

**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**No. DA 19-0492**

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PARK COUNTY ENVIRONMENTAL COUNCIL and GREATER  
YELLOWSTONE COALITION,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and LUCKY  
MINERALS, INC.,

Defendants and Appellants,

and

TIM FOX, in his capacity as Attorney General of the STATE OF MONTANA,

Intervenor and Appellant.

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On Appeal from the Montana Sixth Judicial District Court,  
Park County, Hon. Brenda R. Gilbert, Presiding  
Cause No. DV-17-126

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**RESPONSE BRIEF OF PLAINTIFFS-APPELLEES**  
**PARK COUNTY ENVIRONMENTAL COUNCIL AND**  
**GREATER YELLOWSTONE COALITION**

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## STATEMENT OF ISSUES

1. Whether Plaintiffs-Appellees Park County Environmental Council and Greater Yellowstone Coalition (collectively, “PCEC”) have standing to challenge mineral exploration near the northern border of Yellowstone National Park that would interfere with their members’ use and enjoyment of Emigrant Gulch and their neighboring properties.

2a. Whether the Montana Department of Environmental Quality (“DEQ”) violated the Montana Environmental Policy Act (“MEPA”), MCA § 75-1-101 et seq., in evaluating proposed mineral exploration by failing to rationally consider:

- i. impacts on wildlife;
- ii. impacts on water quality; and
- iii. alternatives that could mitigate or avoid environmental harm.

2b. Whether the issue of DEQ’s failure to evaluate the potential for Lucky Minerals to acquire legal rights to mine on federal lands is moot in light of a Congressional mineral withdrawal prohibiting such future mining, or in the alternative, whether this failure violated MEPA.

3. Whether the Montana Legislature’s 2011 MEPA amendment prohibiting courts from vacating any permit issued in violation of MEPA, MCA § 75-1-201(6)(c), (d), is unconstitutional as applied to this case (or, in the alternative, facially), in violation of the public’s fundamental rights to a clean and healthful

environment, Mont. Const. art. II, § 3, art. IX, § 1, and meaningful participation in agency decisionmaking, Mont. Const. art. II, § 8.

## **STATEMENT OF FACTS**

### **I. MONTANA ENVIRONMENTAL POLICY ACT**

This case arises from DEQ’s analysis, pursuant to MEPA, of the environmental consequences of issuing a license to Lucky Minerals to conduct extensive mineral exploration in Park County, Montana, in a location outside the northern boundary of Yellowstone National Park known as Emigrant Gulch.

The Montana Legislature adopted MEPA “to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans.” MCA § 75-1-102(2). Consistent with this purpose, the Legislature identified MEPA as a necessary tool for implementing the state’s constitutional obligation to prevent unreasonable environmental degradation. See MCA § 75-1-102(1). While MEPA mandates procedures rather than substantive outcomes, “[t]he Legislature enacted MEPA to prevent or eliminate environmental damage.” Pompeys Pillar Historical Ass’n v. Mont. Dep’t of Env’tl. Quality, 2002 MT 352, ¶ 17, 313 Mont. 401, 61 P.3d 148. MEPA’s environmental review requirement fosters better decision-making by establishing a look-before-you-leap mandate, “ensur[ing] that presently unquantified environmental amenities and values may be given appropriate

consideration.” MCA § 75-1-201(1)(b)(ii); see also id. § 75-1-102(1) (legislature’s intent is that MEPA “review of state actions [will] ensure that ... environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations” and “the public is informed of the anticipated impacts in Montana of potential state actions”); Ravalli Cty. Fish & Game Ass’n v. Mont. Dep’t of State Lands, 273 Mont. 371, 378, 903 P.2d 1362, 1367 (1995) (“MEPA requires that an agency take procedural steps ... in order to make informed decisions.”) (citation omitted).

To meet these purposes, MEPA requires DEQ to “take a ‘hard look’ at the environmental impacts of a given project or proposal” before implementing an action. Mont. Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877; see also MCA § 75-1-201(1)(b)(iv); ARM 17.4.609(3)(d). DEQ must consider, among other things, the direct, indirect, and cumulative environmental impacts of the proposed action and reasonable alternatives. MCA § 75-1-201(1)(b)(iv), (v); ARM 17.4.609(3). DEQ must also identify and evaluate measures that will mitigate the project’s impacts. ARM 17.4.609(3)(g).

DEQ must set out this analysis in an environmental impact statement (“EIS”) if the project under review may “significantly affect[] the quality of the human environment.” ARM 17.4.607(1). DEQ may approve the project without

preparing an EIS only if it rationally determines through preparation of an environmental assessment (“EA”) that the project’s impacts will not be significant. ARM 17.4.607(1)(b). To demonstrate that an EIS is required, “[a] plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared.” Ravalli Cty. Fish & Game Ass’n, 273 Mont. at 379, 903 P.2d at 1368 (quoting LaFlamme v. Fed. Energy Regulatory Comm’n, 852 F.2d 389, 397 (9th Cir. 1988)) (emphasis omitted).

## **II. LUCKY MINERALS’ PROPOSED MINERAL EXPLORATION PROJECT**

Lucky Minerals proposes extensive exploration for gold and other minerals in Emigrant Gulch, just outside the rugged and remote Absaroka-Beartooth Wilderness and 15 miles north of Yellowstone National Park within the Greater Yellowstone Ecosystem. AR **10, 14** (map), 130-31.<sup>1</sup> The proposed project area is home to bighorn sheep, elk, deer, moose, marmots, coyotes, black bears, and wolves. AR 51. It also provides important, occupied habitat for state-listed species of concern, including the wolverine and grizzly bear, which is also a threatened species under the federal Endangered Species Act. AR 51-53, 62. The

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<sup>1</sup> Citations are to DEQ’s administrative record filed in the district court on or about November 30, 2017. Bolded citations are included in PCEC’s supplemental appendix, filed herewith.

creeks in Emigrant Gulch—including those in the project area—drain into the Yellowstone River, which hosts a world-renowned trout fishery. AR 48, 2884. Emigrant Peak dominates the mountains flanking the Gulch, and is one of the most popular year-round recreation destinations in Montana. AR 136. For over a hundred years, area residents and visitors have soaked in the natural mineral pools of Chico Hot Springs, which sits at the mouth of Emigrant Gulch. AR 166, 2934-35. These features and the area’s natural beauty are also important to the local economy, supporting tourism that employs large numbers of Park County residents. AR 2883-84.

Within this special landscape, Lucky proposes drilling 46 exploratory holes, each up to 2,000 feet deep, at 23 locations on patented land that was privatized under the 1872 Mining Act. AR 10, 28-29. Drilling would take place over two years, and persist for nearly 24 hours a day during three-month field seasons. AR 25, 29. Lights similar to those used by highway construction crews would light the operation every night, disturbing sensitive wildlife. AR 29, 72-75. Lucky proposed to make the project area accessible to mining vehicles and heavy equipment by improving road conditions that currently limit human presence in sensitive wildlife habitat. AR 26, 73, 75. In short, the proposed mineral exploration would introduce industrial activity and greater human encroachment

into an area that has not seen significant mining or exploration activity for more than 20 years.

The affected community in Park County, Montana—including hundreds of businesses—has opposed Lucky’s plan. AR 2934, 3095. When Lucky first announced its proposal in 2015, Park County’s newspaper, The Livingston Enterprise, editorialized that, “[a]s we have learned from a long, sordid history of mining in Montana, we must be selective and critical in determining where companies are given the green light for resource extraction. ... Emigrant Peak is the ideal location for many activities, but a mine exploration project isn’t one of them.” AR 2015. Community meetings in summer 2015 drew hundreds of local residents opposed to exploration drilling in the gateway to Yellowstone Park. See AR 3129.

Reflecting this opposition, on November 21, 2016, the U.S. Forest Service and Department of Interior announced a proposal to withdraw 30,000 acres of federal land in Park County—including National Forest System lands adjacent to Lucky’s proposed project—from mineral exploration and development. See Notice of Application for Withdrawal, 81 Fed. Reg. 83,867, 83,867-68 (Nov. 22, 2016). The proposal had the immediate effect of preventing mining activity on the National Forest lands, subject to valid existing rights, for two years. Id. The withdrawal was intended “to protect and preserve the scenic integrity, important

wildlife corridors, and high quality recreation values of the Emigrant Crevice area located in the Custer Gallatin National Forest, Park County, Montana.” Id. Following the district court’s ruling on the validity of DEQ’s MEPA review, on October 12, 2018, then-Interior Secretary Ryan Zinke finalized the administrative mineral withdrawal, extending protections for 20 years. Pub. Land Order 7875, 83 Fed. Reg. 51,701 (Oct. 12, 2018). Subsequently, Congress enacted permanent protections. Pub. L. No. 116-9, 133 Stat. 580 (Mar. 12, 2019).

Critically, however, the federal mineral withdrawal does not include the patented mining claims on which Lucky proposed mineral exploration. Id. While the withdrawal effectively prevents the expansion of Lucky’s mining activities onto the National Forest, Lucky’s mineral exploration project remains a threat on private land inholdings within this protected area. See AR 14 (map).

### **III. DEQ’S MEPA ANALYSIS**

Rather than prepare an EIS to evaluate the environmental impacts of Lucky’s proposed mineral exploration, DEQ prepared a less-comprehensive EA. DEQ’s Draft Environmental Assessment (“Draft EA”), released on October 13, 2016, drew 3,384 public comments, the majority of which highlighted the harm Park County’s environment, economy, residents, and businesses will suffer if the exploration project goes forward. See AR 177, **379**, 2950-6284. Nevertheless, on July 26, 2017, DEQ issued its Final Environmental Assessment (“Final EA”),

which concluded that the project will not have significant environmental impacts and therefore that no EIS is required. AR 1-2. Under the Final EA, the agency approved Lucky's proposal with only slight modifications that, according to DEQ, will "address potential [environmental] impacts." Id.

As described below, however, the Final EA did not rationally evaluate many of the project's most troubling impacts, including impacts to sensitive wildlife and water quality, or explain how measures included in the agency-modified alternative will render those impacts insignificant. DEQ approved the exploration license on July 26, 2017 without further environmental review. Id.

## **STANDARD OF REVIEW**

### **I. MEPA CLAIMS**

The Court reviews DEQ's MEPA analysis, including DEQ's decision not to prepare an EIS, to determine whether it is "arbitrary, capricious, unlawful, or not supported by substantial evidence." Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality, 2016 MT 9, ¶ 14, 382 Mont. 102, 365 P.3d 454 (quoting Clark Fork Coal. v. Mont. Dep't of Env'tl. Quality, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.2d 482). Under this standard, the Court determines, based on a careful review of the administrative record, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. (quoting Clark Fork Coal., ¶ 21) (quotation omitted). An agency fails this test if it

does not take a “hard look” at a proposal’s environmental impacts. Mont. Wildlife Fed’n, ¶ 43.

When the record does not support an agency’s decision, the decision is remanded “to the agency for additional investigation or explanation.” Ravalli Cty. Fish & Game Ass’n, 273 Mont. at 382, 903 P.2d at 1369 (quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)); see also Charles A. Koch & Richard Murphy, 3 Admin. L. & Prac. § 8:27 (3d. ed., Feb. 2019 update) (when “the administrative record provides inadequate support for an agency action, the usual remedy is to vacate and remand that action for further agency proceedings”).

## **II. CONSTITUTIONAL CLAIMS**

The rights of Montana citizens to a clean and healthful environment and to reasonable public participation, found in article II of our Constitution, are “fundamental right[s] because [they are] guaranteed by the Declaration of Rights.” Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality (“MEIC”), 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236. Accordingly, “any statute or rule which implicates th[ose] right[s] must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State’s objective.” Id. (emphasis omitted); accord N. Plains Res. Council v. Mont. Bd. of Land Comm’rs, 2012 MT 234, ¶ 18, 366 Mont. 399, 288

P.3d 169. To demonstrate a compelling interest, the State must show, “at a minimum, some interest ‘of the highest order and ... not otherwise served’ or ‘the gravest abuse[], endangering [a] paramount [government] interest.’” Armstrong v. State, 1999 MT 261, ¶ 41 n.6, 296 Mont. 361, 989 P.2d 364 (alterations in original; quotations omitted).

The Attorney General’s suggested “balancing” of PCEC’s fundamental rights with Lucky’s private property interest, in lieu of strict scrutiny, is not the appropriate standard for judicial review of MEPA’s remedial restrictions. AG Br. 6-8. As the district court correctly held, public welfare regulations such as MEPA “do not unduly interfere with the fundamental nature of private property ownership.” Order Ruling on P’s Mot. for Vacatur (Apr. 12, 2019) (hereafter, “Vacatur Decision”) (quoting Williams v. Bd. of Cty. Comm’rs of Missoula Cty., 2013 MT 243, ¶ 56, 371 Mont. 356, 308 P.3d 88). Therefore, strict scrutiny applies.

### **SUMMARY OF ARGUMENT**

The district court’s rulings in this case were correct and should be affirmed.

First, PCEC demonstrated that it has standing to pursue its MEPA claims because its members’ recreational and property interests would be harmed by Lucky’s mineral exploration project in Emigrant Gulch, where members live, work, and recreate.

Second, DEQ violated MEPA by failing to rationally evaluate the project's impacts and feasible alternatives. In particular, DEQ arbitrarily failed to rationally analyze the long-lasting impacts of Lucky's proposed road improvements on sensitive wildlife, which DEQ no longer contests, and potential discharges of poor-quality water from drill holes to ground and surface waters in the project area. DEQ further violated MEPA by summarily rejecting two alternatives that would have lessened the project's environmental impacts without conducting any independent evaluation of whether Lucky could feasibly reduce the scale of its exploration project. DEQ's additional error that was correctly identified by the district court—its failure to examine the potential for severe environmental consequences in the event that Lucky uses its exploration project to establish vested mining rights on National Forest lands—was rendered moot by the subsequent Congressional withdrawal of those federal lands from future mining.

Third, the 2011 Legislature's attempted limitation on this Court's equitable power to prevent the environmental harm underlying DEQ's significant MEPA violations is unconstitutional as applied to this case (or, in the alternative, on its face). The MEPA amendment adopting remedial restrictions, MCA § 75-1-201(6)(c), (d), unconstitutionally infringes PCEC's fundamental right to a clean and healthful environment and violates the State's corresponding obligation to provide adequate remedies to protect that right. Mont. Const. art. II, § 3, art. IX, §

1. Additionally, the remedial restrictions violate PCEC's constitutional right to participate meaningfully in DEQ's decisionmaking process before a final decision is made and implemented. Id. art. II, § 8. To vindicate these rights, the district court properly vacated Lucky's unlawfully issued exploration license.

## **ARGUMENT**

### **I. PCEC HAS STANDING**

PCEC has standing to challenge DEQ's approval of Lucky's mineral exploration license. Lucky's attack on PCEC's standing improperly dismisses its members' concrete, personal stake in Lucky's proposal to industrialize lands adjacent to their homes and businesses, injuring their recreational and property interests. And it misapprehends the nature of PCEC's injuries, which under MEPA include not just the direct consequences of the challenged exploration project, but also the procedural harm from DEQ's failure to disclose and consider those consequences before authorizing the exploration. The district court properly rejected Lucky's arguments. Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, ¶ 30, 356 Mont. 41, 230 P.3d 808 ("A district court's determination regarding standing presents a question of law which we review for correctness") (citation omitted).

To meet the constitutional requirements for standing, "the plaintiff must clearly allege a past, present, or threatened injury to a property or civil right.

Furthermore, the injury must be one that would be alleviated by successfully maintaining the action.” Heffernan v. Missoula City Council, 2011 MT 91, ¶¶ 33, 360 Mont. 207, 255 P.3d 80 (citations omitted). Plaintiffs also must satisfy certain prudential requirements, primarily, as relevant here, the requirement that their “alleged injury ... be distinguishable from the injury to the public generally, though not necessarily exclusive to the plaintiff.” Id. Associations have standing to assert the rights of their members who would otherwise have standing in their own right. Id. ¶ 43; Mont. Immigrant Justice All. v. Bullock, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430 (same).

PCEC members meet these requirements. They satisfy the injury prong of constitutional standing “by showing ‘a connection to the area of concern sufficient to make credible the connection that the person’s life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded.’” W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 484 (9th Cir. 2011) (quoting Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1149 (9th Cir. 2000)).<sup>2</sup> Applying this standard, the Montana Supreme Court has

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<sup>2</sup> Federal precedents interpreting Article III, Section 2 of the federal constitution are persuasive authority for interpreting Montana’s constitutional standing requirements. Heffernan, ¶ 30 n.3.

repeatedly affirmed plaintiffs’ standing to challenge activities based on their potential impacts to wildlife, noise and traffic, and property values. See Aspen Trails Ranch, LLC, ¶¶ 41-42; Heffernan, ¶¶ 38, 41, 46; see also MEIC, ¶ 45 (affirming organization’s standing to challenge polluting activity that would have “an arguably adverse impact” on a river in which its members recreate).

Consistent with these cases, PCEC members filed affidavits in the district court alleging injuries sufficient to confer standing by documenting harm to their business, property, recreational, and aesthetic interests if the exploration project proceeds. For example, PCEC member Seabring Davis co-owns Chico Hot Springs Resort, at the base of Emigrant Gulch, and owns 635 acres of adjacent property that she maintains as open space. Davis Dec. ¶¶ 1-2, 4 (filed Jan. 12, 2018). Lucinda Reinold, a member of PCEC and Greater Yellowstone Coalition, lives in Pray, Montana, at the base of Emigrant Peak. Reinold Dec. ¶¶ 1-2 (filed Jan. 12, 2018). Both Ms. Davis and Ms. Reinold recreate frequently in Emigrant Gulch and alleged their recreational interests would be harmed by mineral exploration that disturbs valuable wildlife habitat, injects noise into a quite landscape, and threatens water quality. Davis Dec. ¶¶ 5-6; Reinold Dec. ¶¶ 4-5, 8. They also alleged that mineral exploration would diminish the value and their enjoyment of their nearby properties. Davis Dec. ¶ 6, Reinold Dec. ¶ 8. Contrary to Lucky’s representations, Lucky Br. 17-18, 21-22, these affidavits allege harm

not only from large-scale mining, but also from the mineral exploration project itself. E.g. Davis Dec. ¶ 6; Reinold Dec. ¶ 8. In sum, as the district court found, PCEC’s standing declarations “demonstrate specific impacts to the individuals in terms of business ownership, ownership of adjacent homes and undeveloped property, together with specific and aesthetic impacts that would negatively affect their recreational pursuits in the specific area of Lucky’s proposed exploration as well [as] enjoyment of their own property.” Order Denying Lucky Cross-Mot. for Summ. J. 6 (May 23, 2018) (hereafter, “Standing Decision”).<sup>3</sup>

Lucky’s standing argument also ignores the nature of harms that accrue when MEPA is violated. “[T]he legislative branch may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” Heffernan, ¶ 34 (quotation and citation omitted). As Lucky observes, “[t]he legal issue before the Court is entirely based upon whether the procedure DEQ employed in evaluating Lucky’s planned drilling project was satisfactory.” Lucky Br. 22 (emphasis added; citing MCA § 75-1-102). This procedure is designed to fulfill MEPA’s requirement “that an agency be informed

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<sup>3</sup> Contrary to Lucky’s suggestion, it is irrelevant to the standing analysis that Lucky’s mineral exploration project would occur on private land, Lucky Br. 22—a circumstance no different than the challenged subdivision approvals at issue in Aspen Trails Ranch and Heffernan.

when it balances preservation against utilization of our natural resources.” Ravalli Cty. Fish & Game Ass’n, 273 Mont. at 384, 903 P.2d at 1371. Thus, the harm to PCEC members from DEQ’s failure to comply with MEPA “consists of added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment.” Citizens for Better Forestry v. U.S. Dep’t of Agric., 341 F.3d 961, 971 (9th Cir. 2003).

Contrary to Lucky’s claim, Lucky Br. 23, the concrete injuries to PCEC members’ recreational, property, and procedural interests differ from those suffered by the public generally. The district court correctly found that PCEC’s “allegations that the proposed exploration project will have a more particular effect on them as nearby landowners and frequent users of the area than on the public at large are sufficient to establish standing.” Standing Decision 5 (quoting Aspen Trails Ranch, LLC, ¶ 43).

## **II. DEQ’S ENVIRONMENTAL REVIEW OF LUCKY’S MINERAL EXPLORATION PROPOSAL VIOLATED MEPA**

In approving Lucky’s exploration project based on a flawed and irrational evaluation of the project’s potentially significant environmental impacts and alternatives that could lessen those impacts, DEQ violated MEPA. Specifically, the Final EA fails to rationally evaluate: 1) harm to wildlife due to road improvements that will enhance human access to remote habitat (an issue DEQ no

longer contests); 2) potential contamination of water resources from artesian flow from drill holes; and 3) alternatives to the proposed action that could reduce its potentially significant environmental impacts. Accordingly, the district court correctly held that DEQ violated MEPA's requirements that, in an EA, the agency must "take a 'hard look' at the environmental impacts" of a proposed project, Mont. Wildlife Fed'n, ¶ 43 (quoting Ravalli Cty. Fish & Game Assn., 273 Mont. at 377, 903 P.2d at 1367), rationally evaluate their significance, ARM 17.4.608, and meaningfully consider feasible project alternatives, id. 17.4.609(3)(f). Additionally, because the environmental consequences of Lucky's exploration project are potentially significant, DEQ violated MEPA by failing to analyze them thoroughly in an EIS. MCA § 75-1-201(1)(b)(iv); ARM 17.4.607.

Although the district court also correctly found that DEQ violated MEPA by failing to consider the potential that Lucky may use the exploration project to obtain rights to mine National Forest lands, Congress' subsequent mineral withdrawal rendered this issue moot and it should be dismissed from this appeal.

**A. DEQ Arbitrarily Dismissed Harm to Sensitive Wildlife Due to Road Improvements**

DEQ's Final EA failed to rationally evaluate harm to wolverines and grizzly bears caused by Lucky's proposed road improvements, which DEQ first acknowledged in the Draft EA but later, without rational explanation and contrary to the record evidence, dismissed. Acceding to the District Court's decision on this

point, DEQ no longer defends its analysis of wildlife impacts from road improvements and asks this Court to remand the EA to DEQ for further analysis on this issue. DEQ Br. 5 n.1, 41-42. Lucky nonetheless persists in its meritless defense. Contrary to Lucky's arguments, DEQ's analysis does not satisfy MEPA's requirement that DEQ "take a 'hard look'" at environmental impacts. Mont. Wildlife Fed'n, ¶ 43 (citation omitted). Further, because the impacts to sensitive wildlife are potentially significant, DEQ should have studied them in an EIS. MCA § 75-1-201(1)(b)(iv); ARM 17.4.607.

DEQ's initial analysis of this issue, in its Draft EA, concluded that Lucky's proposed road improvements—designed to make Emigrant Gulch accessible to mining vehicles and equipment—also would provide hunters and motor vehicles with easier access to remote parts of the Emigrant Creek drainage, causing harm to the wildlife residing there. AR 442. "Wildlife populations that are subjected to hunting and trapping may sustain higher mortalities as a result of better access. ... Further, because of the increased human presence under the Proposed Action, the harassment or poaching of wildlife may also increase." Id. (citation omitted). With respect to wolverines in particular, DEQ's Draft EA predicted that improved human access could be "detrimental," because "an increase in human disturbance may cause" female wolverines to abandon their dens. AR 445.

The record evidence supports the Draft EA’s conclusions, and indeed suggests that road improvements in prime wildlife habitat within the greater Yellowstone ecosystem would cause even greater and longer-term harm than DEQ acknowledged. Most significantly, Montana Fish Wildlife & Parks (“FWP”), the state’s expert agency on wildlife matters, wrote in a comment letter on the Draft EA:

The road improvements will facilitate access for motorized use in an area that presently is very remote and rarely disturbed. This will result in a potentially significantly increased level of disturbance and fragmentation of the habitat with higher traffic volume, higher traffic speeds, and increased human presence. The road improvements would represent a permanent change to the landscape, with long-term implications for habitat suitability and productivity of the area for wildlife. This is of greatest concern for those species that are most sensitive to human activity, such as wolverine, lynx, grizzly bears and ungulates including elk, mule deer and moose that use this habitat for calving/fawning or migration.

AR **2983** (emphasis added). To reduce these long-term impacts, FWP requested that DEQ “[a]dapt the project to be completed without improving the roads, or, reclaim/close the roads after the 2 field seasons are complete to avoid long-term permanent alteration of wildlife habitat.” AR **2985**.

Consistent with FWP’s concerns, numerous scientific studies in the agency record documented the harmful effects of human encroachment on wolverines and grizzly bears. Human development and activity “in once remote areas may ... cause reduced ability of wolverines to perform their daily activities unimpeded,

making the habitat less optimal or causing wolverines to avoid the disturbed area.” AR 2601; see also, e.g., AR 1911-1912 (summarizing research); AR 2535 (“Human activity may therefore increase mortality [of wolverines] through increased natural or human predation; alternatively denning and rearing areas may be abandoned owing to perceived risk.”). Similarly, “[o]ne of the principal factors that ha[s] reduced grizzly bear populations has been creation of human access into grizzly bear habitat by roads built for resource extraction.” AR 2141; see also AR 1908-10 (summarizing research); AR 2116 (identifying “increased bear mortality rates caused by improved access” as a “major concern[]” for grizzly bear conservation).

In response to this evidence and FWP concerns that the Draft EA understated the harm to wildlife from increased motorized access, DEQ in the Final EA illogically “re-evaluated the impact on wildlife resulting from the proposed road improvements and believes that the draft EA overstated the impacts.” AR **197** (emphasis added). Yet DEQ “offered no reasoned analysis whatsoever in support of its conclusion—which is in direct conflict with the conclusion ... of its sister agency,” FWP. W. Watersheds Project, 632 F.3d at 492-93 (holding that BLM violated NEPA where it “never seriously considered the

concerns raised by” wildlife agencies).<sup>4</sup> Indeed, DEQ’s own findings elsewhere in the Final EA contradicted its ultimate conclusion on wildlife impacts, stating that “[i]mprovements to the existing roads would facilitate an increase in motorized access and hunter access into higher, more remote areas in the drainage” and that “the impacts of improved access to more remote areas may be detrimental to regional populations” of wolverines. AR 75.

Lucky fails to justify the Final EA’s conclusion. Lucky claims that four-wheel drive vehicles can currently access the Project site, so road improvements will not increase human presence. Lucky Br. 25. But the record demonstrates that the road currently is not accessible by passenger vehicles—even with four-wheel drive. See, e.g., AR 6634 (email from Forest Service employee to DEQ: “The lower portion of the road is not passible with hwy vehicles due to several avalanches and rock slides. If you plan to go up I would bring a[n] [A]TV.”); AR 2939 (reporting comment of U.S. Forest Service district ranger that “the existing road is comparable to a Jeep trail and would need ‘significant improvement’ to handle heavier trucks and equipment”); AR 3009-10, 6629-33 (photographs of

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<sup>4</sup> The Montana Supreme Court has stated “that since MEPA is modeled after the National Environmental Policy Act (NEPA), federal case law construing parallel provisions in NEPA is persuasive” in MEPA cases. Mont. Wildlife Fed’n, ¶ 32 (citation omitted).

road obstructions). Lucky fails to support its further assertion that “roads will return to their present condition naturally” and offers no analysis of the time frame over which such natural deterioration would occur. Lucky Br. 25. Further, because DEQ itself did not rely on this possibility to dismiss wildlife impacts, it would be improper for the Court to step into the shoes of the agency and make such findings. See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) (stating “courts may not accept appellate counsel’s post hoc rationalizations for agency action”).

In short, Lucky offers no legitimate basis for this Court to second-guess DEQ’s acquiescence to the district court’s well-reasoned ruling on the agency’s flawed analysis of wildlife impacts from road improvements. In revising its conclusion concerning the impacts of improved access to the Emigrant drainage, DEQ failed to “examine the relevant data,” including data submitted by Montana’s expert wildlife agency, and to “articulate a satisfactory explanation for its action,” in violation of MEPA. Mont. Wildlife Fed’n, ¶ 43 (quoting Clark Fork Coal., ¶ 47). Further, because the record demonstrates that wildlife impacts may be significant and long-lasting, MEPA required DEQ to evaluate them in an EIS. MCA § 75-1-201(1)(b)(iv); ARM 17.4.607.

## **B. DEQ Arbitrarily Evaluated Water-Quality Impacts Due to Contaminated Flow from Drill Holes**

The district court also correctly held that DEQ violated MEPA by failing to rationally evaluate potential water-quality impacts. The EA acknowledged that “it is likely that Lucky Minerals would ... encounter artesian conditions during drilling,” meaning that groundwater may flow freely from the drill holes before the holes are plugged following exploration. AR 127; cf. Lucky Br. 27-28 (denying this point without citing any contrary evidence). Drilling fluid and groundwater that escape the drill pad under these conditions threaten to pollute ground and surface waters with dissolved metals and sulfuric acid, which commonly occur with sulfide-ore mining and exploration. AR 2729, 2731-61 (comments of geophysicist Dr. David Chambers); see also AR 1862 (explaining that metal sulfide minerals exposed to air and water oxidize to form sulfuric acid); AR 1503 (Lucky engineering report describing mineral deposits occurring as “sulfide disseminations”). The EA is arbitrary on this point, and further, this potentially significant impact to groundwater and Yellowstone River tributaries required study in an EIS. MCA § 75-1-201(1)(b)(iv); ARM 17.4.607

Nevertheless, Lucky and DEQ assert that artesian flow of contaminated water from drill holes will not threaten local water quality in part because drill holes will be plugged after drilling is complete. DEQ Br. 25, Lucky Br. 27-28. While DEQ faults the district court for allegedly overlooking this point, DEQ Br.

25, its argument is misguided. PCEC’s claim—and the scenario evaluated by the district court—is that contaminated groundwater may flow freely from the drill holes during exploration, “before the holes are plugged.” Decision Re. Cross-Mots. for Summ. J. 16 (May 23, 2018) (hereafter, “MEPA Decision”) (emphasis added). The fact that Lucky will plug drill holes after exploration is irrelevant to this issue.

As to the potential for contaminated discharges during drilling, the Final EA offered two primary reasons why Lucky’s exploratory drilling would not pose a risk to local water resources. First, the Final EA stated that Lucky “would develop a mitigation plan to effectively contain flow from artesian boreholes during drilling .... The procedures for artesian flow containment would be developed prior to commencing drilling operations[.]” AR **128**. As the district court correctly concluded, this amounts to nothing more than a “plan to make a plan to address water quality issues, which is insufficient analysis for a Final EA.” MEPA Decision 19. Indeed, DEQ does not contest this finding, acknowledging that “DEQ should have identified and evaluated the effectiveness of specific mitigation measures in the Final EA.” DEQ Br. 14. Thus, DEQ does not appeal this issue. While Lucky continues to defend DEQ’s reliance on unspecified future mitigation to support the Final EA’s conclusion that water quality impacts will be insignificant, Lucky Br. 28, its argument fails because DEQ could not meet its

burden to “explain exactly how the measures will mitigate the project’s impact” when they have not yet been formed. Ravalli Cty. Fish & Game Ass’n, 273 Mont. at 383, 903 P.2d at 1370 (citation omitted); see also ARM 17.4.607(4) (MEPA rules allow DEQ to find impacts insignificant based on mitigation only based on “enforceable controls or stipulations or both imposed by the agency or other government agencies”) (emphasis added).

The Final EA also dismissed potential water quality impacts on the basis that DEQ expects water flowing from drill holes to meet water quality standards. AR **127**. While both DEQ and Lucky attempt to defend this conclusion, the agency’s water quality analysis irrationally overlooked contrary record evidence, as the district court held. MEPA Decision 19. In particular, while DEQ selectively relied on samples from the so-called “Duval bore holes” and nearby seeps that exhibit generally good water quality, AR **127**, it dismissed other samples in the exploration area that are highly acidic and contaminated with metals, AR **104**.

DEQ urges this Court to disregard the poor water quality evident near the project area because it occurs at sites north of East Fork Emigrant Creek, while Lucky’s exploration will occur immediately south of the creek. DEQ Br. 17-20, 23-24. However, while water quality samples from sites north of the East Fork exhibit generally poorer quality than water sampled from a handful of sites south of the East Fork, even south of the East Fork, samples exhibited acidity as well as

metal (cadmium, zinc) pollution exceeding water quality standards. AR **104, 110** (GWIC #284924). Indeed, even as to the water flowing from the Duval bore holes on which DEQ relies, the Montana Bureau of Mines and Geology (Hargrave et al., 2000) reported that “[t]he effect[] on ground water is unknown and may be of some concern.” AR **8063**. Although DEQ now seeks to dismiss the groundwater findings of this report, DEQ Br. 24, the Final EA relied on the sentence in the report immediately preceding this groundwater finding to support its conclusions that vegetation beyond the immediate area surrounding the Duval boreholes “appears unaffected by the water,” AR **102** (quoting Hargrave et al., 2000). DEQ cannot have it both ways by selectively adopting the Bureau findings it likes and dismissing other findings as not supported.

Further, DEQ also blames poor water quality in the exploration area on conditions “not representative” of the groundwater and geology Lucky’s drill holes may encounter. DEQ Br. 20, 22-23. But while DEQ suggests that “pyrite oxidation and other sulfides” from a granodiorite intrusive are uniquely present north of East Fork Emigrant Creek, DEQ Br. 18, the record indicates that this same geological material occurs within Lucky’s exploration area, AR 38 (exploration area is within granodiorite and dacite porphyry); AR 1505 (exploration area contains “coarse, massive pyrite”). Further, despite DEQ’s confidence that the groundwater quality Lucky will encounter will match that from the Duval

boreholes to the West, the Final EA concedes that “the depths of the [Duval] boreholes and the nature of the altered volcanics that were encountered are unknown.” AR 102; see also AR 102, 106 (describing seeps, with no information about depth of groundwater). There is no record support for DEQ’s belief that Lucky’s drill holes with depths up to 2,000 feet will encounter the same conditions as the Duval boreholes, west of the exploration area with an unknown depth and mineralogy. Indeed, the record is devoid of information about the mineralogy and groundwater in the project area at the depths at which Lucky plans to drill and the entire purpose of Lucky’s exploration project is to determine the subsurface geology and mineralization, AR 25 (Final EA project description).

In light of these information gaps, DEQ’s conclusion that Lucky’s exploratory drilling will not encounter poor quality water that is commonly associated with sulfide-ore exploration and present in areas adjacent to the project site was speculative, at best. And if poor-quality groundwater is intercepted, DEQ offered nothing more than a “plan to make a plan” to protect Yellowstone River tributaries from acid and heavy metals discharges during drilling. Because DEQ failed to “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made,” Mont. Wildlife Fed’n, ¶ 43 (citation omitted), the agency’s water-quality analysis was arbitrary. While DEQ’s irrational examination of this issue alone

constitutes a violation of MEPA, DEQ further violated MEPA by failing to study this potentially significant impact in an EIS. MCA § 75-1-201(1)(b)(iv); ARM 17.4.607.

**C. DEQ Unlawfully Failed to Evaluate Feasible Project Alternatives**

DEQ also violated MEPA by failing to consider alternatives for reducing the exploration project's environmental impacts. Contrary to DEQ's and Lucky's arguments, DEQ's deference to Lucky's aspirational project scope could not lawfully justify its failure to consider reasonable alternatives. One of the primary purposes of an EA is "to assist in the evaluation of reasonable alternatives and the development of conditions, stipulations or modifications to be made a part of a proposed action." ARM 17.4.607(2)(b). MEPA's alternatives requirement ensures that agencies consider alternatives to a proposed project that will accomplish the project's goals while lessening impacts. See MCA § 75-1-201(1)(b)(v) (agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources"); ARM 17.4.609(3)(f) (EA must include "a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider").

The touchstone for determining whether an alternative is reasonable is whether it would lessen environmental impacts while achieving the project's

purpose. Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 812 (9th Cir. 1999) (“The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency cannot define its objectives in unreasonably narrow terms.”) (quotation and alteration omitted). Here, the Final EA states that the project’s purpose is “to conduct mineral exploration at the St. Julian Claim Block.” AR 11. Yet rather than considering whether alternative project parameters could reasonably achieve this purpose, DEQ deferred to Lucky’s specific proposal to drill at 23 locations over two seasons and rejected any alternative that deviated from this scope. AR 34-36. DEQ first dismissed an alternative that would have limited exploration to one field season on the ground that doing so would require Lucky to double the intensity of drilling, using “four, rather than two, drill rigs.” AR 35. Second, DEQ dismissed an alternative to eliminate night drilling, which would avoid some of the project’s harmful effects on sensitive wildlife because, according to DEQ, it would extend exploration “for an additional three or four field seasons.” AR 35-36. DEQ’s explanations for dismissing both of these alternatives unreasonably assumed that Lucky could not reduce the number of holes it will drill. See AR 408 (“Restricting the exploration license to one drilling season would limit Lucky Minerals’ ability to explore 23 locations without increasing the number of drill rigs, employees, traffic, and noise.”); AR 6435 (DEQ inquiry to Lucky about the effects on the project timeline

of eliminating night drilling, assuming no change in project scope). Based on this assumption, DEQ concluded that neither alternative would reduce the project's intensity or environmental impacts. AR 35-36. Yet DEQ failed to actually evaluate whether Lucky could feasibly reduce the scale of its exploration project while meeting the project's purpose, simply asserting that "DEQ has no basis to second-guess Lucky Minerals['] need to conduct drilling at all of the proposed locations." AR 321.

Contrary to DEQ's suggestion, MEPA does not permit DEQ to reject alternatives by blindly deferring to a project applicant's claim about the necessary scale of its project. See Nat'l Parks & Conservation Ass'n v. BLM, 606 F.3d 1058, 1072 (9th Cir. 2010) (holding that an agency may not "adopt[] private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives"). Although MEPA requires DEQ to "give due weight" to Lucky's feedback about proposed alternatives, MCA § 75-1-201(1)(b)(iv)(C)(II), the statute simultaneously requires DEQ to evaluate "different parameters ... that would accomplish the same objectives as those included in the proposed action by the applicant," id. § 75-1-220(1).

DEQ asserts that it properly deferred to Lucky's aspirational project scale, but DEQ misconstrues the case law. The cases DEQ cites, DEQ Br. 38-40, stand for the unchallenged proposition that an agency may consider an applicant's goals

in determining the project purpose and evaluating alternatives. Alaska Survival v. Surface Transp. Bd., 705 F.3d 1073, 1085 (9th Cir. 2013) (“agency has discretion to determine the best way to implement its statutory objectives ... in light of the goals stated by the applicant”); Biodiversity Conservation All. v. BLM, 608 F.3d 709, 715 (10th Cir. 2010) (agency “may give substantial weight to the goals and objectives” of applicant) (quotation and citation omitted). At the same time, the cases on which DEQ relies affirm that such consideration of an applicant’s goals does not relieve an agency of its obligation to “evaluate alternative ways of achieving [the project’s] goals”—that is, alternatives that do not conform precisely to applicant’s specifications. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C. Cir. 1991); cf. Nat’l Parks Conservation Ass’n v. Jewell, 965 F. Supp. 2d 67, 81 (D.D.C. 2013) (“NPS followed NEPA’s requirements by considering the range of alternatives flowing from the proposal’s purpose, including consideration of the application’s method of achieving the goals and alternative methods.”) (emphasis added); Theodore Roosevelt Conservation P’ship v. Salazar, 661 F.3d 66, 75 (D.C. Cir. 2011) (holding that an agency “was under no obligation to include a scaled-back-development alternative that would not ‘bring about the ends of the federal action’”) (emphasis added). Despite DEQ’s confusion on this point, “[r]equiring agencies to consider [third-party] objectives ... is a far cry from mandating that those [third-party] interests define the scope of

the proposed project.” Nat’l Parks Conservation Ass’n, 606 F.3d at 1070 (emphasis added). The agency may not reject otherwise feasible alternatives merely because they differ from the applicant’s proposal. See S. Utah Wilderness All. v. Norton, 237 F. Supp. 2d 48, 52-54 (D.D.C. 2002) (BLM violated NEPA where it rejected alternatives based on its “unquestioning acceptance of the statements of [project applicants] that limiting their operations to existing roads and trails would not meet the project objectives”).

In sum, DEQ violated MEPA by failing “to conduct an independent analysis” of alternative methods of meeting Lucky’s goals while reducing the project’s environmental footprint. Id.

**D. DEQ and Lucky’s Appeal Regarding Impacts from Mine Development on Federal Lands is Moot**

While the district court properly held in May 2018 that DEQ’s MEPA analysis should have considered the threat that Lucky may obtain a vested right to mine National Forest lands adjacent to the project area, that issue was rendered moot by subsequent events and it should be dismissed from this appeal. In the alternative, the district court’s decision should be upheld.

PCEC argued and the district court held that DEQ unlawfully failed to consider whether Lucky may use information from its exploration activities to establish “valid existing rights” to mine adjacent federal lands. MEPA Decision 26. However, in March 2019, the federal lands at issue were rendered permanently

off-limits to such future mining by virtue of a Congressional mineral withdrawal. Pub. L. No. 116-9, 133 Stat. 580 (Mar. 12, 2019); see also AG Br. 28 (acknowledging that “the recent withdrawal of federal lands in the Emigrant and Crevice areas prevents Lucky Minerals from” acquiring mining rights). Because Lucky can no longer establish rights to mine federal lands, it would be pointless for DEQ to analyze this potential on remand. In circumstances such as these, when the Court can no longer grant effective relief, an appeal is moot. Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, ¶ 19, 293 Mont. 188, 193, 974 P.2d 1150, 1153 (“If the parties cannot be restored to their original position, the appeal becomes moot.”) (citations omitted). This Court “do[es] not render advisory opinions,” and DEQ and Lucky’s appeal on this issue should be dismissed. Serena Vista, LLC v. State of Mont. Dep’t of Nat. Res. & Conservation, 2008 MT 65, ¶ 14, 342 Mont. 73, 179 P.3d 510.

Should this Court determine that the issue is not moot, it should uphold the district court’s decision. MEPA requires DEQ to evaluate a project’s direct and secondary environmental impacts. ARM 17.4.609(3)(d). Such secondary impacts include any “further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.” Id. 17.4.603(18). The scope of the agency’s MEPA review must include all impacts for which there is “‘a reasonably close causal relationship’ between the subject

government action and the particular environmental effect.” Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’tl. Quality, 2017 MT 222, ¶ 25, 388 Mont. 453, 401 P.3d 712 (citation omitted).

DEQ’s claim that the potential that Lucky could mine federal lands is not an impact that is “stimulated or induced by or [would] otherwise result from” Lucky’s exploration project is unavailing. DEQ Br. 31 (quoting ARM 17.4.603(18)). The purpose of mineral exploration is to demonstrate minable reserves, and here Lucky’s “[o]verall target” is a large-scale mine on both private and public lands capable of producing millions of ounces of gold, copper, and silver. AR 1546. Lucky’s proposed exploration is an indispensable phase of this larger project. This is exactly the type of “secondary impact” that DEQ is required to evaluate. ARM 17.4.603(18).

Further, while PCEC believes this issue no longer presents a live controversy, at the time DEQ issued the Final EA and approved Lucky’s exploration license, there was a significant risk that Lucky could make a discovery of valuable minerals that would deprive DEQ of authority to prevent mining on federal lands. Under the 1872 Mining Law, which governs mining on federal lands, an individual may establish a “valid existing right” to exploit federal minerals by demonstrating a reasonable prospect of success in developing a valuable mine, given market conditions and operating costs. 30 U.S.C. § 26;

Wilderness Soc’y v. Dombeck, 168 F.3d 367, 375 (9th Cir. 1999). Such a right amounts to a possessory interest that “entitles the claim holder to the right to extract all minerals from the claim” even though “the United States retains title to the land.” McMaster v. United States, 731 F.3d 881, 885 (9th Cir. 2013) (quotation and citations omitted). Although DEQ may regulate such mining under state law, it cannot prohibit it altogether without running afoul of Lucky’s rights and federal law. S.D. Mining Ass’n, Inc. v. Lawrence Cty., 155 F.3d 1005, 1011 (8th Cir. 1998) (holding county ordinance preempted where its “de facto ban on mining on federal land” conflicts with federal law); cf. Cal. Coastal Comm’n v. Granite Rock Co., 480 U.S. 572, 586-89 (1987) (finding state regulation of mining was not preempted where “it does not seek to prohibit mining of the unpatented claim on national forest land”).

Because DEQ’s decision to grant the exploration license triggered a chain of events that DEQ would be powerless to prevent, it reflected an “irretrievable commitment of resources” that DEQ was required to evaluate under MEPA. N. Fork Pres. Ass’n v. Dep’t of State Lands, 238 Mont. 451, 462, 778 P.2d 862, 869 (1989); see also Conner v. Burford, 848 F.2d 1441, 1446, 1448-49 (9th Cir. 1988) (an “irretrievable commitment of resources” occurs when the agency no longer has the “absolute right” to prevent an activity).

Contrary to DEQ's position, DEQ was on notice of this issue through public comments requesting analysis of full-scale mining that may occur as a result of exploration, observing that Lucky may seek to access federal minerals through angle-drilling during exploration, and explaining that Lucky's establishment of valid existing rights could entitle it to drill federal minerals. See AR 181, 295-96. Although PCEC's comments present a "less refined legal argument" than presented here, they were sufficient to exhaust PCEC's administrative remedies under MEPA. Native Ecosystems Council v. Dombeck, 304 F.3d 886, 898-900 (9th Cir. 2002).

Should this Court determine that this issue was not rendered moot on appeal by the Congressional withdrawal of federal lands from future mining, it should uphold the district court's finding that DEQ's failure to consider this issue in the Final EA violated MEPA.

### **III. MEPA'S REMEDIAL RESTRICTIONS ARE UNCONSTITUTIONAL AS APPLIED TO THIS CASE, AND LUCKY'S UNLAWFULLY ISSUED EXPLORATION LICENSE SHOULD BE VACATED**

To ensure that DEQ complies with MEPA's mandates to evaluate and avoid environmental harm before that harm is a foregone conclusion, the district court properly determined that remedial restrictions in MEPA violate PCEC's fundamental constitutional rights and vacated Lucky's exploration license.

Otherwise, MEPA becomes a meaningless paperwork exercise that fails to meet its stated purpose of protecting Montanans' fundamental rights.

While PCEC argued and the district court ruled that MCA § 75-1-201(6)(c), (d) violate PCEC's constitutional rights as applied to this case, even if this Court considers the facial constitutionality of these provisions, as the Attorney General urges, the result is the same. The 2011 Legislature's prohibition against district courts' vacating or enjoining of unlawful state agency decisions violates the public's fundamental rights to be free of unreasonable environmental degradation, Mont. Const. art. II, § 3; art. IX, § 1, and participate in agency decision-making before final decisions are made, Mont. Const. art. II, § 8.

**A. MEPA Amendments That Restricted This Court's Remedial Powers Violate PCEC's Constitutional Right to a Clean and Healthful Environment**

Because MEPA compliance is a core component of the Legislature's scheme to implement the Constitution's environmental provisions, MEPA amendments that undermined that role violate PCEC's right to a clean and healthful environment. Mont. Const., art. II, § 3; art. IX, § 1. MEPA helps the State prevent unreasonable environmental harm—such as the harm from Lucky's mineral exploration project—by establishing a common-sense “look-before-you-leap” mandate that fosters better decisionmaking. See Ravalli Cty. Fish & Game Ass'n, 273 Mont. at 384, 903 P.2d at 1371 (stating MEPA promotes informed

decisionmaking by requiring agencies to analyze impacts before reaching a decision). However, in sweeping amendments to MEPA in 2011, the Legislature turned this mandate on its head. Senate Bill 233 enacted sections 75-1-201(6)(c) and (d), which together provide that the only permissible remedy for adjudicated MEPA violations is a remand to the agency to re-do its analysis. See 2011 Mont. Laws ch. 396, § 6 (SB 233). “A permit, license, lease, or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court.” MCA § 75-1-201(6)(d). As a result, the 2011 amendments would allow Lucky’s project, with its attendant environmental harms, to occur before DEQ completes a legitimate environmental review to evaluate and identify measures to avoid that harm. This transforms MEPA’s mandate from “look before you leap” to “leap before you look.” By eliminating the district court’s—and this Court’s—ability to vacate Lucky’s exploration license or enjoin exploration activity while DEQ undertakes a new environmental analysis, the 2011 amendment unconstitutionally infringed the “anticipatory and preventative” environmental provisions of our Constitution. MEIC, ¶ 77; Mont. Const., art. II, § 3, art. IX, § 1.

1. MEPA Compliance is an Important Component of the State's Constitutionally Mandated Remedial Scheme to Prevent Unreasonable Environmental Degradation.

Montana's Constitution compels the state to prevent unreasonable environmental degradation to protect the public's right to a clean and healthful environment, and compliance with MEPA is an essential part of satisfying that obligation. The Montana Constitution recognizes an inalienable "right to a clean and healthful environment," and as a correlative responsibility requires that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. II, § 3, art. IX, § 1(1). In addition, the Constitution requires that the Montana Legislature "shall ... provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." *Id.* art. IX, § 1(3). These environmental protections do not "merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." MEIC, ¶ 77. Rather, they provide environmental "protections which are both anticipatory and preventative." *Id.*

The Attorney General's attempt to diminish the 2011 legislation's threat to these constitutional rights is unavailing. The Attorney General cites the 40-year-old decision in Kadillak v. Anaconda Co., 184 Mont. 127, 602 P.2d 147 (1979), to argue that MEPA has no constitutional role. AG Br. 13-14. While MEPA

mandates procedures rather than substantive outcomes, “[t]he Legislature enacted MEPA to prevent or eliminate environmental damage,” among other goals. Pompeys Pillar Historical Ass’n, ¶ 17. To meet this goal, MEPA “requires State agencies to review, through an EIS, major actions that significantly affect the quality of the human environment so that the agencies may make informed decisions.” N. Plains Res. Council, ¶ 14 (citation omitted); see also Ravalli Cty. Fish & Game Ass’n, 273 Mont. at 378, 903 P.2d at 1367 (“MEPA requires that an agency take procedural steps to review ‘... major actions of state government significantly affecting the quality of the human environment’ in order to make informed decisions.”) (citation omitted). Accordingly, subsequent to Kadillak, the Montana Legislature in 2003 expressly identified MEPA as a central tool for implementing the State’s constitutional obligation to prevent unreasonable environmental degradation. See 2003 Mont. Laws ch. 361, § 5 (HB 437) (codified at MCA § 75-1-102(1)) (stating that “the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution” with respect to the right to a clean and healthful environment, and listing statutes, including MEPA). Indeed, this Court has recognized that “[o]ne of the ways that the Legislature has implemented Article IX, Section 1 is by enacting

MEPA.” N. Plains Res. Council, ¶ 14. The Attorney General’s contrary claim is meritless.

2. DEQ Cannot Satisfy Its Constitutional Obligation to Prevent Unreasonable Environmental Degradation Unless It Complies with MEPA Before Lucky Commences Drilling

Because MEPA is an important component of the State’s scheme for implementing its constitutional obligation to prevent unreasonable environmental degradation, DEQ would violate its constitutional obligation and PCEC’s constitutional rights if Lucky Minerals were allowed to conduct environmentally harmful mineral exploration before DEQ undertakes a lawful study of the project’s consequences under MEPA. “MEPA requires that an agency be informed when it balances preservation against utilization of our natural resources and trust lands. The [agency] may not ... reach a decision without first engaging in the requisite significant impacts analysis.” Ravalli Cty. Fish and Game Ass’n, 273 Mont. at 384, 903 P.2d at 1371 (emphasis added). Thus, an agency must complete its environmental review before there is “an ‘irretrievable commitment of resources’” to an action. N. Fork Pres. Ass’n, 238 Mont. at 461, 778 P.2d at 868 (citation omitted). Otherwise, MEPA compliance becomes meaningless paperwork.

In this case, DEQ must reinitiate MEPA review to rationally evaluate the environmental impacts discussed above, which include impacts DEQ itself acknowledges were not adequately evaluated in the Final EA. DEQ Br. 5 n.1, 41-

42. However, such review can remedy the flaws in DEQ's initial decision-making process only if Lucky's exploration license is set aside so that the new review can inform a new agency decision. If DEQ's initial, uninformed decision to allow mineral exploration were to stand and drilling were to proceed before the EIS is complete, "the process becomes a useless ritual, defeating the purpose of [M]EPA, and rather making a mockery of it." Nat. Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975); see also Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 785 (9th Cir. 2006) (affirming that "dilatory or ex post facto environmental review cannot cure an initial failure to undertake environmental review"); Save the Yaak Comm. v. Block, 840 F.2d 714, 718-19 (9th Cir. 1988) (holding that agencies' failure to conduct timely environmental review "seriously imped[ed] the degree to which their planning and decisions could reflect environmental values").

The insufficiency of post hoc environmental review to satisfy state constitutional mandates is underscored by this Court's recognition that the Constitution's environmental protections are meant to be "anticipatory and preventative." MEIC, ¶ 77. "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." Id. MEPA can only "prevent[]" unreasonable environmental harm if it is employed before that harm occurs. Id. (emphasis added).

3. The Legislature's 2011 MEPA Remedial Limitations Violate PCEC's Constitutional Environmental Rights

Because it stripped the courts of equitable authority to prevent the environmental consequences of the challenged decision from occurring before DEQ has reasonably evaluated those consequences—and alternatives to avoid them—in a lawful MEPA analysis, the Montana Legislature's 2011 amendment to MEPA, MCA § 75-1-201(6)(c), (d), infringes PCEC's right to a clean and healthful environment and is subject to strict scrutiny. MEIC, ¶ 63; see Mont. Const., art. II, § 3, art. IX, § 1.

Lucky's proposed mineral exploration threatens significant environmental harm that implicates PCEC's environmental rights. As the district court determined in a finding that DEQ does not challenge, exploratory drilling may impact wolverines and grizzly bears “from increased human access to sensitive wildlife habitat that ha[s] the potential to persist beyond the two-year period of Lucky's exploration.” MEPA Decision 15. Additionally, “[t]he record contradicts DEQ's prediction that Lucky's artesian discharges will not harm surface or groundwater.” Id. at 19. And DEQ has failed to evaluate reasonable alternatives to minimize the project's impacts. Id. at 29. If not fully accounted for and addressed in DEQ's decisionmaking, these impacts implicate PCEC's “constitutional right to a clean and healthy environment and to be free from unreasonable degradation of that environment.” MEIC, ¶ 79.

As MEIC makes clear, a legislative enactment that eliminates statutory protection against such impacts violates the Montana Constitution. In MEIC, the plaintiffs challenged the constitutionality of an exemption from a statutory requirement to review the potential for activities to degrade high-quality waters. See MEIC, ¶ 80. The challenged statutory provision deemed certain activities categorically “nonsignificant” and “allow[ed] them to proceed without the form of review which would otherwise be required for degradation of the State’s waters.” Id. ¶ 19. The MEIC Court determined that the nondegradation review requirement was “a reasonable legislative implementation of the mandate” to provide a “clean and healthful environment.” Id. ¶ 80. By creating a blanket exemption from nondegradation review for certain potentially polluting activities, the Legislature “violate[d] those environmental rights guaranteed by ... the Montana Constitution.” Id.

Similarly, MEPA “is a reasonable legislative implementation of the mandate” to prevent unreasonable environmental degradation associated with mineral exploration. Id.; see MCA § 75-1-102(1). However, under the Legislature’s 2011 amendment enacting sections 75-1-201(6)(c) and (d), an entire category of activities—those that were approved based on environmental review that a court found to be unlawful—may proceed with their attendant environmental consequences “without the form of review which would otherwise be required”

under MEPA. MEIC, ¶ 19. Accordingly, like the exemption from nondegradation review at issue in MEIC, the Legislature’s 2011 amendment to MEPA’s remedial provisions violates the Constitution’s environmental guarantees and triggers strict scrutiny. See Mont. Const. art. II, § 3, art. IX, § 1.

4. Other Environmental Laws Cannot Substitute for a MEPA Vacatur Remedy

The Attorney General’s argument that a MEPA vacatur remedy is unnecessary because remedies are available to enforce separate regulatory requirements of the Metal Mine Reclamation Act (“MMRA”), MCA § 82-4-301 et seq., is also meritless. AG Br. 16-23. A MEPA remedy is necessary here to ensure that DEQ acknowledges and studies the environmental harm posed by Lucky’s exploration project, and thus appropriately addresses that harm through alternatives or mitigation measures in any MMRA exploration license it may ultimately issue.

Contrary to the Attorney General’s argument, AG Br. 18-19, MEPA’s procedural requirements complement, and do not conflict with, substantive environmental laws such as the MMRA. As the district court recognized, MEPA and the MMRA “work[] in tandem.” Vacatur Decision 19. DEQ, in determining whether to issue an exploration license, studies a project’s potential environmental impacts through the MEPA process. See AR 3-378 (Final EA). DEQ then uses the results of that environmental review to propose mitigation measures to reduce the exploration project’s environmental impacts. See AR **30-34** (Final EA’s

description of agency-modified alternative). These mitigation measures are incorporated into DEQ's final permit decision, which can then be enforced under the MMRA. See AR 1 (“[T]he exploration license issued by DEQ will reflect the proposed exploration activity ... as modified by the mitigation measures contained in the Agency Modified Alternative.”); MCA § 82-4-361(2)(a) (providing that DEQ may bring an action to enjoin activity in violation of an MMRA permit). Indeed, here, DEQ's only review of Lucky's exploration license application and potential environmental impacts was its MEPA review. MEPA's “procedural steps” were therefore essential to help DEQ “to make informed decisions.” Ravalli Cty. Fish & Game Ass'n, 273 Mont. at 378, 903 P.2d at 1367.

Once the exploration license is finalized, however, DEQ's MEPA review can no longer inform steps to lessen environmental harm. If DEQ failed to study some salient environmental impact, and the permit thus provides insufficient mitigation to address that impact, no remedy under the MMRA can compel the agency to revisit its environmental analysis, reopen the permit, and fix its omission. See MCA §§ 82-4-354, 82-4-361 (setting out MMRA remedies). Instead, that is the role of MEPA's vacatur remedy: to prevent harmful activity until state agencies can examine and address the environmental impacts of that activity. Vacatur ensures that an agency is “informed when it balances preservation against utilization of our natural resources,” Ravalli Cty. Fish &

Game Ass'n, 273 Mont. at 384, 903 P.2d at 1371, and is thus in a position to, if possible, “prevent or eliminate environmental damage,” Pompeys Pillar Historical Ass'n, ¶ 17. By requiring such consideration before a project is permitted to proceed, MEPA’s remedies form an essential element of the “anticipatory and preventative” right to a clean and healthful environment. MEIC, ¶ 77.

The Attorney General’s related argument that other environmental laws, including the MMRA and the Montana Water Quality Act (“MWQA”), are adequate to prevent environmental harm in this case even absent MEPA compliance is equally meritless. AG Br. 19-21, 24.<sup>5</sup> The Attorney General charges that the district court “ignor[ed] legislatively created criteria for environmental protection” under these laws. AG Br. 25. This argument overlooks the key point that the Montana Legislature identified MEPA as a critical component of this legislative scheme, notwithstanding and in addition to the substantive protections afforded by other statutes. 2003 Mont. Laws ch. 361 (HB

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<sup>5</sup> The Attorney General suggests that the district court should have evaluated the exploration project’s water quality impacts under the MWQA, instead of MEPA. AG Br. 24. The Court should reject this argument because no party raised it before the district court, Planned Parenthood of Mont. v. State, 2015 MT 31, ¶ 32, 378 Mont. 151, 342 P.3d 684, and the Attorney General has not explained how the cited provisions of the MWQA were implicated where DEQ itself did not identify them. AG Br. 24. Regardless of the potential that DEQ’s action may also violate the MWQA, the issue in this case is whether DEQ violated MEPA’s requirement to analyze the environmental impacts of its action. MCA § 75-1-201.

437) (stating that “the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution” with respect to the right to a clean and healthful environment, and listing statutes, including MEPA). Moreover, DEQ ostensibly applied requirements under substantive environmental statutes in issuing Lucky’s exploration permit, see AR 11, 18 (describing applicable regulatory requirements), but DEQ nevertheless failed to acknowledge or address certain harmful impacts from exploration, as described above. As a result, the MMRA and MWQA did not protect against the environmental harm that PCEC seeks to redress. A MEPA vacatur remedy is essential so that DEQ can appropriately study the environmental impacts of Lucky’s proposed exploration, and consider issuance of a new license with new mitigation accordingly.

5. MEPA’s Remedial Restrictions Do Not Serve Any Compelling State Interest

Because the Legislature’s 2011 amendment restricting MEPA remedies infringes PCEC’s fundamental environmental rights under the Montana Constitution, the amendment “can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.” MEIC, ¶ 63; see also Butte Cmty. Union v. Lewis, 219 Mont. 426,

430, 712 P.2d 1309, 1311 (1986) (stating that once plaintiffs have demonstrated that a statute infringes a fundamental right, the burden shifts to the State to prove that the statute can survive strict scrutiny). The State cannot carry that burden, and indeed, in its brief it has not even tried.

To demonstrate a compelling state interest, DEQ must show, “at a minimum, some interest ‘of the highest order and ... not otherwise served,’ or ‘the gravest abuse[ ], endangering [a] paramount [government] interest.’” Armstrong, ¶ 41 n.6 (alterations original; quotations omitted). No such interest animated the 2011 Legislature’s MEPA amendment. To the contrary, legislators attempted to justify the 2011 amendment only with speculation that eliminating effective remedies under MEPA would stimulate or expedite industrial development in this State. E.g., Hearing on SB 233 Before the Mont. H. Comm. on Fed. Relations, Energy, and Telecommunications, 62d Reg. Sess. 2:22:00-2:23:00 (Mar. 9, 2011) (statement by bill sponsor Sen. Keane).<sup>6</sup> Encouraging private, industrial development, however, is not a governmental interest “of the highest order” that

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<sup>6</sup> The bill’s sponsor, Senator Keane, repeatedly spoke before the Senate and in committee about the bill’s intent to stimulate “industry.” See, e.g., Second Reading of SB 233, S. Floor Sess., 62d Reg. Sess. 2:50:10 (Feb. 23, 2011) (“This bill is about forming new industry.”); Hearing on SB 233 Before the Mont. H. Comm. on Fed. Relations, Energy, and Telecommunications, 62d Reg. Sess. 2:22:50 (Mar. 9, 2011) (“What this bill is about is the birth of new industry. That’s what this is about.”).

could justify eliminating public remedies that protect a fundamental constitutional right. Armstrong, ¶ 41 n.6; see also McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 189 (D. Mass. 2015) (stating that “the promotion of tourism and business has never been found to be a compelling government interest” justifying infringement of constitutional free speech rights) (citation omitted). To the contrary, as discussed above, the Montana Constitution requires the Legislature to “provide adequate remedies to prevent unreasonable depletion and degradation of natural resources,” Mont. Const. art. IX, § 1—not to eliminate such remedies in the service of expediting private projects before the State has adequately grappled with their significant environmental impacts. The legislative record is thus devoid of any compelling interest to justify the Legislature’s 2011 enactment of MEPA’s remedial limitations.

Even if the State could demonstrate a compelling interest for eliminating any effective remedy for MEPA violations—which it cannot do—the 2011 amendment’s wholesale elimination of vacatur and injunctive remedies is not “the least onerous path that can be taken to achieve the State’s objective.” MEIC, ¶ 63. The amendment’s infringement of constitutional rights “is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” See Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997). Here, the State has not tried to, and could not,

demonstrate that alternatives short of eliminating all remedies to prevent unexamined environmental harm would not suffice to address the Legislature's professed concern with promoting industrial development.

In sum, as applied to Lucky's exploration license, sections 75-1-201(6)(c) and (d) are not narrowly tailored to serve a compelling state interest. They therefore fail strict scrutiny.

**B. MEPA AMENDMENTS THAT RESTRICTED THIS COURT'S REMEDIAL POWERS VIOLATE PCEC'S CONSTITUTIONAL PUBLIC PARTICIPATION RIGHTS**

The district court also correctly held that, as applied to this case, the 2011 MEPA amendment violates PCEC's constitutional right to participate meaningfully in DEQ's decisionmaking process before the agency makes a final decision. Vacatur Decision 20-21. The Attorney General waived any appeal of this holding by failing to raise it in its brief. See Pengra v. Mont., 2000 MT 291, ¶ 13, 302 Mont. 276, 14 P.3d 499 (“[A]n appellant may not raise new issues in a reply brief.”) (citing Mont. R. App. P. 23(c)). Lucky's challenge on this issue is meritless.

Under Montana Constitution article II, section 8, “[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.” As with the right to a clean and healthful environment, the right

to public participation is found in Article II of the Montana Constitution, which enumerates Montanans' fundamental rights. Mont. Const., art. II, § 8.

Accordingly, legislation that impairs the right to public participation is subject to strict scrutiny. MEIC, ¶ 63.

By allowing Lucky's exploration project to proceed before DEQ has studied the project's impacts, including consideration of public comments to inform its final decision as required under MEPA, the 2011 amendment violates the public participation provision of the Montana Constitution. One of MEPA's basic purposes is to ensure that "the public is informed of the anticipated impacts in Montana of potential state actions." MCA § 75-1-102(1)(b). DEQ rules implement this policy by requiring the agency to consider substantive public comments regarding an environmental assessment or EIS and modify its final decision as appropriate based on such consideration. ARM 17.4.610(6), 17.4.618, 17.4.619. However, under the Legislature's 2011 amendment, these public participation procedures are meaningless where, as here, DEQ is required to re-do an unlawful MEPA analysis. In such circumstances, the public has no meaningful opportunity to participate in DEQ's new decision because, as a practical matter, DEQ's unlawful initial MEPA decision may already be implemented before a new decisionmaking process can occur. At that point, DEQ's unlawful initial decision would, for all practical purposes, constitute its final decision, and public

participation in a remand MEPA process would be reduced to a meaningless component of a hollow paperwork exercise.

Contrary to Lucky's argument, Lucky Br. 47, such a meaningless opportunity for public participation after an agency decision has been not only made but fully implemented does not constitute a "reasonable opportunity for citizen participation ... prior to the final decision." Mont. Const., art. II, § 8. As interpreted by the Montana Supreme Court, the "reasonable opportunity" to participate mandated by Montana's Constitution requires that citizens have access to all of the relevant information about the agency's decision, so that they can comment intelligently on a proposal before a final decision. See Bryan v. Yellowstone Cty. Elementary Sch. Dist. No. 2, 2002 MT 264, ¶¶ 44-46, 312 Mont. 257, 60 P.3d 381 (holding that plaintiff's public participation rights were violated where school district did not disclose information necessary to informed participation). Here, DEQ failed to adequately disclose to the public the anticipated environmental impacts of Lucky's exploratory drilling and alternatives to lessen those impacts, as MEPA requires. DEQ will be required to disclose that information in a new environmental analysis on remand, but if Lucky's exploration license remains in place, as sections 75-1-201(6)(c) and (d) direct, PCEC will have no opportunity to use the new disclosures to participate in DEQ's decisionmaking process "prior to the final decision," as the Montana Constitution mandates. Mont.

Const., art. II, § 8. For the same reasons set forth in Part I, above, this infringement of PCEC’s fundamental constitutional rights cannot withstand strict scrutiny.

**C. Lucky’s Right to Explore for Gold is Subject to Compliance with Environmental Laws, Including MEPA**

The Attorney General erroneously argues that Lucky’s right to the “possession and use of [its] private property” must be balanced against PCEC’s environmental and public participation rights. AG Br. 8. This argument fails first because Lucky’s right to use and enjoy its property is subject to compliance with state law, including MEPA’s environmental review requirement. As this Court has held, when “regulations are designed to ‘have a real and substantial bearing upon the public health, safety, morals and general welfare of a community,’ such regulations do not unduly interfere with the fundamental nature of private property ownership.” Williams, ¶ 56 (quoting Freeman v. Bd. of Adjustment, 97 Mont. 342, 355, 34 P.2d 534, 538 (1934)); see also Gawenis v. Ark. Oil & Gas Comm’n, 2015 Ark. 238, 8 (2015) (“[T]he individual’s use and enjoyment of property,” although protected by the Arkansas Constitution, “is always subject to reasonable regulations in order to preserve the welfare of the public at large.”); Gacke v. Pork Xtra, LLC, 684 N.W.2d 168, 176 (Iowa 2004) (“constitutional right to possess and enjoy property is subject to state’s reasonable regulation”) (citation omitted).

There is no basis to suggest that conditioning mineral exploration on MEPA compliance interferes or competes with private property rights, as the Legislature designed MEPA to balance environmental and property interests even before the 2011 Amendment. Pompeys Pillar Historical Ass'n, ¶ 17 (stating the Legislature designed MEPA's procedural requirements "to prevent or eliminate environmental damage as well as protect the right to use and enjoy private property free from undue governmental regulation"); MCA § 75-1-103(1). Under the balance struck by the Legislature, if an agency follows MEPA's procedures and bases its decisions on complete information, it may authorize activities that impact the environment, including mineral exploration. Bitterrooters, ¶ 18 ("MEPA requirements are merely 'procedural' and do not require an agency to reach any particular decision in the exercise of its independent authority."). Thus, vacating Lucky's exploration license and requiring DEQ to make a new decision after a lawful MEPA process may delay Lucky's mineral exploration, but does not itself prevent that activity. As the U.S. Supreme Court has held, such delay does not, by itself, violate the property owner's constitutional rights, particularly where, as here, the delay "facilitat[es] informed decisionmaking." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 339-42 (2002). Indeed, even to the extent that the value of Lucky's mining property may be diminished by delay, "the property will recover value as soon as" a new permit is issued. Id. at

332. By contrast, PCEC's constitutional rights that MEPA is designed to protect will be obliterated if Lucky is allowed to inflict environmental harm that has not been lawfully evaluated and considered by the agency, because that harm cannot be undone.

Because the 2011 MEPA amendment effectively extinguishes PCEC's rights that MEPA was designed to protect, the district court correctly held that it is unconstitutional.

**D. The District Court Appropriately Vacated Lucky's Mineral Exploration License**

Having found the 2011 Legislature's remedial limitation unconstitutional, the district court properly enforced the normal remedy for MEPA violations and vacated Lucky's mineral exploration permit. Vacatur Decision 22. Although the Attorney General correctly observes that courts "are not mechanically obligated to vacate" unlawful agency decisions, AG Br. 15 (citation omitted), they decline to do so "only in 'limited circumstances'" when leaving an unlawful agency action in place is necessary to prevent environmental harm or when an agency's violations are technical and not substantive. Pollinator Stewardship Council v. EPA, 806

F.3d 520, 532 (9th Cir. 2015) (quoting Cal. Cmities. Against Toxics v. EPA., 688 F.3d 989, 994 (9th Cir. 2012)). Neither circumstance is present here.<sup>7</sup>

This Court has routinely held that a permit or authorization issued without the observance of required procedures should be set aside. Citizens for Responsible Dev. v. Bd. of Cty. Comm’rs, 2009 MT 182, ¶ 26, 351 Mont. 40, 208 P.3d 876 (finding that inadequate compliance with the Montana Subdivision and Platting Act’s environmental review requirement, which is similar to MEPA’s, “require[s] reversal” of a county’s subdivision approval); Aspen Trails Ranch, LLC, ¶ 59 (same); Kadillak, 184 Mont. at 144, 602 P.2d at 157 (finding that, where application for a mining permit was “incomplete and inadequate,” the mining permit “was void from the beginning and [the permittee] may not continue the

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<sup>7</sup> While the Attorney General’s brief repeatedly refers to injunctive remedies, here PCEC requests vacatur of Lucky’s exploration license rather than an injunction. In Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165-66 (2010), the U.S. Supreme Court recognized a clear distinction between injunctive relief and vacatur, and held that courts should not impose injunctive relief to remedy a NEPA violation if vacatur of the challenged agency decision alone is “sufficient to redress [a plaintiff’s] injury.” Here, vacatur of DEQ’s authorization will afford PCEC effective relief because Lucky may not conduct exploration without that authorization. In any event, the Attorney General is wrong that this Court’s precedent forecloses an injunction remedy under MEPA. AG Br. 15. Montana Wilderness Association v. Board of Health & Environmental Sciences did not even address whether injunctive relief was appropriate under MEPA because it found MEPA inapplicable to that case. 171 Mont. 477, 482, 559 P.2d 1157, 1160 (1976) (“[T]he right to injunctive relief ha[s] been briefed and argued but need not be determined here.”).

mining activities ... until a valid permit is granted by State Lands”). Further, in the analogous federal law context, vacatur is the normal remedy for an unlawful agency action. Alsea Valley All. v. Dep’t of Commerce, 358 F.3d 1181, 1185 (9th Cir. 2004). Likewise, here, because DEQ violated MEPA when it approved Lucky’s exploration license, that decision should be vacated and remanded to DEQ.

### CONCLUSION

For the foregoing reasons, the district court’s decisions on standing, MEPA compliance, and the unconstitutionality of MEPA’s remedial restrictions should be affirmed.

Respectfully submitted this 27<sup>th</sup> day of January, 2020.

/s/ Jenny K. Harbine  
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## CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e), I certify that this response brief is printed with a proportionately spaced Times New Roman typeface of 14 points; is double-spaced; and contains 12,968 words, as counted by Microsoft Word for Windows.

/s/ Jenny K. Harbine  
Jenny K. Harbine

## CERTIFICATE OF SERVICE

I, Jenny Kay Harbine, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-27-2020:

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