. The SDEIS does not quantify the location of such losses including the loss for each farm/ranch crossed by the TRR. The SDEIS does not quantify the number of parcels (of prime farm land or range land) that will be severed by the TRR. The SDEIS does not quantify the impacts of such losses and severance on individual farming and ranching operations. No discussion of the impacts of such losses and severance on the fair market value of the ranches or the ability of the landowner to sell such ranch.
- The SDEIS fails to discuss the impacts of the railroad on the market value of ranches in the valley.
- No discussion of the impacts of the TRRC diverting water from the Tongue River for construction purposes. No discussion of the legal requirements of the Montana Water Use Act or discussion of whether any water is legally available for such use or the environmental impacts of such diversions in downstream irrigators or aquatic life.

- STB fails to evaluate the impacts of increased sediment rates on aquatic life including macroinvertebrates, periphyton, and fisheries including the endangered pallid sturgeon and other species of concern.
- STB fails to evaluate the impacts of the hundreds of crossings of intermittent and ephemeral streams on natural runoff events during storm events and snowmelt events or the impacts of such changes on surface water quality.
- The STB fails to quantify the impacts of the TRR on a single species of wildlife.
- The SDEIS fails to discuss the impacts of the TRRC resorting to eminent domain to acquire right-of-way for the railroad. The SDEIS fails to discuss the requirements of Montana Eminent Domain law and discuss the impacts of such a process on the financial costs of constructing the railroad and the economic impacts on local farmers and ranchers and the viability of their farms and ranches.
- The SDEIS fails to quantify the impacts of the construction and operation of the TRR on wildlife occurrences and fails to quantify the impacts on the spread of noxious weeds (no baseline data on noxious weeds in valley is provided including a list of noxious weed species and location of current infestations).
- The SDEIS fails to quantify the impacts of the railroad on traffic levels on county, state, and private roads in the valley including increased accident rates and increased demands on local fire and rescue services.
- The SDEIS fails to quantify the number of railroad jobs that could be lost in Forsyth and Sheridan and the resulting indirect socioeconomic impacts of the loss of such jobs.

- The SDEIS fails to quantify the number of coal mining jobs that could be lost at coal mines in Montana in the northern portion of the Powder River Basin and the indirect socioeconomic impacts of the loss of such jobs.
- The SDEIS fails to quantify the impacts of work camps on private landowners, local emergency services, fires, noise levels, or surface water and ground water resources (septic systems) etc. 4-59. Work camps can have numerous impacts-none of which are discussed by the STB in the SDEIS.

G. STB violated NEPA by failing to adequately consider the cumulative impacts on numerous resources that will be impacted by the TRR, methane development, and other past, present, and reasonably foreseeable actions.

1. Legal Standard

NEPA, 40 CFR 1508.27(b)(7), defines a cumulative impact as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

In *City of Carmel-by-the-Sea v. U.S. Dep't of Trans.*, 123 F.3d 1142, 1160 (9th Cir. 1997), the Ninth Circuit held that a NEPA document must “catalogue adequately the relevant past projects in the area.” It must also include a “useful analysis of the cumulative impacts of past, present, and future projects [which] requires a discussion of how [future] projects together with the proposed . . . project will affect the environment.” The NEPA document must analyze the combined effects of the actions in sufficient detail to be “useful to the decision-maker in deciding whether, or how, to alter the program to lessen cumulative impacts.” Detail is therefore required in describing the cumulative

effects of a proposed action with other proposed actions. Neighbors of Cuddy Mountain v. USFS, 137 F.3d at 1379 (9th Cir. 1998); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214-15 (9th Cir. 1998).

In Muckleshoot Indian Tribe v. USFS, the Ninth Circuit held that “twelve sections [of an EIS] entitled cumulative impacts . . . [that] provide very broad and general statements devoid of specific, reasoned conclusions . . . were far too general and one-sided to meet NEPA requirements.” The Court went on to state that the statements regarding the potential cumulative impacts “fall far short of a ‘useful analysis’ as required by City of Carmel, 123 F.3d at 1160. “To consider cumulative effects, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the Forest Service’s decisions, can be assured that the Forest Service provided the hard look that it is required to provide [under NEPA].” Neighbors of Cuddy Mountain v. USFS, 137 F.3d 1372, 1376 (9th Cir. 1998). In Cuddy Mountain, the Court explained “[g]eneral statements about ‘possible’ effects and ‘some risk’ do not constitute the ‘hard look’ absent a justification regarding why more definitive information could not be provided. *Id.* See *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 361 F.3d 1108, 1128 (9th Cir. 2004) (quoting *Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). The analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Id.* The SDEIS falls fall short of this standard.

As the Ninth Circuit recently observed, “[c]umulative impacts of multiple projects can be significant in different ways. The most obvious way is that the greater total magnitude of the environmental effects-such as the total number of acres affected or the

total amount of sediment to be added to streams within a watershed- may demonstrate by itself that the environmental impact will be significant. Sometimes the total impacts from a set of actions may be greater than the sum of the parts.” *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 2004 U.S. App. LEXIS 22435, 22443

2. Inadequate Cumulative Impacts Analysis

The SDEIS does not discuss the other past, present, and reasonably foreseeable future projects and does not provide a “quantified assessment of their combined environmental impacts.” The STB makes no attempt to quantify any of the environmental impacts from coal bed methane development despite the fact that the BLM just completed an Environmental Impact Statement that purportedly analyzed those impacts.⁸

The alleged “cumulative impacts” analysis does not provide a useful analysis of the impacts. The STB has an obligation to provide an “objective quantification of the impacts” and when conclusions are made, to disclose “what data the conclusion was based on, or why objective data cannot be provided.” *Id.* “General statements about possible effects and some risk” do not constitute the requisite “hard look” at potential cumulative impacts. *Id.* Like the cumulative impacts analyses the Ninth Circuit found inadequate in *Cuddy Mountain*, *Ocean Advocates*, and *Klamath-Siskiyou*, the cumulative impacts analysis in the SDEIS is full of ‘generalized conclusory statements that the effects are not significant or will be effectively mitigated.” *Klamath-Siskiyou* at 22449. NEPA documents are inadequate if they contain only narratives of expert opinions.

⁸ The Bureau of Land Management’s Final Statewide Oil and Gas Environmental Impact Statement and Amendment of the Powder River and Billings Resource Management Plans (2003) is the subject of litigation in federal district court. The combined litigation contends that the BLM decision violates the NEPA, FLPMA, CAA, and CWA.

Idaho Sporting Cong. V. Thomas, 137 F.3d 1146, 1150 ((9th Cir. 1998) (“Allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff’s ability to challenge an agency action or results in courts second guessing an agency’s scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.”). As the CEQ regulations emphasize, “public scrutiny [is] essential.” 40 C.F.R. §1500.1(b).

The STB analysis in the SDEIS is fatally flawed because it does not even adequately consider and quantify the direct and indirect environmental impacts of the TRR, much less take into account the combined environmental effects that can be expected as a result of construction and operation of the railroad, coal bed methane development in the Powder River Basin, and other foreseeable projects. Some examples will illustrate the flaw in the STB cumulative impacts analysis.

The Statewide Methane FEIS predicted that the air quality impacts from methane development under Alternative E will include:

- A. Localized short-term increases in carbon monoxide, nitrogen oxides, sulfur dioxides, PM2.5, and PM10 concentrations.
- B. Maximum concentrations are expected to be below applicable state and NAAQS and PSD increments for near-field and far-field modeling.
- C. Potential direct visibility impacts within seven mandatory federal PSD Class I areas and the Northern Cheyenne Reservation. Additional visibility impacts to seven federal PSD Class II areas including the Crow and Fort Belknap Indian Reservation and three wilderness areas and one national recreational area and one national monument.
- D. Cumulative impacts (assumes dust suppression implemented at 50% effectiveness and BACT 1.5 nitrogen oxides required)
 - a. Potentially exceed the 24-hour PM10 and PM2.5 NAAQS south of Spring Creek Mine.
 - b. Potentially exceed the PSD Class II increments for 24-hour PM10 south of Spring Creek Mine.

- c. Potentially exceed PSD Class I increments for 24-hour PM10 on the Northern Cheyenne Reservation and Washakie WSA.
- d. Potentially exceed PSD Class I increments for annual nitrogen oxides on the Northern Cheyenne Reservation.
- e. Potentially exceed atmospheric depositions thresholds in the very sensitive Upper Frozen Lake in the PSD Class I Bridger Wilderness Area and Florence Lake in the Class II Cloud Peak Wilderness Area.
- f. Potential visibility impacts in all federal PSD Class I (17 areas) and II (13 areas) sensitive areas including the Northern Cheyenne, Fort Peck, Fort Belknap, and Crow Indian Reservations

FEIS 4-13.

These predicted impacts do not include emissions from numerous past, present, and reasonably foreseeable future projects, including the TRR. See Exhibit J. Furthermore, these predicted impacts already assume that best available emissions control technologies and best management practices (like reduced speed limits and dust suppression methods) are implemented. There is little additional mitigation, short of denying air quality permits to methane operators, that Montana Department of Environmental Quality can require to limit emissions. The STB statement on 6-24 that “implementation of mitigation measures in conjunction with mitigation measures for CBM gas-well development imposed by BLM would ensure no adverse cumulative effects to regional visibility and haze would occur” has no basis in reality.

The Environmental Assessment and Finding of No Significant Impact for the Fidelity Exploration and Production Company Badger Hills Plan of Development drives home this point. In the EA, the BLM predicts that emissions from the project when combined with past, present, and reasonably foreseeable future actions (which excludes the TRR and 217-well Fidelity Coal Creek Project) will consume nearly all the available Class II nitrogen oxide increment and a significant portion of the Class I increment. See Exhibit H.

The emissions from the construction and operation of the *entire* TRR can only exacerbate predicted impacts from methane development. The STB has made no attempt

to quantify the impacts of emissions from the operation and construction of the entire TRR much less consider what the cumulative impacts will be when combined with emissions from methane and other reasonably foreseeable future development. The STB's three-page discussion of cumulative air quality impacts on pages 6-18 thru 6-21 is inadequate and does not constitute the hard look required by NEPA. The STB's attempt to limit the scope of its cumulative air quality impacts analysis to the Western Alignment and Air Quality Control Region 143 in Montana violates NEPA.

The STB has failed to adequately consider the cumulative impacts of the TRR on farms and ranches of the Tongue River valley and regional economy they support. The STB concludes that no adverse cumulative impacts to land use resources are expected as a result of the construction of the railroad and states that "the rail line is not expected to constrain development or land use activities in the project area, including existing ranching and farming operations." 6-12; 6-13. This statement is inconsistent with the impacts predicted in the Statewide Methane FEIS.

The FEIS states that "[m]itigation agreements are expected to facilitate replacement of water lost in the drawdown of groundwater levels within producing coal seam aquifers, but in areas of concentrated depletion water sources may not support water replacement. In such cases, either agriculture that depends upon the groundwater, or CBM development would need to be limited." FEIS 4-63. In addition to the loss of springs and wells caused by methane dewatering activities, many of the same farms and ranches that will be crossed by the TRR also face methane development. The STB's statements that "speculative location of CBM gas wells makes an adverse cumulative effect unlikely" and methane development is "not expected to create adverse cumulative effects due to the relatively small area impacted and reclamation of the land back to its original state after the gas has been extracted" is contrary to the evidence before the STB.

Methane development will have devastating impacts on the farms and ranches of the Tongue River valley. In addition to having their pastures and irrigated fields bisected by the TRR and the fair market value of their ranch reduced forever, the farmers and ranchers of the valley will face the loss of their springs and wells used for livestock watering and domestic uses for decades to come. These same farmers and ranchers will face the construction of miles of access roads and pipelines, hundreds of well pads, compressor stations, and the construction of impoundments to dispose of methane wastewater. The TRR and methane development will inflict numerous cumulative impacts on farming and ranching operations including but not limited to cumulative noise impacts on the silence of the valley, cumulative impacts on everyday ranching operations from the construction of roads and the railroad and resulting bisecting of pastures and irrigated fields, the loss of productive acres from surface disturbance, impacts on irrigation diversion and transportation structures from increased suspended sediment caused by increased erosion and sediment loading, loss of property value, loss of solitude, air quality impacts including the impacts of increased dust on livestock, increased traffic on county, state, and private access roads and the resulting increased accident rates, increased trespass caused by the increased access to private ranch lands, increased risk of fires, and increased infestation and spread of noxious weeds. These direct cumulative impacts on farms and ranches will have indirect cumulative impacts on the region's economy-an economy heavily dependent on agriculture sector jobs. The STB has failed to consider any of these potentially devastating cumulative impacts on the farming and ranching community. See Exhibits A, B, C, and Exhibit L (Aerial photographs showing impacts of methane development in the Powder River Basin)

The STB has also failed to consider the cumulative impacts of the construction the TRR and DM&E Railroads on existing coal mines in Montana. For over two decades,

economists hired at considerable expense by Northern Plains have repeatedly stated the obvious-if the TRR is built, it will give yet another competitive advantage to Wyoming coal and likely put some Montana coal mines out of business. At the public hearing on TRR III in Miles City on November 16, 2004, a representative from Westmorland Coal Company echoed this concern as the basis for the company's opposition to the construction of the Ashland to Decker segment of the railroad.

Ignoring evidence before it, the STB assumes, without any supporting data or analysis, that construction of the TRR will result in an increase in coal production in Montana. Yet on page 6-22, the STB admits that the TRR and other proposed railroads could "somewhat reduce the transportation costs associated with low-sulfur coal by shortening the route from existing mines to power plants in the upper Midwest region." The STB fails to consider the indirect impacts of lower transportation costs on existing coal mines in the northern portion of the Powder River Basin in Montana (namely the Sarpy Creek Mine and coal mines at Colstrip). As the representatives from Westmorland Coal Company, which owns and operates the Sarpy Creek Mine and one of the coal mines at Colstrip, testified at the Miles City hearing, Westmorland opposes the construction of the Ashland to Decker part of the railroad because of the likelihood that construction of the railroad will lower transportation costs for existing mines in the Powder River Basin and provide them with a competitive advantage that coal mines in the northern portion of the Basin currently enjoy. As a result, some of the coal mines in the northern portion of the Basin may close or at the very least cut back production. The STB has failed to consider these potential cumulative impacts. Furthermore, mine closures or reductions in production will have socioeconomic impacts on the region's economy. These socioeconomic impacts include job losses, decreases in property taxes and other tax bases, etc. The STB has failed to consider these cumulative socioeconomic

impacts. Many of these impacts would occur in some of the same areas that could lose railroad jobs as a result of the construction of the TRR-another impact that STB has failed to consider.

The STB's discussion of the cumulative impacts on wildlife and wildlife habitat is limited to three short paragraphs and is an inexcusable violation of the NEPA mandate to take a hard look at wildlife impacts. See 6-13 thru 6-14. This analysis is flawed in numerous respects. First, the STB fails to quantify the impacts of the TRR on a single species of wildlife-a failure that is not surprising considering the fact that the STB fails to provide baseline data for any species of wildlife and illegally defers numerous wildlife inventories, surveys, and studies to the preconstruction phase.

The STB's description of the impacts of methane development on wildlife and wildlife habitat is limited to two sentences: "Some disruption to wildlife, including big game migration, upland bird activity, and raptor activity, is expected to occur during CBM gas-well construction. These impacts are described in the BLM EIS as localized and temporary in nature." 6-13. This perfunctory description of methane development's impacts on wildlife is not just misleading, it is an outright lie.

Despite numerous inadequacies, the Montana Methane FEIS summarizes the cumulative impacts of Alternative B (an analysis which excludes the impacts of the TRR) as follows:

CBM development under Alternative B would have widespread ecosystem-level impacts on wildlife and wildlife habitat as discussed at length for Alternative A. Virtually every wildlife species that occurs within CBM development areas would be impacted, with sensitive species suffering the greatest impacts. For example, wintering and nesting sage grouse and nesting golden eagles would not be adequately protected by stipulations and would be expected to suffer large-scale impacts. It is likely that, at this scale of development, some species would become locally rare or vacate large areas. All of the wildlife groups listed in Table 4-17 would have a very high probability of being impacted throughout the CBM development area under Alternative B. Direct and indirect impacts on

wildlife from this scale of development would be both widespread and substantial. Same impacts as Alternative A for wildlife and species of concern; however, about 20 times greater in area and scope due to greater CBM well development and associated impacts of construction of such roads. FEIS 4-172, 4-175.

Even with the Wildlife Monitoring and Protection Plan required by Alternative E, the FEIS predicts that the direct, indirect, and cumulative impacts to wildlife species would be similar to those described for Alternatives B. FEIS 4-178-181. Although the Montana Methane FEIS makes no effort to quantify the impacts on any species of wildlife predicted from Wyoming development, it concludes that “impacts from Wyoming CBM development on wildlife and wildlife habitat would be . . . about 2.5 times greater than described for Alternative E. CBM development in Wyoming would have cumulative effects for many species of concern in Montana.” FEIS 4-171. A recent study shows that oil and gas development in Wyoming is having significant adverse impacts on mule deer populations and habitat use. See Exhibit K (Mule Deer Studies).

Furthermore, the United States Fish and Wildlife Service found that methane development would adversely impact bald eagles and mountain plovers, and issued an incidental take permit under Section 9 of the Endangered Species Act.

Given the impacts predicted from methane development, the STB’s conclusion that “known occurring species, including threatened and endangered species, would not be adversely impacted by the TRR in conjunction with CBM gas wells” is contrary to the evidence before the STB, implausible, and thus arbitrary and capricious.

The STB’s conclusion that no cumulative impacts on soil resources are expected as a result of the construction of the TRR on page 6-14 also ignores the evidence before

the agency. The STB assumes away the impacts of methane development on soil erosion and sediment loading into the Tongue River watershed because methane wells will not be drilled within the railroad right-of-way. Apparently the STB does not understand that methane development and the TRR will be located in the same watershed and that erosion and sediment loading will occur in the Tongue River and its tributaries. The STB's cumulative soils impacts analysis is inadequate. Numerous models used by the Forest Service and BLM to evaluate increases in sediment loading from timber harvesting and other natural resources development are available to model and quantify the potential cumulative impacts on soil erosion rates and sediment loading on the Tongue River watershed.

The STB cumulative water quality impacts analysis is also inadequate. The STB fails to consider numerous impacts that methane development will have on water quality. As discussed previously, the STB has failed to quantify the impacts of methane development on erosion rates, sediment loading, and increase total suspended sediment levels in the Tongue River. The construction associated with methane development has never been quantified but common sense tells one that industrial development on such a massive scale over such a large area will increase erosion and sediment in the Tongue River. The stimulation of methane wells can lead to high total suspended solid concentrations in methane discharges. See Exhibit M . Exhibits Filed in Support of Northern Plains Motion for Summary Judgment. The STB also erroneously assumes that because methane discharges are regulated by the Montana DEQ that there will be no impacts. The only producing methane operator in Montana-Fidelity Exploration and Production Company-has a long history of violating the Clean Water Act and Montana

and Wyoming state water quality laws and regulations. See Exhibit M. Some of these violations involved the discharge of untreated wastewater into intermittent tributaries of the Tongue River and failures of wastewater impoundments. These violations have the potential to cause further violations of water quality standards and to increase sediment loading to the Tongue River. The STB also fails to discuss the fact that methane discharges contain numerous other pollutants including ammonia, fluoride, and bicarbonate that can be toxic to aquatic life. See Exhibit K.

Finally, the STB concludes that methane development will have no cumulative transportation impacts including vehicular traffic, increased traffic delays, and accident rates. 6-17. The only rationale the STB provides to support its conclusion is that methane development is speculative and is not expected to occur adjacent to the railroad. Methane development will increase traffic on state, county, and private roads in the Tongue River valley-the same roads that will be used to access the TRR right-of-way. Methane development is predicted to occur over the next 10-20 years-construction of the railroad, if it ever happens, is likely to occur during methane development. It defies logic to argue that methane development will not have cumulative transportation impacts on roads in Rosebud, Big Horn, and Custer Counties.

The STB also failed to consider the cumulative impacts of methane development and the TRR on noise levels in the Tongue River valley. Methane development will require the construction and operation of hundreds of compressors-noise from which will cause cumulative impacts on the solitude of the valley and impact people as well as wildlife species-specifically song-birds.

3. Other Reasonably Foreseeable Future Actions Ignored by STB

To justify the public need for the TRR, the TRRC and STB have repeatedly touted the development of Otter Creek coal tracts and new coal-fired power plants near Ashland, Montana. Yet in the same breathe, the STB has determined that the development of the same coal tracts and power plants is “less than reasonably foreseeable” because none of the coal tracts have been leased, much less mine permits granted, and no transmission line right-of-way has been acquired. 6-6 thru 6-7. As a result, the STB did not consider the potential cumulative impacts of such development in its environmental analysis. If the STB is going to use the development of these coal tracts and power plants to justify the public need for the TRR, then NEPA requires that it consider the cumulative impacts of such development. The STB’s approach is disingenuous at best.

The STB also excluded the proposed Dakota, Minnesota, and Eastern Railroad from its cumulative impacts analysis. 6-7. The construction and operation of the TRR and DM&E Railroad will have cumulative air quality impacts on the Powder River Basin and the STB’s decision to exclude emissions from this proposed project from its cumulative air quality impacts analysis is arbitrary and capricious. The operation of the TRR and DM&E Railroad will also have cumulative impacts in the Upper Midwest Region. As the Eight Circuit Court of Appeals observed, “increased availability of inexpensive coal will at the very least make coal a more attractive option to future entrants into the utilities market when compared with other potential fuel sources.” *Mid States Coalition*, 345 F.3d at 549. The STB has failed to consider the cumulative impacts of the TRR and DM&E railroads on air quality in the Upper Midwest Region. The STB’s rationale that it need not consider these impacts because emissions from

power plants will be limited by each state's State Implementation Plan (SIP) is flawed. The STB needs to disclose the current air quality conditions in the upper Midwest and discuss whether such airsheds are attainment or non-attainment areas. Second, the STB needs to quantify the emissions for *all pollutants* that would be produced from increased energy generation by coal-fired power plants supplied with coal by the TRR and DM&E railroad and evaluate the impacts of these increases in emissions on existing air quality in the upper Midwest. Third, the STB needs to discuss the requirements of each SIP and discuss whether the terms and conditions of each SIP could mitigate some of the predicted air quality impacts including discussing what pollutants are covered by the various SIPs. SIPs do not cover all potential pollutants from coal-fired power plants. Finally, the STB needs to consider the indirect impacts of these increased emissions of various pollutants on human health and welfare.

Emissions from coal-fired power plants include many pollutants that are not regulated by SIPs including mercury, particulates, nitrogen oxides, and carbon dioxide. The STB assumes that SIPs are static and their terms and conditions can never be relaxed-SIPs can be changed to allow for more emissions from power plants. The STB erroneously assumes that SIPs will limit the emissions for all pollutants from coal-fired power plants. Without this information, the STB and other decision-makers do not know how the TRR and DM&E railroad will affect emissions and air quality in the Midwest for pollutants not covered by SIPs.

Emissions from new power plants might also decrease air quality, but not to the point where violations of air quality standards occur. There is a growing body of evidence that increases in particulate emissions to levels below existing air quality

standards, has impacts on human health and welfare. The STB needs to discuss these direct and indirect impacts in the upper Midwest region.

As the Eighth Circuit recognized, the nature of effects of constructing the TRR and DM&E is “almost certainly true—that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.” *Id.* Northern Plains recognizes that the extent of the impacts on air quality in the upper Midwest may be unclear. The CEQ regulations provide for a specific procedure for evaluating reasonably foreseeable environmental impacts when faced with incomplete or unavailable information. 40 C.F.R. §1502.22.

This provision requires “the disclosure and analysis of the costs of uncertainty [and] the costs of proceeding without more and better information.” Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark (SOCATS), 720 F.2d 1475, 1478 (9th Cir. 1983). “On their face these regulations require an ordered process by an agency when it is proceeding in the face of uncertainty.” Save Our Ecosystems v. Clark, 747 F.2d 1240, 1244 (9th Cir. 1984). 40 C.F.R. §1502.22 imposes three mandatory obligations on the STB in the face of uncertainty: (1) a duty to disclose the scientific uncertainty; (2) a duty to complete independent research and gather information if no adequate information exists unless the costs are exorbitant or the means of obtaining the information are not known; and (3) a duty to evaluate the potential, reasonably foreseeable impacts in the absence of relevant information, using a four-step process. Unless the costs are exorbitant or the means of obtaining the information are not known, the STB must gather the information in studies or research.

The STB violated NEPA's environmental full disclosure mandate because it does not disclose the uncertainty concerning potential air quality impacts in the upper Midwest. The duty to conduct independent research when faced with incomplete or unavailable information insures agencies comply with NEPA's central purpose – “to obviate the need for speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action. Save Our Ecosystems at 1248-49. The Ninth Circuit has held that “Section 1502.22 clearly contemplated original research if necessary.” *Id.* at 1244 note. 5.

The STB has failed to comply with this NEPA requirement at every level. First, the STB fails to disclose that it lacks information on the nature and extent of air quality impacts in the upper Midwest. Second, the STF fails to explain why it did not gather and compile this information or explain why it could not do so because the costs of obtaining the information are exorbitant. To the extent that the STB did not collect and compile such data for this NEPA analysis, it has violated NEPA. The STB does not even discuss the requirements of the various SIPs. There must be hundreds of permits and NEPA documents and other scientific studies from the upper Midwest that the STB could have compiled and from which it could have collected baseline information and information relevant to the impacts of additional coal-fired power plant emissions.

Third, the STB has violated its NEPA obligation to evaluate the potential, reasonably foreseeable impacts in the absence of relevant information, using a four-step process by (1) stating that such information is incomplete or unavailable; (2) stating of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable environmental impacts; (3) summarizing existing credible scientific evidence

which is relevant to evaluating those impacts; and (4) evaluating the impacts based on theoretical approaches or research methods generally accepted in the scientific community. The STB is well aware of computer models used by the utility industry to simulate the impacts of additional generating sources to meet electricity demands over a particular period of time. The Sierra Club and other organizations made the STB aware of these models in the DM&E proceedings. Selected documents from DM&E proceedings before the STB. The STB could have used these computer models to simulate the potential impacts of increases emissions of the various pollutants on air quality in the upper Midwest.

Rather than attempt to comply with NEPA and discuss the nature and extent of impacts on air quality in the upper Midwest pursuant to 40 C.F.R. §1502.22, the STB relies on a recent Supreme Court decision in *Department of Transportation v. Public Citizen*, 124 S. Ct. 2204 (2004), to argue that there is not a proximate causal relationship between the construction of the TRR and DM&E and increased air emissions from power plants and thus not need to analyze those impacts. The Supreme Court decision is very different from the factual circumstances presented here. Contrary to the agency in *Public Citizen*, the STB has exclusive and plenary authority over the construction and operation of railroads, 49 U.S.C. §10501(b). The STB has the absolute discretion to deny the TRR application if it finds that the impacts from the TRR on air quality in the Midwest when combined with the impacts of the DM&E railroad and other environmental impacts, makes the railroad inconsistent with the public convenience and necessity. Unlike *Public Citizen*, which involved an agency decision not to prepare an EIS, the STB has already determined that the TRR will have significant impacts on the human environment that

requires the preparation of an EIS. In this circumstance, the STB has an obligation to consider all reasonably foreseeable impacts.

The construction of the DM&E Railroad is also relevant to the question of whether there is a legitimate public need for the TRR. If the DM&E Railroad is constructed it will satisfy the need for a shorter transportation route for existing coal mines in the Powder River Basin and eliminate one of the stated needs for the TRR—providing a shorter route for such coal. The need for the TRR to transport coal for the speculative coal mines near Ashland, Montana, could be eliminated if a mine-mouth power plant was constructed and transmission lines carried electricity to the Midwest. The STB has failed to consider whether the construction of the DM&E Railroad will eliminate the allegedly public need for the TRR.

The STB fails to mention the fact that the Custer National Forest has initiated the process that is likely to result in opening large areas of the Ashland Ranger District to oil and gas leasing and ultimately conventional oil and gas and methane development and production. While the process is in its early stages, the CNF has completed an internal Reasonably Foreseeable Development scenario that will form the starting point for any NEPA analysis. Additional conventional oil and gas development and coal bed methane development on the National Forest will only exacerbate predicted impacts. The STB needs to consider the cumulative impacts of additional methane and oil and gas development in the Tongue River valley.

4. The STB Ignored Other Past and Present Projects that will have cumulative impacts when combined with the impacts of the TRR

The STB also failed to list much less quantify the impacts of numerous other existing projects that will impose cumulative impacts when combined with the impacts of the TRR. These projects include but are not limited to the Spring Creek Coal Mine, Decker Mines, and Colstrip coal mines and coal-fired power plants. These projects have impacted virtually every aspect of the human environment from surface water quality, air quality, vegetation, soils, aesthetics, fish and wildlife populations and habitat, and the socioeconomic conditions of Rosebud, Big Horn, and Custer counties.

5. The Description of Related Actions Evaluated in the Cumulative Effects Analysis is Inadequate

In City of Carmel-by-the-Sea v. U.S. Dep't of Trans., 123 F.3d 1142, 1160 (9th Cir. 1997), the Ninth Circuit held that a NEPA document must “catalogue adequately the relevant past projects in the area.” It must also include a “useful analysis of the cumulative impacts of past, present, and future projects [which] requires a discussion of how [future] projects together with the proposed . . . project will affect the environment.” The NEPA document must quantify the environmental impacts of past projects in the area of the actions in sufficient detail to be “useful to the decision-maker in deciding whether, or how, to alter the program to lessen cumulative impacts.” Detail is therefore required in describing the cumulative effects of a proposed action with other proposed actions. Neighbors of Cuddy Mountain v. USFS, 137 F.3d at 1379 (9th Cir. 1998); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214-15 (9th Cir. 1998). In addition to failing to identify several significant past projects in the area of the TRR, the STB’s description of related actions coal bed methane development is far too general to satisfy the hard look that NEPA requires. The discussion of the methane development

impacts is limited to less than a page (6-9 thru 6-10) and does not quantify any of the potential impacts from such development. This cursory discussion is troubling, given the numerous EISs and EAs that have been prepared by the BLM and other state agencies concerning the impacts of methane development. See Exhibits C, D, H, and I.

H. The STB violated NEPA by failing to take a hard look at mitigating the impacts of the TRR

In Methow Valley Citizens Council, 490 U.S. 332, 352 (1989), the Supreme Court held that “omission of a reasonably complete discussion of possible mitigation measures would undermine the action-forcing function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.”

The purpose of the discussion of mitigation measures is to provide decision-makers and the public with an opportunity to develop and evaluate methods of avoiding or minimizing the potential environmental impacts identified in the alternatives and environmental consequences portion of the NEPA process. The CEQ regulations emphasize that agencies shall “include appropriate mitigation measures not already included in the proposed action or alternatives.” 40 CFR 1502.14(f). Under the CEQ regulations, mitigation means:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment,
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

- (e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. §1508.20

While NEPA does not mandate that agencies mitigate environmental impacts, it does require that they give a “hard look” at potential mitigation measures. At a minimum, a “hard look” requires developing and disclosing potential mitigation measures and evaluating their potential effectiveness at minimizing or avoiding environmental impacts of the proposed action.

Courts have generally found an agency’s discussion of mitigation measures inadequate when the following factors are present: mere listing of mitigation measures without an explanation of their effectiveness; mitigation measures that rest only on vague promises or hollow hopes; mitigation measures not imposed by statute or regulations; mitigation that depends on implausible assumptions of human behavior; mitigation with no strategy for overcoming a record of past failures; and mitigation cannot rely on good intentions of third parties. Most recently the 9th Circuit has held that a “mere listing of mitigation measures is insufficient to qualify as a reasoned discussion required by NEPA (citing Northwest Indian Cemetery Protective Association). Without analytical data to support the proposed mitigation measures, we are not persuaded that they amount to anything more than a “mere listing” of good management practices.” Idaho Sporting Congress In the case, the Forest Service tried to argue that water quality would not be affected by the proposed logging because of the mitigation measures listed in the EA will be implemented. In rejecting the perfunctory Forest Service list of mitigation measures and conclusion that they would mitigate small increases in sedimentation and other

affects on surface waters, the Court looked at five factors (1) failure to identify and evaluate mitigation measures near logging site; (2) fact that it was not clear whether any of listed mitigation measures would be adopted; (3) no estimate of how effective the mitigation measures would be if adopted or given a reasoned explanation of as why such an estimate is not possible; and (4) own expert stated that mitigation measures are so general would be impossible to determine where, how, and when they would be used and how effective they would be.

The need for analysis of mitigation of the impacts of the TRR is particularly important in light the significant and widespread detrimental impacts that methane development will have on key resources-surface water resources, air quality, soils and vegetation, and wildlife. It is imperative, therefore, that the STB fully develop and evaluate alternative technologies and mitigation measures that will help reduce additional impacts caused by the TRR.

One of the pervading themes of the SDEIS is the reliance on mitigation measures to reduce the environmental impacts of the TRR to non-significant levels. Time and time again, the STB relies on mitigation measures without evaluating their effectiveness at avoiding or minimizing the environmental impact. See Chapter 7, SDEIS. Almost without exception, the STB fails to evaluate the effectiveness of proposed mitigation measures at reducing or avoiding the impact for which it is proposed. Furthermore, many of the proposed mitigation measures merely mirror the requirements of Federal or state law (like requiring that TRRC compensate landowners for the right-of-way and damages to their lands caused by the construction of the railroad). Finally, many of the mitigation

measures require TRRC to collect baseline data on wildlife, aquatic life, and other resources-data that the STB had an obligation to collect and use for this NEPA analysis.

A few examples will illustrate the problem:

- On page 6-16, the STB states that BMPs and re-vegetation during construction will significantly reduce sediment erosion and decrease estimated TSS by between 50 to 70 percent. The STB provides no data or analysis to support this conclusion.
- On page 7-14 the STB describes a reclamation plan and assumes, without any supporting data or analysis, that it will solve all erosion and sediment loading impacts. The STB needs to describe the effectiveness of such a reclamation plan at limiting soil erosion, restoring vegetation, etc.
- As discussed previously, the list of mitigation measures for biological resources is simply a requirement that the TRRC collect baseline data on such resources-baseline data that the STB should have gathered and included in this analysis.
- On page 7-31, the STB discusses several mitigation measures to control dust emissions but does not discuss the effectiveness of such measures.

IX. CONCLUSION

Northern Plains respectfully requests that the STB start a new EIS process for the entire length of the TRR (TRR I, TRR II, and TRR III)-a single EIS is necessary to analyze the these connected actions. In the new EIS, the STB must analyze a full range of alternatives, the direct, indirect, and cumulative environmental impacts, and mitigation measures for the entire length of the TRR in light of significant predicted impacts from methane development and other significant new information and changes in circumstances.

Simultaneous with this new EIS process, the STB needs to rescind its decisions in the TRR I and TRR II proceedings authorizing the construction of the different segments. The STB must gather, collect, and analyze the public need for the TRR simultaneously

with its analysis of the environmental impacts pursuant to NEPA. Northern Plains has repeatedly opposed the STB's severance of its public need analysis from its environmental analysis. There is no meaningful way to determine the public need for the TRR without considering its environmental impacts. Making a preliminary determination that the TRR is in the public need violates NEPA because it prejudices any subsequent NEPA analysis.

Sincerely,

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