Bryan Hurlbutt (ISB # 8501)
Laurence ("Laird") J. Lucas (ISB # 4733)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208.342.7024
bhurlbutt@advocateswest.org
llucas@advocateswest.org

Attorneys for Nez Perce Tribe and Idaho Conservation League

Julia Thrower (ISB # 10251)
Mountain Top Law PLLC
614 Thompson Ave.
McCall, ID 83638
208.271.6503
jthrower@mtntoplaw.com

Attorney for Save the South Fork Salmon

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
NEZ PERCE TRIBE, IDAHO CONSERVATION LEAGUE, and SAVE THE SOUTH FORK SALMON	)	OAH Case No. 23-245-01
Petitioners,	)	**PETITIONERS' RESPONSE TO RESPONDENT DEQ'S CROSS-MOTION FOR SUMMARY JUDGMENT and INTERVENOR PERPETUA'S MOTION FOR SUMMARY JUDGMENT and PETITIONERS' REPLY IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT**
v.	)	
IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Respondent,	)	
and	)	
PERPETUA RESOURCES IDAHO, INC.	)	
Intervenor.	)	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS

OTHER AUTHORITIES

AIR RULES

INTRODUCTION

In their Cross Motions for Summary Judgment, the Idaho Department of Environmental Quality ("DEQ") and Perpetua Resources Idaho, Inc. ("Perpetua") (collectively, "Respondents") first assert that Petitioners lack standing to challenge DEQ's issuance of the permit to construct ("Permit"). The Permit authorizes the construction and operation of a mine which will emit coarse particulate matter ("PM_{10}") and arsenic for 16 years: pollutants known to adversely affect human health and the environment. Yet, Respondents argue that neither the Nez Perce Tribe (whose exclusive aboriginal home and treaty rights area includes the Stibnite Gold Project site and its surrounds), the Idaho Conservation League (the state's largest conservation organization), nor Save the South Fork Salmon (a group formed by locals specifically around concerns about the Project's impacts on the South Fork Salmon River watershed) have standing. Petitioners are submitting several declarations herewith attesting to the many ways that they are injured by DEQ's errors in issuing the defective Permit, confirming their standing. Moreover, Respondents' standing arguments would conflict with precedent, and create insurmountable hurdles to bringing contested cases. The Hearing Officer must reject these arguments.

Turning to the merits, Respondents' briefs repeatedly point to DEQ's "discretion" and "expertise" to excuse the errors DEQ made when it issued the Permit. However, in many of these instances DEQ neither has discretion nor the expertise implicated, as discussed below. Even in those instances where DEQ has discretion or relevant expertise, these are not valid excuses for making arbitrary or capricious decisions, nor do they allow DEQ to deviate from the Air Rules (IDAPA 58.01.01), and other governing authorities, as it did here. The Hearing Officer should grant summary judgment for Petitioners, set aside the Permit, and remand to DEQ to correct these errors.

ARGUMENT

I. PETITIONERS HAVE STANDING.

A. Petitioners' Standing Declarations.

"Th[e Idaho Supreme] Court has adopted the federal justiciability standard. 'When deciding whether a party has standing, [the Idaho Supreme Court has] looked to decisions of the United States Supreme Court for guidance.'" *Radford v. Van Orden*, 168 Idaho 287, 299 (2021) (quoting *Koch v. Canyon Cnty.*, 145 Idaho 158, 161 (2008) (internal citations omitted)). An organization has "standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth v. Laidlaw Env't Servs. (TOC)*, 528 U.S. 167, 169 (2000). For a member to have standing in their own right: (1) the member must suffer an "injury in fact" that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) the injury must be "fairly traceable to the challenged action;" and (3) it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth*, 528 U.S. at 180–81.

Petitioners Nez Perce Tribe (the "Tribe"), Idaho Conservation League ("ICL"), and Save the South Fork Salmon ("SSFS") each have standing to challenge DEQ's issuance of the Permit to Perpetua. The Permit authorizes 16 years of air pollution from the Stibnite Gold Project ("Project"), including coarse particulate matter ("PM_{10}") pollution and arsenic pollution. Eliminating or minimizing air pollution is germane to each Petitioners' purpose and directly harms their members' health, cultural, recreational, aesthetic, and other interests, as was alleged

in the Petition for Contested Case and is confirmed by the declarations from members of each Petitioner organization submitted herewith.

ICL submits standing declarations from its members Jonathan Oppenheimer, Allison Fowle, and Asa Menlove. Mr. Oppenheimer has worked at ICL since 2002, and has been an ICL member for even longer. Oppenheimer Decl. ¶ 2. Founded in 1973, ICL is Idaho's largest state-based conservation organization. *Id.* ¶ 3. Advocating for responsible mining practices, including by engaging in agency permitting processes, is central to ICL's mission to protect the air Idahoan's breathe, the water they drink, and the land and wildlife they love. *Id.* ¶¶ 3–4.

As Exhibit A to Mr. Oppenheimer's declaration shows, EPA has found that there is a no-threshold relationship between PM exposure and several adverse health effects, meaning any increase in PM can have negative health effects. *See id.* ¶ 15 & Ex. A. Exhibit B to Mr. Oppenheimer's declaration is a study titled, "Health Effects Associated with Inhalation of Airborne Arsenic Arising from Mining Operations," which links the inhalation of arsenic-bearing dusts to increased arsenic uptake and adverse carcinogenic and non-carcinogenic health outcomes. *See id.* ¶ 16 & Ex. B.

ICL's declarants have each regularly visited the South Fork Salmon River ("SFSR") watershed, including in the East Fork SFSR drainage, and intend to continue doing so, including specific plans to visit this year and/or next. Oppenheimer Decl. ¶¶ 9–13; Fowle Decl. ¶¶ 3–6, 9–10; Menlove Decl. ¶¶ 7, 9–10. Because of the Project's dust and arsenic emissions, ICL's declarants will suffer health risks when they visit these areas; will suffer degradation of their recreational, environmental, and aesthetic interests; and/or will no longer visit these areas. Oppenheimer Decl. ¶¶ 15–18; Fowle Decl. ¶¶ 7–8, 11; Menlove Decl. ¶¶ 7–11.

SSFS submits standing declarations from its members Zak Sears and Drew Hollenback. SSFS's mission is to protect and preserve the biological resources of the SFSR watershed, including from the threats posed by the Project. Sears Decl. ¶ 2; Hollenback Decl. ¶ 2. SSFS's declarants have each regularly visited the SFSR watershed, including in the East Fork SFSR drainage, and intend to continue doing so, including specific plans to visit this year and beyond. Sears Decl. ¶¶ 5–12; Hollenback Decl. ¶¶ 4–9. Because of the Project's dust and arsenic emissions, SSFS's declarants will suffer health risks when they visit these areas; will suffer degradation of their recreational, environmental, and aesthetic interests; and/or will no longer visit these areas. Sears Decl. ¶¶ 12–21; Hollenback Decl. ¶¶ 10–14.

The Tribe submits the declarations of Joseph Oatman and Emmit Taylor Jr. Mr. Taylor is an enrolled member of the Tribe and is Director of the Tribe's Department of Fisheries and Resources Management ("DFRM"), Watershed Division. Taylor Decl. ¶ 2. Mr. Oatman is an enrolled member of the Tribe and is DFRM's Deputy Program Manager. Oatman Decl. ¶ 2. As Mr. Oatman states:

> Since time immemorial, the Nez Perce people, the Nimiipuu, exclusively occupied over 13 million acres encompassing a large part of what is today Idaho, Washington, and Oregon—stretching from the Bitterroot Mountains to the Blue Mountains. Nez Perce also traveled far beyond this homeland to fish, hunt, gather and pasture—frequently going east to buffalo country, in what is today Montana, and west along the Snake and Columbia Rivers. In 1855, to preserve its way of life and the foods we depend upon, the Tribe entered into a treaty with the United States reserving to itself, among other guarantees, "the right of taking fish at all usual and accustomed places in common with the citizens of the Territory." Treaty with the Nez Perces, June 11, 1855 (12 Stat. 957). Since that time, the Tribe has continued to exercise its treaty-reserved fishing, hunting, gathering, and pasturing rights. It is essential for tribal members to maintain connection with the rivers, lands, and fish that are critical to supporting our culture and livelihoods. Nez Perce Tribal members, pursuant to the Tribe's Treaty-reserved rights, continue to fish, hunt, gather and pasture across the Tribe's vast aboriginal homeland at traditional places, including areas within and surrounding the proposed Stibnite Gold Project ("SGP") area and in waters directly downstream.

Id. ¶ 4. The Tribe has one of the largest fisheries programs in the United States, and DFRM's goal is to recover and restore all populations and species of anadromous and resident fish that are important to exercising the Tribe's treaty-reserved rights and way of life. *Id.* ¶ 8. To that end, DFRM works extensively throughout the SFSR watershed, including moving some Chinook salmon above the "Glory Hole" legacy mine pit at the Project site that blocks salmon from migrating to their spawning grounds farther upstream in the East Fork SFSR. *Id.* ¶ 9.

Mr. Taylor and Mr. Oatman have engaged in treaty fishing within the Project's boundaries and intend to do so in the future. Mr. Taylor and Mr. Oatman and their families also regularly visit the SFSR watershed, including Johnson Creek and the East Fork SFSR drainage, as their families have for generations, and as they plan to continue doing, to gather, hunt, fish, express their culture and identity, and connect to their history, their ancestors, and the land and rivers. Taylor Decl. ¶¶ 5–9; Oatman Decl. ¶¶ 5–7. Because of the Project's dust and arsenic emissions, the Tribe's declarants will suffer health risks when they visit these areas, and will suffer degradation of their subsistence, cultural, spiritual, and economic interests. Taylor Decl. ¶ 9; Oatman Decl. ¶ 7.

B. Petitioners Will Suffer Injury in Fact from Increases in Air Pollution.

"The alleged injury need not be large: an actual and genuine loss, even if a trifle, will suffice for standing purposes." *Waste Action Proj. v. Draper Valley Holdings LLC*, 49 F. Supp. 3d 799, 802 (W.D. Wash. 2014). "[N]othing necessitates a showing of existing environmental harm." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005). Rather, "an increased risk of harm can itself be injury in fact for standing." *Id.*; *see also In re*

Zappos.com, Inc., 888 F.3d 1020, 1026–29 (9th Cir. 2018) (finding sufficient risk of future harm).

DEQ argues that Petitioners have not shown injury in fact because they cannot distinguish themselves from the general public. *See* DEQ Resp. at 8–9.[1] This is wrong. As shown in the declarations described above, Petitioners—unlike the general public—regularly visit the area in and around the Project site on the East Fork SFSR, and will be directly harmed by breathing air with increased concentrations of PM_{10} and arsenic when they visit the area in the future if the Permit remains in effect as approved by DEQ.

Moreover, the U.S. Supreme Court rejected the same argument fifty years ago, stating:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

United States v. Students Challenging Regul. Agency Procs., 412 U.S. 669, 687 (1973) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)). "Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing." *Id.* at 686–87. "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *Id.* at 688; *see also Summers v. Earth*

[1] DEQ's Response to Petitioners' Motion for Summary Judgment and Brief in Support of Cross Motion for Summary Judgment is abbreviated as "DEQ Resp" followed by the page number. Perpetua's Memorandum in Support of Intervenor-Respondent's Motion for Summary Judgment and in Opposition to Petitioners' Motion for Summary Judgment is abbreviated as "Perpetua Opp'n" followed by the page number. Petitioners' Opening Summary Judgment Brief is abbreviated as "Pet'rs' Mot. Summ. J." followed by the page number.

Island Inst., 555 U.S. 488, 494 (2009) ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interest of the plaintiff, that will suffice.").

Federal courts consistently find health, aesthetic, and recreational risks from pollution sufficient to confer standing. *See Friends of the Earth*, 528 U.S. at 183–84 (injury from observing pollutants discharged into water and from alterations of behavior as a result of pollution risk); *Sierra Club v. EPA*, 972 F.3d 290, 299 (3d Cir. 2020) (injury to members whose health, recreational, aesthetic, and economic interests were affected by ozone pollution); *Covington v. Jefferson Cnty.*, 358 F.3d 626, 641 (9th Cir. 2004) (injury to plaintiff's property from RCRA-covered leaking substances caused by a failure to follow Clean Air Act procedures); *Sierra Club v. EPA*, 762 F.3d 971, 977 (9th Cir. 2014) (injury to members with existing respiratory problems and other members who fear the pollution caused by a permit issued to a power company would impact their health); *Ass'n of Irritated Residents v. EPA*, 10 F.4th 937, 943 (9th Cir. 2021) (injury where members' recreational, aesthetic, and health interests were affected by the approval of an inadequate state implementation plan); *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1370–71 (D.C. Cir. 2007) (injury where members "use[d] or live[d] in areas affected by the [pollutant] sources"); *Cal. Cmtys. Against Toxics v. EPA*, 928 F.3d 1041, 1049 (D.C. Cir. 2019) (injury where members lived, commuted, worked, and recreated near a pollution source and would "spend less time outdoors," or have diminished ability to enjoy the outdoors because of fear of health and environmental harms); *Sierra Club v. EPA*, 755 F.3d 968, 974 (D.C. Cir. 2014) (injury resulting in "behavioral changes" from fear of hazardous waste exposure); *WildEarth Guardians v. BLM*, 8 F. Supp. 3d 17, 28 (D.D.C. 2014) (injury from "increase in pollution" that would diminish member's aesthetic, recreational enjoyment).

DEQ's reliance on *Selkirk-Priest Basin Ass'n v. State ex rel. Batt*, 128 Idaho 831 (1996) ("*SPBA*"), and the Board of Environmental Quality order in *In re Simmons Sanitation*, Docket No. 0106-05-01 (Sept. 26, 2005), is misplaced. *See* DEQ Resp. at 6–7. In both matters, the organizations failed to provide the types of detailed, specific information Petitioners provide here in their member declarations attesting to their regular use and enjoyment of specific places that will have increased air pollution, their specific plans to return to these areas, the specific ways in which their experiences will be degraded, and (for some) their concern that they might have to alter their behavior and avoid these places. And in neither case did members show direct health risks to themselves from exposure to increased pollution, like every one of Petitioners' members has attested to here.

In *In re Section 401 Water Quality Certification for Relicensing of the C.J. Strike Hydroelectric Facility*, Docket No. 0102-01-06, at 14 (2002), the Board found Idaho Rivers United established representational standing based on members affidavits stating that they hiked, camped, boated, bird watched, and mountain biked in the area but avoided fishing and swimming in the water because of water quality concerns. Similarly here, Petitioners' members have documented their recreational, aesthetic, and environmental interests in the Project site and nearby areas in the East Fork SFSR drainage, the injuries they will suffer as the members might avoid these activities due to air quality concerns, or if they do still engage in these activities, their experiences will be degraded. Additionally, by continuing to engage in activities in these areas, their health will suffer from increased PM_{10} and arsenic inhalation, further conferring standing beyond what sufficed in *C.J. Strike*.

C. Petitioners' Injuries Are Fairly Traceable to DEQ's Issuance of the Permit, and a Favorable Decision Will Redress These Injuries.

In addition to suffering injury in fact, Petitioners satisfy the remaining elements of standing, because each of their injuries are "fairly traceable" to DEQ's issuance of the Permit, and a favorable decision setting aside and/or remanding the Permit to DEQ to correct errors identified by Petitioners would redress these injuries.

To be "fairly traceable," the causal connection between the injury and the challenged action cannot be too speculative or the result of the independent action of some third party not before the court. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). There is nothing speculative about Petitioners' injuries, which are obviously caused by DEQ's issuance of the Permit, which is required for Perpetua to construct and operate the Project. But for DEQ's issuance of the Permit, Perpetua cannot construct and operate the Project. And there is no dispute that constructing and operating the Project will generate air pollutants—as DEQ's own modeling confirms. This increase in air pollutants will cause the injuries asserted in the declarations submitted by Petitioners' members.

Traceability does not require an absolute certainty, *see Ass'n of Irritated Residents*, 10 F.4th at 944, or a "scientific certainty" that the defendant's actions caused the petitioner's harm. *See Idaho Conservation League v. Atlanta Gold Corp.*, 844 F. Supp. 2d 1116, 1130 (D. Idaho 2012) (quoting *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000)). Rather, petitioners need only establish that the challenged action has a reasonable probability of threatening a member's concrete interest. *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001). Petitioners also do not need to show that DEQ's approval of the Permit is the "sole source" of its members' injuries and "need not eliminate any other contributing causes to

establish its standing." *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011). *See also Ocean Advocs.*, 402 F.3d at 860 (finding causation even though other factors also caused plaintiffs' injury). Members of Petitioners organizations assert that they will be harmed when they encounter increased air pollution.

DEQ's reliance on *Rebound v. Idaho Dept. of Health & Welfare*, Docket No. 0101-99-07 (Jan. 19, 2002) is misplaced. *See* DEQ Resp. at 9-10. There, the Board held that Rebound (a trade union group) failed to establish standing to challenge a permit modification to add additional equipment to a power plant. *Rebound* at 2. To try to establish organizational standing, Rebound relied on another trade union group and fellow petitioner, IBEW Local, as an organizational member, and relied on affidavits from IBEW local members and other area residents. *Id.* at 3–4. The Board held that Rebound failed to establish standing for many reasons, including because: IBEW Local's mission did not have anything to do with environmental advocacy; Rebound failed to show how IBEW Local members gave it standing; it was unclear whether the area residents who submitted affidavits were actual Rebound members; and the affidavits failed to identify any specific injury, so it was not possible to establish a direct link between increased emissions from the modification and the asserted general injuries. *Id.* Petitioners' declarations here are far more specific, direct, and factual in establishing each Petitioner's interests and injuries caused by the Permit.

DEQ also relies on *Solomon v. IDEQ*, Docket No. 0101-03-01 (2003), DEQ Resp. at 10, where, similar to *Rebound*, petitioners failed to provide sufficient evidence in their affidavits establishing an injury in fact that was caused by DEQ's issuance of two permits instead of one for a facility. *See Solomon* at 6. And DEQ relies on *Rickards v. Idaho Dept. of Health & Welfare*, Docket No. 0101-92-12 (Dec. 18, 1992), *see* DEQ Resp. at 10, where the Board found that the

pro se petitioner failed to establish standing because his injury—driving past the proposed emitting source—was too speculative and failed to make a connection to the challenged action due to his failure in providing affidavits or other certified documentation supporting his contentions. *See Rickards* at 2–4, 11.

By contrast, here (as already discussed), environmental advocacy—including specifically in the SFSR watershed—are central to the missions of Petitioners' organizations; every declarant is a member of one of the organizations; and the declarants point to specific, direct injuries they will suffer from the increased air pollution—including the health risks of breathing in PM_{10} and arsenic—that will occur from the construction and operation of mine, as approved by DEQ. This satisfies causation.

To satisfy redressability, Petitioners must allege that "it is likely, as opposed to merely speculative," that their injuries "will be redressed by a favorable decision." *Friends of the Earth*, 528 U.S. at 181. A plaintiff meets the redressability requirement if it is likely, even if not necessarily certain or inevitable, that the injury can be redressed by a favorable decision. *See Bonnichsen v. United States*, 367 F.3d 864, 873 (9th Cir. 2004); *Beno v. Shalala*, 30 F.3d 1057, 1065 (9th Cir. 1994). It is sufficient to show that the requested remedy would "slow or reduce" the harm. *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). For procedural injuries, Petitioners need only show that the agency "could reach a different conclusion" if required to reconsider their decisions. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 185 (D.C. Cir. 2017). "Causation and redressability typically 'overlap as two sides of a causation coin'" because "if a government action causes an injury, enjoining the action usually will redress that injury." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017).

If the Hearing Officer sets aside the Permit (as Petitioners have requested), this will unquestionably redress Petitioners' injuries because the Project (and the air pollution it will cause) cannot commence without a permit to construct ("PTC"). Additionally, remanding the Permit to DEQ to reconsider and correct any of the errors Petitioners have alleged (as Petitioners have requested) will also redress Petitioners' injuries. Correcting the ambient air boundary so that the Stibnite Road Access Route ("Route") is no longer considered part of the mine site will require Perpetua to further reduce its emissions in order to meet air quality standards, thereby lowering the air pollution Petitioners members will experience when they use the Route. *See infra* Part II. Developing and including in the Permit more robust and specific conditions and limits to ensure Perpetua achieves PM_{10} and arsenic emissions control levels will slow or reduce air pollution emissions, and will better ensure projected emissions levels are indeed met throughout the life of the Project and, if not, that any violations can be more readily enforced. *See infra* Parts III, V–VI. Removing the 16/70 allowance in arsenic concentrations DEQ approved in the Permit will require Perpetua to reduce its arsenic emissions. *See infra* Part VII. Finally, requiring Perpetua to submit to DEQ its "work plans" as part of the public permitting process, instead of letting Perpetua submit them later, will allow for public comments and more robust review by DEQ, which could result in a different decision. *See infra* Part IV. Petitioners, thus, satisfy redressability for both their substantive and procedural claims because they adequately alleged their members could get "at least some" relief. *Tozzi v. U.S. Dep't of Health & Hum. Servs.*, 271 F.3d 301, 310 (D.C. Cir. 2001).

In sum, Petitioners have adequately alleged—and documented through their member declarations—all elements of standing based on the harm the Project's air emissions will cause to

their members' health, aesthetic, recreational, environmental, and other interests within and surrounding the Project area.[2]

II. EXCLUDING THE STIBNITE ROAD ACCESS ROUTE FROM AMBIENT AIR PROTECTIONS IS UNLAWFUL.

Under the current Permit, the Route will be open to the Tribe and general public and the air above it will be excluded from ambient air protections. *See* PET 310.[3] In other words, it will be polluted with undisclosed and unregulated amounts of PM_{10} and arsenic, and other criteria, toxic, or hazardous air pollutants as the health-based limits established under the Clean Air Act ("CAA") and the Idaho Air Rules will not apply.[4] As stated in Perpetua's brief, "the boundary of the project's 'ambient air' is important," and the Route is particularly important to local residents who have used the existing road through the mine site to access high-value recreational and

[2] Respondents also argue Petitioners have failed to show DEQ's issuance of the Permit prejudices their substantial rights under I.C. § 67-5279(4). *See* DEQ Resp. at 13–14, 17; Perpetua Opp'n at 10, 27. First, this requirement only applies to the relief courts can grant when reviewing agency decisions, and does not apply to this contested case. Second, for the same reasons Petitioners have standing, they also show DEQ's decision prejudices their substantial rights, including by jeopardizing their health and well-being, as well as their recreational, cultural, aesthetic, and environmental interests, and by depriving Petitioners of the ability to meaningfully participate in DEQ's permitting process. *See Citizens Against Linscott/Interstate Asphalt Plant v. Bonner Cnty. Bd. of Comm'rs*, 168 Idaho 705, 716 (2021) ("A right is substantial if it could impact the outcome of the litigation."). Finally, the cases cited by DEQ involve land use decisions governed by the Idaho Local Land Use and Planning Act, Idaho Code § 67-6501 *et. seq.*, that has specific provisions defining who is an "affected person," *id.* § 67-6521(1), under which the substantial right inquiry is reviewed. *See* DEQ Resp. at 14, 17 (citing *Noble v. Kootenai Cnty. ex rel. Kootenai Cnty. Bd. of Comm'rs*, 148 Idaho 937 (2010)).

[3] "PET" followed by a Bates number corresponds to Petitioners' exhibits; "PRI" followed by a Bates number corresponds to Perpetua's exhibits.

[4] DEQ states that "[i]t is unclear from the Petitioners' argument exactly how far from the Route the 'ambient air' boundary should extend from either side of the road." DEQ Resp. at 22. However, that determination is not Petitioners' responsibility, but DEQ's responsibility as the permitting agency.

cultural sites on public lands, and who intend to continue to do so. Perpetua's Opp'n at 6; *see supra* Part I.

DEQ's arbitrary and unsupported determination that Perpetua has the ability to *preclude* tribal and public access and then to label the general public traveling on the Route as "guests of the mine," *see* PET 570, to avoid either of two undesirable outcomes—prohibiting tribal and public access to the Route or ensuring the air above the Route complies with air quality standards—is not within the agency's technical expertise, is not entitled to deference, and is wrong.[5] *See* DEQ Resp. at 22; Perpetua Opp'n at 16. The Hearing Officer should vacate the Permit and remand it to DEQ to fix this error.

First, DEQ's assertion that Perpetua has the "legal authority to prohibit access by the 'general public'" is incorrect. DEQ Resp. at 23. According to EPA's Revised Policy on Exclusions from "Ambient Air," there are two policy conditions that determine whether the general public has access: "whether the general public has access in a *legal* sense" and "whether the general public has access in a *practical or physical* sense."[6] PET 774, 776. In this case,

[5] Perpetua mistakenly relies on *Resisting Environmental Destruction on Indigenous Lands, REDOIL v. EPA*, 716 F.3d 1155 (9th Cir. 2013). Perpetua Opp'n at 18–19. The issue there was whether it was reasonable for EPA to apply the ambient air exclusion policy to the area over water versus land. *REDOIL*, 716 F.3d at 1165. Contrary to Perpetua's assertion, the *REDOIL* case did not involve an "air boundary exemption" that allowed the public to access non-ambient air such as what Perpetua is trying to do here. *See* Perpetua Opp'n at 21; *REDOIL*, 716 F.3d at 1159 (stating that in addition to the U.S. Coast Guard's "establishment of an effective safety zone that *prohibits* members of the public from entering the area[,] Shell must also develop and implement a public access control program to [ ] notify the general public of the *prohibition* on entering the safety zone . . . .") (emphasis added).

[6] DEQ argues that in the application of its definition of ambient air, it does not need to be consistent with EPA's policy, DEQ Resp. at 22; Perpetua, however, argues that DEQ "followed EPA guidance," Perpetua Opp'n at 16. Regardless, under the CAA and its regulations which are incorporated into IDAPA 58.01.01 ("Idaho Air Rules") Section 107.03.c, "the air agency must still determine, based on the administrative record for the permit, that the *general public does not*

although Respondents argue that Perpetua can preclude public access in the practical or physical sense by using "security escort vehicles, manned guardhouses, locked gates, barriers, warning signs, and registration of" those accessing the Route, DEQ Resp. at 23, it cannot reasonably determine that the Tribe and public do not have access in a legal sense.

Indeed, the mine plan that is in front of the U.S. Forest Service for review and approval requires that "public access through the site would be provided by" the new Route. PET 957. *See also* PET 905 (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)"); PET 964 ("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."); PET 838 (same). Additionally, the Route will be open seasonally to the public, as it is now, and Perpetua can only temporarily prohibit public access when there are "concerns related to public or employee health and safety, such as during blasting, mining in the immediate area of the road and other similar operations." PET 838. *See also id.* ("During operations, the public access road would be used to travel through the mine site and would provide seasonal use, open to all vehicles."); PET 1240 ("The public access road would not be plowed in the winter (current county maintenance standards) and signs would inform the public of seasonal and *temporary* closures.") (emphasis added); *id.* ("The through-site public access would be seasonal, similar to current conditions."). Thus, although Perpetua may have the ability to exclude the public "in a

have access to the property in order to exclude an area from ambient air." PET 773 (emphasis added) (footnote omitted).

practical or physical sense" (though this is questionable),[7] it does not, under the mining plan submitted to the U.S. Forest Service, have "the right to preclude the general public's access." PET 776.

Second, it was unreasonable to label the Tribe or public traveling on the Route as "guests of the mine." *See* PET 839 (stating that DEQ's approach to excluding the Route from ambient air protections was that "people traveling on the road would be considered 'guests of the mine.'"). Nothing in the Idaho Air Rules, DEQ's guidance, or EPA policy suggests that, because "access for all guests will be carefully managed," the Tribe or the public are not afforded the protections of ambient air under the CAA. *See* DEQ Resp. at 23; *see also* Perpetua Opp'n at 21 ("Those that seek access must be required to register at the access gate and will be informed that they are proceeding as guests of Perpetua rather than members of the public."). Notably, Respondents do not point to a single case where DEQ has allowed the general public to travel through a facility where the route is exempt from ambient air protections.

DEQ's reference to "business invitees" in EPA's Revised Policy only hurts its case. *See* DEQ Resp. at 23. There, EPA made the distinction between the general public and true "guests of the mine"—others who may have legal and practical access to a site but who would not be afforded air quality protections, such as "employees of the owner or operator who work at the site, or 'business invitees,' such as contractors or delivery persons." PET 776. Respondents cannot reasonably argue that the Tribe or its members traveling to or through the mine site to

[7] It is also questionable whether Perpetua can exclude the public, consistent with EPA's policy, in a practical sense. Although the public traveling to access the road might have to comply with stated safety procedures by stopping at the gate, registering, and following a pilot car, there is no apparent ability for Perpetua to physically exclude the public from accessing the Route if they comply with these procedures.

exercise Treaty-reserved rights, or for the general public to travel through the site to access public lands, who have not been invited by Perpetua, who are not doing business with Perpetua, and who will not be allowed to deviate off of the Route are nonetheless "guests of the mine."

The record thus does not, and cannot, demonstrate that Perpetua may legally or practically preclude Tribal or public access to the Route, and DEQ's determination to the contrary was unreasonable, as was its decision to label the public as "guests of the mine." DEQ's determination was not well-reasoned, and is inconsistent with the Idaho Air Rules, the CAA, and EPA policy. The Hearing Officer should vacate the permit and remand it back to DEQ for further review.

III. DEQ'S DETERMINATION THAT THE PROJECT WILL COMPLY WITH PM_{10} AND ARSENIC LIMITS IS ARBITRARY AND VIOLATES THE AIR RULES.

Even using DEQ's ambient air boundary, DEQ's determination that the Project's potential to emit will not cause or contribute to an exceedance of the PM_{10} National Ambient Air Quality Standards ("NAAQS") and the arsenic acceptable ambient concentrations for carcinogens ("AACC")—as required under Section 203 of the Air Rules prior to issuing a PTC—are arbitrary and capricious, violate the Air Rules, and must be set aside and remanded. *See* Pet'rs' Mot. Summ. J. at 19–28.

A. DEQ's Assumption that Perpetua Will Prevent 93.3% of Fugitive Dust Emissions Is Unreasonable and Violates the Air Rules Because the Permit Fails to Include Conditions Needed to Achieve This.

There is no dispute that a critical factor affecting fugitive dust emissions, and therefore whether the Project will comply with the PM_{10} NAAQS and arsenic AACC limits, is the degree to which Perpetua can effectively control dust from haul roads. It is evident from the permit record that in order for this mine to extract, haul, and process the 180,000 tons of ore per day

needed to meet Perpetua's desired production capacity—a capacity allowed under the Permit conditions—and still comply with PM_{10} NAAQS and arsenic AACC, Perpetua must control the dust to a 93.3% efficiency. *See* Pet'rs' Mot. Summ. J. 19–23. Nothing less will suffice. *See* PET 275 ("[I]t is critical for NAAQS compliance that this high level of control be achieved."); *see also* PET 325 (same), PET 328 (same); PET 325–26 (finding that cutting operations with only 90% dust control would still cause exceedances of the PM_{10} 24-hour NAAQS).

As explained in Petitioners' Opening Brief, 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. Pet'rs' Mot. Summ. J. at 19–20. DEQ itself recognized that it will be "challenging to consistently and continuously achieve the targeted level of fugitive dust control." PET 065. Later 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. PET 090. Accordingly, DEQ failed to reasonably determine that 93.3% dust control efficiency was achievable either by the chemical/water method, or by the particular means of application.

Respondents first argue that the record shows 93.3% is achievable. *See* Perpetua Opp'n at 22–23. It does not. Moreover, and addressed more below, Petitioners emphasized that this largely misses the point. Again, DEQ admits that 93.3% is a high, aggressive, and a "challenging" level to achieve. PET 065, 263, 325. Instead of resting on an "assumption" that Perpetua will be "vigilant" and implement the necessary control procedures (procedures that remain unspecified and for future development in various "plans"), DEQ should have developed

and included in the Permit the limits and conditions necessary to ensure 93.3% will be achieved. DEQ modeling staff "recommend[ed] that the permit require an aggressive implementation of measures to achieve above 93% control efficiency for fugitive particulate emissions from roadways." PET 328. Because DEQ did not include such limits and conditions in the Permit, it was arbitrary and capricious to assume this high 93.3% would be achieved, and that the Project would comply with the PM_{10} NAAQS and arsenic AACC, as discussed in more detail below.

1. DEQ's determination that a combination of chemical dust suppressants and water would achieve the required dust control efficiency was arbitrary and capricious, and not supported by the permit record.

Perpetua argues that its technical memorandum demonstrates that chemical dust suppressants applied to unpaved industrial roads can have a dust control efficiency of 90-99% for PM_{10}. Perpetua Opp'n at 22–23 (citing PET 546). It also points out that watering alone, according to AP-42, can reach a control efficiency of 95%. *Id.* at 22 n.9 (citing PET 808). Perpetua, however, misses the mark, and fails to address Petitioners' argument that there is no evidence for, and no rationale provided, that supports a finding that Perpetua will be able to achieve 93.3% dust control efficiency by using a *combination* of chemical dust suppressants and water.

Notably, the evidence that Perpetua points to in its brief contradicts that such a high control efficiency can be achieved with a combination of chemicals and water. *See id.* at 23. The EPA RACT/BACT/LAER Clearinghouse database (reproduced in DEQ's SOB) shows that out of seven sites reviewed that used a combination of chemicals and water to control dust, *none* of them were able to achieve higher than 90% control efficiency. PET 547. Moreover, the permit record demonstrates that, for the studies that it does cite, DEQ never compared the site-specific

conditions of those mines to determine whether the studies were applicable to Perpetua's site; what application methods were used to achieve the stated dust control efficiencies; and come to a conclusion whether the methods and application of dust control was reasonably achievable in this case. *See generally* PET 044–548.

Furthermore, the lack of record support is confirmed by EPA's comment on the final draft permit, stating that "the permit record does not demonstrate that [93.3%] efficienc[y is] achievable based on the site-specific conditions at the Perpetua mine." PET 669. EPA pointed out that "IDEQ's permitting record does not appear to provide support for a 93.3% control efficiency applicable to fugitive dust emissions resulting from mining excavation operations and haul roads[ ]" and that "IDEQ's permitting record does not provide any technical studies showing that the supplementing of magnesium chloride with watering will improve the control efficiency of magnesium chloride." PET 670. Yet, DEQ's response to these comments was a blanket statement that it "has confirmed based on a review of test studies that [93.3% dust control efficiency] can be achieved using water and magnesium chloride dust suppressants," and points to a yet to be seen FDCP to specify the "minimum and substantive requirements" that will not be subject to public review. *See* PET 551, 555, 557.

The questionable capability of achieving 93.3% dust control efficiency is perhaps why DEQ's modeling team recommended "aggressive implementation of measures to achieve above 93% control efficiency." PET 328. Yet the Permit, as discussed below, does nothing to dictate the enforceable limits that would indicate what the aggressive measures will be, or ensure that they are "aggressive[ly] implement[ed]." *Id.*

DEQ's determination that Perpetua would be able to achieve sufficient dust control efficiency such that it would comply with PM_{10} NAAQS and arsenic AACC was thus arbitrary and capricious.

2. The permit lacks enforceable limits on how the dust control efficiency will be achieved to ensure compliance with PM_{10} NAAQS and arsenic AACC.

Respondents argue that because the permit requires Perpetua to generally control dust by using chemical dust suppressants and water, it is legally and practically enforceable. *See* Perpetua Opp'n at 23–26; DEQ at 15–16; PET 008–10 (Permit Conditions 2.1–2.6). It is notable that Perpetua argues that the permit cannot contain details of how dust will be controlled because it is "impractical" to "establish specific numeric limits to control efficiency variables." Perpetua Opp'n at 26. Yet, DEQ relies on a yet-to-be drafted FDCP, which will not be subject to public review, to establish those detailed conditions and limits—unknown measures that will "require an aggressive implementation . . . to achieve above 93.3% control efficiency." PET 328; *see also* PET 009 (Permit Condition 2.5 stating that dust control measures must be applied "on a frequency" to ensure emissions do not exceed a certain threshold); PET 010 (Permit Condition 2.6 requiring the FDCP 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."). At bottom, without any actual, meaningful, and enforceable limits in the Permit, DEQ cannot ensure that the Project will be in compliance with PM_{10} NAAQS and arsenic AACC.

Perpetua argues that there is "no legal authority" that requires DEQ to include legally and practically enforceable permit conditions. Perpetua Opp'n at 23–24. However, the Air Rules Section 107.03.c incorporates 40 C.F.R. Part 52 of the CAA regulations that define the "potential

to emit," and state that physical or operational limitations are part of the facility's design "if the limitation or the effect it would have on emissions *is state or federally enforceable*." Air Rules Section 006.36 (emphasis added); *see also* 40 C.F.R. 52.21(b) (definition of potential to emit).

"EPA's longstanding position is that a permit limitation can legally restrict a source's [potential to emit] if it" is practically enforceable—meaning that the limitation is technically accurate; there is a time period specified for the limitation; and there is a method to determine compliance. PET 664 (footnote omitted). Perpetua argues that the Permit Conditions establish that the 93.3% control efficiency meets the criteria to be practically enforceable. Perpetua Opp'n at 24. It is wrong for multiple reasons.

First, there is no technically accurate limitation for achieving the required 93.3% dust control efficiency. For instance, DEQ states that the 93.3% control efficiency is "supported by assuming appropriate application of water and magnesium chloride," PET 090, but neither the permit record, nor the Permit itself, specifies the limitations on how much chemical dust suppressant and/or water should be applied, under what operational or atmospheric conditions, and at what frequency. *See* PET 008–10 (Permit Conditions 2.1–2.6); *see also* PET 670 (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."). Second, there is no time period specified for the limitation. Finally, the monitoring requirements that Perpetua highlights hardly can be considered a method that will determine compliance. For example, Permit Condition 2.2 requires Perpetua to record the frequency and methods used to control fugitive dust, but does not require any actual monitoring or record keeping to demonstrate that those methods are effective. PET 008. Permit Condition 2.4 requires facility-wide inspections of potential sources of fugitive

emissions, but there is no actual requirement to monitor whether the potential source is complying with the limitations or whether, if fugitive emissions were observed, those emissions exceed the PM_{10} NAAQS or arsenic AACC. *Id.* Finally, Permit Condition 2.5 requires that the "visible emissions from vehicle traffic on a haul road do not exceed 10% opacity," but there is no actual requirement to monitor opacity at certain time intervals and under what operational or site-specific conditions, or keep records documenting when opacity requirements were not being met. PET 009. Moreover, nothing in the permit record establishes that a 10% opacity correlates with a 93.3% dust control efficiency, and therefore ensures compliance with the PM_{10} NAAQS or arsenic AACC.

Third, Perpetua asserts that the "FDCP itself ensures compliance with fugitive dust requirements," and since it will contain substantive requirements and is incorporated into the Permit, this demonstrates that the Permit Conditions will "achieve the expected control efficiency." Perpetua Opp'n at 25–26. But Perpetua cannot make that claim when the provisions of the FDCP are unknown as the document does not exist. Moreover, as discussed below, the FDCP which purportedly will contain enforceable permit conditions, will not be available for review and public comment.

Finally, Perpetua complains that the Permit is already more stringent than other permits, and "requires a more comprehensive and detailed FDCP than in any other minor source permit DEQ has issued." *Id.* But here, DEQ's past practice highlights a pervasive approach to air quality permitting that is less vigorous in protecting public health than it should be. *See, e.g.*, PET 842 (stating that a review of synthetic minor source permits "found that many of the permit limitations did not adhere to EPA's guidance" and that many "permit limits did not have sufficient information within the permit or the permit's supporting documentation to determine

whether the limits were technically accurate."). Respondents make no claim that prior, more lenient permits were similar to the present one that requires "aggressive level[s] of control" and "aggressive implementation" that, if not met, would exceed the PM_{10} NAAQS or arsenic AACCs and threaten public health. PET 325, 328.

In summary, DEQ failed to include in the Permit enforceable limitations, as required under the Idaho Air Rules, that it admitted are necessary to ensure Perpetua achieves the "aggressive" 93.3% level of dust control. The Permit should therefore be vacated and remanded to DEQ to fix these deficiencies.

B. DEQ's Use of a "Surrogate Production Limits" in the Permit is Unreasonable, Does Not Ensure Compliance with PM_{10} NAAQS and Arsenic AACC, and the Permit Limit is Not Enforceable.

Variables, such as daily vehicle miles traveled, truck weight, and speed limit are important parameters that are used in developing fugitive dust emission factors for haul roads of any mine, including this one. *See, e.g.*, PET 798, 800; *see also* PET 062. Although there is no specific authority *requiring* DEQ to include those parameters as specific, enforceable permit limitations, *see* Perpetua Opp'n at 27, it was unreasonable in this case for DEQ not to consider these variables given that they were "critical" in calculating fugitive dust emissions and ensuring that PM_{10} NAAQS and arsenic AACC are met. *See, e.g.*, PET 062 ("[I]t was recognized that accurate determination of site-specific parameters characterizing road conditions and vehicle traffic was critical to estimating particulate matter emissions and ambient air impacts."); *see also* PET 275 ("However, it is critical for NAAQS compliance that this high level of [dust] control be achieved."). DEQ's decision to use a production limit as a "surrogate" for these critical variables

to ensure compliance with the PM_{10} NAAQS and arsenic AACC is not supported by the permit record, and is arbitrary and capricious.[8]

Perpetua asserts that a surrogate "production limit" of 180,000 tons of ore hauled per day is sufficient to ensure compliance with PM_{10} NAAQS and arsenic AACC. Perpetua Opp'n at 28. Yet nothing in the permit record demonstrates that a daily production limit is equivalent to providing enforceable limits on the variables that were so critical to demonstrating compliance with air quality standards. For example, Perpetua's citation to DEQ's response to comments only discuss how daily production limits are sufficient in wintertime conditions to ensure compliance, but does not discuss whether production limits alone are sufficient for drier seasons when fugitive dust will be more problematic. *Id.* at 26 (citing PET 629–630).

Simply put, daily production limits do not constrain all the variables that went into the calculation of fugitive dust emissions, and nothing in the permit record indicates that DEQ understood or demonstrated that a daily production limit would be equivalent to more specific permit limits addressing these critical variables. *See generally* PET 044-548. For example, Perpetua can haul the same amount of ore by using all larger trucks driving less miles, or using all smaller trucks driving more miles. But by using only a production limit in the Permit, there exists a legal and plausible operating scenario where more fugitive dust is generated such that it would exceed PM_{10} NAAQS and arsenic AACC. *See* PET 670 (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 emissions factors estimates for the

[8] Silt content is just one variable that is taken into account when calculating fugitive dust emissions. The fact that there may be permit limits on silt content does not fix the lack of permit limits concerning the other critical variables used to calculate fugitive dust emissions. *See* Perpetua Opp'n at 28–29.

haul roads and access roads."). But it is unknown to DEQ and from the permit record whether that is the case, rendering arbitrary and capricious the use of its surrogate limit to ensure compliance. Thus, this is not a "technically accurate" limitation and inconsistent with EPA's guidance on practically enforceable permit limitations. *See* PET 791; Perpetua Opp'n at 32–34.

Relying on past permits that do not include such permit limits does not help DEQ's case as there is no indication that, first, the variables such as truck weight and vehicle miles were "critical" to compliance, and second, if they were, that a surrogate production limit was shown to ensure compliance with air quality standards. *See* Perpetua Opp'n at 28.

What is more, the actual permit limitation found in Permit condition 3.5 does not have any associated monitoring or recordkeeping requirements to ensure compliance, and defers to a yet-to-be created Operation and Maintenance Manual ("O&M Manual") plan that will not be available for review by the public. PET 019; *see* Perpetua Opp'n at 29, 32–34. And Perpetua's contention that the peak production rate modeled will actually be lower, and thus emissions will be lower, is beside the point because the Permit gives Perpetua the legal authority to produce up to the production limit even if it would exceed air quality standards.

DEQ did not demonstrate that a surrogate production limit would ensure compliance with air quality standards. Its decision to substitute this for limits to the critical variables it actually used to calculate fugitive dust emissions is not supported by the record and is arbitrary and capricious. Even more, the surrogate limit it did include in the Permit is not an enforceable limit. The Hearing Officer must vacate the Permit and remand it back to DEQ for further consideration.

C. DEQ Failed to Use Representative Precipitation Data.

Perpetua's argument that Petitioners are wrong to assume "that the use of local precipitation data would have resulted in higher fugitive dust emissions" not only misses the point, but it still uses the wrong precipitation data to try and make its point. Perpetua Opp'n at 31. Petitioners' point is that, as is pervasive throughout the Permit, DEQ did not use available local data that are more accurate and consistent with its own guidance, but opted to use a default, generalized data to perform its calculations. Pet'rs' Open. Mot. Summ. J. at 25-26. Here, Perpetua argues that local data indicates that the conditions are wetter than EPA's default data. But it only looks at a single year. *Id.* Underestimation of the true site conditions when the data is available calls the emissions calculations and results into question. The Hearing Officer should vacate the Permit and remand it back to DEQ for further review.

IV. 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.

There is no dispute that the Permit calls for four "work plans"—Access Management Plan ("AMP"), FDCP, Haul Road Capping Plan ("HRCP"), and O&M Manual—to be developed by Perpetua later and submitted to DEQ. Petitioners' Opening Brief showed that, by relying on these future plans, DEQ bypassed the requirements of the PTC permitting process, including public comment, and issued what is essentially a partial, incomplete PTC, in violation of the Air Rules and CAA. Pet'rs' Mot. Summ. J. at 28–31. Only later will DEQ issue a complete, final PTC, after Perpetua develops and submits to DEQ additional plans, information, and conditions through the AMP, FDCP, HRCP, and O&M Manual, shielded from public review and outside the normal PTC process required by the Air Rules.

In its Response, Perpetua asserts that "work plans" are "not required by any express provision of Idaho Air Rules (nor the CAA) to be included in the application, the Final Permit, or any part of the public comment process." Perpetua Opp'n at 38. Perpetua is wrong.[9]

Under the Air Rules, 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).

Through the "work 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

[9] Perpetua also argues that Petitioners cannot rely on DEQ violations of the CAA or the CAA regulations at 40 C.F.R. Part 51 to challenge the Permit here. Perpetua Opp'n at 14. But Idaho's Air Rules are EPA-approved CAA rules, which EPA found to satisfy the minimum requirements of the CAA and the CAA Part 51 regulations; therefore, the content of the CAA, the Part 51 regulations, and the federal precedent and guidance under them are persuasive authority in considering DEQ's compliance with the Air Rules and whether DEQ was arbitrary and capricious in approving the Permit under them. *See*, *e.g.*, *Powder River Basin Res. Council v. Wyo. Dep't of Env't Quality*, 226 P.3d 809, 813 (Wyo. 2010) ("[B]ecause the state program is intended to be compatible with, and at least as stringent as, the federal Clean Air Act, federal precedent and regulatory guidance is persuasive authority in Wyoming air quality cases.").

information, will be made available to the public" for comment. DEQ's use of these future work plans, thus, violates the Air Rules.

In its Response, DEQ does not even argue that the work plans comply with the Air Rules; rather, DEQ asserts that relying on work plans is a common DEQ practice and that this practice makes things easier for the permittee and for DEQ. DEQ Resp. at 24. But these points have no bearing on whether DEQ complied with the Air Rules, which it did not. 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.

DEQ rationalizes 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." *Id.* at 24 (quoting Simon Decl. ¶ 10). But the work plans for this Project go way beyond waiting for these types of final and relatively insignificant 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. PET 019–20. 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 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." PET 010. 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 supra* Part III.A. 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." PET 010. 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." PET 569. But DEQ is letting Perpetua decide important details about access management later, outside of public review.

Thus, DEQ is not relying on the work plans to merely account for small, final details related to equipment actually purchased or final characteristics of the facility, which might be

reasonable or practically necessary for some information. Here, the work plans will include all manner of important details bearing on disputed issues about whether the Project will comply with air quality standards and whether DEQ set the right ambient air boundary. These types of information, plans, and details bearing on whether the Project will comply with standards have to 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. DEQ does not have a good excuse, or practical necessity, to deviate from these requirements.

DEQ also congratulates itself for what it describes as "the extraordinary and unprecedented three-year collaboration that proceeded" issuing the Permit. DEQ Resp. at 24. In truth, DEQ tried to issue the Permit much faster, but twice after the public alerted DEQ to errors, DEQ had to gather additional information, perform more analysis, take additional comment, and ultimately correct numerous errors. *See* PET 052–54. DEQ's errors and the important role the public played over the three-year permitting process thus confirm the critical role of public comment on all important aspects of the Permit, including on the work plans DEQ is shielding from public review.

Moreover, the Project is a large, complex mine, and permitting it is complicated and time-consuming. To this day, the Permit issued by DEQ is the first and only major permit Perpetua has secured for the Project. Perpetua has yet to receive required authorizations from the Forest Service, U.S. Army Corps of Engineers, NOAA Fisheries, U.S. Fish and Wildlife Service, and other agencies. Perpetua also has yet to receive several other major DEQ permits, including an ore processing by cyanidation permit, an Idaho Pollutant Discharge Elimination System ("IPDES") permit, a point of compliance permit, and a 401 water quality certification. The only

thing "extraordinary" about DEQ's issuance of the Permit in three years, is that it issued this Permit to Perpetua before any other DEQ permit and earlier than any other agency did, while the proposed Project was still in its infancy and before many important details of the Project had even been decided.

Perpetua also criticizes Petitioners for relying on two Clean Water Act ("CWA") cases, instead of any Air Rule or CAA cases, for the proposition that agencies cannot hide important permit-related information from required public review. Perpetua Opp'n at 37. But Perpetua does not point to any Air Rule or CAA cases holding that it is okay to exclude important information from the public during CAA permitting processes. And these CWA cases are relevant.

As Perpetua explained: "in *Environmental Defense Center v. EPA*, the Ninth Circuit held that Notices of Intent ("NOI") are functional equivalents to permits under the Clean Water Act's general permit option, and EPA's failure to require review of NOIs available to the public contravened the express requirements of the Clean Water Act." Perpetua Opp'n at 37 (citing *Env't Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 (9th Cir. 2003)). Indeed, the Ninth Circuit found that 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." *Env't Def. Ctr.*, 344 F.3d at 853. Similarly here, the "work plans" are not mere procedural correspondence; as already discussed, each plan will establish what Perpetua will do to reduce emissions, to set enforceable permit limits, and to otherwise comply with "substantive components" of the Air Rules.

The work plans are also similar to the Nutrient Management Plans ("NMP") at issue in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 503 (2d Cir. 2005), where the Second Circuit held that EPA "deprive[d] the public of the opportunity for the sort of regulatory participation

that the [CWA] guarantees because the Rule [at issue] effectively shields the nutrient management plans from public scrutiny and comment." Perpetua tries to downplay this case, asserting that the Second Circuit reached this conclusion because the NMPs were "effluent limitations," and the CWA specifically requires public participation in developing effluent limitations. Perpetua Opp'n at 37. Perpetua misleadingly fails to mention that the Second Circuit's decision did not end there, but went farther:

> *And even assuming, arguendo, that the nutrient management plans did not themselves constitute effluent limitations, we would still hold that the CAFO Rule violates the Act's public participation requirements*. Nutrient management plans are . . . a critical indispensable feature of the "plan, or program established by the Administrator or any State" in order to regulate Large CAFO land application discharges. 33 U.S.C. § 1251(e). The EPA itself has stated in the Preamble to the Rule that "the only way to ensure that non-permitted point source discharges of manure, litter, or process wastewaters from CAFOs do not occur is to require ... [land application] in accordance with site specific nutrient management practices."

399 F.3d at 504 (emphasis added).

Like the NMPs 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. For example, DEQ modeling staff stating "it is *critical* for NAAQS compliance that this high level of control [(93.3% dust control)] be achieved." PET 275 (emphasis added); *see also* PET 325 (same). DEQ 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." PET 328. But the Permit does not include these implementation measures; instead, specific measures for achieving 93.3% dust control will be developed in the FDCP, shielded from public view. Similarly, DEQ admitted in the Statement of Basis "accurate determination of site-specific parameters characterizing road conditions and vehicle traffic was *critical* to estimating

particulate matter emissions and ambient air impacts," PET 062 (emphasis added), but the Permit does not include these site-specific parameters, which will be developed later (if at all) by Perpetua in the HRCP and FDCP without public comment. Likewise, DEQ asserted "[c]ompliance is assured by complying with the [O&M Manual] monitoring and recordkeeping requirements," but again, the Permit does not include monitoring and recordkeeping requirements; Perpetua will develop those later, without public involvement.

Finally, 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 37. Petitioners do not dispute that states have broad discretion to develop permit conditions. The problem here is that DEQ has *not* developed a number of important permit conditions and is letting Perpetua develop them later, outside of the Air Rules PTC process, and without public review. 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 Hearing Officer must set aside and remand the Permit to correct these errors.

V. DEQ MUST REQUIRE AMBIENT AIR MONITORING.

As shown in the Opening Brief: DEQ has authority under the Air Rules Section 211.01.d to require Perpetua to monitor ambient air quality while the Project is underway; ICL, SSFS, and the EPA all urged DEQ to require such monitoring to verify whether Perpetua does actually comply with the PM_{10} NAAQS in light of the assumptions and uncertainties surrounding the Project's emissions; but DEQ declined. Pet'rs' Mot. Summ. J. at 31–32. DEQ failed to even respond to this issue. *See generally* DEQ Resp. Perpetua admits that DEQ has authority to

require ambient air monitoring, but after pointing to DEQ's responses to comments argues that in "DEQ's analysis and judgment, there was no reason to impose ambient air monitoring." Perpetua Opp'n at 41. DEQ's reasons for refusing to require ambient air monitoring, however, were arbitrary and capricious.

In response to comments, DEQ suggested that there is no need for ambient air monitoring since the Project area is remote. PET 559. But, as shown in Petitioners' standing declarations, members of the Tribe, ICL, and SSFS visit locations near the ambient air boundary set by DEQ, including staying overnight and engaging in strenuous activities.

DEQ also asserted in response to comments that ambient air monitoring "is not considered unless DEQ lacks a satisfactory confidence of NAAQS or toxic air pollutant ("TAP") increment compliance . . . without such monitoring," PET 562, and that here, DEQ is "reasonably confident" that impacts to ambient air will be below applicable standards, PET 559. To support this, DEQ points out that the Permit includes "extensive fugitive dust control measures," PET 560, "includes limits on operational levels and key parameters" and "includes monitoring and recordkeeping requirements to ensure compliance," PET 561. But the Permit does not include such measures, as discussed in the preceding section, and DEQ, thus, does not have a reasonable basis for being confident the Project will comply with the NAAQS and AACCs. *See supra* Part IV.

Again, as EPA commented: "Given the high level of uncertainty in the assumptions and requirements to ensure compliance with the PM_{10} 24-hr NAAQS, the addition of post-construction ambient monitoring requirements is highly prudent." PET 561. Again, Perpetua aims to achieve what DEQ admitted elsewhere is a "high" and "aggressive" level of dust control, which DEQ modelers recommended requiring aggressive implementation conditions in the

Permit. PET 275, 325, 328. And again, the Permit does not include such measures, leaving it highly uncertain whether the PM_{10} NAAQS will be met.

VI. DEQ FAILED TO ANALYZE ECONOMIC INFORMATION AND ENVIRONMENTAL IMPACTS IN THE ARSENIC T-RACT.

As set forth in the Opening Brief, DEQ granted Perpetua's arsenic "T-RACT demonstration," granting Perpetua a 10-times increase in allowable concentrations of TAP AACCs during operations. *See* Pet'rs' Mot. Summ. J. at 32–34. Air Rules Section 210.14 dictates a specific process with specific requirements for DEQ's review and approval of an applicant's T-RACT, including consideration of technical and economic feasibility and environmental impacts—factors DEQ failed to consider. *Id.* In response, neither DEQ nor Perpetua disputes Petitioners' showing that DEQ failed to consider these factors when it approved Perpetua's T-RACT. Rather, they argue that DEQ did not need to consider these factors. They are wrong.

In response, DEQ makes the absurd argument that it has discretion to do whatever it reasonably wants—whether or not doing so actually complies with the Air Rules. DEQ points to the first sentence in Section 210, which states that a permit applicant shall "demonstrate preconstruction compliance with Section 161[(toxics standards)] *to the satisfaction of the Department*" and argues "[w]hether DEQ is satisfied is a matter of discretion." DEQ Resp. at 18 (emphasis by DEQ). The "to the satisfaction of the Department" language is superfluous and meaningless. How would the provision be any different if it omitted the "to the satisfaction of Department" phrase and instead said the applicant must "demonstrate preconstruction compliance with Section 161"? Even without the "to the satisfaction of the Department" phrase, this provision of the Air Rules would require DEQ to make a determination (to its satisfaction—

not to someone else's satisfaction) that the applicant demonstrated preconstruction compliance. Anytime DEQ is required to make any determination under the Air Rules, it must make that determination to its "satisfaction." And when it does so, DEQ's determination cannot be arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, contrary to law, or in excess of authority.

DEQ also argues that, because Section 210.14 of the Air Rules states that DEQ is to determine T-RACT on a "case-by-case basis," this somehow gives it free reign to ignore the specific requirements set forth in Section 210.14. DEQ Resp. at 19. Again, DEQ does not have discretion to ignore applicable provisions of the Air Rules. Moreover, what the Air Rules actually say (which DEQ misleadingly omitted from its "case-by-case basis" quote) is: "T-RACT shall be determined on a case-by-case basis by the Department as follows:". Air Rules Section 210.14 (emphasis added). After "as follows", the Air Rules list specific requirements in Sections 210.14.a through 210.14.f for how DEQ is to make this case-by-case determination, including among other requirements:

> **c.** The technological feasibility of a control technology or other requirements for a particular source *will* be determined considering several factors including, but not limited to:
>
> i. Process and operating procedures, raw materials and physical plant layout.
>
> ii. The environmental impacts caused by the control technology that cannot be mitigated, including, but not limited to, water pollution and the production of solid wastes.
>
> . . .
>
> **d.** The economic feasibility of a control technology or other requirement, including the costs of necessary mitigation measures, for a particular source *will* be determined considering several factors including, but not limited to:
>
> i. Capital costs.
>
> ii. Cost effectiveness, which is the annualized cost of the control technology divided by the amount of emission reductions.

iii. The difference in costs between the particular source and other similar sources, if any, that have implemented emissions reductions.

Air Rules Section 210.14 (emphases added). Thus, the Air Rules explicitly require that DEQ "will" consider "technological feasibility," including "environmental impacts," and "will" consider "economic feasibility." *Id.* DEQ cannot simply ignore these explicit requirements for its review of T-RACT.

Perpetua argues that these requirements in 210.14 to consider technological and economic feasibility and environmental impacts apply only when DEQ is considering a new RACT, and argues that "[n]othing in Section 210.1[4] [*sic*] requires DEQ to reevaluate the technological and economic feasibility of established control measures." Perpetua Opp'n at 44. This is wrong. Again, Section 210.14 requires DEQ to determine T-RACT "on a *case-by-case basis*" and prescribes specifically how DEQ is to do this. First, Air Rules Section 210.14.a requires: "[T]he applicant must submit information to the Department identifying and documenting which control technologies or other requirements the applicant believes to be T-RACT." Perpetua did that here. *See* PET 543–48 (SOB, App'x G, "T-RACT Analysis"). Next, Air Rules Section 210.14.b requires: "The Department will review the information submitted by the applicant and determine whether the applicant has proposed T-RACT." DEQ did that here. *See* PET 070 (SOB). Next, when making that determination, Air Rules Sections 210.14.c and d requires that DEQ "will" consider technological feasibility, including environmental impacts, and economic feasibility. Furthermore, parts c and d require DEQ to consider factors that are specific to a particular facility (not factors that are general to the control technology itself), such as "[p]rocess and operating procedures, raw materials and physical plant layout" and the "difference in cost between the particular source and other similar sources."

Nowhere in the Air Rules does it say that these requirements are limited to new control technologies. And nowhere does it say that when DEQ conducts its case-by-case review under Section 210.14 of an applicant's submission of a T-RACT proposal (as occurred here), DEQ can skip the mandatory requirements of 210.14.c and d if the control technology has been used or evaluated in the past, as Perpetua argues it has. Rather, as set forth above, the Air Rules requires DEQ to consider these factors in every case. But, again, DEQ did not do so here.

Perpetua's argument that applying chemical dust suppressant and watering have been used and approved before for other projects ignores the important and unique considerations at issue here. As Petitioners warned in their comments, applying large amounts of magnesium chloride to roads to control dust can cause the accumulation of toxic concentrations of these substances in trees and soils and can degrade water quality and harm aquatic life. PET 596, 612. Additionally, "frequent watering" may cause environmental harm because the water that will be used to supplement dust control measures will be from sources that already have elevated arsenic levels. PET 612. These concerns are especially important here since the mine site is made up of narrow mountain valleys where haul roads are located primarily right next to rivers and streams. *See* Pet'rs' Open. Mot. Summ. J. at 15 (map). These concerns are especially important here also because Perpetua will have to use "aggressive" measures—presumably meaning more chemical suppressants and more water than is typical—to achieve the high 93.3% control level on the haul roads. Just because DEQ has approved other projects to use similar dust control measures does not relieve the agency of its responsibility under Section 210.14.c.ii that it "will" consider water pollution and other environmental impacts caused by Perpetua's "aggressive" dust control efforts in this unique Project site and for this particular case.

Similarly, DEQ must consider technological feasibility by considering the "[p]rocess and operating procedures, raw materials and physical plant layout" for this Project. Air Rules Section 210.14.c.i. The fact that DEQ has in the past considered chemical dust suppressants at other facilities, which employ different processes and operating procedures, which use different materials, and which have different layouts, does not satisfy this requirement.

And DEQ must consider economic feasibility by considering the "difference in cost between the particular source and other similar sources." Air Rules Section 210.14.d.iii. The fact that DEQ has approved chemical dust suppressants for past projects from similar sources does not satisfy this requirement to compare the difference in cost between this "particular source" and other similar sources.

The Hearing Officer should set aside and remand the Permit, and order DEQ to follow the requirements of Section 210.14 to review Perpetua's T-RACT application.

VII. DEQ'S DETERMINATION THAT THE PROJECT WILL EMIT LESS THAN THE ARSENIC AACC HAS NO RATIONAL BASIS.

As shown in Petitioners' Opening Brief, DEQ not only granted Perpetua's T-RACT demonstration (giving Perpetua a 10-times increase in allowable arsenic concentrations), but it went further and effectively diluted the apparent concentration of arsenic the Project will emit by spreading it out over a human lifetime. *See* Pet'rs' Mot. Summ. J. at 34–37. Instead of using the average annual concentration of arsenic emitted for the Project to determine compliance with the AACC under the Idaho Air Rules, DEQ diluted the Project's arsenic concentration by spreading the Project's 16 years of emissions over a 70-year human lifetime. *See id.* Thus, instead of comparing the actual annual arsenic concentration that will be emitted and present in the air while the Project is operating and that people recreating at the point of compliance (the ambient

air boundary) will breathe, DEQ created a fiction by finding that only a fraction (16/70)—a mere 23 percent of the true concentration—will be present in any given year. *Id.*

DEQ does not argue that the 16/70 averaging is allowed under any provision of the Idaho Air Rules (which it is not). Instead, DEQ appears to assert a rationale of why it allowed a 10-fold increase in the arsenic AACC:

> [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.

DEQ Resp. at 21 (quoting Schilling Decl. 11–12) (internal citations omitted). DEQ, thus, admits that it applied the "general approach" of a specific Air Rules provision—a provision which purposefully and narrowly addresses "short-term" sources—to a long-term project to fabricate and grant to Perpetua a new AACC adjustment. An adjustment found nowhere in the Air Rules. DEQ never presented this rationale in its response to draft Permit public comments; it is simply post-hoc rationalization. Furthermore, although requested as part of the Petitioners' Discovery, DEQ was unable to produce any previously established guidance, procedural memorandum, or permitting example which rationalizes or justifies the use of this 16/70 averaging tactic. Regardless, its new rationale does not provide any basis for inventing a permitting tactic completely outside the bounds of the Air Rules and arbitrarily and capriciously diluted annual arsenic concentrations beyond the life of a project.

DEQ goes on to assert that "Petitioners . . . offer absolutely no evidence that multi-year averaging presents a public health risk." DEQ Resp. at 21. But that is not Petitioners' responsibility, it is DEQ's. Whether or not DEQ had a reason to use its 16/70 tactic, it cannot ignore the Air Rules, and it needs to provide a rational basis for why its approach does not create

a public health risk. The Air Rules use a one-year average concentration for the arsenic AACC (not a life of the project over an entire lifetime average, as DEQ did). Air Rules Section 586. The Air Rules include explicit exceptions to meeting the normal AACCs, allowing less stringent AACCs either where: a project is five years or less; or where a T-RACT demonstration is done. Air Rules Sections 210.12, 210.15. There are no other exceptions in the Air Rules.

Here, Perpetua's T-RACT demonstration was granted (using Section 210.12), already giving it significant leniency (a 10 times increase in allowable arsenic concentrations). But DEQ chose to give Perpetua even more leniency by creating a new exception—again, not found in the Air Rules—by using the 16/70 approach. DEQ does not have discretion to deviate from the Air Rules and make up new exceptions to the meeting the AACCs. The Hearing Officer must, therefore, set aside and remand the Permit to comply with the Air Rules.

Perpetua's arguments fare no better.[10]

First, as stated above, there is nothing in the Idaho Air rules or the permit record that supports the "normaliz[ation]" of emissions by spreading them out over a time period longer than the project lifetime to assess cancer risk. *See* Perpetua Opp'n at 48. What this "normaliz[ation]" does is unreasonably assume that higher concentrations of arsenic for shorter periods of time (16 years) is equivalent in terms of cancer risk to lower concentrations of arsenic over longer periods of time (70 years). *See id.* ("[DEQ] evaluated the maximum modeled arsenic emissions

[10] To start, Perpetua mischaracterizes Petitioners' arguments, claiming that Petitioners ignore Section 210 methods of compliance and only focus on the Section 586 standards. Perpetua Opp'n at 45–46, 48. Petitioners do not challenge DEQ's use of Section 210.12 as a method for demonstrating compliance with the arsenic AACC; they challenge the way that DEQ determined the amount of arsenic emitted—using unsupported and unvalidated assumptions that have no basis in the Air Rules—to ensure that the emissions would be less than the T-RACT adjusted AACC and thus allow DEQ to claim that emissions would not create a health risk under Section 161. *See* Pet'rs' Mot. Summ. J. at 36–37.

from the Project during the operational period and then evaluated whether that would exceed the AACC over 70 years, demonstrating that the cancer risk was less than one in one hundred thousand."). But there is no support in the permit record nor in the Air Rules for this "normaliz[ation]." Granted, the Air Rules allow an assumption of a linear relationship *between cancer risk and pollutant concentration*—a 10-fold increase in the AACC is equivalent to a 10-fold increase in cancer risk probability. Air Rules Section 210.12.b. There is no comparable equivalency in the Air Rules, however, to allow for the dilution of emissions over a much longer period of time.[11]

In its response to comments, DEQ states:

> The acceptability criteria is that a facility not pose a cancer risk greater than 1-in-1,000,000 or 1-in-100,000 if T-RACT is used. The annual value of the AACC is provided under the assumption that a facility will emit *at such a level* on a permanent basis. Since the criteria of Idaho's TAP rules is the risk associated with the project, *the time over which that risk is spread is immaterial*.

PET 597 (emphasis added). DEQ's assertion means that it can apparently choose any time frame to "spread" out the risk of exposure to arsenic (or any other carcinogenic pollutant) so that it falls below the T-RACT adjusted AACC and thus it is not a cancer risk anymore. Moreover, if the "criteria of the TAP rules is the risk associated with the project," *id.*, the Project's emissions will occur only for 16 years; there is no risk from the Project for the subsequent 54 years. Although

[11] Perpetua argues that Section 125 of the Air Rules provide the rationale for diluting 16 years of arsenic emissions over 70 years. Perpetua Opp'n at 47. First, Perpetua is referring to the definition of "Toxic Air Pollutant Carcinogenic Increments" which is found in the 2020 version of the Air Rules, but has been removed from the current version. Second, the definition refers to 70 years as the timeframe that cancer risk probability is assessed, but it in no way indicates that a facility's emissions can be diluted by a timeframe less than that during which pollutants will be emitted.

this "refined" approach makes it easier to permit a polluting facility, it makes absolutely no sense in terms of assessing cancer risk, as required under Section 161 of the Air Rules.

Case in point, the time over which the risk is spread from 16 to 70 years is very material; one time (16 years) demonstrates that the emissions from the Project are greater than the T-RACT adjusted AACC, while the other (70 years) falsely concludes that the emissions are much lower than the T-RACT adjusted AACC. DEQ's dilution method to assess cancer risk does not account for the fact that for 16 years during the life of the mine, Tribal members such as Emmit Taylor and Joe Oatman, who exercise Treaty rights in and around the ambient air boundary and intend to do so in the future, and Zak Sears, who recreates in and around the ambient air boundary several times a year, will be exposed to close to three times above the level of the T-RACT adjusted AACC for the next 16 years. *See* Taylor Decl. ¶ 9; Oatman Decl. ¶ 7; Sears Decl. ¶ 6. Young children more susceptible to air pollutants, like those of Drew Hollenback, will be breathing in 16 years of arsenic that will be well-above the 1-in-100,000 cancer risk, as provided by the T-RACT adjusted AACC. *See* Hollenback Decl. ¶¶ 4, 6–7. To be sure, Air Rules Section 210.12.c does provide for the potential for "further procedures" to demonstrate that the cancer risk is acceptable under Section 161 when the emissions exceed the T-RACT adjusted AACC. Nevertheless, DEQ did not conduct any further procedures, but instead and without any reasoned or scientific basis, assumed the cancer risk probability from high dose/short-term exposure was equivalent to low dose/long term exposure. *See* Perpetua Opp'n at 48.

EPA noted similar concerns:

> The EPA continues to have concern that the arsenic screening analysis underestimates cumulative impacts of airborne arsenic to the environment in the vicinity of the project. The results presented on page 4-46 of the [draft supplemental environmental impact statement], and Table 4.3-13 are compared to an annual acceptable ambient concentration for a carcinogen (AACC), the Idaho toxics

> screening threshold. However, this screening threshold is not necessarily intended to be compared against a 70-year lifetime scenario where 57 years of the period assumes zero exposure. The threshold is an annual average used for screening, prescribed as a de-minimus value based on lifetime risk. Under IDEQ's hazardous air pollutant program, in practice, project impacts from the maximum year of emissions would typically be compared to the annual average AACC for arsenic.

PET 667.

Next, Perpetua contends that "set[ting] the life-of-mine hauling and excavating limit" is what is important because it is the total arsenic emissions that matter, not the concentration of arsenic and not how long the mine will operate. Perpetua Opp'n at 49 n.19. Yet, neither Perpetua nor DEQ cite any provision in the Air Rules that allows or even supports using "total" emissions to assess cancer risk probability. *See* Air Rules Section 586 (discussing annual averages for AACC); *id.* at Section 210.12.b (allowing a 10-fold increase in the *annual* AACC).

Third, Perpetua argues that the "arsenic emissions produced from the actual operating analysis are only 19% of the worst-case scenario." Perpetua Opp'n at 49. This fact, if it be true, is inconsequential because the permit allows Perpetua to operate at a higher level, and there are no enforceable permit conditions to ensure that the mine operates at a level of reduced emissions and thus actually emits less than the T-RACT adjusted AACC.

Finally, though Respondents were quick to point to prior (undisclosed) permits that had less stringent approaches than what is the case here, by contrast, they cannot point to a single permit where TAPs concentrations were spread out over the human lifetime or any other time, rather than the life of the facility. DEQ's determination that the Project's arsenic emissions demonstrates preconstruction compliance with the Air Rules Section 210.12 requirements is unreasonable, arbitrary and capricious, and unsupported by the record. The Hearing Officer must vacate the permit and remand it back to DEQ to fix these errors.

CONCLUSION

A permit issued by DEQ under the auspices of the Clean Air Act signals to the Tribe and public that this Project is emitting air pollutants, but doing so in a legal way to protect the ambient air—"that portion of the atmosphere . . .to which the general public has access"—and thus public health. PET 772. DEQ's failure, then, to lawfully and reasonably address the fugitive dust emissions is particularly troubling given that these legal and logical failures (esoteric to the general public) now presented to this reviewing body solely on paper will result in real world impacts to public health.

Yet, throughout their briefs, Respondents largely attempt to hide behind the cloak of agency discretion and deference to agency technical expertise. But that discretion is not unreviewable; that deference is not absolute. *See Laurino v. Bd. of Pro. Discipline of Idaho State Bd. of Med.*, 137 Idaho 596, 602 (2002) ("The Board, however, may not use its expertise as a substitute for evidence in the record, since the requirement for administrative decisions based on substantial evidence and reasoned findings—which provide the basis for effective judicial review—would become meaningless if material facts known to or relied upon by the agency did not appear in the record.") (footnote omitted).

As discussed above, there are many instances in this Permit where DEQ made decisions that are unexplained, unreasonable, and unsupported by the permit record. The aggressive and unsupported dust control efficiency. The mathematical distortion of arsenic concentrations. The leniency or lack of enforceable limits and monitoring. And each unexplained, unreasonable, and unsupported decision involves fugitive dust emissions from haul roads, therefore compounding the potential that arsenic and PM_{10} pollution outside of the ambient air boundary where Tribal

members use and the public recreates will exceed levels permitted by the law. This Permit, thus, cannot stand. Hence, the Hearing Officer should vacate the Permit and remand to DEQ for further review.

DATED: June 9, 2023

Respectfully submitted,

/s/ Julia Thrower
Julia S. Thrower
Attorney for Petitioner Save the South Fork Salmon

/s/ Bryan Hurlbutt
Bryan Hurlbutt
Attorney for Petitioners Nez Perce Tribe and Idaho Conservation League

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2023, a true and correct copy of the Petitioners' Response to Respondent DEQ's Cross-Motion for Summary Judgment and Intervenor Perpetua's Motion for Summary Judgment and Petitioners' Reply in Support of Petitioners' Motion for Summary Judgment was served on the following:

Dylan B. Lawrence Varin Thomas, LLC 242 N. 8th St., Suite 220 Boise, ID 83702 (208) 345-6021 dylan@varinthomas.com *Hearing Officer*	Via:	Email: Fax: CM/ECF: Hand Delivery: U.S. Mail:	[x] [ ] [ ] [ ] [x]
Paula Wilson paula.wilson@deq.idaho.gov *Hearing Coordinator*	Via:	Email:	[x]
Office of Administrative Hearings P.O. Box 83720 Boise, ID 83720-0104 filings@oah.idaho.gov	Via:	Email: U.S. Mail:	[x] [x]
John Shackelford Office of the Attorney General 1410 N. Hilton, 2nd Floor Boise, ID 83706 (208) 373-0453 john.shackelford@deq.idaho.gov *Attorney for Respondent Idaho Department of Environmental Quality*	Via:	Email: Fax: CM/ECF: Hand Delivery: U.S. Mail:	[x] [ ] [ ] [ ] [ ]
Krista McIntyre W. Christopher Pooser Wade Foster Stoel Rives, LLP 101 S. Capital Blvd., Suite 1900 Boise, ID 83702 (208) 389-9000 krista.mcintyre@stoel.com christopher.pooser@stoel.com wade.foster@stoel.com *Attorneys for Intervenor Perpetua Resources of Idaho, Inc.*	Via:	Email: Fax: CM/ECF: Hand Delivery: U.S. Mail:	[x] [ ] [ ] [ ] [ ]