

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2024, the foregoing was filed, served, and copied as shown below.

Bryan Hurlbutt
Laird Lucas
Advocates for the West
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/s/ Paula J. Wilson
Paula J. Wilson

CONTESTED CASE TRANSMITTAL SHEET
 State of Idaho – Office of Administrative Hearings

TO: OFFICE OF ADMINISTRATIVE HEARINGS (email: bryan.nickels@oah.idaho.gov)

DATE	June 28, 2024
FROM (Referring Agency/Board)	Board of Environmental Quality
AGENCY CASE/ PROCEEDING NO.	0102-24-02
DOCUMENTS ATTACHED	Notice of Filing and Service of Petition Petition to Initiate Contested Case

PARTY/LICENSEE

NAME	Petitioners Idaho Conservation League (ICL), Idaho Rivers United (IRU), Save the South Fork Salmon, Earthworks
ADDRESS	N/A Petitioners' addresses, emails, and phone numbers were not included in petition
EMAIL	N/A
PHONE	N/A

PARTY/LICENSEE ATTORNEY (if any)

NAME	Attorneys for Petitioners ICL and IRU Bryan Hurlbutt Laird Lucas	Attorney for Petitioners Save the South Fork Salmon and Earthworks Julia Thrower
ADDRESS	Advocates for the West P.O. Box 1612 Boise, ID 83701	Mountain Top Law PLLC 614 Thompson Ave. McCall, ID 83638
EMAIL	bhurlbutt@advocateswest.org llucas@advocateswest.org	jthrower@mtntoplw.com
PHONE	(208)342-7024	(208)271-6503

NON-PETITIONER LICENSEE/PERMITTEE (potential intervenor)

NAME	Perpetua Resources Idaho, Inc. Alan Haslam, Vice President – Permitting
ADDRESS	405 South 8 th Street, Suite 201 Boise, ID 83702
EMAIL	Alan.Haslam@Perpetua.us
PHONE	N/A

NON-PETITIONER LICENSEE/PERMITTEE ATTORNEY (potential intervenor)

NAME	Unknown	
ADDRESS		
EMAIL		
PHONE		

AGENCY/BOARD ATTORNEY

NAME	Michael Short, Deputy Attorney General
ADDRESS	Idaho Attorney General's Office 1410 N. Hilton Boise, ID 83706
EMAIL	michael.short@deq.idaho.gov
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SHORT STATEMENT OF THE NATURE OF THE CASE (e.g., "Suspension of license based on following grounds . . .") AND GOVERNING STATUTES

Short statement of the nature of the case
Petitioners are seeking Board review of Clean Water Act Section 401 Water Quality Certification NWW-2013-00321 issued by the Department of Environmental Quality on May 22, 2024, to Perpetua Resources Idaho, Inc. for its proposed Stibnite Gold Project.
Governing statutes and administrative rules
The Board of Environmental Quality has legal authority to hear this matter pursuant to the Environmental Protection and Health Act, Chapter 1, Title 39, Idaho Code . This proceeding is governed by the Administrative Procedure Act, Chapter 52, Title 67, Idaho Code ; IDAPA 58.01.23, Contested Case Rules and Rules for Protection and Disclosure of Records ¹ ; and IDAPA 58.01.02, Water Quality Standards .

¹ On June 26, 2024, the Idaho Board of Environmental Quality adopted a temporary rule for IDAPA 58.01.23 with an effective date of July 1, 2024.

The Notice of Rulemaking – Temporary and Proposed Rule for Docket No. 58-0123-2401 will publish in the Idaho Administrative Bulletin on July 3, 2024. An unofficial advance copy of the July 3, 2024 Bulletin publication is available at <https://www2.deq.idaho.gov/admin/LEIA/api/document/download/22305>

ARE THERE SPECIFIC STATUTORY/REGULATORY RULES ON THE TIME FOR HEARING OR DECISION?

YES: NO: X

[OAH typically sets hearings based on parties' availability and agreement with written decision no later than the end of the month following the month the hearing was held]

If yes:

Deadline for hearing		
Deadline for decision		
Statute(s)/Rule(s) citation		

HAS ANY PARTY TO THE CONTESTED CASE PROCEEDING REQUESTED INTERIM, EXPEDITED, OR EMERGENCY RELIEF?

YES: NO: X

If yes, briefly explain	
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DO ANY HEARING PROCEDURAL RULES, OTHER THAN IDAPA 62.01.01, IDAHO RULES OF ADMINISTRATIVE PROCEDURE², APPLY TO THIS PROCEEDING?

YES: X NO:

If yes, statute(s)/rule(s) citation	IDAPA 58.01.23, Contested Case Rules and Rules for Protection and Disclosure of Records
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ORDER REQUESTED - N/A

Preliminary Order

Recommended Order

² Effective July 1, 2024

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
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.)

)

) Agency Case No. 0102-24-02

) NOTICE OF FILING AND SERVICE
) OF PETITION

NOTICE IS HEREBY GIVEN that:

1. A Petition to Initiate Contested Case was filed with the Idaho Board of Environmental Quality on June 25, 2024.
2. A true and correct copy of the Petition is hereby served on the following.

On Behalf of the Department of Environmental Quality:

Michael A. Short
Deputy Attorney General
Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706
michael.short@deq.idaho.gov
electronic service

On Behalf of Permit Applicant/Permit Holder:

Alan Haslam, Vice President – Permitting
405 South 8th Street, Suite 201
Boise, ID 83702
Alan.Haslam@Perpetua.us
via electronic service

3. Pursuant to IDAPA 58.01.23.352, in any proceeding involving a permit, a petition to

intervene by the permit applicant or permit holder must be filed within twenty-one (21) days after the date of service of this petition.¹

Dated this 28th day of June, 2024.

/s/ Paula J. Wilson
Paula J. Wilson, Paralegal
Energy and Natural Resources Division
Office of the Attorney General
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paula.wilson@deq.idaho.gov

¹ On June 26, 2024, the Idaho Board of Environmental Quality adopted a temporary rule for IDAPA 58.01.23 with an effective date of July 1, 2024. The Notice of Rulemaking – Temporary and Proposed Rule for Docket No. 58-0123-2401 will publish in the Idaho Administrative Bulletin on July 3, 2024. An unofficial advance copy of the July 3, 2024 Bulletin publication is available at <https://www2.deq.idaho.gov/admin/LEIA/api/document/download/22305>

CERTIFICATION OF SERVICE

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/s/ Paula J. Wilson
Paula J. Wilson

Idaho Code § 39-107(5) and IDAPA 58.01.23 and 04.11.01.210. This Petition challenges the Clean Water Act Section 401 Water Quality Certification (the “401 Certification”) issued by the Idaho Department of Environmental Quality (“DEQ”) on May 22, 2024, to mining company Perpetua Resources Idaho, Inc. (“Perpetua”) for its proposed Stibnite Gold Project.

2. The Stibnite Gold Project site is in the headwaters of the East Fork of the South Fork of the Salmon River, approximately ten miles east of the town of Yellow Pine, Idaho. As proposed, Perpetua would use conventional mining techniques to extract ore from three open pits, process gold, and dispose of mine waste at the site over sixteen years.

3. Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, requires that Perpetua seek certification from DEQ that the Stibnite Gold Project will comply with applicable water quality standards in order to obtain any federal permit authorizing pollution discharges at the mine. Among other federal permits, Perpetua has 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 twenty-one miles of streams and over 150 acres of wetlands. In the 401 Certification challenged here, DEQ certified that the requested Army Corps 404 permit for the Stibnite Gold Project will comply with all applicable Idaho water quality standards.

4. When it issued the 401 Certification, DEQ failed to comply with Clean Water Act Section 401, the U.S. Environmental Protection Agency’s (“EPA”) Clean Water Act regulations, and Idaho water quality rules, its decision was not supported by substantial evidence in the record, and it otherwise acted on unlawful procedure, arbitrarily and capriciously, and/or abused its discretion under the Idaho Administrative Procedure Act, Idaho Code § 67-5279, in five ways: (1) DEQ failed to consider water quality impacts from atmospheric deposition of pollution from the Stibnite Gold Project; (2) DEQ ignored information from the U.S. Forest Service that

determined there would be decreased water quality from the mine to many streams at the Stibnite Gold Project site; (3) DEQ ignored increased mercury and other pollution in West End Creek that is projected to occur due to Perpetua's rerouting of West End Creek; (4) DEQ failed to include the West End pit lake in the waters certified and failed to address post-mining conditions in West End Creek; and (5) DEQ ignored numerous factors in its socioeconomic analysis.

5. Petitioners respectfully request that the Board therefore declare the 401 Certification invalid, reverse and set aside the 401 Certification, and/or remand to DEQ to correct these errors.

LISTING OF REPRESENTATIVES

6. Copies of all pleadings, correspondence, and official documents shall be served on the Petitioners' respective counsel as listed below:

For Idaho Conservation League and Idaho Rivers United:

Bryan Hurlbutt
Laird Lucas
Advocates for the West
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For Save the South Fork Salmon and Earthworks:

Julia Thrower
Mountain Top Law PLLC
614 Thompson Avenue
McCall, ID 83638
jthrower@mtntoplw.com

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JURISDICTION, STANDARD OF REVIEW, PARTIES, AND STANDING

7. Pursuant to Idaho Code § 39-107(5), IDAPA 58.01.23, and IDAPA 58.01.02 (the “Idaho Water Quality Standards” or “IWQS”),¹ the Board has jurisdiction over this contested case challenging DEQ’s action issuing the 401 Certification for the Stibnite Gold Project on May 22, 2024. This Petition is timely filed on June 25, 2024, within thirty-five (35) days of the date of DEQ’s May 22, 2024 decision. *See* IDAPA 58.01.23.060.

8. An agency action, such as DEQ’s issuance of the 401 Certification challenged here, shall be reversed if it is in violation of constitutional or statutory provisions, in excess of statutory authority, made on unlawful procedure, not supported by substantial evidence on the record as a whole, or is arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279. When an agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Id.*

9. Pursuant to IDAPA 58.01.23.002.02: “Any person aggrieved by an action or inaction of the Department may file a petition to initiate a contested case pursuant to Chapter 52, Title 67, Idaho Code.” An aggrieved person is defined as “[a]ny person or entity with legal standing to challenge an action or inaction of the Department, including but not limited to permit holders and applicants for permits challenging Department permitting actions.”

IDAPA 58.01.23.005.01.

10. PETITIONER IDAHO CONSERVATION LEAGUE (“ICL”) is an Idaho non-profit conservation organization. Its main office is located in Boise, Idaho, and it has three field offices in Sandpoint, Ketchum, and McCall. ICL represents approximately 35,000 supporters dedicated to protecting and conserving Idaho’s clean water, air, public lands, and wildlife.

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

11. ICL has standing to bring this contested case. ICL supporters, staff, and board members (“ICL members”) regularly visit the Stibnite Gold Project area and the South Fork Salmon River watershed for professional, recreational, aesthetic, and other purposes. ICL members will suffer health, environmental, and aesthetic injuries from water quality degradation from temperature, sediment, mercury, arsenic, and other pollutants caused by the Stibnite Gold Project and authorized by DEQ’s issuance of the 401 Certification. A favorable decision in the Contested Case will redress ICL’s injuries. Neither the claims asserted, nor the relief requested, requires participation of individual ICL members in this proceeding. The interests that ICL seeks to protect are germane to the organization’s purpose in protecting Idaho’s clean water, clean air, wildlife, and public lands.

12. In furtherance of its mission, ICL participated in the public process for the 401 Certification, including submitting formal public comments to DEQ on April 12, 2024.

13. PETITIONER IDAHO RIVERS UNITED (“IRU”) is an Idaho non-profit conservation organization with its principal place of business in Boise, Idaho. IRU represents over 3,500 members in its work to preserve and improve the environmental integrity of rivers throughout Idaho. IRU’s supporters, staff, and board members (“IRU members”) expect the protection of rivers for their ecological, scenic, and recreational values; accordingly, IRU’s mission is to protect and restore the rivers and fisheries of Idaho’s rivers.

14. IRU has standing to bring this contested case. IRU members regularly visit the Stibnite Gold Project area and/or nearby areas where water quality will be degraded for professional, recreational, aesthetic, and other purposes. IRU members will suffer health, environmental, and aesthetic injuries from water quality degradation from temperature, sediment, mercury, arsenic, and other pollutants caused by the Stibnite Gold Project and authorized by

DEQ's issuance of the 401 Certification. A favorable decision in the Contested Case will redress IRU's injuries. Neither the claims asserted, nor the relief requested, requires the participation of individual IRU members in this proceeding. The interests IRU seeks to protect are germane to the organization's purpose of protecting Idaho's rivers and fisheries.

15. In furtherance of this mission, IRU participated in the public process for the 401 Certification, including submitting formal public comments to DEQ on April 12, 2024.

16. PETITIONER SAVE THE SOUTH FORK SALMON ("SSFS") is a community-based, non-profit conservation organization headquartered in McCall, Idaho. SSFS represents approximately 500 members and supporters dedicated to preserving the South Fork Salmon River watershed and ecosystem.

17. SSFS has standing to bring this contested case. SSFS members, supporters, and members of the Board of Directors ("SSFS members") regularly visit the South Fork Salmon River watershed and the Stibnite Gold Project area, where the water quality degradation due to DEQ's issuance of the 401 Certification would impact professional, economic, recreational, aesthetic, environmental, and human health interests. SSFS members will suffer health, environmental, and aesthetic injuries from water quality degradation from temperature, sediment, mercury, arsenic, and other pollutants caused by the Stibnite Gold Project and authorized by DEQ's issuance of the 401 Certification. A favorable decision in the Contested Case will redress these injuries suffered by SSFS members. Neither the claims asserted, nor the relief requested, requires participation of individual SSFS members in this proceeding. The interests SSFS seeks to protect are germane to the organization's mission of protecting and preserving the South Fork Salmon River watershed and ecosystem, and protecting public health, the river, the fish, and recreational opportunities in the area.

18. In furtherance of this mission, SSFS participated in the public process for the 401 Certification, including submitting formal public comments to DEQ on April 12, 2024.

19. PETITIONER EARTHWORKS is a non-profit conservation organization dedicated to protecting communities and the environment against the adverse impacts of mineral and energy development, while seeking sustainable solutions. Earthworks has standing to bring this contested case. Earthworks staff and supporters have visited the mine site and/or nearby areas where water quality will be degraded for professional, recreational, aesthetic, and other purposes. Earthworks staff/supporters will suffer health, environmental, and aesthetic injuries from water quality degradation from temperature, sediment, mercury, arsenic, and other pollutants caused by the Stibnite Gold Project and authorized by DEQ's issuance of the 401 Certification. Neither the claims asserted, nor the relief requested, requires the participation of these individuals in this proceeding. The interests Earthworks seeks to protect are germane to the organization's mission of protecting and preserving the South Fork Salmon River watershed and ecosystem, and protecting public health, the river, the fish, and recreational opportunities in the area.

20. In furtherance of this mission, Earthworks participated in the public process for the 401 Certification, including submitting formal public comments to DEQ on April 12, 2024.

21. RESPONDENT IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY is an executive department and administrative agency organized under the laws of the State of Idaho, pursuant to the Idaho Constitution (Article IV, Section 20) and Idaho Code § 39-104(1). Its principal office is located at 1410 N. Hilton, Boise, Idaho 83706. DEQ, through its Director, and subject to Board oversight, is responsible for issuing 401 certifications under the Idaho

Water Quality Standards, IDAPA 58.01.02, the Clean Water Act, 33 U.S.C § 1341, and Clean Water Act Regulations, 40 C.F.R. § 121.

22. On May 22, 2024, DEQ issued the 401 Certification for Permit NWW-2013-00321, which is the subject of this Contested Case.

LEGAL BACKGROUND ON 401 CERTIFICATIONS

23. 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(c).

24. 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).

25. Section 401 of 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).

26. DEQ is the agency designated to make 401 certification decisions in Idaho. The Idaho Water Quality Standards, IDAPA 58.01.02, includes 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.

27. 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) (2024). Among other water quality requirements, the Idaho Water Quality Standards includes concentrations of pollutants that must be met, including for mercury,

arsenic, and other pollutants, designed to protect beneficial uses. IWQS 052.06; IWQS 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:

- a. Will or can be expected to result in violation of the water quality standards applicable to the receiving water body or downstream waters; or
- b. Will injure designated or existing beneficial uses

IWQS 080.01.

28. The Idaho Water Quality Standards also require antidegradation review, providing three levels of protection to Idaho waters. IWQS 051; IWQS 052. All water bodies subject to Clean Water Act jurisdiction are protected under “Tier I” to ensure the level of water quality standards for existing uses of the water body will be maintained. IWQS 051.01; IWQS 052.01. A “Tier I” review is conducted for all new permits. IWQS 052.07. “Tier II” waters are considered high quality, and any lowering (degradation) of water quality is prohibited unless doing so is “necessary to accommodate important economic or social development in the area in which the waters are located.” IWQS 051.02; IWQS 052.08. For Tier II waters, “[i]n allowing such degradation or lower water quality, [DEQ] shall assure water quality adequate to protect existing uses fully.” IWQS 051.02. Any water body that fully supports its beneficial uses will be considered high quality. IWQS 052.05. Finally, “Tier III” requires that activities do not lower water quality for water bodies designated by the legislature as “outstanding resource waters.” IWQS 051.03; IWQS 052.09.

29. DEQ must conduct a Tier II analysis for activities or discharges subject to the 401 certification that cause degradation. IWQS 052.08. The process for a Tier II analysis first requires DEQ to determine if the degradation caused by the activity or discharge is insignificant,

the parameters for which are outlined in the Idaho Water Quality Standards. IWQS 052.08.a. Significant degradation requires a Tier II analysis and antidegradation implementation for other source controls (IWQS 052.08.b), alternatives analysis (IWQS 052.08.c), or socioeconomic justification (IWQS 052.08.d). IWQS 052.08.a.iii. Other source control analysis requires DEQ to assure all new and existing point source and nonpoint source controls within the watershed meet “the highest statutory and regulatory requirements.” IWQS 052.08.b. The alternatives analysis determines degradation necessary “only if there are no reasonable alternatives to discharging at the levels proposed” given the outlined principles are followed. IWQS 052.08.c. Finally, DEQ must also determine that degradation of water quality is necessary “to accommodate important economic or social development” through following a number of steps outlined in Idaho’s Water Quality Standards. IWQS 052.08.d.

30. In its analysis, DEQ must determine that the degradation is necessary to accommodate important economic or social development. IWQS 052.08.d. Factors that DEQ must consider in making this determination include, but are not limited to, identifying the relevant social, economic, and environmental health costs associated with the potential water quality degradation and the impacts to the uses associated with the high quality water, such as fishing, recreation, and tourism. IWQS 052.08.d.iii. Impacts to these factors “should be quantified whenever possible.” IWQS 052.08.d.iv.

31. 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.” 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. “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.

32. The scope of a 401 water quality certification is also broad in that it considers water quality impacts of the activity as a whole, not just the specific discharge or point-source releases, being authorized by a federal permit. EPA’s 401 regulations define the scope of 401 certification by stating a certifying authority “shall evaluate whether the activity will comply with applicable water quality requirements.” 40 C.F.R. § 121.3(a) (2024). The certifying authority’s evaluation “is limited to water quality-related impacts from the activity subject to the Federal license or permit, including the activity’s construction and operation.” *Id.* Idaho’s Water Quality Standards define “Activity” for purposes of antidegradation review as “an activity that causes a discharge to a water subject to the jurisdiction of the Clean Water Act.” IWQS 010.01.

33. EPA’s 401 regulations, which apply to DEQ 401 certifications, were first adopted in 1971, and then revised in 2020, and 2023. 88 Fed. Reg. 66558 (Sept. 27, 2023). In its 2023 final rule, EPA emphasized that the scope of 401 certifications use the “activity as a whole” approach affirmed by the U.S. Supreme Court for water quality-related impacts from an activity, not a “discharge only” approach. 88 Fed. Reg. 66559 (Sept. 27, 2023); *PUD No. 1 of Jefferson Cnty. v. Washington Dep’t of Ecology*, 511 U.S. 700, 712 (1994) (“EPA’s conclusion that *activities*—not merely discharges—must comply with the state water quality standards is a reasonable interpretation of § 401, and is entitled to deference.”). EPA explained that this “activity as a whole” approach is necessary to certify that the applicant “will comply” with water quality requirements, as required under Section 401 of the Clean Water Act. 88 Fed. Reg. at 66594.

34. 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.

OVERVIEW OF STIBNITE GOLD PROJECT & THE 401 CERTIFICATION

35. Perpetua is currently in the process of seeking multiple permits and other approvals from federal and state agencies for the proposed Stibnite Gold Project. 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).

401 Certification, pp. 2-3.

36. On April 7, 2023, Perpetua submitted an application to the Army Corps for discharging dredge and fill material under Section 404 of the Clean Water Act for the Stibnite Gold Project.

37. On April 21, 2023, DEQ received a pre-filing meeting request from Perpetua concerning 401 certification for the Army Corps Section 404 permit. DEQ hosted a pre-filing meeting on May 17, 2023. And on May 26, 2023, DEQ received a certification request.

38. DEQ issued notice of a public comment period on the draft certification on March 6, 2024, through April 5, 2024. DEQ extended the comment period through April 12, 2024.

39. Petitioners ICL, IRU, SSFS, and Earthworks submitted joint written comments on April 12, 2024. 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 consider information showing that mercury concentrations in West End Creek will increase and potentially exceed applicable water quality standards due to Perpetua's planned rerouting of the 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.

40. The Nez Perce Tribe also submitted comments on April 12, 2024. 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 an insufficient socioeconomic justification for the degradation of Tier II waters.

41. On May 22, 2024, DEQ issued the final 401 Certification, along with its response to comments. While DEQ made limited updates to the 401 Certification, it rejected most of the issues raised by the commenters, including the issues described above.

42. In the 401 Certification, DEQ identified the following pollutants of concern for the Stibnite Gold Project: sediment; temperature, pH; bacteria; nutrients; antimony; arsenic; mercury; methylmercury; copper; cadmium; lead; zinc; and cyanide. DEQ found the Stibnite Gold Project impacts 33 assessment units (AUs) within the North Fork Payette River and South Fork Salmon River subbasins. DEQ provided that “[e]ach water body will receive necessary protections for existing and designated beneficial uses,” and identified the water body protection levels for each use in Appendix B to the 401 Certification. DEQ also conducted antidegradation reviews for 28 high-quality waters that will be impacted by the Stibnite Gold Project. For 16 of those waters where degradation will occur, DEQ relied on Perpetua’s Alternatives Analysis and Socioeconomic Justification (“AASJ”).

43. In the 401 Certification, DEQ determined:

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.

401 Certification, p. 1.

FACTUAL & LEGAL SUPPORT FOR THE PETITION

I. DEQ’S FAILURE TO CONSIDER WATER QUALITY IMPACTS FROM ATMOSPHERIC DEPOSITION

44. In their comments, Petitioners urged DEQ to consider water quality impacts from atmospheric deposition of dust the Stibnite Gold Project will generate, including dust laden with mercury, arsenic and other metals. As EPA has recognized, airborne particles pose a dual threat

to the environment and human health. Dust can be carried by winds and can impact on-site and off-site water bodies due to direct deposition and by stormwater transport.

45. The Stibnite Gold Project will generate large quantities of dust. Per DEQ's Statement of Basis for the Permit to Construct it issued to Perpetua in June 2022, the Stibnite Gold Project will generate up to 3,655 tons per year (T/yr) of particulate matter. This will include 2.4 tons per year of arsenic and 244 pounds per year (lbs/yr) of mercury.

46. In the 401 Certification, DEQ never analyzed the impacts that atmospheric deposition will have on water quality at the site.

47. In its response to comments, DEQ stated that these are "operational impacts, which are outside the scope of the 401 Certification." DEQ referenced its memorandum *Scope Directive 2023 Clean Water Act Section 401 Water Quality Certifications for Section 404 Permits* (May 6, 2024) ("*Scope Directive*"). The *Scope Directive* states: "DEQ's evaluation of project activities seeking certification of Clean Water Act § 404 permit authorization from the Army Corps of Engineers has been and will remain focused on the potential water quality impacts from the proposed project's activity and not the operations."

48. DEQ's response to comments and *Scope Directive* are directly at odds with EPA's 401 certification regulations, which require considering water quality impacts of the activity as a whole, not just the discharge. In the *Scope Directive*, DEQ acknowledges that EPA's 2023 regulations address the scope of certification at 40 C.F.R. § 121.3. DEQ even quoted the part of the regulations which states that the certifying authority's evaluation is of "water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation." While the regulations include "construction and operation" as part of the "activity," DEQ separates it out in the *Scope Directive*. But the *Scope Directive* does not

cite any legal authority for that approach, does not explain how it supports the aims of the 401 certification process, does not state how it complies with Idaho’s Water Quality Standards or furthers DEQ’s mission, and does not offer any other justification for refusing to consider water quality impacts from what DEQ labeled as “operations.”

49. DEQ responded to Petitioners’ comments regarding atmospheric deposition by stating that the 401 certification only looks at operation impacts, and thus atmospheric deposition is outside of the scope of activities required to be analyzed.

50. DEQ’s 401 Certification thus violates Clean Water Act, 33 U.S.C. § 1341, EPA’s 401 regulations, 40 C.F.R. § 121.3, and Section 010.01 of Idaho’s Water Quality Standards, which require considering water quality impacts from the activity as a whole, including operations.

51. Additionally, DEQ’s decision to ignore impacts to water quality from atmospheric deposition is not supported by substantial evidence in the record as a whole, and its decision to issue the 401 Certification without considering atmospheric deposition in violation of the above-referenced statutory and regulatory provisions was made upon unlawful procedure, and is arbitrary, capricious, and/or an abuse of discretion under Idaho Code § 67-5279.

II. DEQ’S FAILURE TO CONSIDER WATER QUALITY IMPACTS PROJECTED BY THE FOREST SERVICE

52. In their comments, Petitioners noted that the draft 401 Certification and its supporting documents relied heavily on some specialist reports and other documents and information generated by the U.S. Forest Service for the Stibnite Gold Project Supplemental Draft Environmental Impact Statement (“Supplemental Draft EIS”), but that DEQ selectively failed to consider other important information generated by the Forest Service during this environmental review process. Among other concerns, the related documents identify many

other water quality impacts from the Stibnite Gold Project. In its review of Perpetua’s application for 401 certification, however, DEQ failed to consider and account for this highly pertinent information.

53. In August 2022, as part of the Forest Service’s Supplement Draft EIS for the Stibnite Gold Project, the Forest Service prepared a Water Quality Specialist Report. Table 7-27 of the Water Quality Specialist Report summarizes water quality impacts expected from the Stibnite Gold Project. Most notably, quantitative information on projected impacts to the East Fork of the South Fork Salmon River (“East Fork SFSR”), Meadow Creek, and West End Creek are analyzed and listed in Table 7-27 as follows:

Issue	Indicator	Existing Conditions	No Action	2021 Modified Mine Plan	Johnson Creek Route Alternative
The SGP may cause changes in surface water and groundwater quality.	Surface water quality parameters (e.g., pH, temperature, major ions, total dissolved solids, metals, sediment content, and organic carbon).	East Fork SFSR: <ul style="list-style-type: none"> Antimony (0.005 to 0.037 mg/L) Arsenic (0.014 to 0.076 mg/L) Mercury (5 to 10 ng/L) Summer Max Temperature (13.4 to 17.4°C) Meadow Creek: <ul style="list-style-type: none"> Antimony (0.001 to 0.025 mg/L) Arsenic (0.004 to 0.075 mg/L) Mercury (1 to 2 ng/L) Summer Max Temperature (17.9 to 19.8 °C) West End Creek: <ul style="list-style-type: none"> Antimony (0.008 to 0.012 mg/L) Arsenic (0.064 to 0.088 mg/L) Mercury (4 to 6 ng/L) Summer Max Temperature (12.9°C) 	Same as Baseline Condition	East Fork SFSR: <ul style="list-style-type: none"> Antimony (0.004 to 0.041 mg/L) Arsenic (0.010 to 0.066 mg/L) Mercury (4 to 10 mg/L) Summer Max Temperature (13.4 to 18.0°C) Meadow Creek: <ul style="list-style-type: none"> Antimony (0.001 to 0.014 mg/L) Arsenic (0.001 to 0.018 mg/L) Mercury (1 to 5 ng/L) Summer Max Temperature (14.6 to 24.5 °C) West End Creek: <ul style="list-style-type: none"> Antimony (0.002 to 0.014 mg/L) Arsenic (0.008 to 0.095 mg/L) Mercury (4 to 63 ng/L) Summer Max Temperature (16.8 to 21.7°C) 	Same as 2021 MMP
	Potential for spills in proximity to streams and sedimentation from access road traffic	No mine-related traffic on existing Forest Service roads	Same as Baseline Condition	<ul style="list-style-type: none"> Mine access roads would cross 71 different streams. 1.56 miles (4% of routes) would be within 100 feet of streams. Sedimentation and fugitive dust predicted to be within normal range of properly maintained Forest Service roads. 	<ul style="list-style-type: none"> Mine access roads would cross 50 different streams. 6.5 miles (18% of routes) would be within 100 feet of streams. Sedimentation and fugitive dust predicted to be within normal range of properly maintained Forest Service roads.
	Sedimentation from utility stream crossings	No transmission line upgrades or new lines constructed	Same as Baseline Condition	<ul style="list-style-type: none"> Mine utility work would cross 36 different streams. Potential for transmission line-related erosion and sedimentation would be minimized by BMPs. 	Same as 2021 MMP

54. As Table 7-27 shows, several pollutants are expected to increase in concentration within these water bodies as a result of the Stibnite Gold Project and its construction and operation. While some pollutant increases in some water bodies were analyzed in the 401 Certification (e.g. temperature for West End Creek), several others were never analyzed,

including: increased antimony concentrations in the East Fork SFSR and West End Creek; increased mercury concentrations in West End Creek (as noted above) and Meadow Creek; and increased temperatures in East Fork SFSR and Meadow Creek.

55. For Tier I compliance, DEQ never considered the increased antimony concentrations in the East Fork SFSR; increased temperatures in the East Fork SFSR; any impacts to Meadow Creek; and increased antimony and mercury concentrations in West End Creek for Tier II compliance.

56. Because the East Fork SFSR and Meadow Creek are both impaired for temperature, any increase in temperature would contribute to an existing impairment of a beneficial use and is prohibited by IWQS 052.07. The East Fork SFSR is also impaired for antimony. Thus, any increase in antimony concentrations as a result of the Stibnite Gold Project would contribute to that impairment.

57. West End Creek is designated as a Tier II waterbody and thus is subject to a Tier II analysis. IWQS 052.08.

58. Petitioners' comments stated that DEQ selectively ignored information in the Supplemental Draft EIS that projected impacts to these water bodies. In response to comments, DEQ claimed that the impacts were a result of using fill with high metal concentrations and added language to the 401 Certification stating that only clean material will be placed as fill, but still failed to do the required Tier I, Tier II, and antidegradation analysis.

59. Because DEQ failed to consider the predicted degradation in water quality due to the Stibnite Gold Project, the agency failed to comply with the Clean Water Act, 33 U.S.C. § 1341, and EPA's 401 regulations, 40 C.F.R. § 121.3(a), which require DEQ to certify that all state water quality standards will be met.

60. DEQ also failed to comply with Idaho Water Quality Standard provisions that require an evaluation of the effects of an activity to water quality for each pollutant, IWQS 052.06; require protection of designated and existing beneficial uses, IWQS 050.02; require no degradation or lowering of water quality that would cause or contribute to violation of water quality criteria, IWQS 052.07; prohibit discharges that violate water quality standards, IWQS 080.01; and require antidegradation reviews for Tier I waters to protect existing uses, IWQS 051.01, and for Tier II waters to protect and maintain water quality. IWQS 051.02.

61. DEQ's decision to issue the 401 Certification is not supported by substantial evidence in the record, and its failure to consider and evaluate these impacts to water quality was made upon unlawful procedure, and is arbitrary, capricious, and/or an abuse of discretion under Idaho Code § 67-5279.

III. DEQ'S FAILURE TO CONSIDER MERCURY IMPACTS FROM REROUTING WEST END CREEK

62. Petitioners' comments also notified DEQ that it must consider increased mercury and other heavy metals pollution in lower West End Creek projected to occur from Perpetua's diverting and re-routing of West End Creek during mining operations. The Creek will be re-routed to facilitate open pit mining in the West End Pit. West End Creek is a Tier II waterbody, and in its antidegradation review, DEQ did consider increased temperature pollution that could occur during re-routing, but wholly failed to consider mercury and other pollutants (including but not limited to antimony, as noted above).

63. In the Supplemental Draft EIS , the Forest Service stated that upper West End Creek is impacted by mercury, but the West End Creek below the West End pit has low mercury concentrations, likely from naturally occurring processes that reduce mercury concentrations downstream of the pit location. During operations when West End Creek is rerouted around the

West End pit, mercury impacts from the upper portion of the Creek are predicted to extend the flow down to lower West End Creek. In the Supplemental Draft EIS, the Forest Service calculated that mercury concentrations in West End Creek will increase from a baseline of 4 to 6 ng/l to as high as 63 ng/l during the ten years of mining operations at the West End pit.

64. In its comments on the Supplemental Draft EIS, EPA warned that the Stibnite Gold Project is “predicted to exceed Idaho’s Clean Water Act mercury aquatic life criterion” in West End Creek during its operation. Moreover, because mercury and its related compound, methylmercury, are bioaccumulative, EPA warned that the effects this pollutant will have on the system will likely extend far beyond Stibnite Gold Project’s operations.

65. Despite Petitioners and EPA raising these concerns in their comments to DEQ, and providing supporting information from the Forest Service and EPA, DEQ failed to consider mercury increases in West End Creek in its 401 Certification. DEQ never ensured the Tier I requirements of maintaining and protecting water quality necessary to protect the existing uses from mercury in West End Creek. IWQS 051.01, 052.01. Additionally, DEQ did not consider mercury degradation in its Tier II socioeconomic analysis. IWQS 051.02, 052.08.

66. In response to these comments, neither DEQ nor Perpetua’s consultants offered any explanation for why they did not consider mercury impacts for the re-routing of West End Creek. Subsequent to DEQ’s issuance of the 401 Certification, Petitioners reached out to DEQ via email to inquire about this oversight. In response, DEQ acknowledged that it was “aware of the potential for mercury concentrations to rise in Lower West End Creek because of the diversion and has included monitoring and reporting conditions in the certification.” But DEQ said it “does not have sufficient data to list mercury as a pollutant of concern.”

67. Again, the 401 Certification itself identifies the following pollutants of concern for the Stibnite Gold Project: sediment; temperature, pH; bacteria; nutrients; antimony; arsenic; mercury; methylmercury; copper; cadmium; lead; zinc; and cyanide. The information from the Forest Service and EPA that Petitioners submitted to DEQ with their comments, which Perpetua was already aware of, provided data and other information showing that mercury is very much a concern.

68. In the response to comments, DEQ failed to explain why mercury was not considered. This response is insufficient because the 401 Certification identifies mercury as a pollutant of concern and DEQ must therefore consider it.

69. Without considering water quality impacts from the West End Creek reroute (except for temperature impacts), DEQ failed to comply with the Clean Water Act, 33 U.S.C. § 1341, and EPA's 401 regulations, 40 C.F.R. § 121.3(a), which require DEQ to certify that all state water quality standards will be met. DEQ also failed to comply with Idaho Water Quality Standard provisions requiring evaluating effects of an activity to water quality and for each pollutant, IWQS 052.06; requiring protection of designated and existing beneficial uses, IWQS 050.02; prohibiting discharges that violate water quality standards, IWQS 080.01; and requiring antidegradation reviews for Tier I waters to protect existing uses, IWQS 051.01, and for Tier II waters to protect and maintain water quality. IWQS 051.02.

70. DEQ's failure to consider mercury as a pollutant of concern for the West End Creek, and its decision to issue the 401 Certification without a Tier I or Tier II antidegradation analysis for mercury in the West End Creek is not supported by substantial evidence in the record, was made upon unlawful procedure, and is arbitrary, capricious, and/or an abuse of discretion under Idaho Code 67-5279.

IV. DEQ'S FAILURE TO CONSIDER WATER QUALITY IN THE WEST END PIT LAKE

71. At the conclusion of mining activities, the West End Creek diversion and re-route will be removed, and West End Creek will flow generally back through the area where it currently flows. However, when it does so, the upper portions of West End Creek will flow into the West End mining pit where it will create the West End pit lake.

72. The lower portion of West End Creek will be downstream of the area of the West End pit lake. According to Perpetua, following mining activities, "West End Creek will continue to have surface flow downstream of West End pit lake where it will continue to have connection with groundwater and continue to receive input from precipitation and runoff from this portion of the West End Creek watershed."

73. In their comments on the 401 Certification, Petitioners urged DEQ to analyze the impacts of metals contamination predicted to occur in the West End pit lake and downstream in lower West End Creek after the re-route is removed. Petitioners submitted and pointed to the Forest Service's Supplemental Draft EIS, which identifies a number of ways in which the Stibnite Gold Project is predicted to cause or contribute to water quality standard violations. The Forest Service stated:

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 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.

74. In the Supplemental Draft EIS, the Forest Service also noted the possibility that the pit lake water could enter the lower portion of West End Creek via outlet spillage or seepage after the closure and reclamation of the mine. Furthermore, any groundwater seepage from West End pit lake that reemerges with pollutants as surface water within the lower portion of West End Creek could be considered a functional equivalent direct discharge as established by the Supreme Court in *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020).

75. Given the potential uncertainty around the West End pit lake water volume and potential for discharges from the West End pit lake to West End Creek (via both surface water “spillage” or functionally equivalent direct discharge seepage), DEQ has not demonstrated that West End Creek downstream of the pit lake will meet water quality standards post-closure.

76. Despite the Forest Service’s analysis in the Supplemental Draft EIS and Petitioners’ comments, DEQ never considered water quality in the West End pit lake itself in the 401 Certification.

77. The only response to Petitioners’ comments was that “careful consideration and planning” has gone into the Stibnite Gold Project to comply with permit conditions and environmental regulations.

78. Without considering water quality impacts to the post-mining West End pit lake and the West End Creek downstream of the pit lake, DEQ failed to comply with the Clean Water Act, 33 U.S.C. § 1341, and EPA’s 401 regulations, 40 C.F.R. § 121.3(a), which require DEQ to certify that all water quality standards will be met for all navigable waters and waters subject to state water quality standards.

79. DEQ also failed to comply with Idaho Water Quality Standard provisions requiring evaluating effects of an activity to water quality and for each pollutant, IWQS 052.06;

requiring protection of designated and existing beneficial uses, IWQS 050.02; prohibiting discharges that violate water quality standards, IWQS 080.01; and requiring antidegradation reviews for Tier I waters to protect existing uses, IWQS 051.01, and for Tier II waters to protect and maintain water quality. IWQS 051.02.

80. In addition to violation of specific statutory and regulatory requirements, DEQ's decision to issue the 401 Certification without consideration of water quality in the West End pit lake and West End Creek downstream of the pit lake was not supported by substantial evidence in the record, was made upon unlawful procedure, and was arbitrary, capricious, and/or an abuse of discretion under Idaho Code § 67-5279.

V. DEQ'S FAILURE TO FULLY EVALUATE SOCIOECONOMIC FACTORS

81. DEQ identified a subset of 16 Assessment Units ("AU") warranting Tier II protection as socioeconomic justification for the potential degradation due to temperature increases. To evaluate whether this is necessary to support an important local economic interest, DEQ relied on Perpetua's Alternatives Analysis and Socioeconomic Justification ("AASJ"). The AASJ examined alternatives and weighed impacts to the 16 AUs against socioeconomic benefits to the community to justify the temperature degradation.

82. In their comments, Petitioners noted that the AASJ failed to consider many important factors in demonstrating how degradation is necessary to support important socioeconomic development to the local community. These "include, but are not limited to: (1) economic benefits to the community...; (2) provision of necessary services to the community...; (3) potential health impacts related to the proposed activity; (4) impacts to direct and indirect uses associated with high quality water...; and (5) retention of assimilative capacity for future activities or discharges." IDAPA WQS 052.08.d.iii.

83. DEQ failed to show how any socioeconomic benefits provided by the Stibnite Gold Project that lowered water quality are particularly or specifically important to the surrounding community as opposed to generic or additive. While the socioeconomic benefits of the Stibnite Gold Project may be considered “important” in a vacuum, the Idaho Water Quality Standards and Tier II socioeconomic justification requirements call for the “importance” of these benefits to be judged within the context of the surrounding community. IWQS 52.08.d.

84. The AASJ did not indicate any socioeconomic deficiencies in the local community that would be aided by the Stibnite Gold Project and instead presented data that the local economy was fairly stable without reliance on industry or mining. Negative socioeconomic impacts identified in the Supplemental Draft EIS were ignored, including the stresses that in-migration of workers would have on affordable housing and school systems, as well as public infrastructure, telecommunications, and emergency services concerns. The AASJ also portrayed the proposed economic benefits from cleanup activities of the Stibnite Gold Project as the only way to address historical contamination without any support and ignoring the benefits of the Nez Perce Tribe’s long-standing fisheries supplementation, research, and watershed restoration efforts near the site which will be negatively impacted by the Stibnite Gold Project.

85. In the response to comments, DEQ stated that Petitioners misinterpret the socioeconomic justifications requirements to be much more rigid and narrow than what is required, but never provided a reason of why these factors were ignored in the antidegradation analysis.

86. Without considering or giving proper weight to the above socioeconomic factors and data, DEQ failed to comply with the Clean Water Act, 33 U.S.C. § 1341, and EPA’s 401 regulations, 40 C.F.R. § 121.3(a), which requires DEQ to certify that all water quality standards

will be met. DEQ also failed to comply with Idaho Water Quality Standard for authorizing degradation of Tier II waters requiring a socioeconomic justification finding degradation is necessary “to accommodate important economic or social development” through following a number of steps outlined in Idaho’s Water Quality Standards. IWQS 052.08.d.

87. DEQ’s decision, which was based on a failure to consider these factors in the socioeconomic justification, is not supported by substantial evidence in the record, was made upon unlawful procedure, and is arbitrary, capricious, and/or an abuse of discretion under Idaho Code § 67-5279.

RELIEF REQUESTED

88. Based on the legal violations and other flaws in DEQ’s issuance of the 401 Certification described above, DEQ’s action is in violation of the Clean Water Act, Clean Water Act regulations, and Idaho Water Quality Standards, and is otherwise not supported by substantial evidence in the record, and is arbitrary, capricious, made on unlawful procedure, and an abuse of discretion and must be reversed.

89. By issuing the 401 Certification in its current form, DEQ failed to adequately protect the public and environment from harmful water quality degradation causing injury to Petitioners and their members and supporters.

90. To cure these legal violations and redress the injuries, Petitioners respectfully request the Board to hold unlawful, set aside and remand the 401 Certification, and direct DEQ to correct the following errors prior to issuing any new or revised 401 Certification, as follows:

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Atmospheric Deposition

A. DEQ must assess water quality impacts of atmospheric deposition, including for sediment, arsenic, mercury, and dust and any other pollutants emitted in more than *de minimus* quantities;

B. DEQ must perform additional and updated antidegradation reviews as necessary for the atmospheric deposition impacts to water quality; and

C. DEQ must adopt conditions to ensure existing and designated beneficial uses are maintained and degradation is limited to acceptable levels.

Forest Service's Projected Impacts

D. DEQ must consider water quality impacts projected by the Forest Service which DEQ has not accounted for in the 401 Certification;

E. DEQ must perform additional and updated Tier I, Tier II, and antidegradation reviews as required by the Forest Service-projected water quality impacts not already considered by DEQ; and

F. DEQ must adopt conditions to ensure existing and designated beneficial uses are maintained and degradation is limited to acceptable levels for water quality impacts projected by the Forest Service and not already considered by DEQ.

Rerouting of West End Creek

G. DEQ must consider mercury and other pollutants increases beyond just temperature increases from rerouting West End Creek;

H. DEQ must perform and update Tier II and antidegradation reviews for West End Creek as required based on the non-temperature water quality impacts of rerouting; and

I. DEQ must adopt conditions to ensure existing and designated beneficial uses are maintained and degradation is limited to acceptable levels from rerouting West End Creek.

West End Pit Lake

J. DEQ must include the West End pit lake in the 401 Certification;

K. DEQ must identify beneficial uses and applicable water quality standards for the West End pit lake;

L. DEQ must evaluate water quality conditions that will occur in the pit lake and the lower portion of West End Creek post-mining from the Stibnite Gold Project; and

M. DEQ must adopt conditions to ensure water quality of the pit lake and the lower portion of West End Creek would meet water quality standards necessary to support identified beneficial uses.

Socioeconomic Analysis

N. DEQ must re-examine the alternatives and impacts, including consideration of identified negative socioeconomic impacts in a revised AASJ to account for important factors not considered and ensure that any water quality degradation deemed necessary accommodates economic and social development.

CONCLUSION

91. When it issued the 401 Certification for the Stibnite Gold Project, DEQ violated the federal Clean Water Act, EPA's 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 remand to DEQ to correct all errors.

Dated: June 25, 2024

Respectfully submitted,

/s/ Laurence J. Lucas

Laurence (“Laird”) J. Lucas

Attorneys for Petitioners Idaho

Conservation League and Idaho Rivers

United

/s/ Julia S. Thrower

Julia S. Thrower

Attorney for Petitioners Save the South Fork

Salmon and Earthworks

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2024, I caused a true and correct copy of the following PETITION TO INITIATE CONTESTED CASE to be served upon the following persons:

Via Email and Certified U.S. Postal Mail:

Paula Wilson, Hearing Coordinator
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Julia S. Thrower