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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' REPLY 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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INTRODUCTION

Petitioners Nez Perce Tribe, Idaho Conservation League, and Save the South Fork Salmon submit this Reply Brief in support of their Amended Petition for Review of Preliminary Orders. For the reasons set forth in Petitioners' Opening Brief, and as further explained below, the Idaho Department of Environmental Quality ("DEQ") committed multiple errors when it issued the permit to construct ("the Permit") to Perpetua Resources Idaho, Inc. ("Perpetua") for the proposed Stibnite Gold Project ("SGP" or "Project"): a 16-year proposal to construct and operate a large open-pit gold mine in Valley County, Idaho.

These errors threaten to expose the public to unhealthy concentrations of particulate matter ("PM") and arsenic air pollution. These errors also render DEQ's approval of the permit arbitrary, capricious, and not in accordance with the Rules for the Control of Air Pollution in Idaho ("Air Rules"), IDAPA 58.01.01 *et seq.* The Board should set aside the Permit, and remand to DEQ to correct these errors, comply with the Air Rules, and protect the public from the SGP.

ARGUMENT

I. DEQ CANNOT EXCLUDE THE STIBNITE ROAD ACCESS ROUTE FROM AMBIENT AIR PROTECTIONS.

DEQ cannot exclude the Stibnite Road Access Route from ambient air protections because Perpetua does not and will not have the legal authority to preclude the public from traveling on the Route. Its impermissible creation of a "guest of the mine" category to strip away ambient air protections from the public is not supported by EPA policy, DEQ guidance, the Idaho Air Rules, or the Clean Air Act, and should be rejected.

A. DEQ Unreasonably Relied on Perpetua's Statement that It Has Legal Control to Preclude Public Access Over the Stibnite Road Access Route.

It is incredulous that despite the established legal precedent that an agency's decision must be based on the record before it,[1] conflicting evidence in the record, and questions raised by the public during the comment period, DEQ and Perpetua continue to advance the argument that it was reasonable for DEQ to rely on one assertion by Perpetua to determine that Perpetua had legal authority to *preclude* the public from the Stibnite Road Access Route. *See* PRI at 20-21; DEQ at 9-10. But that is their argument, and it is wrong.DEQ argues that it "cannot be expected to fact check every individual averment made by a permittee," DEQ at 9, but that is not what Petitioners are asking here. Petitioners, instead, ask that the Board find that DEQ's determination, that was based on one statement in the record and ignored other evidence in the record, was not reasonable, and should be remanded to DEQ for further consideration.

Given the context of this air permit, DEQ's contention that it was appropriate to rely on one statement in the application flies in the face of reasoned decision-making.

First, the truth and accuracy of Perpetua's statement that it has legal control to preclude public access is central to the determination of whether the Route can be excluded from ambient air protections and consistency with EPA's policy on ambient air that states that an owner or operator must have "the right to preclude the general public's access." REC 1142. This is a threshold question for the ambient air boundary determination, and would not be unreasonable for DEQ to verify the truth of the statement.[2]

[1] *State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 261(1985).
[2] As discussed further below, Perpetua's representation can be read several ways, but what it does not state in no uncertain terms is that Perpetua will have the legal right to "preclude" public access from the Stibnite Road Access Route.

The Ninth Circuit in the "*Rosemont*" case faced a similar situation regarding a mining company's claims of rights to use public land. *Ctr. for Biol. Diversity v. U.S Fish & Wildlife Serv.*, 33 F.4th 1202 (9th Cir. 2022) There, the threshold issue centered around the 1872 mining law allowing a mining company to dump its waste on Forest Service land if it holds a "valid" mining claim on those lands. *Id.* at 1210. The Forest Service relied on Rosemont Copper Company's statements that it had valid mining claims, but failed to verify that assumption. *Id.* at 1221. The Ninth Circuit found the Forest Service "improperly assumed their validity" and reversed the Forest Service's approval of the Rosemont's project. *Id.* at 1222.

Second, has Petitioners brought up during the public comment period and throughout this contested case, there was substantial evidence in the record (and in conflict with Perpetua's representation) to indicate that, although Perpetua may have (once the mine plan is approved) the legal to "control" public access, it will not have the legal right to "preclude" access. Given that Perpetua's legal right to preclude public access was an issue throughout the administrative process, it was unreasonable for DEQ to not question Perpetua's statement "when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." *Hunnicutt*, 110 Idaho at 261.

DEQ makes light of the issue, calling it an "oversimplification" and "irrelevant" to the ultimate issuance of the permit. DEQ at 10. But it is neither. Setting the ambient air boundary is central to the entire permit and establishes the point of compliance for which all modeling of air pollutant emissions is based, and central to the protection of public health by ensuring that the public does not breathe air that does not comply with the NAAQS established by the EPA. *See* PRI at 21 ("Perpetua's application for a permit to construct and DEQ's approval of the Final

Permit is based on the proposed operational [or ambient air] boundary."); *see also* REC 415 ("This operations boundary also defines the ambient air boundary used in all ambient air quality impact analyses.").

As stated above, Perpetua's legal rights over the Route is a central and threshold issue as to whether it can even think about excluding the Route from ambient air protections. In that vein, DEQ still refuses to look at the record before it, arguing "[i]t is unclear what Petitioners are referring to." DEQ at 10. However, Petitioners' briefs have cited many instances in the record that demonstrate that no matter what mine plan alternative the Forest Service approves, the Route will remain open as a public access route to access important recreational and other sites on public lands. *See* REC 895; REC 2624-25; Pet'rs' Opening Br. at 20-21. Having the legal right to preclude public access, as stated above, is central to EPA's determination whether an area external to a source's buildings are afforded ambient air protections or excluded from them. REC 1142.

"Voluneer[ing]" to build the Stibnite Road Access Route around mining features (note that a road through the proposed mine site, Stibnite Road, currently exists) is an inaccurate characterization of the case at hand, and still does not give Perpetua the right to preclude public access. *See* PRI at 22. The record demonstrates that Perpetua attempted to exclude public access in its mine plan, but the Forest Service–after receiving numerous public comments indicating that a change in access "was of significant concern–directed Perpetua to evaluate "access options for the [Stibnite Gold Project] that provided access similar to existing conditions and travel times." REC 895. As a result, the only alternative under consideration that can be approved by

the Forest Service is a mine plan that would "provide access similar to that provided by the existing Stibnite Road." REC 895.

"[D]eterminations concerning the adequacy of measures to preclude public access should be made on a case-by-case basis *after consideration of information in the relevant administrative record*." REC 1148 (emphasis added). DEQ did not do this. As such, this Board should not, and can not, allow DEQ to refuse to provide ambient air protections to the general public, and should reverse the Hearing Officer's order, vacate the permit, and remand it back to DEQ for further consideration.

B. The General Public Are Not "Guests Of The Mine" and Must Be Provided Ambient Air Protections.

If the mine plan is approved by the Forest Service, the only alternative, as demonstrated above, is a mine whereby the Stibnite Road Access Route will remain open to the public for through travel to access public recreation sites on Forest Service land. Without the legal right to preclude public access and the inability to provide ambient air protections over the Route, which traverses right through the center of the mine site, Perpetua and DEQ needed to create a new category of the public that will not longer be the public, but will be "guests of the mine." Calling the public "guests of the mine" in this manner and based on the public's use of the Route, is inconsistent with EPA's ambient air policy and DEQ's guidance, and strips the public of any ambient air protections afforded by the Clean Air Act.

Perpetua's and DEQ's briefs, and the Hearing Officer's order attempt to misdirect the issue by focusing on whether the physical measures that Perpetua proposes to use to control public access, such as a manned access and warning signs, are adequate to control public access

under EPA's policy on ambient air. *See* DEQ at 11-12; PRI at 23-26; REC 3392. To be sure, they could be, if they were used to actually physically "preclude" the public from access.[3]

But what Perpetua's and DEQ's briefs and the Hearing Officer's order fail to address is DEQ and Perpetua's legal sleight of hand which strips the public of its status as the public–and thus ambient air protections–with a single signature on a "waiver" that requires the public to agree to be "guests of the mine" despite the fact that they were never invited to be a guest of the mine, and have no intentions of visiting the mine. *See* PRI at 24; DEQ at 12.

Neither Perpetua nor DEQ claim that the Clean Air Act allows the public to waive its right to ambient air protections in this way. And that would be inconsistent with both EPA's policy on ambient air and DEQ's guidance which distinguish those people that can be excluded from ambient air protections by virtue of their defined activity, but not the effectiveness of physical or non-physical barriers.

For example, EPA's policy states that the EPA

> recognize[s] that some persons that have both legal and practical access to the source's property are not necessarily considered as members of the general public, such as employees or the owner or operator who work at the site, or "business invitees," such as contractors or delivery persons.

REC 1142. These classes of people may not require ambient air protections because they are at the facility for the purpose of the facility–to work at the facility, to provide services to the

[3] *See, e.g.*, PRI at 24 (discussing manned gates, physical barriers, posting signs, etc.). Perpetua relies on an unofficial statement from Jay McAlpine, Regional Modeling Contact at EPA, that provides an opinion as to whether the Route is not ambient air, but clearly qualifies his statement with "we need to confirm th[is] with the policy division." PRI at 24; REC 1350. A year and a half later, McAlpine provided a similar opinion regarding the Route, but still "[could]not provide an approval." REC 1496. And yet, despite these questions from DEQ staff, the EPA, and Petitioners on whether exclusion of the Route from ambient air protections is consistent with EPA's policy, DEQ never submitted the question for EPA's review. REC 1038.

facility; the public traveling over the Route is not there for the purpose of the facility, and so under this policy, should be afforded ambient air protections.

Similarly, DEQ's guidance states,

> 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*. * * * *For the purpose of defining ambient air, the "general public" is considered anyone not directly associated with the facility. In general, if someone present at the site would be subject to [the Occupational Safety and Health Administration], then they are considered as the general public.*

REC 743 (emphasis added). DEQ and Perpetua can't credibly claim that persons traveling over the Stibnite Road Access Route–who may not even be aware that they would be passing through an active mine site–to access public lands are "directly associated with the facility" or are subject to the federal Occupational Safety and Health Administration's jurisdiction.

DEQ's and Perpetua's plan to strip the public from ambient air protections by calling them "guests of the mine" is disingenuous at best. It is not consistent with EPA's ambient air policy, DEQ's guidance, or the Idaho Air Rules that adopt the federal regulatory definition of ambient air. The Board should reject DEQ and Perpetua's

II. BY DEFERRING PERMIT DETAILS TO BE DETERMINED LATER, OUTSIDE THE PTC PROCESS AND WITHOUT PUBLIC COMMENT, DEQ VIOLATED THE AIR RULES AND THE CAA.

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). The FDCP, HRCP, and AMP will include numerous Project details, some of which significantly affect PM_{10} and arsenic emissions, as well as the public's access and exposure to emissions. *See id.* Yet, because DEQ already

issued the Permit, DEQ will review the plans behind closed doors and outside of the PTC permitting process set forth in the Air Rules. As explained in Petitioners' Opening Brief (pp. 25-34) and further explained below, this violates the Air Rules Section 202 requirements for what information must be included in a PTC application, and it violates the Section 209 public comment requirements.

A. Violations of Air Rule Section 202 Requirements for What Must Be Included in an Application.

DEQ's deferral of the plans violates Section 202 requirements for what must be included in a PTC application. "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). Additionally, 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.

Here, the FDCP, HRCP, O&M Manual, and AMP are themselves and/or will include "plans," "information," "descriptions," and "specifications" required to be in an application under Section 202.01.a.i. They will also include "information necessary" under Section 202 for DEQ to analyze and determine compliance with the PM_{10} NAAQS. DEQ and Perpetua argue that because DEQ has allowed some plans for some other projects to be deferred like this in the past, it was fine to defer all of these plans here. While it may be appropriate under the Air Rules for some project to allow some of plans and project details to be submitted later after the project has

already been approved, it runs afoul of Air Rules Section 202 to defer plans that include "information necessary" for DEQ to analyze and determine compliance with Sections 200 through 227. Here, DEQ has impermissibly allowed important project details including "information necessary" under Section 202 for DEQ to determine compliance with the NAAQS, as explained below.

1. Fugitive Dust Control Plan

Under Permit Condition 2.6, Perpetua is required to prepare a Fugitive Dust Control *Plan*. REC 0375-76. The FDCP is a "plan" under Section 202.01.a.i because it includes details related to the nature and amount of the SGP's fugitive dust emissions, and the manner in which Perpetua will operate the mine and control fugitive dust. Among other Permit requirements of the FDCP, Perpetua is required to develop "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. The frequency, type, and rate at which Perpetua will apply dust suppressants are "information," "descriptions," and/or "specifications" on the manner in which the facility will be operated and how Perpetua will control fugitive dust under Section 202.01.a.i and, therefore, must be included in the PTC application--not developed after the PTC has already been approved.

The FDCP also includes the type of "information necessary" under Section 202 for DEQ to analyze and determine whether the Project complies with the PM_{10} NAAQS and, therefore, this information must be in the PTC application. Project PM_{10} emissions come mostly from haul roads, and applying dust suppressants is the primary way Perpetua plans to achieve 93.3% dust control on the roads. Achieving only slightly less than the targeted 93.3% dust control will

violate the hourly PM_{10} NAAQS, as was found in the modeling supporting the Permit Statement of Basis. *See* REC 0691–92. The frequency, type, and application rates of dust suppressants Perpetua will use is information which is critical to understanding how and whether the SGP will comply with the PM_{10} NAAQS. Thus, this is the type of "necessary information" under Section 202 which should have been considered as part of the application, when DEQ had to make its determination that the Project would not violate the NAAQS. Deferring these critical project details to later violates the Air Rules.

2. Haul Road Capping Plan

Under Permit Condition 3.13, Perpetua is required to prepare, submit, and follow a Haul Road Control *Plan*. REC 0385-86. The HRCP is a "plan" under Section 202.01.a.i because it is a plan related to the nature and amount of the mine's fugitive dust emissions, and the manner in which Perpetua will operate the mine and prevent dust emissions by capping some Project roads. Among other conditions in the Permit, the HRCP is required to include: a silt content sampling plan (including standard procedures for sampling, sampling frequency, and sampling analysis method); a sampling plan for low-arsenic quartzite rock; and specifications for how frequently haul roads will be inspected and maintained. REC 0386.

These required plans and specifications within the HRCP are "information," "plans," "descriptions," and/or "specifications" on the manner in which the facility will be operated and how Perpetua will prevent fugitive dust required to be in the application under Section 202.01.a.i, not deferred to later. Furthermore, these plans and other information which will be in the HRCP include "information necessary" under Section 202 for DEQ to analyze and determine

whether the Project will achieve the PM_{10} NAAQS. Therefore, these plans and information must be included in the PTC application—not developed after the PTC is already approved.

3. Operation & Maintenance Manual

Petitioners are willing to concede for purposes of this Petition for Review that the O&M Manual required at Permit Condition 2.20 is the type of plan DEQ might reasonably allow Perpetua to submit later. Permit Condition 2.20 provides: "The O&M manual shall be a permittee-developed document based upon, but independent from, manufacturer-supplied operating manuals." REC 0378. The requirements of the O&M Manual relate primarily to the operation, maintenance, and monitoring for specific control equipment, and none of which bear meaningfully on DEQ's determination and analysis that the Project will satisfy ambient PM10 and arsenic limits. *See* REC 0378-79. By contrast, and as already stated above, parts of the FDCP and HRCP will include plans, descriptions, specifications, and other information and details regarding how Perpetua will control fugitive dust emissions, details which are not yet determined, which do not depend on manufacturer specifications, and which are critical to analyzing and determining compliance with the PM_{10} NAAQS.

4. Access Management Plan

Under Permit Condition 2.7, Perpetua is required to prepare, submit, and follow an Access Management *Plan*. REC 0376. In the AMP, Perpetua is required to "identif[y] the facility boundary and all primary and secondary access points, and clearly specif[y] measures used to discourage public access to the facility." *Id.* Moreover: "*Plans* shall be described in the AMP, including identifying the access points monitored, the frequency of patrol, and measures employed to discourage access." *Id.* (emphasis added). The AMP itself is a "plan," and the

contents of the AMP are "information," "plans," "descriptions," and "specifications" of the facility and of the manner in which it will be operated and controlled regarding access, making them "required information" under Section 202.01.a.i. Moreover, these details in the AMP are "information necessary" for DEQ's analysis and determination as to what the proper ambient air boundary is for the SGP, making them required information under Section 202.

In summary, while it might be appropriate for DEQ to allow some types of information to be submitted later (such as things like the specifications related to purchased equipment called for in the O&M Manual), DEQ went too far here when it allowed important project details concerning the nature of the facility, its operations, its dust control measures, its ability comply with the NAAQS, and its ambient air boundary to be developed and submitted by Perpetua later. The Board should remand the Permit, and direct DEQ to require Perpetua to prepare and submit the FDCP, HRCP, and AMP first, and for DEQ to factor each plan into its analyses and determinations as to whether the Project satisfies the requirements of the Air Rules.

B. Violations of Section 209 Public Comment Requirements.

DEQ's deferral of the FDCP, HRCP, and AMP separately but relatedly violates the Air Rules Section 209 public comment requirement. Not only do the Air Rules require public comment, but they require that 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). The FDCP, HRCP, and AMP will include "information submitted by the applicant" under 209.01.c.i. And when DEQ reviews each plan (as the Permit requires it to do), DEQ will perform an "analysis of that information" under 209.01.c.i. But the public comment periods already occurred, and the information Perpetua will submit in these plans, and DEQ's analysis of that

information, will happen in the future, without public comment. This violates the plain language of the public comment provisions at Section 209.01.c.

The Clean Water Act ("CWA") cases Petitioners presented in their Opening Brief support this. Pet'rs' Opening Br., pp. 31-32. Perpetua and DEQ try to distinguish these cases on the grounds that those cases concerned rulemakings for specific types of CWA permits instead of CAA permits. But neither DEQ nor Perpetua points to any cases or other authorities to offer any principled basis for determining what types of project information need to be subjected to public comment as part of pollution permitting versus which project information can be appropriately withheld from the public. These CWA cases are instructive and highly persuasive on this point.

In *Environmental Defense Center v. U.S. EPA*, 344 F.3d 832, 856 (9th Cir. 2003), the Ninth Circuit considered whether Notices of Intent ("NOI") prepared by applicants seeking coverage under the CWA's general permit option were required to be subject to EPA review and to public comment. The Ninth Circuit held that because the NOI at issue "establishes what the discharger will do to reduce discharges to the 'maximum extent practicable,' the [] NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime" and require EPA review. *Id.* at 853. The Ninth Circuit also held that because "the NOIs . . . contain the substantive information about how the operator . . . will reduce discharges to the maximum extent practicable", the NOIs are subject to the CWA's public availability and public hearing requirements. *Id.* at 857.

Similarly here, the FDCP, HRCP, and AMP are more than mere procedural correspondence between Perpetua and DEQ. Each plan will include critical details as to how Perpetua will control emissions in order to comply with the "substantive components" of the Air

Rules. Again, the FDCP will set the criteria for determining types, frequencies, and application rates of dust suppressants necessary to achieving 93.3% dust control, as is necessary for the Project to comply with the PM10 NAAQS. Again, the HRCP will include sub-plans with numerous details as to how Perpetua will cap roads to reduce fugitive emissions. And again, the AMP will include details as to how Perpetua will exclude the public and maintain its ambient air boundary. Moreover, the details specified in the FDCP, HRCP, and AMP will "be incorporated by reference" into the Permit and will become"enforceable permit conditions." *See* REC 0375 (FDCP), 0376 (AMP), 0386 (HRCP). These plans include the type of substantive information, plus enforceable permit limits, for how Perpetua will control emissions to required levels that should be subject to the Air Rule Section 209 public comment requirements.

The FDCP, HRCP, and AMP are also similar to the Nutrient Management Plans ("NMP") at issue in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). There, the Second Circuit recognized that CWA permitting schemes that do not allow for public review of best management practices set forth in NMPs, where those NMPs are then incorporated into permits, violate the CWA. *Id.* at 503-504. The Second Circuit noted that the NMPs are "a critical indispensable feature of" the plan to regulate the pollution discharges from the type of facilities at issue. *Id.* at 504. The Second Circuit explained that a permit that relies on best management practices in an NMP 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.

Here, like the NMPs in *Waterkeeper*, the FDCP, HRCP, and AMP are critical and indispensable features of the Permit. For example, DEQ modeling staff stating "it is *critical* for NAAQS compliance that this high level of control [(93.3% dust control)] be achieved." REC 0641 (emphasis added); *see also* REC 0691 (same). Yet, the FDCP is where Perpetua will select the types, rates, and frequencies for which it will try to achieve 93.3% dust control. And here, like the EPA in *Waterkeeper*, DEQ has shielded the FDCP, HRCP, and AMP from public scrutiny and comment and has deprived the public of the sort of regulatory participation the Air Rules Section 209 guarantees.

Perpetua cites *Train v. NRDC*, 421 U.S. 60, 79 (1975) for the proposition that "CAA jurisprudence affords broad discretion to states to develop permit conditions." Perpetua Opp'n at 31. Petitioners do not dispute that DEQ has broad discretion to develop permit conditions. The problem here is that DEQ has *not* developed a number of important permit conditions yet and is letting Perpetua develop them later, outside of the Air Rules PTC process, and without public inolvement. Thus, *Train*, *Environmental Defense Center*, and *Waterkeeper* all underscore that DEQ's use of work plans here to leave numerous details and conditions to be decided later, outside the PTC permitting and public comment processes, violates the Air Rules Section 209.01 public participating requirements.

The Board should remand the Permit, and order that the FDCP, HRCP, and AMP must be subject to public comment before DEQ can issue any permit.

III. DEQ HAD NO REASONABLE BASIS TO CONCLUDE PERPETUA WILL ACHIEVE 93.3% DUST CONTROL AS OPPOSED TO SOME OTHER HIGH BUT INSUFFICIENT LEVEL, SUCH AS 90%.

Under the Air Rules, DEQ cannot issue a PTC unless it determines that the facility "would not cause or significantly contribute to a violation of any ambient air quality standards"

(i.e., the NAAQS). 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, is the degree to which Perpetua will effectively control dust from haul roads.[4]

There is no dispute that 93.3% is a very high and aggressive level of dust control, and no dispute that achieving 93.3% is critical to meeting the PM_{10} NAAQS. Among other examples in the record, DEQ modeling staff stated "it is *critical* for NAAQS compliance that this high level of control [(93.3% dust control)] be achieved." REC 0641 (emphasis added); *see also* REC 0691 (same); REC 0921 (EPA saying the same). Nor is there any dispute that if Perpetua fails to achieve this high level control, even by just a little bit, then it will cause exceedances of the PM_{10} NAAQs. For example, Perpetua's and DEQ's modeling showed that if Perpetua cut its operations by a third (hauling just 120,000 tons per day instead of the authorized 180,000 tons per day) yet 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.

At this stage in the proceedings, Petitioners do not challenge DEQ's determination that 93.3% dust control could technically be possible. Rather, Petitioners challenge DEQ's determination that this Project, based on the terms and conditions in the Permit, will actually achieve 93.3% and thus comply with the NAAQS, as opposed to achieving some slightly lesser control, such as 90%, which would violate the NAAQS. Thus, even removing the "conservative" (as DEQ and Perpetua put it) ways the modeling was conducted (by assuming higher activity

[4] There are other sources of fugitive dust emissions at the facility, including "drilling and blasting activities, crushing and ore handling equipment, ore and rock storage piles, and unpaved roadways." REC 0430. However, fugitive dust emission from unpaved roadways represents a majority of the estimated PM10 (and arsenic) emissions from the facility. REC 0427, 0429 (Table 3).

than Perpetua and DEQ says is likely to occur), if Perpetua underperforms just slightly on dust control, it will violate the NAAQS.

First, the Permit does not include an enforceable condition to achieve 93.3% dust control. Perpetua appears to acknowledge this reality in its Brief. But in its Brief, DEQ claims otherwise, pointing to a table in the permit that has "93.3%" in it to argue that this is an enforceable permit limit. In fact, there are two such tables in the Permit. But neither of these tables includes enforceable permit conditions. Table 1.1 merely "lists all sources of regulated emissions in this permit" and describes the "Control Equipment" for each regulated emission source. REC 0369. Similarly, Table 3.1 "contains a description of control equipment used to control emissions from mining and ore processing activities." REC 0384. "Excavating and hauling activities" are listed in both tables as an emission source whose "Control Equipment" includes chemical and water sprays with a control efficiency of "93.3%" for haul roads. *Id.* These tables merely list the 93.3% *target or goal* for haul road fugitive dust control, they do not list enforceable permit conditions.

Even if this 93.3% dust control goal was a permit limit or condition, it is not enforceable. Perpetua is not required to prove, by testing or monitoring, the actual percent dust control it achieves once operations are underway. Perpetua is not required to monitor ambient air to ensure the SGP complies with the NAAQS. Under the terms of the Permit, there is no way DEQ will ever know whether Perpetua actually achieves 93.3% dust control and whether it violates the NAAQS. And there is, thus, no way for DEQ to try to enforce any supposed 93.3% limit (which doesn't exist anyway).

To DEQ's credit, the Permit does include a number of enforceable terms and conditions related to dust control. These include terms and conditions that will be included in the

forthcoming FDCP and HRCP, and other conditions, which generally require Perpetua to develop various plans, require following a variety of best practices, and require corresponding monitoring to ensure that those plans and best practices are indeed followed. These terms and conditions are all well and good, for what they are worth. But none of these terms and conditions have any bearing on whether the Project will achieve 93.3% dust control as opposed to, say, 90% (or even less) dust control.

It might be within DEQ's technical expertise to conclude that the dust control conditions in the Permit are adequate to ensure a high level of dust control for the SGP. But the finding that Perpetua will achieve a whopping 93.3% dust control and not, say, 90% (which is still very high, but is not sufficient to meet the NAAQS) is entirely speculative and untethered from any enforceable conditions in the Permit. Again, the Permit does not require testing or monitoring the actual dust control achieved, nor does it require any ambient air boundary monitoring to ensure the NAAQS are being met. Under the Air Rules, DEQ has authority under Section 211 to require any reasonable conditions in the Permit, and authority under Section 211.01(d) specifically to require ambient air boundary monitoring. Had DEQ exercised either or both of these authorities here to require dust control testing or monitoring, or to require ambient air boundary monitoring, then it could ensure the "high" and "aggressive" 93.3% will be achieved. But DEQ did not.

As a result, Perpetua could submit the plans as called for in the Permit, DEQ could approve those plans, Perpetua could operate and follow the plans and all other permit conditions to a tee, and Perpetua could achieve a high level of dust control; yet, that high level of dust control might be only, say, 90%, meaning the SGP would cause NAAQS violations over the next 16 years. If this happens, neither DEQ, Perpetua, nor the public will ever know. Perpetua will be

in compliance with the Permit. And there will be no way to take any enforcement action against Perpetua to bring its dust control up to the necessary 93.3%.

For these reasons, DEQ lacked a reasonable basis for concluding that the SGP will not cause or contribute to an exceedance of the NAAQS. The Board should, thus, set aside and remand the Permit and order DEQ not to approve the Permit unless DEQ imposes enforceable monitoring and/or testing to ensure 93.3% control is achieved, or otherwise limits or alters Perpetua's mining or emissions controls so that it will comply with the PM_{10} NAAQS.

IV. THE "PROJECT SPECIFIC ADJUSTMENT" DEQ GRANTED PERPETUA VIOLATES THE AIR RULES, AND THREATENS PUBLIC HEALTH.

Deference to agency expertise cannot overcome an attempt at a regulatory overhaul allowing project-specific adjustments, methods never before used for any other permit application in DEQ's history, REC 1201, and not found in the Air Rules. As Petitioners explained in the Opening Brief (pages 40-47), DEQ must follow the Air Rules as written, and cannot deviate from those rules, as it did here when it granted Perpetua a "project specific adjustment factor." 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 (emphasis added). Section 210 does not allow for project specific adjustment factors like DEQ used here to artificially dilute the amount of arsenic it actually modeled to result from the project annually by spreading it out by 16/70s (the life of the mine, divided by the average human lifetime). Perpetua's and DEQ's opposition briefs provide no convincing evidence or argument that such a project-specific adjustment is "envisioned by the Air Rules," "authorized" under the

Air Rules, or "well within DEQ's discretion" to use, or squared with DEQ's "mission to protect public health and the environment." PRI at 43; DEQ at 32. For that reason, the Board must thus grant Petitioners' Amended Petition, reverse the Hearing Officer's order, vacate the permit, and remand to DEQ for further consideration.

DEQ and Perpetua argue that this project specific adjustment factor is warranted here because the Air Rules, they argue, are designed for facilities that have an "indefinite or unknown operational life" which could emit pollutants over a 70-year human life, and because, they also argue, this a unique situation where the mine's operational life is known and is shorter than 70 years. *See* PRI at 43-44. This is wrong. There is nothing novel about a short-term source, and the Air Rules explicitly address short-term sources in Section 210.

The Air Rules define short-term source as "[a]ny new stationary source . . . with an operational life no greater than five (5) years from the inception of any operations to the cessation of actual operations." Air Rules 007.08. Under Section 210.15, such short-term sources may utilize a short-term adjustment factor of ten times to demonstrate compliance with the acceptable ambient concentrations of arsenic. Thus, the methods in Section 210 specifically address short term sources. DEQ and Perpetua, however, apparently disagree with the way DEQ previously (when it adopted the Air Rules) chose to define short-term sources. But again, DEQ is not free to deviate from the rules or to rewrite them by redefining what qualifies as a short-term source. DEQ must follow the methods in Section 210.

Perpetua also argues that the use of the word "equivalent" in Section 210.12 somehow gives DEQ wiggle room to grant Perpetua a project-specific adjustment factor. But it does not. By way of background, in addition to allowing a 10 times leniency for short-term sources that

are five or less years (Section 210.15), the Air Rules also allow a 10 times leniency for sources that demonstrate "T-RACT" (Section 210.12). The T-RACT rules explain how to determine whether a source like Perpetua's which has been granted T-RACT complies with the TAPs requirements:

> Compare the source's . . . approved T-RACT ambient concentration at the point of compliance for the toxic air pollutant to the amount of the toxic air pollutant that would contribute an ambient air cancer risk probability of less than one to one hundred thousand (1:100,000) (which amount is equivalent to ten (10) times the applicable acceptable ambient concentration listed in Section 586).

Air Rules, 210.12.b (emphases added).

Here, DEQ granted Perpetua's T-RACT, but when it compared the SGP's annual average ambient arsenic concentrations to 10 times the annual acceptable ambient concentration for arsenic listed in Section 586 (as 210.12.b instructs DEQ to do), DEQ and Perpetua determined that the SGP would exceed that value. *See* Pet'rs' Opening Br. pp. 41-42. This is when DEQ made up the "project specific adjustment factor." 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.

Perpetua argues that where Section 210.12.b directs DEQ to compare the ambient arsenic concentration to the "equivalent" of 10 times the value listed in Section 586, that use of the term "equivalent" instead of "equal" gives DEQ the option to compare the SGP's arsenic concentrations to something else. The plain reading of 201.12.b is clear: compare the ambient arsenic concentrations for Perpetua's project to 10 times the acceptable ambient arsenic concentration in Section 586. The idea that the use of term "equivalent" creates an ambiguity that

allows DEQ to grant even more than a 10 times leniency to Perpetua is absurd. By being granted T-RACT, Perpetua was already given a large leniency: 10 times the arsenic concentrations that would otherwise be allowable. T-RACT does not allow additional leniency beyond that.

Ultimately, DEQ's use of the project specific adjustment factor here was not made "[u]sing the methods provided in Section 210;" yet that it was Section 203.03 requires DEQ to do. Using the methods in Section 210, including granting Perpetua's T-RACT demonstration, the SGP was modeled to cause ambient arsenic concentrations that exceed 10 times the acceptable arsenic value in Section 586. *See* Pet'rs' Opening Br. pp. 41-42. To get around this problem, instead of limiting the SGP's throughput, or imposing other conditions to reduce arsenic emissions, DEQ made up a new approach that deviates from the specific numeric methods set forth in Section 210.

Additionally, DEQ argues that arsenic emissions won't be that high because it used the worst-case scenario: the permit bases emissions on "total ore production" which "is <u>over fifty percent greater</u> than the actual potential mine production." DEQ at 30 (emphasis in original). But DEQ cannot reasonably base its decision that arsenic emissions will not exceed the AAAC (or adjusted AAAC) based on emissions calculations it did not perform and certainly against the mandate that agency's make decisions based on substantial evidence in the record and not in an arbitrary and capricious manner. Furthermore, any limitations to ore production limits that are placed in the permit are based on the modeling. If DEQ is going to rationalize that arsenic emissions won't exceed the adjusted AAAC because production won't be as high as was modeled, it needs to put those production limits as enforceable limitations in the permit. There is no indication that it has done that. *See* DEQ at 30-31.

In summary, DEQ failed to follow its own rules. Agencies are not afforded deference to deviate from the plain language of their rules. What is more concerning is the precedent that will be set for future projects in Idaho if this Board sanctions DEQ's deviation from the Idaho Air Rules by the use of project-specific methods, procedures, and adjustments, shielded from review in the name of agency deference. The Board therefore must set aside the permit, and remand to DEQ to ensure the Project complies with the Air Rules' arsenic protections.

CONCLUSION

For the foregoing reasons, Petitioners request that the Board issue an order reversing the Office of Administrative Hearing's preliminary order, vacating or setting aside the Permit, and remanding it back to DEQ for further consideration.

Dated: February 14, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2024, a true and correct copy of Petitioners' Reply Brief in Support of Amended Petition for Review of Preliminary Order was served on the following:

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