Bryan Hurlbutt (ISB # 8501)
Andrew Hursh (ISB # 12644)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208.342.7024
bhurlbutt@advocateswest.org
ahursh@advocateswest.org

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

Attorneys for Petitioners
Idaho Conservation League and
Save the South Fork Salmon

IN THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO CONSERVATION LEAGUE, a non-profit corporation, and SAVE THE SOUTH FORK SALMON, a non-profit corporation, Petitioners, v. IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, and PERPETUA RESOURCES IDAHO, INC., Respondents.	Case No. CV01-25-13306 Agency Case No. 0101-22-01 OAH Case No. 23-245-014 **[CORRECTED] PETITIONERS' OPENING BRIEF**

APPEAL FROM THE ADMINISTRATIVE PROCEEDINGS

OF THE IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Idaho Code

TABLE OF ACRONYMS

AACC	Acceptable Ambient Concentration for Carcinogens (*see* IDAPA 58.01.01.586)
Air Rules	Rules for the Control of Air Pollution in Idaho (*see* IDAPA 58.01.01)
APA	Idaho Administrative Procedure Act (Idaho Code Title 67, Chapter 52)
Board	Idaho Board of Environmental Quality
DEQ	Idaho Department of Environmental Quality
EPA	U.S. Environmental Protection Agency
ICL	Idaho Conservation League
I.C.	Idaho Code
NAAQS	National Ambient Air Quality Standards
NEPA	National Environmental Policy Act
Permit	DEQ "Permit to Construct" issued under the Air Rules
Perpetua	Perpetua Resources Idaho, Inc.
PM	Particulate Matter
Project	Stibnite Gold Project, as described in Perpetua's DEQ Permit Application
Route	Stibnite Road Access Route
SSFS	Save the South Fork Salmon
T-RACT	Toxic Air Pollutant Reasonably Available Control Technology (*see* IDAPA 58.01.01.210)

INTRODUCTION

Petitioners Idaho Conservation League ("ICL") and Save the South Fork Salmon ("SSFS") submit this opening brief in support of their Amended Petition for Review. Petitioners challenge the Idaho Department of Environmental Quality's ("DEQ") approval of an air quality permit for constructing and operating a large open-pit gold mine in Valley County, Idaho. Perpetua Resources Idaho, Inc. ("Perpetua") submitted a permit application for the proposed Stibnite Gold Project ("Project") in 2019, and DEQ approved the Permit in 2022. This lawsuit follows Petitioners' contested case, which challenged the permit in a series of administrative proceedings before a Hearing Officer and the Board of Environmental Quality ("Board").

The proposed Project would excavate 340 million tons of waste rock to mine and process approximately 100 million tons of ore, using 55 miles of haul truck routes over 16 years. Blasting, excavating, ore hauling, and other Project activities would emit significant amounts of hazardous and toxic air pollutants, including coarse particulate matter ("PM_{10}") and arsenic. The Clean Air Act and Idaho's air pollution regulations ("Air Rules") control emissions of PM_{10} and arsenic because they can cause significant and severe health and environmental hazards.

Here, however, DEQ's approval of the Permit violated the Clean Air Act and Idaho's Air Rules. DEQ relied on arbitrary and capricious rationales to approve the Project despite impermissible impacts on air quality. Petitioners challenge DEQ's Permit (and the Board's administrative decisions upholding it) based on four principal errors.

First, DEQ erred when it determined arsenic concentrations outside the mine's operations boundary would comply with applicable standards. Arsenic is a toxic and carcinogenic air pollutant contained in the dust that would be kicked up by mining activities. Idaho's Air Rules

prohibit DEQ from issuing a permit for a project that would emit arsenic at levels injurious to human health, and the rules define such limits through an annual concentration maximum stated in micrograms per cubic meter ($\mu g/m^3$). Here, the Project's high projected arsenic emissions would exceed that limit, even after taking advantage of a lenient allowance in the rules for deploying "control technologies," namely controlling the dust raised by haul roads. To issue the Permit anyways, DEQ unlawfully circumvented the Air Rules by creating a newfangled "project-specific adjustment." Under this novel approach, DEQ diluted the modeled annual average arsenic concentrations that would occur during the Project to a number representing only 23% of that actual value. It did this by spreading the Project's 16 years' worth of arsenic concentrations over a hypothetical 70-year human lifespan (i.e., 16/70=23%). DEQ cannot ignore the Air Rules and invent a new exception—found nowhere in the rules—just to achieve a desired outcome of issuing the Permit.

Second, DEQ acted unlawfully when it determined particulate matter (dust) emissions outside the mine's operations boundary would comply with applicable standards. The proposed Project would cause violations of federal air quality standards for PM_{10} unless Perpetua were to apply extremely strict conditions on dust control. To issue the Permit here, DEQ tailor-made aggressive dust control expectations to match those needed to bring the Project's emissions under relevant limits. But in public engagement on the Permit approval process, the U.S. Environmental Protection Agency (EPA) and Petitioners raised serious concerns about whether Perpetua could realistically achieve such high levels of dust control that even DEQ believed were "aggressive." Rather than address those issues, DEQ issued the Permit in reliance on unreasonable and unsubstantiated assumptions that these aggressive dust control aspirations

would be achieved, without meaningful requirements to ensure such achievement. Making matters worse, these speculative dust control aspirations are the same "control technologies" that DEQ used to justify allowance of more lenient arsenic emissions limits discussed above.

Third, DEQ erroneously defined the mine's "operational boundary" to encompass the Stibnite Road Access Route. DEQ should have instead classified the Stibnite Road Access Route area as "ambient air," because this is where members of the public will be traveling and experience the Project's air pollution. Under the Clean Air Act and Idaho's Air Rules, "ambient air" includes any outdoor portion of the atmosphere to which the public has access. Air quality standards—including the health-based standards for arsenic and particulate matter discussed above—must be met in all ambient air. By contrast, Perpetua would not be required to meet quality standards for air within the operational boundary.

A major public issue during the many permitting processes for the Project was the public's ability to continue accessing popular areas of public land, including areas located beyond the mine site that are reached only by passing through it on the Stibnite Road Access Route. The U.S. Forest Service thus issued its Project approvals with specific assurance of continued public access through the mine area along the Stibnite Road Access Route. Perpetua has also repeatedly promised to allow such continued public access through the mine site. Yet DEQ's classification of the Stibnite Road Access Route within the mine's operational boundary, rather than as ambient air, was based on the false premise that the public would *not* have access to the area. As a result, DEQ failed to ensure that members of the public who use the Stibnite Road Access Route will encounter safe pollution levels required of ambient air.

Fourth and finally, each of the above issues was compounded by DEQ's unlawful approach of punting material elements of the Permit to be decided by Perpetua in the future. This deferral of substantive permitting components violates the Clean Air Act and Idaho's Air Rules by evading requirements for legally enforceable standards and shielding the plans from required public scrutiny and comment.

Because DEQ acted arbitrarily, capriciously, without substantial evidence, without following required procedure, and/or contrary to law, for the reasons elaborated further below, this Court must vacate the Permit and remand the process to DEQ.

THE CLEAN AIR ACT AND IDAHO AIR RULES

The federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, was passed to "protect and enhance the quality of the Nation's air resources" by prescribing national ambient air quality standards ("NAAQS"), which state and regional authorities must maintain or make progress toward. To achieve the Clean Air Act's goals, Congress directed the EPA to establish primary and secondary NAAQS for any pollutant "reasonably . . . anticipated to endanger public health or welfare" and to periodically review and revise those standards. *Id.* §§ 7408(a)(1)(A), 7409(a)(1), (d).

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

845 F.2d 1088, 1090 (D.C. Cir. 1988).

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

EPA regulations require each State Implementation Plan to "set forth legally enforceable procedures" that enable the State to determine whether the construction of a facility will result in a violation of its air pollution control strategies or interfere with attaining or maintaining the NAAQS. 40 C.F.R. § 51.160(a). These legally enforceable procedures must include means by which the State will prevent construction if the facility will violate air pollution control strategies or interfere with attaining or maintaining the NAAQS, and they must provide for the applicant to submit information on the "location, design, construction, and operation of such facility . . . as may be necessary" to permit the State to "to make the determination" that the facility will comply with its air pollution control strategies and the NAAQS. *Id.* § 51.160(b)–(c). "The legally enforceable procedures in § 51.160(b) must also require" the State to provide opportunity for public comment on information submitted by the applicant and on the State's analysis of the effects on ambient air quality. *Id.* § 51.161(a).

EPA delegated to DEQ authority to issue air quality permits in Idaho pursuant to Idaho's State Implementation Plan: the Rules for the Control of Air Pollution in Idaho, at IDAPA 58.01.01 ("Air Rules").[1] Prior to facility construction, the owner or operator must obtain a permit

[1] All citations herein to subsections of IDAPA 58.01.01 are provided using the shorthand "Air Rules" (e.g., "IDAPA 58.01.01.202.03" will be cited as "Air Rules § 202.03").

to construct ("permit") from DEQ, which satisfies applicable Air Rules requirements. Air Rules § 201.

A permit application shall "be accompanied by all information necessary to perform any analysis or make any determination required under Sections 200 through 227." Air Rules § 202. The applicant must provide the following required information: "Site information, plans, descriptions, specifications, and drawings showing the design of the stationary source, facility, or modification, the nature and amount of emissions (including secondary emissions), and the manner in which it will be operated and controlled." Air Rules § 202.01.a.i. Additionally, "[a]ny additional information, plans, specifications, evidence or documents that the Department may require to make the determinations required under Sections 200 through 225 shall be furnished upon request." Air Rules § 202.03.

Among other determinations, DEQ cannot issue a permit unless it determines that the facility: (1) "would comply with all applicable federal emissions standards;" (2) "would not cause or significantly contribute to a violation of any ambient air quality standards" (i.e., the NAAQS); and (3) "emissions of toxic air pollutants . . . would not injure or unreasonably affect human or animal life or vegetation as required by Section 161." Air Rules § 203. When making these determinations, DEQ must consider the source's "potential to emit," which is defined as:

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

Air Rules § 006.36.

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

STATEMENT OF FACTS

THE STIBNITE GOLD PROJECT

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

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

The Permit that DEQ issued on June 17, 2022 (REC 0367–409) was the first of dozens of permits required from various local, state, and federal agencies for the proposed mine.

OVERVIEW OF PERPETUA'S APPLICATION AND DEQ'S APPROVAL

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

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

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

DEQ revised the February 2021 draft Permit and released it for public comment on January 13, 2022. *Id.* Comments were submitted by the EPA, Petitioners ICL and SSFS, and others. *See* REC 0915–0982. Commenters raised numerous concerns and urged DEQ to gather

additional information, to perform additional modeling and analysis, and to develop additional enforceable permit conditions and limits prior to issuing a final Permit. *See id.* DEQ rejected most of the issues raised by the commenters. *See id.* And on June 17, 2022, DEQ issued the final Permit (REC 0367–409) along with the Statement of Basis (REC 0410–0914) and Response to Comments (REC 0915–1000).

ARSENIC EMISSIONS FROM THE PROJECT

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

DEQ cannot approve a Permit unless the agency determines that the applicant has shown, "[u]sing the methods provided in Section 210" of the Air Rules, that "the emissions of toxic air pollutants from the . . . source . . . would not injure or unreasonably affect human health or animal life or vegetation as required by Section 161." Air Rules § 203.03. Section 161 of the Air Rules states that "[a]ny contaminant that is by its nature toxic to human or animal life or vegetation must not be emitted in such quantities or concentrations as to alone, or in combination with other contaminants, injure or unreasonably affect human or animal life or vegetation." Air Rules § 161. For carcinogenic toxic air pollutants like arsenic, the Air Rules set an Acceptable Ambient Concentration of Carcinogens ("AACC"), where each AACC is an annual average in micrograms per cubic meter ($\mu g/m^3$). Air Rules § 586. To demonstrate compliance with these

toxic air pollutant rules, ambient impacts must be less than the AACC. Air Rule § 203; *see also* REC 0836.

Because of the Project's high arsenic emissions, Perpetua used what DEQ described in its Statement of Basis as "a highly refined [toxic air pollutant] analysis approach to demonstrate compliance with applicable [toxic air pollutant] increments." REC 0698. As one part of this approach, DEQ allowed Perpetua to use a demonstration of reasonable available control technologies (called "T-RACT") to grant an increase in the allowed concentration of arsenic caused by the Project. The Air Rules provide that if this demonstration of control technologies does not sufficiently reduce toxic emissions to below the AACC, then the permit applicant is allowed a 10-fold increase in the AACC and can employ production limitations to ensure compliance with the now increased AACC. *See* Air Rules § 210.12.b. Perpetua submitted to DEQ such a "T-RACT demonstration." *See* REC 0909–914 (SOB, App'x G, T-RACT Analysis).

As another part of this "highly refined" approach, DEQ allowed what it called an "AACC adjustment for the Operational Life of the Mine." REC 0698. DEQ also referred to this as a "project-specific adjustment factor." REC 1243–45. Under this approach, instead of comparing the highest annual average ambient arsenic concentration during the Project lifetime to the T-RACT adjusted AACC (which is also an annual average), DEQ stretched out and diluted the arsenic concentrations from the 16-year Project lifetime over a longer 70-year hypothetical human lifespan. *See* REC 0710 (here, the 16/70 adjustment is referred to as a "lifetime exposure adjustment"). Multiplying the modeled annual arsenic concentration during the Project by 16 and dividing by 70, as DEQ did, dilutes the arsenic concentration to only 23% of its actual value. During permitting, DEQ staff noted that this approach had never been used before and raised concerns about whether it was permissible under the Air Rules. *See* REC 1183–190;

REC 1191–96.

During public comment, Petitioners questioned DEQ's novel tactic for diluting the apparent arsenic exposure by 16/70 and warned that without this, the Project would exceed the arsenic AACC, even with the T-RACT adjustment. REC 0962, 0971, 0975. Petitioners also warned that DEQ failed to assess the environmental impacts caused by the control technology, including by applying large amounts of magnesium chloride to roads to control dust, which can accumulate over time to toxic concentrations in trees and soils and can impact water. REC 0962; REC 0978.

In the end, DEQ approved Perpetua's application as compliant with the arsenic AACC, through a combination of accepting the T-RACT demonstration, providing the 10-fold increase in allowable arsenic pollution, *and* using the creative new "project-specific adjustment" to dilute the apparent arsenic exposure to just 16/70 (or 23%) of its modeled value. *See* REC 0698.

PM_{10} EMISSIONS FROM THE PROJECT

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

DEQ found that the Project has the potential to emit 986 tons per year of PM_{10} from a variety of controlled fugitive sources, plus 55.7 additional tons per year of PM_{10} from a variety of controlled point sources. REC 0430 (Table 3). The generation of dust from ore haul trucks

traveling along haul roads is the most significant source, representing approximately 72% of all fugitive PM_{10} emissions, and 68% of all modeled PM_{10} emissions. *See id.* The next most significant sources of PM_{10} are from drilling and blasting activities, which together account for an estimated 21% of all fugitive PM_{10} emissions (20% of all emissions). *See id.*

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

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

During public comment, Petitioners, EPA, and other commenters warned that DEQ unreasonably assumed PM_{10} emissions would be this low. REC 0921–25. Specifically, Petitioners and EPA commented that DEQ unreasonably assumed Perpetua would be able to control 93.3% of dust it would otherwise emit on haul roads, and pointed out that DEQ's

assumptions relied on the yet-to-be determined details of numerous future plans that have not yet been developed by Perpetua, submitted to DEQ, or included as conditions of the Permit. *Id.*

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

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

AMBIENT AIR BOUNDARY AND THE STIBITE ROAD ACCESS ROUTE

The Clean Air Act and Idaho Air Rules require Perpetua to meet various air standards, including the PM_{10} NAAQS and arsenic AACCs discussed above, where there is "ambient air." *See*, *e.g.*, Air Rules §§ 006.11 (NAAQS), 006.125 (toxic air pollutants). EPA's regulations define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50.1(e).

DEQ defined an operations boundary for the Project. REC 0415 (Figure 1, shown on the next page).

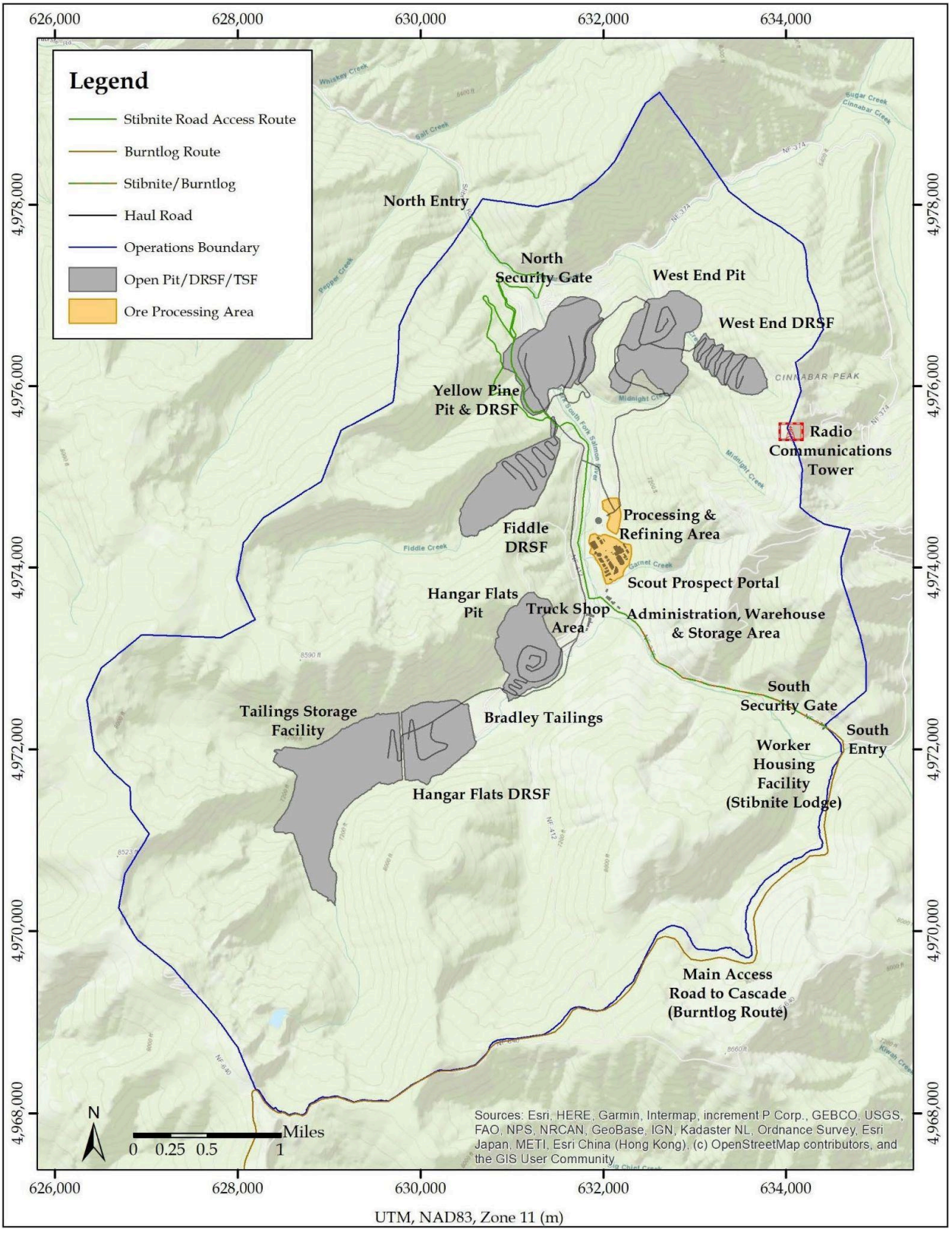
//

//

//

//

Figure 1 PROJECT AREA OF OPERATIONS



Outside of the operations boundary is considered ambient air, where air quality standards must be met. By contrast, within the operations boundary is not considered ambient air and, therefore, air quality standards need not be met there.

The Stibnite Road Access Route ("Route") is a road that passes through what Perpetua and DEQ have defined as the mine's operations boundary. REC 0415 (map). However, during mine operations, as explained by DEQ, Perpetua "will manage [this] access route to provide the general public with limited access through the [Project] site between Stibnite Road at Sugar Creek and Thunder Mountain Road at Meadow Creek." REC 0676.

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

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

PROCEDURAL BACKGROUND

On June 17, 2022, DEQ issued a Permit to Construct ("Permit") P-2019.0047, which is the Permit at issue in this case. *See* REC 0367–0409 (Permit). On July 22, 2022, Petitioners timely filed the original Petition to Initiate Contested Case, challenging DEQ's permit at the administrative level. REC 0001. Perpetua intervened in the contested case. *See* REC 0044.

In 2023 and 2024, Petitioners briefed their contested case before an administrative Hearing Officer and on appeal from that Hearing Officer to the Board.

In a series of orders in 2024, the Board ruled for DEQ on several issues and ruled in Petitioners' favor on arsenic-related issues. The Board concluded that the Air Rules do not allow the 16/70 project-specific adjustment factor and that DEQ had not sufficiently shown that this 16/70 approach was protective of human health. REC 3715–17. The Board also found that DEQ did not act reasonably in using a five-year rolling average and in limiting mine production with respect to arsenic. REC 3712–14. The Board remanded to the Hearing Officer for factual development on these arsenic issues.

Following proceedings on remand, on January 7, 2025, the Hearing Officer issued a new order in DEQ's favor on the arsenic issues. *See* REC 7091. Petitioners again elevated the Hearing Officer's order to the Board, arguing that regardless of whether DEQ or Perpetua could present evidence about health risks under the novel approach, the Air Rules do not allow the 16/70 project-specific adjustment factor. REC 7054–57, 7126–30. On May 27, 2025, the Board issued a final order in DEQ's favor, REC 7358, and a month later an order denying SSFS's Motion for Reconsideration Based on New Evidence. REC 7568.

The present Petition for Review, filed in this Court on July 23, 2025, challenges DEQ's Permit and the Board's decisions from the administrative contested case. After this Court denied DEQ's and the Board's motion to dismiss, Petitioners filed and served an amended petition at the Court's direction, naming Perpetua as a Respondent and achieving service in a specified manner. The parties stipulated to dismiss the Board from the action and stipulated to the briefing schedule according to which this Opening Brief is presented.

//

APPLICABLE LEGAL STANDARDS

Under the Idaho Administrative Procedure Act ("APA"), an agency action like DEQ issuing the Permit will be overturned where its findings, inferences, conclusions, or decisions are: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." Idaho Code ("I.C."). § 67-5279(3); *see 917 Lusk v. City of Boise*, 158 Idaho 12, 14 (2015). "An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles." *Am. Lung Ass'n of Idaho/Nev. v. Idaho State Dep't of Agric.*, 142 Idaho 544, 547 (2006) (citations omitted).

The Court reviews an agency decision based upon the record created before the agency. I.C. § 67–5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1).

ARGUMENT

I. PETITIONERS HAVE STANDING.

"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, 181 (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." *Id.* at 180–81.

Petitioners ICL and SSFS each have standing to challenge DEQ's issuance of the Permit. The Permit authorizes 16 years of air pollution, including PM_{10} and arsenic, from the Project. Eliminating, minimizing, or reducing air pollution is germane to each Petitioners' purpose, and air pollution in the Project area, both within and outside of the Permit's operational boundary, directly harms their members' health, recreational, environmental, aesthetic, economic, and other interests, as shown in the standing declarations filed herewith.

ICL submits standing declarations from its member and former staffperson Jonathan Oppenheimer, member and board member Allison Fowle, and member and current staff person Will Tiedemann. Founded in 1973, ICL is Idaho's largest state-based conservation organization, and 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. Tiedemann Decl. ¶¶ 4–8. SSFS submits standing declarations from its Board members Mary Faurot Petterson and member Zac Sears. Founded in 2019, SSFS has over 500 members and supporters in Valley County and throughout Idaho. Faurot Petterson Decl. ¶¶ 3, 7-9. SSFS's mission is dedicated to protecting and preserving the natural and economic resources of the South Fork Salmon River watershed, and SSFS has been engaged in advocacy, public education, and litigation regarding the Stibnite Gold Project. *Id.* ¶¶ 4. The Project is currently the largest threat to the South Fork Salmon River watershed, an area that

SSFS's members and supporters use on a routine basis for recreation, scientific study, aesthetic enjoyment, and for their livelihoods. *Id.* ¶¶ 5-10.

Mr. Oppenheimer's declaration references an EPA study in the record (REC 2401–89) which found there is a no-threshold relationship between PM exposure and several adverse health effects, meaning any increase in PM can have negative health effects. Oppenheimer Decl. ¶ 13. He also references a study in the record titled "Health Effects Associated with Inhalation of Airborne Arsenic Arising from Mining Operations" (REC 2490–538), which links the inhalation of arsenic-bearing dusts to increased arsenic uptake in humans and adverse carcinogenic and non-carcinogenic health outcomes. Oppenheimer Decl. 15.

ICL's and SSFS's declarants have regularly visited the South Fork Salmon River watershed, including the East Fork of the South Fork Salmon River and the Stibnite Road through the mine site, as well as other parts of the Project area in and near the Permit's operation boundary, and they intend to continue doing so. Oppenheimer Decl. ¶¶ 4–11; Fowle Decl. ¶¶ 3–9, 12–13; Tiedemann Decl. ¶¶ 9–19; Sears Decl. ¶¶ 6-11. Because of the Project's dust and arsenic emissions, the 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 places. Oppenheimer Decl. ¶¶ 13–18; Fowle Decl. ¶¶ 10–11, 14; Tiedemann Decl. ¶¶ 21–25; Sears Decl. ¶¶ 15-21. SSFS member Zak Sears also works as a river and fishing guide in the area, and is concerned about the health impacts to his clients and the impact it will have on his business, which is a significant source of income. Sears Decl. ¶¶ 5, 16, 18.

In the underlying contested case, the Hearing Officer rejected DEQ's and Perpetua's arguments that ICL and SSFS lacked standing. REC 3286–90. The Hearing Officer found that the declarations submitted by members of each organization showed that these individuals'

concerns over health effects from particulate and arsenic pollution are sufficiently concrete and particularized, are causally connected to DEQ's issuance of the Permit allowing such pollution emissions, and that there is a likelihood that these health concerns will be addressed by a decision in favor of Petitioners. REC 3287–88 (ICL); REC 3289–90 (SSFS). Petitioners continue to have standing here.

II. DEQ'S INVENTION OF A "PROJECT-SPECIFIC ADJUSTMENT FACTOR" TO ARTIFICIALLY DILUTE ARSENIC LEVELS VIOLATES THE AIR RULES.

A. The Air Rules Do Not Allow the 16/70 Adjustment.

The Air Rules' requirements for controlling the emission of toxic air pollutants, including arsenic, begin with Section 161's overarching policy or qualitative standard that provides:

> Any contaminant that is by its nature toxic to human or animal life or vegetation must not be emitted in such quantities or concentrations as to alone, or in combination with other contaminants, injure or unreasonably affect human or animal life or vegetation.

To satisfy this qualitative standard, Section 203 of the Air Rules requires that, to obtain a permit to construct, an applicant must demonstrate:

> Using the methods provided in Section 210, the emissions of toxic air pollutants from the stationary source or modification would not injure or unreasonably affect human or animal life or vegetation as required by Section 161. Compliance with all applicable toxic air pollutant carcinogenic increments and toxic air pollutant non- carcinogenic increments demonstrates preconstruction compliance with Section 161 with regards to the pollutants listed in Sections 585 and 586.

Air Rules § 203.03 (emphasis added). Thus, if a toxic air pollutant is listed in Section 585 or 586, it must be evaluated "using the methods provided in Section 210."

Section 586 of the Air Rules consists of a table that lists each carcinogenic toxic air pollutant that is covered by the rules, including arsenic. Section 586 includes the "acceptable ambient concentrations for carcinogens" ("AACC") for each toxic carcinogenic pollutant listed. The AACC for arsenic is 2.3E-04 $\mu g/m^3$. The AACC is the carcinogen concentration in air at

which daily exposure would limit the risk of cancer to 1 in 1 million over a lifetime, with a lifetime identified as 70 years. The AACCs listed in the table in Section 586 are based on "annual averages." Air Rules § 586.

Section 210.01 provides that the applicant must first identify what toxic air pollutants will be emitted by the project. Then the applicant must use "standard scientific and engineering principles and practices to estimate the emission rate" of the pollutant. Air Rules § 210.02.a. If any of those toxic emission rates exceed screening levels in Section 586, then the applicant must continue with further analysis under Section 210.

The applicant must then use "the modeling methods provided in Subsection 202.02 to estimate the ambient concentrations at specified receptor sites for any toxic air pollutant emitted from the point(s) of emission." Air Rules § 210.03.a. The "point of compliance is the receptor site that is estimated to have the highest ambient concentration of the toxic air pollutant of all the receptor sites . . . ." Air Rules § 210.03.b. Preconstruction compliance for toxic pollutants can be demonstrated using any of the methods "described in Subsection 210.05 through 210.08 and may use any applicable specialized method described in Subsection 210.09 through 210.12." Air Rules § 210.04.

Applicable here are the compliance methods described in Section 210.12, which provides for the use of "T-RACT" to demonstrate preconstruction compliance for toxic pollutants listed in Section 586. T-RACT stands for "Toxic Air Pollutant Reasonably Available Control Technology" and "is an emission standard based on the lowest emission of toxic air pollutants that a particular source is capable of meeting by the application of control technology that is reasonably available, as determined by the Department, considering technological and economic feasibility." Air Rules § 210. The applicant must first get approval from DEQ to proceed under

the T-RACT provisions before it can be used in the modeling. If T-RACT is used, it allows for a comparison of:

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

Air Rules § 210.12.b (emphasis added). Thus, if the source's approved T-RACT ambient concentration meets the AACC listed in Section 586 times 10, then "no further procedures for demonstrating preconstruction compliance will be required for that toxic air pollutant as part of the application process." Air Rules § 210.12.c. DEQ must then include appropriate conditions in the permit to ensure that the T-RACT is implemented so that the 10-times ambient concentrations can be met. Air Rules § 210.12.d.

Section 210 provides one further analysis that has bearing here: "short term" projects "may utilize a short-term adjustment factor of ten (10)." Air Rules § 210.15. "For a carcinogen, multiply either the applicable acceptable ambient concentration (AACC) or the screening emission rate, but not both, by ten (10), to demonstrate preconstruction compliance." *Id.* "Short Term Source" is defined as any new stationary source "with an operational life no greater than five (5) years from the inception of any operations to the cessation of actual operations." Air Rules § 007.08. Thus, short term sources are also allowed 10 times the AACC, which would represent a 1 in 100,000 cancer risk, as long as the operational source life is no greater than five (5) years.

For the Project here, neither the AACC arsenic limit of 0.00023 $\mu g/m^3$, nor the 10-fold higher T-RACT arsenic limit of 0.0023 $\mu g/m^3$, could be met. *See* REC 3710–12. Thus, DEQ first adjusted the Project's calculated arsenic emissions by (1) decreasing maximum potential annual

mine production from 180,000 tons of material per day ("T/day") to 135,000 T/day based on a five-year rolling average limit; and (2) decreasing maximum potential annual production from the West End Pit by applying a 50% annual limit. *See id.* Even then, the Project's highest annual average arsenic concentration of 0.00416 μg/m^3 exceeded the T-RACT limit of 0.0023 μg/m^3.[2] Next, Perpetua and DEQ came up with and applied the novel 16/70 Project-specific adjustment to the calculated arsenic concentrations: multiplying the calculated highest annual average arsenic concentration of 0.00416 μg/m^3 by 16 and dividing by 70. *See* REC 1243–44; REC 0698–706. This 16/70 adjustment reduced the supposed arsenic concentration from 0.00416 μg/m^3 (which *exceeds* the T-RACT arsenic limit) down to 0.00095 μg/m^3 (which is below the T-RACT arsenic limit).

In its May 2024 Order, the Board held that DEQ did not act reasonably and in accordance with law when it applied the 16/70 adjustment factor. REC 3715. There, the Board correctly concluded that the 16/70 Project-specific adjustment factor DEQ used here is "nowhere" found in the Air Rules.

[2] This value of 0.00416 μg/m^3 can be found by undoing the 16/70 adjustment performed in the Statement of Basis. Applying the novel "lifetime exposure adjustment" to dilute the Project's annual arsenic concentration by 16/70, DEQ calculated a lifetime concentration of 0.00095 μg/m^3 of arsenic. REC 0714 (Table 6); *see also* REC 0710. This value is less than the T-RACT adjusted arsenic AACC of 0.0023 μg/m^3 (*see* Air Rules Section 586). DEQ's dilution can be removed by multiplying 0.00095 μg/m^3 by 70 and then dividing by 16, which results in an *annual* arsenic concentration during the Project of 0.00416 μg/m^3. DEQ's expert also found this 0.00416 μg/m^3 to be "the maximum modeled annual concentration" of arsenic during the Project. REC 3876. So too did Perpetua. *See* REC 7037. This value, which represents the annual arsenic exposure modeled to occur during the 16 years of the Project, is *181%* of the T-RACT adjusted arsenic AACC and thus would not meet Section 210.12.a requirement that a "source's . . . approved T-RACT ambient concentration at the point of compliance" be "less than or equal to the amount" "which is equivalent to ten (10) times the [AACC] listed in Section 586." Air Rules §§ 210.12.b, c.

The Board explained as follows:

> The Air Rules clearly provide an [acceptable ambient concentration ("AACC")] standard in Section 586. They then clearly provide an adjustment to that AACC standard when T-RACT can be used to control emissions. IDAPA 58.01.01.210.12.b. The Air Rules also clearly allow for a 10-times adjustment to the AACC when a project is going to operate for 5 years or less. IDAPA 58.01.01.210.15. But nowhere in the Air Rules does it provide that a project that will operate more than 5 years but less than 70 years may be adjusted in proportion to the amount of time it will operate.

Id. (emphasis added).

This should have been the end of the story on the 16/70 Project-specific adjustment factor issue; because it is not one of the methods in Section 210 for determining toxic air pollutant compliance, it violates the Air Rules, and cannot be used by DEQ. Yet, the Board remanded to the Hearing Officer "for the development of further evidence regarding ambient air concentrations of arsenic that will be produced by the [Project] and whether those levels comply with the Air Rules." REC 3717. After remand, the Board concluded that using the 16/70 approach "was reasonable and complied with the directive in Rule 161 that arsenic 'not be emitted in such quantities or concentrations as to alone, or in combination with other contaminants, injure or unreasonably affect human or animal life or vegetation.'" REC 7367. The Board also held that "[i]t was within DEQ's discretion to use the EPA methodology to effectuate the T-RACT limits." REC 7371.

Yet the Board failed to explain how using Section 161 and using EPA methodology for assessing cancer risk somehow comports with the Air Rules' directive to use the "methods in Section 210" to demonstrate toxic air pollutant compliance. *See* Air Rules § 203.03. It does not. Nothing in Section 210 provides for these methods that the Board relied on to uphold DEQ's use of the 16/70 adjustment.

Neither DEQ nor the Board are free to disregard the plain language of the Air Rules, even if they have a supposed rationale for doing so. Agency rules (like the Air Rules) have the full force and effect of law. *See Mead v. Arnell*, 117 Idaho 660, 664–65 (1990). As the Idaho Supreme Court has explained: "We must follow the law as written. If it is socially or economically unsound, the power to correct it is legislative, not judicial." *Herndon v. West*, 87 Idaho 335, 339 (1964). And to the extent that DEQ and the Board purport to interpret the Air Rules as allowing for the 16/70 adjustment, they run afoul of well-established canons of interpretation. "Regulations, like statutes, are interpreted according to canons of construction." *Black & Decker Corp. v. C.I.R.*, 986 F.2d 60, 65 (4th Cir. 1993); *see also United States v. Korotkiy*, 118 F.4th 1202, 1209-10 (9th Cir. 2024).

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

Here, several provisions of the Air Rules detail with *specificity* how to determine toxic air pollutant compliance. Section 203.03 requires "no permit to construct shall be granted"

unless DEQ determines that the applicant has shown: "Using the methods provided in Section 210, the emissions of toxic air pollutants from the . . . source . . . would not injure or unreasonably affect human health or animal life or vegetation as required by Section 161." (emphasis added). To protect human health, Section 586 sets a numeric arsenic AACC limit at an annual average of 0.00023 $\mu g/m^3$. Section 210 includes two explicit exceptions to meeting the AACC: (1) Section 210.12 allows a 10-fold higher AACC where the applicant makes a T-RACT demonstration (as Perpetua did here); and (2) Section 210.15 allows a 10-fold higher AACC where a project is a short-term 5 years or less source (which the Project is not, since it is for 16 years). These specific, numerical provisions for demonstrating toxic air pollutant compliance cannot be disregarded by DEQ to fall back on a more general, qualitative standard in Air Rule Section 161, which provides that a toxic air pollutant "shall not be emitted in such quantities or concentrations as to alone, or in combination with other contaminants, injure or unreasonably affect human or animal life or vegetation." DEQ must follow Section 210.

Nor can the explicit AACC annual average value listed in Section 586 be ignored by reverse-engineering cancer risk calculations, as DEQ and Perpetua now say they are doing. This method is nowhere found in the "methods in Section 210" and has never been used by DEQ before. As Kevin Schilling, a longtime air modeling supervisor at DEQ, explained: the 16/70 adjustment is "a complete change in the regulatory approach used to demonstrate compliance with toxics," and it "abandons the Section 210 approach." REC 1194 (emphasis added). Section 210 sets forth clear and straightforward methods for checking a source's annual arsenic concentration against the annual arsenic value listed in Section 586, or to 10 times that value for eligible T-RACT and short-term sources.

Instead of using these methods in Section 210, DEQ abandoned this approach and made up a new method that does *not* use the highest modeled annual arsenic concentration, but instead averages and spreads out 16 years of that concentration over an artificial 70-year period, and compares that diluted value to the T-RACT adjusted AACC. This is a fabrication. DEQ must follow Section 210 and compare the modeled annual average arsenic concentrations from the Project to the T-RACT adjusted AACC listed in Section 586. *See* Air Rules § 210.12. Again, the Project's modeled annual average arsenic concentration is 0.00416 $\mu g/m^3$, which exceeds the T-RACT limit of 0.0023 $\mu g/m^3$.

Another canon of construction requires interpreting regulations to avoid rendering provisions superfluous. "A statute should be construed so that effect is given to all its provisions, so that no part will be rendered superfluous or insignificant." *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 117 (1995). DEQ's approach renders the Air Rules' explicit short-term source adjustment for projects superfluous. Section 210.15 specifically provides that for short-term sources operating for five years or less, such sources are allowed to meet a 10-times higher AACC. The Project's emissions will occur over 16 years. It is therefore not eligible for the Air Rules' explicit short-term source adjustment. Yet if DEQ can adjust AACCs based on project duration, as it has done here, then the short-term adjustment in Section 210.15 would be superfluous. Any source operating for 5, 4, 3, 2, or 1 years would be better off getting a 5/70, 4/70, 3/70, 2/70, or 1/70 project-specific adjustment.

When the Air Rules already include a short-term project adjustment, DEQ cannot simply make up a new and different short-term adjustment, like 16/70, to fit this Project. Doing so essentially amends the Air Rules. But DEQ cannot amend the Air Rules through the process of issuing an individual permit. A rule is void if it was not adopted following the required

processes. *See Asarco Inc. v. State*, 138 Idaho 719, 722–25 (2003) (voiding a water quality limit issued by DEQ because it qualified as a rule and was not promulgated according to the rulemaking requirements of the Idaho APA). Unless and until DEQ goes through the Idaho APA rulemaking process to change the Air Rules, DEQ must follow the rules "as written," and DEQ is not free to make up project-specific rules for Perpetua, as it did here.

In summary, DEQ must follow the methods in Section 210. That section allows an applicant to seek a 10-times larger AACC through T-RACT (a significant leniency, which DEQ granted to Perpetua) and through the five-year-or-less short-term project exception (which indisputably does not apply to this 16-year Project). *Id.* But nothing in Section 210 allows DEQ to make up other grants of leniency, such as by concocting the 16/70 dilution. Because Permit modeling shows that the Project would exceed the T-RACT adjusted AACC value, DEQ should have either denied the Permit or required Perpetua to reduce arsenic emissions. Instead, DEQ created "a project-specific adjustment factor" to dilute the apparent arsenic to a mere 23% of its true, modeled concentration. To accept this approach would be to allow DEQ to impermissibly ignore and rewrite the Air Rules on a permit-by-permit basis. Because the 16/70 adjustment is not allowed by the Air Rules, DEQ's issuance of the Permit using the adjustment is arbitrary, capricious, and contrary to law under I.C. § 67-5279, and it must be set aside and remanded.

B. Allowing the 16/70 Approach Would Set Dangerous Precedent.

Not only does the plain language of the Air Rules foreclose DEQ's approach, but this approach is contrary to the intent of the Air Rules and would create a dangerous precedent by subjecting Idahoans to higher cancer risks than allowed under DEQ's longstanding interpretation of the Air Rules.

Under the Air Rules as written and previously applied by DEQ, a new source must meet the AACC value listed (or 10 times that value for T-RACT sources and short-term sources) each and every year that the new source operates. This protects Idahoans throughout their entire life: it limits their risk of exposure to toxic carcinogen concentrations at or below the AACC value (or for certain facilities, 10 times that value), across the variety of places and times such emissions may be encountered, or no matter what air emission sources might come online where they live, work, and recreate.

Under DEQ's novel approach for this Permit, an Idahoan could instead be exposed to a value higher than the listed AACC value (or 10 times that) from the operation of any given source. For example, during the 16 years the Project emits pollutants, Idahoans could now be exposed to a 0.00416 $\mu g/m^3$ average annual arsenic concentration. As discussed above, this exceeds the T-RACT adjusted AACC for arsenic of 0.0023 μg/m3. Those same Idahoans might have already faced arsenic emissions earlier in their lives or elsewhere, and might be exposed to other arsenic emissions later.

To try to rationalize the 16/70 adjustment, the Board relied on DEQ's and Perpetua's expert reports and testimony, which offered explanations as to why being exposed to 0.00416 $\mu g/m^3$ of arsenic from this 16-year Project poses an acceptable cancer risk over an Idahoan's hypothetical 70-year lifetime. *See* 7363–71. However, those cancer assessments were narrowly limited to the cancer risk caused by being exposed *only* to this Project's arsenic during its 16 years of its operations. *See* REC 3873–916 (Padden Decl.); REC 4277–318 (Lopez Decl.). Those experts never accounted for the *other 56 years* of the person's life, when the person could be exposed to other sources of arsenic. *See id.*

For example, if Perpetua were to expand and extend mining at Stibnite after 16 years, or if another mine were to open in the future nearby, then an Idahoan would be exposed to the Project's permitted arsenic emissions *plus* additional arsenic from the new or expanded mining thereafter. This is a real possibility, as this Project itself includes not just mining, but also mine exploration to identify potential areas of future mine expansion. Faurot Pettersen Decl. ¶ 5, Exhs. 1, 2. Moreover, another company is currently exploring next door. *Id.* 6, Exhs. 3, 4.

Under the Air Rules, DEQ considers new air permits independently and does not address other emissions in the same area or consider whether or where people may have already been exposed to arsenic or other toxic air pollutants. *See generally* Air Rules § 210. This structure in the Air Rules works sufficiently—and as designed—so long as DEQ adheres to it and employs the agency's longstanding practice of ensuring that each new source complies with the AACC limits during *each and every year* of operations. But DEQ's approach to the Permit here abandoned that structure.

DEQ's approach would create dangerous precedent, not limited to this Project. If the 16/70 workaround is allowed here, then it could be used anywhere else in Idaho, creating an untold number of individual exceptions allowing polluters to exceed the annual AACC values (or 10 times those values), so long as they plan to operate for less than 70 years. By contrast, disallowing DEQ's new approach would continue to ensure—by the Air Rules' design—that Idahoans will not encounter exposures at more than the established permitted values through their lifetime of residence, recreation, and other activities throughout the state. This ensures that the cancer risk levels in the Air Rules are achieved, no matter how many sources a person encounters during their life.

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

Under the Air Rules, DEQ cannot issue a Permit unless it determines that the facility "would not cause or significantly contribute to a violation of any ambient air quality standards" (i.e., the NAAQS). Air Rules § 203. A critical factor affecting the Project's fugitive dust emissions—and therefore whether DEQ can make the required determinations under Air Rules Section 203 that the Project will comply with the PM_{10} NAAQS—is the degree to which Perpetua will effectively control dust from haul roads.[3] To issue the Permit, DEQ assumed Perpetua would achieve a 93.3% level of dust control and, thereby, comply with the NAAQS. This assumption was arbitrary and capricious.

There is no dispute that 93.3% is a very high and aggressive level of dust control, and no dispute that achieving 93.3% is critical to meeting the PM_{10} NAAQS. Among other examples in the record, DEQ modeling staff stated "it is critical for NAAQS compliance that this high level of control [(93.3% dust control)] be achieved." REC 0641 (emphasis added); *see also* REC 0921 (EPA saying the same). DEQ modeling staff called this "an aggressive level of control," adding that this "high level of emission control was needed to demonstrate compliance with NAAQS." REC 0691. DEQ recognized that it "may prove challenging to consistently and continuously achieve the targeted level of fugitive dust control." REC 0431. Elsewhere, DEQ admitted that meeting 93.3% was based on an "assumption" that Perpetua would appropriately apply water and magnesium chloride and would require "vigilant inspection and monitoring." REC 0456.

[3] There are other sources of fugitive dust emissions at the facility, including "drilling and blasting activities, crushing and ore handling equipment, ore and rock storage piles, and unpaved roadways." REC 0431. However, fugitive dust emission from unpaved roadways represents a majority of the estimated PM_{10} (and arsenic) emissions from the facility. *See* REC 0430.

The record also shows that if Perpetua fails to achieve this high level of control, even by just a little bit, then it will cause exceedances of the PM_{10} NAAQs. For example, Permit modeling showed that if Perpetua cut its operations by a third (hauling just 120,000 tons of material per day instead of the authorized 180,000 tons per day) yet achieved only 90% dust control, then this slightly lower dust control—even when combined with a major cut in mining activity—would cause exceedances of the PM_{10} NAAQS. REC 0691–92. Thus, again, if Perpetua underperforms just slightly on dust control, it will violate the NAAQS.

Yet the Permit lacks sufficient conditions for DEQ to reasonably assume that 93.3% or higher dust control will be achieved. In upholding the Permit, the Board concluded that the Permit "contains multiple conditions that require Perpetua to take specific steps to achieve 93.3% dust control," pointing to Permit Conditions 2.1 through 2.6. REC 3705–06. The Board also pointed to Table 3.1 in the permit as "specifically stat[ing] that 93.3% dust control is required." REC 3706. The Board was wrong.

First, the Permit does *not* include any explicit condition or limitation to achieve 93.3% dust control. Table 3.1 does not contain any Permit conditions; it merely "contains a description of control equipment used to control emissions from mining and ore processing activities." REC 0384. Similarly, Table 1.1 in the Permit "lists all sources of regulated emissions in this permit" and describes the "Control Equipment" for each regulated emission source. REC 0369. "Excavating and hauling activities" are listed in both tables as an emission source whose "Control Equipment" includes chemical and water sprays with a control efficiency of "93.3%" for haul roads. *Id.* These tables merely list the 93.3% *target or goal* for haul road fugitive dust control when summarizing control equipment for the Project; the tables themselves are not permit conditions, and 93.3% control is not found in any of the actual Permit conditions.

Even if these references to 93.3% dust control in the tables were some kind of permit limit or condition, they are not enforceable. Perpetua is not required to prove, by testing or monitoring, the percent dust control it achieves once operations are underway. Perpetua is not required to monitor ambient air to ensure the Project complies with the NAAQS. Under the terms of the Permit, there is no way DEQ would ever know whether Perpetua actually achieves 93.3% dust control, or whether it violates the NAAQS. And there is, thus, no way for DEQ to try to enforce any supposed 93.3% limit, and no reasonable basis for DEQ to conclude that the Project will achieve 93.3% control and comply with the NAAQS.

Second, the Board was wrong about Permit Conditions 2.1 through 2.6. It is true that those conditions require Perpetua to take various steps related to controlling dust, and that following those steps will likely help control dust. *See* REC 0374–76. But nothing in Conditions 2.1 through 2.6 does anything to ensure Perpetua will specifically achieve a 93.3% or higher level of dust control. *See id.* Rather, Conditions 2.1 through 2.6 generally require Perpetua to develop various plans, require it to follow a variety of best practices, and require corresponding monitoring of Perpetua's practices to ensure that those plans and practices are indeed followed. *See id.* But again, nothing in these or any other Permit conditions requires or ensures achieving specifically 93.3% or greater dust control. And even though these conditions require some monitoring and reporting, none of these monitoring and reporting requirements include monitoring or testing the level of dust control achieved to ensure it is at least 93.3%, and none of these include monitoring PM_{10} concentrations to ensure the NAAQS are met once the Project is underway.

Under the Air Rules, DEQ has authority under Section 211 to require any reasonable conditions in the Permit, and authority under Section 211.01(d) specifically to require ambient

air boundary monitoring. Had DEQ exercised either or both of these authorities here to require dust control testing or monitoring, or to require ambient air boundary monitoring, then it might be able to ensure the "high" and "aggressive" 93.3% will be achieved. But DEQ did not do so.

This is particularly concerning since DEQ deferred many important dust control measures to be developed later by Perpetua in the Fugitive Dust Control Plan. Permit Condition 2.6 requires Perpetua to develop a Fugitive Dust Control Plan, which will become an enforceable part of the Permit, with a "list of all potential sources of fugitive dust emissions and the following reasonable precautions to minimize fugitive dust emissions." REC 0375. But Permit Condition 2.6 does not set out those "reasonable precautions" such as requirements for the frequency or quantity of sprays and other important variables that EPA (an expert) said is important.[4] Instead, Condition 2.6 directs Perpetua to "[d]evelop specific criteria to determine what frequency and type (water and/or chemical) of dust suppressant must be applied, and appropriate suppressant application rates." REC 0376. This vague direction for Perpetua to develop "criteria to determine" spray frequency, rates, and types in no way assures that the criteria Perpetua decides on will actually achieve its ambitious 93.3% control efficiency—or anywhere close to it. This is especially so since the Fugitive Dust Control Plan will be developed by Perpetua and submitted to DEQ for approval 30 days prior to startup, without public comment. *See supra* Part V.

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

[4] EPA guidance identifies the following factors bearing on the effectiveness of chemical dust suppressants: (a) the dilution rate used in the mixture; (b) the application rate (volume of solution per unit road surface area); (c) the time between applications; (d) the size, speed, and amount of traffic during the period between applications; and (e) meteorological conditions (rainfall, freeze/thaw cycles, etc.) during the period. REC 1163–82.

32 haul trucks weighting between 37 and 357 tons, and a targeted dust control efficiency of 93.3% accomplished by application of both dust suppressant and water controls." REC 0430. Later in its Statement of Basis, DEQ admitted that meeting 93.3% was based on "assuming" that Perpetua would appropriately apply water and magnesium chloride, that "vigilant inspection and monitoring" would be required, and that additional measures beyond those actually required by the Permit would be necessary in the Fugitive Dust Control Plan. *See* REC 0456.

In summary, whatever value Permit Conditions 2.1 through 2.6 may provide, nothing in these terms and conditions (nor any others in the Permit) supplies any reasonable basis for assuming the Project will achieve 93.3% (or greater) dust control. Again, even at 90% dust control, the Project would violate the NAAQS. DEQ staff may be able to apply technical expertise regarding how permit conditions may adequately ensure a high level of dust control. But here, DEQ demonstrated no sufficient technical or substantive basis for finding that Perpetua will achieve a whopping 93.3% dust control required to meet the NAAQS. Instead, DEQ's decision-making on dust control was entirely speculative and untethered from any enforceable conditions or monitoring in the Permit.

Thus, the Court should set aside and remand the Permit and order DEQ to impose enforceable monitoring and/or testing to ensure 93.3% control is achieved, or otherwise limit or alter Permit conditions so that emissions will comply with the PM_{10} NAAQS.

IV. DEQ'S REFUSAL TO AFFORD AMBIENT AIR PROTECTIONS ALONG THE STIBNITE ROAD ACCESS ROUTE WAS UNLAWFUL.

Health-based limits on pollution, such as the NAAQS and arsenic AACC, form the foundation of the Clean Air Act and the Air Rules, and these pollution limits must be met in "ambient air." *See*, *e.g.*, Air Rules §§ 006.11, 006.125. By contrast, in areas excluded from ambient air, a facility does not have to demonstrate compliance with the NAAQS or arsenic

AACC. Both EPA and DEQ define "ambient air" as "that portion of the atmosphere . . . to which the general public has access." 40 C.F.R. § 50.19(c); Air Rules § 006.10.

"The essence of the EPA's regulatory definition links ambient air to public access." *Resisting Envtl. Destruction on Indigenous Lands (REDOIL) v. U.S. EPA*, 716 F.3d 1155, 1165 (9th Cir. 2013); *see also Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 65 (1975) (ambient air "is the statute's term for the outdoor air used by the general public"). EPA's long-standing policy, therefore, has been to exempt from ambient air only "the atmosphere over land owned or controlled by the source and to which public access is precluded." REC 1138. EPA's policy further explains:

> [T]he EPA's policy allowing exclusion of some areas external to buildings is not based on language in the regulatory definition mandating exclusion or providing particular criteria for such an exclusion, but rather, is inferred as the inverse of what is affirmatively covered by that definition (*i.e.*, if "ambient air" is defined as that to which the general public has access, then that to which the general public does not have access is not ambient air. . . .) The EPA continues to view the "general public" to include any person(s) other than those who are permitted access to the property as employees or business invitees of a specific stationary source (including trespassers).

REC 1145.

Here, DEQ defined the mine's 14,000+-acre operations boundary as the ambient air boundary. *See supra* at 14 (citing REC 0415). Thus, during permitting, DEQ treated only those locations outside of the operations boundary as ambient air which must meet the NAAQS and toxic air pollutant limits. By contrast, DEQ treated the air inside the operations boundary as not required to meet the NAAQS or toxic air pollutant limits.

Currently, the Stibnite Road is used by the public to access public lands beyond the proposed mine site. The proposed Stibnite Road Access Route ("Route") will be a public access

road that passes through the mine site.[5] REC 0676. The proposed Route "was designed to be separated from mine operations" and will be constructed so as "to provide controlled through-site access that is safe, provides travel-time comparable to current conditions and is consistent with the United States Forest service travel management plan." REC 0676; REC 0895. And during operations, aside from intermittent, temporary closures for safety, Perpetua will continue to allow the public to use the Route. REC 0676-77; *see also* REC 7554. Yet DEQ included the Route *inside* the operations boundary and thus excluded it from ambient air protections. *See supra* at 14 (citing REC 0415); REC 0676 ("Receptors on the Stibnite road access route were not included in the [Project] air quality analyses as this road is not considered ambient air."). The Permit is thus inconsistent with the Clean Air Act and Air Rules and should be vacated and remanded back to DEQ.

A. Perpetua Does Not Have Legal Power to Exclude the Public from the Route.

Again, both EPA and DEQ define "ambient air" as "that portion of the atmosphere . . . to which the general public has access." 40 C.F.R. § 50.19(c); Air Rules § 006.10. According to EPA policy, an area can only be excluded from ambient air protections when the land meets two conditions: (1) the owner or operator has the "the [legal] power to exclude the general public," and (2) physical barriers effectively preclude public access. REC 1141. DEQ's guidance is similar to EPA's policy in that it "assume[s] that the air within the facility boundaries is ambient air unless the facility can demonstrate that public access is precluded." REC 1109. "The

[5] The proposed Stibnite Road Access Route is a public access road traversing the Project site and linking the west side of the Payette National Forest, through Yellow Pine, to important recreational areas. The importance of maintaining public access was highlighted in public comments received through the National Environmental Policy Act ("NEPA") process for the Project, "particularly for those in the Johnson Creek and Yellow Pine area who use Stibnite Road to access Thunder Mountain Road and points beyond." REC 0895. Maintaining access to these important recreational areas "is consistent with the [Forest Service] travel management plan." REC 0896.

facility-proposed ambient air boundary must include justification that demonstrates the facility has reasonable control of the area and effectively precludes public access on a routine basis." *Id.* Here, Perpteua does not have the requisite legal control to exclude the public from using the Route.

At the time DEQ issued the Permit, the Forest Service had not yet completed its approval process for the Project, and the status of public use on the Stibnite Road Access Route and other mine access routes had not been officially determined. At that time, DEQ based its decision to exclude the Route from ambient air protections solely on the following representation Perpteua made in its permit application regarding the status of the Route:

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

REC 1807. Notably, Perpetua's statement does not profess that it has legal control to *preclude* the public from using the Route. Yet DEQ did not question Perpetua's statement, and did not consider Forest Service and Perpetua documents indicating that the Route would be open to the public.[6] DEQ arbitrarily issued the Permit without ensuring that ambient air protections were in place.

---

[6] *See* REC 2677 (Forest Service stating that "public access would be provided by" the Stibnite Road Access Route); REC 2625 (indicating that during operations "public access" will be provided "through the Operations Area Boundary [ ] by constructing new road through Yellow Pine pit and below mine haul road to link Stibnite Road (FR 50412) to Thunder Mountain Road (FR 50375)"); REC 2684 ("The 2021 [Modified Mine Plan] would include a 12-foot-wide gravel road to provide public access from Stibnite Road (FR 50412) to Thunder Mountain Road (FR 50375) through the SGP."); REC 2557 (Perpetua consultant stating: "During operations, the public access road would be used to travel through the mine site and would provide seasonal use, open to all vehicles.").

On January 3, 2025, the Forest Service completed its permitting process and issued a Final Environmental Impact Statement and Record of Decision for the Project. After that, Petitioners raised this issue again with the Board. *See* REC 7374-7455. The Forest Service's final decision documents unequivocally establish that the Stibnite Road Access Route is for public use and that Perpetua does not have legal authority to preclude such use. *See* REC 7392-7455. Furthermore, the Stibnite Road Access Route was designated as a public route under the Forest Service's Travel Management Rule, 36 C.F.R. § 212, Subparts B and C, REC 7430, and the only route that "would allow continuous access to the Thunder Mountain Road sites/areas." REC 7428. As the Forest Service's decision document explains:

> A new 12-foot-wide gravel road will be constructed to provide public access from Stibnite Road (FR50412) to Thunder Mountain Road (FR 50375) through the Stibnite Gold Project. During operations, the public access road will be used to travel through the Stibnite Gold Project and will provide seasonal use, open to all vehicles.

REC 7448-49 (emphasis added).

Despite this unequivocal showing that the Route will be open for public access during Project operations, the Board chose instead to rely on a single statement from the Forest Service that the Route is "not considered a public road." The Board affirmed DEQ's decision to exclude the Route from ambient air protections based on this statement, despite the fact that, regardless of the road's label, the public will in fact use it to travel within Perpetua's mine operations boundary to access places beyond the mine site, and Perpetua does not have the authority to preclude such use. REC 7572.

In defining an ambient air boundary, whether an owner or operator has legal authority to preclude the public is the defining issue, not whether the land is owned by the public or the operator (or how it is labeled by the Forest Service). EPA's policy speaks directly to this:

> Although a landowner who owns a stationary source downwind of another landowner's separate stationary source may restrict public access onto his or her private property, the owner and the individuals that are permitted access to his or her downwind property are, generally speaking, members of the general public relative to the upwind stationary source. An alternative reading of "general public" that excludes all persons on any private property to which access is restricted (*e.g.*, private homeowners with fenced yards) would expand the exclusion beyond reason and deny the protection of the NAAQs to large numbers of people.

REC 1145. DEQ's guidance is consistent with EPA's policy, providing that if "the general public [is] allowed on site as part of a right-of-way easement or common service road," "then the right-of-way is determined to be ambient air." REC 1110.

Here, regardless of how one labels the Route, the Forest Service's decision-making made clear that the public is authorized to travel over the Stibnite Road Access Route. The Forest Service, not Perpetua, had the legal authority to determine whether public access will be precluded, and the Forest Service determined that the public will have access: "the public access road will be used to travel through the Stibnite Gold Project and will provide seasonal use, open to all vehicles." REC 7566-67. Based on this alone, DEQ's failure to provide ambient air protections to the Route, thus denying the public the protection of the NAAQS and toxic air pollutant rules, is arbitrary and capricious, not supported by substantial evidence on the record, and should be set aside and remanded for further proceedings. I.C. 67-5279(3).

B. Even If Perpetua Has Legal Power to Exclude the Public, Perpetua Is Nonetheless Allowing the Public to Use the Stibnite Road Access Route.

Even if the Court were to find that Perpetua has the legal authority necessary to preclude public access on the Stibnite Road Access Route, that alone is not enough to strip the Route of ambient air protections. In order to exclude an area from ambient air protections, EPA policy requires both that: (1) Perpetua have the "the [legal] power to exclude the general public," *and*

(2) physical barriers that effectively preclude public access. REC 1141. And DEQ's guidance requires Perpetua to "demonstrate that public access is precluded." REC 1109.

Perpetua is not going to preclude access; rather, it is going to allow the public to use the Route. The Route was proposed for the sole purpose of "provid[ing] public access from Stibnite Road on the northern end of the [Project] to Thunder Mountain Road on the southeastern end of the site." REC 0895. The Forest Service's approval of the Project grants the public access on the Route, as already discussed above. Moreover, Perpetua's draft Access Management Plan prepared for its air permit application demonstrates that Perpetua will allow such public access. *See generally* REC 0893-0899.

The draft Access Management Plan—which was developed to "manage access on designated roads that traverse the proposed Stibnite Gold Project"[7]—"provides controlled, through-site access . . . that is consistent with the [U.S. Forest Service] travel management plan." REC 0893, 0896. Perpetua's draft Access Management Plan purports to give it "the discretion" to impose "additional access controls" "during various phases of construction [and] during mine operations that present potential safety hazards," but it does not purport to preclude public access. REC 0896. Furthermore, the entry point gates, guard shacks, safety briefing, and signage to direct travelers to stay on the Route will be used to *facilitate* safe public access, not to preclude it. REC 0896. Exerting some control over when and how public access occurs is not the same as precluding public access.

Nothing in the Clean Air Act, EPA's policy, the Air Rules, or DEQ guidance allows a facility to strip the public's right to ambient air protections. But that is what DEQ did in this

[7] Note that the draft Access Management Plan was developed before the Forest Service's final approval issued, and discusses "alternative [public] access . . . via the newly constructed Burntlog Route." REC 0893. The Forest Service's Record of Decision determined, however, that during mining operations, public access on the Burntlog Route would be prohibited, meaning public access will occur along the Stibnite Road Access Route only. REC 7562.

Permit, relying on Perpetua's labeling of the public who use the Route as "guests of the mine." Because Perpetua does not have the legal right to preclude the public and has not demonstrated that it will practically preclude the public, DEQ contorted law and policy to claim that the public "passing through the facility to another destination" are "registered guests of the facility" by virtue of signing a piece of paper. REC 0936. The Court should reject this dangerous sleight of hand, and vacate and remand the Permit back to DEQ.

When it comes to ambient air, EPA policy and DEQ guidance distinguish invitees of a facility, like employees and contractors of Perpetua, who need not receive ambient air protections, from the general public, who are entitled to ambient air protections. For example, EPA's policy states that the EPA

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

REC 1142. These classes of people may not require ambient air protections because they are at the facility for the purpose of the facility—to work at the facility or to provide services to the facility. Similarly, DEQ's guidance states:

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

REC 1109. Members of the public who will use the Stibnite Road Access Route are not employees or contractors of Perpetua, and are not subject to OSHA health rules. Perpetua and DEQ have tried to get around this by labeling the public who will travel through the mine site to access public lands "guests of the mine." This label is disingenuous at best, and does nothing to magically convert members of the public to employees, contractors, or business invitees. DEQ cannot reasonably argue that the public traveling through the mine site to access public lands,

who have not been invited by Perpetua, who are not doing business with Perpetua, and who will not deviate off of the Route are akin to employees and contractors.

DEQ acted unreasonably and contrary to the Clean Air Act, EPA's policy, the Air Rules, and its own guidance when it failed to afford ambient air protections to the public who will use the Stibnite Road Access Route. The Court should vacate the Permit and remand it to DEQ to fix this error.

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

Under the Permit, Perpetua is allowed to submit the following plans in the future, after the Permit was already issued: the Fugitive Dust Control Plan; the Haul Road Capping Plan; the Operation and Maintenance Manual; and the Stibnite Road Access Management Plan. *See* REC 0375–76; REC 0378–80; REC 0385–86 (Permit conditions calling for future plans). These plans will include numerous Project details which significantly affect air emissions, public access, and compliance with the Air Rules. *See id.* Yet, because DEQ already issued the Permit, DEQ will review these plans later, outside of the Permit approval process set forth in the Air Rules, including the required public comment period.

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

EPA's Clean Air Act regulations require each State Implementation Plan, including

Idaho's Air Rules, to "set forth legally enforceable procedures" that enable the State to determine whether the construction of a facility will result in a violation of its air pollution control strategies or interfere with attaining or maintaining the NAAQS. 40 C.F.R. § 51.160(a). These legally enforceable procedures must include means by which the State will prevent construction if the facility will violate air pollution control strategies or interfere with attaining or maintaining the NAAQS, and they must provide for the applicant to submit information on the "location, design, construction, and operation of such facility . . . as may be necessary" to permit the State to "to make the determination" that the facility will comply with its air pollution control strategies and the NAAQS. *Id.* § 51.160(b)–(c). "The legally enforceable procedures in § 51.160(b) must also require" the State to provide opportunity for public comment on information submitted by the applicant and on the State's analysis of the effects on ambient air quality. *Id.* § 51.161(a).

Under the Air Rules (which are Idaho's EPA-approved State Implementation Plan), DEQ must provide an opportunity for public comment. Air Rules § 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 § 209.01.c.i. (emphasis added). A Permit 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 § 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 § 202.01.a.i (emphasis added).

Here, instead of following these procedural requirements in Sections 202 and 209, DEQ rushed forward and issued Perpetua what is a *partial, incomplete Permit*, based on incomplete information and analysis, and lacking numerous permit conditions. DEQ will effectively issue a complete Permit later, after Perpetua develops and submits to DEQ additional plans, information, and conditions through the Fugitive Dust Control, Haul Road Capping, and Access Management Plans and the Operation and Maintenance Manual, shielded from public review and outside the normal Permit process required by the Air Rules and the Clean Air Act.

Through the future "plans," DEQ is allowing Perpetua to submit Section 202.01.a.i information later, and shielding it from public comment. But Air Rules Section 209.01.c.i requires the "information submitted by the applicant" and DEQ's "analysis of the information, will be made available to the public" for comment. DEQ's use of these future work plans, thus, violates the Air Rules and the Clean Air Act regulations upon which they are based. The Court must therefore set aside and remand the Permit.

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

Federal courts have rejected similar tactics when it comes to Clean Water Act permitting, which has similar public participation requirements to Clean Air Act permitting. In one case, the Second Circuit recognized that Clean Water Act permitting schemes that do not allow for public review of best management practices incorporated into permits violate that statute. *Waterkeeper*

Alliance v. U.S. EPA, 399 F.3d 486, 503-504 (2d Cir. 2005). The Second Circuit held that a permit that relies on best management practices but does not specifically list those best management practices in the permit itself "deprives the public of the opportunity for the sort of regulatory participation that the Act guarantees because [such a permit] effectively shields the . . . management plans from public scrutiny and comment." *Id*. at 503. The Ninth Circuit has similarly held in a Clean Water Act case that "programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable [i.e., the relevant statutory standard]." *Envtl. Def. Ctr. v. U.S. EPA*, 344 F.3d 832, 856 (9th Cir. 2003).

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

For example, Permit Condition 2.6 requires the Fugitive Dust Control Plan to include "specific criteria to determine what frequency and type (water and/or chemical) of dust suppressant must be applied, and appropriate suppressant application rates." REC 0376. 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 II. Yet, critical Permit details about

how Perpetua will control dust are to be developed later in the Fugitive Dust Control Plan, without public comment.

Similarly, Permit Condition 3.13 requires that the Haul Road Capping Plan include a sampling plan for analyzing arsenic concentrations of materials Perpetua uses, a silt content sampling plan, and information about the frequency with which Perpetua will inspect haul roads, among other similar requirements. REC 0385–86. These Permit conditions also affect Perpetua's ability to control dust, but they too have been deferred to Perpetuat to decide on in the future.

Similarly, Permit Condition 2.7 requires the Access Management Plan to specify the "measures to be used to discourage public access to the facility." REC 0376. Access management is a critical issue, in part because it bears on the ambient air boundary (*see supra* Part IV). As EPA warned in comments: "Given the unique situation with a public access road traversing the mine site, the key assumptions, parameters, and methodologies used to preclude public access from the mine site must be fully disclosed in the permit record and the necessary requirements be included in the permit and available for public review and comment." REC 0935. Yet, DEQ deferred this plan, letting Perpetua decide important Permit details outside of public review.

Likewise, the Permit provides that the Operation and Maintenance Manual will "ensure compliance with emission limits (Permit Conditions 2.9, 2.13, 4.3, and 5.3)." REC 0378. But again, Perpetua will develop these important Permit terms later, shielded from public scrutiny.

Like the nutrient management plans at issue in *Waterkeeper*, the post-permit plans here are indispensable features of the Permit. And like the EPA in *Waterkeeper*, DEQ here has acknowledged that details in these plans are critical to ensuring the Project meets air quality standards. Thus, these plans and their details must be submitted by the applicant under Air Rules Section 202.01.a.i, and that information, along with DEQ's review of the information, are

required to be made available to the public under Air Rules Section 209.01.c.i.

The Court should set aside and remand the Permit, and should require Perpetua to submit the Access Management, Fugitive Dust Control, and Haul Road Capping Plans and the Operations and Maintenance Manual; require DEQ to provide for public comment on these Plans; require DEQ to review and revise the Plans to ensure the Project's emissions, as limited by enforceable conditions, comply with Air Rules Section 203; and require DEQ to complete these steps *before* issuing a new Permit—not afterward and behind closed doors.

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

Upon ruling for Petitioners on any of their claims above, the Court must set aside the Permit and remand to DEQ to correct the errors it made. When an agency action is held unlawful under the Idaho APA and a substantial right of the petitioner has been prejudiced, the Court "shall" set aside the agency action, in whole or in part, and remand for further proceedings as necessary. I.C. § 67-5279. *See*, *e.g.*, *In re Variance ZV2011-2*, 156 Idaho 491, 496 (Idaho 2014) (vacating and remanding arbitrary agency action for further proceedings consistent with the Court's opinion); *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 842 (2003) (vacating and remanding agency action that was based on "erroneous statement" of legal doctrine).

For the same reasons Petitioners have standing, their substantial rights will also be prejudiced, including by jeopardizing their health and well-being, as well as their recreational, cultural, aesthetic, environmental, and economic interests, and by depriving Petitioners of the ability to meaningfully participate in DEQ's permitting process. *See supra* Part I. The Clean Air Act was passed to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C.

§ 7401 (b)(1). Idaho's Air Rules (which are Idaho's State Implementation Plan under the Clean Air Act) carry out this goal to protect air quality to promote public health and welfare by, among things, prohibiting DEQ from issuing new permits unless the applicant shows that it will not cause or contribute to a violation of the NAAQS and will not emit toxic air pollutants so as to injure or unreasonably affect human health in ambient air. Air Rules § 203. The health and welfare of members of ICL and SSFS are substantial rights that are directly harmed by DEQ's failure to comply with the Air Rules' public health protections and procedures when it issued the Permit for the Stibnite Gold Project.

CONCLUSION

Petitioners request that the Court issue an order remanding to DEQ and vacating the Permit.

Dated: November 7, 2025

Respectfully submitted,

/s/ Bryan Hurlbutt
Bryan Hurlbutt

/s/ *Andrew Hursh*
Andrew Hursh

/s/ Julia S. Thrower
Julia S. Thrower

Attorneys for Petitioners Idaho Conservation League and Save the South Fork Salmon

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2025, a true and correct copy of the foregoing was filed and served on the following in the manner indicated:

Michael A. Short
Deputy Attorney General
Attorney for Idaho Department of Environmental Quality
iCourt/eServe: michael.short@deq.idaho.gov

Christopher McCurdy
Katylyn Riker
Holland & Hart LLP
Attorneys for Perpetua Resources Idaho, Inc.
iCourt/eServe: CCMcCurdy@hollandhart.com
iCourt/eServe: kdriker@hollandhart.com
iCourt/eServe: intaketeam@hollandhart.com

/s/ Julia Thrower
Julia Thrower