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

350 MONTANA et al., Plaintiffs, vs. DEB HAALAND, et al. Defendants.	CV 19-12-M-DWM **SUPPLEMENTAL REMEDIES BRIEF IN SUPPORT OF VACATUR**

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INTRODUCTION

The question before the Court is whether to apply the standard remedy and vacate Federal Defendants' unlawful approval of the Bull Mountains Mine expansion pending completion of an environmental impact statement (EIS)[1] or, in equity, remand without vacatur and allow mining of federal coal to occur before the harm from the activity is assessed and disclosed to the public.

Vacatur is the presumptive remedy and, here, the only one consistent with the National Environmental Policy Act (NEPA). Federal Defendants violated NEPA by "hid[ing] the ball" about the extent to which 240 million tons of greenhouse gas pollution (GHGs) from the mine "will add to the severe impacts of climate change." *350 Mont. v. Haaland*, 50 F.4th 1254, 1265–66, 1270 (9th Cir. 2022). Without "significant reductions" of GHGs from major polluters, like Signal Peak Energy LLC, "severe, pervasive, and irreversible" impacts to people and the environmental—i.e., tremendous suffering—will likely result. *Id.* at 1276–77.

Signal Peak's avarice compromises our future. Pervasive criminal and inequitable conduct by the company and its owners disqualifies them from seeking an equitable exception to vacatur. Additionally, the seriousness of the violation and harm from the expansion outweigh any disruptive effects of vacatur.

[1] Federal Defendants intend to prepare an EIS on remand. (Doc. 92 at 31:13–16.)

This Court should vacate Federal Defendants' approval of the federal mining plan modification for the AM3 expansion of the Bull Mountains Mine.

FACTS

Since the parties briefed remedies in 2019, relevant facts have come to light.

First, the science on the severity of climate change has advanced. It is now clear that climate change is already causing widespread suffering and ecological devastation. Hansen Decl. at 3–5. If emissions are not significantly and rapidly reduced, the suffering that will result is unconscionable: millions of deaths annually, destruction of ecosystems, and densely populated regions rendered uninhabitable. *Id.* at 4. The best science has now determined, conservatively, that each ton of GHGs (measured in "carbon dioxide equivalent" or "CO_2e") causes nearly $200 in harm to people and the environment. *Id.* at 7–11. Peer-reviewed research shows every 4,434 tons of GHGs cause one excess death globally: Signal Peak's 23 million tons of annual GHGs cause over 5,000 deaths. *Id.* at 9. As President Biden acknowledges, "[t]he United States and the world face a profound climate crisis." Exec. Order No. 14,008, 86 Fed. Reg. 7,619, 7,619 (Feb. 1, 2021).

Second, the curtain has been pulled back on Signal Peak and its owners. Multiple corporate corruption investigations resulted in convictions and admissions of guilt from Signal Peak, Signal Peak's management, and Signal Peak's owners. These prosecutions showed Signal Peak lied repeatedly to this Court about its

worker and environmental safety record. Signal Peak's owners have also used criminal schemes and deception to obstruct public policy intended to reduce the impacts of climate change. And Signal Peak continues to harass and pressure ranch families to leave the Bull Mountains, threatening their livelihoods so the company can evade mitigating mine impacts.

LEGAL STANDARD

"[V]acatur is the presumptive remedy" for unlawful agency action "under the APA." *350 Mont.*, 50 F.4th at 1273. Only in "limited circumstances," "when equity demands," a court may "remand without vacatur." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (quoting *Cal. Cmties. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012), and *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).

To assess whether a rare exception to vacatur is warranted, courts consider the seriousness of the agency's errors and the disruptive consequences of vacatur. *350 Mont.*, 50 F.4th at 1273. A court may remand without vacatur "when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *Se. Alaska Conservation Council v. USFS*, 468 F. Supp. 3d 1148, 1150 (D. Alaska 2020) (quoting *Aqualliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 881 (E.D. Cal. 2018)). The party seeking the

exception bears the burden of overcoming the presumption of vacatur. *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 157 (D.D.C. 2022).

ARGUMENT

I. Remand without vacatur would violate the core purpose and express prohibition of NEPA.

NEPA's regulations flatly prohibit any activity related to a proposal that may have "an adverse environmental impact" until the environmental review process is complete. 40 C.F.R. § 1506.1(a); *see also id*. § 1502.2(f); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 160 n.5 (2010) (admitting bar).

Here, continued mining operations cause adverse environmental effects, including air pollution and land subsidence. This Court has already found that these activities constitute irreparable harm: "greenhouse gas … once released into the atmosphere[] cannot be removed by judicial action," and "[o]nce federal coal is removed from beneath the Bull Mountains, it cannot be put back." *Mont. Env't Info. Ctr. v. OSM* (*MEIC II*), No. CV 15-106, 2017 WL 5047901, at *3 (D. Mont. Nov. 3, 2017). Nor is this harm de minimis. The mine's projected 23 million tons of annual GHGs exceed those of the "single largest [point] source of GHG emission in the United States." *350 Mont.*, 50 F.4th at 1259; *see also id.* at 1262 (cataloging climate destruction). The harm from these emissions is extraordinary and "simply incompatible with restoration of a habitable climate system on which security of the nation and … plaintiffs … depend." (Doc. 37-6 at 14.) Additional

damage to water and land from subsidence harms the livestock, wildlife, and ranchers above the mine. Charter Decl. ¶¶ 20–24.

Thus, continued mining of federal coal in the AM3 area during remand would violate 40 C.F.R. § 1506.1(a), making vacatur the only legally valid remedy. By contrast, reclamation—e.g., filling subsidence fractures and replacing damaged water resources—does not cause adverse impacts and can continue on remand.[2]

II. The inequitable acts of Signal Peak and its owners disqualify them from seeking an exception to vacatur in equity.

"[O]ne who seeks equity must do equity." *Donaldson Bros. v. Phila. Ins. Co.*, CV 06-139, 2008 WL 11349981, at *5 (D. Mont. May 14, 2006) (quoting *Kauffman-Harmon v. Kauffman*, 36 P.2d 408, 411 (Mont. 2001)). "When a party seeking equitable relief 'has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him.'" *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022) (quoting *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933)).

Signal Peak cannot request an equitable exception to vacatur because it has acted inequitably. Signal Peak deceived this Court about its safety record. In 2019, erstwhile Signal Peak CEO Joseph Farinelli boasted the mine did not have "lost-time accidents" and won awards for safety. (Doc. 42-1 ¶ 12.) Mr. Farinelli's

[2] Vacatur does not affect Signal Peak's reclamation obligations, which exist independent of permitting. Admin. R. Mont. 17.24.407(1)(b), 522(1), 1118(3).

predecessor Bradley Hanson made the same claims to this Court in 2017.[3] In fact, in 2022, Signal Peak pled guilty to lying to mine safety authorities to hide workplace accidents.[4] From 2013 to 2018, Signal Peak "habitually violated" worker and environmental safety standards with the "full knowledge, direction, and participation of the most senior management of the mine, including the President and CEO."[5] Signal Peak was not running a safe ship, but criminally concealing violations.[6] Messrs. Farinelli and Hanson intentionally deceived the parties and this Court, barring Signal Peak from seeking equity. *Donaldson Bros.*, 2008 WL 11349981, at *5 (misrepresentations constituted unclean hands).

Signal Peak's conviction was at the center of a web of criminality, ranging from embezzlement and money laundering to drug and gun charges, prompting the U.S. Attorney's Office to describe the mine as a "den of thievery." (Doc. 90 at 5–6

[3] Transcript of Oral Argument at 33:12 to 34:6, *MEIC II*, 2017 WL 5047901 (No. CV 15-106) (Doc. 101) (mine is "safest" with "least amount of citations"); *id.* at 62 (Court congratulating Signal Peak on safety and "good management").

[4] Judgment, *United States v. Signal Peak Energy, LLC*, No. CR 21-79 (D. Mont. Jan. 31, 2022) (Doc. 16); Offer of Proof at 3, *Signal Peak Energy*, No. CR 21-79 (D. Mont. Oct. 5, 2021) (Doc. 7).

[5] Offer of Proof at 3, *Signal Peak Energy*, No. CR 21-79.

[6] Since the investigation into Signal Peak began, reported accidents at the mine have increased significantly. Jensen Decl. ¶ 14. Consistent with its disregard for workers, Signal Peak defeated unionization efforts and has an extensive record of mine safety violations, including nearly 200 "significant and substantial" violations. Jensen Decl. ¶¶ 13–14; Charter Decl. ¶ 29.

& nn.3–4.) Signal Peak's owners, FirstEnergy Corp. and Gunvor Group, are similarly infected, having recently paid criminal fines of tens and hundreds of *millions* of dollars for bribery schemes (to obtain fossil fuels and subsidies) and lying to regulators. Jensen Decl. ¶¶ 16–23. FirstEnergy further stands out for deceiving the public about climate change: it is one of the nation's utilities "most involved in climate denial, doubt, and delay" with "heav[y] invest[ments] in dirty energy" and "few plans to transition to clean power." *Id.* ¶ 20 (quoting Emily Williams et al., *The American Utility Industry's Role in Promoting Climate Denial, Doubt, and Delay*, Env't Research Letters, Oct. 2022 at 10).

Further, while Mr. Farinelli touted Signal Peak's value to the community (Doc. 42-1 ¶ 10), the company has devastated the once-sustainable ranching community in the Bull Mountains, bullying and harassing ranchers to sell out or leave, often successfully. Charter Decl. ¶¶ 10–18, 28. Consistent with its concealment of safety violations, Signal Peak has serially and knowingly violated environmental protection standards, especially those for monitoring and assessing impacts to water. Jensen Decl. ¶¶ 8–11. And, as this Court noted before, Signal Peak shares the blame for Federal Defendants' failure to prepare an EIS. *MEIC II*, 2017 WL 5047901, at *4; *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (discounting self-inflicted harm).

This conduct is relevant to demonstrate that (1) Signal Peak, its management, and owners are dishonest actors, who intentionally deceived the parties and this Court; (2) their criminal and duplicitous conduct aggravates climate change, one harm at issue here; and (3) Signal Peak harms the community and employees that it claims to help. *See Keystone Driller Co.*, 290 U.S. at 244–45 (requiring connection between inequitable conduct and issues in case); Fed. R. Evid. 609(a)(2) (evidence of crimes of dishonesty admissible). The doors of equity should be closed against Signal Peak. *Ramirez*, 142 S. Ct. at 1282.

III. The violation of NEPA is serious, warranting vacatur.

To assess the seriousness of an error, courts consider whether it is "limited," or sufficiently substantial that "a different result may be reached" on remand. *WildEarth Guardians v. Steele*, 545 F. Supp. 3d 855, 884 (D. Mont. 2021); *Pollinator*, 806 F.3d at 532. In NEPA cases, courts reject outcomes that "vitiate," "subvert," or "frustrate" the statute's goals. *Standing Rock Sioux v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052–53 (D.C. Cir. 2021); *350 Mont.*, 50 F.4th at 1273; *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1037 (D. Mont. 2006).

Here, the Ninth Circuit found that Federal Defendants "hid the ball" about the significance of the mine expansion's climate impacts, which was "deeply troubling" given the magnitude of the emissions, the "dramatic" effects of climate change, and its "profound" consequences. *350 Mont.*, 50 F.4th at 1266, 1269–70,

1275. Federal Defendants failed to "cite any scientific evidence" to support their non-significance determination, but merely concluded unhelpfully that while the expansion would "add more fuel to the fire," "its contribution will be smaller than the worldwide total of all other sources of GHGs." *Id.* at 1266.

Worse, after this Court first overturned Federal Defendants' analysis of GHGs, *Mont. Env't Info. Ctr. v. OSM* (*MEIC I*), 274 F. Supp. 3d 1074, 1103–04 (D. Mont. 2017), Federal Defendants "*backpedaled* and *omitted* combustion-related emissions [from portions of the analysis] in the 2018 EA." *350 Mont.*, 50 F.4th at 1269 (first emphasis supplied). The repeated failure to comply with NEPA indicates seriousness. *Standing Rock*, 985 F.3d at 1051; *Friends of the Earth*, 583 F. Supp. 3d at 158.[7] More so here, where (1) the agencies' remand analysis was not only unlawful, but *more misleading* than their first analysis; and (2) they have now agreed to prepare an EIS (Doc. 92 at 31:13–16), abandoning their position that the effects are insignificant. When an EIS is required, vacatur is critical. "[P]ermitting the Mine Expansion to go forward while Interior prepares a new … EIS will frustrate NEPA's purpose to look *before* they leap." *350 Mont.*, 50 F.4th at 1273

[7] *Cf. Ctr. for Food Safety v. Regan*, 56 F.4th 648, 668 (9th Cir. 2022) (non-NEPA case, remanding without vacatur despite repeat violations where vacatur would cause greater environmental harm); *but see id.* at 672 (Miller, J, concurring in part dissenting in part) (without vacatur, agency "escape[s] any serious consequence," incentivizing unlawful action).

(internal quotation omitted) (agreeing with Conservation Groups); *Standing Rock*, 985 F.3d at 1052–53; *Fry*, 408 F. Supp. 2d at 1037.

Moreover, this Court already found that the unlawful NEPA analysis was "serious" and lay "at the heart of NEPA's requirement that agencies make informed decisions." *MEIC II*, 2017 WL 5047901, at *6. This is consistent with precedent finding an agency's failure lawfully to disclose the magnitude of GHG emissions warrants vacatur. *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 751 (9th Cir. 2020); *Friends of the Earth*, 583 F. Supp. 3d at 158.

As in *Friends of the Earth*, this Court should "harbor substantial doubt" that Federal Defendants chose correctly and find that they "may well approve another alternative on remand." 583 F. Supp. 3d at 158 (quoting *Standing Rock*, 985 F.3d at 1052, and *Ctr. for Biological Diversity*, 982 F.3d at 740). The President recognizes: the "increasing urgency for combatting climate change and accelerating the transition toward a clean energy future"; the need to reject proposals that "undermine U.S. climate leadership"; and the "essential" value of the social cost of carbon (SCC) in agency "decision-making." Exec. Order No. 13,990, 86 Fed. Reg. 7,307, 7,040–41 (Jan. 25, 2021). The administration intends to "hold polluters accountable" and "lead … by example" through "public lands" policy. Exec. Order No. 14,008, 86 Fed. Reg. at 7,622–23. Thus, the Council on Environmental Quality (CEQ) issued interim guidance instructing agencies to

assess whether a proposed action's GHG emissions are "consistent with GHG reduction goals." 88 Fed. Reg. 1,196, 1,203 (Jan. 9, 2023). Here, Federal Defendants must determine whether the expansion's 240 million tons of GHGs are consistent with the national goal of *reducing* U.S. emissions "50 to 52 percent below 2005 levels in 2030." *Id.* at 1,197 n.9. Federal Defendants thus may well reach "a different result" on remand. *Steele*, 545 F. Supp. 3d at 884.

CEQ further instructs agencies to use the "best available social cost of GHG estimates" in decision-making. *Id.* at 1,198. Applying the best available SCC ($190) to the 240 million tons of GHGs from the expansion reveals more than $44 billion in harm, more than 30 times greater than the purported $1.39 billion in benefits. Hansen Decl. at 8–9; *see MEIC II*, 2017 WL 5047901, at *5 (climate costs "far exceed[]" benefits based on prior lower SCC); (Doc. 32 at 115 (Bates #16810) (benefits)). No "reasoned decisionmaking" could sustain a proposal with such lopsided costs and benefits. *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

IV. The consequences of not vacating the mine expansion would be more disruptive than any consequences of vacatur.

When assessing disruptive consequences of vacatur for violations of environmental laws, courts "largely should focus on potential environmental disruption." *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1038 (D. Mont. 2020); *Pollinator*, 806 F.3d at 532. Courts also consider the "economic impact" and interests of "local communities," *Steele*, 545 F. Supp. 3d at

885, but "[a] third party's potential financial damages … generally do not outweigh potential harm to the environment." *Fry*, 408 F. Supp. 2d at 1034; *Standing Rock*, 985 F.3d at 1051.

Here, any effects of vacatur would not "significantly outweigh" the seriousness of the violations. *Se. Alaska Conservation Council*, 468 F. Supp. 3d at 1150. The opposite is true: harm from remand without vacatur would significantly outweigh any benefits of allowing Signal Peak to operate outside the law. *See Ohio Valley Env't Coal. v. U.S. Army Corps of Eng'rs*, 528 F. Supp. 2d 625, 633 (S.D. W. Va. 2007) ("Economic gain is not [to] be pursued at all costs, and certainly not when it is contrary to the law.").

While courts may decline vacatur when doing so would *increase* environmental harm, that is not the case here. *Cf. Idaho Farm Bureau*, 58 F.3d at 1405–06; *N. Plains Res. Council*, 460 F. Supp. 3d at 1038. To the contrary, vacatur will prevent the severe climate and subsidence impacts from extracting federal coal. Hansen Decl. at 6–11; Charter Decl. ¶¶ 23–24. These impacts will cause substantial and long-term costs, which Signal Peak has no intention to pay. Hansen Decl. at 6–11; Charter Decl. ¶¶ 20–27; (Doc. 90-4 at 4).

Nor will any economic impacts of vacatur significantly outweigh the impacts of remand without vacatur. As noted, the harm to the public and the environment from mining coal (here, federal coal) overwhelmingly outweighs all

benefits of the coal. Hansen Decl. at 8–9; *MEIC II*, 2017 WL 5047901, at *6; *see* Exec. Order No. 13,990, 86 Fed. Reg. at 7,040 ("sound decision-making" requires consideration of "full costs" of GHGs, including SCC). This is not simply an operation of math and economics, but a measurement of tremendous human suffering. The mine's 23 million tons of annual GHGs will cause thousands of deaths each year from excessive heat, mostly among people who benefit least from fossil fuels and are least able to avoid climate impacts. Hansen Decl. at 3, 9.

Signal Peak has argued stopping mining will not reduce GHGs at all because other coal (from other mines or from non-federal coal at Bull Mountains) will be entirely substituted for the unmined federal coal. (Doc. 92 at 27:16 to 28:23.) But the argument is legally and factually mistaken. Legally, this Court and others have rejected it as "illogical," *MEIC I*, 274 F. Supp. 3d at 1098, "irrational," and "contrary to basic supply and demand principles." *WildEarth Guardians v. BLM*, 870 F.3d 1222, 1236 (10th Cir. 2017).[8] Factually, Signal Peak's self-serving analysis is illogical. Signal Peak has asserted, inconsistently, that stopping mining in federal coal will (1) end *all* mining at the Bull Mountains Mine (Doc. 42-1 ¶¶ 3–6), *and* (2) that it would merely "consign[]" Signal Peak to moving its longwall

[8] Federal Defendants notably rejected perfect substitution in their 2018 EA. (Doc. 32 at 221, 254 (Bates #16918, 16951) ("[T]he EA does not assume that the coal would be replaced by other sources….").)

machine a few miles "to min[e] private and state coal."[9] (Doc. 92 at 25:19 to 26:13.) Both cannot be true. And while either outcome—stopping mining or moving the longwall machine—would cost Signal Peak money, the company and its owners can clearly afford it, having spent over $60 million to bribe politicians and over $230 million in criminal fines and penalties. Jensen Decl. ¶¶ 16–23.

The interests of workers are important, *Steele*, 545 F. Supp. 3d at 885, but Signal Peak has demonstrated no more interest in protecting workers than it has in protecting the environment, having repeatedly compromised their safety and thwarted unionization. Jensen Decl. ¶¶ 13–14; Charter Decl. ¶ 29. Regulators have long recognized the mine as a boom-and-bust operation (Doc. 37-8 at 37), and Signal Peak has no plan or funding for worker or community transition when the bust arrives.[10] (*See* Doc. 51 at 20.) Instead, the public is funding just transition policies.[11] If Signal Peak is genuinely concerned about its employees on remand,

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[9] Signal Peak admits that even in this scenario *less* total coal will be mined if the expansion is vacated, though it would require *more* labor. (Doc. 95 at 25:19 to 26:25); *cf. MEIC II*, 2017 WL 5047901, at *5 (limiting injunction where injunction would not reduce harm at all).

[10] The Worker Adjustment and Retraining Notification (WARN) Act requires, subject to certain exceptions, 60-days' notice to workers prior to a mine closure or payment of pay and benefits for 60 days. 29 U.S.C. §§ 2102(a), 2014(a).

[11] Exec. Order No. 14,008, 86 Fed. Reg. at 7,627–28 (creating Interagency Working Group on Coal and Power Plant Communities); Tara Righetti et al., *Adapting to Coal Plant Closures: A Framework for Understanding State Resistance to the Energy Transition*, 51 Env't Law 957, 988 (2021) (Interagency Working Group identified $38 billion for transition funding for energy

let it set aside $60 million in an employee compensation and transition fund, equal to the amount its owner, FirstEnergy, set aside to bribe legislators.

By contrast, if Signal Peak continues mining federal coal, it will likely force the last ranch families to abandon the Bull Mountains. Charter Decl. ¶ 28. The climate impacts will stretch far beyond the Bulls, costing the public billions, costing many people their lives, and further pushing the world beyond the "resilience of some ecological and human systems." *See* Hansen Decl. at 3, 8–11. It is hard to image a greater violation of all Montanans' "inalienable" "right to a clean and healthful environment." Mont. Const. art. II, § 3.

CONCLUSION

This Court should vacate Federal Defendants' approval of the federal mining plan modification for the AM3 expansion of the Bull Mountains Mine pending completion of a lawful EIS.

Respectfully submitted this 20th day of January, 2023.

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communities and additional public funding in bipartisan infrastructure legislation); Exec. Order No. 14,082, 87 Fed. Reg. 56,861, 56,861–62 (Sept. 12, 2022) (prioritizing Inflation Reduction Act funding to create union jobs in clean energy in "traditional energy communities"). Efforts to force *coal companies* to fund community transition have failed. *See* Micah Carper, *From the Ruhr Valley to Ramp Hollow: Lessons for America from Germany's Just Transition*, 35 Tul. Env't L.J. 91, 110 (2022) (recounting failure of RECLAIM Act).

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 3,707 words, excluding caption, certificate of compliance, tables of contents and authorities, exhibit index, and signature block.

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