

December 14, 2022

Citizens Complaint

Marcelo Calle
Office of Surface Mining Reclamation and Enforcement
PO Box 25065
One Denver Federal Center #41
Denver, CO 80225-0065
mcalle@osmre.gov

Jeff Fleischman
Chief, Denver Field Division
Office of Surface Mining Reclamation and Enforcement
150 East B St., Rm. 1018
Casper, WY 82602
jfleischman@osmre.gov

Frank Bartlett
Permit Coordinator/Assessor
OSMRE-Casper Area Office
150 East B St., Rm. 1018
Casper, WY 82602
fbartlett@osmre.gov

Glenda Owens
Deputy Director
Office of Surface Mining Reclamation and Enforcement
1849 C Street NW
Washington, DC 20240
gowens@osmre.gov

Deb Haaland
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
exsec@ios.doi.gov

Mssrs. Calle, Fleischman, and Bartlett, and Mses. Owens and Haaland:

INTRODUCTION

Signal Peak Energy LLC's (Signal Peak or SPE) Bull Mountains Mine continues to be a scofflaw and outlier in the coal mining industry, requiring immediate enforcement, oversight, and action. Evidence from monitoring records, inspection reports, and public observations indicate that Signal Peak is again in ongoing violation of the Montana Strip and Underground

Mine Reclamation Act (MSUMRA) and the Surface Mining Control and Reclamation Act (SMCRA). Specifically, evidence indicates that SPE has (1) failed to reclaim springs damaged by its mine; and (2) is failing to comply with permit requirements for assessing impacts to springs. Further, evidence demonstrates that Montana regulators with the Department of Environmental Quality (DEQ) are failing to issue notices of violation or cessation orders when inspections identify conditions that violate provisions of MSUMRA/SMCRA, regulations, or permit provisions.

Consequently, pursuant to 30 U.S.C. § 1271(a)(1) and 30 C.F.R. § 842.11(b)(1)(i) and (ii)(C), Montana Environmental Information Center, Northern Plains Resource Council, Sierra Club, and WildEarth Guardians (together, “Conservation Groups”) request that the Office of Surface Mining Reclamation and Enforcement (OSMRE) conduct a federal inspection of this mine. Following the inspection, OSMRE should issue a cessation order to SPE requiring immediate cessation of the company’s operations at the Bull Mountains Mine pending compliance with the law.

If immediate action is not taken, Signal Peak will continue to dramatically dewater the Bull Mountains, which will in turn force ranchers and wildlife alike to desert the area. Already two long-time ranching families have left the Bull Mountains under pressure from the mine. Signal Peak has forced another rancher out of the Bull Mountains by canceling a lease. And the company is in the process of attempting to force one of the few remaining ranch families in the Bull Mountains off its land through bullying, harassment, and threatened litigation.

The land must remain capable of supporting existing or higher land uses. Signal Peak’s actions—dewatering springs, failing to reclaim springs, and attempting to escape scrutiny by forcing residents off the land—are inconsistent with the requirements of SMCRA and MSUMRA and must stop.

FEDERAL LAW AND REGULATIONS REQUIRE OSMRE TO PROMPTLY TAKE ENFORCEMENT ACTION AND CORRECT VIOLATIONS OF SMCRA

(1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the

Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to paragraph (5) of this subsection. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

30 U.S.C. § 1271(a)(1)-(2).

Implementing regulations further provide:

Any person may request a Federal inspection under § 842.11(b) by providing to an authorized representative a signed, written statement (or an oral report followed by a signed written statement) setting forth information that, along with any other readily available information, may give the authorized representative reason to believe that a violation, condition, or practice referred to in § 842.11(b)(1)(i) exists. The statement must also set forth the fact that the person has notified the State regulatory authority, if any, in writing, of the existence of the possible violation, condition, or practice, and the basis for the person's assertion that the State regulatory authority has not taken action with respect to the possible violation. The statement must set forth a phone number, address, and, if available, an email address where the person can be contacted.

30 C.F.R. § 842.12. When such a request for inspection is made, the law requires a response within 15 days:

Within ten days of the Federal inspection or, if there is no Federal inspection, within 15 days of receipt of the person's written statement, the Office shall send the person the following.

(1) If a Federal inspection was made, a description of the enforcement action taken, which may consist of copies of the Federal inspection report and all notices of violation and cessation orders issued as a result of the inspection, or an explanation of why no enforcement action was taken;

(2) If no Federal inspection was conducted, an explanation of the reason why; and

(3) An explanation of the person's right, if any, to informal review of the action or inaction of the Office under § 842.15.

Id. § 842.12. If an inspection reveals any violation, the agency must issue either a cessation order or a notice of violation. *Id.* §§ 843.11(a), 12(a).

I. Signal Peak Has Failed to Protect, Replace, and Reclaim Impacted Water Resources

SMCRA and MSUMRA require coal mines to protect water resources from adverse effects from mining and, if any such impacts occur, replace and reclaim the damaged resources. 30 U.S.C. §§ 1202(e), 1258(a)(13), 1265(b)(2), (10); Mont. Code Ann. § 82-4-231(1), (10)(k); ARM 17.24.648, 903(2), 1116(6)(d).

Monitoring data and observations by landowners and residents indicate that virtually all important water resources that have been undermined by Signal Peak have been damaged. This damage is evident despite Signal Peak's repeated failure to conduct required monitoring and DEQ's serial failure to require Signal Peak to conduct rigorous assessments of impacts to water resources.

A. Litsky Spring: Signal Peak Has Failed to Monitor, Protect, and Reclaim This Critically Important Perennial Water Source.

Signal Peak's permit identifies the springs with historically significant flow that require mitigation if impacted by mining. Permit Tbl. 314-4-1. The first significant spring to be undermined was Litsky Spring (Spring 17415). DEQ, AM3 CHIA at 9-9. Litsky Spring was recognized by DEQ's agency predecessor (the Montana Department of State Lands) as one of the most important springs in the Bull Mountains based on its value for hydrology, aquatic life, vegetation, land use, and wildlife. Mont. Dep't of State Lands, Final Environmental Impact Statement Meridian Minerals Bull Mountains Mine No. 1, at III-14 (1992) (along with Cold Water and Busse Water). It is one of only eight springs in the area that are critically important to wildlife, one of only five that are critically important for vegetation, and one of only four that are critically important to aquatic life (along with Busse Water). *Id.* at III-20, III-23.

Since it was undermined, the spring has never been the same. Historical monitoring from 1989 to 1996 identified continuous flow, except on four occasions when the spring was frozen and once when it was ponded.¹ Thus in the permit, DEQ and Signal Peak identify the baseline condition of the spring as perennial. Permit Tbl. 304(5)-4. More recent monitoring shows the

¹ DEQ, Excel Spreadsheet Historical Monitoring Data (Exhibit 1).

flow is significantly reduced, much less frequent, and more sporadic, due in large part to Signal Peak's repeated unlawful failures to monitor the spring as required (for which DEQ has issued multiple violations)² and Signal Peak's failure to take both protective and corrective actions. It is clear that Signal Peak has a corporate culture that tries to evade the law by failing to conduct required monitoring. Still, DEQ's record shows regular flows from the early 2000s to 2011 of, on average, 2 gallons per minute (gpm),³ sufficient to support approximately 200 cattle and healthy wildlife populations.

Litsky Spring was undermined in March 2012. DEQ, AM3 CHIA at 9-9. At the time of undermining—early spring, following a year of above-average precipitation—Litsky Spring had significant flow of over 30 gpm. Almost immediately after undermining, flows decreased to approximately 0.5 gpm. Only 11 flow measurements were recorded for the spring in the ten years following undermining.⁴ The highest measured flow was 4 gpm. For much of the time since undermining, the once perennial spring—one of the three most important and highest value springs in the Bull Mountains prior to mining—has been dry and unable to provide critically important support for wildlife, aquatic life and vegetation.

Although both DEQ and Signal Peak possess historical data on aquatic life, vegetation, and wildlife associated with Litsky Spring, they have not used that information to assess impacts. Permit App. 313-4 at ii (2013) (listing addenda containing baseline information) (Exhibit 6A); *cf.* ARM 17.24.645(2)(a) (groundwater monitoring must be sufficient to detect impacts); *id.* 17.24.646(1)(a), (b) (surface water monitoring must be sufficient to detect violations). Similarly, while DEQ and Signal Peak possess historical data about reference springs to use to assess impacts to Litsky Spring, they have not attempted to use that data to assess impacts. Permit App. 313-4 at 313-4-8 (2013).

DEQ and Signal Peak identified Busse Water (Spring 14325) as a reference spring for Litsky Spring. Permit App. 313-4 at 313-4-8 (2013). However, neither DEQ nor Signal Peak made any comparison to Busse Water to assess whether the changes to Litsky Spring were from mining. Review of the monitoring data for Busse Water does not reveal any contemporaneous

² See Ltr. from Matthew Dorrington, DEQ, to Dusty Weber, Signal Peak at 8 (Nov. 8, 2019) (noting Signal Peak's "history of monitoring violations") (Exhibit 2); DEQ, Notice of Noncompliance (Aug. 22, 2019) (explaining that Signal Peak had "wilfully violated the law by intentionally not complying with the weekly spring monitoring requirements of their permit in the MQAP, leading to an irreversible loss of monitoring data") (Exhibit 3); DEQ, Expert Disclosure at pdf. 7 (noting that Signal Peak had received a violation for failing to conduct required monitoring at Litsky Spring) (Exhibit 4). Signal Peak's culture of concealing data from regulators was also demonstrated in its recent criminal conviction for lying to mine safety regulators about workplace injuries and unlawfully and clandestinely disposing of toxic mine waste. See Offer of Proof, *United States v. Signal Peak Energy, LLC*, No. CR-21-79 (Oct. 5, 2021) (Exhibit 5).

³ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022 (Exhibit 6).

⁴ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022.

impacts similar to those that occurred at Litsky Spring in 2012 and thereafter,⁵ clearly indicating, by DEQ's and Signal Peak's own metric, that the impacts to Litsky Spring did not result from changes in precipitation or other environmental factors; instead, the impacts were caused by mining. Signal Peak has taken no action to reclaim the spring, in clear violation of its obligation to protect and restore water resources. Instead, Signal Peak forced the rancher who was leasing the land to move by terminating his lease.

This illustrates the repeated observations of residents of the Bull Mountains that Signal Peak is not reclaiming damaged water resources on its own property and these resources are essential to sustain and support the existing land uses of wildlife and cattle grazing. Although Signal Peak may own the land where Litsky Spring is located, it does not own the water. The Montana Constitution establishes that all Montana water belongs to the people of Montana (Mont. Const. art. IX, § 3). Thus, Signal Peak must assure that water is still available for the pre-mining uses (wildlife and livestock) in the same amounts, seasonality, and frequency as it was before mining. *See also* Permit App. 313-2 at 313-2-2 (“If impacted, these springs or livestock wells will require mitigation ...”); *Id.* (explaining that springs are “valuable components of premining land use, providing forage and water for ... wildlife habitat”). Mitigation to impacted water resources must begin immediately and may not be delayed until final bond release. *Id.* at 313-3-2 to 3 (requiring interim mitigation immediately).

Furthermore, OSM has specifically rejected prior efforts by the State of Montana to limit reclamation of hydrologic resources and protection of the hydrologic balance to human uses of water resources. 70 Fed. Reg. 8,002, 8,004 (Feb. 16, 2005). OSM required Montana to protect the “natural resource, the hydrologic conditions and interactions, that exist within and around the area” regardless of human use. *Id.* Regulators must make clear that Signal Peak cannot evade its legal duty to protect, restore, and reclaim water resources by forcing people using the land to move off the land.

Worse, Signal Peak is attempting to force other area ranchers off those ranchers' **own land** on the basis that the costs to Signal Peak of mitigating water and subsidence impacts are too expensive for the company. *See* Ltr. from Parker Phipps, SPE, to Steve Charter (Nov. 14, 2022) (attempting to expel that rancher from his own property because Signal Peak has spent “tens of thousands of dollars ... mitigating temporary hydrologic disturbances, hauling water ... and addressing subsidence issues on [rancher's] property” which is “inconvenient” and “unsustainable” for the coal company) (Exhibit 7).

Signal Peak obviously fails to comprehend that its obligations to mitigate hydrologic impacts and address subsidence are required by MSUMRA, SMCRA, and its permit regardless of whether anyone is currently ranching the land. *See* Mont. Code Ann. § 82-4-203 (reclamation means restoring land to uses the “land was capable of supporting prior to any mining” regardless of whether the coal company has harassed landowners off their land); Permit App. 313-2 at 313-2-3 (requiring reclamation of damaged well, regardless of whether landowner is present). With this complaint, the Secretary and OSM officials at the highest level are now aware of these

⁵ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022 (compare flows for Spring 14325 with flows at Spring 17415).

violations and we urge you to fulfill your responsibility to put an immediate stop to Signal Peak's bullying and flouting of its obligations under federal and state law.

B. Bull Spring: A Formerly Reliable, Perennial Spring Now Mostly Dry

Bull Spring (Spring 17145) was the next important spring to be undermined. It too went dry following mining. DEQ cautiously ventured that this abrupt decrease in flow coincident with undermining, along with subsidence fractures near the spring, and decreases in nearby monitoring wells, indicated that the decreased flow "may" be due to undermining. DEQ, AM3 CHIA at 9-10. Neither DEQ nor Signal Peak identified another reason for the decreased flow, and neither tried to correlate the decreased flow with precipitation patterns.

The spring remained dry through 2017, including in 2013 and 2014, which were years of well above-average precipitation, DEQ, AM3 CHIA fig. 4-2, demonstrating that climatic conditions did not account for the reduced flow. Signal Peak made various attempts to replace the water at Bull Spring, but none have worked. Spring flow returned briefly in 2018 and 2019,⁶ years of well above-average precipitation and snow-melt.⁷ However, since 2019, flow has been sporadic and Bull Spring has often been dry.

Nevertheless, based on flow from two years of above-average precipitation, at the end of 2019, Signal Peak deemed Bull Spring "recovered" and tore out the equipment it installed in its unsuccessful attempts at water replacement (namely, a solar array and piping). Needless to say, flow during two years of high precipitation is no indication that the spring flows at the same rates and times as it did prior to undermining.

Prior to mining Bull Spring was a reliable spring, even in dry years, and accordingly it is identified in the permit as a "perennial" spring. Permit Tbl. 314-4-1. The data clearly demonstrate that the spring is no longer perennial. Signal Peak's failure to reclaim the spring violates its obligation to protect and restore water resources. 30 U.S.C. §§ 1202(e), 1258(a)(13), 1265(b)(2), (10); Mont. Code Ann. § 82-4-231(1), (10)(k); ARM 17.24.648, 903(2), 1116(6)(d); Permit App. 313-2 at 313-2-3.

C. Mountain Spring: Once Reliably Perennial, Now Dry without Permanent Mitigation

Mountain Spring (Spring 72125), a historically reliable spring identified by DEQ and Signal Peak as perennial (Permit Tbl. 304(5)-4), was undermined in 2020 and has been dry ever since. No flow measurements have been made at the spring since undermining.⁸ Substantial subsidence occurred around Mountain Spring when it was undermined.⁹ Signal Peak has

⁶ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022.

⁷ See SPE, Annual Hydrology Report (2019) (Exhibit 8); SPE, Annual Hydrology Report (2018) (Exhibit 9).

⁸ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022.

⁹ SPE, Annual Hydrology Report (2022) (Exhibit 10).

provided temporary mitigation by hauling water when cattle have been present, but when cattle are not present the company has failed to provide temporary mitigation for wildlife that depend on the spring in the fall and winter months.

Again, Signal Peak's reclamation of water resources and protection of the hydrologic balance cannot be limited to existing human uses of the water. 70 Fed. Reg. 8,002, 8,004 (Feb. 16, 2005). Again, Signal Peak appears unconcerned with these impacts and has done little to rectify those effects. Signal Peak has made no effort to establish permanent mitigation at Mountain Spring.¹⁰ And Signal Peak has also failed to provide interim mitigation for wildlife. Signal Peak's failure to reclaim the spring violates its obligation to protect and restore water resources. 30 U.S.C. §§ 1202(e), 1258(a)(13), 1265(b)(2), (10); Mont. Code Ann. § 82-4-231(1), (10)(k); ARM 17.24.648, 903(2), 1116(6)(d); Permit App. 313-2 at 313-2-3.

¹⁰ Signal Peak's permit used to require permanent mitigation if flow did not return within two years of the detection of impacts. Permit App. 313-4 at 313-4-10 (2013). DEQ apparently no longer has any standard for determining permanent impacts or requiring permanent mitigation. This is a significant failing of the permit, which effectively allows Signal Peak to avoid permanent mitigation indefinitely. For example, Litsky Spring has been impacted since 2012, but no permanent mitigation has been provided.



Figure 1: Mountain Spring 2022 after undermining is now dry and the cows and wildlife have no water.

D. Owl Spring: Important to Ranchers but Signal Peak Has Failed to Mitigate

Owl Spring (81165) was a minor (seasonal) spring that was nevertheless important to ranchers on Dunn Mountain. Baseline data identified seasonal flows at Owl Spring. Permit Tbl. 304(5)-4. Monitoring data identified intermittent and seasonal, but regular flows from Owl Spring from at least 2011 to 2015.¹¹ However, when the spring was undermined in 2017, there was substantial subsidence fracturing around it. Since that time, Owl Spring has been dry, despite well above-average precipitation in 2018 and 2019. *See* SPE, Annual Hydrology Report (2019) (noting that precipitation was “well above a 30 year average” at the mine); SPE, Annual Hydrology Report (2018) (noting “above average precipitation”). Owl Spring remains dry five years after undermining. Signal Peak has taken no mitigation actions and has not attempted to reclaim the spring, in violation of its obligations under MSUMRA, SMCRA, and its permit. 30 U.S.C. §§ 1202(e), 1258(a)(13), 1265(b)(2), (10); Mont. Code Ann. § 82-4-231(1), (10)(k); ARM 17.24.648, 903(2), 1116(6)(d); Permit App. 313-2 at 313-2-3.

¹¹ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022.

E. Busse Water: Signal Peak Is Not Protecting This Very Productive Resource Critically Important for All Uses and the Company Has Not Mitigated Most Impacts

Busse Water (Spring 14325) has historically been one of the most productive springs in the Bull Mountains and the most important to the hydrology, aquatic life, land use, and wildlife of the area. Mont. Dep't of State Lands, Final Environmental Impact Statement Meridian Minerals Bull Mountains Mine No. 1, at III-14 (1992). It is critically important for wildlife, aquatic life, and vegetation. *Id.* at III-20, III-23. But it is now imperiled by Signal Peak's destructive and irresponsible activities. Busse Water was a perennial spring, with average flows of greater than 10 gpm. Permit tbl. 314-3-1; Permit tbl. 304(5)-4. Busse Water was undermined in 2021. Since that time, there has been some water in Busse Water, there have been no flow measurements and no staff gauge measurements, plainly demonstrating the dramatic impacts of undermining.¹²

While DEQ is requiring partial mitigation of the impacts to the spring, it is incomplete and insufficient. DEQ requires Signal Peak to replace the water at Busse Water **only** when livestock are present. Permit App. 313-2 at 313-2-3. But this is insufficient to mitigate impacts to all existing uses or protect the water resource itself. DEQ's CHIA recognizes that wildlife and aquatic life both use and rely on the scarce water resources in the Bull Mountains. DEQ, AM3 CHIA at 7-2 (noting "spring and stock ponds provide a sufficient source of water to support livestock grazing and wildlife"); *id.* (noting springs also support "aquatic life"). The permit also recognizes the need to restore water resources to support wildlife. Permit App. 313-2 at 313-2-4 ("Reclamation targets will be determined by identifying the amount of water required to support ... wildlife utilizing the spring ..."); *id.* at 313-4-10 (success of mitigation requires demonstration that "mitigation measures can provide water for consumptive use by ... wildlife of seasonal quality ... and quantity").

Indeed, DEQ's predecessor, the Montana Department of State Lands, recognized that while wetlands make up only 0.1% of the land in the Bull Mountains, they play a critically "important role in local ecosystems" by providing "watering points for wildlife ... and habitat diversity." Mont. Dep't of State Lands, Final Environmental Impact Statement Meridian Minerals Bull Mountains Mine No. 1, at III-19 (1992). Busse Water, in particular, is recognized as having the highest possible value for wildlife, aquatic life, and vegetation. *Id.* at III-14. As noted, DEQ and Signal Peak possess abundant baseline data demonstrating the presence of aquatic life at springs in the Bull Mountains. Permit App. 313-4 at ii (2013) (listing addenda containing baseline information). Reclamation requires reclamation and restoration of "fish and wildlife habitats and related environmental values." ARM 17.24.1116(6)(d). It is precisely because DEQ is not requiring Signal Peak to reclaim water resources that are not being used and advocated for by ranchers that Signal Peak appears to believe it can evade its reclamation obligations by simply running ranchers out of the Bull Mountains and DEQ will look the other way.

¹² DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022.

The fact that virtually all springs that have been undermined and have been assessed have shown serious and lasting impacts demonstrates how much work will be required for Signal Peak to reclaim these waters. Apparently, Signal Peak has determined that it will be easier simply to run ranchers out of the area and thereby avoid the “inconvenience” of mitigating impacted waters. Signal Peak has failed entirely to provide replacement water to restore the value of Busse Water when livestock are not present and when wildlife rely on this critically important resource. Signal Peak is thus in violation of its reclamation obligations under MSUMRA and SMCRA. 30 U.S.C. §§ 1202(e), 1258(a)(13), 1265(b)(2), (10); Mont. Code Ann. § 82-4-231(1), (10)(k); ARM 17.24.648, 903(2), 1116(6)(d); Permit App. 313-2 at 313-2-3.

F. Big Spring: Signal Peak Has Made No Effort to Protect This Critically Important Spring Where Flows Are Diminishing as Mining Nears

Big Spring (71115) is another perennial and critically important water resource in the Bull Mountains. Permit tbl. 314-3-1; Mont. Dep’t of State Lands, Final Environmental Impact Statement Meridian Minerals Bull Mountains Mine No. 1, at III-14 (1992) (noting significant importance for hydrology, land use, and aquatic life). Its average flows are only around 4 gpm (enough for more than 200 cattle), but are extremely consistent. As Signal Peak’s mining has neared Big Spring (it has not been undermined yet), flows have begun to diminish. DEQ has acknowledged this in conversations with residents and said it would look into this. In nearly six months, DEQ has not provided any further information.

Reduced flows impact not only livestock, but also primary vegetation production on which wildlife depend, wildlife watering, and aquatic life in the headwaters of Railroad Creek. Signal Peak has made no efforts at mitigation or reclamation of these impacts, in violation of SMCRA and MSUMRA. 30 U.S.C. §§ 1202(e), 1258(a)(13), 1265(b)(2), (10); Mont. Code Ann. § 82-4-231(1), (10)(k); ARM 17.24.648, 903(2), 1116(6)(d); Permit App. 313-2 at 313-2-3.

G. Spring 17515: Signal Peak Has Failed to Mitigate Impacts to This Important Perennial Spring Where No Flows Have Been Measured Since It Was Undermined 10 Years Ago

Spring 17515 was a perennial spring on Dunn Mountain. Permit tbl. 304(5)-4. The initial and best monitoring of the spring from the late 1980s to the early 1990s always documented regular flows.¹³ It is recognized for its substantial importance to hydrology, aquatic life, vegetation, and land use. Mont. Dep’t of State Lands, Final Environmental Impact Statement Meridian Minerals Bull Mountains Mine No. 1, at III-14 (1992). However, since the spring was undermined in approximately 2012, no flows have been measured.¹⁴ Signal Peak has taken no

¹³ DEQ, Excel Spreadsheet Historical Monitoring Data.

¹⁴ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022. It is true that there were virtually no flow measurements at the spring between 2003 and 2010, but that period was also an abnormal drought in the Bull Mountains, and therefore not representative. The monitoring data from the late 1980s and early 1990s is more representative of the precipitation patterns in the Bull Mountains from the 2012 to the present. *See* DEQ, AM3 CHIA tbl. 4-2. Moreover, the

action to mitigate impacts to this spring, in violation of SMCRA, MSUMRA, and its permit. 30 U.S.C. §§ 1202(e), 1258(a)(13), 1265(b)(2), (10); Mont. Code Ann. § 82-4-231(1), (10)(k); ARM 17.24.648, 903(2), 1116(6)(d); Permit App. 313-2 at 313-2-3.

H. Dunn Corner Spring: Signal Peak Has Failed to Mitigate Impacts to This Important Perennial Spring Where No Flows Have Been Measured Since It Was Undermined 2 Years Ago

Dunn Corner Spring (Spring 16135) is perennial spring that has historically been highly important to ranchers. Permit tbl. 314-3-1; Mont. Dep’t of State Lands, Final Environmental Impact Statement Meridian Minerals Bull Mountains Mine No. 1, at III-14 (1992). The spring was identified as having the highest possible hydrologic value. Mont. Dep’t of State Lands, Final Environmental Impact Statement Meridian Minerals Bull Mountains Mine No. 1, at III-14 (1992). Historic flow measurements identified the spring as flowing continuously, in dry years and wet.¹⁵ More recent, albeit inconsistent monitoring, also identified regular and substantial flows.¹⁶ However, since the spring was undermined in December 2020, no flows have been recorded at this important spring.¹⁷ This is another instance of Signal Peak simply ignoring impacts to water resources on its own property, and DEQ not requiring any—interim or permanent—mitigation, reclamation, or replacement of such waters. Signal Peak has taken no action to mitigate impacts to this spring, in violation of SMCRA, MSUMRA, and its permit. 30 U.S.C. §§ 1202(e), 1258(a)(13), 1265(b)(2), (10); Mont. Code Ann. § 82-4-231(1), (10)(k); ARM 17.24.648, 903(2), 1116(6)(d); Permit App. 313-2 at 313-2-3.

I. Summary of Signal Peak’s Failure to Protect, Replace, Mitigate, and Restore These Waters

In sum, virtually all springs that have been undermined by Signal Peak have been impacted, including dire impacts to some of the most important springs in the area, on which both the ecology and economy of the area depend. Signal Peak has failed utterly to mitigate, replace, restore, or reclaim these impacted waters. When required to mitigate impacts, Signal Peak’s efforts have been unsuccessful (at Bull Spring) or the company has retaliated against landowners who have exercised their right to mitigation of their damaged water and land (as with the ranchers it is trying to force off their own lands). Signal Peak views reclamation of water resources as “inconvenient” and “unsustainable.” Ltr. from Parker Phipps, SPE, to Steve Charter at 3 (Nov. 14, 2022).

Equally troubling is that Signal Peak has not reclaimed impacted water resources located on land that it owns (Litsky Spring, Dunn Corner Spring) or only partially mitigated impacts (Busse Water). It is clear from its letter to landowners complaining about the cost of mitigating

monitoring that was conducted in the 2000s was, like Signal Peak’s more recent monitoring (and non-monitoring), not reliable.

¹⁵ DEQ, Excel Spreadsheet Historical Monitoring Data.

¹⁶ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022.

¹⁷ DEQ, Excel Spreadsheet, Field Parameters 2003 to 2022.

damaged water that Signal Peak does not intend to reclaim any water resources unless and until it is forced to do so. Signal Peak's actions continue to be those of a bad actor and bad neighbor. It is equally clear that Signal Peak has no intention to replace, restore, or reclaim water resources for wildlife or aquatic life and has done nothing to that effect.

Because Signal Peak's own monitoring and baseline data, plus the personal observations of residents, demonstrate that the mine has dewatered some of the most critical waters in the Bull Mountains on which aquatic life, wildlife, vegetation, and livestock depend (i.e., the ecology and the economy of the area), its failure to mitigate and reclaim these resources constitutes a threat of significant, imminent environmental harm to land and water resources—the mine is depopulating the Bull Mountains of people, wildlife, and aquatic life, and this chronic failure to comply with the law, regulations, and its permit requires OSM to make an immediate inspection and issue cessation orders.

The urgency of action from OSM is underscored by a recent scientific study by HydroSolutins of Signal Peak's proposed source of replacement water, an aquifer below the coal seam called the "deep underburden aquifer." DEQ, AM3 CHIA at 9-25 (designating deep aquifer as "the replacement water source"). DEQ is relying on the deep aquifer for "any mitigation wells which may become necessary in the future." *Id.* DEQ complete reliance on the deep aquifer rests on a groundwater model and analysis of the aquifer by Signal Peak. The HydroSolutions study, however, explains that Signal Peak's analysis of the deep aquifer is cursory at best.¹⁸ Signal Peak's model of the deep aquifer is based on a single data point for horizontal hydraulic conductivity extrapolated to an area of over 350 square miles. As such, the model fails to account for the known heterogeneity of the aquifer formation. Moreover, Signal Peak's model is poorly calibrated and identifies the deep aquifer as highly sensitive to climate-driven variations. As a result the "model does not establish the Deep Underburden as a viable replacement water source."¹⁹ The unproven and untested nature of the designated replacement water source makes it all the more troubling that Signal Peak is not reclaiming damaged water resources, but instead forcing ranchers out of the Bull Mountains.

II. Signal Peak Has Failed to Conduct Monitoring Sufficient to Detect Impacts to Water Resources and Failed to Conduct Monitoring and Analysis Required by Law and Its Permit.

Equally troubling is that Signal Peak's inadequate monitoring and analysis of impacts to water resources has proven insufficient for Signal Peak or DEQ to clearly identify impacts to water resources and, worse, Signal Peak is not even following the paltry analysis requirements of its permit. This violates SMCRA, MSUMRA, and Signal Peak's mining permit.

Monitoring is the most essential element for ensuring that the promises of SMCRA and MSUMRA are fulfilled. Without the basis of monitoring—the gathering of data—the protections of these laws are just words on paper. Recognizing the importance of monitoring, SMCRA and MSUMRA require monitoring sufficient to identify impacts to surface and groundwater from

¹⁸ Memorandum from Michael Meredith, HydroSolutions (Nov. 30, 2022) (Exhibit 11).

¹⁹ Memorandum from Michael Meredith, HydroSolutions (Nov. 30, 2022).

mining. 30 C.F.R. § 784.14(h)(i) (monitoring plan must “describe how the data may be used to determine the impacts of the operation upon the hydrologic balance”); ARM 17.24.645, 646 (monitoring must be sufficient to detect changes in hydrologic balance). Signal Peak, however, has—in the words of DEQ—a “history of monitoring violations”²⁰ that has caused an “irreversible loss of monitoring data.”²¹ Indeed, it is not hyperbole to state that Signal Peak’s modus operandi for at least the past decade has been to lie to and deceive regulators about its harmful activities to avoid accountability.²² That’s why the company is currently on criminal probation for committing multiple federal crimes of dishonesty.

It should come as no surprise, then, that while Signal Peak’s permit contained rigorous provisions for monitoring and detecting impacts to water resources, involving assessment of reference springs, statistical analyses, evaluation of aquatic life and vegetation, Permit App. 313-4, Signal Peak admitted that it *never* followed those requirements.²³ When this decade-long failure was brought to the attention of DEQ, the agency did not bring any enforcement action against Signal Peak, but instead surreptitiously—without any public notice and opportunity for public consultation and comment—modified the company’s permit to eliminate the rigorous methodology for assessing impacts to water resources. *See* Permit, App. 314-3. Now instead of requiring a rigorous methodology for assessing impacts to water resources, Signal Peak’s permit only requires the following:

The Permittee expects that should an impact to spring flow or quality occur, it would be identified as sudden changes in hydrologic conditions or unexpected seasonal conditions, combined with changes at adjacent monitoring wells and/or observable and proximal physical indicators (e.g., subsidence fractures). If an impact is observed, potential changes in the point of spring issuance will be investigated by visual inspections of the adjacent drainages and hill slopes.

Permit, App. 314-3 at 314-3-1. Worse, the permit now gives Signal Peak veto authority over any alleged impacts by requiring Signal Peak to “concur regarding the cause and permanence of the impact.” *Id.* This requirement places Signal Peak in the position of sharing enforcement power with DEQ, a practice totally contrary to the letter, intent, and history of both the federal and state laws. It also violates the provisions of SMCRA and MSUMRA that require monitoring to occur in such a way as to be able to identify impacts to water resources. 30 C.F.R. § 784.14(h)(i); ARM 17.24.645, 646.

The handcuff that this wrongful empowerment has imposed on the agency is demonstrated by DEQ’s CHIA for the AM3 expansion: despite reductions in flow, declines in monitoring wells, and subsidence damage around Litsky Spring and Bull Spring—the agency was still unable, or unwilling, to reach any definitive conclusion about whether the springs had

²⁰ Ltr. from Matthew Dorrington, DEQ, to Dusty Weber, Signal Peak at 8 (Nov. 8, 2019).

²¹ DEQ, Notice of Noncompliance (Aug. 22, 2019).

²² Offer of Proof, *United States v. Signal Peak Energy, LLC*, No. CR-21-79 (Oct. 5, 2021).

²³ Hrg. Tr. at 769, 786-87, 893, *In re Bull Mountains Mine*, No. BER 2016-03 (Mont. Bd. of Env’t Rev.) (Exhibit 12).

been impacted by mining. DEQ, AM3 CHIA at 9-9 to 9-10. At most, DEQ ventured that Bull Spring “may” have been impacted. *Id.* Nor was DEQ willing to make an express statement about impacts to Litsky Spring. DEQ notably did not assess whether volume or seasonality of flow was the same before or after mining or compare Litsky Spring to its then-assigned reference spring (under the prior monitoring and assessment plan described in the section of this complaint on Litsky Spring).

In support of the agency’s self-imposed paralysis, Signal Peak’s own expert testified that based on the monitoring data collected by Signal Peak, he was unable to determine if springs had been impacted, admitting that the data could be interpreted either way.²⁴ Signal Peak has also denied the ability to assess any impacts to Litsky Spring in its annual hydrologic reports, citing its lack of consistent monitoring data: “Given the lack of consistent/comparable historical data, an impact evaluation for this spring is not feasible.”²⁵ In short, if interrupted and decreased flow, changes in monitoring wells, and subsidence are insufficient for DEQ or Signal Peak to reach any definitive conclusion about impacts, then the monitoring and assessment method does not pass muster under SMCRA and MSUMRA. 30 C.F.R. § 784.14(h)(i); ARM 17.24.645, 646. This is particularly the case with the requirement that Signal Peak must “concur” in any determination regarding impacts. To date, Signal Peak has vehemently contested any suggestion that its mine has impacted water resources. OSM should conclude that this provision violates SMCRA and MSUMRA and must be stricken and the prior monitoring and assessment methodology imposed.

Worse, Signal Peak is failing even to satisfy the weakened monitoring and assessment requirements in its current permit. Under the modified permit requirements, Signal Peak “analyzes” impacts to springs in its annual hydrologic reports. Permit, App. 313-4 at 1 (“During the course of mining, data collected in accordance with Appendix 314-4 (Monitoring Quality Assurance Plan; MQAP) will be used to measure impacts to spring water quantity and quality. Impact assessment methods described in Appendix 314-3 (Spring Impact Detection and Mitigation) and supplemental analyses and interpretations presented in the Annual Hydrology Report (AHR; a requirement of the MQAP) will be used to determine whether springs may have been impacted by mining.”). This requires, as noted, assessment of any changes in flow, along with assessment of water levels at adjacent monitoring wells, assessments of subsidence in the area of the spring, and visual inspections. Permit, App. 314-3 at 314-3-1. However, in Signal Peak’s annual hydrology reports, the assessment of impacts to springs has consistently failed to assess changes in adjacent monitoring wells or evidence of subsidence near springs, and at no point does any annual hydrology report discuss or describe follow-up visual inspections of wells, as required by the permit.²⁶ The analyses in the annual hydrology reports are cursory at best,

²⁴ Hrg. Tr. at 889-90, *In re Bull Mountains Mine*, No. BER 2016-03 (Mont. Bd. of Env’t Rev.) (agreeing that all springs undermined and analyzed “may have been impacted” but stating that he could not confirm impacts one way or another).

²⁵ SPE, Annual Hydrology Report at pdf. 7 (2019). Signal Peak, of course, has self-servingly used the lack of adequate monitoring or reliable data to assert that “there is no evidence of long-term mining impacts to spring flows.” *Id.*

²⁶ SPE Annual Hydrology Report at 5-8 (2022); SPE, Annual Hydrology Report at pdf. 7-8 (2019); SPE, Annual Hydrology Report at pdf. 7-8 (2018); SPE, Annual Hydrology Report at

often dismissing any potential impacts to springs on the basis that springs have been monitored without flow in the past, without any rigorous analysis. It is abundantly clear that Signal Peak does not take its monitoring and assessment obligations seriously and perform them. Signal Peak has mined nearly 60% of the panels in the mine area over more than a decade and the company still has failed to monitor and report impacts to water resources as required by the permit. Enough. Signal Peak's failure to follow the spring impact assessment requirements from its permit is unlawful.

An immediate inspection is warranted to obtain data from monitoring wells and to observe impacts of subsidence near undermined springs. If an inspection is delayed, this vital evidence could be lost.

III. DEQ's Failure to Conduct Enforcement Upon Detection of Violations or Suspend Signal Peak's Permit for Its Pattern of Violations.

Under SMCRA and MSUMRA, the regulatory authority, here DEQ, must take enforcement action if it identifies any violation. 30 U.S.C. § 1271(a)(1)-(2); 30 C.F.R. §§ 843.11(a), 12(a); Mont. Code Ann. § 82-4-251(1)-(2); ARM 17.24.1202(2). DEQ's enforcement action must be either an "order of cessation" or a "notice of noncompliance." ARM 17.24.1202(2) ("If it is determined on the basis of an inspection that the permittee is, or any condition or practice exists, in violation of any requirement of this part or any permit condition required by this part, the director or an authorized representative shall promptly issue a notice of noncompliance or order of cessation for the operation or the portion of the operation relevant to the condition, practice, or violation in accordance with 82-4-251, MCA, and this subchapter."). A cessation order is required if the violation "creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant and imminent environmental harm to land, air, or water resources." Mont. Code Ann. § 82-4-251(1). If the violation does not threaten imminent harm, DEQ must issue a notice of noncompliance, requiring abatement within 90 days. *Id.* § 82-4-251(2).

In practice at the Bull Mountains Mine, DEQ is not adhering to these requirements of SMCRA and MSUMRA. DEQ recently explained that instead of issuing cessation orders or notices of non-compliance, when the agency identifies conditions that do not comply with MSUMRA or Signal Peak's permit, DEQ issues what it calls a "follow-up" or "maintenance item" with an unspecified timeline for resolution:

DEQ, as required by ARM 17.24.1201, conducts regular coal mine inspections on a monthly basis. DEQ also conducts additional inspections—like aerial, complaint, discipline specific, and bond release inspections—on an "as-needed" basis. After these inspections are completed, DEQ staff write inspection reports, which are entered into a database and forwarded to U.S. Department of Interior, Office of Surface Mining and Reclamation (OSMRE). Issues related to permit and

pdf. 7-8 (2017) (Exhibit 13); SPE, Annual Hydrology Report at 4-5 (2016) (Exhibit 14); SPE, Annual Hydrology Report at 4-5 (2015) (Exhibit 15).

MSUMRA rule compliance that are identified during an inspection are categorized into one of three classifications and are documented on the inspection reports as:

- 1) ‘Follow-up Item’: Follow-up items are used to document observations and/or minor inconsistencies with regulatory requirements. Such items are meant to be tracked and reviewed during subsequent inspections. Follow-up items may be resolved through subsequent action and discussion or may be elevated to a maintenance item on a case-by case basis.
- 2) ‘Maintenance Item’: Maintenance items are used to document observations of operations or reclamation that are inconsistent with a permit or MSUMRA. Such items are identified for the operator and the operator is given a timeframe for resolution. If not resolved as directed by DEQ, the item may be elevated to a ‘violation.’
- 3) ‘Violation’: A violation is used to document non-compliance with the existing permit and/or MSUMRA, which have either not been resolved in a specified timeframe or which have been deemed serious enough to warrant potential referral to DEQ’s Enforcement Program.²⁷

This practice violates SMCRA and MSUMRA. Specifically, DEQ does **not** issue either a cessation order or a notice of noncompliance when it identifies “operations or reclamation that are inconsistent with a permit or MSUMRA.” This is the case for noncompliance that is **not minor** (DEQ addresses “minor” noncompliance with “follow-up items”).

In the past 10 years, Signal Peak has received 113 “maintenance items,”²⁸ meaning that inspections have identified **113 violations** of Signal Peak’s permit or MSUMRA in the past ten years, a rate of approximately 11 violations per year. This volume of noncompliance constitutes a “pattern of violations,” warranting suspension or revocation of Signal Peak’s permit. Mont. Code Ann. § 82-4-251(3); ARM 17.24.1213. This is especially the case given Signal Peak’s recent and extensive criminal violations detailed in Conservation Groups’ prior citizen complaint,²⁹ as well as DEQ’s own recognition as recently as 2019 that Signal Peak has “history of monitoring violations”³⁰ that has caused an “irreversible loss of monitoring data.”³¹ DEQ itself has recognized that Signal Peak’s violations have been “willful[]” and “intentional[].”³² This assessment corresponds to the remarks of the U.S. Attorney’s Office for Montana that Signal Peak “willfully” violated the law by unlawfully disposing of toxic mine waste and that the criminal conduct occurred “with the full knowledge, direction, and participation of the most

²⁷ Ltr. from Dan Walsh, DEQ, to Shiloh Hernandez et al. (Sept. 2, 2022) (Exhibit 16).

²⁸ *Id.*

²⁹ Ltr. from Shiloh Hernandez et al. to Chris Dorrington et al., at 5-7 (Aug. 18, 2022).

³⁰ Ltr. from Matthew Dorrington, DEQ, to Dusty Weber, Signal Peak at 8 (Nov. 8, 2019).

³¹ DEQ, Notice of Noncompliance (Aug. 22, 2019).

³² *Id.*

senior management of the mine during that period, including the President and CEO, the Vice President of Surface Operations, the Vice President of Underground Operations, and the Safety Manager.”³³ It is also consistent with Signal Peak’s statements that it has never complied with the permit’s prior spring assessment obligations, before DEQ removed those requirements through a minor (and unlawful) permit revision.³⁴ And now Signal Peak is attempting to force ranchers off their own land to evade reclamation obligations required by SMCRA and MSUMRA. Ltr. from Parker Phipps, SPE, to Steve Charter (Nov. 14, 2022). This conduct must not be sanctioned. And DEQ should not be permitted to downplay Signal Peak’s serial and often willful violations of SMCRA, by classifying violations as “maintenance” items.

Here, Signal Peak’s serial noncompliance (classified euphemistically as “maintenance items”) warrants an inspection and cessation order. Similarly, DEQ’s practice of using “follow up” and “maintenance” items to ignore violations and noncompliance must end.

Pursuant to 30 C.F.R. § 842.12(a), the Conservation Groups are submitting this citizen complaint simultaneously to DEQ, the state regulatory authority. DEQ has not taken action with respect to the violations identified in this citizen complaint. To the contrary, DEQ has repeatedly accommodated Signal Peak’s unlawful conduct by (1) failing to require Signal Peak to conduct monitoring and assessments that are sufficient to detect impacts to water resources; (2) ignoring Signal Peak’s failure to adequately monitor and assess impacts to springs; (3) allowing Signal Peak to modify its permit repeatedly through non-public procedures to eliminate rigorous assessment methods, weaken water reclamation requirements, and sanctify Signal Peak’s unlawful disposal of toxic mine waste; (4) failing to require Signal Peak to reclaim water resources on its own land; (5) failing to require Signal Peak to reclaim water resources for use by aquatic life and wildlife; (6) using an oversight scheme that does not comply with the requirements of SMCRA and MSUMRA to issue notices of noncompliance and cessation orders upon detection of permit violations and violations of MSUMRA, as detailed above.

CONCLUSION

In conclusion, complainants respectfully request a federal inspection of the Bull Mountains Mine and the land above the mine, pursuant to 30 U.S.C. § 1271 and 30 C.F.R. § 842.11, sufficient to determine if SPE is continuing to violate the law as described above. The Conservation Groups respectfully request that their representatives, attorneys, and any necessary experts be permitted to participate in the inspection. Following the inspection, OSMRE is requested to issue a cessation order halting operations of the mine pending compliance with the law. Signal Peak is an outlier in the coal mining industry and a serial scofflaw. It must not be permitted to continue to violate the law with impunity.

We appreciate your efforts to make this inspection happen and ensure that Signal Peak complies with state and federal law. If there is anything we can do to expedite the process, please contact us.

³³ Offer of Proof, *United States v. Signal Peak Energy, LLC*, No. CR-21-79 (Oct. 5, 2021).

³⁴ Hrg. Tr. at 769, 786-87, 893, *In re Bull Mountains Mine*, No. BER 2016-03 (Mont. Bd. of Env’t Rev.).

Sincerely,

Shiloh Hernandez
Earthjustice
313 E. Main Street
Bozeman, MT 59772
shernandez@earthjustice.org
406.426.9649

Emily Qiu
Earthjustice
313 E. Main Street
Bozeman, MT 59772
equi@earthjustice.org

Barbara Chillcott
Western Environmental Law Center
103 Reeders' Alley
Helena, MT 59601
chillcott@westernlaw.org

Melissa Hornbein
Western Environmental Law Center
103 Reeders' Alley
Helena, MT 59601
hornbein@westernlaw.org

Anne Hedges
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59601
ahedges@meic.org

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59601
djohnson @meic.org

Joanie Kresich
Chair, Northern Plains Resource Council
220 S. 27th Street, Suite A
Billings, MT 59101
info@northernplains.org

cc: Dan Walsh
Mining Bureau Chief
Montana Department of Environmental Quality
(406) 444-6791
deqcoal@mt.gov