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**BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO**

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

Petitioners,

v.

IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Respondent,

and

PERPETUA RESOURCES IDAHO,
INC.

Intervenor-Respondent

)
) Agency Case No. 0102-24-02
) OAH Case No. 24-245-05
)
) **PETITIONERS' OPENING**
) **MERITS BRIEF**

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INTRODUCTION

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251–1388, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* § 1251(a). One way the Act achieves this is through “401 certifications,” which is a process by which a state reviews a proposed action that will discharge pollutants to its waters to ensure the action will not violate or impermissibly degrade state water quality standards. *See id.* § 1341.

This contested case challenges the 401 Certification for the Stibnite Gold Project (the “Project”)—a massive gold mine proposed in the headwaters of the East Fork of the South Fork Salmon River (“East Fork SFSR”), consisting of three open pits, an ore processing facility, a tailings (mine waste) storage facility, and an extensive web of roads and other infrastructure. Many of these mine features are located on, in, and adjacent to Idaho rivers, streams, and wetlands, some of which would be permanently buried and destroyed by the mine, and others which would be polluted for decades or more.

Among other federal permits, mining company Perpetua Resources Idaho, Inc. (“Perpetua”) applied for a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers (“Army Corps”), seeking authorization to discharge pollutants to fill over *21 miles* of streams and over *150 acres* of wetlands to construct and operate the mine. This 404 permit application triggered the 401 Certification at issue here.

The Idaho Department of Environmental Quality (“DEQ”) first issued the 401 Certification on May 22, 2024. After Petitioners initiated this contested case and filed their opening brief on the merits, the case was stayed until April 10, 2026, when DEQ issued an Addendum to the 401 Certification. Petitioners now challenge the 401 Certification and the Addendum. Despite addressing some of the issues Petitioners raised previously, DEQ has still

failed to comply with Clean Water Act Section 401, the U.S. Environmental Protection Agency's ("EPA") Clean Water Act regulations, and Idaho's water quality rules in two main ways.

First, DEQ's and Perpetua's modeling and analyses project that the mine would cause *decades* of elevated water temperature in the East Fork SFSR and Meadow Creek, exceeding the state's standards for protecting fish. Yet DEQ falsely characterized these increases as "temporary," and committed other similar errors, to find the Project will comply with Idaho's water quality "antidegradation" requirements. Any exemptions for "temporary" water quality degradation apply to pollution lasting on the order of weeks or months—not decades.

Second, DEQ bypassed its 401 certification duties for the West End Pit Lake. One of pits Perpetua would mine is located in and under West End Creek. During mining, Perpetua would reroute West End Creek while it excavates the pit. After it finishes extracting what it wants, Perpetua plans to run West End Creek back into the pit, which would fill and form the West End Pit Lake, a permanent feature Perpetua would leave behind. Modeling and analysis indicate that the Lake would be polluted and exceed applicable water quality standards. DEQ, however, erroneously determined the West End Pit Lake will not qualify as a "water of the United States" ("WOTUS") and, thus, need not comply with Idaho's water quality standards. DEQ applied the wrong WOTUS regulations and otherwise failed to recognize that man-made impoundments like the West End Pit Lake qualify as WOTUS and are subject to Clean Water Act protections.

For these reasons, DEQ's action is not supported by substantial evidence, and it acted on unlawful procedure, arbitrarily and capriciously, and/or abused its discretion under the Idaho Administrative Procedure Act, Idaho Code § 67-5279. Petitioners respectfully request that the Hearing Officer declare the 401 Certification and Addendum invalid, and set aside and remand them to DEQ to correct these errors as required under Idaho Code § 67-5279.

LEGAL & FACTUAL BACKGROUND

401 CERTIFICATIONS UNDER THE CLEAN WATER ACT & THE IDAHO WATER QUALITY STANDARDS

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251–1388, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* § 1251(a). To those ends, the Clean Water Act requires states to develop water quality standards that establish, and then protect, the desired conditions of each waterway within the state’s regulatory jurisdiction. *Id.* § 1313(a). Water quality standards must be sufficient to “protect the public health or welfare, enhance the quality of water and serve the purposes of [the Clean Water Act].” *Id.* § 1313(c)(2)(A). State water quality standards must be reviewed and approved by the EPA before they become a component of the state’s regulatory scheme deemed consistent with the federal Clean Water Act. *See* 40 C.F.R. § 131.21.

Water quality standards must include three elements: (1) one or more designated uses of a waterway; (2) numeric and narrative criteria specifying the water quality conditions, such as maximum allowable amounts of pollutant, maximum allowable temperatures, and the like, that are necessary to protect the designated use; and (3) antidegradation policy requirements that ensure that uses are protected and high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. For water with multiple use designations, the criteria must support the most sensitive use. 40 C.F.R. § 131.11(a)(1).

Section 401 of the Clean Water Act, entitled “Certification,” requires that “[a]ny applicant for a Federal license or permit to conduct activity . . . which may result in any discharge into navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates. . . .” 33 U.S.C. § 1341(a)(1). The state is specifically required to certify “that any such discharge will comply with the applicable

provisions of sections 1311, 1312, 1313, 1316, and 1317” of the Clean Water Act, which include a state’s EPA-approved water quality standards. *Id.* “Any certification” provided by a certifying authority “shall set forth any effluent limitations and other limitations, and monitoring requirements necessary” to ensure compliance with these water quality standards. *Id.* § 1341(d).

DEQ is the agency designated to make 401 certification decisions in Idaho. The Idaho Water Quality Standards, IDAPA 58.01.02 (hereafter “IWQS”)¹, include EPA-approved water quality standards and requirements that apply in Idaho. DEQ is “charged with the supervision and administration of a system to safeguard the quality of the waters of the state including the enforcement of standards relating to the discharge of effluent into the waters of the state.” IWQS 000. “Wherever attainable, surface waters of the state shall be protected for beneficial uses which for surface waters includes all recreational use in and on the water surface and the preservation and propagation of desirable species of aquatic life.” IWQS 050.02.a. “In all cases, existing beneficial uses of the waters of the state will be protected.” IWQS 050.02.b.

A 401 certification must cover all “navigable waters”, which are “waters of the United States,” as such terms are used in the Clean Water Act. 33 U.S.C. §§ 1341(a)(1), 1362(7).

Additionally, 401 certifications require states to issue certification based on any other applicable requirements of state law. *Id.* § 1341(d). As relevant here, Idaho defines “waters” to include “[a]ll accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof which are wholly or within, which flow through or border upon the state.” IWQS 010.113. Idaho requires surface waters of the state be protected for beneficial uses, including recreation in and on the water surface, as well as “preservation and propagation of desirable species of aquatic life.” IWQS 050.02.a.

¹ Hereinafter citations to “IDAPA 58.01.02” will be abbreviated to “IWQS.”

The scope of a 401 water quality certification is broad in that it shall certify compliance with any “water quality requirements,” which include any limitation, standard, or other requirement under any applicable Clean Water Act provision, any Federal and state laws or regulations implementing those sections, and any other water quality-related requirement of state law. 40 C.F. R. § 121.1(j).

Among other water quality requirements, the Idaho Water Quality Standards includes concentrations of pollutants that must be met, including for mercury, arsenic, antimony, temperature, and other pollutants, designed to protect beneficial uses. *See* IWQS 052.06, 210.

In particular, the Idaho Water Quality Standards require:

No pollutant shall be discharged from a single source or in combination with pollutants discharged in other sources in concentrations or in a manner that:

Will or can be expected to result in violation of the water quality standards applicable to the receiving water body or downstream waters; or

Will injure designated or existing beneficial uses

IWQS 080.01.a and .b.

As part of a 401 certification, DEQ is required to conduct an antidegradation review any time an activity is calculated to cause a lowering of water quality (or “degradation”). IWQS 051; IWQS 052. Idaho’s antidegradation policy provides three levels of protection to Idaho waters, one of which is relevant here: Tier I waters. IWQS 051.01. Every waterbody subject to Clean Water Act jurisdiction in Idaho receives Tier I protection, which ensures existing uses and the level of the water quality necessary to protect the existing uses will be maintained and protected. IWQS 051.01; IWQS 052.01. DEQ must conduct a Tier I review for all new permits. IWQS 052.07. Tier I prohibits DEQ from allowing any degradation or lowering of water quality that would cause or contribute to a violation of applicable water quality standards. *Id.*

“‘Degradation’ or ‘lower water quality’ . . . means . . . a change in a pollutant that is adverse to designated or existing uses, as calculated for a new point source” IWQS 010.20. To evaluate the effect of an activity or discharge on water quality in an antidegradation review, DEQ “will evaluate the effect on water quality for each pollutant.” IWQS 052.06. DEQ “will determine whether an activity or discharge results in an improvement, no change, or degradation of water quality.” *Id.* “Effect on water quality will be based on the calculated change in concentration of the receiving water as a result of a new . . . permit or license.” IWQS 052.06.a.

THE STIBNITE GOLD PROJECT & WATER QUALITY IMPACTS AT ISSUE HERE

As described by DEQ in the 401 Certification:

The Stibnite Gold Project (SGP) proposed by Perpetua Resources Idaho, Inc. (PRII) is a mining and reclamation operation near Yellow Pine in Valley County, Idaho. The operation footprint impacts federal, state, and private lands in both the North Fork Payette River and South Fork Salmon River subbasins. The Stibnite Mining District was first mined in the early 1900s and experienced intermittent mining activities through 1997. During that time, mining related facilities were constructed in the basin and ultimately abandoned. Various remediation and reclamation activities have taken place to remove structures and contaminated/hazardous material, but environmental concerns still exist in the basin resulting from previous mining activities. Many of the mining impacts for the proposed SGP will overlap with historic mining impacts already present in the Meadow Creek subbasin, although the proposal will also include new impacts from new and improved infrastructure, and active mining operations. All previous mining activities and remediation efforts predate PRII’s ownership.

Under the proposed action plan, the project proponent would be spending the first 3 years constructing infrastructure and preparing for mining operations. PRII has also proposed remediating and restoring some areas unaffected by mining operations early in the project, including portions of Blowout Creek. Next, operational construction and mining activities would take place over an estimated 15 years, while mine closure and reclamation would take place during years 16 to 25. Activities proposed for Clean Water Act § 404 permitting and § 401 water quality certification under the action plan include the following:

- Transmission line construction and improvements
- Access road construction and improvements, including stream crossings
- Mining and backfill activities
- Dewatering and diversion activities
- Construction and maintenance of tailings storage

- Construction of tailing storage buttress
- Construction of Stibnite Gold Logistics facility
- Road maintenance facilities
- Worker housing facilities

Extensive groundwater and surface water monitoring will be required during construction and operation phases. Project activities will also include construction for restoration and remediation efforts. Postclosure and reclamation will include environmental monitoring to demonstrate the efficacy of remediation at the site.

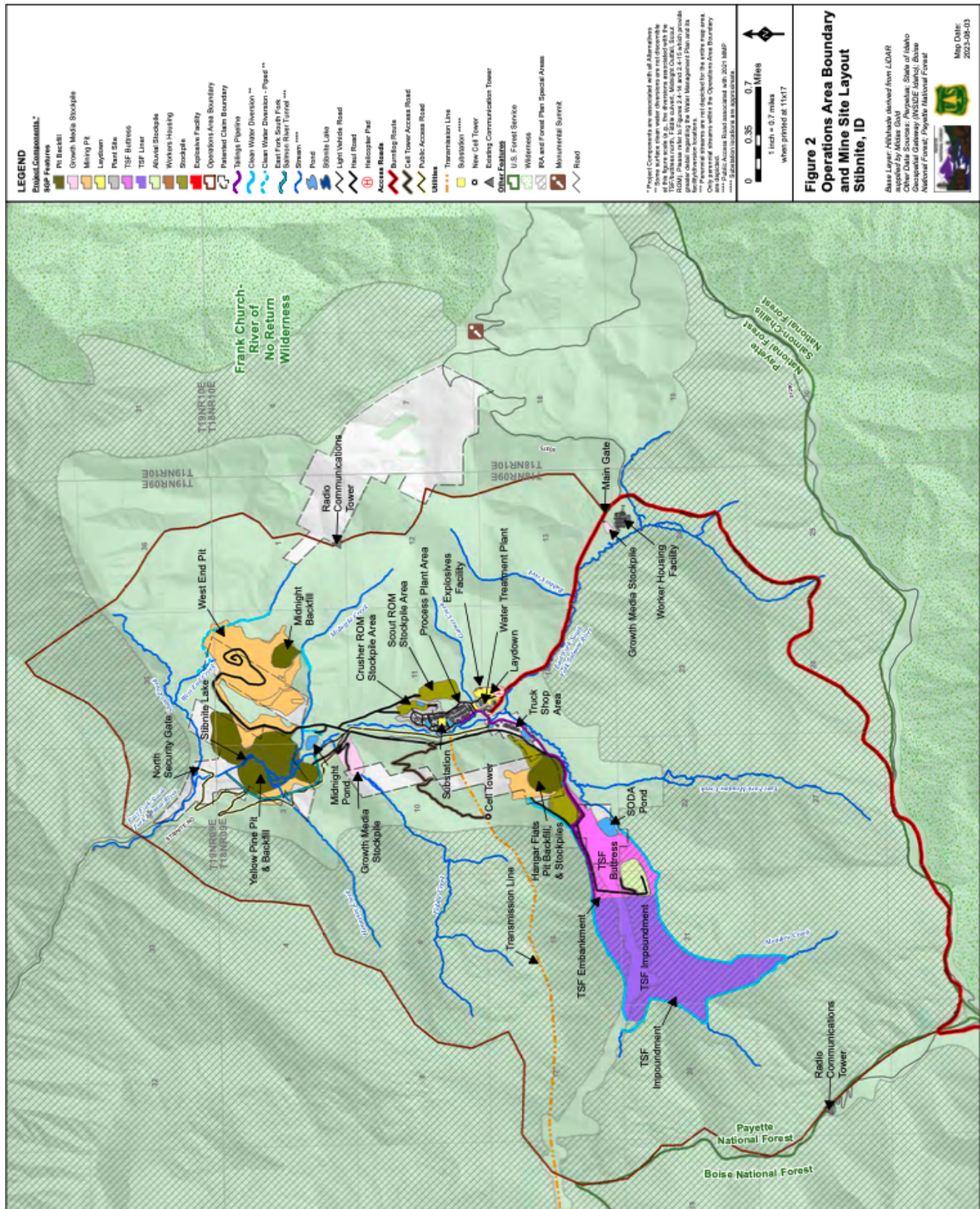
Over the life of the project, dredge and fill activities for the SGP would impact an estimated combined 111,737 linear feet of streams in the North Fork Payette River and South Fork Salmon River subbasins. Additionally, the project would impact an estimated 150.44 acres of jurisdictional wetlands between the two subbasins. Mitigation and remediation projects are proposed to compensate for both permanent and temporary impacts to water bodies in the two subbasins. More details on project background and activities found in the *Stibnite Gold Project Supplemental Draft Environmental Impact Statement (SDEIS)* (USDA 2022).

PET 014329–014330.²

The draft environmental impact statement (“EIS”) DEQ referenced above was finalized by the Forest Service. *See* PET 002429. The Forest Service also issued a Record of Decision, and although it approved the Project, the Forest Service concluded that taking “no-action” was the “environmentally preferred alternative;” whereas the Project would degrade the environment overall, even if Perpetua successfully carries out its restoration and reclamation plans. *See* PET 014643–44. The map from the Forest Service’s Record of Decision reproduced below shows the mining pits, mine waste dump (the “TSF Impoundment”), and other Stibnite Gold Project features that would be constructed directly in, under, over, and next to the East Fork SFSR, Meadow Creek, West End Creek and their tributaries.

² For the Hearing Officer’s convenience, Petitioners file herewith an “Excerpts of Record” which includes documents already disclosed by the Parties in this case and which are cited in this Opening Merits Brief. Petitioners cite to these documents use the Bates numbers designated by the party who disclosed the document (e.g., PET 000001, DEQ 000001, PER 000001). For filings in this case, Petitioners cite to the docket number on DEQ’s webpage for this contested case (available at <https://www.deq.idaho.gov/rules-and-guidance/petitions-for-review-and-precedential-orders/>).

Fig. 1 – Operations Area Map from Forest Service’s Record of Decision (PET 014750)



Among other activities in and near these streams, Perpetua would excavate about 392 million tons of material from three open pits on 473 acres of land. *See* PET 002563. The Yellow Pine Pit is an existing historical mining pit. PET 002561. The East Fork SFSR currently flows through the existing pit, forming the Yellow Pine Pit lake. *Id.* The Project would expand the Yellow Pine Pit to cover about 222 acres and be 720 feet deep. PET 002563. To facilitate mining, the East Fork SFSR would be diverted into a 0.9-mile-long man-made tunnel for approximately 12 to 16 years. PET 002580–81; PET 007109–10 (tables). The Hangar Flats Pit, which would be built into steep slopes adjacent to the Meadow Creek valley floor, would cover about 66 acres and be about 460 feet deep. PET 002561, 002563. The West End Pit, which would be built under West End Creek, would cover 185 acres and be 440 feet deep. PET 002563, 002582. The Yellow Pine and Hangar Flat pits would be backfilled after mining concludes, but the West End Pit would result in a permanent pit lake. *See* PET 003501.

To dispose of 120 million tons of mine tailings solids, a Tailings Storage Facility (“TSF”) would be built on 423 acres of National Forest land in the Meadow Creek valley. PET 002573. The TSF is made up of the TSF Buttress and the TSF Impoundment; each are depicted in Figure 1 above. The TSF would be 475 feet deep. PET 003267–68. After mining, Meadow Creek, which is a tributary of the East Fork SFSR, would be routed over the TSF. PET 003451.

Modeling and assessments by Perpetua, DEQ, and the Forest Service all confirm that these and other mining activities will cause increases in multiple pollutants in multiple locations in the East Fork SFSR, Meadow Creek, and West End Creek watersheds. *See generally* PET 009745–962 (Forest Service Water Quality Specialist Report). For example, and relevant here, in the West End Pit Lake, contaminants including arsenic, mercury, selenium, and lead are modeled to exceed applicable standards. *See* PET 009879–80.

Also relevant here, water temperatures are projected to rise in some locations in all three of these watersheds, resulting in temperatures exceeding standards designed to protect fish. *See* PER 003541–785 (Perpetua temperature modeling report). Applicable temperature standards are displayed in the table below.

Table 1 – Applicable Temperature Criteria

Criteria Type	Criteria	Start Date	End Date	Source
Cold Water Aquatic Life	22°C Maximum Daily	April 1	March 31	IWQS 250.02.b
	19°C Maximum Daily Average	April 1	March 31	IWQS 250.02.b
Salmonid Spawning (Spring/Summer Chinook)	13°C Maximum Daily	August 8	April 30	IWQS 250.02.f.ii
	9°C Maximum Daily Average	August 8	April 30	IWQS 250.02.f.ii
Salmonid Spawning (Westslope Cutthroat Trout)	13°C Maximum Daily	April 1	June 30	IWQS 250.02.f.ii
	9°C Maximum Daily Average	April 1	June 30	IWQS 250.02.f.ii
Bull Trout	10°C 7-day Average Daily Maximum Temperature	June 1	September 30	40 C.F.R. 131.33
	13°C Maximum Weekly Maximum Temperature	June 1	August 31	IWQS 250.02.g
	9°C Maximum Daily Average	September 1	October 31	IWQS 250.02.g

DEQ’S ISSUANCE OF THE 401 CERTIFICATION

On April 7, 2023, Perpetua submitted an application to the Army Corps seeking authorization to discharge dredge and fill material under Section 404 of the Clean Water Act for the Stibnite Gold Project. *See* DEQ 000001–02 (application cover letter). On April 21, 2023, DEQ received a prefilng meeting request from Perpetua concerning 401 certification for the Army Corps Section 404 permit. *See* PET 014328. DEQ hosted a prefilng meeting on May 17, 2023. *Id.* And on May 26, 2023, DEQ received a certification request. *Id.* DEQ issued notice of a

public comment period on the draft certification on March 6, 2024, through April 5, 2024. *Id.* DEQ extended the comment period through April 12, 2024. *Id.*

Petitioners Idaho Conservation League, Idaho Rivers United, Save the South Fork Salmon, and Earthworks submitted joint written comments on April 12, 2024. DEQ 010023–0010148. Petitioners raised numerous concerns, including that DEQ failed to consider water quality impacts from atmospheric deposition of metals like mercury and arsenic that could occur from the large amounts of dust the Stibnite Gold Mine is projected to generate; that DEQ failed to consider water quality impacts projected by the U.S. Forest Service; that DEQ failed to certify whether the West End pit lake will comply with water quality standards; and that DEQ failed to consider important socioeconomic factors to justify water quality degradation of Tier II waters. *See id.*

The Nez Perce Tribe also submitted comments on April 12, 2024. DEQ 010011–010022. The Nez Perce Tribe raised similar concerns to Petitioners, including DEQ’s failure to certify whether the West End pit lake will comply with water quality standards, specifically mercury, and DEQ’s insufficient socioeconomic justification for the degradation of Tier II waters. *See id.*

On May 22, 2024, DEQ issued the final 401 Certification, along with its response to comments. PET 014328–014467. While DEQ made limited updates to the 401 Certification, it rejected most of the issues raised by Petitioners and other commenters.

DEQ found the Stibnite Gold Project will impact 33 Assessment Units within the North Fork Payette River and South Fork Salmon River subbasins. PET 014331. DEQ conducted antidegradation reviews for 28 high-quality waters that will be impacted by the Stibnite Gold Project. *See* PET 014333. DEQ determined degradation will occur in 16 of those waters, and DEQ relied on Perpetua’s Alternatives Analysis and Socioeconomic Justification (“AASJ”) to

conclude those degradations were necessary to accommodate important economic and social development. *See* PET 014358. However, DEQ never included the water quality impacts from atmospheric deposition of metals-laden dusts from construction and mining, instead relying on a policy that it does not consider “operational” impacts in 401 certifications. *See* PET 014368.

DEQ also admitted that there were numerous “pollutants of concern” for the Stibnite Gold Project, including temperature, antimony, arsenic, and mercury among others. PET 014331. But the 401 Certification’s antidegradation reviews narrowly focused on temperature increases only (*see* PET 014367, 014384, 014387, 014396, 014456), ignoring other pollutants of concern which are projected to increase in concentration in the East Fork SFSR, Meadow Creek, and West End Creek due to constructing mine pits and a mine waste facility, among other 404 dredge and fill activities occurring in, over, under, and next to streams and wetlands throughout the Stibnite Gold Project site. *See* PET 009955.

And even though the 401 Certification focused on temperature increases, it never addressed temperature increases modeled to occur in the East Fork SFSR and Meadow Creek. Moreover, DEQ’s 401 Certification failed to address post-mining water quality in the West End Pit Lake.

Nevertheless, DEQ concluded in the 401 Certification:

Based upon review of the federal permit application, readily available water quality materials, and certification request in accordance with 40 C.F.R. §§ 121.5 (b) and (c), and 121.7(c), received on 5/26/2023, DEQ certifies that if the permittee complies with the terms and conditions imposed by the federal permit and the conditions set forth in this water quality certification, then it is reasonable for DEQ to conclude that the activity will comply with water quality requirements, including applicable requirements of the Clean Water Act §§ 301, 302, 303, 306, and 307, Idaho’s “Water Quality Standards” (IDAPA 58.01.02), and other appropriate water quality requirements of state law.

PET 014328.

THE ORIGINAL PETITION TO INITIATE CONTESTED CASE

On February 2, 2025, Petitioners filed the Petition to Initiate Contested Case, challenging DEQ's issuance of the 401 Certification. Dkt. 001. Perpetua intervened. *See* Dkt. 011. The Parties agreed to a litigation schedule and engaged in limited discovery. *See* Dkt. 019–034. On February 2, 2025, Petitioners filed their Opening Merits Brief. Dkt. 042.

Petitioners Opening Brief argued that DEQ failed to consider water quality impacts from atmospheric deposition of metals like mercury and arsenic that could occur from the large amounts of dust the Stibnite Gold Mine is projected to generate; that DEQ failed to consider specific temperature and other water quality impacts projected to occur in the East Fork SFSR, Meadow Creek, and West End Creek; that DEQ failed to certify whether the West End pit lake will comply with water quality standards; and that DEQ failed to consider important socioeconomic factors to justify water quality degradation of Tier II waters. *See id.*

Instead of continuing with briefing, DEQ decided it would modify the 401 Certification and submitted a modification request to the Army Corps on March 25, 2025, and sought to extend its deadline to file a Response Brief. *See* Dkt. 046. In its request to the Army Corps, DEQ indicated that it intended to address a number of, but not all of, the issues Petitioners raised in the Opening Brief. Dkt. 046 at Ex. A. Then and thereafter, the Parties did not oppose and/or agreed to DEQ's successive requests for extensions until it completed the modification (*see generally* Dkt. 048–070), which DEQ did via the “Addendum” discussed next.

DEQ'S ADDENDUM TO THE 401 CERTIFICATION & THE AMENDED PETITION TO INITIATE CONTESTED CASE

In July 2025, DEQ released a Draft Addendum to the 401 Certification for public comment. Petitioners submitted comments on the Draft Addendum. DEQ 029600–624. Among other concerns, Petitioners warned that DEQ (1) failed to address water temperature increases

projected in the East Fork SFSR and Meadow Creek (DEQ 029608–610) and (2) wrongly determined the West End Pit Lake will not be a water of the United States. DEQ 029614–16.

On April 10, 2026, DEQ issued the final Addendum. DEQ 029803–899. In it, DEQ stated that the “addendum supplements—but does not replace—the conditions of the existing certification.” DEQ 029803. The Addendum makes an effort to correct some of the errors Petitioners identified in their previous Opening Brief, including by evaluating atmospheric deposition, addressing pollutants other than just temperature, and adding to the socioeconomic justification in ways the 401 Certification did not. However, DEQ rejected Petitioners’ comments that it (1) failed to conduct a legally defensible Tier 1 antidegradation analysis for elevated water temperatures in the East Fork SFSR and in Meadow Creek and (2) incorrectly determined the West End Pit Lake is not a WOTUS.

On May 8, 2026, Petitioners filed the Amended Petition. Dkt. 072.

ARGUMENT

Under the Idaho APA, an agency action like DEQ’s issuance the 401 Certification, 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 § 67-5279(3). *See 917 Lusk v. City of Boise*, 158 Idaho 12, 14 (2015). “An action is capricious if it was done without a rational basis. It is arbitrary if it was done in disregard to the facts and circumstances presented or without adequate determining principles.” *Am. Lung Ass’n of Idaho/Nev. v. Idaho State Dep’t of Agric.*, 142 Idaho 544, 547 (2006) (citations omitted).

DEQ committed two significant errors in the 401 Certification and Addendum. First, DEQ arbitrarily and capriciously classified decades-long increases in water temperatures in the East Fork SFSR and in Meadow Creek as “temporary” and otherwise improperly dismissed or

discounted them. Second, DEQ erroneously determined the West End Pit Lake, which will be a permanent lake that West End Creek will flow through, is not a “water of the United States” (“WOTUS”). By using these tactics, DEQ bypassed Idaho’s “antidegradation” requirements for each of these three water bodies.

I. DEQ IMPROPERLY EXEMPTED DECADES-LONG WATER TEMPERATURE INCREASES FROM TIER I ANTIDEGREDATION REQUIREMENTS.

A. East Fork SFSR Temperature Pollution.

At the mine site, DEQ classifies the lower reach of the East Fork SFSR as “impaired” because it currently fails to meet applicable water quality criteria for temperature. *See* DEQ 029811. As such, this lower portion (referred to as the “3rd order” of the East Fork SFSR) is afforded Tier I protection from degradation. PET 014352. For Tier I waters, the IWQS prohibit DEQ from allowing any discharge or activity that will degrade or lower water quality and would cause or contribute to a violation of any applicable water quality criteria. IWQS 052.07.

The East Fork SFSR runs through the heart of the mine site and would be significantly transformed during mining and afterward. Among other polluting activities, Perpetua would divert the East Fork SFSR and run it through a tunnel in order to conduct open pit mining *underneath the river* in the Yellow Pine Pit, and would later route the East Fork SFSR back through the Pit. *See* PET 002561, 002580–002581, 002584, 002588, 002607–002608. Remarkably, the 401 Certification does not even discuss these specific activities.

Perpetua’s temperature modeling shows the Project is projected to cause an increase in maximum water temperatures in the East Fork SFSR over baseline conditions in the Yellow Pine Pit starting between mine year 6 and mine year 12. *See* PER 003577 (figure reproduced below). Downstream of the pit, temperatures will exceed baseline (represented by the dashed “No Action” line) earlier. In the figure below, the Yellow Pine Pit is labeled “YPP/SL” (between about 7km and 8km on the y-axis). Downstream of the Pit begins around the 8km mark. Elevated

temperatures in the Pit would continue through at least mine year 27. *Id.* Sometime between mine years 27 and 52, temperatures in the Yellow Pine Pit and the downstream East Fork SFSR would fall to or below baseline. *Id.* Thus, at a minimum, the Project would cause elevated maximum temperatures over *fifteen years*, from years 12 to 27. These elevated temperatures could last as long as *forty six years*, from year 6 to year 52.

Fig. 2 – Reproduction of the East Fork SFSR Flow Path Portion of Figure 3-2 at PER 003577, titled “Simulated Maximum Temperatures for the Maximum Weekly Summer Condition Compared to IDEQ Criteria . . .”



During each of these years of elevated temperatures above baseline in the Yellow Pine Pit and downstream East Fork SFSR (at least 15 years and up to 46 years in the Yellow Pine Pit), the maximum temperatures would exceed the 13 °C salmonid spawning maximum daily maximum criteria (labeled “SS, MDMT” on the figure above) and would exceed the 13 °C bull trout maximum weekly maximum criteria (“BT, MWMT”), thereby causing and/or contributing to these exceedances in violation of IWQS 052.07.

Perpetua’s modeling data shows additional instances in which the Project would cause elevated temperatures above baseline in the East Fork SFSR and which cause or contribute to

violations of other temperature criteria, in violation of IWQS 052.07. Perpetua's Figure 3-3, "Simulated Average Temperatures for the Maximum Weekly Summer Condition . . .", shows average temperatures downstream of the Yellow Pine Pit would be above baseline and above the 9 °C salmonid spawning maximum daily average temperature criteria (SS, MDAT) for a number of years. PER 003579. And Figure 3-5, "Simulated Maximum Temperatures for the Maximum Weekly Fall Condition . . .", shows maximum fall temperatures in the Yellow Pine Pit and downstream above baseline and above the 9 °C fall³ bull trout maximum weekly maximum temperature criteria for a number of years. PER 003581.

B. Meadow Creek Temperature Pollution.

Meadow Creek, which is a tributary of the East Fork SFSR, would also be significantly transformed by the Stibnite Gold Project, though this too is not apparent in the 401 Certification. Among other activities, Perpetua would mine the Hanger Flats Pit adjacent to Meadow Creek and, further upstream, would fill the Meadow Creek Valley to create a massive, permanent mine waste dump (the "Tailings Storage Facility" or "TSF", which consists of the TSF Buttress and the TSF Impoundment), which Meadow Creek would later flow over and through forever. *See* PET 002561, 002573–002577, 002583, 002585.

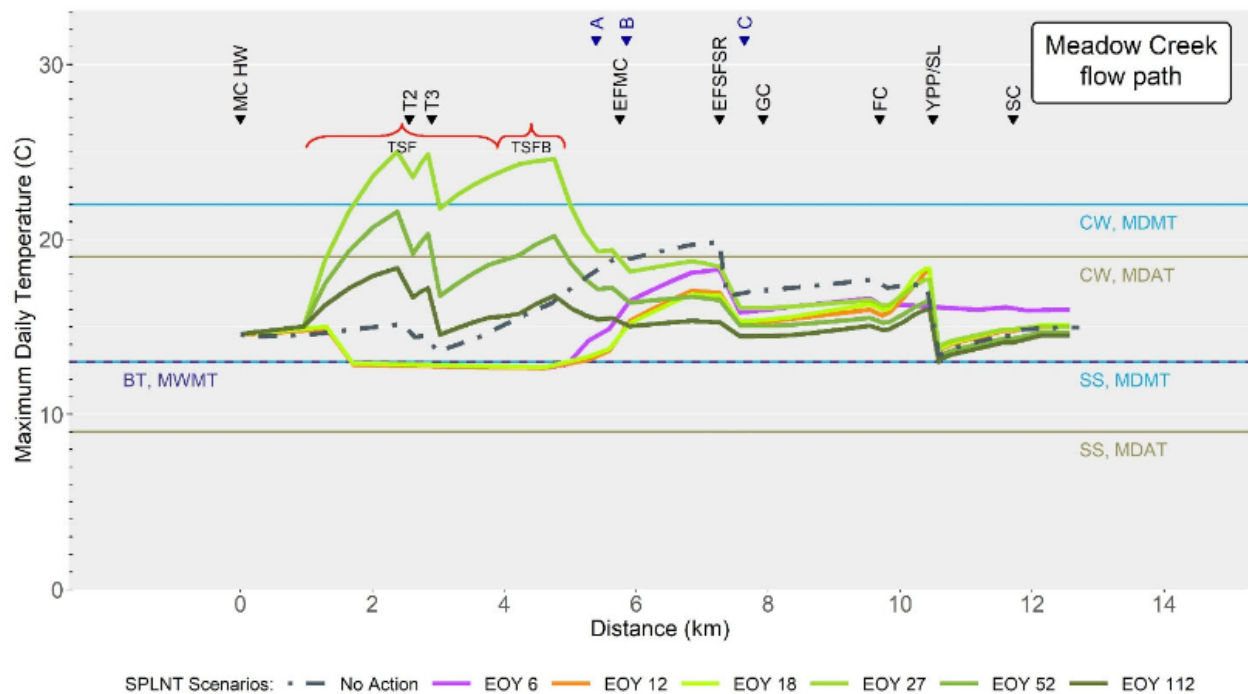
DEQ classifies Meadow Creek as "impaired" because it currently fails to meet applicable temperature water quality criteria. *See* DEQ 029811. Meadow Creek is thus afforded Tier I protections from increased water temperature. Again, for Tier I waters, the IWQS prohibit DEQ from allowing any discharge or activity that will degrade or lower water quality and would cause or contribute to a violation of any applicable water quality criteria. IWQS 052.07.

Temperature increases in Meadow Creek would be even more severe and longer lasting than in the East Fork SFSR. Perpetua's modeling shows the Project is projected to cause an

³ Perpetua's figures do not show the 9 °C *fall season* bull trout water quality criteria. They show only the 13 °C bull trout criteria that applies at other times of the year. *See* Table 1 above.

increase in maximum water temperatures above baseline conditions throughout an approximately 4km stretch of Meadow Creek (where it flows across the TSF) starting sometime between mine years 12 and 18. *See* PER 003577 (figure reproduced below). For most of this 4km reach (approximately stream km 1 to km 5 in the figure), elevated temperatures would continue to mine year 112 *at a minimum*. *Id.* Year 112 is the last year modeled, so it is unknown whether temperatures would ever return to baseline along this stretch of Meadow Creek. Thus, at a minimum, the Project would cause elevated maximum temperatures over a *ninety-four year* period from years 12 to 112. And at a maximum, these elevated temperatures could last forever.

Fig. 3 – Reproduction of the Meadow Creek Flow Path Portion of Figure 3-2 at PER 003577, titled “Simulated Maximum Temperatures for the Maximum Weekly Summer Condition Compared to IDEQ Criteria . . .”



During each of these years of elevated temperatures above baseline in Meadow Creek (lasting *94 years or longer*), maximum temperatures would exceed the 13 °C salmonid spawning maximum daily maximum temperature criteria (“SS, MDMT”) and exceed the 13 °C bull trout maximum weekly maximum criteria (“BT, MWMT”), thereby causing or contributing to

impairments, in violation of IWQS 052.07. Moreover, temperatures get so high by year 27 that they also exceed the 22 °C cold water maximum daily maximum temperature criteria (labeled “CW, MDMT” above), thereby causing a violation of this criteria, in violation of IWQS 052.07.

Perpetua’s modeling data shows additional instances in which the Project would cause elevated temperatures above baseline in Meadow Creek and which cause or contribute to violations of other temperature criteria, in violation of IWQS 052.07. Perpetua’s Figure 3-3, “Simulated Average Temperatures for the Maximum Weekly Summer Condition . . .”, shows average temperatures would be above baseline and above the 9 °C salmonid spawning maximum daily average temperature criteria (SS, MDAT) for a number of years, not just for the approximately 4km on the TSF, but further downstream too. PER 003579. And Figure 3-5, “Simulated Maximum Temperatures for the Maximum Weekly Fall Condition . . .”, shows maximum fall temperatures in Meadow Creek would be above baseline and above the 9 °C fall bull trout maximum weekly maximum temperature criteria for a number of years. PER 003581.

C. DEQ Erroneously Disregarded These Decades of Temperature Increases.

In the 401 Certification, DEQ disregarded these temperature increases in the East Fork SFSR and Meadow Creek and did not conduct a Tier I antidegradation review for them. In the Addendum, DEQ added a Tier I antidegradation review for temperature (and other pollutants) in both streams. DEQ 029812–15. There, DEQ acknowledged the Project would cause some increased temperatures in the East Fork SFSR and in Meadow Creek. But for the East Fork SFSR, DEQ wrote off all temperature increases as “brief,” “occurring only during early restoration,” “spatially limited to localized restored reaches,” “below biologically significant thresholds,” and “offset by widespread cooling in other segments of the [East Fork] SFSR.” DEQ 029815.

Similarly, for Meadow Creek, DEQ wrote off any temperature increases as “a

temporary spike,” “short-term,” and “not the result of a thermal discharge,” while stating “[c]old water aquatic life and contact recreation uses are preserved” and that “[o]ver the life of the project and subsequent restoration phases, overall water quality and habitat conditions are projected to improve as stream and riparian functions are restored.” DEQ 029813.

These conclusions are not based on substantial evidence, are arbitrary and capricious, and fail to follow the Clean Water Act, the IWQS, and guidance rendering the 401 Certification and Addendum unlawful. For Tier I waters: “Existing uses and the water quality necessary to protect the existing uses must always be maintained and protected. No degradation or lowering of water quality may be allowed that would cause or contribute to violation of water quality criteria as calculated after authorized mixing of the discharge with the receiving water.” IWQS 052.07.

The Idaho Antidegradation Implementation Procedures (DEQ, 2024) similarly provide for Tier I reviews: “Existing uses and their water quality to protect those uses must be maintained. All activities or discharges must not cause or contribute to a violation of numeric or narrative water quality criteria.” PET 015021. “The Tier I antidegradation review for a § 404 dredge and fill permit must demonstrate the project will comply with Idaho numeric and narrative water quality criteria” PET 015023.

“‘Degradation’ or ‘lower water quality’ . . . means . . . a change in a pollutant that is adverse to designated or existing uses, as calculated for a new point source” IWQS 010.20. To evaluate the effect of an activity or discharge on water quality during an antidegradation review, DEQ “will evaluate the effect on water quality for each pollutant” and “will determine whether an activity or discharge results in an improvement, no change, or degradation of water

quality.” IWQS 052.06. “Effect on water quality will be based on the calculated change in concentration of the receiving water as a result of a new . . . permit or license.” IWQS 052.06.a.

First, *decades* of elevated temperatures above baseline are not a “temporary spike” or “brief” for purposes of the Clean Water Act and Idaho water quality standards. EPA’s 2012 Clean Water Act Handbook defines temporary and short-term water quality impacts for restoration projects for antidegradation purposes as meaning “weeks or months, not years.” PET 014802. EPA provides as examples activities including replacing a septic tank at a campground, repairing a boat ramp, restoring a sea wall, and repairing a bridge, as the types of activities that might have only short-term water quality impacts limited to the short duration of the construction activity at issue. PET 014802–03.

Similarly, DEQ’s Idaho Antidegradation Implementation Procedures define short-term or temporary changes in water quality as “reductions in water quality lasting for a short time period with no long-term, residual effects.” PET 015008. The Procedures identify the following factors as relevant to whether a change in water quality is temporary or whether it causes a “longer-lasting effect”: (1) “Duration and extent of water quality impact;” and (2) “Potential for delayed, cumulative, or long-term effects on existing beneficial uses beyond the duration of the permitted activity.” PET 015038. The Procedures describe the types of project that “may result in only short-term or temporary lowering of water quality” to “include culvert replacements, small bridge installations, and streambank restoration.” PET 015038.

The Stibnite Gold Project is nothing like these small-scale, short-term projects, which may typically cause only very limited and short-lasting water quality impacts (turbidity) during their brief construction period of weeks or months. Over the next *two decades or more*, Perpetua would permanently bury Meadow Creek under nearly 500 feet of mine waste and

would excavate a mine pit under the East Fork SFSR, placing the East Fork in a tunnel for 12 years and later rerouting it back through the pit, among other major in-stream activities in these watersheds. And again, instead of causing brief temperature increases, Perpetua’s modeling projects *decades* of elevated water temperatures. Some temperature increases are modeled to last at least 96 years—nearly a century—and could last longer. Temperatures would be so high in both watersheds during these decades of elevated temperatures that they would exceed one or more fish protection water quality criteria.

Second, it does not matter whether the temperature increases are the result of a “thermal discharge.” DEQ must evaluate whether the “activity or discharge” will “degrade” water quality, not just the discharge itself. IWQS 052.06. “For a new permit or license, the calculated change [in water quality] will be the difference between the existing receiving water quality and water quality that would result from the activity or discharge as proposed in the new permit or license.” IWQS 052.06.a. DEQ’s Procedures also provide for Tier I reviews that all “activities or discharges” must not cause or contribute to a violation of water quality criteria. PET 015021. Here, Perpetua’s modeling is clear that the Project’s discharges and activity would increase water temperatures above baseline, and that these increases would cause or contribute to violations of multiple water quality criteria as explained above.

Third, there are no exceptions under the Clean Water Act and IWQS when water quality impacts are “spatially limited” to part of a watershed or “offset” by cleaner water elsewhere. This will be true almost any time a discharge or activity causes a lowering of water quality: while water quality will be lowered in the vicinity of the discharge or activity, there will likely be no water quality impact upstream or in tributaries, and any downstream water quality impact will typically be diluted after some distance. It would create a gaping loophole in the IWQS if a lowering of water quality could be exempted because water quality will not be lowered at other

locations in the watershed. Moreover, as Perpetua’s modeling shows and explained above, the elevated temperatures caused by the Project are not so limited. In the East Fork SFSR, the Project would elevate temperatures in the Yellow Pine Pit and downstream of it. In Meadow Creek, temperatures would be elevated along an approximately 4km stretch of the Creek.

Finally, DEQ’s suggestion temperatures would be below “biologically significant thresholds” is unsupported and irrelevant. Stretches of the East Fork SFRS and Meadow Creek already exceed multiple temperature criteria (SS, MDMT; SS MDAT; and BT, MWMT). As explained above, the Project would make these exceedances even worse in both watersheds. In Meadow Creek, the Project would cause such a large increase in water temperature that another criteria (CW, MDMT) would be exceeded. These criteria were adopted by Idaho in its water quality rules to protect fish. Under the Clean Water Act and IWQS, these criteria are the “thresholds” that matter, not some other “biologically significant thresholds.”

In summary, DEQ’s determination that the Project will not cause or contribute to violations of water quality criteria under IWQS 052.07 is not supported by substantial evidence, is arbitrary and capricious, and is contrary to the IWQS. The Hearing Officer should set aside 401 Certification and the Addendum and remand for DEQ to correct these errors.

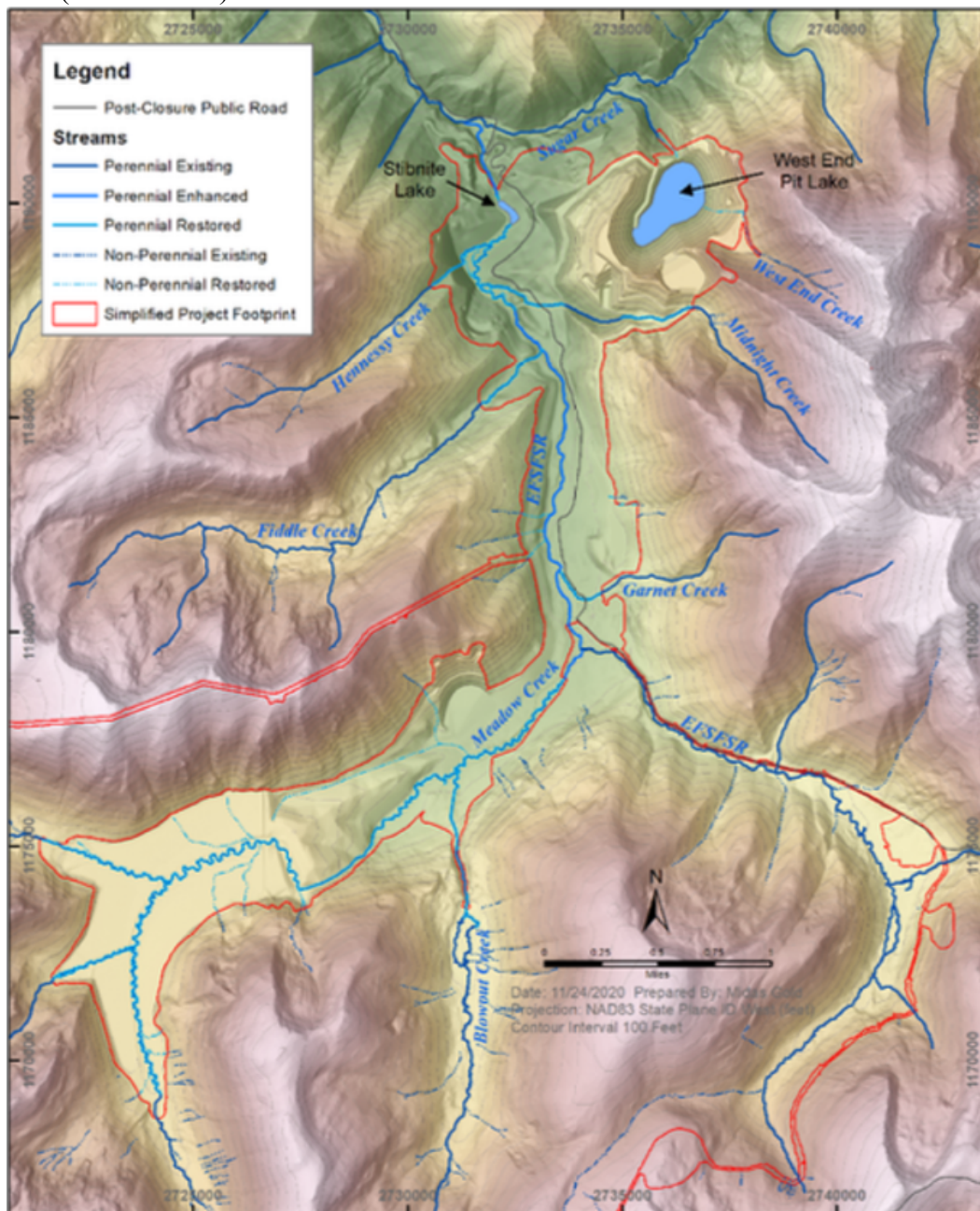
II. THE WEST END PIT LAKE IS A WATERS OF THE UNITED STATES.

A. Background & Summary of Argument

Among other open pit mining, the Stibnite Gold Project includes mining the West End Pit. *See* PET 002561, 002582, 002589, 002608. Perpetua would re-route West End Creek around the open pit during mining operations. *Id.* At the conclusion of mining the West End Pit, the West End Creek diversion and re-route would be removed, and West End Creek would flow generally back through the area where it currently flows. *Id.* When it does so, the upper portions of West End Creek would flow into the West End Pit where it would create the West End Pit

Lake, up to 400 feet deep. *Id.* The West End Pit would not be refilled by Perpetua and the Lake would remain on the landscape in perpetuity, as shown in the figure below

Fig. 4 – Reproduction of Forest Service FEIS Figure 2.4-18, “Post Closure and Reclamation Condition” (PET 002604).



The Forest Service identified a number of ways in which the Project is predicted to cause or contribute to water quality standard violations in the West End Pit Lake, stating:

The West End pit lake would not be reclaimed or restored and would not meet water quality criteria for fish occupancy. Based on the pit lake geochemical model (Section 4.9), predicted West End pit lake water chemistry exhibits circumneutral pH conditions with TDS concentrations below 130 mg/L. Antimony, arsenic, and mercury concentrations that exceed the strictest potentially applied water quality standards would occur in the West End pit throughout the operating and closure period. Predicted concentrations of copper and lead are predicted to exceed the strictest potentially applied water quality standards during pit dewatering operations, when produced water is routed for consumptive use and water treatment but decrease below those levels during as the lake fills. Concentrations of arsenic, mercury, and antimony are predicted to slightly exceed the strictest potentially applied water quality standards permanently post-closure.

PET 003633. Table 7-13 in the Water Quality Specialist Report displays a summary of geochemical modeling results for the West End Pit Lake. PET 009879–80. The table identifies (highlighted in gray background) instances where the Pit Lake (starting at mine year 13) is modeled to exceed the strictest potentially applicable water quality standards, including for As (arsenic), Hg (mercury), Pb (lead), and Sb (antimony). *Id.*

DEQ never even acknowledged this pollution in the West End Pit Lake in the 401 Certification. In the Addendum, DEQ included a section on water quality impacts related to the West End Pit Lake. DEQ 029825–28. There, however, DEQ explained that it need not address these water quality impacts because the West End Pit Lake is not a “water of the United States” or “WOTUS” and, therefore, is not subject to the CWA and Idaho antidegradation rules. *Id.*

In the Addendum, DEQ acknowledges that “West End Creek qualifies as a WOTUS before modification due to its relatively permanent flow and direct surface water connection to downstream navigable waters.” DEQ 029826. But DEQ determined that the Project would cause the “conversion of upper West End Creek from a jurisdictional tributary to a nonjurisdictional pit lake” under WOTUS regulations and the Supreme Court’s *Sackett v. EPA* decision. 598 U.S 651 (2023). DEQ 029825. According to DEQ, the West End Pit Lake is not

a WOTUS because it will not be “connected to traditional interstate navigable waters and will lack a continuous surface water connection to any other jurisdictional water.” DEQ 029827.

DEQ is wrong for multiple reasons, each of which are explained in the next sections. First, DEQ applied the wrong regulations. It relied on the WOTUS rules adopted in 2023, and the U.S. Supreme Court’s decision in *Sackett*. But in Idaho, the pre-2015 WOTUS rules and *Sackett* decision are the governing framework for defining waters of the United States. Second, the West End Pit Lake qualifies as a WOTUS under the pre-2015 rules, consistent with *Sackett*, and under the 2023 rules too, because it would be an “impoundment” of West End Creek. *See* 40 C.F.R. 230.3(s) (pre 2015); 40 C.F.R. 120.2(a)(2) (2023).⁴ Third, it also qualifies as a WOTUS because it would be a permanent “lake” and its degradation could affect interstate or foreign commerce through recreation and industry.

Without considering the water quality impacts to West End Pit Lake, DEQ failed to comply with the Clean Water Act, 33 U.S.C. § 1341, EPA’s 401 regulations, 40 C.F.R. § 121.3(a), and IWQS 050.02.a, which requires DEQ to certify that all water quality standards will be met for all waters of the United States. DEQ also failed to comply with IWQS 052.07 by failing to perform a Tier I antidegradation review and by allowing degradation that will cause or contribute to water quality standard violations in West End Pit Lake, including some violations that are expected to occur permanently beyond the mine’s closure.

B. DEQ Applied the Wrong Regulations.

In its Addendum, DEQ relied on the rules promulgated in 2023, to determine that West End Pit Lake is not a WOTUS. DEQ 029827. Due to litigation enjoining the 2023 rules defining WOTUS in Idaho and 25 other states, the pre-2015 regulatory regime and

⁴ Portions of the pre-2015 rules and the 2023 rules defining WOTUS are attached to this brief.

the *Sackett* decision apply in Idaho. *Texas v. EPA*, 662 F. Supp. 3d 739 (S.D. Tex. 2023) (enjoining the rule in Texas and Idaho); *West Virginia v. EPA*, 669 F. Supp. 3d 781 (D.N.D. 2023) (enjoining the rule in 24 additional states). EPA’s webpage titled “Definition of ‘Waters of the United States’: Rule Status and Litigation Update” provides a detailed explanation of this situation and confirms that Idaho is among the states that apply the pre-2015 regulatory regime consistent with *Sackett*, not the 2023 WOTUS rule.⁵

Under the pre-2015 rules, WOTUS are defined to include “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.” 40 C.F.R. § 230.3(s)(1) (pre 2015). These waters include “[a]ll interstate waters.” *Id.* § 230.3(s)(2). They include “intrastate lakes, rivers, streams (including intermittent streams)... degradation or destruction of which could affect interstate or foreign commerce including any such waters: [] which are or could be used by interstate or foreign travelers for recreational or other purposes; [] or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; [] or which are used or could be used for industrial purposes by industries in interstate commerce.” *Id.* § 230.3(s)(3). They include “[t]ributaries of” other WOTUS. *Id.* § 230.3(s)(5). And they include “all impoundments of waters otherwise defined as waters of the United States under this definition.” *Id.* § 230.3(s)(4).

In *Sackett*, the Supreme Court ruled on what is required for “adjacent wetlands” to qualify as WOTUS, holding that such wetlands must have a “continuous surface connection” to another waterbody that qualifies as a WOTUS. *Sackett*, 598 U.S. at 654. This holding narrowed traditional interpretations of 40 C.F.R. § 230.3(s) (pre-2015), eliminating jurisdiction

⁵ Available at: <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

for wetlands that would have previously qualified as WOTUS based on a groundwater connection.

In November 2025, the EPA and the Army Corps released a proposal to revise the definition of WOTUS yet again. But those rules have not been finalized. And even if those rules are finalized during the pendency of this matter, the Ninth Circuit has held that changes in the Clean Water Act WOTUS rules only apply prospectively, not retroactively. *United States v. Lucero*, 989 F.3d 1088, 1104–1105 (2021). The EPA Environmental Appeals Board has similarly held that when a 401 certification is challenged on appeal, and the definition of WOTUS changes during review, the applicable law is the “regulatory definition in force at the time of permit issuance.” *In re: Arizona Public Service Co.*, 2020 WL 5902262, at *15 (EAB 2020).

Here, when DEQ issued the 401 Certification in May, 2024, and when it issued the Addendum, the 2023 rule defining WOTUS had already been enjoined, and the pre-2015 regime, as informed by *Sackett*, applied in Idaho. That is still the operative regulatory regime in Idaho today.

C. West End Pit Lake Is an “Impoundment,” Making It a WOTUS.

West End Pit Lake is an “impoundment” of West End Creek, and therefore qualifies as a WOTUS. The pre-2015 rules define WOTUS to include “[a]ll impoundments of waters otherwise defined as waters of the United States.” 40 C.F.R. § 230.3(s)(4) (pre 2015). The West End Pit Lake would be formed through a process of impounding water from West End Creek. Merriam Webster defines “impoundment” as “a body of water formed by impounding,” and defines “impounding” as “to collect and confine (water) in or as if in a reservoir.”⁶ This

⁶ <https://www.merriam-webster.com/dictionary/dictionary>.

describes the West End Pit Lake and the process by which it would be created: Perpetua would collect and confine the water in West End Creek (which DEQ admits is itself a WOTUS), and would confine that water in the West End Pit, creating a body of water—the West End Pit Lake.

As described in Perpetua’s supporting materials for the 401 Certification, Perpetua would divert “West End Creek around and downstream of West End pit with the eventual capture and retention of the upper West End Creek at West End Pit Lake after reclamation and closure.” PET 014398. This same document repeatedly describes the Creek’s flows as being “captured and retained” in in the West End Pit Lake after mining. PET 014404, 014411, 014415, 014416, 014430.

While impoundments are often associated with dams, courts have defined lakes as impoundments for purposes of the Clean Water Act. *See In re Jarvis*, 2002 WL 550952 (E.P.A., 2002) (“As Boone Lake was created by the impoundment of the South Fork of the Holston River, it falls within the definition of a water of the United States.”); *see also In re Smith*, 2004 WL 1658484 (E.P.A., 2004) (holding that Lake Jackson appeared to be a WOTUS “by virtue of the fact that it may be an impoundment of the Ocmulgee River, under [40 C.F.R. § 230.3(s)(4) (pre 2015)].”).

DEQ determined that West End Pit Lake is not jurisdictional because it lacks “a continuous surface water connection to any other jurisdictional water.” DEQ 029827. But 40 C.F.R. § 230.3(s) (pre 2015) does not require impoundments to maintain a continuous surface water connection to a jurisdictional water to qualify as WOTUS. And while *Sackett* requires a continuous surface connection for “adjacent wetlands”, it did not address or overrule the impoundment category. *See Sackett*, 598 U.S. at 654. The impoundment category turns on how a water body is created—“in or from jurisdictional waters”—not on whether it retains a surface

outlet afterward. Indeed, the capture and retention of jurisdictional flow—here flow from upper West End Creek—is what makes a water an impoundment; a rule conditioning impoundment status on a continuous surface connection would read the category out of the definition.

Moreover, even under the 2023 WOTUS rules, which do not apply in Idaho, and which were adopted post *Sackett* to add in all requirements from that decision, the West End Pit Lake is still an impoundment that qualifies as a WOTUS. Subsections (a)(1) and (a)(3) of that rule define WOTUS to include “[i]nterstate waters” and “[t]ributaries” to such waters, which include West End Creek. 40 C.F.R. § 120.2 (2023). They also define WOTUS to include “[i]mpoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section.” *Id.* § 120.2(a)(2). There is no requirement in the post-*Sackett* regulations that impoundments have a continuous surface water connection. Here, the West End Pit Lake is an impoundment of a tributary (West End Creek) to interstate waters (the Salmon-Snake River system) and qualifies as a WOTUS under those rules.

D. West End Pit Lake Is Also a WOTUS Because It Is a Lake that Could Affect Interstate Commerce.

In addition to qualifying as a WOTUS by being an impoundment, the West End Pit Lake also qualifies because it would be a relatively permanent body of water with the potential to affect interstate or foreign commerce under the governing pre-2015 rules and *Sackett*. The pre-2015 definition of WOTUS expressly reaches “[a]ll other waters such as intra-state lakes . . . the degradation or destruction of which could affect interstate or foreign commerce,” including waters from “which fish . . . are or could be taken and sold in interstate or foreign commerce,” waters “which are or could be used by interstate or foreign travelers for recreational or other purposes,”

and waters “[w]hich are used or could be used for industrial purposes by industries in interstate commerce.” 40 C.F.R. § 230.3(s) (pre 2015).

Sackett and the pre-2015 framework both recognize that lakes themselves can be WOTUS if they are relatively permanent. *See, e.g., Sackett*, 598 U.S. at 671–74 (grouping “lakes” with oceans, streams, and rivers which all count as WOTUS, and distinguishing wetlands from this group). Similarly, the Supreme Court in *Rapanos v. United States*, 547 U.S. 715, 732–33 (2006), listed “streams, oceans, rivers, and lakes” as the prototype WOTUS. The *Rapanos* Court defined these as “relatively permanent, standing or flowing bodies of water,” rather than “transitory puddles or ephemeral flows.” Although *Sackett* requires a “continuous surface connection” to a WOTUS to establish jurisdiction for “adjacent wetlands,” it does *not* set forth the same requirement for lakes. *See Sackett*, 598 U.S. at 654.

The West End Pit Lake would be a permanent lake. It is expected to be up to 400 feet deep and would exist in perpetuity. PET 014416 (“The up to 400-foot-deep West End pit lake will fill gradually”); DEQ 029848 (“The West End Pit Lake will persist permanently.”). DEQ projects that the lake would fill to a maximum volume of approximately 2,700 acre-feet at a surface elevation of 6,663 feet over roughly 57 years. DEQ 029826. Throughout the record, the West End Pit Lake is discussed having lake-like behavior, experiencing seasonal fluctuations, longer-term climate variations, and stratification and turn over, and being a permanent feature that would “have impacts on fish in perpetuity.” DEQ 029216, 029303; PET 009874. Perpetua and DEQ themselves use lake in the title of the body of water: “West End Pit Lake”.

Industrial Purposes. One way the West End Pit Lake qualifies as a WOTUS is that its waters “are used or could be used for industrial purposes by industries in interstate commerce.” 40 C.F.R. § 230.3(s)(3)(iii) (pre 2015). Perpetua’s mine would be an industrial operation that

would engage in interstate commerce. The West End Pit Lake would be used for this industrial purpose. In fact, the Lake is being created for Perpetua's industrial purposes. And it "could" be used for future industrial mining purposes. This alone makes it a WOTUS.

Recreation on the Lake. Another way the West End Pit Lake qualifies as a WOTUS because it could affect interstate or foreign commerce through recreational use of the Lake. 40 C.F.R. § 230.3(s)(3)(i) (pre 2015). Part of the West End Pit Lake would sit on public lands. *See* DEQ 029615 (reproduction of Project map showing private property boundaries). The waters of this drainage are already managed for recreational uses: DEQ designates the assessment unit encompassing West End Creek for cold water aquatic life, salmonid spawning, and primary contact recreation, and reports all assessed uses as fully supporting. DEQ 029810–11.

The U.S. Fish & Wildlife Service's Biological Opinion for the Project that precisely this has already occurred at this mine site: The Yellow Pine Pit, "[f]irst mined in 1938, and abandoned in the late 1950s," has "since filled with river water and formed a lake," and "recreationists currently camp on the old mine benches within the open pit and catch fish in" it. DEQ 029249. The Project's stated closure objectives confirm the point for the West End Pit Lake: "Closure and reclamation activities are intended to achieve post-mining land uses of wildlife and fisheries habitat and dispersed recreation in the action area." DEQ 029214.

Thus, the lake would be accessible to the public for recreation. The water's use, degradation, or destruction therefore "could affect" interstate or foreign commerce since it "could be used by interstate or foreign travelers for recreational or other purposes." 40 C.F.R. § 230.3(s). West End Pit Lake is therefore a "lake" that is itself relatively permanent and could affect interstate or foreign commerce through recreation, making it a WOTUS.

Downstream Recreation. The West End Pit Lake also qualifies as a WOTUS because its degradation could affect recreation and interstate commerce downstream in West End Creek and Sugar Creek. 40 C.F.R. § 230.3(s)(3)(i) (pre 2015). The FEIS’s Water Quality Specialist Report states that 100% of groundwater outflow from West End Pit Lake discharges as surface water into West End Creek and Sugar Creek. PER 003480. This squarely contradicts DEQ’s assertion that the lake “will not have a direct hydrologic connection to WOTUS under ordinary conditions.” DEQ 029827.

The U.S. Fish & Wildlife Service’s Biological Opinion expressly identifies a permanent contaminant pathway running from the West End Pit Lake to Sugar Creek. Because “[t]he West End pit lake, unlike other active mine and facility areas, will not be reclaimed or restored,” it “will therefore have impacts on fish in perpetuity,” and “impacts to bull trout from contaminants in the West End pit lake will be limited to contaminants entering Sugar Creek via outlet spillage *or seepage* after the closure and reclamation of the mine.” DEQ 029303 (emphasis added). Recognizing this connection is critical because the Stibnite Gold Project Water Quality specialist Report details several contaminants, including arsenic, mercury, lead, and antimony, that would be present in the West End Pit Lake at values “greater than the strictest potentially applicable water quality standards.” PET 009879–80.

Defendants’ April 2026 Addendum, issued in part to clarify DEQ’s treatment of “post-mining conditions in West End Pit Lake and downstream waters” (DEQ 029803), only deepens that record. DEQ predicts that once the Lake fills, its volume and surface elevation “would vary at slightly lower levels as meteoric inflows varied in relation to *outflows to bedrock groundwater* and evaporative balance.” DEQ 029826 (emphasis added). That outflow does not vanish after the Lake fills. DEQ acknowledges that pit lake water, if released, “could reintroduce mercury or other

legacy contaminants into lower West End Creek and Sugar Creek,” and that “modeled risks remain if high precipitation or unforeseen inflows occur.” DEQ 029841. Perpetua has accordingly committed to “[m]onitoring the pit lake and lower West End Creek for flow, water quality, and connectivity throughout postclosure,” and to “[e]stablishing a mobile treatment contingency if the pit lake, though designed not to spill, risks overflowing post-mining.” DEQ 029827; *see also* DEQ 029825 (the lake’s “potential interaction with lower West End Creek is subject to monitoring”); DEQ 029848 (“the risk of future discharge necessitates indefinite monitoring and contingency treatment infrastructure”). There would be no reason to monitor “connectivity” in perpetuity for a water body that is hydrologically isolated.

In summary, DEQ’s determination that the West End Pit Lake is not a WOTUS lacks support by substantial evidence, is arbitrary and capricious, and is not supported by law and regulation. The West End Pit Lake qualifies as a WOTUS because it is an “impoundment” of West End Creek. It also qualifies because it is a permanent water body that could affect interstate commerce via recreational use of the Lake and of downstream West End Creek and Sugar Creek. As such, the Lake is entitled to protection under the IWQS antidegradation provisions. The Hearing Officer should set aside the 401 Certification and Addendum and remand for DEQ to correct these errors.

CONCLUSION

When it issued the 401 Certification and Addendum for the Stibnite Gold Project, DEQ violated the federal Clean Water Act, Clean Water Act regulations, and the Idaho Water Quality Standards. Its decision is not supported by substantial evidence in the record, and it acted arbitrarily, capriciously, and on unlawful procedure and/or abused its discretion under Idaho Code § 67-5279. Accordingly, the Board should hold unlawful and set aside the 401 Certification and Addendum and remand to DEQ to correct all errors.

Dated: August 7, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2026, a true and correct copy of Petitioners' Opening Merits Brief was served via email to:

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Attachment A

Excerpt of Pre-2015 Clean Water Act Regulations, 40 C.F.R. Part 230

Environmental Protection Agency

§ 230.1

**PART 230—SECTION 404(b)(1)
GUIDELINES FOR SPECIFICATION
OF DISPOSAL SITES FOR
DREDGED OR FILL MATERIAL**

Subpart A—General

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Subpart G—Evaluation and Testing

- 230.60 General evaluation of dredged or fill material.
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- 230.70 Actions concerning the location of the discharge.
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- 230.73 Actions affecting the method of dispersion.
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**Subpart I—Planning To Shorten Permit
Processing Time**

- 230.80 Advanced identification of disposal areas.

**Subpart J—Compensatory Mitigation for
Losses of Aquatic Resources**

- 230.91 Purpose and general considerations.
- 230.92 Definitions.
- 230.93 General compensatory mitigation requirements.
- 230.94 Planning and documentation.
- 230.95 Ecological performance standards.
- 230.96 Monitoring.
- 230.97 Management.
- 230.98 Mitigation banks and in-lieu fee programs.

AUTHORITY: Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

SOURCE: 45 FR 85344, Dec. 24, 1980, unless otherwise noted.

Subpart A—General

§ 230.1 Purpose and policy.

(a) The purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.

(b) Congress has expressed a number of policies in the Clean Water Act. These Guidelines are intended to be

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consistent with and to implement those policies.

(c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.

(d) From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.

§ 230.2 Applicability.

(a) These Guidelines have been developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army acting through the Chief of Engineers under section 404(b)(1) of the Clean Water Act (33 U.S.C. 1344). The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States. Sites may be specified through:

(1) The regulatory program of the U.S. Army Corps of Engineers under sections 404(a) and (e) of the Act (see 33 CFR Parts 320, 323 and 325);

(2) The civil works program of the U.S. Army Corps of Engineers (see 33 CFR 209.145 and section 150 of Pub. L. 94-587, Water Resources Development Act of 1976);

(3) Permit programs of States approved by the Administrator of the Environmental Protection Agency in accordance with section 404(g) and (h) of the Act (see 40 CFR parts 122, 123 and 124);

(4) Statewide dredged or fill material regulatory programs with best management practices approved under section 208(b)(4)(B) and (C) of the Act (see 40 CFR 35.1560);

(5) Federal construction projects which meet criteria specified in section 404(r) of the Act.

(b) These Guidelines will be applied in the review of proposed discharges of dredged or fill material into navigable waters which lie inside the baseline from which the territorial sea is measured, and the discharge of fill material into the territorial sea, pursuant to the procedures referred to in paragraphs (a)(1) and (2) of this section. The discharge of dredged material into the territorial sea is governed by the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 92-532, and regulations and criteria issued pursuant thereto (40 CFR parts 220 through 228).

(c) Guidance on interpreting and implementing these Guidelines may be prepared jointly by EPA and the Corps at the national or regional level from time to time. No modifications to the basic application, meaning, or intent of these Guidelines will be made without rulemaking by the Administrator under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

§ 230.3 Definitions.

For purposes of this part, the following terms shall have the meanings indicated:

(a) The term *Act* means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92-500, as amended by Pub. L. 95-217, 33 U.S.C. 1251, *et seq.*

(b) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”

(c) The terms *aquatic environment* and *aquatic ecosystem* mean waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.

(d) The term *carrier of contaminant* means dredged or fill material that contains contaminants.

(e) The term *contaminant* means a chemical or biological substance in a form that can be incorporated into, onto or be ingested by and that harms aquatic organisms, consumers of aquatic organisms, or users of the aquatic environment, and includes but

is not limited to the substances on the 307(a)(1) list of toxic pollutants promulgated on January 31, 1978 (43 FR 4109).

(f)-(g) [Reserved]

(h) The term *discharge point* means the point within the disposal site at which the dredged or fill material is released.

(i) The term *disposal site* means that portion of the “waters of the United States” where specific disposal activities are permitted and consist of a bottom surface area and any overlying volume of water. In the case of wetlands on which surface water is not present, the disposal site consists of the wetland surface area.

(j) [Reserved]

(k) The term *extraction site* means the place from which the dredged or fill material proposed for discharge is to be removed.

(l) [Reserved]

(m) The term *mixing zone* means a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a discharge point where receiving water quality may not meet quality standards or other requirements otherwise applicable to the receiving water. The mixing zone should be considered as a place where wastes and water mix and not as a place where effluents are treated.

(n) The term *permitting authority* means the District Engineer of the U.S. Army Corps of Engineers or such other individual as may be designated by the Secretary of the Army to issue or deny permits under section 404 of the Act; or the State Director of a permit program approved by EPA under section 404(g) and section 404(h) or his delegated representative.

(o) The term *pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The legislative history of the Act reflects that “radioactive materials” as included within the definition of “pollutant” in section 502 of the Act means only radioactive materials

which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term “pollutant”, are radium and accelerator produced isotopes. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

(p) The term *pollution* means the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of an aquatic ecosystem.

(q) The term *practicable* means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(q-1) *Special aquatic sites* means those sites identified in subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See § 230.10(a)(3))

(r) The term *territorial sea* means the belt of the sea measured from the baseline as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone and extending seaward a distance of three miles.

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or

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destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

[45 FR 85344, Dec. 24, 1980, as amended at 58 FR 45037, Aug. 25, 1993]

§ 230.4 Organization.

The Guidelines are divided into eight subparts. Subpart A presents those provisions of general applicability, such as purpose and definitions. Subpart B establishes the four conditions which must be satisfied in order to make a

finding that a proposed discharge of dredged or fill material complies with the Guidelines. Section 230.11 of subpart B, sets forth factual determinations which are to be considered in determining whether or not a proposed discharge satisfies the subpart B conditions of compliance. Subpart C describes the physical and chemical components of a site and provides guidance as to how proposed discharges of dredged or fill material may affect these components. Subparts D through F detail the special characteristics of particular aquatic ecosystems in terms of their values, and the possible loss of these values due to discharges of dredged or fill material. Subpart G prescribes a number of physical, chemical, and biological evaluations and testing procedures to be used in reaching the required factual determinations. Subpart H details the means to prevent or minimize adverse effects. Subpart I concerns advanced identification of disposal areas.

§ 230.5 General procedures to be followed.

In evaluating whether a particular discharge site may be specified, the permitting authority should use these Guidelines in the following sequence:

(a) In order to obtain an overview of the principal regulatory provisions of the Guidelines, review the restrictions on discharge in § 230.10(a) through (d), the measures to minimize adverse impact of subpart H, and the required factual determinations of § 230.11.

(b) Determine if a General permit (§ 230.7) is applicable; if so, the applicant needs merely to comply with its terms, and no further action by the permitting authority is necessary. Special conditions for evaluation of proposed General permits are contained in § 230.7. If the discharge is not covered by a General permit:

(c) Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§ 230.10(a)).

(d) Delineate the candidate disposal site consistent with the criteria and evaluations of § 230.11(f).

Attachment B

2023 Clean Water Act Regulations, 40 C.F.R. 120.2

This content is from the eCFR and is authoritative but unofficial.

Title 40 —Protection of Environment
Chapter I —Environmental Protection Agency
Subchapter D —Water Programs
Part 120 —Definition of Waters of the United States

Authority: 33 U.S.C. 1251 *et seq.*

Source: 85 FR 22340, Apr. 21, 2020, unless otherwise noted.

§ 120.2 Definitions.

For the purpose of this regulation these terms are defined as follows:

- (a) *Waters of the United States* means:
 - (1) Waters which are:
 - (i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
 - (ii) The territorial seas; or
 - (iii) Interstate waters;
 - (2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;
 - (3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;
 - (4) Wetlands adjacent to the following waters:
 - (i) Waters identified in paragraph (a)(1) of this section; or
 - (ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;
 - (5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.
- (b) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:
 - (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;
 - (2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

- (3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;
 - (4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;
 - (5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - (6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;
 - (7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and
 - (8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.
- (c) In this section, the following definitions apply:
- (1) **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
 - (2) **Adjacent** means having a continuous surface connection.
 - (3) **High tide line** means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.
 - (4) **Ordinary high water mark** means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.
 - (5) **Tidal waters** means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

[88 FR 3143, Jan. 18, 2023, as amended at 88 FR 61969, Sept. 8, 2023]