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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

IN THE MATTER OF AIR QUALITY PERMIT TO CONSTRUCT P-2019.0047	)	Agency Case No. 0101-22-01
	)	OAH Case No. 23-245-01
NEZ PERCE TRIBE, IDAHO CONSERVATION LEAGUE, and SAVE THE SOUTH FORK SALMON	)	**PETITIONERS' OPENING BRIEF IN SUPPORT OF AMENDED PETITION FOR REVIEW OF PRELIMINARY ORDERS**
Petitioners,	)	
v.	)	
IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Respondent,	)	
and	)	
PERPETUA RESOURCES IDAHO, INC.	)	
Intervenor-Respondent.	)	

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Table of Abbreviations & Terms

AACC.....Acceptable Ambient Concentrations of Carcinogens

Air Rules ..... Idaho Rules for the Control of Air Pollution

Amended Preliminary Order & Amended Order.....
..... Amended Memorandum Decision on Motions for Summary Judgment and Preliminary Order

AMP ..... Access Management Plan

CAA .....Clean Air Act

Claim No. 3 .....???

Contested Case Rules.....
..... DEQ's Contested Case Rules and Rules for the Protection and Disclosure of Records

CWA.....Clean Water Act

DEQ ..... Idaho Department of Environmental Quality

EPA ..... Environmental Protection Agency

FDCP..... Fugitive Dust Control Plan

HAP..... Hazardous air pollutants

HRCP ..... Haul Road Capping Plan

I.R.C.P. .....Idaho Rules of Civil Procedure

ICL ..... Idaho Conservation League

Idaho Rules of Administrative Procedure .....
.....Idaho Rules of Administrative Procedures of the Attorney General

NAAQS .....National Ambient Air Quality Standards

NMP(s).....Nutrient management plan(s)

O&M Plan .....Operations and Management Plan

PM.....Particulate matter

Preliminary Order .....

.....Memorandum Decision on Motions for Summary Judgment and Preliminary Order

Project ..... Stibnite Gold Project

PSD .....Prevention of Significant Deterioration

PTC .....Permit to construct

RACT .....Reasonable available control technologies

Route .....Stibnite Road Access Route

RTC .....Response to Comment

SGP ..... Stibnite Gold Project

SOB.....Statement of Basis

SSFS.....Save the South Fork Salmon

TAP .....Toxic air pollutants

Table of Authorities

Cases

917 Lusk v. City of Boise,
158 Idaho 12 (2015)..... 15

American Lung Association of Idaho/Nevada v. Idaho State Department of Agriculture,
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Asarco Inc. v. State,
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Black & Decker Corp. v. C.I.R.,
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Brown v. Caldwell School District No. 132,
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Environmental Defense Center v. U.S. Environmental Protection Agency,
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Herdon v. West,
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Idaho State Insurance Fund v. Hunnicutt,
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Local 1494 of International Association of Firefighters v. City of Coeur d' Alene,
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Mead v. Arnell,
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Mickelsen v. City of Rexburg,
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Natural Resource Defense Council v. Thomas,
845 F.2d 1088 (D.C. Cir. 1988)..... 2

Perez-Guzman v. Lynch,
835 F.3d 1066 (9th Cir. 2016)..... 45

Radzanower v. Tourche Ross & Co.,
426 U.S. 148 (1976) 45

Tomich v. City of Pocatello,
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Waterkeeper Alliance v. U.S. Environmental Protection Agency,
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Federal Rules, Regulations & Statutes

40 C.F.R. § 50.6 7

40 C.F.R. § 50.7 7

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40 C.F.R. § 51.161(a) 3, 30

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42 U.S.C. § 7401 et seq. 1

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42 U.S.C. § 7408(a)(1)(A) 2

42 U.S.C. § 7409(a)(1) 2

42 U.S.C. § 7409(d) 2

42 U.S.C. § 7410 2

42 U.S.C. § 7410(a)(2)(A) 2

42 U.S.C. § 7410(a)(2)(C) 2

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IDAPA 58.01.01.209.01.b.ii 4

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IDAPA 58.01.01.209.04.b.iii 4

IDAPA 58.01.01.210 40-47

IDAPA 58.01.01.210.12 41

IDAPA 58.01.01.210.12.a 42

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IDAPA 58.01.23.003.01 25

IDAPA 58.01.23.160.01 26

IDAPA 58.01.23.162.02 15

Other Authorities

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Petitioners Nez Perce Tribe ("NPT"), Idaho Conservation League ("ICL"), and Save the South Fork Salmon ("SSFS") submit this opening in support of their Amended Petition for Review of the Preliminary Orders.

In this contested case, Petitioners challenge the Idaho Department of Environmental Quality's ("DEQ" or "Department") approval of a permit to construct (the "Permit") issued to Perpetua Resources Idaho, Inc. ("Perpetua") for the proposed Stibnite Gold Project ("SPG" or "Project"): a large open-pit mine in Valley County, Idaho. As proposed, Perpetua would excavate 340 million tons of waste rock to mine and process approximately 100 million tons of ore, using 55 miles of haul truck routes over 16 years. Blasting, excavating, ore hauling, and other Project activities will emit air pollutants, including coarse particulate matter ("PM_{10}") and arsenic. PM_{10} and arsenic are regulated under the federal Clean Air Act and Idaho's air pollution regulations, because they can cause significant and severe health and environmental hazards.

The Hearing Officer committed multiple errors in granting summary judgment for DEQ and Perpetua in the October 31, 2023 Preliminary Order and the December 5, 2023 Amended Preliminary Order. The Preliminary Orders should be modified, amended, or revoked, and the Permit should be vacated and remanded to DEQ, based on the errors below.

THE CLEAN AIR ACT AND IDAHO AIR RULES

The federal Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq.*, was passed to "protect and enhance the quality of the Nation's air resources" by prescribing national ambient air quality standards ("NAAQS") which state and regional authorities are required to either maintain or make progress toward. To achieve the CAA's goals, Congress directed the Environmental Protection Agency ("EPA") to establish primary and secondary NAAQS for any pollutant "reasonably . . . anticipated to endanger public health or welfare" and to periodically review and

revise those standards. *Id.* §§ 7408(a)(1)(A), 7409(a)(1), (d). The CAA also requires the EPA to divide up the country into areas designated as "nonattainment," "attainment," or "unclassified" based on whether these areas meet the NAAQS. *Id.* § 7407(d).

States have the primary responsibility for assuring that air quality within their borders meets the NAAQS. Each state must establish a state implementation plan (SIP), which is submitted to EPA for review. *Id.* § 7410. To be approved by EPA, each SIP must "include enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable requirements of [the CAA]." *Id.* § 7410(a)(2)(A); 40 C.F.R. § 52.02(a). States can adopt and enforce their own standards regarding emissions "provided such state standard is no less stringent than any applicable federally mandated SIP provision." *Nat. Res. Def. Council v. Thomas*, 845 F.2d 1088, 1090 (D.C. Cir. 1988).

The CAA requires that State air rules "shall" include "enforceable emission limitations" and other control measures, means, or techniques as necessary or appropriate to meet CAA requirements. 42 U.S.C. § 7410(a)(2)(A). SIPs "shall" also include a "program to provide for the enforcement" of the limitations and measures described in subparagraph (A), and for the "regulation of the modification and construction of any stationary source . . . to assure that [NAAQS] are achieved." *Id.* § 7410(a)(2)(C).

EPA's CAA regulations require each SIP to "set forth legally enforceable procedures" that enable the State to determine whether the construction of a facility will result in a violation of its air pollution control strategies or interfere with attaining or maintaining the NAAQS. 40 C.F.R. § 51.160(a). These legally enforceable procedures must include means by which the State will prevent construction if the facility will violate air pollution control strategies or interfere with attaining or maintaining the NAAQS, and they must provide for the applicant to submit

information on the "location, design, construction, and operation of such facility . . . as may be necessary" to permit the State to "to make the determination" that the facility will comply with its air pollution control strategies and the NAAQS. *Id.* § 51.160(b)–(c). "The legally enforceable procedures in § 51.160(b) must also require" the State to provide opportunity for public comment on information submitted by the applicant and on the State's analysis of the effects on ambient air quality. *Id.* § 51.161(a).

EPA has delegated to DEQ authority to issue air quality permits in Idaho pursuant to the Rules for the Control of Air Pollution in Idaho ("Air Rules"), IDAPA 58.01.01. Prior to construction of a facility, the owner or operator must first obtain a permit to construct ("PTC") from DEQ which satisfies the applicable requirements of the Air Rules. Air Rules Section 201.

A PTC application "shall be accompanied by all information necessary to perform any analysis or make any determination required under Sections 200 through 228." Air Rules Section 202. The applicant must provide the following required information: "Site information, plans, descriptions, specifications, and drawings showing the design of the stationary source, facility, or modification, the nature and amount of emissions (including secondary emissions), and the manner in which it will be operated and controlled." Air Rules Section 202.01.a.i. The applicant must also provide: "Any additional information, plans, specifications, evidence or documents that the Department may require to make the determinations required under Sections 200 through 225 shall be furnished upon request." Air Rules Section 202.03.

Among other determinations, DEQ cannot issue a PTC unless it determines that the facility: (1) "would comply with all applicable federal emissions standards;" (2) "would not cause or significantly contribute to a violation of any ambient air quality standards" (i.e., the

NAAQS); and (3) "emissions of toxic air pollutants . . . would not injure or unreasonably affect human or animal life or vegetation as required by Section 161." Air Rules Section 203. When making these determinations, DEQ must consider the source's "potential to emit" ("PTE"), which is defined as:

> The maximum capacity of a facility or stationary source to emit an air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the facility or source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is state or federally enforceable. Secondary emissions do not count in determining the potential to emit from a facility or stationary source.

Air Rules Section 006.88.

For all PTC applications, DEQ must provide an opportunity for public comment. Air Rules Section 209.01.c. The Air Rules also require DEQ to issue either an "approval," a "conditional approval," or a "denial." Air Rules Sections 209.01.b.i & ii, c.iv. DEQ "may impose any reasonable conditions" upon the facility in the PTC. Air Rules Section 211. DEQ can also authorize revisions to permits, but such revisions must go through the Air Rule Section 209 public comment process if the revision results in an increase in emissions or if deemed appropriate by the DEQ director. Air Rules Section 209.04.b.iii.

STATEMENT OF FACTS

I. THE STIBNITE GOLD PROJECT.

Perpetua proposes to construct and operate a conventional open-pit mine with ore preparation and gold extraction facilities approximately 10 miles east of the town of Yellow Pine, in Valley County, Idaho. *See* REC 0415–17 (DEQ Statement of Basis ("SOB"), Facility Information). The Project is located on a combination of public National Forest and private

lands. *Id.* The Project is also geographically located within the Nez Perce Tribe's aboriginal homeland and within the area over which the Nez Perce Tribe has Treaty-reserved rights and resources. *See* REC 2390 (Oatman Decl.), 2548 (Taylor Decl.).

The Project includes 3 years of development and construction activities, followed by approximately 12 years of mining. REC 0415–17. The Project would require "construction of significant infrastructure," including a power transmission line, a primary mine site access road, onsite haul roads, an ore processing facility, onsite workspaces, employee housing and recreation, water storage and distribution facilities, and sewage disposal facilities. *Id.* Conventional open-pit mining methods including drilling, blasting, excavating, and hauling will be used to extract ore and waste rock (termed development rock) from three open pits. *Id*. Over the life of the mine, approximately 340 million tons of waste rock would be handled and 100 million tons of ore will be mined from the three pits. *Id.* A fleet of large trucks will haul ore and waste rock using a network of over 55 miles of unpaved haul roads at the mine site. REC 0431.

The Permit issued by DEQ on June 17, 2022 (REC 0367–409) is the first of over 50 permits required from various local, state, and federal agencies for the proposed mine. Perpetua is currently in the process of seeking these other permits for the proposed Project, including from the U.S. Forest Service, U.S. Army Corps of Engineers, and U.S. Fish and Wildlife Service.

II. OVERVIEW OF PERPETUA'S APPLICATION AND DEQ'S APPROVAL.

Perpetua (previously Midas Gold) submitted a PTC application to DEQ on August 20, 2019. *See* REC 0418–420 (SOB, Application Chronology). Between that date and March 6, 2020, DEQ determined that the application was incomplete, requested additional information, and received supplementary materials from Perpetua no fewer than four times. *Id.* On May 15, 2020, DEQ deemed Perpetua's application complete. *Id.*

Between May 15, 2020, and March 16, 2022, DEQ developed three versions of the draft Permit and released them for public comment. *Id.* As noted in comments submitted by the Nez Perce Tribe, ICL, SSFS, and other members of the public and agencies, the first two draft versions of the Permit (the "September 2020" and "February 2021" Draft Permits) contained significant shortcomings. *See* REC 0983–1000 (DEQ Response to Comments ("RTC")). After taking public comment, DEQ deemed the September 2020 draft Permit deficient and required updated information from Perpetua, including updated hazardous air pollutants ("HAP") and toxic air pollutants ("TAP") emissions estimates. *See* REC 0418–420.

DEQ subsequently updated the draft Permit in February 2021, and took public comment. *Id.* Following additional comments, DEQ determined that the February 2021 draft Permit was deficient and required additional information from Perpetua, including Prevention of Significant Deterioration ("PSD") emissions estimates and regulatory applicability for the lime manufacturing plant. *Id.*

DEQ revised the February 2021 draft PTC and released it for public comment on January 13, 2022. *Id.* Comments were submitted by the Nez Perce Tribe, ICL, SSFS, EPA, and Ian von Lindern of Terragraphics International Foundation. *See* REC 0915–0982. Commenters raised numerous concerns and urged DEQ to gather additional information, to perform additional modeling and analysis, and to develop additional enforceable permit conditions and limits prior to issuing a final Permit. *See id.*

DEQ rejected most of the issues raised by the commenters. *See id.* And on June 17, 2022, DEQ issued the final Permit (REC 0367–409) along with the Statement of Basis ("SOB") (REC 0410–0914) and Response to Comments ("RTC") (REC 0915–1000).

III. PM_{10} EMISSIONS FROM THE PROJECT.

Particulate matter ("PM") is a "criteria air pollutant." Under CAA Sections 108 and 109, EPA is required to establish NAAQS for each criteria pollutant to protect the nation's public health and welfare. The NAAQS specify a maximum amount of PM to be present in the outdoor air. *See* 40 C.F.R. §§ 50.6, 50.7. EPA established primary and secondary NAAQS for coarse particulate matter, or "PM_{10}," and for fine particulate matter, or "$PM_{2.5}$". 40 C.F.R. § 50.6–50.7. PM_{10} consists of inhalable particles with diameters that are generally ten micrometers and smaller; whereas, $PM_{2.5}$ consists of inhalable particles that are 2.5 micrometers and smaller. *Id.*

DEQ found that the Project has the potential to emit 986 tons per year of PM_{10} from a variety of controlled fugitive sources, plus 55.7 additional tons per year of PM_{10} from a variety of controlled point sources. REC 0430 (Table 3). The generation of dust from ore haul trucks traveling along haul roads is the most significant source, representing approximately 72% of all fugitive PM_{10} emissions, and 68% of all modeled PM_{10} emissions. *See id.* The next most significant sources of PM_{10} are from drilling and blasting activities, which together account for an estimated 21% of all fugitive PM_{10} emissions (20% of all emissions). *See id.*

To evaluate whether the Project would comply with the PM_{10} NAAQS, DEQ modeled receptors at various locations along the Project's ambient air boundary and found the Project would exceed the 24-hour PM_{10} NAAQS at one receptor, when using a single-value for PM_{10} background at the site. REC 0717–19 (SOB, App'x B at "TAPs Addendum Modeling Review"). DEQ then used seasonal and monthly background PM_{10} values to find that the maximum 24-hour PM_{10} pollution from the Project would be 123.5 micrograms per meter cubed ("ug/m^3), which is 82.3% of the NAAQS. REC 0717 (Table 7).

Among other factors, these modeled PM_{10} emissions are based on Permit Condition 3.5 limiting Perpetua's production to no more than 180,000 tons per day, and no more than an average of 135,000 tons per day on a rolling five-year basis. *See* REC 0421 (Table 1). They also depend on Perpetua achieving a 93.3% rate of control of fugitive dust. *Id.* Achieving these and other Permit conditions, and assumptions used in the modeling, also depend on future plans called for in the Permit, including a Fugitive Dust Control Plan ("FDCP"), Operations and Maintenance Plan ("O&M Plan"), and Haul Road Capping Plan ("HRCP"). *See* REC 0375, 0378, 0386 (Permit Conditions 2.6, 2.20, 3.13), 0456–57.

During public comment, Petitioners, EPA, and other commenters warned that DEQ unreasonably assumed PM_{10} emissions would be this low. REC 0921–25. Specifically, Petitioners and EPA commented that DEQ unreasonably assumed Perpetua would be able to control 93.3% of dust it would otherwise emit on haul roads, and pointed out that DEQ's assumptions relied on the yet-to-be determined details of numerous future plans that have not yet been developed by Perpetua, submitted to DEQ, or included as conditions of the Permit. *Id.*

In its comments, EPA underscored that achieving 93.3% control for excavation and haul roads, and 90% control for drilling, "are critical to ensuring no violation of the NAAQS and Title V HAP limits." REC 0921. EPA warned that the Permit lacks conditions necessary to assure Perpetua achieves these efficiencies and that record fails to show those efficiencies are achievable based on site-specific conditions. REC 0921–22. EPA also noted that DEQ failed to provide evidence to support its claim that a 90% control using magnesium chloride could be improved by also using water sprays to achieve a 93.3% control. REC 0923.

Similarly, the NPT, ICL, and SSFS commented that DEQ had not demonstrated that 93.3% control was attainable or enforceable under the Permit. REC 0921, 0923–24.

IV. ARSENIC EMISSIONS FROM THE PROJECT.

Arsenic is a Toxic Air Pollutant ("TAP") regulated by DEQ. Air Rules Section 586. DEQ determined arsenic is the largest projected TAP emission from the Project. REC 0435. DEQ found that the Project could emit 0.544 lbs/hr at the maximum mine production rate of 180,000 tons per day. REC 0433. Arsenic is a component of rocks, soils, and dust at the Project site, so arsenic emissions are essentially a percentage of the Project's PM_{10} emissions, and like with PM_{10}, the largest source of Project arsenic emissions are haul roads, estimated at 0.464 lbs/hr. REC 0428.

No PTC can be granted unless DEQ determines the applicant showed "the emissions of toxic air pollutants from the . . . source . . . would not injure or unreasonably affect human health or animal life or vegetation as required by Section 161." Air Rules Section 203.03. Section 161 states, "[a]ny contaminant which is by its nature toxic to human or animal life or vegetation shall not be emitted in such quantities or concentrations as to alone, or in combination with other contaminants, injure or unreasonably affect human or animal life or vegetation." Air Rules Section 161. For each carcinogenic TAP, including arsenic, the Air Rules set Acceptable Ambient Concentrations of Carcinogens ("AACC"), where each AACC is an annual average in ug/m^3. Air Rules Section 586. To demonstrate compliance with these TAPs requirements, ambient impacts must be less than the AACC. Air Rule Section 203; *see also* REC 0836.

Because of the Project's high arsenic emissions, Perpetua used what DEQ described in the SOB as "a highly refined TAPs analysis approach to demonstrate compliance with applicable TAP increments." REC 0698.

As one part of this approach, DEQ approved Perpetua's "T-RACT demonstration" to allow a 10-times increase in the arsenic AACC. *Id.* As the Air Rules provide, a permittee can

analyze reasonable available control technologies ("RACT") that could be applied to a source of TAPs. *See* Air Rules Section 210.14. If using RACT does not sufficiently reduce toxic emissions to below the AACC, then the permittee is allowed a 10-fold increase in the AACC and can employ production limitations to ensure compliance with the now increased AACC. *See* Air Rules Section 210.12.b. Perpetua submitted to DEQ a T-RACT demonstration for arsenic emissions from open-pit drilling and ore haul roads. *See* REC 0909–914 (SOB, App'x G, T-RACT Analysis). For open-pit drilling, Perpetua determined dry drilling with dust collectors was the most effective RACT. REC 0911. For ore haul roads, Perpetua determined that the application of chemical dust suppressant, supplemented with frequent watering, as the RACT. REC 0914.

As another part of this "highly refined" approach, DEQ allowed what it called an "AACC adjustment for the Operational Life of the Mine." REC 0698. Under this approach, instead of comparing the highest annual average ambient arsenic concentration during the Project lifetimes to the T-RACT adjusted AACC (which is also an annual average), DEQ stretched out and diluted the arsenic concentrations from the 16-year Project lifetime over a longer 70-year human life. *See* REC 0710. Multiplying the modeled highest annual arsenic concentration by 16 and dividing by 70, as DEQ did here, dilutes the arsenic concentration to only 23% of its actual value. During permitting, DEQ staff noted that this approach had not been used before, and raised concerns about whether it was permissible under the Air Rule. *See* REC 1183–190; REC 1191–96.

During public comment, Petitioners questioned DEQ's novel tactic for diluting the apparent arsenic exposure by spreading it over 70 years, and warned that without this the Project would exceed the arsenic AACC, even with the T-RACT adjustment. REC 0962, 0971, 0975. Petitioners also warned that DEQ failed to assess the environmental impacts caused by the

control technology, including by applying large amounts of magnesium chloride to roads to control dust, which can accumulate over time to toxic concentrations in trees and soils and can impact water. REC 0962, 0978.

In the end, DEQ approved Perpetua's T-RACT demonstration and, thus, granted a 10-fold increase in allowable arsenic pollution combined with using the creative new "adjustment" to dilute the apparent arsenic exposure to just 16/70 (or 23%) of its modeled value so that DEQ and Perpetua could determined the Project would comply with the AACC. *See* REC 0698.

V. AMBIENT AIR BOUNDARY AND THE STIBITE ROAD ACCESS ROUTE.

The CAA and Idaho Air Rules require Perpetua to meet various air standards, including the NAAQS and TAPs AACCs, in ambient air. *See*, *e.g.*, Air Rules Sections 006.11 (NAAQS), 006.125 (TAPs). EPA's CAA regulations define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e).

The Stibnite Road Access Route ("Route") is a road that passes through what Perpetua and DEQ have defined as the mine's operations boundary and the ambient air boundary, and the inside of that boundary is the active industrial site where Project mining activities and heavy equipment operation will occur. REC 0415 (map). Perpetua has indicated that it will not cut off public access along the Stibnite Road Access Route during mine operations, and as explained by DEQ, Perpetua "will manage an access route to provide the general public with limited access through the [Project] site between Stibnite Road at Sugar Creek and Thunder Mountain Road at Meadow Creek." REC 0676.

In public comments, Petitioners urged DEQ to count the Stibnite Road Access Route as ambient air where air quality standards would have to be met, since Perpetua plans to allow public access on the Route. REC 0956–58. But DEQ excluded everything within the mine

operations boundary from ambient air—including the Stibnite Road Access Route. *See id.*; *see also* REC 0415 (map).

In its comments, EPA urged: "Given the unique situation with a public access road traversing the mine site, the key assumptions, parameters, and methodologies used to preclude public access from the mine site must be fully disclosed in the permit record and the necessary requirements be included in the permit and available for public review and comment." REC 0935. But instead of following EPA's advice, DEQ is instead allowing Perpetua to develop an Access Management Plan ("AMP") to address these issues later without public review. REC 0376, 0436.

CONTESTED CASE BACKGROUND

On June 17, 2022, DEQ issued a permit to construct ("PTC") P-2019.0047, which is the Permit at issue in this contested case. *See* REC 0367–0409 (Permit). On July 22, 2022, Petitioners timely filed the original Petition to Initiate Contested Case. REC 0001. On July 28, 2022, the Hearing Officer Dylan Lawrence was assigned to preside over this matter. REC 0031. On August 12, 2022, Perpetua filed a Petition to Intervene. REC 0040. On August 22, 2022, Perpetua's Petition to Intervene was granted. REC 0044. On September 6, 2022, Perpetua filed a Motion to Dismiss. REC 0052. On November 15, 2022, the Hearing Officer issued the Order on Motion to Dismiss, denying the motion with respect to the majority of Petitioners' claims, dismissing or partially dismissing four claims, and declining to allow the pleadings to be amended unless Petitioners file for consideration a formal motion to amend the Petition. REC 0160. On December 6, 2022, Petitioners filed their First Amended Petition to Initiate Contested Case. REC 0292.

After DEQ produced a Project Record and the Parties engaged in limited discovery, Petitioners filed a Motion for Summary Judgment on all claims remaining in the contested case on April 14, 2023. REC 0319 (Petitioners' Motion for Summary Judgment), 0323 (Petitioners' Opening Summary Judgment Brief), REC 0364 (Hurlbutt Declaration, submitting documents cited in brief). DEQ and Perpetua filed Cross Motions for Summary Judgment, along with opening briefs and declarations. *See* REC 1204-2316. On June 9, 2023, Petitioners filed a Response/Reply Summary Judgment Brief (REC 2317), additional documents (REC 2555), and standing declarations (REC 2372-2554). DEQ filed a "non-reply" (REC 2986), and Perpetua filed a reply brief (REC 2989).

On August 28, 2023, Perpetua and DEQ filed a joint Motion in Limine to exclude an August 10, 2023 letter from EPA Region 10 Administrator Casey Sixkiller to IDEQ Director Jess Byrne requesting an in-person meeting to discuss EPA's concerns with the Permit. REC 3097. In the letter, EPA raised three primary concerns with the Permit, including concerns that: DEQ used the wrong emission factors, and had it used proper emission factors, the SGP's potential to emit would exceed the major source permitting threshold; DEQ's emission limits were inadequate to demonstrate compliance with NAAQS for particulate matter; and DEQ's delineation of the SGP's ambient air boundary was not supported. Further explanation of the EPA's concerns were detailed in a 19-page enclosure. REC 3146. Three days later, Petitioners filed a Motion to Supplement with EPA's letter and enclosure, and on September 8, 2023, filed a Motion to Amend Contested Case Petition to add a claim regarding the issue EPA raised in its letter about whether DEQ used improper emission factors and was thus wrong when it concluded the SGP's potential to emit will be below major source thresholds. REC 3137. On September 15, 2023, the Hearing

Officer denied Perpetua and DEQ's motion in limine, granted Petitioners' motion to supplement with the EPA letter, and denied Petitioners' motion to amend. REC 3265.

On September 21, 2023, the Hearing Officer held a hearing on the cross motions for summary judgment. REC 3275 (Notice of Hearing), TR 0001 (Transcript).

On October 31, 2023, the Hearing Officer issued a Memorandum Decision on Motions for Summary Judgment and Preliminary Order (the "Preliminary Order"). REC 3280.

In the Preliminary Order, the Hearing Officer rejected DEQ's and Perpetua's arguments that Petitioners lacked standing to pursue this contested case, finding each Petitioner had standing to challenge the Permit. But the Hearing Officer ruled against Petitioners on all claims addressed in the Preliminary Order and granted Summary Judgment to DEQ and Perpetua. The Preliminary Order, however, never addressed one of Petitioners' bases for review: DEQ's allowing Perpetua to defer the submission of project plans until later, after the Permit is already issued, outside of the normal permitting process, and without public comment.

On November 14, 2023, Petitioners filed a timely Petition for Review of Preliminary Order, seeking review of the October 31, 2023 Preliminary Order, including review of the issue ("Claim No. 3") never addressed by the Hearing Officer, as well as review of additional issues. REC 3342.

On November 10, 2023, DEQ and Perpetua filed a Joint Motion for Reconsideration and/or Clarification regarding whether Claim No. 3 was addressed. REC 3332. Petitioners responded (REC 3361), and on December 5, 2023, the Hearing Officer issued an Order on Joint Motion for Reconsideration and/or Clarification (REC 3367) and also issued an Amended Memorandum Decision on Motions for Summary Judgment and Preliminary Order (the "Amended Preliminary Order") (REC 3372). The Amended Preliminary Order found Claim

No. 3 had already been dismissed and, alternatively, granted summary judgment to DEQ and Perpetua on Claim No. 3.

On December 15, 2023, Petitioners filed the Amended Petition for Review, seeking review of the same five issues as in the original Petition for Review, with minimal changes to reflect that review is now sought of the Preliminary Order and/or the Amended Preliminary Order. REC 3426.

APPLICABLE LEGAL STANDARDS

Petitioners bring this contested case to challenge DEQ's action in issuing the Permit. Under the Idaho APA, an agency action like DEQ issuing the Permit will be overturned where its findings, inferences, conclusions, or decisions are: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." Idaho Code ("I.C."). § 67-5279(3). *See 917 Lusk v. City of Boise*, 158 Idaho 12, 14 (2015).

"An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard to the facts and circumstances presented or without adequate determining principles." *Am. Lung Ass'n of Idaho/Nev. v. Idaho State Dep't of Agric.*, 142 Idaho 544, 547 (2006) (citations omitted).

Motions for summary judgment before the Board are allowed by IDAPA 58.01.23.162.02 and are governed by the Idaho Rules of Civil Procedure ("I.R.C.P."). Summary judgment is proper here under I.R.C.P. 56(c), because there is no genuine issue as to any material fact and Petitioners are entitled to judgment as a matter of law. I.R.C.P. 56(c).

ARGUMENT

I. AMBIENT AIR PROTECTIONS MUST BE MET ALONG THE STIBNITE ROAD ACCESS ROUTE.

The Clean Air Act and Idaho's Air Rules, IDAPA 58.01.01 *et seq.*, require Perpetua to meet various air quality standards, including the National Ambient Air Quality Standards ("NAAQS") and acceptable ambient concentrations of carcinogens ("AACCs") for toxic air pollutants ("TAPs"), in ambient air. *See*, *e.g.*, Air Rules Sections 006.11 (NAAQS), 006.125 (TAPs). The U.S. Environmental Protection Agency ("EPA") CAA regulations define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e). This definition of ambient air is incorporated by reference in Idaho Air Rule 006.05.

The Permit, however, fails to provide any ambient air protections to the general public traveling on the Stibnite Road Access Route thought the SGP to access public lands, exposing the public to concentrations of particulate matter and toxic, carcinogenic air emissions that exceed the NAAQS and health-based standards for carcinogenic pollutants. This includes NPT, ICL, and SSFS members, whose declarations demonstrate that they regularly use the Route and will be injured by the Project. *See* REC 2372–2554 (Petitioners' standing declarations).

The Hearing Officer's determination that DEQ had substantial evidence of Perpetua's legal authority to preclude the public from entering, and reasonably determined that the Perpetua did not need to provide ambient air protections to the public traveling over the Stibnite Road Access Route to access recreational sites on public land was in err. The Board of Environmental Quality should grant this Petition for Review, set aside the Permit, and order DEQ on remand to ensure that the Stibnite Road Access Route maintains air quality consistent with the NAAQS and health-based standards for arsenic.

A. DEQ Impermissibly Relid on Perpetua's Assertions That It Has Legal Control of the Route.

The Stibnite Road Access Route ("Route") is a road that passes through what Perpetua and DEQ have defined as the mine's 14,000+-acre operations boundary and the ambient air boundary. The Amended Memorandum and Decision on Motions for Summary Judgment and Preliminary Order ("Amended Order") make several misstatements and implications regarding the Route, which are corrected here. First, the Amended Order states that "one could drive northeast from Cascade to reach the South Entry of the SGP." REC 3385. Currently, to access the South Entry by driving northeast from Cascade, one would have to pass through Yellow Pine to reach the North Entry and travel through the proposed mine site to reach the South Entry and public sites on National Forest land as the Burntlog Route does not exist.[1] . Second, the Amended Order states that the "Burntlog Route would provide year-round access to the south side of the SGP." REC 3386. This statement is true *only if* the Burntlog Road alternative is approved by the Forest Service after the NEPA process. However, even with the Burntlog Route, if access through the SGP is precluded, residents of Yellow Pine would have to travel west on Lick Creek Road, through McCall, south to Cascade, and northeast on Johnson Creek Road to reach the proposed Burntlog Route and the south side of the SGP to access public sites on National Forest land. REC 340. Finally, the Amended Order states that "if access through the SGP is precluded, those traveling from Yellow Pine to access those recreational areas would have to travel much farther and around the SGP to do so." REC 3387. This is true, however, *only if* the Forest Service approves the alternative that allows for the construction and extension of the

[1] Currently, access from Yellow Pine to public recreational sites is possible by continuing east, past the Stibnite Road turn off, and traveling along Sugar Creek on NF-374. However, this route will presumably be closed at the North Entry point because it is within the ambient air boundary. REC 340.

Burntlog Route, which currently does not exist, and thus far has not been approved.[2] If the Burntlog Route is not approved and travel is precluded through the SGP, the public will *not* have access to important public recreational areas on National Forest land. *Id.*

Second, the Hearing Officer erred in determining that it was reasonable for DEQ to rely on Pereptua's single, factual statement in its application that Perpetua had legal control of the Stibnite Road Access Route without any other documentation to that effect and without consideration of other, conflicting evidence in the record. *See* REC 3389–390. Specifically, the Hearing Officer's erred in three ways.

First, the Hearing Officer erred in determining that it was reasonable for DEQ to rely solely on one single statement made in the application by a permit applicant to determine that Perpetua had legal control over the Stibnite Road Access Route. *See* REC 3388–90. However, an agency's determination can only be upheld where "evidence supporting the agency decision is substantial when viewed in the light of *the entire record, including the body of evidence opposed to the agency's view.*" *State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 261 (1985) (emphasis added); *see also Local 1494 of Intern. Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 638, (1978) (stating that a court's "task" is to "determine whether, on the whole record, the [agency's] decision was substantially supported by the evidence and by applicable law"). Instead of considering the whole record, the Hearing Officer stated, "in the experience of the Hearing Officer, it is not unusual for an agency to rely on representations made in a permit application." REC 3390. The Hearing Officer's finding that "DEQ's reliance on Perpetua's representation," without further consideration of the record as a whole, was "reasonable and supported by

[2] The other alternative mining route that the Forest Service is considering would follow Johnson Creek Road up to Yellow Pine and travel east along Stibnite Road to the North Entry of the SGP.

substantial evidence in the record" is inconsistent with Idaho Supreme Court precedent, and should be rejected.

Second, the evidence in the record does not support DEQ's finding that Perpetua had legal control over the Stibnite Road Access Route to preclude public access. As discussed above, the ambient air is "that portion of the atmosphere, external to buildings, to which the general public has access." Idaho Air Rules 006.05. The EPA's Revised Policy on Exclusions from "Ambient Air" states that the agency's

> longstanding policy is based on the view that the general public does not have access to land occupied by a stationary source . . . when the land meets both of the following conditions: (1) the land is owned or controlled by the owner or operator of the stationary source: and (2) the land is surrounded by a fence or other physical barriers that preclude general public access.

REC 1141. EPA's policy further explains:

> it uses "controlled" . . . to mean that the owner or operator of the source has the legal right to use the land, and that its land-use rights include "the power to control public access" *and* "the power to exclude the general public."

REC 1143 (emphasis added).

Here, DEQ's determination—based solely on the representation made by Perpetua in the application itself—that Perpetua has legal control to exclude the general public from the Stibnite Road Access Route was erroneous, unreasonable, and not supported by substantial evidence in the record. Perpetua's single statement on the issue provides that:

> [Perpetua] will legally control the SGP, an active industrial site where mining activities will occur, such as heavy equipment operation. Most areas of the mine will require strict safety protocols and controlled access. [Perpetua] has established an operations boundary to identify the area where public access will be excluded. Public access inside the operations boundary will be restricted for the life of the mine by physical barriers at points of potential access, including the current Stibnite Road point of entry and proposed site access via the Burntlog Route, as well as natural features of the landscape that prevent access.

REC 1807. Notably, Perpetua does not state that it *has* legal control over the Stibnite Road Access Route. That is because Perpetua does not have legal control over the Route, which is a public road managed by the Forest Service. To get legal control over the Route, and the power to *exclude* the public from it, requires Forest Service approval—something Perpetua has not received.

Perpetua is in the process of seeking Forest Service approval for the Stibnite Gold Project. However, not only has Perpetua yet to achieve such approval, even if the Forest Service approves the SGP, the SGP will not authorize Perpetua to exclude the public.

Perpetua initially proposed to the Forest Service during the NEPA process to exclude public access through the SGP site, which would limit or preclude all access to Thunder Mountain and other important public recreational sites. REC 0893, 0896. However, due to extensive public comments in opposition, access preclusion was dropped, and the *only* alternative now under consideration for approval by the Forest Service provides the public with continued access through the SGP on the Stibnite Road Access Route. REC 0983; *see also* REC 2677 (stating that "public access would be provided by" the Stibnite Road Access Route); REC 2625 (indicating that during operations "public access" will be provided "through the Operations Area Boundary [ ] by constructing new road through Yellow Pine pit and below mine haul road to link Stibnite Road (FR 50412) to Thunder Mountain Road (FR 50375)"); REC 2684 ("The 2021 [Modified Mine Plan] would include a 12-foot-wide gravel road to provide public access from Stibnite Road (FR 50412) to Thunder Mountain Road (FR 50375) through the SGP."); REC 2557 ("During operations, the public access road would be used to travel through the mine site and would provide seasonal use, open to all vehicles."). Thus, even if the Forest Service

approves the current mine plan, it would only give Pereptua the legal ability to "control public access;" it will not give Perpetua the legal "power to exclude the general public."

As is evident in the record before DEQ, the Forest Service has not approved the SGP yet, has therefore not given Perpetua legal control over the Stibnite Road Access Route, and based on the current alternative under consideration, will *not* give Perpetua the legal authority to preclude public access such that Perpetua can exclude the Stibnite Road Access Route from meeting ambient air quality standards. *See* REC 1142 (EPA policy stating that to exclude an area from ambient air, an "owner or operator of the source [must] ha[ve] the legal right to use the land, and that its land-use rights include 'the power to control public access' *and* 'the power to exclude the general public'"). DEQ's reliance on a single, unsupported statement from the permit applicant to determine that Perpetua has legal control to exclude the public from Stibnite Road Access Route, and thus exclude it from ambient air protections, is not supported by substantial evidence. In fact, the evidence in the record shows Perpetua does not have and will not have the power to exclude the public. DEQ's determination is thus arbitrary and capricious.

Third, the Hearing Officer's post-hoc rationale that DEQ's "broad enforcement authority" is relevant to the legality of DEQ'S determination on the application at hand cannot be used to justify improper and unreasonable decision-making. *See* REC 3390.

The Board must set aside and remand the Permit to DEQ, hold that Perpetua lacks the required authority to preclude public access on the Stibnite Access Route, and direct DEQ to treat the Route as ambient air entitled to air quality protections.

B. Because Perpetua Will Allow "Guests of the Mine" to Use the Route, the Route Is Ambient Air.

Because Perpetua does not–and will not[3]–have the legal right to preclude the public from using the Stibnite Road Access Route to access important public recreational sites (and thus would have to exclude the Stibnite Road Access Route from the ambient air boundary), it created a new definition for "guests of the mine" which neither has a basis in law nor in EPA policy or DEQ guidance. The Hearing Officer erred in finding that the Permit is consistent with the Idaho Air Rule's definition of ambient air, agency policy, and guidance documents, and that exclusion of the Stibnite Road Access Route from ambient air was appropriate. *See* REC 3392.

First, the Hearing Officer erroneously determined that the Permit conditions sufficiently demonstrate that the Permit complies with EPA's ambient air policy and DEQ guidance. *Id.* Air Rule 006.005 defines "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access (incorporating EPA's regulatory definition of ambient air found in 40 C.F.R 50.1(e)). Conversely, if the general public does not have access, the area can be excluded from complying with ambient air quality standards. "EPA has long recognized that certain areas external to buildings may be excluded from the regulatory definition of ambient air because *the general public does not have access to them*." REC 1140 (emphasis added). As discussed above, "the general public does not have access to land occupied by a stationary source . . . when the land meets" two conditions: (1) it "is owned or controlled by the owner or operator . . .; and (2) the land is surrounded by a fence or other physical barriers that preclude general public access." REC 1141; *see also* REC 1109 (DEQ guidance stating the same). "Controlled"

[3] Again, the only alternative under consideration by the Forest Service would leave the Stibnite Road Access Route open for public use to travel through the SGP to public recreational sites, like Thunder Mountain and Monumental Summit.

means the owner or operator has "'the power to control public access' and 'the power to exclude the general public.'" REC 1141.

DEQ's guidance is similar to EPA's policy in that it "assume[s] that the air within the facility boundaries is ambient air unless the facility can demonstrate that public access is *precluded*." REC 1109. "The facility-proposed ambient air boundary must include justification that demonstrates the facility has reasonable control of the area *and effectively precludes public access on a routine basis.*" *Id.*

Point blank, in order to exclude an area from ambient air, both EPA's policy and DEQ's guidance together require that the owner or operator be able to *exclude* the general public from accessing the area on a routine basis. The Permit conditions referenced by the Hearing Officer do not demonstrate that.

The first condition in Permit Section 2.7 requires Perpetua to "[o]bserve all primary access points to preclude *unauthorized* public access." REC 0376 (emphasis added). It is unclear what "unauthorized" public access is. But the condition does not preclude authorized public access—travel over the Stibnite Road Access Route for access to public recreational sites—that would be allowed under the mine plan being considered for approval by the Forest Service. *See* REC 2677; REC 2625; REC 2684; REC 2557. The second condition in Permit Section 2.7 states that Perpetua may control access at the North and South Entry does not speak to precluding authorized public access, but only exerting some control over access. *See* REC 0376. The third condition in Permit Section 2.7 discusses "secondary access points" and is not relevant to access to the Stibnite Road Access Route, which is a primary access point. *See id.*

Finally, the fourth condition in Permit Section 2.7 restricts access to "guests of the facility." *Id.* Allowing the general public to use the Route such as to access public lands (as

Perpetua has committed to doing, and as the Forest Service expects under the Project it is reviewing), but labeling them "guests of the mine," does not count as precluding public access..

The Hearing Officer erred in finding that DEQ and Perpetua's labeling of the public as "guests of the mine" is consistent with EPA policy and DEQ guidance. *See* REC 3392–93. For example, "EPA also recognized that some persons that have both legal and practical access to the source's property" but "are not necessarily considered members of the general public." REC 1142. However, those persons EPA recognized as not necessarily members of the general public are limited to persons with a direct, business connection for accessing the facility, such as "employees of the owner or operator who work at the site, or business invitees; such as contractors or delivery persons." *Id.* These persons recognized by EPA are nothing like any and all people driving the Stibnite Access Route to access public lands.

Similarly, DEQ's guidance states that if the "general public [is] invited as part of the normal business conducted on the facility site" then the area where the "public is invited is determined to be ambient air." REC 1110. Furthermore, if the "general public [is] allowed on site as a part of a right-of-way easement or a common service road," then that road is "determined to be ambient air." *Id.* Here, the Stibnite Access Route is such a road that the general public will be invited and allowed to use. As such, the DEQ guidance (like EPA policy) affords people using the Route ambient air quality protections, whether or not Perpetua labels them "guests of the mine."

The Board should vacate and remand the Permit and hold that "guests of the facility" traveling the Stibnite Access Route are entitled to ambient air quality protections.

II. DEQ VIOLATED THE PROCEDURAL REQUIREMENTS OF THE AIR RULES BY ISSUING A PERMIT FIRST AND ALLOWING PERPETUA TO SUBMIT PROJECT PLANS LATER.

Under the Permit, Perpetua is allowed to submit the following plans in the future: the Fugitive Dust Control Plan ("FDCP"); the Haul Road Capping Plan ("HRCP"); the Operation and Maintenance Manual ("O&M"); and the Stibnite Road Access Management Plan ("AMP"). *See* REC 0375–76, 0378–80, 0385–86 (Permit conditions). These plans will include numerous Project details which significantly affect air emissions and public access. *See id.* Yet, because DEQ already issued the Permit, DEQ will review the plans outside of the PTC permitting process set forth in the Air Rules, including reviewing them without public comment.

Despite devoting extensive briefing to this issue in Petitioners' Opening Summary Judgment Brief (REC 0353–56) and Response/Reply Summary Judgment Brief (REC 2350–57), the Hearing Officer failed to even consider this issue in the Preliminary Order (*see* REC 3280–3328). In the Amended Preliminary Order, the Hearing Officer erred where he first found that Petitioners' failed to raise this issue, and he erred again when he found that DEQ satisfied the Air Rules anyway. REC 3403–7.

A. Petitioners Properly Raised This Issue in The Petition to Initiate Contested Case and Summary Judgment Briefs.

DEQ's Contested Case Rules and Rules for the Protection and Disclosure of Records ("Contested Case Rules"), IDAPA 58.01.23, govern contested cases, such as this one. The Contested Case Rules incorporate Rules 52 and 305 (among others) of the Idaho Rules of Administrative Procedure of the Attorney General ("Idaho Rules of Administrative Procedure"). IDAPA 58.01.23.003.01, .05. Rule 52 states:

> The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest.

IDAPA 04.11.01.052. Similarly, Rule 305 favors liberal construction of the pleadings and amendment if necessary:

> The presiding officer may allow any pleading to be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded. . . .

IDAPA 04.11.01.305 Rule 52 further provides: "Unless required by statute, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings." *Id*.

Nowhere do the rules require that a petition to initiate a contested case include specific claims for relief. Rather, Rule 160.01 provides that a contested case petition must include the following contents:

> a. Fully state the facts upon which it is based, including the specific alleged action or inaction of the Department;
>
> b. Refer to the particular provisions of statute, rule, order or other controlling law upon which it is based. Legal assertions will be accompanied by citations of cases and statutory provisions;
>
> c. State the relief sought; and
>
> d. State the basis for the petitioner's legal standing to initiate the contested case.

IDAPA 58.01.23.160.01.

The Amended Petition to Initiate Contested Case complied with these rules by including detailed factual and legal background describing DEQ's action in issuing the Permit and citing applicable laws and regulations. REC 0270–80. The Amended Petition also described the errors and omissions DEQ allegedly made when it issued the Permit. REC 0280–87. The Amended Petition also included a section on the requested relief, stating in detail the relief sought by Petitioners. REC 0287–291. The Amended Petition did not, and was not required to by the applicable rules, set forth separate claims for relief.

Later, in the Argument section of its Opening Summary Judgment Brief, Petitioners organized the brief to argue the separate bases upon which DEQ was alleged to have erred. *See* REC 0339–62. Each of these sections in the Opening Summary Judgment Brief addressed alleged errors, omissions, and other flaws which had been identified and discussed in the Amended Petition to Initiate Contested Case.

The Hearing Officer erroneously held that the issue of whether DEQ violated procedural requirements of the Air Rules when it issued the Permit first and allowed Perpetua to submit various plans later, outside the PTC process and without public comment, was not raised in the Amended Petition.

Both the original Petition and the Amended Petition included a Relief Requested section titled "FDCP, AMP, O&M Manual, & HRCP" which states as follows:

> DEQ must require Perpetua to submit the FDCP, AMP, O&M Manual, and HRCP (collectively, "Plans"), must provide for public comment on the Plans, must review and revise Plans to ensure the SGP's emissions comply with IDAPA 58.01.01.203, and must incorporate the Plans as enforceable PTC conditions.

REC 0025 (Petition, ¶ D); REC 0289–90 (Amended Petition, ¶ D). After the Hearing Officer's decision on the Motion to Dismiss, Petitioners revised Paragraphs 32 and 70 in the Amended Petition to Initiate Contested Case by adding CAA regulation and Idaho Air Rule provisions related to the permit review process requirements, including public comment requirements. *See* REC 0274–75, 0288. The FDCP and HRCP were already discussed in the original Petition to Initiate Contested Case in Paragraphs 37 and 39, including stating that these plans had not yet been developed but were being relied upon by DEQ; and after the decision on the Motion to Dismiss, Paragraph 37 was revised to add references raising the issue that DEQ failed to take public comment on the FDCP and HRCP in the First Amended Petition to Initiate Contested Case. *See* REC 0276–78. The O&M Manual was already discussed in the original Petition to

Initiate Contested Case in Paragraph 40; and after the decision on the Motion to Dismiss, Paragraph 40 was revised to add additional information about the O&M Manual and about Air Rule permit process requirements, including requirement for submitting project plans and for taking public comment. *See* REC 0278. The AMP was already discussed in the original Petition in Paragraphs 63 through 65, including raising the issue that DEQ was relying on the AMP even though it had not yet been written and would not go through public comment; and these statements remained in the Amended Petition. *See* REC 0286.

Petitioners also devoted extensive briefing to this issue in their summary judgment briefing. Petitioners' Opening Summary Judgment Brief included an entire section on this specific issue: Section III, titled "DEQ's Reliance on Future Plans to be Prepared by Perpetua Outside of the PTC Process Violates the Air Rules and CAA." REC 0353–56. In that section of the opening brief, Petitioners argued that DEQ violated the Air Rules and the CAA by relying on the FDCP, HRCP, O&M Manual, and AMP without preparing these plans during the permitting process set forth in the Air Rules and CAA, including without taking public comment on the plans. DEQ and Perpetua responded, opposing this specific claim on the merits, and without arguing the claim had been dismissed or was not raised in the Amended Petition. REC 1229–30 (DEQ); REC 1319–23 (Perpetua). Petitioners' Response/Reply Summary Judgment Brief again devoted an entire section to this issue: Section IV, titled "DEQ's Reliance on Future Plans to be Prepared by Perpetua Outside of the Permit Process Violates the Air Rules and the Clean Air Act." REC 2350–57. In fact, this was the lengthiest argument section of Petitioners' reply brief.

The Board should find that Petitioners properly raised this issue.

B. By Deferring Permit Details to Be Determined Later, Outside the PTC Process and Without Public Comment, DEQ Violated the Air Rules and the CAA.

DEQ deferred addressing many issues during the PTC permitting process and will let Perpetua address those issues in the future through various plans. Again, these "plans" include the the Fugitive Dust Control Plan ("FDCP"); the Haul Road Capping Plan ("HRCP"); the Operation and Maintenance Manual ("O&M"); and the Stibnite Road Access Management Plan ("AMP"). *See* REC 0375–76, 0378–80, 0385–86 (Permit conditions). All of the Plans are to be developed by Perpetua later and submitted to DEQ for 30 days prior to starting operation for review and approval without public comment. *See id.* (Permit Conditions 2.8, 2.21, 3.13).

DEQ's reliance on these future Plans violates the Air Rules and CAA, and is otherwise arbitrary and capricious. No provisions in the Air Rules authorize DEQ to save portions of a PTC to be developed later, outside the normal PTC permitting process. Rather, the Air Rules require DEQ to process PTC applications only when they are complete, require DEQ to ensure the applicant has submitted sufficient information so DEQ can make all required determinations for PTCs, and requires DEQ to take public comment. *See* Air Rules Section 209.

EPA's CAA regulations require each SIP to "set forth legally enforceable procedures" that enable the State to determine whether the construction of a facility will result in a violation of its air pollution control strategies or interfere with attaining or maintaining the NAAQS. 40 C.F.R. § 51.160(a). These legally enforceable procedures must include means by which the State will prevent construction if the facility will violate air pollution control strategies or interfere with attaining or maintaining the NAAQS, and they must provide for the applicant to submit information on the "location, design, construction, and operation of such facility . . . as may be necessary" to permit the State to "to make the determination" that the facility will comply with

its air pollution control strategies and the NAAQS. *Id.* § 51.160(b)–(c). "The legally enforceable procedures in § 51.160(b) must also require" the State to provide opportunity for public comment on information submitted by the applicant and on the State's analysis of the effects on ambient air quality. *Id.* § 51.161(a).

Under the Air Rules (which are Idaho's EPA-approved SIP), DEQ must provide an opportunity for public comment. Air Rules Section 209.01.c. During public comment, the "Department's proposed action, together with the information submitted by the applicant and the Department's analysis of the information, *will* be made available to the public . . . ." Air Rules Section 209.01.c.i. (emphasis added). A PTC application "must . . . be accompanied by all information necessary to perform any analysis or make any determination required under Sections 200 through 227," which includes the requirement to determine whether the facility will cause or contribute to a violation of the NAAQS. Air Rules Section 202. "Required Information" that the applicant must provide includes: "Site information, *plans*, descriptions, specifications, and drawings showing the design of the . . . facility, . . . the nature and amount of emissions . . . , and the manner in which it will be operated and controlled." Air Rules Section 202.01.a.i (emphasis added).

Here, instead of following these procedural requirements in Sections 202 and 209, DEQ rushed forward and issued Perpetua what is essentially a *partial, incomplete PTC*, based on incomplete information and analysis, and lacking numerous permit conditions. DEQ will effectively issue a complete PTC later, after Perpetua develops and submits to DEQ additional plans, information, and conditions through the AMP, HRCP, FDCP, and O&M Manual, shielded from public review and outside the normal PTC process required by the Air Rules and the CAA.

Through the future "plans," DEQ is allowing Perpetua to submit Section 202.01.a.i information later, and allowing itself to review that information later. But Air Rules Section 209.01.c.i requires the "information submitted by the applicant" and DEQ's "analysis of the information, will be made available to the public" for comment. DEQ's use of these future work plans, thus, violates the Air Rules and the CAA regulations upon which they are based. No provisions in the Air Rules authorize DEQ to save pieces of a PTC to be developed later, outside the normal PTC permitting process and without public comment as DEQ has done here.

The Board must, therefore, set aside and remand the Permit.

Not only does DEQ's reliance on these Plans fail to comport with the Air Rules and the CAA provisions discussed above, but it also undermines DEQ's determinations that the Project will comply with air quality standards. Because DEQ has deprived the public of meaningful involvement, and has failed to conduct a full and adequate review of the application before it issued the Permit, DEQ cannot reasonably claim that the Project will comply with the PM_{10} NAAQS and arsenic AACC.

Federal courts have rejected similar tactics when it comes to Clean Water Act ("CWA") permitting. In one case, the Second Circuit recognized that CWA permitting schemes that do not allow for public review of best management practices incorporated into permits violate the CWA. *Waterkeeper Alliance v. U.S. EPA*, 399 F.3d 486, 503-504 (2d Cir. 2005). The Second Circuit held that a permit that relies on best management practices but does not specifically list those best management practices in the permit itself "deprives the public of the opportunity for the sort of regulatory participation that the Act guarantees because [such a permit] effectively shields the . . . management plans from public scrutiny and comment." *Id*. at 503. The Ninth Circuit has similarly held that "programs that are designed by regulated parties must, in every instance, be

subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable [i.e., the relevant statutory standard]." *Envtl. Def. Ctr. v. U.S. EPA*, 344 F.3d 832, 856 (9th Cir. 2003).

By allowing Perpetua to provide plans, descriptions, specifications, and information about the manner in which the facility will be operated and controlled at a later date after the Permit has already been approved, DEQ has similarly circumvented the Air Rules and CAA permitting requirements, shielding the plans from public scrutiny and comment, depriving the public of meaningful review, and undermining DEQ's determinations that the Project will comply with applicable standards.

DEQ tries to rationalize its use of post-permit work plans as allowing "the permittee to prepare a specific plan or manual based on the actual equipment purchased and installed, the manufacturer's instructions and recommendations, as well as the operational characteristics of the facility after construction is completed." REC 1230. But the work plans for this Project go way beyond waiting for these limited types of relatively inconsequential final details.

For example, Permit Condition 3.13 requires that the HRCP include a sampling plan for analyzing arsenic concentrations of materials Perpetua uses, a silt content sampling plan, and information about the frequency with which Perpetua will inspect haul roads, among other similar requirements. REC 0385–86. It is entirely feasible for Perpetua to provide, and DEQ to review, these types of sampling plans and road inspection details during the public PTC permitting process. These plans do not depend on final details of actual equipment Perpetua purchases or the operational characteristics of the facility after it is complete. Many, if not all, of these details can and should have been developed during the PTC process and submitted to the public for comment.

Likewise, Permit Condition 2.6 requires the FDCP to include "specific criteria to determine what frequency and type (water and/or chemical) of dust suppressant must be applied, and appropriate suppressant application rates." REC 0376. Why couldn't Perpetua provide details on the "specific criteria" it will use "to determine" the frequency, type, and application rates of suppressants to DEQ for review during the public PTC process? Petitioners and the EPA raised serious concerns about Perpetua's ability to achieve 93.3% dust control; DEQ itself admitted this was an "aggressive" level of control that would require vigilant monitoring and aggressive requirements in the permit, and admitted that achieving 93.3% control is critical to ensuring the NAAQS are met. *See infra* Part III. Yet, the Permit does not require 93.3% dust control, and details about how Perpetua will control dust are to be developed later in the FDCP, without public comment.

Similarly, Permit Condition 2.7 requires the AMP to specify the "measures to be used to discourage public access to the facility." REC 0376. Again, what does this have to do with the equipment Perpetua actually purchases, and why could these measures not be submitted by Perpetua and reviewed by DEQ during the public PTC process? Access management is a critical issue that generated controversy during public comment. EPA warned in its comments: "Given the unique situation with a public access road traversing the mine site, the key assumptions, parameters, and methodologies used to preclude public access from the mine site must be fully disclosed in the permit record and the necessary requirements be included in the permit and available for public review and comment." REC 0935. But through the AMP DEQ is letting Perpetua decide important details about access management later, outside of public review.

Likewise, the Permit provides that the Operation and Maintenance Manual will "ensure compliance with emission limits (Permit Conditions 2.9, 2.13, 4.3, and 5.3)." REC 0378. But

again, the Permit does not include monitoring and recordkeeping requirements; Perpetua will develop those later, shielded from public scrutiny.

Like the nutrient management plans (NMPs) at issue in *Waterkeeper*, the work plans here are critical, indispensable features of the Permit. And like the EPA in *Waterkeeper*, DEQ here has acknowledged that details in these work plans are critical to ensuring the Project meets air quality standards. Thus, these plans and their details must be submitted by the applicant under Air Rules Section 202.01.a.i, and that information, along with DEQ's review of the information, are required to be made available to the public under Air Rules Section 209.01.c.i.[4]

Again, the Board should set aside and remand the Permit, and should require Perpetua to submit the AMP, FDCP, O&M Manual, and HRCP; to provide for public comment on the Plans; to review and revise Plans to ensure the Project's emissions, as limited by enforceable conditions, comply with Air Rules Section 203; and to complete these steps before issuing a new Permit—not afterward and behind closed doors.

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[4] Purporting to address the merits of this issue, the Hearing Officer inexplicably considered only whether "deferring aspects of emissions monitoring and recordkeeping requirements to an O&M Plan that has not yet been developed." REC 3406. He never mentions the other three plans at issue (the FDCP, HRCP, and AMP), never mentions the public comment requirement and other permit application requirements of Air Rules Sections 202 and 209, and never mentions the *Waterkeeper* and *Environmental Defense Center* cases. *See* REC 3406–7. Again, these issues were briefed extensively by Petitioners and Perpetua (and to a lesser degree by DEQ).

And when he considered this one limited issue, the Hearing Officer faulted Petitioners for not offering "expert testimony explaining how deferring identification of the specific 'devices and methodologies' until later could be arbitrary, capricious, or an abuse of discretion." REC 3407. The Hearing Officer improperly ignored the fact that Petitioners extensively cited to DEQ's own statements (already discussed above), as well as the expert federal agency EPA and other commenters with expertise. *See also* REC 1036 (EPA stating that "[t]o make the [potential to emit] limitations enforceable as a practical matter, the permit should include the parameters and assumptions used to develop the fugitive dust emission factors estimates for the haul roads and access roads.").

III. DEQ LACKED A REASONABLE BASIS FOR FINDING THE PROJECT WILL ACHIEVE 93.3% DUST CONTROL, AS NEEDED TO COMPLY WITH THE NAAQS AND TAPS.

Under the Air Rules, DEQ cannot issue a PTC unless it determines that the facility: (1) "would comply with all applicable federal emissions standards;" (2) "would not cause or significantly contribute to a violation of any ambient air quality standards" (i.e., the NAAQS); and (3) "emissions of toxic air pollutants . . . would not injure or unreasonably affect human or animal life or vegetation as required by Section 161." Air Rules Section 203.

A critical factor affecting the SGP's fugitive dust emissions, and therefore whether DEQ can make the required determinations under Air Rules Section 203 that the Project will comply with the PM_{10} NAAQS and arsenic AACC limits, is the degree to which Perpetua will effectively control dust from haul roads. When it approved the Permit, DEQ assumed that Perpetua will achieve a 93.3% control efficiency of all haul road dust by using a combination of water sprays and chemical dust suppressants. However, as EPA and other commenters pointed out, it is highly questionable whether 93.3% fugitive dust control is realistically attainable for this Project, and even if it were technically possible, the Permit lacks sufficient conditions for DEQ to reasonably assume Perpetua will achieve such a high level of control.

The Hearing Officer concluded that DEQ reasonably determined that the Project will achieve 93.3% control because "the Permit includes a specific requirement that 93.3% control efficiency be achieved." REC 3402. This is incorrect. The Permit does not include a specific requirement to achieve 93.3% or any other level of dust control. *See* REC 0367–409 (Permit).

The Permit does include requirements for Perpetua to develop a Fugitive Dust Control Plan (Permit Condition 2.6, (REC 0375–76)) and a Haul Road Capping Plan (Permit Condition 3.13 (REC 0385–86)). And while Permit conditions 2.6 and 3.13 require specific things to be

included in those plans, none of the required contents of the plan ensure any specific control efficiency will be achieved—let alone an aggressive 93.3% control efficiency.

As approved, Perpetua can comply with the Permit conditions by submitting its plans to DEQ, even if those plans will not actually achieve 93.3% dust control. All Perpetua must do is describe what it will do to control dust, and then follow through on those plans. For example, if Perpetua's plans would only achieve only, say, 90% dust control in actuality, so long as Perpetua submits those plans to DEQ, DEQ signs off on them, and Perpetua follows through and complies with the deficient plans, then Perpetua will be in compliance with the terms of the Permit--even though it will not achieve 93.3% dust control. And this is significant, because Perpetua's and DEQ's modeling showed that if Perpetua cut its operations by a third (hauling 120,000 tons per day instead of the authorized 180,000 tons per day) and achieved only 90% dust control, this slightly lower dust control—even when combined with a major cut in mining activity—would cause exceedances of the PM_{10} NAAQS. REC 0691–92.

Thus, contrary to the Hearing Officer's finding, the Permit does not explicitly require 93.3% dust control. Moreover, the Permit lacks other conditions necessary to ensure such a high level of control is achieved. It was, therefore, arbitrary and capricious for DEQ to conclude the Project will achieve 93.3% control and thereby comply with the NAAQS.

The Hearing Officer also faulted Petitioners for not offering "expert testimony describing the terms they believe are necessary to ensure compliance." REC 3402. The Hearing Officer ignored the briefing and the expert testimony in the form of public comments and other submissions to DEQ made by the EPA, Petitioners, and others with technical expertise on this very issue, including briefing relying on expert statements.

As Petitioners noted in their summary judgment briefing, information in the record shows that 93.3% is a very high and aggressive level of control; EPA and other commenters questioned whether this was even achievable by applying chemicals and water as Perpetua plans to do; and DEQ itself repeatedly stated it would be critical to meeting the NAAQS, yet challenging to actually achieve, 93.3% control. *See* REC 0344–48. DEQ experts admitted that 93.3% is a high, aggressive, and a "challenging" level to achieve. REC 0431 (DEQ stating it will be "challenging to consistently and continuously achieve the targeted level of fugitive dust control"), 0629, 0691. Elsewhere in the Statement of Basis ("SOB"), DEQ admitted that meeting 93.3% was based on an "assumption" that Perpetua would appropriately apply water and magnesium chloride, "vigilant inspection and monitoring" would be required, and additional measures—not in the Permit—would be necessary in the Fugitive Dust Control Plan ("FDCP") Perpetua will develop later. REC 0456. DEQ modeling staff thus "recommend[ed] that the permit require an aggressive implementation of measures to achieve above 93% control efficiency for fugitive particulate emissions from roadways." REC 0694. Because DEQ did not include such limits, conditions, and aggressive implementation measures in the Permit, it was arbitrary and capricious for DEQ to assume this high 93.3% would be achieved, and that the Project would comply with the PM_{10} NAAQS and arsenic AACC.

In their briefing, Petitioners also pointed to guidance from the expert agency EPA to argue that even if one assumes that the high 93.3 % dust control efficiency could technically be achieved, the Permit fails to include enforceable limits on the spray frequency and rates, and other important factors, affecting whether Perpetua will in fact achieve anywhere near 93.3% dust control. EPA guidance identifies the following factors bearing on the effectiveness of chemical dust suppressants: (a) the dilution rate used in the mixture; (b) the application rate

(volume of solution per unit road surface area); (c) the time between applications; (d) the size, speed, and amount of traffic during the period between applications; and (e) meteorological conditions (rainfall, freeze/thaw cycles, etc.) during the period. REC 1163–82.

To be sure, the Permit includes conditions related to dust control. Permit Conditions 2.1 through 2.5 require Perpetua to take "reasonable precautions" to monitor and maintain records related to dust emissions; but they do not specify the quantity or frequency of spray or other important variables. *See* REC 0374–75. Permit Condition 2.6 requires Perpetua to develop the Fugitive Dust Control Plan ("FDCP"), which will become an enforceable part of the Permit, with a "list of all potential sources of fugitive dust emissions and the following reasonable precautions to minimize fugitive dust emissions." REC 0375. But Permit Condition 2.6 does not set out those "reasonable precautions" such as requirements for the frequency or quantity of sprays and other important variables that EPA (an expert) said is important. Instead, Condition 2.6 directs Perpetua to "[d]evelop specific criteria to determine what frequency and type (water and/or chemical) of dust suppressant must be applied, and appropriate suppressant application rates." REC 0376.

This vague direction for Perpetua to develop "criteria to determine" spray frequency, rates, and types in no way assures that the criteria Perpetua decides on will actually achieve its ambitious 93.3% control efficiency—or anywhere close to it. This is especially so since the FDCP will be developed by Perpetua and submitted to DEQ for approval 30 days prior to startup, without public comment. *See supra* II.B.

Again, DEQ (an expert agency) itself recognized that it will be "challenging to consistently and continuously achieve the targeted level of fugitive dust control for emissions from traffic on unpaved roadways, with over 55 miles of haul truck routes within the operations

boundary a fleet of 32 haul trucks weighting between 37 and 357 tons, and a targeted dust control efficiency of 93.3% accomplished by application of both dust suppressant and water controls." REC 0430. Later in the SOB, DEQ admitted that meeting 93.3% was based on an "assumption" that Perpetua would appropriately apply water and magnesium chloride, that "vigilant inspection and monitoring" would be required, and that additional measures beyond those actually required by the Permit would be necessary in the FDCP:

> Reduction of PM emissions from haul roads by a combined 93.3% was supported by assuming appropriate application of water and magnesium chloride dust suppression; DEQ is cognizant that to consistently achieve this level of control requires conscientious efforts, vigilant inspection and monitoring, and a comprehensive FDCP. Because continuous operation was proposed, suppression measures will need to account for and accommodate all weather conditions including diurnal and seasonal variability, and all traffic loads including mining and public traffic along publicly accessible roads. Conditions outside of what may normally be anticipated may require additional measures such as a reduction in vehicle speeds or selection of a more effective chemical dust suppressant. Although the FDCP specifies a minimum of efforts required, additional operational limits and monitoring are to be considered moving forward and evaluated for incorporation into the FDCP.

REC 0456.

DEQ's modeling staff similarly recognized that "it is critical for NAAQS compliance that this high level of control [(93.3%)] be achieved." REC 0641. The modeling staff called this "an aggressive level of control," adding that this "high level of emission control was needed to demonstrate compliance with NAAQS." REC 0691. Again, DEQ modeled what would happen if Perpetua cut its operations by a third (hauling 120,000 tons per day instead of the authorized 180,000 tons per day) and achieved only 90% dust control; DEQ found that this slightly lower dust control, even when combined with a major cut in mining activity, would cause exceedances of the PM10 24-hour NAAQS. REC 0691–92. Ultimately, DEQ's modeling team

"recommend[ed] that the permit require an aggressive implementation of measures to achieve above 93% control efficiency for fugitive particulate emissions from roadways." REC 0694.

But DEQ failed to require such "aggressive implementation" and "vigilant inspection and monitoring" in the Permit, instead relying on the vague direction for Perpetua to consider some of these issues later in its FDCP. Without determining first what dust suppressant types, frequencies, and rates Perpetua will employ, DEQ had no reasonable basis for assuming the Project will achieve 93.3% dust control as required so as not to cause or contribute to a violation of the NAAQS.

The Board should vacate and remand the Permit and hold that DEQ must include enforceable permit limits on the combinations, volumes, and frequencies for applying water sprays and chemical suppressants, as well as necessary monitoring and inspection, sufficient to achieve 93.3% dust control and meet the NAAQS before it can issue a PTC. Air Rules, Section 203.

IV. DEQ'S CREATION OF A "PROJECT SPECIFIC ADJUSTMENT FACTOR" TO ARTIFICIALLY DILUTE THE AMBIENT ARSENIC CONCENTRATIONS ATTRIBUTABLE TO THE SGP VIOLATES THE AIR RULES.

The Hearing Officer ignored the plain language of the Air Rules when he endorsed DEQ's use of "other methods" and DEQ's creation of a "project specific adjustment factor" to show (fictitiously) that the Project would comply with the arsenic toxic pollutant standards, as required to issue a PTC.

Under the Air Rules, "no permit to construct shall be granted" unless DEQ determines that the applicant has shown: "Using the methods provided in Section 210, the emissions of toxic air pollutants from the . . . source . . . would not injure or unreasonably affect human health or animal life or vegetation as required by Section 161." Air Rules Section 203.03.

Section 161 requires, "[a]ny contaminant which is by its nature toxic to human or animal life or vegetation shall not be emitted in such quantities or concentrations as to alone, or in combination with other contaminants, injure or unreasonably affect human or animal life or vegetation." Air Rules Section 161. For each carcinogenic TAP, including arsenic, the Air Rules set Acceptable Ambient Concentrations of Carcinogens ("AACC"), where each AACC is an annual average in ug/m3. Air Rules Section 586. If an applicant can demonstrate that its annual average emissions meet the specified AACC, then compliance with Section 161 is demonstrated. Air Rules Section 203.03 The AACC for arsenic is 0.00023 μg/m^3. *See id.*

The "methods provided in Section 210" (which must be followed to satisfy Section 203.03) spell out in detail how to estimate TAPs emissions and ambient concentrations. *See* Air Rules Section 210. Section 210 includes two explicit exceptions to meeting the normal AACCs in Sectio 586: (a) a project is short term (five years or less); and/or (b) a T-RACT demonstration is made. Air Rules Sections 210.12, 210.15. A T-RACT demonstration is a specific "emission standard based on the lowest emissions of toxic air pollutants that a particular source is capable of meeting by the application of control technology that is reasonably available." Air Rules Section 210. When either of these exceptions apply, the AACC is adjusted by increasing it tenfold (making it more lenient); but the applicant must still satisfy the adjusted AACC.

There are no other exceptions in the Air Rules.

The Stibnite Gold Project is for 16 years, and thus it is not eligible for the short-term (five-year-or-less) source exception at Section 210.15. DEQ did, however, grant the Section 210.12 T-RACT exception to Perpetua, which allows Perpetua 10 times the normal annual average arsenic limit, or 0.0023 ug/m^3 of arsenic (instead of 0.00023 μg/m^3). Even with this large leniency afforded by the T-RACT adjustment, DEQ found, however, that the Project would still

exceed the adjusted arsenic AACC of 0.0023 µg/m^3. In summary judgment briefing, Petitioners demonstrated based on Perpetua's and DEQ's modeling that annually the Project will result in around 0.0042 µg/m^3 arsenic.[5] This value, which represents the undisputed annual arsenic exposure modeled to occur during the 16 years of the Project, is *181%* of the T-RACT adjusted arsenic AACC and thus would not meet Section 210.12.a requirement that a "source's . . . approved T-RACT ambient concentration at the point of compliance" be "less than or equal to the amount" "which is equivalent to ten (10) times the [AACC] listed in Section 586." Air Rules Sections 210.12.b, c.

DEQ recognized that the Project would exceed the AACC, even with the T-RACT adjustment. To avoid this problem, DEQ created a new tactic not authorized under the Air Rules to artificially reduce the apparent arsenic exposure by spreading out the actual arsenic exposure resulting from the 16-year Project over a longer 70-year human lifetime. *See* REC 0698, 0710 (SOB, App'x B). This never-before-used tactic artificially reduces the apparent concentration of arsenic to a mere 23% (16/70 x 100) of what the arsenic concentration will actually be (based on Perpetua and DEQ's modeling) each year during the Project. This violates the Air Rules.[6]

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[5] Applying the novel "lifetime exposure adjustment" to dilute the Project's annual arsenic concentration by 16/70, DEQ calculated a Maximum Modeled Lifetime Exposure Concentration of 0.00095 ug/m^3 of arsenic. REC 0714 (Table 6). *See also* REC 0710. This value is less than (about 41% of) the T-RACT adjusted arsenic AACC of 0.0023 ug/m^3 (*see* Air Rules Section 586). DEQ's dilution can be removed by multiplying 0.00095 ug/m^3 by 70 and then dividing by 16, which results in an *annual* arsenic exposure during the Project of 0.0042 ug/m^3.

[6] DEQ permitting staff recognized this problem, and documented their concerns in two memos. *See* REC 1183–90; REC 1191–96. DEQ staff acknowledged that this approach had not been used before, stating that requiring the methods in Section 210 is "certainly how DEQ has used this in the past." REC 1185. DEQ staff questioned whether this novel approach was allowed under the Air Rules. *See*, *e.g.*, REC 1188 ("Can a 70 year average concentration be used for comparison to AACCs rather than a single year average for Section 210 analyses?"). In the end, DEQ broke from its established practice of comparing annual average arsenic exposures from a facility to the annual average AACC and instead spread the arsenic exposures from the 16-year Project over 70 years, reducing the supposed arsenic exposure to a mere 23% of what it is really modeled be during Perpetua's operations. *See* REC 0710.

Again, Section 210 allows applicants to seek a 10-times larger AACC through T-RACT (a large leniency, which DEQ allowed Perpetua) and/or through the five-year-or-less short-term project exception (which everyone agrees does not apply to this 16-year Project). *Id.* But nothing in Section 210 allows DEQ to grant *even greater leniency* or use of a "qualitative" standard when it comes to meeting the AACCs, such as by diluting a project's 16-year TAPs concentrations over 70 years, as it did here.

During these proceedings, DEQ conceded that this 16/70 adjustment is not found in the Air Rules. At the summary judgment hearing, DEQ's counsel explained that the agency "applied the five-year rule [in Section 210.15] by analog and extend[ed] it to a 16-year projected mine site." TR 0021 (Transcript p. 80). Similarly, in its briefing and declarations, DEQ explained:

> [This] approach to modeling TAP compliance employed the Short-Term Source Factor rule (Section 210.15) by analogue. This section allows an impact of 10 times the AACC for projects having an operational lifetime of no greater than five years. DEQ simply used this general approach to develop *a project-specific adjustment factor* for the [Stibnite Gold Project], using the 16-year maximum life of the project.

REC 1227 (quoting Schilling Decl. 11–12) (internal citations omitted) (emphasis added). DEQ, thus, admits that it instead of applying the "methods provided in section 210" (as required by the Air Rules), such as the applying the short-term exception at 210.15 as written, it used the short-term exception as a starting point to then make up an entirely new exception for Perpetua—"a project specific adjustment factor."

Accepting DEQ's approach, the Hearing Officer stated that "unless an issue is squarely addressed by the Air Rules, the hearing officer will defer to 'practical' interpretations of the Air Rules by DEQ." REC 3378. But as already stated above, the Air Rules squarely address this issue: they provide two specific exceptions to meeting the numeric arsenic AACC (the short-term exception at 210.15 and the T-RACT exception at 210.10); and they do not provide

other exceptions. The Hearing Officer erred by deferring to DEQ's "practical" interpretation, an interpretation fabricated a third exception found nowhere in the Rules.

DEQ is not free to disregard the plain language of the Air Rules, even if it has some rationale for doing so. Agency rules (like the Air Rules) have the full force and effect of law. *See Mead v. Arnell*, 117 Idaho 660, 664–65 (1990). As the Idaho Supreme Court has explained: "We must follow the law as written. If it is socially or economically unsound, the power to correct it is legislative, not judicial." *Herndon v. West*, 87 Idaho 335, 339 (1964). Thus, the Air Rules—as written—apply to the Project, whether or not DEQ has some rationale for deviating from the plain language of the rules.

Nor can DEQ simply amend the Air Rules through the process of issuing an individual permit, as it did here when it invented "a project specific adjustment factor" for Perpetua. A rule is void if it was not adopted following the required processes. *See Asarco Inc. v. State*, 138 Idaho 719, 722–25 (2003) (voiding TMDL issued by DEQ because it qualified as a rule and was not promulgated according to the rulemaking requirements of the Idaho Administrative Procedure Act). DEQ can seek to change the Air Rules following the required process under the Idaho APA and other applicable laws. Until then, DEQ must follow the Air Rules "as written," and DEQ is not free to make up project-specific rules for Perpetua, as it did here.

The Hearing Officer also erred by drawing on the general provisions of the Rules at Sections 161 to override the specific provisions in Section 210 and 586. "Regulations, like statutes, are interpreted according to canons of construction." Black & Decker Corp. v. C.I.R., 986 F.2d 60, 65 (4th Cir. 1993). Under the canon of *generalia specialibus non derogant*, when there is a conflict between a general provision and a specific provision, the specific provision prevails. "The canon provides that a 'narrow, precise, and specific' statutory provision is not

overridden by another provision 'covering a more generalized spectrum' of issues." *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) (quoting *Radzanower v. Tourche Ross & Co.*, 426 U.S. 148, 153–54 (1976)). "[T]he assumption being that the more specific of two conflicting provisions 'comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence.'" *Perez-Guzman*, 835 F.3d at 1075 (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 183 (2012)). The Idaho Supreme Court applies this cannon. *See Tomich v. City of Pocatello*, 127 Idaho 394, 400 (1995); *Mickelsen v. City of Rexburg*, 101 Idaho 305, 307 (1980).

Again here, Air Rules Section 203.03 requires "no permit to construct shall be granted" unless DEQ determines that the applicant has shown: "Using the methods provided in Section 210, the emissions of toxic air pollutants from the . . . source . . . would not injure or unreasonably affect human health or animal life or vegetation as required by Section 161." To protect human health, Section 586 specifically sets a numeric arsenic AACC at an annual average of 0.00023 ug/m^3. Section 210 creates two specific exceptions to meeting the AACC (which is an annual emissions factor), allowing a 10x higher AACC where the applicant makes a T-RACT demonstration (Section 210.10) and/or where a project is short-term (5 years or less) (Section 210.15).

Disregarding these specific, numerical provisions in Sections 586 and 210, and disregarding Section 203.03's unequivocal command to "Us[e] the methods provided in section 210," the Hearing Officer accepted DEQ's argument that it could rely on other general and qualitative language in the Air Rules as an excuse for DEQ to invent and grant Perpetua "a project specific adjustment factor." *See* REC 3419–21. Specifically, the Hearing Officer relied on the "qualitative" standard in Air Rule 161, which provides that a toxic air pollutant "shall not be

emitted in such quantities or concentrations as to alone, or in combination with other contaminants, injure or unreasonably affect human or animal life or vegetation." REC 3419. The Hearing Officer's interpretation runs afoul of basic rules of regulatory interpretation, because it lets a general and qualitative provision trump the specific numeric provisions that apply.

Another cannon of construction requires interpreting regulations to avoid rendering provisions superfluous. "A statute should be construed so that effect is given to all its provisions, so that no part will be rendered superfluous or insignificant." *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 117 (1995). In order to determine whether a project will meet the Air Rules' general, qualitative directive that it "would not injure or unreasonably affect human health or animal life or vegetation", the Air Rules explicitly require the applicant and DEQ to "Us[e] the methods provided in Section 210" to make such a determination. Air Rules 203.03. To do so, DEQ must find that the applicant has shown it will meet the numerical AACC for arsenic (0.00023 ug/m^3), which is specifically set in the Air Rules at Section 586. And again, Section 210 includes two specific exceptions for when a project need not meet that AACC (projects that have demonstrated T-RACT and short-term five-year-or-less projects), which must meet a more lenient AACC. Under DEQ's interpretation of the rules, where it can simply offer a qualitative explanation for why any project will not injure or unreasonably affect human health, then what is the point of Section 203.03's directive to follow the methods in Section 210? What is the point of the numeric AACC for arsenic and other carcinogens in Section 586? What is the point of the two explicit exceptions to meeting the AACCs in Section 210 (T-RACT, and five-year-or-less short term projects)? DEQ's interpretation renders these provisions superfluous and, thus, cannot stand.

In summary, even with the T-RACT adjustment allowing a 10 times higher limit, Perpetua's and DEQ's modeling shows that the Stibnite Gold Project would exceed the arsenic AACC. DEQ agrees that the Project was not eligible for the short-term five-year-or-less project adjustment set forth in the Rules at Section 210.15. DEQ also agrees that annual arsenic emissions as calculated over the 16-year lifetime of the Project exceeds the T-RACT adjusted AACC. But instead of denying the Permit or requiring Perpetua to reduce arsenic emissions as required by Air Rules Section 203.03, DEQ created "a project specific adjustment factor" of 16/70 to dilute the apparent arsenic to a mere 23 percent of its true, modeled concentration. Accepting this approach, the Hearing Officer allowed DEQ to impermissibly ignore and rewrite the Air Rules.

The Hearing Officer incorrectly interpreted the Air Rules to find a "qualitative standard" for compliance with Section 161 that neither exists in Section 210 nor anywhere else in the Air Rules to justify DEQ's "16/70 adjustment." *See* REC 3421 DEQ does not have discretion to deviate from the plain language of the Air Rules and make up new exceptions to meeting the AACCs. The Board must, therefore, set aside and remand the Permit and order that DEQ not authorize the Permit unless it will comply with the arsenic AACCs using the methods in Air Rules Section 210, without any "project specific adjustment factor" of 16/70.

V. THE PERMIT MUST BE SET ASIDE AND REMANDED TO DEQ TO CORRECT ALL ERRORS.

Under the Idaho APA, when an agency action is not affirmed by a court, it "shall" be set aside, in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279. *See also In re Variance ZV2011-2*, 156 Idaho 491, 496 (Idaho 2014) (vacating and remanding arbitrary agency action for further proceedings consistent with the Court's opinion). Upon reversing the Hearing Officer and granting summary judgment for Petitioners on any of their

claims above, the Board of Environmental Quality should set aside the Permit and remand to DEQ to correct the errors it made when it issued the Permit.

CONCLUSION

Petitioners request that the Board of Environmental Quality issue an order remanding to DEQ and vacating the Permit, and/or remand to the Hearing Officer for additional proceedings.

Dated: January 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024, a true and correct copy of Petitioners' Opening Brief was served on the following:

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