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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs, v. UNITED STATES BUREAU OF LAND MANAGEMENT, et al., Defendants, and P4 PRODUCTION, L.L.C., Intervenor-Defendant.	Case No. 4:21-cv-182-BLW **PLAINTIFFS' OPENING BRIEF ON REMEDIES**

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INTRODUCTION

On January 24, 2023, this Court held that the U.S. Bureau of Land Management (BLM) violated multiple federal laws in approving the Caldwell Canyon open-pit phosphate mine. Mem. Decision and Order, ECF No. 79 (hereinafter "Order"). Specifically, the Court found that BLM contravened the Federal Land Policy and Management Act (FLPMA), by allowing mine construction impermissibly close to a greater sage-grouse lek, and the National Environmental Policy Act (NEPA), by failing to consider the impacts of processing ore at the Soda Springs Superfund site; by excluding a citizen-proposed alternative without explanation; and by failing to properly study the project's impacts on an imperiled population of sage-grouse. The Court then requested supplemental briefing on the appropriate remedy for these violations. ECF No. 80.

Vacatur is the presumptive and appropriate remedy here. The Ninth Circuit has instructed that unlawful agency actions should be allowed to stand only in "limited circumstances" and "when equity demands." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). In environmental suits, this is typically when vacatur will *cause* environmental harm. This is not such a case. Allowing this mine to proceed before BLM complies with NEPA and FLPMA would pose unnecessary risks to public health and wildlife, erode public confidence in this project, and subvert NEPA's core purpose. Conversely, vacatur will only require a temporary pause to a 40-year project until a new mine plan is approved. Such is the normal cost of a NEPA study, and one that would not be inequitably disruptive to P4 or its parent corporation Bayer (together, "Bayer"), one of the world's largest multinational corporations.

Accordingly, the Court should vacate the Caldwell Canyon Record of Decision (ROD), Environmental Impact Statement (EIS), and all decisions relying on them, including the Phosphate Use Permit (IDI-38927), East Caldwell haul road right of way (IDI-038996), water

pipeline right of way (IDI-039279), fiber optic line right of way (IDI-039280), and powerline right of way (IDI-039281).

LEGAL STANDARD

Vacatur is the statutorily required remedy for a successful challenge under the Administrative Procedure Act (APA). *See* 5 U.S.C. § 706(2)(A) ("reviewing court *shall* . . . hold unlawful and set aside agency action" that is "not in accordance with law."); *see also FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law[.]'"); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413–14 (1971) ("In all cases agency action must be set aside if the action was '. . . not in accordance with law'").

Although courts retain equitable discretion to withhold that remedy, the burden is on the defendant agency to "overcome the presumption of vacatur" and show why "equity demands" that the unlawful action remain intact. *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018); *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042, 1083 (D. Idaho 2020) ("The burden is on BLM to show that compelling equities demand anything less than vacatur."); *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 157 (D.D.C. 2022) ("[D]efendants bear the burden to prove that vacatur is unnecessary.").

The Ninth Circuit has instructed that vacatur may be withheld only in "limited" or "rare circumstances." *Pollinator Stewardship*, 806 F.3d at 532; *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *see also Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 882 (9th Cir. 2022) (vacatur "is the presumptive remedy for agency action that violates the NEPA"); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th

Cir. 2011) (when "an agency's action failed to follow Congress's clear mandate the appropriate remedy is to vacate that action.").

To evaluate a request for remand without vacatur, the Ninth Circuit follows the test from *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), weighing the (1) seriousness of the agency's errors" and (2) "disruptive consequences" of vacatur. *Pollinator Stewardship*, 806 F.3d at 532. In environmental suits, a central consideration is the "extent to which either vacating or leaving the decision in place would risk environmental harm." *Nat'l Fam. Farm Coal. v. U.S. EPA*, 960 F.3d 1120, 1144–45 (9th Cir. 2020).

ARGUMENT

The Court should vacate the unlawful Caldwell Canyon mine authorizations. This case does not present the type of "rare circumstances" that justify withholding that remedy. BLM's multiple errors were serious and will require the mine plan to be altered on remand to comply with the sage-grouse lek buffer. This alone is dispositive, as remand without vacatur is only appropriate where there is a strong likelihood that the agency will reaffirm the *same decision* on remand. Additionally, vacatur is the only remedy that will ensure the NEPA's "look before you leap" process works as intended. If further mine development is allowed *before* BLM properly studies the effects, the damage will be done, options to modify the project diminished, and NEPA's purpose flipped on its head. The disruption to Bayer of temporarily pausing a 40-year mine project is not an unusual impact of vacatur or so substantial as to outweigh the public's interest in avoiding irreparable environmental harm.

A. The Seriousness of BLM's Many Errors Strongly Favors Vacatur.

The first *Allied-Signal* prong considers the "seriousness" of the agency's errors and "extent of doubt whether the agency chose correctly." 988 F.2d at 150. Where "a different result

may be reached" on remand, vacatur is warranted. *Pollinator Stewardship*, 806 F.3d at 532. Here, BLM's multiple violations of FLPMA and NEPA were serious errors that make it unlikely—indeed impossible—that the same mine plan will be reapproved on remand, strongly favoring vacatur. *Nat'l Family Farm Coal.*, 960 F.3d at 1145 (vacatur warranted where it is "unlikely that the same [decision] would be adopted" on remand); *Env't Def. Fund v. FERC*, 2 F.4th 953, 976 (D.C. Cir. 2021) (vacatur warranted where it is uncertain whether agency will adopt same decision on remand).

First, the FLPMA violation confirms the same mine plan *cannot* be reaffirmed on remand because it violates the governing resource management plan. At least two essential features—the East Caldwell Haul Road and the Caldwell Canyon Service Road—must be relocated to comply with the 3.1-mile sage-grouse lek buffer. *See* ECF No. 56 (map of project with lek buffer overlay). These roads are critical to the mine project, as they provide mine access and will be used to transport ore to the stockpile and tipple. AR003082. This Court already found that the East Caldwell Haul Road violates the 3.1-mile lek buffer of the 2015 sage-grouse resource plan amendments ("2015 ARMPA"). *See* Order at 47–52. Additionally, although the Caldwell Canyon Service Road was originally approved in the 2019 Record of Decision, when the weaker 2.0-mile lek buffer under the 2019 sage-grouse resource plan amendments ("2019 ARMPA") was still in effect, BLM cannot reapprove that road now because it also falls within the 3.1-mile lek buffer. *Id.*

Courts remand without vacatur only where the agency will likely readopt the same decision on remand. Because BLM cannot reapprove a mine plan that violates the lek buffers, *Allied-Signal*'s first prong should be dispositive. *See Alliance for the Wild Rockies*, 907 F.3d at 1121 (violation of land use plan standards "sufficient to justify vacatur"); *Nat'l Family Farm*

Coal., 960 F.3d at 1145 (vacatur proper where "fundamental flaws in the agency's decision make it unlikely that the same [decision] would be adopted on remand"); *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) (explaining that the "the second *Allied–Signal* factor is weighty only insofar as the agency may be able to rehabilitate its rationale for [its action]").

The NEPA violations are independently serious. Among other problems, BLM failed to consider the human health and environmental impacts of processing phosphate ore from this mine. That oversight was significant. The ore is destined for the Soda Springs Processing Plant, a federal Superfund site that was added to the National Priorities List due to concern that the site is contaminating groundwater supplies with selenium, cadmium, sulfates, and fluoride. AR028495; AR028427. Subsequent investigation also identified potential exposures to employees and community members from radionuclides and toxic metals (arsenic and beryllium). AR028427. The cleanup plan for that site is failing to prevent contaminated groundwater from leaving the property. AR028444, -46.

The record suggests that the human health and environmental risks of ore processing are potentially significant. As just one example, phosphate ore contains elevated levels of natural radioactivity. AR069012–19, AR023551; *see also* AR068485–792; AR026361 (email from environmental scientist with the Shoshone Bannock Tribes expressing continued frustration with BLM's failure to disclose the "radiological components and risks associated with phosphate ore and waste rock"). These radionuclides are concentrated during ore processing into a radioactive waste product, which must then be stored. AR023551; *see also* AR028384; AR028388 (photos of molten slag piles at the Soda Springs plant). Numerous pathways exist for radionuclides and other toxic pollutants to be transferred into the environment during ore processing, exposing

workers or members of the public. AR069014. These and other environmental and human health risks of processing phosphate ore went undisclosed in the Caldwell Canyon EIS.

BLM also failed to properly study the project's impacts on an imperiled species, the greater sage-grouse. BLM overlooked various critical impacts the mine may have on sage-grouse—such as functional habitat loss and loss of population connectivity—and failed to consider the cumulative effects to sage-grouse of this mine when combined with other projects that are destroying the bird's remaining habitat. These errors cut to the heart of NEPA. Given the current administration's policy priorities,[1] and diminishing sage-grouse populations and habitat conditions,[2] it is foreseeable that BLM will alter the mine plan after more fully studying the impacts to the vulnerable East Idaho Uplands sage-grouse population.

Case law instructs that where an agency's NEPA analysis is incomplete in some nontrivial way, as it is here, courts should "harbor substantial doubt that . . . the agency chose correctly" because NEPA compliance is intended to alter agency decisions. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) (noting the primacy of vacatur as remedy for NEPA violations). As the D.C. Circuit wrote soon after NEPA's enactment, "Congress did not intend the Act to be . . . a paper tiger." *Calvert Cliffs' Coordinating Comm. V. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *see also Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1124 (9th Cir. 2010) ("NEPA is not a paper exercise, and new analyses may point in new directions"). The Supreme Court itself has said that

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[1] *See, e.g.*, 86 Fed. Reg. 66,331 (Nov. 22, 2021), https://www.federalregister.gov/documents/2021/11/22/2021-25393/notice-of-intent-to-amend-land-use-plans-regarding-greater-sage-grouse-conservation-and-prepare (considering tightening restrictions on development in sage-grouse habitat in light of "new science and rapid changes" affecting the bird's habitat).

[2] Idaho sage-grouse populations are down 30% since 2016. *See* Idaho Dep't of Fish & Game, 2022 Sage-grouse Population Triggers Analysis (Aug. 15, 2022), https://species.idaho.gov/wp-content/uploads/2022/09/SageGrouse_2022TriggersAnalysis_ Final.pdf.

NEPA compliance is “almost certain to affect the agency’s substantive decision.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). Accordingly, this Court should assume NEPA will work as intended here and result in modification to the Caldwell Canyon mine plan.

Vacatur is a particularly important remedy for violations of NEPA, because the statute only works by requiring agencies to look *before* they leap. “NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). “[A]llowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary” to that mandate. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007); *see also Standing Rock*, 985 F.3d at 1052 (refusing to vacate action due to NEPA violation “would ‘vitiate’ the statute”). So too here, if the Caldwell Canyon mine is allowed to progress further before an adequate EIS is prepared, irreparable damage may be done and options for altering the project will diminish. Further investments in the Project may also bias the NEPA process and make officials “more committed to the action initially chosen” and “reluctant to spend the ever greater amounts of time, energy and money . . . to embark upon a new and different course of action.” *Sierra Club v. Marsh*, 872 F.2d 497, 503 (1st Cir. 1989) (J. Breyer); *Save the Yaak Committee v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (recognizing that further investments in a project make it “likely that more environmental harm will be tolerated”); *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000) (vacating decision and suspending a whaling contract to ensure new NEPA analysis was “done under circumstances that ensure an objective evaluation free of the previous taint”); *W. Oil & Gas Ass’n v. U.S. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (explaining that “procedural safeguards that assure the public

access to the decisionmaker should be vigorously enforced. . . [and] relief for agency procedural error should be a strict reconstruction of procedural rights").

Consistent with these principles, this Court and others have not hesitated to vacate mine projects due to NEPA violations. *See, e.g.*, *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1099 (9th Cir. 2016) (vacating Record of Decision for large molybdenum mine due to NEPA violations); *ICL v. U.S. Forest Serv.*, No. 1:18-cv-504-BLW, 2020 WL 2115436, at *2 (D. Idaho May 4, 2020) (vacating mine project where Forest Service failed to properly study groundwater impacts despite "economic loss and layoffs" that would result); *ICL v. U.S. Forest Serv.*, No. 1:11-cv-00341-EJL, 2012 WL 3758161 at *7 (D. Idaho Aug. 29, 2012) (vacating mine project where Forest Service violated NEPA by failing to take hard look at drilling impacts to groundwater); *ICL v. U.S. Forest Serv.*, No. 1:16-cv-0025-EJL, 2016 WL 3814021 at *17 (D. Idaho, Jul. 11, 2016) (vacating mine project where Forest Service violated NEPA and NFMA by failing to take hard look at impacts to sensitive plant); *Dine Citizens Against Ruining Our Env't v. U.S. Off. Of Surface Mining Reclamation & Enf't*, No. 12-cv-01275-JLK, 2015 WL 1593995, at *1–3 (D. Colo. Apr. 6, 2015) (vacating coal mine for NEPA violations despite "significant economic impact").

In sum, the first *Allied-Signal* factor strongly favors vacatur. BLM's failures raise serious doubts that it "chose correctly," 988 F.2d at 150, and strongly suggest that "a different result may be reached" on remand, *Pollinator Stewardship*, 806 F.3d at 532.

B. The Disruptive Consequences Prong Also Favors Vacatur.

1. Vacatur Would Avoid Environmental Harm

The second *Allied-Signal* factor likewise favors vacatur, as that remedy will avoid irreparable environmental harm. The Ninth Circuit places special emphasis on the environmental

damage that would result from granting or withholding vacatur. Where present, the risk of environmental harm weighs strongly in favor of vacatur. *See, e.g.*, *Alliance for the Wild Rockies*, 907 F.3d at 1122 (vacatur "appropriate when leaving in place an agency action risks more environmental harm than vacating it"); *Pollinator Stewardship*, 806 F.3d at 532 (focusing on whether vacatur would avoid or risk "possible environmental harm"). Conversely, a "rare circumstance" that will support non-vacatur in environmental cases is when leaving an unlawful action in place will avoid environmental harm—the opposite of the scenario here. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (leaving unlawful ESA listing rule in place to protect imperiled snail); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993–94 (9th Cir. 2012) (remanding without vacating in part to avoid toxic air pollution, undermining the Clean Air Act); *NRDC v. U.S. EPA*, 38 F.4th 34, 59–60 (9th Cir. 2022) (declining to vacate where it would increase "ecological risk").

Here, allowing the Caldwell Canyon mine to proceed before BLM reassesses its decision risks unnecessary environmental harm. First is the irreversible damage to greater sage-grouse. The local sage-grouse population is already "isolated" and at "high risk" with a "low probability of persistence," AR065117, AR016508, AR065171–72, and leks within the project area have exhibited declining counts since the 1970s. AR071354. Continued mining activities will harm sage-grouse in many ways, including by causing irreparable habitat loss, abandonment, and fragmentation; impaired movement between seasonal use areas; behavioral disruptions from project noise; and bird mortality through vehicle collisions. AR065104–05, -44; AR071359; AR003182; AR003189. This is especially true where mine traffic will occur on roads that were constructed impermissibly close to the Dry Valley lek, virtually assuring disruption to birds as they attempt to breed on the lek, nest in the surrounding lands, or move to other seasonal

habitats. *See* ECF No. 66 at 34–35 (describing impacts of roads). The Ninth Circuit has found that where it will help protect a "precarious" species, vacatur is warranted. *See Pollinator Stewardship Council*, 806 F.3d at 532 (vacating given "the precariousness of bee populations").

Equally significant are the potential risks of ore processing. As explained above, there are inherent human health and environmental risks in processing phosphate ore and waste rock, given the toxic metals and radionuclides they contain. The further the mine proceeds, the less likely that BLM will meaningfully evaluate options for avoiding or mitigating the risks of processing phosphate ore from this mine.

In sum, the risk of irreparable environmental harm strongly favors vacatur.

2. The Economic Costs to Bayer Do Not Warrant an Exception from Vacatur

The economic impacts of vacatur will not be so unduly disruptive as to warrant an exception from that remedy. Vacatur of the mine authorizations will only temporarily pause ground-disturbing preparations to allow BLM to ensure compliance with NEPA and FLPMA before reapproving another mine plan. Vacatur will not halt ore extraction or processing, which has not begun yet. ECF No. 65-1 at ¶ 21. While Bayer[3] may incur costs from demobilizing and remobilizing construction equipment and hiring engineers to redesign non-compliant aspects of the project, Bayer is one of the world's largest companies with annual revenues exceeding $50 billion and will easily absorb these costs. *See* Stellberg Decl., Exs. A, B, C. This type of economic impact is "not commonly a basis, standing alone, for declining to vacate agency action." *Standing Rock*, 985 F.3d at 1051. Rather, such costs are a common result of vacatur and do not compare to the magnitude of disruption the Ninth Circuit has found significant enough to withhold vacatur, such as potential species extinction, *Idaho Farm Bureau*, 58 F.3d at 1405,

[3] *See* AR000141, AR028409 (portraying project as "Bayer's" mine).

power blackouts and air pollution, *Cal. Cmtys. Against Toxics*, 688 F.3d at 93–94, or effects antithetical to the underlying statute, *id.*; *Idaho Farm Bureau*, 58 F.3d at 1405; *W. Oil & Gas v. U.S. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

Giving strong weight to economic disruption would also create undesirable incentives for agencies and industry to invest heavily in illegal projects—the approve now, study later attitude NEPA is designed to prevent. *See W. Watersheds Project*, 441 F. Supp. at 1042 (withholding vacatur due to economic disruption would incentivize parties "to invest heavily in potentially-illegal projects upfront, only to claim later that the economic consequences in setting aside those projects would be too massive to unwind); *Env't Def. Fund*, 2 F.4th at 976 (vacatur avoids undesirable incentive to "build first and conduct comprehensive reviews later") (cleaned up); *Friends of the Earth v. Haaland*, 583 F. Supp. 3d at 157 (vacatur avoids "perverse incentives for the agency to press forward with a faulty decision . . . [I]f you can build first and consider environmental consequences later, NEPA's action-forcing purpose loses its bite"); *Standing Rock Sioux Tribe v. U.S. Corps of Eng'rs*, 471 F. Supp. 3d 71, 85 (D.D.C. 2020) ("If projections of financial distress are sufficient to prevent vacatur, the Court fears that agencies and third parties may choose to devote as many resources as early as possible to a challenged project").

Finally, of course, any economic harm to Bayer must be weighed against the strong public interest in avoiding environmental harm and in ensuring that BLM correctly follows the law. There is a substantial public interest "in having governmental agencies abide by the federal laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). When an agency disregards the law, "it disregards the public interest and undermines its own credibility." *W. Watersheds Project v. Rosenkrance*, No. 4:09-cv-298-EJL, 2011 WL 39651, at *14 (D. Idaho 2011). There is also an undeniable "public interest in preserving nature

and avoiding irreparable environmental injury [that] outweighs economic concerns[,]" *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc), and "in careful consideration of environmental impacts before major federal projects go forward," *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). Thus, "suspending such [federal] projects until [NEPA] consideration occurs comports with the public interest." *Id.* at 1138 (citation omitted).

Facing similar facts, courts have found significant economic disruption outweighed by the strong public interest in environmental preservation and informed agency decisionmaking. *See, e.g.*, *ICL v. U.S. Forest Serv.*, 2020 WL 2115436, at *1 (J. Winmill) (vacating mine project despite "economic loss and layoffs" that would result); *Nat'l Family Farm*, 960 F.3d at 1145 (vacating pesticide registration despite far-reaching economic consequences on farmers left with unusable product); *Standing Rock*, 985 F.3d at 1052 (affirming vacatur of pipeline authorization despite hundreds of millions of dollars in economic disruption); *W. Watersheds Project v. Zinke*, 441 F. Supp. 3d at 1088 (vacating oil and gas leases despite over $100 million in lost public revenue); *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 739, 751 (9th Cir. 2020) (vacating agency approval of a billion-dollar offshore drilling project in Alaska due to environmental violations); *Env't Def. Fund*, 2 F.4th at 976 (vacating completed pipeline despite disruption); *Dine Citizens Against Ruining Our Env't v. United States Off. of Surface Mining Reclamation & Enf't*, No. 12-cv-01275-JLK, 2015 WL 1593995, at *2 (D. Colo. Apr. 6, 2015) (vacating mine to "fulfill NEPA's purpose" despite "$400,000 per month" in costs); *cf. League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) (enjoining logging project because the economic harms were "outweighed by threatened irreparable injury to elk habitat").

In sum, the second *Allied-Signal* factor also favors vacatur, because the temporary disruption to Bayer does not outweigh irreparable environmental harm.

C. Vacatur Is Necessary to Ensure that P4's Improper Mine Plan Modification Undergoes NEPA Review.

One recent development further compels vacatur. It came to light during briefing that *after* BLM finalized the Caldwell Canyon EIS, P4 substantially modified the Caldwell Canyon Mine and Reclamation Plan to: (1) relocate the office and shop complex, laydown yard, waste water treatment and disposal area, septic and lagoon system, and growth media stockpile from Dry Valley to a location along the East Caldwell haul road; (2) construct a new access road segment paralleling the Dry Valley Haul Road then extending north from the Dry Valley tipple area to the junction with Dry Valley Road (3) resize and relocate sediment control ponds; and (4) replace the Slug Creek powerline with a utility corridor along the East Caldwell Haul Road. *See* 2d. Gibson Decl., Ex. A at 7–8, 11–14 (ECF No. 64-2); *compare* AR016147 *and* ECF No. 56 (maps of 2017 MRP facility layout) *with* 2d. Gibson Decl., Ex. A at 8, 12, 19 (maps of 2020 MRP facility layout).

None of these changes were evaluated under NEPA. The modifications were also undertaken without the requisite authorization by BLM. *See* 43 C.F.R. § 3592.1(a), (c) ("No operations shall be conducted except as provided in an approved plan" which must cover "the proposed roads [and] the size and location of structures and facilities to be built"); *id.* § 3592.1(d) ("mining plan modification(s) shall not be implemented unless previously approved"). After a meet and confer on this issue, counsel for Federal Defendants confirmed that BLM had not approved the modifications but declined to explain how this possibly complied with 43 C.F.R. § 3592.1 or NEPA. Stellberg Decl. ¶ 2. These latest developments underscore the importance of pausing the project so BLM can conduct a proper EIS.

CONCLUSION

Southeast Idaho is already burdened by a legacy of phosphate mining, with more than ten Superfund sites plaguing the region. Allowing another mine to proceed before BLM has properly studied or disclosed its impacts will undermine public confidence in this project, risk irreparable environmental damage, and frustrate the compelling purposes of NEPA. These equities aside, this case is not even a candidate for remand without vacatur because the mine plan must be altered to comply with FLPMA. While vacatur can be withheld in the rare case where compelling equities require, this is not such a case.

Accordingly, the Court should vacate the Caldwell Canyon ROD and EIS, and all decisions made in reliance on those documents, including Phosphate Use Permit (IDI-38927), East Caldwell haul road right of way (IDI-038996), water pipeline right of way (IDI-039279), fiber optic line right of way (IDI-039280), and powerline right of way (IDI-039281).

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Respectfully submitted.

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