

RAÚL R. LABRADOR  
Attorney General

SCOTT L. CAMPBELL  
Deputy Attorney General  
Chief, Energy and Natural Resources Division

MICHAEL A. SHORT, ISB #10554  
Deputy Attorney General  
Department of Environmental Quality  
1410 N. Hilton, 2nd Floor  
Boise, Idaho 83706  
Telephone: (208) 373-0494  
Facsimile: (208) 373-0481  
Email: [michael.short@deq.idaho.gov](mailto:michael.short@deq.idaho.gov)

*Attorneys for the Department of  
Environmental Quality*

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF IDAHO**

IN THE MATTER OF SECTION 401  
WATER QUALITY CERTIFICATION  
NWW-2013-00321

IDAHO CONSERVATION LEAGUE,  
IDAHO RIVERS UNITED, SAVE THE  
SOUTH FORK SALMON, AND  
EARTHWORKS

Petitioners,

v.

IDAHO DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Respondent.

PERPETUA RESOURCES IDAHO, INC.,

Intervenor.

Agency Case No. 0102-24-02

OAH Case No. 24-245-05

**RESPONDENT'S MOTION TO  
VACATE SCHEDULING ORDER  
AND SET STATUS CONFERENCE**

COMES NOW, Respondent, the Idaho Department of Environmental Quality (the “Department” or “DEQ”), by and through the office of the Attorney General, and hereby submits this Motion to Vacate Scheduling Order and Set Status Conference in accordance with the Idaho Rules of Administrative Procedure, IDAPA 62.01.01.325.01, and Idaho Rule of Civil Procedure 16 in the above captioned matter.

### **DISCUSSION**

On March 4, 2025, DEQ submitted its amended request that the Hearing Officer extend its deadline to submit its response brief in this matter by three (3) weeks. That motion was granted the next day and a new briefing schedule was issued—notably, the new schedule did not set prehearing conferences nor an evidentiary hearing.

In DEQ’s Motion to Extend, the Department discussed a variety of new information it was reviewing and called attention to the potential that “its current review of new information may result in it taking action that impacts the 401 certification at issue in this case.” *Motion to Extend Time* at fn.1. DEQ has determined, pursuant to 40 C.F.R 121.10, that it is appropriate to request permission from the Army Corp of Engineers (“ACOE”) to modify the grant of certification at issue in this contested case.

DEQ’s request seeks modification of the certification in order to address much of the new information and changes to the project that have developed during the pendency of this matter. This includes recent regulatory developments and updated project commitments, particularly the newly proposed long-term treatment of water from West End Creek and the Final Record of Decision (“ROD”) issued by the U.S. Forest Service and the National Marine Fisheries Service’s (“NMFS”) Biological Opinion. More significantly, many of the areas of the certification to be

modified directly bear on Petitioners' challenge to the certification. Thus, the modifications are highly likely to render much of Petitioners' current challenge as moot.

DEQ submitted its written request to ACOE on March 25, 2025. In it, DEQ identified only those portions of the certification it seeks to modify.<sup>1</sup> During the modification process, DEQ may not, and will not revoke the grant of certification, nor change the grant of certification into a denial or waiver. *See* 40 C.F.R. 121.10(b)(1-2).

For all these reasons, it is appropriate to vacate the current scheduling order and allow DEQ to proceed with its certification modification process.

### **SPECIFIC RELIEF REQUESTED**

Once ACOE confirms DEQ's modification request, DEQ and the Parties will be better situated to confer on an appropriate proposed scheduling order. That scheduling order will provide for, at the least, the following:

- Adequate time for DEQ to review any new information the applicant may have produced since the original application relevant to the topics identified in the modification request, and to make appropriate changes to the certification.
- Appropriate time to conduct public notice and comment on the modified certification.
- Time for Petitioners' to amend their Petition in light of the modified certification, once finalized.<sup>2</sup>
- A briefing schedule providing Petitioners' opportunity to submit a new, amended opening brief, a response brief by DEQ and Intervenors, and a reply brief.
- A preconference meeting.
- An evidentiary hearing.

---

<sup>1</sup> A true and correct copy of DEQ's *Request for Modification of Section 401 Water Quality Certification for Stibnite Gold Project (Permit No. NWW-2013-00321)*, emailed and mailed on March 25, 2025, is attached hereto as Exhibit A.

<sup>2</sup> DEQ will maintain a record of any new information it relies on and will supplement its discovery once the modified certification is completed.

DEQ optimistically hopes that ACOE's approval and the parties' ability to agree on a scheduling order can be accomplished in thirty (30) days. The constraints of the federal bureaucracy and the exigencies of life, however, may prove our optimism misguided. Nonetheless, we will endeavor for that timeline to provide the Hearing Officer with a proposed scheduling order.<sup>3</sup> Successful or otherwise, DEQ requests the Hearing Officer conduct a status conference in thirty (30) days, or soon thereafter at the Hearing Officer's convenience.

### CONCLUSION

While the procedures outlined above may add significant time before a decision can be rendered in this case, those procedures provide (1) DEQ the time it needs to properly modify the certification (likely rendering moot much of the current Petition in this matter); (2) due process to the community at large through public notice and comment; and, (3) Petitioners' ample opportunity to respond to the modified certification through an amended petition and amended opening brief. As such, this request is narrowly tailored and serves the interest of justice.

Thus, good cause exists to vacate the scheduling order and provide DEQ the time it needs to modify the certification, while serving the interests of justice and orderly adjudication. The Department, therefore, respectfully requests the Hearing Officer issue an order vacating the scheduling order and setting a status conference in 30 days' time.<sup>4</sup>

//signature and date page to follow//

---

<sup>3</sup> Once the parties have submitted a proposed scheduling order, DEQ also requests that, if approved, the Hearing Officer set appropriate dates for an evidentiary hearing at that time.

<sup>4</sup> A proposed order has been provided, concomitantly, with this motion for the Hearing Officer's convenience.

DATED: March 25, 2025.

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL

*/s/ Michael A. Short*

---

MICHAEL A. SHORT

Deputy Attorney General

Attorneys for the Idaho Department of  
Environmental Quality

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of March, 2025, the foregoing was filed, served, and copied as shown below.

Bryan Hurlbutt  
Laurence (“Laird”) J. Lucas  
Advocates for the West  
P.O. Box 1612  
Boise, ID 83701

*Attorneys for Petitioners  
Idaho Conservation League and  
Idaho Rivers United*

[bhurlbutt@advocateswest.org](mailto:bhurlbutt@advocateswest.org)  
[llucas@advocateswest.org](mailto:llucas@advocateswest.org)  
*via electronic service*

Murray D. Feldman  
Katy D. Riker  
Holland & Hart LLP  
800 W. Main Street, Ste. 1750  
Boise, ID 83702-7714

Ashley A. Peck, *pro hac vice*  
Holland & Hart LLP  
222 S. Main Street, Suite 2200  
Salt Lake City, UT 84010

*Attorneys for Intervenor-Respondent  
Perpetua Resources Idaho, Inc.*

[mfeldman@hollandhart.com](mailto:mfeldman@hollandhart.com)  
[kdriker@hollandhart.com](mailto:kdriker@hollandhart.com)  
[aapeck@hollandhart.com](mailto:aapeck@hollandhart.com)  
*via electronic service*

Julia S. Thrower  
Mountain Top Law, PLLC  
614 Thompson Ave.  
McCall, ID 83638

*Attorneys for Petitioners  
Save the South Fork Salmon  
and Earthworks*

[jthrower@mtntoplw.com](mailto:jthrower@mtntoplw.com)  
*via electronic service*

Alan Haslam, Vice President – Permitting  
L. Michael Bogert, Special Counsel  
Perpetua Resources Idaho, Inc.  
405 South 8<sup>th</sup> St., Ste 201  
Boise, ID 83702

*Intervenor-Respondent  
Perpetua Resources Idaho, Inc.*

[Alan.Haslam@Perpetua.us](mailto:Alan.Haslam@Perpetua.us)  
[Michael.Bogert@Perpetua.us](mailto:Michael.Bogert@Perpetua.us)  
*via electronic service*

Merritt Dublin  
Administrative Law Judge  
Office of Administrative Hearings  
P.O. Box 83720  
Boise, ID 83720-0104

*Hearing Officer*

[merritt.dublin@oah.idaho.gov](mailto:merritt.dublin@oah.idaho.gov)  
*via electronic service*

Office of Administrative Hearings  
P.O. Box 83720  
Boise, ID 83720-0104

[filings@oah.idaho.gov](mailto:filings@oah.idaho.gov)  
*via electronic service*

Diane Cutler  
Hearing Coordinator  
Rules and Planning Analyst  
Department of Environmental Quality  
1410 N Hilton  
Boise ID 83706

[diane.cutler@deq.idaho.gov](mailto:diane.cutler@deq.idaho.gov)  
*via electronic service*

/s/ DeAnne M. Chaffin  
DeAnne M. Chaffin

# EXHIBIT A





March 25, 2025

Commander, Walla Walla District  
Lt. Col. Kathryn (Katie) Werback  
U.S. Army Corps of Engineers  
201 North Third Avenue  
Walla Walla, WA 99362-1876  
Via email: Kathryn.a.werback@usace.army.mil

Subject: Request for Modification of Section 401 Water Quality Certification for Stibnite Gold Project  
(Permit No. NWW-2013-00321)

Dear Lt. Colonel Werback:

Pursuant to 40 CFR 121.10, the Idaho Department of Environmental Quality (DEQ) requests modifications to specific elements of the Final Section 401 Water Quality Certification for the Stibnite Gold Project. These modifications are necessary to ensure consistency with the most recent environmental assessments, regulatory determinations, and Perpetua Resources' revised project commitments. This modification is not a new certification, nor does it change the final decision of DEQ to certify this project with conditions.

Based on our review of the recently published Final Environmental Impact Statement (USFS, 2024) and the Final Biological Opinion (NOAA NMFS, 2024), DEQ has identified the following elements requiring modification:

1. Antidegradation Analysis for West End Creek (Section 2.4 and Appendix F)
  - Modification Needed: Clarify the Tier II Antidegradation Analysis for West End Creek, incorporating Perpetua's commitment to long-term water treatment. Expand the socioeconomic justification section (Appendix F) to include a more detailed explanation of the important social and economic development. Include an explanation of the water quality standards and protections that will apply to the West End Pit Lake after its formation.
  - Rationale: The new proposed alternative of water treatment for West End Creek was not evaluated for the 401 Certification as Perpetua incorporated it after comments from NOAA National Marine Fisheries Biological Opinion.
2. Mercury Impact Analysis for Meadow Creek (Section 2.3 and Appendix D)
  - Modification Needed: The certification's assessment of potential mercury and methylmercury discharges into Meadow Creek by requiring additional baseline monitoring and adaptive management provisions.
  - Rationale: DEQ should enhance monitoring requirements and establish clearer mitigation conditions to demonstrate compliance with IDAPA 58.01.02.250 (Toxic Substances Criteria).
3. Antimony Mitigation for East Fork South Fork Salmon River (Section 3.2 and Appendix D)

- Modification Needed: Revise Condition 5 of Section 3.2 (Special Conditions) to include explicit mitigation measures for potential increases in antimony levels. The modification will:
  - Require quarterly monitoring of dissolved antimony levels at key locations in the East Fork South Fork Salmon River.
  - Include adaptive management triggers (e.g., requiring treatment adjustments if levels exceed 75% of the applicable criterion).
- Rationale: Enhancing this condition will make the certification more robust by providing clear monitoring and adaptive management for antimony, ensuring measurable actions are taken if water quality thresholds are approached.

#### 4. Socioeconomic Justification (Appendix F)

- Modification Needed: Improve the socioeconomic justification (SEJ) to comprehensively evaluate economic benefits and costs, including:
  - Potential negative impacts on tourism, recreation, and fisheries.
  - Infrastructure strain and public service demands, including housing, emergency services, and transportation.
  - A long-term economic stability plan to mitigate a potential boom-bust cycle.
- Rationale: To strengthen its defensibility, the SEJ should:
  - Clearly quantify both costs and benefits using updated economic modeling.
  - Demonstrate mining's economic contributions considering potential environmental costs.
  - Commit to post-mining economic transition strategies, including workforce retraining and local infrastructure investment.

#### 5. Air deposition (Section 2.3 and 3.1)

- Modification Needed: Revise Section 2.3 to more clearly identify the considered impacts of air deposition from haul roads on nearby streams. Include conditions in Section 3.1 clarifying the additional permitting requirements Perpetua Resources II, Ltd, must adhere to that address mitigation of dust. More clearly identify existing special conditions that also address dust mitigation.
- Rationale: Ensure that the certification expressly considers the potential water quality impacts of air deposition from dust emissions considering new information regarding the Fugitive Dust Control Plan, Haul Road Capping Plan, and Dust Control Monitoring Plan.

#### Conclusion

These modifications are narrowly tailored to ensure that the 401 Certification remains scientifically robust while maintaining regulatory compliance under the Clean Water Act and Idaho's Water Quality Standards. DEQ respectfully requests the Army Corps of Engineers' approval to draft these modifications as part of the ongoing certification process and appreciate the Corp's cooperation to implement these modifications. Please let us know if any additional information is required to facilitate these changes.

We look forward to your reply and continuing our strong working relationship.

Sincerely,



Jess Byrne

Director, Idaho Department of Environmental Quality

c: Kelly Urbanek, Chief, Regulatory Division, ACOE  
Michael Short, Deputy Attorney General, Idaho Attorney General's Office