No. _______

In the Supreme Court of the United States

SAN CARLOS APACHE TRIBE

Petitioner,

v.

STATE OF ARIZONA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Queen Creek is sacred to members of the San Carlos Apache Tribe. For over a century, nearby mines have discharged copper into Queen Creek, causing it to fail water quality standards, harming Apache Holy Beings (Ga'an), and interfering with traditional Apache religious beliefs. The policy of the United States is that the chemical, physical, and biological integrity of Queen Creek be restored and maintained. *See* 33 U.S.C. § 1251(a). Accordingly, federal regulations impose strict requirements on new sources of pollution before they discharge into impaired waterways. *See*, *e.g.*, 40 C.F.R. § 122.4(i), Part 440.

In 2007, Resolution Copper Mining, LLC ("Resolution") began constructing one of the largest copper mines in modern history near an old mine that had been exhausted in 1996. In 2017, Resolution applied to the Arizona Department of Environmental Quality ("ADEQ") to renew the old mine's discharge permit and included the new mine with it.

Rather than conduct a "new source analysis" as required by governing regulations, ADEQ capitulated and renewed the permit, treating the new mine as part of the existing source. The Arizona Supreme Court affirmed, also departing from the regulation's plain text, thereby committing an error of law. Rather than consider whether the new mine is operationally independent, as 40 C.F.R. § 122.29(b) requires, the court invented a "material connection" test out of whole cloth and determined that the gargantuan new mine is merely an extension of the exhausted mine.

By departing from the regulation's plain text, the Arizona Supreme Court failed to apply the method of interpretation this Court requires. *See Cty. of Maui v.*

Haw. Wildlife Fund, 590 U.S. 590, 140 S. Ct. 1462 (2020); R. Sup. Ct. 10(c). As the only published opinion explaining how to perform a new source analysis, the state court opinion will have catastrophic consequences not only on Queen Creek, but also on waterways throughout the Nation. This Court should grant certiorari and direct regulators and courts across the Nation how to determine when newly constructed sources of pollution may be included within an existing discharge permit and when, like here, they must be treated as new sources.

The questions presented are:

(1) Did the Arizona Supreme Court err by determining that 40 C.F.R § 122.29(b)'s new source analysis is satisfied by merely finding a "material connection" between a newly constructed source of polluted discharge and an existing source rather than considering whether the new source operationally depends on the existing source?

(2) Did the Arizona Supreme Court err by determining that new source performance standards for copper mines in 40 C.F.R. § 440.104 do not "independently apply" to Resolution's new mine?

PARTIES TO THE PROCEEDINGS

Petitioner, the San Carlos Apache Tribe, a federally recognized Indian Tribe, was the appellant before the Arizona Superior Court, appellant before the Arizona Court of Appeals, and respondent before the Arizona Supreme Court.

Respondents the State of Arizona and Arizona Department of Environmental Quality were respondents before the Arizona Superior Court, Appellees before the Arizona Court of Appeals, and Petitioners before the Arizona Supreme Court.

Respondent Resolution Copper Mining, LLC was an intervenor before the Arizona Superior Court, Intervenor/Appellee before the Arizona Court of Appeals, and Petitioner before the Arizona Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner the San Carlos Apache Tribe represents that it does not have any parent entities and does not issue stock.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *San Carlos Apache Tribe v. State of Arizona*, *et al.*, Superior Court of Arizona, Maricopa County, No. LC2019-00264-001. Judgment entered March 25, 2021.
- *San Carlos Apache Tribe v. State of Arizona*, *et al.*, Arizona Court of Appeals, No. 1 CA-CV 21-0295. Opinion filed November 15, 2022.
- *San Carlos Apache Tribe v. State of Arizona*, *et al.*, Arizona Supreme Court, No. CV-22-0290-PR. Opinion filed June 27, 2024.

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PETITION FOR CERTIORARI

Queen Creek is a tributary of the Gila River that flows east to west from the Superstition Mountains through the central Phoenix Basin. Since time immemorial, Queen Creek and its surrounding streams, creeks, springs, and seeps have been considered sacred to members of the San Carlos Apache Tribe ("Tribe") and their ancestors. To this day, Queen Creek bears tremendous cultural and religious importance in traditional Apache religious practice, because spiritual beings (Ga'an) reside in its waters.[1] Queen Creek is also a source of Apache food and medicine.

For over a century, nearby mines have discharged copper into Queen Creek, causing it to fail water quality standards under the Clean Water Act ("CWA"), harming Apache Ga'an, and thus, threatening traditional Apache religion and spirituality. The express policy of the CWA is to "restore and maintain the chemical, physical and biological integrity" of the Nation's navigable waters, including Queen Creek. *See* 33 U.S.C. § 1251(a); *see Cnty. of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 140 S. Ct. 1462 (2020). Consequently, federal regulation imposes strict regulations on new sources that would discharge pollution into impaired waterways. *See* 40 C.F.R. § 122.4(i), Part 440.

In 2007, Resolution Copper, LLC ("Resolution") began constructing a new copper mine near Queen Creek. While new copper mines are hardly

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[1]*See* Testimony of Chairman Terry Rambler, San Carlos Apache Tribe, Hearing before the Committee on Energy and Natural Resources, United States Senate (Feb. 9, 2012), https://www.congress.gov/event/112th-congress/senate-event/LC3611/text; Goodwin, Grenville, White Mountain Apache Religion, *American Anthropologist*, 40:24-37, 1938, at 24, 27.

uncommon in Arizona, *this* massive copper mine will be unlike any ever constructed in the United States. Resolution anticipates that over the mine's forty-year lifespan it will produce 20 million tons of copper—equivalent to 25 percent of the United States' copper demand. It will also cause the land above the mine to subside up to 1,000 feet and drain the entire Apache Leap tuff aquifer that has stood above the ore body for eons.[2] Water that flows into this new mine will become contaminated with copper, and Resolution seeks authorization to discharge that copper-contaminated water into Queen Creek.

The Clean Water Act does not outright prohibit Resolution from obtaining a permit to do so, but it first imposes strict requirements. The threshold issues—and subjects of this petition—are (1) how to perform the new source analysis required by 40 C.F.R. § 122.29(b); and (2) whether the Resolution Mine is a new source.

By its plain text, subsection 122.29(b) establishes a three-prong test: a source is a new source if (1) its construction began after applicable new source performance standards were promulgated; (2) it is operationally independent from existing sources; and (3) new source performance standards "independently apply" to it.

ADEQ, Arizona's regulatory agency charged by Environmental Protection Agency with administering discharge permits, misinterpreted and misapplied this simple test, allowing Resolution to completely

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[2]Wells, James, *The Proposed Resolution Copper Mine and Arizona's Water Future*, September 21, 2021, available at https://static1.squarespace.com/static/556e05ade4b0b54303ce3544/t/6470ef67e2f78b310b8f56b1/1685122922028/Dr.+Wells+Report+on+Water+Impacts+from+Resolution+Copper+Mine+%289-28-21%29+%28003%29.pdf (last visited, September 21, 2024).

bypass the CWA's protections. ADEQ, and later the Arizona Supreme Court, determined that this unprecedented new mine was a mere extension of the nearby Magma Mine, which has been shuttered for nearly 30 years.

Under subsection 122.29(b), the Resolution Mine is not an "existing source" of copper-contaminated discharge, but a "new source" because (1) its construction began after new source performance standards for copper mines were promulgated; (2) it is operationally independent of the Magma Mine; and (3) new source performance standards independently apply to its discharge. *See* 40 C.F.R. § 122.29(b).

Queen Creek is worthy of protection, and the Tribe seeks no more protection than what the CWA provides to all waterways across the country. Yet, the Arizona Supreme Court in *SCAT II* sets a bad precedent that threatens to undo federal regulation and the intent of Congress under the CWA. This Court should grant certiorari to provide definitive, final guidance on Subsection 122.29(b)'s "new source" analysis, which governs the challenging balance between government efforts to protect and develop two of our Nations' most vital natural resources: copper and clean water.

OPINIONS BELOW

The Arizona Supreme Court's opinion is published at 550 P.3d 1096 ("*SCAT II*"). The Arizona Court of Appeals' opinion is published at 254 Ariz. 179, 520 P.3d 670 ("*SCAT I*").

JURISDICTION

The Arizona Supreme Court filed its opinion on June 27, 2024. *See* R. Sup. Ct. 13.1. That opinion turns on the interpretation of federal statutes and regulations that the Tribe pressed below, particularly 40 C.F.R. §§ 122.2, 122.29, 440.104 and 440.132. This

Court has jurisdiction. *See* 28 U.S.C. § 1257; *Illinois v. Gates*, 462 U.S. 213, 216-217 (1983). Supreme Court Rule 14.1(e)(v) does not apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the federal statutes and regulations cited in this petition, including 40 C.F.R. §§ 122.2, 122.29, 440.104 and 440.132, are reproduced at APP-156-66.

STATEMENT OF THE CASE

A. Development and Exploitation of the Magma and Resolution Mines.

The Magma and Resolution mines and the ore bodies they exploit are vastly separate and distinct; the mines are built centuries apart, utilize different mining methods, and the new mine will outproduce the old mine fifteen times over.

The facts are not in material dispute. *SCAT II*, 550 P.3d 1096, ¶ 70. In 1911, the Magma Copper Company ("Magma") began constructing a mine on the West Plant Site northwest of Superior that would yield 1.3 million tons of copper by the time it was exhausted in 1996. *Id.* at ¶ 4; APP-109-10. The Magma Mine chased the vein of the high-grade Magma Ore Body using the "adit" (tunnel) mining method accessed through eight mine shafts that Magma drilled around the West Plant Site. APP-109-10. In 1971, Magma constructed "Shaft 9" on the East Plant Site, a non-contiguous parcel two miles east of Superior, to mine the Magma Ore Body from the east. APP-110. At that time, Magma also constructed the Never Sweat Tunnel to connect the East and West Plant Sites. *Id.*

In 1996, all operations related to the Magma Mine ceased when its ore body was depleted, and BHP Copper, Inc. ("BHP") succeeded Magma. *Id.* BHP allowed the Magma Mine to flood and backfilled much of its underground workings including Shafts 1 through 7. *Id.* This marked the end of the Magma Mine.

In 1994, Magma discovered what would become known as the Resolution Ore Body—a new, large, virgin lode of low-grade copper ore sitting beneath Tonto National Forest. *See SCAT II*, 550 P.3d 1096, ¶¶ 9-13. The Resolution Ore Body lies 4,500 to 7,000 feet below the surface, far deeper than the Magma Ore Body and so deep that it can only be mined by robots due to temperatures that exceed 150 degrees. APP-109.

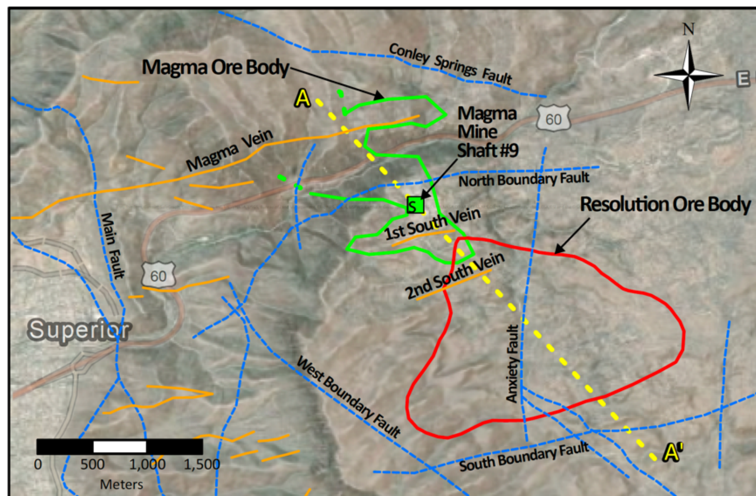

FIGURE 1. OBLIQUE VIEW SHOWING RESOLUTION ORE BODY IN RELATION TO MAGMA ORE BODY

Note: Adapted from Hehnke, et. al., 2012

The Resolution Ore Body sits south and east of the East Plant Site and is separate from, and unrelated to, the Magma Ore Body. APP-108-09.

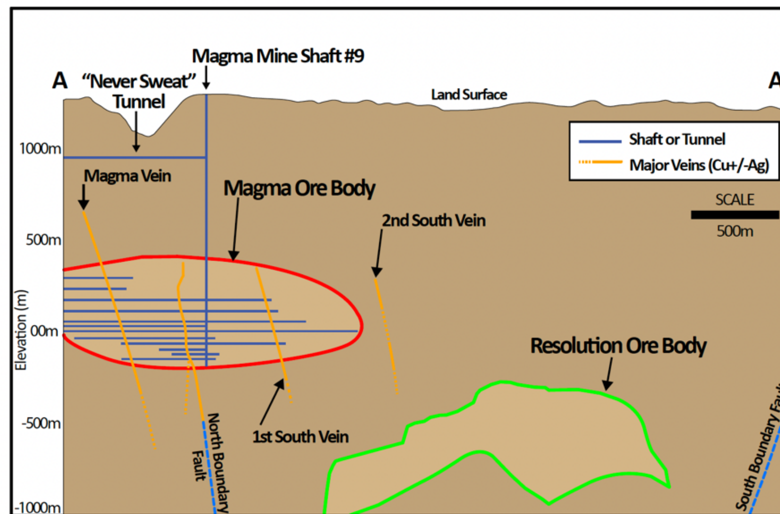

FIGURE 2 - GEOLOGIC CROSS-SECTION SHOWING RESOLUTION ORE BODY IN RELATION TO MAGMA ORE BODY

Notes: 1. Adapted from Hehnke, et al. 2012;
2. Refer to Figure 1 for the location of cross-section.

In 2004, BHP and Rio Tinto formed Resolution as a joint venture and transferred to it all interests and rights they held in the West Plant Site, East Plant Site, and the Resolution Ore Body.[3] *SCAT II*, 550

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[3]Because the Resolution Ore Body sits beneath Tonto National Forest, Resolution began lobbying Congress to transfer that land to it in exchange for far less valuable land elsewhere in Southeastern Arizona. Those efforts resulted in hearings before Congress in which members of the Tribe testified about the sacred character of Oak Flat and the devastating impact of its destruction by Resolution's mine. Resolution's efforts to obtain the land failed eight times between 2005 and 2013 until the land exchange was appended at the last minute to a must-pass National Defense Authorization Act for fiscal year 2015 without being reviewed and considered by Congress at the time of voting. *See* 2005 H.R. 2618, 2005 S.1122; 2006 H.R. 6373, 2006

P.3d 1096, ¶ 12. In 2007, Resolution began constructing active mining areas that will support the Resolution Mine, including Shaft 10, which extends 7,000 feet below ground, as well as cooling towers, a wash bay, and water treatment plant. *Id.*; APP-110-11.

Once completed, the Resolution Mine will consist of a complex network of underground mineworks that will extract ore using the panel caving method. APP-109. The Resolution complex will include the Resolution Mine and numerous facilities on the East and West Plant Sites, some of which were formerly associated with the Magma Mine. Resolution projects that over its 40-year production life, the new mine will yield 20 million tons of copper and consume some 750,000 acre-feet of water, most of which will be discharged as copper effluent in one form or another.

B. ADEQ Erroneously Treats the Resolution Mine as an Existing Source, and the Tribe's Files Its Challenge

In 2017, Resolution applied to renew the discharge permit[4] that ADEQ previously issued for the shuttered Magma Mine and included active mining areas that will exclusively serve the new Resolution Mine. This includes the newly drilled "Shaft 10" on the East Plant Site and the beginnings of a complex network of automated mineworks that Resolution is

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S.2466; 2007 H.R. 3301, 2007 S.1862; 2008 S.3157; 2009 H.R.2509; 2010 H.R. 4880; 2011 H.R.1904; 2013 H.R. 687, 2013 S.339; and 2014 H.R.39979.

[4]The Environmental Protection Agency authorized ADEQ to administer the National Pollution Discharge Elimination Systems within Arizona on December 5, 2002. Arizona Statute applies the federal standards to all tributaries and reaches of the Gila River, among others. *See* A.R.S. §§ 29-201-38, 49-221(G)(1)(b), 49-255(2)(a).

constructing beneath the Resolution Ore Body. ADEQ renewed the permit—without conducting a "new source" analysis—treating the Resolution Mine as an existing source and part of the old, defunct Magma Mine. *SCAT I*, 520 P.3d 670, ¶ 15-16.

The Tribe challenged ADEQ's decision before the Water Quality Appeals Board ("Board") arguing that the Resolution Mine is a "new source" under 40 C.F.R. §§ 122.2 and 122.29. *Id.*; APP-98, 101-02. In November 2018, the Board remanded the matter to ADEQ instructing it to conduct a "new source" analysis. *Id.* ¶ 17.

In 2019, ADEQ completed a truncated new source analysis, in which it determined that the Resolution Mine was an existing source. *Id.* ADEQ erroneously reasoned that because performance standards apply to "the mine as a whole" (*i.e.*, the combination of all "active mining areas" on both sites), the analysis begins and ends with the date that Magma began constructing its original "mine"—1911. *Id.* The Tribe appealed this decision to the Board, which affirmed. *Id.* ¶ 18.

The Tribe appealed the Board's 2019 decision to the Arizona Superior Court arguing under 40 C.F.R. §§ 122.2 and 122.29 that the Resolution Mine is a new source and that the Board's erroneous new source analysis was inconsistent with federal regulations. *Id.* ¶ 20; APP-83-83. However, the Superior Court deferred to ADEQ and affirmed the Board's decision. *SCAT I*, 520 P.3d 670, ¶ 20.

The Tribe appealed to the Arizona Court of Appeals, which reversed, determining that the Resolution Mine was a new source under 40 C.F.R. §§ 122.2 and 122.29. *Id.* ¶ 72. The Court of Appeals rejected ADEQ's erroneous "mine-as-a-whole"

interpretation, which had confused the regulatory definitions of "mine," "active mining area," and "site."[5] *Id.*¶¶ 30-61; *see* 40 C.F.R. §§ 122.2, 440.132(a), (g). The Court of Appeals correctly determined the Resolution Mine is a "new source" because its construction began after 1982, it is "substantially independent" of the Magma Mine, and new source performance standards independently apply to it. *SCAT I*, 520 P.3d 670, ¶¶ 52-61.

Resolution and ADEQ sought review with the Arizona Supreme Court, which accepted review, reversed the Court of Appeals, and determined that the Resolution Mine is not a "new source." Although the court agreed with the Tribe that §§ 122.2 and 122.29(b) require regulators to consider only newly constructed items and not "the mine as a whole," it determined that the Resolution Mine was not independent of the Magma Mine because the two shared a "material connection." *SCAT II*, 550 P.3d 1096, ¶ 63. Further, the court failed to analyze the mineworks that Resolution is constructing under the Resolution Ore Body, but instead focused its analysis on a solitary mineshaft, "Shaft 10"—a term that the Parties and lower courts used as shorthand for all the new active mining areas associated with the Resolution Mine. *Id.* ¶¶ 69-71. In other words, the

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[5]In short, an "active mining area" is a place where "extraction, removal, or recovery of metal ore" takes place. 40 C.F.R. § 440.132(a). A "mine" is a type of active mining area; it is defined as "an active mining area . . . used in or resulting from the work of extracting metal ore . . . from [its] natural deposits." 40 C.F.R. 440.132(g). A "site" is the broadest term and means "the land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the facility or activity." Thus, any mining site may include multiple active mining areas some of which may be mines.

court failed to analyze the mine itself that will be the source of copper-contaminated discharge.

REASONS TO GRANT CERTIORARI

This Court provides the definitive and final interpretation of federal law to guide lower courts and agencies fulfilling federal mandates. Presently, the only published opinion interpreting how agencies must perform a new source analysis is the Arizona Supreme Court's erroneous decision that departs from the plain text of the very regulation establishing that analysis. *See* 40 C.F.R. § 122.29(b). *See* R. Sup. Ct. 10(c) (certiorari warranted when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court").

Further, because new source analyses are frequently the domain of state administrative function, federal judicial review is not only rare, but often subject to the factual determinations of agency officials. As such, published opinions presenting pure legal questions on undisputed facts are infrequent and this Court should take the opportunity to weigh in and provide a consistent framework for Subsection 122.29(b)'across the various jurisdictions in the country.

Moreover, the undisputed facts of the case warrant asking this Court to take a fresh look and definitively interpret the governing regulations. The new Resolution Mine is a colossal undertaking that is legally, factually, and facially independent of the Magma Mine. Resolution projects that its new mine will supply the equivalent of 25% of the Nation's

copper demand,[6] making it one of the most profitable copper mines in the world and a project that Resolution would pursue apart from any connection to the Magma Mine. Further, the Resolution Mine will mine an entirely separate, virgin ore body, use a different extraction method, and will out-produce the Magma Mine fifteen times over in half the time.

Presently, *SCAT II* is the only published authority instructing regulators how to perform a "new source" analysis under 40 C.F.R. § 122.29(b). *Cf. National Wildlife Federation v. E.P.A.*, 286 F.3d 554, 568-70 (D.C. Cir. 2002) (determining specific regulation categorizing new fiber lines as a "new source" did not create an irrebuttable presumption); *Manasota-88, Inc. v. Thomas*, 799 F.2d 687 (11th Cir. 1986)

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[6]This is a projection of volume, not a commitment to deliver copper to producers or consumers in the United States. Resolution Copper Mining Limited Liability Company is owned by Rio Tinto (Australia/England) and BHP (Australia). Rio Tinto owns 55% of Resolution Copper, and BHP owns 45%. Shining Prospect Private Limited Company, based in Singapore, is a holding company that owns over 14% of Rio Tinto, making it the single largest shareholder of Rio Tinto, *see* https://www.sharecafe.com.au/2024/04/05/rio-tintos-annual-share-buyback-battle/ (last visited Sept. 23, 2024). Shining Prospect PLC is wholly owned by Chinalco, a holding company of the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) of the People's Republic of China, *see* https://www.chinalco.com.cn/en/en_gywm/en_qyjj/ (last visited Sept. 23, 2024).
Resolution has long been exploring expansion at the Port of Guaymas to ship its copper to China. *See Port of Guaymas Set to Expand*, Arizona Daily Star (Apr. 5, 2012), https://tucson.com/business/local/port-of-guaymas-set-to-expand/article_1faea8eb-20bf-5fa3-b22c-95d98727a374.html (last visited Sept. 23, 2024).

(summarily determining disposal area "cannot logically be viewed apart" from its source).

Allowing *SCAT II* to stand would not only have grave consequences for Queen Creek and the Tribe, but it would also jeopardize all impaired waterways across the country, as the Arizona Supreme Court's opinion is the only authority on the subject. Most importantly, *SCAT II's* test completely undermines Congress' intent for the CWA to restore Queen Creek and other similarly situated waters faced with the discharge from new mines and other new sources of pollution.

This Court must provide definitive, final guidance to regulators and courts by establishing how to perform a new source analysis under 40 C.F.R. § 122.29(b). *See* R. Sup. Ct. 10(c). This Court should not allow this erroneous state court decision to stand because it involves an important question of federal law and has been decided in a manner that conflicts with relevant decisions of this Court. *See id.*

THE ARIZONA SUPREME COURT DISREGARDED THE THREE-PRONG TEST IN THE PLAIN TEXT OF SUBSECTION 122.29 AND ADOPTED AN UNSUPPORTED "MATERIAL CONNECTION" TEST

Federal regulation establishes a three-prong test to determine whether new construction constitutes a new source. *See* 40 C.F.R. § 122.29(b). New construction is a new source if:

> (1) . . . it meets the definition of "new source" in § 122.2,[7] and

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[7] 40 C.F.R § 122.2 defines a new source, in relevant part, as: "any building, structure, facility, or installation from which

> (i) It is constructed at a site at which no other source is located; or
>
> (ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
>
> (iii) Its processes are substantially independent of an existing source at the same site. . . .
>
> (2) A source meeting the requirements of paragraphs (b)(1) (i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger.

Put in simpler terms, new construction is a "new source" when (1) its construction begins after EPA promulgates new source performance standards, *see* 40 C.F.R. § 122.2; (2) it is operationally independent of other sources, *see* 40 C.F.R. § 122.29(b)(1)(i)-(iii); and (3) it is independent for regulation. *See* 40 C.F.R. § 122.29(b)(2).

Rather than interpret and apply the plain text of these regulations in context, the Arizona Supreme Court departed from it, cutting a new "material connection" test out of whole cloth. This contradicts this Court's precedent regarding the interpretation of federal regulations. *See Green v. Brennan*, 578 U.S. 547, 553 (2016) ("we begin our interpretation of the regulation with its text"); *also, S.D. Warren Co. v.*

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there is or may be a 'discharge of pollutants,' the construction of which commenced . . . [a]fter promulgation of standards of performance under section 306 of CWA which are applicable to such source . . . ."

Maine Bd. of Envtl. Prot., 547 U.S. 370, 376 (2006) (absent regulatory definition, courts must construe terms "in accordance with [their] ordinary or natural meaning"). Only when the text is unclear does this Court turn to other canons of construction. *Green*, 578 U.S. at 553; *Cty. of Maui*, 150 S. Ct. at 1468 (determining plain text of "from" in statute did not mean "fairly traceable" or proximately caused).

A. First Prong: Do Performance Standards Predate Construction?

The first prong of the new source analysis requires determination of whether the new construction meets the definition of a "new source" in 40 C.F.R. § 122.2. Section 122.2 defines a "new source" as "any building, structure, facility or installation from which there is or may be a 'discharge of pollutants,' the construction of which commenced . . . [a]fter promulgation of standards of performance . . . which are applicable to such source." Under § 122.2, the newly constructed facilities alone are at issue and nothing else.

The Arizona Supreme Court correctly determined that the first prong focuses solely on the new construction and not the date that construction began on an entire site. *SCAT II*, 550 P.3d 1096, ¶¶ 41-50. Thus, the court properly rejected ADEQ's interpretation of this prong that focused on the date that Magma originally began construction on the West Plant Site in 1911.[8] Under 40 C.F.R. § 122.2,

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[8]Below, ADEQ and Resolution advanced an erroneous "mine-as-a-whole" interpretation that would render § 122.2 and § 122.29(b) meaningless surplusage. They argued that because construction of the Magma Mine began in 1911, no copper mine on site could ever have a later date. If the inquiry began and ended with whether operations existed on site (or a related site) before 1982, there would be no need to evaluate the remaining prongs. A new source analysis would only occur on vacant sites.

the Resolution Mine is a "new source" because its construction began in 2007, a quarter century after new source performance standards for copper mines were promulgated. *See Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards,* 47 Fed. Reg. 54598–600 (Dec. 3, 1982).

B. Second Prong: Is the New Source Operationally Independent.

Section 122.29(b)(1) provides three paths to establishing that new construction is operationally independent. It states, in part:

> [A] source is a 'new source' if . . . :
>
> (i) it is constructed at a site at which no other source is located; or
>
> (ii) it totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
>
> (iii) its processes are substantially independent of an existing source at the same site.

Here, the Resolution Mine either totally replaces the Magma Mine or is substantially independent from the Magma Mine. Either way, the Arizona Supreme Court, applying its "material connection" test, failed to analyze the Resolution Mine with an eye toward whether it is operationally independent of the depleted Magma Mine.

1. The Resolution Mine Totally Replaces the Magma Mine.

The Resolution Mine is operationally independent of the Magma Mine because it totally replaces it. A new source is independent in fact when it "totally

replaces the process or production equipment that causes the discharge of pollutants at an existing source." 40 C.F.R. § 122.29(b)(1)(ii). Within a mine, the source of pollution is the mine drainage that is "drained, pumped, or siphoned" from extraction areas. *See* 40 C.F.R. § 440.132(g), (h). In a mine, the process or production equipment associated with extraction is the same equipment which causes a discharge, as opposed to equipment associated with removal or recovery of metal ore. *See* 40 C.F.R. § 440.132(a), (g).

Here, neither Resolution, Magma, nor any other person or entity extracts metal ore from the Magma Mine. Accordingly, the Resolution Mine's new mineworks will totally replace the process and production equipment formerly used in the Magma Mine, which has not extracted metal ore since 1996.

2. The Resolution Mine is "Substantially Independent" of the Magma Mine.

Even if the Resolution Mine does not totally replace the Magma Mine, it is nevertheless "substantially independent" of the Magma Mine. *See* 40 C.F.R. § 122.29(b)(1)(iii). Whether a new source is "substantially independent" is determined under the totality of the circumstances. Section 122.29(b)(1)(iii) directs courts and regulators to "consider *such factors as* [(1)] the extent to which the new facility is integrated with the existing plant; and [(2)] the extent to which the new facility is engaged in the same general type of activity as the existing source." (Emphasis supplied). The phrase "such factors as" compels that these two factors are not exclusive.

Therefore, regulators and courts must, on a case-by-case basis and under the totality of the circumstances: consider all the relevant factors; determine how to evaluate them; and decide how

much weight each one deserves. In doing so, regulators and courts must interpret the plain text of these factors in context. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 167 (2012) (explaining that courts must interpret a statute's plain language in context).

Here, the necessary context for interpreting each factor is to ascertain whether a dependent relationship exists between the new and existing sources, such that the new depends upon the existing. Further, because the test considers all the circumstances, regulators and courts, in simplest terms, "just need to look at it." The Arizona Supreme Court erroneously interpreted the two express factors and failed to consider any others.

On the undisputed facts, the Resolution Mine is "substantially independent" from the Magma Mine because (1) the Resolution Mine operationally replaces the exhausted Magma Mine; (2) Resolution's repurposing of vestigial active mining areas does not show integration between the two mines; (3) by using a different mining method, the Resolution Mine will engage in a different type of activity than the Magma Mine; and (4) several more factors indicate that the Resolution Mine does not depend at all on the Magma Mine. Indeed, if one "just looks at" the Resolution Mine, it is obvious that it is substantially independent of the Magma Mine.

a. The Resolution Mine Replaces the Exhausted Magma Mine.

Even if the Resolution Mine does not totally replace the Magma Mine within the meaning of Subsection 122.29(b)(1)(ii), the facts supporting that ground are strong evidence that the Resolution Mine is "substantially independent" of the Magma Mine.

Again, the Magma Mine has been exhausted and it no longer creates mining discharge consequent to extraction of any ore. As such, all activity occurring in the Resolution Mine—and all discharge produced thereby—occurs independent of what may occur or formerly occurred in the Magma Mine.

The Resolution Mine is complete in and of itself and it does not depend on or owe its existence or operations to the Magma Mine. The convenient re-use of active mining areas that formerly supported the Magma Mine is merely an accident of history and a beneficial economic advantage that does not show a dependent relationship. This factor heavily weighs in favor of the conclusion that the Resolution Mine is "substantially independent" of the Magma Mine.

b. The Resolution Mine Is Not Integrated into the Magma Mine; Vestiges of the Magma Mine Are Integrated into It.

The first express factor in Subsection 122.29(b)(1)(iii) is "the extent to which the new facility is integrated with the existing plant." EPA guidance states that *minor* additions like "a new purification step" are highly integrated, while sharing "utilities" or a "treatment plant" constitutes nominal integration. *New Source Criteria* (40 CF 122.29(b)), 49 Fed. Reg. at 38,044 (Sept. 26, 1984).

As a starting point, the Resolution Mine is not a "*minor* addition" to the Magma Mine. Even if the Magma Mine were still in its heyday, the Resolution Mine with its thirty-fold increase in annual production would utterly dwarf it.

Moreover, the examples provided in the Federal Register are illustrative. A new purification step depends on the existing source. If an existing mine does not produce copper ore, the new step would have

nothing to purify. Such integration is strong evidence of dependence. Shared support facilities, however, such as utilities or a treatment plant, constitute nominal integration. If two mines draw electricity from a common power plant or send discharge to a common treatment plant, the shared plants do not place the mines in a dependent relationship with one another. Each mine will otherwise operate independently of the other and curtailing or expanding one will not impact the other.

The direction of any integration is also critical. If a new source is integrated into a dominant existing source, the new source is most likely dependent. By contrast, if vestiges of an existing source are subsumed into a new source such that the new dominates, then the new source is independent. Connections, borne out of mere convenience or economic prudence, do not evidence meaningful integration and do not show that a new source depends on an existing source.

Here, the undisputed evidence overwhelmingly demonstrates that the Resolution Mine is not integrated with the Magma Mine and that any integration is either nominal or shows that vestiges of the Magma Mine have been integrated into the Resolution Mine's operations. This includes the repurposing of the Never Sweat Tunnel and Shafts 8 and 9, which have not facilitated any extraction in the Magma Mine since 1996 but will be repurposed to support the Resolution Mine. The continued use of these vestiges depends on operations within the Resolution Mine. Any integration between them shows that the Resolution Mine dominates useful vestiges of the Magma Mine.

The Arizona Supreme Court failed to consider whether any integration between the mines shows a

dependent or independent relationship. Instead, the court simply asked whether the two mines shared a "material connection," which it found in the Never Sweat Tunnel and Shafts 8 and 9. *SCAT II*, 550 P.3d 1096, ¶¶ 53-56. By doing so, the court set a much lower bar. The "material connection" test the court invented falls short the plain text of the regulation by shifting the inquiry away from one focused on operational independence to one of mere physical connection. The court's test contradicts the regulation's text which requires determination of whether the new mine is "substantially independent."

The Arizona Supreme Court's interpretive shift is not permitted by the text of Subsection 122.29(b)(iii) and contradicts the method of interpretation required by this Court. In *County of Maui*, this Court reversed the Ninth Circuit when it similarly departed from the statutory text. *See* 140 S. Ct. at 1470. There, the lower court interpreted "from" in the CWA's prohibition on adding any pollutant to navigable waters "from any point source" not as a direct discharge or its "functional equivalent," but merely as "fairly traceable."[9] *Id.*; *see also* Scalia & Garner, *Reading Law*, 167 (2012) (explaining that courts must interpret a statute's plain language in context). Here, "material connection" does not fairly rise from regulatory text requiring analysis of whether a new source is so integrated into an existing source that it is operationally dependent on that existing source.

Further, the Arizona Supreme Court's new test is so unbounded that no new source may ever be

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[9]In *County of Maui*, a wastewater treatment facility pumped partially treated sewage through four wells hundreds of feet underground, which then traveled half a mile or more through groundwater to the ocean. 140 S. Ct. 1469.

regarded substantially independent when located on site with another source—unless, of course, it meets the express examples of shared utilities or shared treatment facilities. *See* 49 Fed. Reg. at 38,044. The Resolution Mine is not in any way integrated with the shuttered Magma Mine, and this factor compels the conclusion that the Resolution Mine is "substantially independent" of the Magma Mine. This Court should grant certiorari lest other courts follow this flatly erroneous test.

c. Adit Mining Is Not the Same General Type of Activity as Panel Cave Mining.

The second nonexclusive factor is "the *extent* to which the new facility is engaged in the same general type of activity as the existing source." 40 C.F.R. § 122.29(b)(1)(iii) (emphasis added). By the regulation's plain text, the inquiry is not binary; *i.e.* the question is not whether both mines extract copper. Rather, regulators and courts are directed to consider the "*extent*" to which new and old "*engage*[] in the same general type of activity." *Id.* (emphasis supplied). The regulation begins with the premise that new and existing sources may engage in the same general type of activity (e.g. copper mining) but directs regulators and courts to consider the *degree* of similarity. This is a qualitative analysis aimed at facts that are material to whether a dependent relationship exists.

As with integration, EPA provides an explanation and example: if a plant "producing a final product . . . adds new equipment to produce the raw materials for that product . . . the proposed structure would likely constitute a new source." 49 Fed. Reg. at 38,043-44. Nevertheless, even if the new construction is engaged in the same type of activity, but "essentially replicates, without replacing, the existing source," it

too would be a new source.[10] *Id.* While this second example seems to counter the second express factor because the activities are identical, the thrust of the test is consistent. Like integration, the question is whether the operational characteristics of the new and existing sources evince a dependent relationship between them.

In other words, this factor is not a procrustean bed that allows a willing regulator to stretch the analysis to meet the requisite level of abstraction that will yield the desired result (*e.g.* copper mines become mines become exploitation of natural resources becomes economic activity). Rather, the factor must illuminate whether an otherwise new source is operationally independent of an existing source.

Here, the Magma Mine and Resolution Mine both mine copper but they are entirely dissimilar. The Magma Mine was an adit mine. While active, it chased a high-grade vein through tunnels in a manner that prevented collapse of the overburden. Consequently, it had a comparatively lower impact on the surface and aquifers that lie above.

By contrast, the Resolution Mine will use panel caving—a brute-force method that collapses an ore body from below along with the entire earth above it. As panels of ore collapse, a subsidence zone will form on the surface a thousand feet deep, and the depression will drain the entire Apache Leap tuff aquifer lying above. That aquifer, fed by rainwater and streams from time immemorial, will drain into the Resolution Mine in volumes far exceeding discharges from the Magma Mine. These mining methods are sharply different.

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[10]Note that total replacement is an independent ground for establishing independence in fact. *See* 40 C.F.R. 122.29(b)(1)(ii).

Additionally, the Resolution mine will more than replicate the production of the Magma Mine. *See* 49 Fed. R. 38,044. Indeed, the new mine is thirty times larger in terms of its projected annual production. The Resolution Mine is not a continuation of the Magma Mine, but a new, entirely separate mine that will produce additional discharge on top of any dewatering that occurs in the Magma Mine.

The Arizona Supreme Court erroneously characterized the Resolution Mine as a mere increase in capacity that results from adding equipment in one or two production steps. *SCAT II*, 550 P.3 1096, ¶ 59 (quoting 49 Fed. Reg. at 38,044). Further, the court analyzed only Shaft 10 and ignored the entire mineworks where extraction will occur. *Id.* ¶¶ 59-60. In other words, the court failed to analyze the Resolution Mine itself, and instead focused on a single mineshaft. *Id.* Worse, the court viewed the factor at a high level of abstraction—"the mining process"—and missed the forest for the trees. *Id.* ¶ 61.

To the extent the Magma Mine is engaged in any kind of activity (it is not), the difference in mining method between the two mines demonstrates that that they are not engaged in the same general type of activity. This factor weighs heavily in favor of substantial independence and warrants a new source designation. This Court should grant certiorari to articulate the correct test under this factor as well.

d. Several Other Factors Demonstrate that the Resolution Mine is Substantially Independent of the Magma Mine.

Several other factors support that the Resolution Mine is substantially independent of the Magma Mine. These include the extraordinary size and scale of the Resolution Mine and tremendous investment

that Resolution has made in constructing it. Whereas the Magma Mine produced 1.3 million tons of copper in eighty years from a high-grade ore body, the Resolution Mine will produce 20 million tons of copper in forty years from a separate, low-grade body.[11] This thirty-fold increase in annual production only represents the copper yield. Because the Resolution Mine will target a low-grade ore, it will extract more material per ton of copper produced.

Additionally, Resolution has invested over $2 billion in constructing the new mine since 2004.[12] Final construction will still take an additional ten years, and Resolution remains uncertain when the final stages will begin.[13]

Further, Resolution must also acquire title to U.S. Forest Service land through a land exchange.[14] To accomplish this, Resolution invested untold sums lobbying Congress for ten years before it passed legislation authorizing a land exchange that would allow it to exploit the Resolution Ore Body.[15] Indeed, the land exchange shows the Resolution Mine is completely disjoined from the Magma Mine insofar as it lies beneath Tonto National Forest and such areas as Oak Flat and Apache Leap. These areas are

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[11]*See* https://resolutioncopper.com/project-overview/ (last visited Sept. 23, 2024).

[12]*See* https://resolutioncopper.com/rio-tinto-approves-an-additional-302-million-investment-in-resolution-copper-project/) (last visited Sept. 23, 2024).

[13]https://www.riotinto.com/en/news/releases/2021/Resolution-Copper-project-enters-next-phase-of-public-consultation (last visited Sept. 23, 2024).

[14]This land exchange is the subject of a separate, unrelated petition for certiorari filed with this court in *Apache Stronghold v. U.S.*, No. 24-291.

[15] *See* fn. 4, *supra*.

spiritually, culturally, and historically significant to members of the Tribe.[16]

Resolution's extraordinary investment and the obstacles it seeks to overcome shows that the new mine is so valuable that Resolution would pursue it regardless of any supposed connection to the depleted Magma Mine. Instead, the proper lens to view any connection between the two is that in Arizona's Copper Triangle, exploration is the norm, and active mining areas associated with old mines often present beneficial opportunities for those looking to start new mines. Simply put, the Resolution Mine is not a continuation of the depleted Magma Mine.

The enormous size, cost, and complexity of the Resolution Mine are additional compelling factors demonstrating substantial independence. The Arizona Supreme Court failed to consider any of them despite that the regulatory text demands that regulators and courts consider all relevant factors. *See* 40 C.F.R. § 122.29(b)(1)(iii). Applying the text as written, all the relevant factors that one can conjure, including those expressly stated in Subsection 122.29(b)(1)(iii), show that the Resolution Mine is operationally independent of the Magma Mine and that it is a new source.

C. Third Prong: Do Regulations Independently Apply to the New Source?

Whether a "new source" is independent for regulation turns on whether a new source performance standard is "independently applicable" to it. 40 C.F.R. § 122.29(b)(2). If not, "the source is a new discharger." *Id.* The analysis begins with the new construction and simply considers whether that

[16] *See* fn. 1, *supra.*

construction—standing alone—would be subject to a "new source" performance standard. Here, 40 C.F.R. § 440.104(a) establishes new source performance standards for mine drainage. Subsection 440.132(h) defines "mine drainage" as "any water drained, pumped, or siphoned from a mine." Subsection 440.132(g) defines a mine as "an active mining area . . . used in or resulting from the work of extracting metal ore . . . from [its] natural deposits."

The Resolution Mine consists of all the new mineworks that Resolution is constructing below the Resolution Ore Body to extract copper ore from natural deposits. This new construction in and of itself independently meets the regulatory definition of a "mine." Further, Resolution will discharge mine drainage "drained, pumped, or siphoned" from those mineworks into Queen Creek. Accordingly, new source performance standards independently apply to the Resolution Mine; it is a "new source" for all purposes under § 122.29(b).

The Arizona Supreme Court made three legal errors in evaluating whether new source performance standards independently apply to the Resolution Mine. First, the court transformed the test into one that considers whether the performance standards at issue also apply to other sources on site; *i.e.*, whether the standards *only* apply to the new source and no other sources. *See SCAT II*, 550 P.3d 1096, ¶¶ 67-68. This is not the question. Rather, looking only to the new construction, the question is whether performance standards apply to that new construction.

Indeed, evaluating whether the same standards apply to other sources on a site would duplicate the analysis of the second prong (operational independence) by focusing on whether (1) the new

source is the only source on site; (2) the new source totally replaces an existing source; or (3) the new source is engaged in the same type of activity as an existing source.

Second, even if the regulation directed regulators and courts to evaluate all sources on site, the Arizona Supreme Court applied the test incorrectly. The Magma Mine is not subject to *new* source performance standards but standards for *existing* sources. *Compare* 40 C.F.R. § 440.102-03 (establishing "best practicable control technology" and "best available technology economically achievable" for existing sources) *with* 40 C.F.R. § 440-104 (new source performance standards). Even applying the court's erroneous test, new source performance standards *only* apply to the Resolution Mine.

Third, the Arizona Supreme Court constrained its analysis to Shaft 10 as a simple mineshaft and ignored all the new mineworks that Resolution is constructing that will extract copper ore and that will be the source of the mine drainage. *SCAT II*, 550 P.3d 1096, ¶¶ 69-71; *see* 40 C.F.R. § 440.132(g), (h) ("mine drainage" means "any water drained, pumped, or siphoned from a mine"; "mine" means "active mining area . . . used in or resulting from work of removing metal ore . . . from [its] natural deposits"). In other words, the court entirely failed to analyze the Resolution Mine itself, as the regulation requires. This analysis conflicts with ADEQ's stipulation that Shaft 10 and the other items under construction—*i.e.*, the Resolution Mine—are sources of mine drainage, and therefore, must be a mine. APP-146-47.

In summary, the Resolution Mine meets all three prongs of the "new source" analysis. *See* 40 C.F.R. § 122.29(b). First, Resolution began constructing its new mine in 2007, long after EPA promulgated

performance standards for copper mines. Second, the Resolution Mine is "independent in fact" either as a total replacement of the Magma Mine or as substantially independent of the Magma Mine. Third, the Resolution Mine is "independent for regulation" because it is a "mine" as defined in the regulations and will discharge mine drainage. *See* 40 C.F.R. §§ 440.104, 440.132(g), (h). This Court should grant certiorari, announce the proper method of conducting a new source analysis, and expressly determine that the Resolution Mine is new source under the CWA.

CONCLUSION

Few things are as important to the American Southwest as water and mining; and both often stand in conflict. While the mining sector plays a critical role in supplying essential minerals like copper, the CWA balances those interests against the need to maintain the quality of the Nation's waters. Congress' intent under the CWA is that common law principles alone cannot effectively control pollution and that waterways like Queen Creek must be restored and maintained; without review, the unchecked precedence of *SCAT II* will undermine that intent. This Court should grant certiorari and establish the proper interpretation of the new source analysis required by 40 C.F.R. § 122.29(b). Further, this Court should determine that the Resolution Mine is a new source.

Respectfully Submitted,

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September 25, 2024

APPENDIX

San Carlos Apache Tribe v. State of Arizona

APPENDIX

Opinion Sought to Be Reviewed

San Carlos Apache Tribe v. State of Arizona ("SCAT II"), ___ Ariz. ___, 550 P.3d 1096 (2024).. APP-1

Other Relevant Opinions and Decisions

San Carlos Apache Tribe v. State of Arizona (SCAT I), 254 Ariz. 179, 520 P.3d 670 (App. 2022).. APP-33

San Carlos Apache Tribe, et al. v. State of Arizona, et al., Superior Court of Arizona, Maricopa County, LC2019-00264-001 DT (Mar. 25, 2021).. APP-79

San Carlos Apache Tribe, et al. v. State of Arizona, et al. Office of Administrative Hearing, No. 17-001-WQAB. APP-97

Statutes and Regulations

28 U.S.C. § 1257.. APP-156

33 U.S.C. § 1251.. APP-156

40 C.F.R. § 122.2.. APP158

40 C.F.R. § 122.4.. APP160

40 C.F.R. § 122.29.. APP-161

40 C.F.R. § 440.102.. APP-163

40 C.F.R. § 440.103.. APP-164

40 C.F.R. § 440.104.. APP-165

40 C.F.R. 440.132.. APP-166

***San Carlos Apache Tribe v. State of Arizona (“SCAT II”)*, ___ Ariz. ___, 550 P.3d 1096 (July 27, 2024).**

JUSTICE KING authored the Opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, and JUSTICES BOLICK, LOPEZ, BEENE, and MONTGOMERY joined.

Opinion

JUSTICE KING, Opinion of the Court:

¶1 Copper mining began at the Magma Copper Mine near Superior, Arizona, over a century ago. In 1975, the United States Environmental Protection Agency (the “EPA”) ***1099** issued the mine its first permit authorizing the discharge of water pursuant to the Clean Water Act, 33 U.S.C. §§ 1251–1389 (the “CWA”). *See* 33 U.S.C. § 1342(a) (tasking the EPA with administering the National Pollutant Discharge Elimination System (“NPDES”) permit program, which includes issuing permits that authorize the discharge of pollutants when certain conditions are met). The EPA later renewed the mine's discharge permit every five to eight years.

¶2 In 2002, the EPA delegated its administrative authority over the CWA permit program to the Arizona Department of Environmental Quality (“ADEQ”). *See* Approval of Application by Arizona to Administer the NPDES Program, 67 Fed. Reg. 79629, 79630 (Dec. 30, 2002); A.R.S. §§ 49-255 to -265. Thereafter, ADEQ periodically renewed the mine's permit, as required by the CWA.

¶3 In 2014, the mine's owner, Resolution Copper Mining, LLC (“Resolution”), completed construction of a new mine shaft (“Shaft 10”). Shaft 10 is a vertical

excavation about thirty feet wide that descends nearly 7,000 feet underground. The issue before us is whether Shaft 10 is a "new source" under the CWA. A "new source" is subject to the generally more stringent new source performance standards under § 306 of the CWA, 33 U.S.C. § 1316. Based on the record before us, we conclude that the sinking of Shaft 10 did not create a "new source" under the CWA. Thus, ADEQ acted within its discretion when it issued the discharge permit renewal to Resolution in 2017.

I. BACKGROUND

A. History And Development Of The Mine

¶4 In 1910–1911, Magma Copper Company ("Magma") purchased and began developing the mine to extract copper ore. Part of Magma's development included deepening an existing mine shaft (Shaft 1) and constructing other underground workings, including additional mine shafts (Shafts 2 through 8). A "shaft is the surface opening to the mine which provides a means of entry to or exit from the mine for men and materials, and for the removal of ore or waste from underground to the surface. It may be vertical or inclined." *See* EPA, *Development Document for Final Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category* ("*Development Document*") 29–30 (Nov. 1982), https://www.epa.gov/sites/default/files/2015-10/documents/ore-mining_dd_1982.pdf. The mine shafts were used for a variety of purposes, including the removal of water to keep the mine workings dry (a process known as dewatering) and ventilating and improving air quality below the surface of the mine. Magma also installed equipment at the mine, such as a local concentrator to process ore and a smelter. In addition, the mining operation included underground

tunnels that connected the shafts and facilitated ore extraction.

¶5 The development of a mine may expand as new ore deposits are located. In this case, as active extraction depleted copper ore in the original area, Magma turned its attention to other exploratory efforts. New copper-ore deposits were discovered, and Magma's operations consequently expanded in an eastward direction.

¶6 In 1971, Magma constructed Shaft 9 on non-contiguous property located approximately two miles east of the original workings of the mine. The purpose of Shaft 9 was to identify copper-ore bodies within that area and improve access to ore.

¶7 Magma also constructed an underground tunnel extending about two miles in length that connected the eastern portion of the mine (including Shaft 9) with the western portion. This tunnel was known as the "Never Sweat Tunnel." Magma used the Never Sweat Tunnel to transport copper ore from Shaft 9 to the western portion of the mine, where extracted ore was processed and stored.

¶8 As mining operations continued depleting copper ore, Magma began drilling underground exploratory holes in an effort to locate new ore. Magma discovered some new copper ore near Shaft 9 but ceased further exploratory drilling in 1982. With no operating pumps, Magma allowed the underground workings to flood with infiltrating groundwater.

***1100** ¶9 In 1989, Magma began the process of dewatering the mine. Magma also resumed ore production and underground exploratory drilling. The results of the exploratory drilling suggested the possibility of undiscovered copper. In 1994–1995,

Magma discovered a new, large copper-ore body beneath the eastern portion of the mine (the "Eastern Deposit"). Magma, however, did not extract copper ore from the Eastern Deposit at that time.

¶10 In 1996, a new entity, Broken Hill Proprietary Company Ltd. ("BHP"), acquired the mine, forming a wholly owned subsidiary, BHP Copper, Inc. ("BHP Copper"). BHP Copper continued mining operations from Shaft 9, depleting the remaining reserves in that area. BHP Copper ceased mining operations but continued exploration efforts by drilling deep holes in the area of the Eastern Deposit. In 1998, BHP Copper ceased all operations and turned off its dewatering pumps, allowing the mine's underground workings to flood with water. In addition, some of the underground workings at the mine were backfilled.

¶11 In 2001, BHP entered into an exploration agreement with an entity that was a wholly owned subsidiary of Rio Tinto (collectively "Rio Tinto"). Thereafter, Rio Tinto commenced a deep exploratory drilling program focused on outlining the Eastern Deposit.

¶12 In 2004, Rio Tinto acquired a majority interest in the mine. Rio Tinto then formed Resolution as a joint venture with BHP's successor, BHP Billiton, to continue efforts aimed at extracting copper ore from the Eastern Deposit. Beginning in 2005, Resolution resumed exploratory drilling and conducted a study to assess viable methods of extracting copper ore from the Eastern Deposit. Resolution also decided to construct a new mine shaft and other support structures that would enable it to access and study the Eastern Deposit. Through years of exploration efforts, it was determined that the Eastern Deposit begins around 4,500 feet below ground surface level

and proceeds down to about 7,000 feet. It covers an area of about one square mile, and the ore body is approximately 1,600 feet in thickness.

¶13 From 2007 to 2009, Resolution began developing and sinking Shaft 10. Shaft 10 is located about 300 feet from Shaft 9 in the eastern portion of the mine. Shaft 10 descends nearly 7,000 feet underground; in contrast, Shaft 9 descends roughly 5,000 feet. Shaft 10 is not drilled directly into the Eastern Deposit. In 2014, Resolution completed construction of Shaft 10 and its surface components, including a hoist and structural supports that enable the transport of supplies to and from the base of Shaft 10.

¶14 During Shaft 10's construction, Shaft 9 was used for support purposes (e.g., ventilation and dewatering underground mine workings). Resolution plans to continue to use Shaft 9 for support but not for ore extraction.1

¶15 Around the time of Shaft 10's construction, Resolution performed other work at the mine: (1) rehabilitating and extending the Never Sweat Tunnel; and (2) constructing a new cooling tower, additional rock stockpiles, wash bays, and a mine water treatment plant.2 Resolution used the Never Sweat Tunnel to transport development rock from its activities to the western portion of the mine for storage and future processing. Shaft 9 and the eastern portion of the mine remain connected with the western portion of the mine via the Never Sweat Tunnel.

¶16 Resolution uses Shaft 10 to explore and study the Eastern Deposit, ventilate and dewater the underground workings, and transport supplies. Shaft 10 also provides another point of entry and exit for individuals working at the mine. Resolution has not

used Shaft 10 or other new features for the commercial extraction of copper ore from the Eastern Deposit. Resolution uses preexisting infrastructure at the mine to support Shaft 10's functions. Resolution's operation requires it to control stormwater and other water used in the mining process, as well as remove groundwater from the underground ***1101** workings of the mine through dewatering. To accomplish this, Resolution drains water from Shaft 9 to the base of Shaft 10 and then pumps the water up to and through the Never Sweat Tunnel to the western portion of the mine. From there, it is combined with water that has been collected from Shaft 8, which is used to dewater the western portion of the mine. Then, Resolution sends all combined water west to the water treatment plant for treatment and storage.3

¶17 According to Resolution's General Plan of Operations, after water is treated at the water treatment plant, Resolution will attempt to reuse the water internally for ore processing, dust suppression, equipment washing, drinking water, cooling, or fire protection. In the event of excess treated water, Resolution has a contract with the New Magma Irrigation and Drainage District, thirty miles southwest of the mine, to pipe that water to the irrigation district. If the irrigation district does not have capacity, Resolution is authorized to pipe the treated water into a tributary that flows into Queen Creek. To date, however, Resolution has not discharged any water into Queen Creek; instead, it has sent all excess treated water to the irrigation district. Although circumstances could change, Resolution intends to continue sending its treated water to the irrigation district, rather than discharging it into Queen Creek.

¶18 Many of the originally constructed shafts and tunnels are no longer in operation or accessible. But Shaft 6 is used to ventilate the Never Sweat Tunnel. And, as noted, Shafts 8 and 9 and the Never Sweat Tunnel remain in use, and Resolution plans to continue their use. Resolution may use other preexisting shafts in the future, but not other tunnels.

¶19 Resolution's plan is to access the Eastern Deposit using a technique called panel caving. This method involves cutting the rock underneath the ore deposit, removing its ability to support the overlying rock material and causing it to collapse into a collection zone. As the ore is extracted from the bottom of the mine, the deposit will continue to collapse in on itself, thereby continuing to replenish the extractable ore. Occurring entirely underground, a series of conveyors, rail lines, tunnels, hoists, and other equipment will then transport the ore from beneath the deposit up and to the western portion of the mine for storage and processing. This method differs from that previously implemented at the mine through the use of adits and tunnels. *See Development Document*, *supra*, at 29–30 (describing an "adit" as a "passageway or opening driven horizontally into the side of a hill generally for the purpose of exploring or otherwise opening a mineral deposit," and it "is open to the atmosphere at one end"); *see also Development Document*, *supra*, at 557.

B. The Distinction Between A "New Source" And "Existing Source"

¶20 We must determine whether Resolution's sinking of Shaft 10 created a "new source" under the CWA. The CWA treats "new sources" differently from "existing sources." *See* 40 C.F.R. § 122.29(a)(3) ("Existing source means any source which is not a new source or a new discharger."). A

"new source" is subject to the CWA's new source performance standards. *See* 33 U.S.C. § 1316(a)(1) (defining "standard of performance" as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which [the EPA] determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants"); *see also* Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54598–600 (Dec. 3, 1982) (referring to the standards as "new source performance standards").

***1102** ¶21 "The classification of a facility as a new or existing source is important because under the CWA existing sources are subject to best available technology (BAT) and best conventional technology (BCT) requirements, while new sources are subject to the generally more stringent new source performance standards ... under section 306 of the CWA." NPDES Permit Regulations, 49 Fed. Reg. 37998, 38043 (Sept. 26, 1984). The distinction between a "new source" and an "existing source" "is based on the concept that new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies." *Id.*

C. Water Discharge Permits

¶22 Since the CWA began requiring discharge permits, all past and present owners of the mine have obtained the necessary permit and permit renewals to discharge water from the mine. The permit renewal at issue here is the "Authorization to Discharge under

the Arizona Pollutant Discharge Elimination System," which ADEQ issued to Resolution on January 19, 2017 (Permit No. AZ0020389) (the "2017 Permit Renewal"). The 2017 Permit Renewal became effective on January 23, 2017 and expired on January 22, 2022.

¶23 The 2017 Permit Renewal subjected Resolution to certain requirements for purposes of complying with the CWA's water quality standards. If Resolution complied with such requirements, the 2017 Permit Renewal authorized Resolution

> to discharge mine site stormwater runoff from Outfall 001 and treated mine water, industrial water and seepage pumping from Outfall 002 from the Superior Operations in Pinal County, Arizona to an unnamed wash, tributary to Queen Creek in the Middle Gila River Basin ... in accordance with discharge limitations, monitoring requirements and other conditions set forth herein, and in the attached "Standard [Arizona Pollutant Discharge Elimination System] Permit Conditions."

¶24 As noted, the 2017 Permit Renewal authorized the discharge of waters "to an unnamed wash, tributary to Queen Creek in the Middle Gila River Basin." Queen Creek has been designated an "impaired waterway" due to the levels of copper present in it. *See* 33 U.S.C. § 1313(d)(1)(C) (requiring states to identify waters that do not meet water quality standards and establish for those waters a "total maximum daily load ... at a level necessary to implement the applicable water quality standards"); *see also* 40 C.F.R. § 131.31(b); Ariz. Admin. Code tit. 18, ch. 11, art. 1, app. B. ADEQ's

2017 Permit Renewal subjected Resolution to effluent limitations for copper that are more stringent than federal new source performance standards for copper. *See* 40 C.F.R. § 440.104.

D. Procedural History

¶25 The San Carlos Apache Tribe (the “Tribe”) challenged ADEQ's issuance of the 2017 Permit Renewal with the Arizona Water Quality Appeals Board (the “Board”). The Tribe claimed that the construction of Shaft 10 and other new features created a “new source,” 40 C.F.R. §§ 122.2, 122.29(b), rather than an “existing source,” 40 C.F.R. § 122.29(a)(3), under the CWA. The Tribe maintained that, as a “new source,” Shaft 10 needed to satisfy additional provisions of the CWA before ADEQ could properly issue a permit renewal.

¶26 An administrative law judge (“ALJ”) from the office of administrative hearings conducted a seven-day hearing and issued findings of fact and conclusions of law. The ALJ determined that ADEQ generally did not act arbitrarily and capriciously when it issued the 2017 Permit Renewal, but ADEQ should have first analyzed whether Shaft 10 and the other new features were a “new source” under § 122.29(b). The ALJ, therefore, concluded that “the matter should be remanded to ADEQ to allow it to conduct an analysis as required by 40 C.F.R. § 122.29(b).”

¶27 In response to the ALJ's decision, the Board entered an order remanding the matter to ADEQ to conduct a “new source” analysis. ADEQ did so and concluded that Shaft 10 and the new features were “existing sources” (not “new sources”) under the CWA. The Board issued a final administrative decision, which adopted all the ALJ's ***1103** findings of fact and

affirmed ADEQ's issuance of the 2017 Permit Renewal.

¶28 The Tribe appealed the Board's decision to the superior court under A.R.S. § 12-905. The superior court affirmed the Board's decision, concluding that Shaft 10 and the new features did not constitute a "new source" under the CWA.

¶29 The court of appeals reversed the superior court in a split opinion. *San Carlos Apache Tribe v. State*, 254 Ariz. 179, 193 ¶ 61, 195 ¶ 72, 520 P.3d 670, 684, 686 (App. 2022). The majority concluded that "[t]he CWA treats the new mine shaft as a 'new source' because it is substantially independent of the non-contiguous original deposit at the mining site." *Id.* at 183 ¶ 1, 520 P.3d at 674. Thus, Shaft 10 "is a new source and Resolution's mining site is subject to [new source performance standards] under 40 C.F.R. § 440.104(a)." *Id.* at 193 ¶ 61, 520 P.3d at 684. The majority also determined that because Shaft 10 is a "new source" and Queen Creek is an "impaired waterway," ADEQ may not renew Resolution's discharge permit until (1) ADEQ finalizes a total maximum daily load plan for Resolution's discharge of water into Queen Creek, and (2) Resolution demonstrates other requirements prescribed in 40 C.F.R. § 122.4(i). *Id.* at 183 ¶¶ 2, 4, 193 ¶¶ 62–63, 520 P.3d at 674, 684.

¶30 The dissent disagreed with the order in which the majority approached the CWA regulations for the "new source" determination, explaining that the regulations should be evaluated "in the order they are presented in the text of the regulation." *Id.* at 197–98 ¶¶ 74–76, 520 P.3d at 688–89 (Paton, J., dissenting). Conducting the analysis in that order, the dissent concluded that "Shaft 10 is not a new source that would require ADEQ to issue [a total maximum daily

load plan] before permitting discharge from Shaft 10." *Id.* at 202 ¶ 99, 520 P.3d at 693.

¶31 We granted review because this case presents an issue of statewide importance. Although the 2017 Permit Renewal has expired, the issue presented is one that is likely to arise again and evade review. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution.

II. DISCUSSION

¶32 "We interpret statutes and administrative rules de novo, 'apply[ing] the same rules in construing both statutes and rules.' " *Saguaro Healing LLC v. State*, 249 Ariz. 362, 364 ¶ 10, 470 P.3d 636, 638 (2020) (alteration in original) (quoting *Gutierrez v. Indus. Comm'n*, 226 Ariz. 395, 396 ¶ 5, 249 P.3d 1095, 1096 (2011)). "We do not defer to the agency's interpretation of a rule or statute." *Id.* We "affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(F).

A. What Is The Test For Determining Whether A Construction Is A "New Source" Under The CWA?

¶33 In 1972, Congress passed the CWA with the "objective ... to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the "addition of any pollutant to navigable waters from any point source" without a permit. 33 U.S.C. § 1362(12)(A); *see also* 33 U.S.C. § 1311(a); 40 C.F.R. § 122.1(b)(1). The CWA also requires the EPA to establish "standards of performance" for "new sources" from which there are or may be discharges of

pollutants for certain industries. 33 U.S.C. § 1316(b)(1)(B).

¶**34** The Tribe claims that Shaft 10 is a "new source" under the CWA. According to the Tribe, this designation matters because Queen Creek is an "impaired waterway" and the CWA regulations provide:

> No permit may be issued ... [t]o a new source ... if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source ... proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by ... [the] CWA, and for which the State or interstate agency has performed a pollutants load allocation for ***1104** the pollutant to be discharged, must demonstrate ... that: (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. § 122.4(i). The Tribe maintains that the 2017 Permit Renewal was improper because ADEQ issued it before a copper total maximum daily load for Queen Creek was finalized and before Resolution met its burden under § 122.4(i)(1) and (2). Conversely, Resolution and ADEQ contend that Shaft 10 is not a

"new source" that would trigger these requirements, and therefore ADEQ properly issued the 2017 Permit Renewal.

¶35 At the outset, we must determine the proper framework for determining whether a construction is a "new source" under the CWA.[4] Section 122.29(b) provides the "[c]riteria for new source determination." We agree with the court of appeals' dissent that we should "approach the CWA regulations in the order they are presented in the text of the regulation." *San Carlos Apache Tribe*, 254 Ariz. at 197 ¶ 74, 520 P.3d at 688; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (discussing the "whole-text canon" that "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts").

¶36 Section 122.29(b)(1) begins: "Except as otherwise provided in an applicable new source performance standard, a source is a 'new source' if it meets the definition of 'new source' in § 122.2." *See also* 40 C.F.R. § 122.29(a)(1) (providing that "[n]ew source" is "defined in § 122.2"). Therefore, the test *first* examines the definition of "new source" in § 122.2, which states:

> New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced: (a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or (b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards

> are promulgated in accordance with section 306 within 120 days of their proposal.

See also 33 U.S.C. § 1316(a)(3) (defining "source" as "any building, structure, facility, or installation from which there is or may be the discharge of pollutants"); 40 C.F.R. § 122.29(a)(2) (same); 33 U.S.C. § 1316(a)(2) ("The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.").

¶37 If that provision is satisfied, § 122.29(b)(1) instructs that we *next* evaluate the three criteria in § 122.29(b)(1)(i)–(iii):

> [A] source is a "new source" if it meets the definition of "new source" in § 122.2, *and* (i) It is constructed at a site at which no other source is located; or (ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or (iii) Its processes are substantially independent of an existing source at the same site.

40 C.F.R. § 122.29(b)(1) (emphasis added); *see also Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 568 (D.C. Cir. 2002) (explaining that the new source performance standards apply "only to sources that meet the 'new source' definition in 40 C.F.R. § 122.2, *as well as* one of the following three criteria" in § 122.29(b)(1)(i)–(iii)).

¶38 If those provisions are satisfied, the "new source" test concludes with an evaluation ***1105** of § 122.29(b)(2): "A source meeting the requirements of paragraphs (b)(1)(i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. See § 122.2."5

¶39 The "new source" test, therefore, begins with the broadest criteria—identifying both the general physical characteristics of the construction (whether it is a "building, structure, facility, or installation") and when its construction commenced. *See* 40 C.F.R. §§ 122.2, 122.29(b)(1). The test then evaluates additional criteria that are narrower in scope (e.g., the source's relationship with other features where the source is located). *See* 40 C.F.R. § 122.29(b)(1)(i)–(iii), (b)(2). *See also Nat'l Wildlife Fed'n*, 286 F.3d at 568 ("If new construction does not satisfy 40 C.F.R. § 122.2 *and* one of the three criteria set forth in 40 C.F.R. § 122.29(b)(1), then the construction is generally classified as a 'modification' and is not subject to the [new source performance standards].").

¶40 Accordingly, the following three-step test should be used to determine whether a construction is a "new source" under the CWA:

> 1. <u>Step One</u>: Does the construction meet the definition of "new source" under 40 C.F.R. § 122.2? 40 C.F.R. § 122.29(b)(1); *see also* 33 U.S.C. § 1316(a)(2), (3).
>
> a. Has there been a construction of a building, structure, facility, or installation from which there is or may be the discharge of pollutants? 40 C.F.R.

§ 122.2; *see also* 33 U.S.C. § 1316(a)(3); 40 C.F.R. § 122.29(a)(2).

b. Has construction commenced? 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(2).

c. Did construction commence after the promulgation (or proposal) of standards of performance under section 306 of the CWA that are applicable to such source? 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(2).

If the answer to any subpart is no, the construction is not a new source.

2. Step Two: If the answer to all subparts of step one is yes, does the construction meet any of the following definitions of a "new source" in 40 C.F.R. § 122.29(b)(1)?

a. Is the construction at a site at which no other source is located? 40 C.F.R. § 122.29(b)(1)(i).

b. Does the construction totally replace the process or production equipment that causes the discharge of pollutants at an existing source? 40 C.F.R. § 122.29(b)(1)(ii).

c. Are its processes substantially independent of an existing source at the same site? 40 C.F.R. § 122.29(b)(1)(iii).

If the answer to all subparts is no, the construction is not a new source.

3. Step Three: If the answer to all subparts of step one and any subpart of step two is yes, is there a new source

performance standard that is "independently applicable" to the source? 40 C.F.R. § 122.29(b)(2).

a. If yes, the source is a new source. *Id.*

b. If no, the source is not a new source. *Id.*

This three-step test is consistent with the text and sequence of the "criteria for new source determination" expressly set forth in § 122.29(b). *See, e.g.*, *Nat'l Wildlife Fed'n*, 286 F.3d at 568.

B. Is Shaft 10 A "New Source" Under The Three-Step Test?

¶41 We must now apply the three-step test to determine whether Shaft 10 is a "new source" under the CWA.

***1106 1. Step One**

a. Is Shaft 10 a building, structure, facility, or installation from which there is or may be a discharge of pollutants?

¶42 The Board found that Shaft 10 and other mine features are "facilities" under § 122.2. In this Court, the parties do not dispute that Shaft 10 is a "building, structure, facility, or installation from which there is or may be a 'discharge of pollutants.' " *See* 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(3); 40 C.F.R. § 122.29(a)(2). Copper effluent is a pollutant under the CWA. 40 C.F.R. § 401.15(22).

b. Has construction of Shaft 10 commenced?

¶43 It is undisputed that construction of Shaft 10 has commenced. *See* 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(2).

c. What was the timing of Shaft 10's construction?

¶44 The final issue at step one is whether the construction of Shaft 10 commenced after the promulgation (or proposal) of standards of performance under "section 306 of CWA which are applicable to such source." *See* 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(2).

¶45 We begin by determining the meaning of "applicable to such source"—does "such source" refer to the mine or to the new construction at issue? We do not interpret this specific text in isolation, but instead read it within the context of the CWA "new source" criteria. *See Columbus Life Ins. v. Wilmington Tr., N.A.,* 255 Ariz. 382, 385 ¶ 11, 532 P.3d 757, 760 (2023) (stating that we "determine the plain meaning of the words the legislature chose to use, viewed in their broader statutory context"); *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 558 ¶ 16, 423 P.3d 348, 353 (2018) ("We interpret agency regulations according to principles of statutory construction."); *see also* Scalia & Garner, *supra*, at 167 (explaining that courts must interpret a statute's plain language in context because "[c]ontext is a primary determinant of meaning").

¶46 There are noteworthy differences in the text of the "new source" criteria that assist in our interpretation. Step one considers whether new source performance standards "are *applicable* to such source." *See* 40 C.F.R. § 122.2 (emphasis added); *see also* 33 U.S.C. § 1316(a)(2). Step three provides that "[a] source ... is a new source only if a new source performance standard is *independently applicable* to it." 40 C.F.R. § 122.29(b)(2) (emphasis added). We cannot ignore the text of "independently applicable" at step three when determining the meaning of

"applicable" at step one. *See Columbus Life Ins.,* 255 Ariz. at 385 ¶ 11, 532 P.3d at 760 (noting "we view 'the statute as a whole' to 'give meaningful operation to all of its provisions' " (quoting *Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991))); *Silver*, 244 Ariz. at 558 ¶ 16, 423 P.3d at 353.

45**¶47** This textual distinction reveals that "applicable to such source" at step one addresses whether a new source performance standard is applicable to the mine. And "independently applicable to" the source at step three addresses whether a new source performance standard applies independently to the shaft. This interpretation gives meaning to each term and ensures that the criteria in step one and step three are not redundant. *See State v. Eddington*, 228 Ariz. 361, 363 ¶ 9, 266 P.3d 1057, 1059 (2011) ("[I]f the terms mean the same thing, then one subsection is redundant, and we generally construe statutes so that no part is rendered redundant or meaningless."); *see also* Scalia & Garner, *supra*, at 174 (stating that no provision "should needlessly be given an interpretation that causes it to duplicate another provision or have no consequence").

¶48 Moreover, this interpretation that step one addresses general applicability to the mine is consistent with the fact that the "new source" test begins with the broadest criteria at step one. *See* Part II(A) ¶ 39. The subsequent steps evaluate criteria that are narrower in scope. *Id.*

¶49 Next, we must identify (1) when the construction of Shaft 10 commenced, and (2) when the new source performance standards were promulgated that would be applicable to Shaft 10 as part of the regulated copper ***1107** mine. *See* 40 C.F.R. § 122.2; 33 U.S.C. § 1316(a)(2). And finally, we must determine whether the construction of Shaft 10

commenced after the promulgation of the new source performance standards that would be applicable to Shaft 10 as part of the regulated copper mine. *Id.*

6**¶50** Resolution began developing and sinking Shaft 10 between 2007 and 2009. The EPA promulgated the new source performance standards for the Ore Mining and Dressing Point Source Category on December 3, 1982. *See* Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. at 54598–621; *see also* 40 C.F.R. § 440.100(a)(1) (stating that provisions in Subpart J of Part 440 for Ore Mining and Dressing Point Source Category are applicable to "discharges from ... [m]ines that produce copper" by "open-pit or underground operations"); 40 C.F.R. §§ 440.100 to .105 (providing effluent limitation guidelines for certain mines and mills).6 The construction of Shaft 10 commenced after the promulgation of new source performance standards that are applicable to Shaft 10 as part of the regulated copper mine. Therefore, step one of the "new source" test is met.

2. <u>Step Two</u>

¶51 In order to meet step two, one of the three criteria in § 122.29(b)(1)(i)–(iii) must apply to Shaft 10. Here, we only consider the applicability of one subsection: § 122.29(b)(1)(iii) (evaluating whether "[i]ts processes are substantially independent of an existing source at the same site"). We accepted review on § 122.29(b)(1)(iii), which was presented in ADEQ's petition for review. Further, the Tribe's briefing in this Court focused on whether Shaft 10 met the criteria in § 122.29(b)(1)(iii). The Tribe did not develop an argument under § 122.29(b)(1)(i) or (ii). Accordingly, we decline to consider whether § 122.29(b)(1)(i) or (ii) are satisfied. *See State v.*

Johnson, 247 Ariz. 166, 180 ¶ 13, 447 P.3d 783, 797 (2019) (declining to consider an argument that a party failed to develop).7

¶52 Section 122.29(b)(1)(iii) requires us to determine whether Shaft 10's "processes are substantially independent of an existing source at the same site." As § 122.29(b)(1)(iii) instructs, "[i]n determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source."

a. To what extent is the new facility integrated with the existing plant?

¶53 The record demonstrates that Shaft 10 is integrated with existing sources and operations of the mine. Shaft 10 works with existing infrastructure, including Shaft 9 and the Never Sweat Tunnel, to ventilate and dewater the underground workings of the mine.

¶54 The "management of mine drainage is an integral part of most mining systems." Ore Mining and Dressing Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 25682, 25684 (June 14, 1982). Without proper mine drainage management, water will flood the mine's underground workings and disrupt operations. *See id.* at 25685 ("Water is a natural feature that interferes with mining activities."). To that end, Resolution drains water from Shaft 9 to the base of Shaft 10, pumps the water up to and through the Never Sweat Tunnel, combines that water with water collected from Shaft 8, and sends the water west to the water treatment plant for

treatment and storage. Resolution has integrated these functions of Shafts 8, 9, ***1108** and 10 and the Never Sweat Tunnel. Shaft 10 depends on existing infrastructure to serve the essential functions of ventilation and dewatering, which it does not do independently.

¶55 The Tribe claims that "Shaft 10 is not integrated into prior operations; those facilities are integrated into Shaft 10." But § 122.29(b)(1)(iii) does not draw this fine distinction. Instead, it expressly provides that we consider "the extent to which the new facility is integrated with the existing plant." 40 C.F.R. § 122.29(b)(1)(iii). And the record here demonstrates that Shaft 10 is materially integrated with existing infrastructure for purposes of performing the essential functions of ventilating and dewatering underground workings, which are necessary for the continued pursuit of copper ore. There is no evidence that Shaft 10 alone can ventilate and dewater the underground workings in the manner necessary for exploration and extraction of copper ore at the mine. Shaft 10 is integrated with existing features of the mine for its proper functioning. And the mere fact that Resolution extended the Never Sweat Tunnel does not change this determination. Shaft 10 is also substantially integrated with Shaft 9, which provides further support for the integrated workings. Thus, existing features and Shaft 10 facilitate the continued and integrated workings necessary for the pursuit of copper ore.

¶56 The Tribe points to a provision in the Federal Register where the EPA notes that "a minor change" to a process (like "a new purification step") does not make a facility a "new source"; but "if the only connection between the new and old facility is that they are supplied utilities such as steam, electricity,

or cooling water from the same source or that their wastewater effluents are treated in the same treatment plant, then the new facility will be a new source." *See* NPDES Permit Regulations, 49 Fed. Reg. at 38043. This provision does not support Shaft 10 being a "new source" in this case. Shaft 10 is integrated with existing infrastructure—the Never Sweat Tunnel and Shaft 9—to provide ventilation and dewatering, which are essential components of the mining process. These interconnected systems of ventilation and drainage are essential physical features of the mine structure. Thus, the integration here materially differs from a situation where the *only* connection between facilities is that "they are supplied utilities ... from the same source" or that their water is "treated in the same treatment plant." *Id.*

b. To what extent is the new facility engaged in the same general type of activity as the existing source?

¶57 We now consider the extent to which Shaft 10 "is engaged in the same general type of activity as the existing source." 40 C.F.R. § 122.29(b)(1)(iii). Shaft 10 supports the ventilation and dewatering of underground workings, which are necessary for the exploration, study, and extraction of copper ore. These are the same general types of activities as the existing source (i.e., the original workings of the mine that also supported ventilation and dewatering).

¶58 The Tribe argues that Shaft 10's activity is different from prior activity at the existing mine. In particular, the Tribe claims that dewatering Shaft 10 will be independent of the dewatering that previously took place at a different point of extraction; the mine has not been used to excavate copper ore for a period of time; and Resolution plans to extract from a new,

untouched ore body using a different mining technique (panel caving) that will produce lower grade copper ore and increase the amount of ore production.

¶59 But these arguments miss the mark. The issue is whether Shaft 10 "is engaged in the same *general type of activity* as the existing source." 40 C.F.R. § 122.29(b)(1)(iii) (emphasis added). It is not focused on the specific manner by which "the same general type of activity as the existing source" is conducted, such as a precise mining technique, volume of production, time period, or location. *See also* NPDES Permit Regulations, 49 Fed. Reg. at 38044 (noting there is not a new source "if a facility increases capacity merely by adding additional equipment in one or two production steps"). Here, the historical mining operation in existence for over a century sunk new shafts and provided the ventilation and dewatering necessary to discover, study, and extract new bodies ***1109** of copper ore as the mine expanded in an eastward direction. Shaft 10 is engaged in that "same general type of activity"—providing ventilation and dewatering necessary to discover, study, and at some point extract copper ore (i.e., copper mining). 40 C.F.R. § 122.29(b)(1)(iii); *see also* NPDES Permit Regulations, 49 Fed. Reg. at 38044 ("The second clarifying factor that EPA has added is the extent to which the construction results in facilities or processes that are engaged in the same general type of activity as the existing source. Under this second factor, if the proposed facility is engaged in a sufficiently similar type of activity as the existing source, it will not be treated as a new source.").

¶60 The Tribe also points to the following language from the EPA's guidance: "Of course, to the extent the construction results in facilities engaged in the same

type of activity because it essentially replicates, without replacing, the existing source, the new construction would result in a new source." NPDES Permit Regulations, 49 Fed. Reg. at 38044. But Resolution's sinking of a new shaft 300 feet from Shaft 9 to pursue more ore does not "replicate" the existing source. This is unlike the situation described in the Federal Register where "a power company builds a new, but identical and completely separate power generation unit at the site of a similar existing unit," in which case "the new unit will be a new source." *Id.* Resolution constructed Shaft 10 and the mine's other new features to mine copper ore adjacent to the copper-ore deposits that were exhausted. There is no "replication" in this case where those ore deposits were exhausted. Merely pursuing a new ore deposit in a mining area (as mines often do) does not make a construction a "new source" by default—instead, the "new source" criteria must be evaluated.

¶61 A construction is not a "new source" if it merely *could* operate substantially independently of the existing facility. The focus is on whether it actually *does* operate substantially independently. *See id.* (noting the EPA's agreement that it "should consider whether the new facility *actually* operates substantially independently of the existing facility, not whether it *could* operate substantially independently" (emphasis added)). The record does not establish that Shaft 10 does anything on its own. It is instead fully integrated into the mining process.

¶62 Ultimately, § 122.29(b)(1)(iii) requires us to determine whether Shaft 10's "processes are substantially independent of an existing source at the same site." "Site" is broadly defined as "the land or water area where any 'facility or activity' is physically

located or conducted, including adjacent land used in connection with the facility or activity." 40 C.F.R. § 122.2. Shaft 10, the mine water treatment plant, and the other new features, such as the cooling tower, rock stockpiles, and wash bays, are included in and integrated into the same "site." With Shaft 10 being just 300 feet from Shaft 9, Resolution will continue operating in the area where copper-ore mining previously took place within the confines of an earlier permit renewal.

¶63 We agree with ADEQ's explanation in its "new source" analysis: "The new features added to the mine are supporting the same process that has always existed at the site, which is extracting ore by any means or methods. Therefore, there are no processes that are substantially independent of the existing process to extract ore." The record before us supports this determination. Shaft 10 does not meet the criteria in § 122.29(b)(1)(iii), and it therefore fails to meet the definition of "new source" at step two.

3. Step Three

¶64 Although we conclude that Shaft 10 is not a "new source" at step two, we proceed to apply the remainder of the test at step three to clarify this issue of statewide importance.

¶65 Section 122.29(b)(2) provides that "[a] source meeting the requirements of paragraphs (b)(1)(i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it." Thus, step three requires us to consider whether a new source performance standard is "independently applicable" to Shaft 10. In essence, this step differentiates between a ***1110** "new source" and a "new discharger," because "[i]f there is no such

independently applicable standard, the source is a new discharger." 40 C.F.R. § 122.29(b)(2).

¶66 The CWA sets forth new source performance standards that apply to "discharges from ... [m]ines that produce copper." 40 C.F.R. § 440.100(a)(1); *see also* 40 C.F.R. § 440.104(a) (explaining that the effluent limitations in the new source performance standards apply to "pollutants discharged in mine drainage from mines that produce copper"). The CWA does *not* provide a new source performance standard for a single "shaft." But the Tribe argues that Shaft 10 is "in and of itself a mine" under the CWA.

¶67 A "mine" is "an active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method." 40 C.F.R. § 440.132(g). " 'Active mining area' is a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted ...." 40 C.F.R. § 440.132(a).

¶68 These definitional provisions describe a "mine" as a broader geographic area made up of "all land and property" used in or resulting from the work of extracting ore by any means or method.8 *See All*, Merriam-Webster, https://www.merriamwebster.com/dictionary/all (last visited June 10, 2024) (defining "all" as "the whole amount, quantity, or extent of; as much as possible; every member or individual component of; the whole number or sum of"). The descriptions of "*all* land and property" and "a place where *work or other activity related to* the extraction, removal, or recovery of metal ore is being conducted" include Shafts 9 and 10, the Never Sweat Tunnel, and other features that work together to ventilate and dewater the underground

workings necessary for Resolution to explore the Eastern Deposit and extract copper ore. *See* 40 C.F.R. § 440.132(a), (g) (emphasis added). These provisions do not describe a single shaft which "is the surface opening to the mine." *See Development Document*, *supra*, at 49–50.

¶69 The Tribe claims that "Resolution will use Shaft 10 to extract copper ore from an untouched ore body." Resolution, however, asserts that "Shaft 10 would be used for dewatering and ventilation, not to remove ore." The Tribe has not introduced any evidence to support a finding that Resolution plans to excavate or remove copper ore in the Eastern Deposit from Shaft 10. According to Resolution's General Plan of Operations, in the event of future ore extraction, two new shafts "will be production shafts dedicated to hoisting ore and other rock material from the Mine"—these will be Shafts 11 and 12. The Plan of Operations does not state that Shaft 10 will be used for ore extraction. Thus, we cannot speculate about such alleged future use of Shaft 10. But even if Shaft 10 is at some point used to extract a new ore deposit, this does not automatically make it a "new source." The CWA's "new source" criteria applicable to mines could have stated that a construction used to extract a new ore deposit is a "new source." But the CWA does not take this rigid approach. Instead, when ADEQ considers a discharge permit renewal, it must consider each step of the "new source" criteria and the evidence relevant to each step during the applicable time period.

¶70 The ALJ's findings of fact—which the parties do not challenge here—include testimony describing Shaft 10 as a structure "related to the extraction, removal or recovery of metal ore."9 Shaft 10 is not drilled directly into an ore body; it works with other

features to conduct activities related to ventilating and dewatering underground workings. It is therefore a component of the mine and is not itself a "mine" under § 440.132(g).

***1111 ¶71** Shaft 10 does not have a new source performance standard "independently applicable" to it. *See, e.g.*, *Mahelona v. Hawaiian Elec. Co.*, 418 F. Supp. 1328, 1335 (D. Haw. 1976) ("[W]hile there are standards of performance governing steam electric generating plants, there are no regulations applicable solely to discharge facilities." (internal citation omitted)). Because Shaft 10 does not meet step three of the "new source" test, for this additional reason, it is not a "new source" under the CWA. *See* 40 C.F.R. § 122.29(b)(2).

III. CONCLUSION

¶72 We vacate paragraphs 1–20 and 30–72 of the court of appeals' opinion.10 We affirm the superior court's decision that Shaft 10 is not a "new source" and that ADEQ acted within its discretion by issuing the 2017 Permit Renewal to Resolution.

Footnotes

1

Resolution plans to extend Shaft 9 to about the same depth as Shaft 10 at some point.

2

Resolution also has plans to build a concentrator at the western portion of the mine, as well as another tunnel connecting the western and eastern portions of the mine.

3

Resolution also captures stormwater runoff using a channeling system that diverts the water to a specific area. From there, it can be pumped to another location for evaporation or to the water treatment plant. The main source of water sent to the water treatment plant is from dewatering the underground mine workings, but small volumes of industrial water and stormwater are sent as well.

4

The federal CWA statutes and regulations at issue here may have a corresponding state statute or regulation due to implementation of the Arizona Pollutant Discharge Elimination System Program. *See, e.g.*, Ariz. Admin. Code R18-9-A905(A)(1)(e) (incorporating by reference 40 C.F.R. § 122.29 ("New sources and new dischargers") for the Arizona Program Standards). In this Court, however, the parties exclusively relied upon federal statutes and regulations rather than citing any corresponding state statute or regulation. Thus, we cite to the federal provisions. No party has challenged the validity, enforceability, or applicability of the CWA regulations.

5

As the ALJ noted, the Tribe originally contended Resolution developed a "new discharger" but later withdrew that allegation and presented no substantial evidence on the issue. We were not asked to determine whether Shaft 10 is a "new discharger" under the CWA, *see, e.g.*, 40 C.F.R. § 122.2 (providing a definition of "new discharger"). We therefore do not address that issue or any requirement applicable to a "new discharger."

6

At step one, we do not determine whether Shaft 10 is itself a "mine" because new source performance standards are applicable to copper mines in Subpart J, 40 C.F.R. §§ 440.100 to .105.

7

The Tribe suggests that this "Court might remand for a determination of whether Shaft 10 totally replaces the prior mine(s) under subsection (b)(1)(ii)." We will not do so for the reasons stated. But even if we were inclined to do so, any remand would be futile because we conclude that the "new source" test fails at both steps two and three, *see* Part II(B)(2), (3) ¶¶ 63, 71.

8

The fact that a new mining method will be used for the Eastern Deposit—panel caving—does not change the analysis because the definition of "mine" includes extraction "by any means or method." 40 C.F.R. § 440.132(g).

9

The court of appeals explained that "the Tribe did not challenge any specific factual determinations below" and "[g]iven the parties have not raised any factual issues on appeal, we need not resolve any questions of fact." *San Carlos Apache Tribe*, 254 Ariz. at 186 ¶ 28, 520 P.3d at 677. The same is true in this Court.

10

Paragraphs 21–29 address issues of mootness, timeliness, and deference to factual determinations below that no party challenged before this Court.

***San Carlos Apache Tribe v. State of Arizona (SCAT I)*, 254 Ariz. 179, 520 P.3d 670 (App. Nov. 15, 2022).**

Vice Chief Judge David B. Gass delivered the opinion of the court, in which Presiding Judge Paul J. McMurdie joined. Judge Angela K. Paton dissented.

OPINION

GASS, Vice Chief Judge:

***183 **674** ¶1 San Carlos Apache Tribe (the Tribe) argues Resolution Copper Mining LLC's (Resolution) copper-mining site is a new source under the Clean Water Act (CWA) because Resolution recently sank shaft 10. The CWA treats the new mine shaft as a "new source" because it is substantially independent of the non-contiguous original deposit at the mining site. In short, Resolution radically changed the nature of its existing mining site when it added the new mine shaft—a 7,000-foot-deep shaft designed to use a different mining technique to access a previously untouched, massive copper ore deposit that Resolution predicts will "supply more than 25% of America's demand for [copper] over the next 40 years."

¶2 As a result, before the Arizona Department of Environmental Quality (ADEQ) issues a permit to allow Resolution to operate the new mine shaft, ADEQ must adopt Total Maximum Daily Loads (TMDLs) for Resolution's discharge of stormwater and non-stormwater—including treated mine water, industrial water, and seepage pumping—into Queen Creek near the town of Superior because Queen Creek is "impaired" for copper under the CWA.

FACTUAL AND PROCEDURAL HISTORY

¶3 The controversy arises because ADEQ renewed Resolution's Arizona Pollution Discharge Elimination System (AZPDES) Permit No. AZ0020389 (the permit). The permit ensures Resolution complies with CWA water quality standards for copper mining. The permit authorizes Resolution to discharge (1) stormwater and (2) non-stormwater, including treated mine water, industrial water, and seepage pumping.

¶4 The permit also authorizes Resolution to discharge those waters into an unnamed tributary to Queen Creek near the town of Superior. Queen Creek is "impaired" for copper under § 303(d) of the CWA. *See* 33 U.S.C. § 1313(d). When discharging into an impaired waterway, mines may not exceed TMDLs. *See infra* ¶ 64–68. As such, Resolution and ADEQ began drafting TMDLs for pollutants for the impaired waterway, but the TMDLs remain in draft form. *See* 40 C.F.R. § 130.7. The issue here is which comes first: the permit or the TMDL. We conclude it is the TMDL.

I. Historical Mining At The Superior Site

¶5 Resolution's mining site occupies a broad area of land in and near Superior, and Resolution uses it for underground copper mining activities. This area includes the Superior Operations Mine, located along Superior's northern boundary. Resolution's mining site also includes surface facilities located 0.22 miles north of Queen Creek in two non-contiguous areas identified as the West Plant Site (the WPS) and the East Plant Site (the EPS). The WPS is located immediately northwest of Superior. The EPS is located two miles east of Superior near the intersection of Highway 177 and U.S. Highway 60.

The mining site included two large copper-ore deposits. The first was the now-exhausted ore body, originally owned by Magma, located in the WPS. The second is the recently discovered and untouched Resolution ore body located in the EPS.

¶6 Resolution's mining site has a deep history. Resolution acquired the mining site from a long line of owners, stemming back to Magma, which built the first iteration of the mining site at the WPS in 1912. Magma constructed shafts Nos. 1 through 8 on the WPS as part of its original mining site. In the 1970s, Magma constructed shaft 9 on the EPS to facilitate better access to the Magma ore body. Before that, the Magma ore body was not accessible via the EPS. Magma also constructed shaft 9 to identify other ore bodies in the EPS. Magma connected the EPS to the WPS through a tunnel facility called the Never Sweat Tunnel. Magma used the Never Sweat Tunnel to transport copper ore from shaft 9 to processing facilities at the WPS.

II. Modern Development of the Superior Site

¶7 At one time, the owners extracted ore from the Magma ore body. For extended periods, the owners left the site all but destitute ***184 **675** aside from doing the bare minimum to maintain the site, including groundwater pumping and exploration. In the early-to-mid 1990s, the owner at the time, Broken Hill Proprietary Company, Ltd. (BHP), discovered the untouched Resolution ore body in the EPS.

¶8 Even after BHP discovered the Resolution ore body, BHP ceased actively mining ore at the Superior mining site in 1996 when it depleted the remaining mineable reserves out of the Magma ore body. Two years later, BHP ceased all other ore mining activities—except for applying to renew the permit—

for a variety of reasons, including the costs of maintaining the mining site, falling copper prices, limited data on the Resolution ore body, and a lack of suitable infrastructure to exploit the Resolution ore body. Since discovering the Resolution ore body more than two decades ago, no mine owner has extracted ore.

¶9 Starting in 2000, the Superior mining site ownership changed hands, and Resolution began exploring. In 2004, Resolution began planning new additions at its mining site, including shaft 10, a cooling tower, rock stockpiles, wash bays, and a Mine Water Treatment Plant (MWTP). In 2008, Resolution began constructing shaft 10—the most significant addition. Around this time, Resolution also resumed dewatering at the existing Magma facilities to help facilitate a study for its new construction plans. Dewatering uses water through a system of pumps, pipes, and conveyances to process and access ore and mine discharge drainage.

¶10 By December 2014, Resolution spent approximately $500 million to complete shaft 10. Shaft 10 is 30 feet in diameter and extends 6,943 feet below ground surface (bgs). Resolution built shaft 10 about 300 feet away from shaft 9. Shaft 9, by contrast, only extends 4,882 feet bgs—more than 2,000 feet shy of shaft 10's depth. Resolution rehabilitated and extended the Never Sweat Tunnel as part of constructing shaft 10.

¶11 Since Resolution constructed shaft 10, the only parts of the original mining site remaining operational are the Never Sweat Tunnel and shafts 8 and 9. Resolution uses shaft 8 to dewater the WPS. Resolution uses shaft 9 to support shaft 10, such as for ventilation and flowing mine drainage from shaft 9 to shaft 10. Resolution still actively uses the Never

Sweat Tunnel to pump mine drainage from shaft 10 to the WPS, where the MWTP processes it. Resolution's focus with building the new facilities, like shaft 10, has been to target the yet untouched Resolution ore body.

¶12 Resolution plans to access the Resolution ore body using panel caving. Panel caving is a variation of the high-volume technique known as block caving. Previously, the Superior site owners used adits and tunnels. With panel caving, Resolution will access the ore by caving in the ore zone and causing it to collapse—which will eventually cause ground subsidence. Resolution predicts the Resolution ore body will "supply more than 25% of America's demand for [copper] over the next 40 years."

III. National Pollutant Discharge Elimination System (NPDES) And AZPDES Permitting Activities

¶13 The Environmental Protection Agency (EPA) issued the original permit in 1975. The EPA issued the permit, including its renewals, until 2002, when the State of Arizona took primacy over the CWA and the NPDES permitting. Since then, ADEQ has issued permits to individuals, including Resolution for its copper-mining site.

¶14 In 2015, Resolution applied to renew the permit. In 2017, ADEQ issued the renewed permit, which had an effective date of January 23, 2017, and an expiration date of January 22, 2022. The renewed permit allowed Resolution to operate its mining site, including shaft 10 and the other new facilities at the site, and treated them as existing sources.

IV. Procedural Posture and Permitting Challenges

¶15 Several months after the renewal, the Tribe challenged ADEQ's treatment of shaft 10 and several other new facilities before the Water Quality Appeals Board (the Board). The Tribe argued those facilities were new sources, not existing sources, under ***185 **676** 40 C.F.R. §§ 122.2, 122.29. The Board referred the matter to the Office of Administrative Hearings (OAH) for an evidentiary hearing. In February 2018, OAH held the hearing before an OAH administrative law judge (ALJ). And on October 15, 2018, the ALJ issued findings of fact and conclusions of law, deciding ADEQ generally did not act arbitrarily and capriciously when it renewed the permit in 2017. The ALJ, however, took exception to ADEQ's failure to consider whether Resolution's new facilities, including shaft 10, were new sources under 40 C.F.R. §§ 122.2, 122.29(b). *See infra* ¶ 37. The ALJ, thus, recommended the Board remand the matter to ADEQ to conduct a new source analysis under 40 C.F.R. § 122.29(b). The ALJ did not decide whether Resolution's site was a new source.

¶16 In November 2018, the Board remanded the matter to ADEQ to conduct a new source analysis. The Board's remand order also allowed ADEQ to ignore some of the ALJ's findings of fact and conclusions of law when ADEQ conducted the new source analysis.

¶17 In 2019, ADEQ issued its new source analysis. ADEQ's new source analysis concluded Resolution's mining site was not subject to new source performance standards (NSPS) because the site was an existing source under 40 C.F.R. §§ 122.2, 122.29(b) and did not contain new sources under the CWA. *See infra* ¶ 37. ADEQ reasoned new source standards must apply to “the mine as a whole” and not to discrete facilities, such as shaft 10 because

the regulations only provide independently applicable standards for copper mines and not for any of the new features.

¶18 In March 2019, the Tribe challenged the Board's November 2018 order remanding the matter for ADEQ to conduct a new source analysis, arguing it was error for the Board to allow ADEQ to ignore certain portions of the ALJ's findings of fact and conclusions of law.

¶19 In June 2019, the Board issued its final administrative decision, upholding ADEQ's issuance of the permit to Resolution. The Board also denied the Tribe's challenge to the Board's November 2018 order. In doing so, the Board adopted all the ALJ's findings of fact, including those it allowed ADEQ to ignore in its November 2018 order.

¶20 The Tribe appealed the Board's 2019 decision to the superior court under A.R.S. § 12-905. The superior court upheld the Board's decision, including its findings of fact and conclusions of law. The Tribe timely appealed. This court has jurisdiction under article VI, section 9, of the Arizona Constitution, and A.R.S. §§ 12-913, 12-120.21.A.1, and 12-2101.A.1.

ANALYSIS

V. The Validity Of The Permit Is Not Moot.

¶21 Because the permit at issue here expired on January 22, 2022, this appeal appears to lack a live controversy. *See Kondaur Cap. Corp. v. Pinal Cnty.*, 235 Ariz. 189, 192–93, ¶¶ 8–9, 330 P.3d 379, 382–83 (App. 2014) (issues involving a corporation's ability to seek enforcement of a writ of restitution allowing it to evict occupants of its property became moot when the occupants already were evicted by other means). The parties did not raise mootness. We questioned the

parties about mootness at oral argument, and, therefore, exercise our discretion to decide whether this matter has become moot. *See Big D Constr. Corp. v. Court of Appeals for State of Ariz., Div. One*, 163 Ariz. 560, 562–63, 789 P.2d 1061, 1063–64 (1990).

¶22 The issue here presents a live controversy despite the appearance to the contrary. ADEQ is authorized to administratively extend expired AZPDES permits if: (1) the owner of the mining site applies for a renewal of its permit 180 days before the permit expires and (2) ADEQ has not yet issued a new permit to the owner. *See* 40 C.F.R. § 122.6(d) ("States authorized to administer the NPDES program may continue either EPA or State-issued permits until the effective date of the new permits, if State law allows."); A.A.C. R18-9-B904.B.1 (AZPDES permittee must apply to renew its permit 180 days before the permit expiration date); A.A.C. R18-9-B904.C (continuation beyond the AZPDES permit date is permitted if: (1) ***186 **677** the permittee has timely applied before the permit expires and the permitted activity is continuing; and (2) ADEQ "is unable, through no fault of the permittee, to issue an AZPDES permit on or before the expiration date of the existing permit"). Here, we take judicial notice of Resolution applying to renew the permit on July 23, 2021—180 days before the permit expired. Draft Fact Sheet: Arizona Pollutant Discharge Elimination System (AZPDES), Ariz. Dep't of Env't Quality 1, https://static.azdeq.gov/pn/azpdes_rcml_fs.pdf (last visited Oct. 3, 2022); *see Giragi v. Moore*, 48 Ariz. 33, 41–42, 58 P.2d 1249 (1936); Ariz. R. Evid. 201(b). We also take judicial notice of ADEQ issuing draft forms of the renewed permit. Draft Permit: Authorization to Discharge Under the Arizona Pollutant Discharge Elimination System, Ariz. Dep't of Env't Quality,

https://static.azdeq.gov/pn/azpdes_rcml_dp.pdf (last visited Oct. 3, 2022); *see Moore*, 48 Ariz. at 41–42, 58 P.2d 1249; Ariz. R. Evid. 201(b). Resolution, thus, continues to operate its mining site under the permit at issue here.

VI. The Tribe Untimely Appealed The Board's November 2018 Order.

¶23 The Tribe argues the Board erred when it did not give a written justification for the November 2018 order. In that order, the Board allowed ADEQ to disregard portions of the ALJ's findings of fact and conclusions of law. The Tribe argues the order modified the ALJ decision, requiring written justification. The State correctly contends the Tribe's challenge is untimely because the Tribe did not file its challenge until over 100 days later.

¶24 "[T]he decision of the Board [to reject or modify the ALJ's decision] is the final administrative decision." A.A.C. R2-17-124.A.2. Under A.R.S. § 12-904, a party must commence "an action to review a final administrative decision ... by filing a notice of appeal within thirty-five days from the date" it receives a copy of that decision.

¶25 Because the Tribe waited over 100 days to challenge the Board's November 2018 order and the Board's decision to modify or reject an ALJ's decision was a final agency decision, the Tribe untimely challenged the Board's November 2018 order.

VII. Because The Parties Raise No Issues Of Fact On Appeal, We Need Not Address The 2021 Amendment To § 12-910.F Regarding This Court's Deference To Agencies' Determinations Of Questions Of Fact.

¶26 In 2021, during the pendency of this appeal, the Arizona Legislature modified § 12-910.F to include

language providing, "In a proceeding brought by or against the regulated party, the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency." *See* 2021 Ariz. Laws, ch. 281, § 1 (S.B. 1063) (1st Reg. Sess.) (amending A.R.S. § 12-910.F). Before the amendment, Arizona courts held "a reviewing court may not substitute its judgment for that of the agency on factual questions or matters of agency expertise." *See WildEarth Guardians, Inc. v. Hickman*, 233 Ariz. 50, 53, ¶ 7, 308 P.3d 1201, 1204 (App. 2013).

¶27 Resolution argues we should not decide the constitutionality of the 2021 amendment because none of the parties dispute any of the facts below. We agree.

¶28 The Tribe contends it raised issues of fact because it challenged the superior court's decision, "including the factual error that the Resolution [m]ine was the same mine as the more than 100-year-old Magma [m]ine." But, as we will discuss, this issue is a question of law, not fact. *See infra* ¶¶ 33–35. *Cf. State v. Romero*, 248 Ariz. 601, 604, ¶ 12, 463 P.3d 225, 228 (App. 2020) (issue of whether the defendant knowingly engaged in criminal conduct is a question of fact because it "refers to factual knowledge"). The Tribe also contends whether the superior court's apparent assumption of the Tribe's motivations for disputing the permit improperly influenced its decision to uphold the permit is a question of fact. But the Tribe did not challenge any specific factual determinations below. Given the parties have not raised any factual issues on appeal, we need not resolve any questions of fact.

***187 **678** ¶29 Accordingly, we need not resolve issues relating to the constitutionality of the 2021 amendment to subsection F.

VIII. Shaft 10 Is A New Source Under The CWA.

¶30 A "new source" under the CWA is "any building, structure, facility, or installation from which there is or may be a 'discharge of pollutants,' the construction of which commenced ... [a]fter promulgation of standards of performance under section 306 of CWA which are applicable to such source." 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(2) (same). A source is "a new source only if a new source performance standard is independently applicable to it." 40 C.F.R. § 122.29(b)(2). By contrast, the CWA grandfathers in an "existing source," which is a source permitted before the EPA promulgated performance standards independently applicable to the source. NPDES Permit Regulations, 49 Fed. Reg. 37,998, 38,042–43 (Sept. 26, 1984) (to be codified at 40 C.F.R. § 122.21(k)(4)). This distinction exists because new sources "have never operated under a previously issued permit and ... are considered to be in a better position than existing sources to install and 'start up' their equipment and meet the [more stringent NSPS] permit limitations." *Id.* at 38,034.

¶31 Resolution and the State argue all the sources in Resolution's mining site are existing sources under the CWA because a source must be subject to independently applicable standards to be a new source, and the only applicable standard applies to the "mine as a whole." Resolution and the State, therefore, conclude the mining site is not subject to NSPS because the mining site has existed since 1912,

and as a result, any additional structure or facility must be an existing source.

¶32 The Tribe contends "discrete pollutant-generating structures and facilities can themselves be new sources[,]" including the additions Resolution made since the EPA promulgated standards for copper mining in 1982. The Tribe further contends Resolution's additions effectively created a distinct mine from the original Magma mine, and the new mine should be subject to new source analysis.

¶33 We first address our standard of review for ADEQ's determinations of issues related to the new source analysis. Second, we discuss whether the EPA promulgated any independently applicable standards for the types of sources Resolution constructed at its mining site after the EPA promulgated standards for copper—more specifically, we decide whether shaft 10 is a "mine" under 40 C.F.R. §§ 440.100, 440.132(a), (g). Third, we decide whether shaft 10 is subject to independently applicable NSPS. Fourth, we resolve whether shaft 10 is a new source under the 40 C.F.R. § 122.29(b)(1) criteria (further defining what is required for a source to be classified as a new source).

A. We Review ADEQ's New Source Analysis *De Novo.*

¶34 This court generally reviews *de novo* "the decisions reached by the administrative officer and the superior court" when reviewing questions of law involving an agency's "legal interpretation of a statute." *Eaton v. Ariz. Health Care Cost Containment Sys.*, 206 Ariz. 430, 432, ¶ 7, 79 P.3d 1044, 1046 (App. 2003). Principles of statutory construction apply to federal regulations. *See Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 573–74, 127 S.Ct. 1423, 167

L.Ed.2d 295 (2007) (applying principles of statutory construction to regulations the EPA promulgated under the Clean Air Act); *Time Warner Ent. Co., L.P. v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1050 (10th Cir. 2004) (applying "general rules of statutory construction" to Federal Communication Commission's regulations). This court construes a regulation "and its subsections as a consistent and harmonious whole." *See State v. Green*, 248 Ariz. 133, 135, ¶ 8, 459 P.3d 45, 47 (2020).

¶35 This court starts by "giv[ing] words their plain meaning unless it is impossible to do so or absurd consequences will result." *Marsoner v. Pima Cnty.*, 166 Ariz. 486, 488, 803 P.2d 897, 899 (1991); *see also Allstate Ins. Co. v. Universal Underwriters, Inc.*, 199 Ariz. 261, 264, ¶ 8, 17 P.3d 106, 109 (App. 2000). When a case involves the intersection ***188 **679** of multiple statutes or regulations, this court "construe[s] them together, seeking to give meaning to all provisions." *See State v. Francis*, 243 Ariz. 434, 435, ¶ 6, 410 P.3d 416, 417 (2018) (cleaned up).

¶36 This court gives a federal agency's interpretation of the federal law it administers the level of deference annunciated by the United States Supreme Court in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Eaton*, 206 Ariz. at 434, ¶ 16, 79 P.3d at 1048. By contrast, "[a] state agency's interpretation of a federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under *Chevron*." *Orthopedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997); *see also Arizona v. City of Tucson*, 761 F.3d 1005, 1014 (9th Cir. 2014). Instead, this court "review[s] *de novo* a state agency's interpretation of a federal [law]." *See Belshe*, 103 F.3d at 1495. Further, the Arizona Legislature amended

A.R.S. § 12-910.F (providing the standards of review for final administrative decisions) in 2018 to abolish what is commonly known as the *Chevron* doctrine in Arizona. *See* 2018 Ariz. Laws, ch. 180, § 1 (2d Reg. Sess.) (H.B. 2238) (amending A.R.S. § 12-910.E) ("In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency.").

B. Because Shaft 10 Is A "Mine," It Is A Type Of Source Subject To CWA Copper Mining Regulations.

¶37 The State contends "independently applicable standard" under 40 C.F.R. § 122.29(b)(2) means the EPA must have made standards independently applicable to the types of sources Resolution constructed at its site after 1982 to classify those sources as new sources. And the State urges this court to affirm ADEQ's decision to renew the permit because the only applicable standard under 40 C.F.R. § 440, Subpart J is for "the mine as a whole."

¶38 Under 40 C.F.R. § 122.29(b)(2), "[a] source meeting the requirements of paragraphs (b)(1)(i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger." *See In re: Phelps Dodge Corp., Verde Valley Ranch Dev.*, 10 E.A.D. 460, 2002 WL 1315601, at *15 (EAB 2002) (discussing the need for an independently applicable standard to categorize a source as a new source under the CWA). NSPS only go into effect once the EPA promulgates performance standards independently applicable to the type of

source the EPA is permitting. 40 C.F.R. § 122.2; *see* 33 U.S.C. § 1316(a)(2).

¶39 The EPA promulgated the most recent performance standards for copper mines in 1982. Ore Mining and Dressing Point Source Category Effluent Limitation Guidelines and New Source Performance Standards, Final Rule, 47 Fed. Reg. 54,598 (Dec. 3, 1982). A source producing pollution from copper mining activities, thus, may only be a new source if it was constructed after 1982 and an independent standard applies to such a source. *See* 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(2).

¶40 The standards for copper mining apply to only a few types of sources, and here the only applicable standard is for "mines." *See* 40 C.F.R. § 440.100(a) ("provisions of this subpart are applicable to discharges from ... [m]ines that produce copper" from "open-pit or underground operations"). The other types of sources subject to independently applicable standards under this section are "mills" and "mines and mills," which do not apply here because there are no copper mills at issue. *See* 40 C.F.R. § 440.100(a)(2)–(4). A plain reading of the controlling regulations requires this result, and we agree with the State to the extent it argues the only independently applicable standard is for "mines." *See Marsoner*, 166 Ariz. at 488, 803 P.2d at 899. But that determination does not end our analysis.

¶41 Because "mines" are the only type of source subject to independently applicable standards here, we must determine whether ***189 **680** any sources Resolution constructed at its mining site after 1982 fall within the definition of a "mine." The EPA provides three terms guiding our interpretation of what a "mine" means. The first term, "active mining area," is "a place where work or other activity related

to the extraction, removal, or recovery of metal ore is being conducted." 40 C.F.R. § 440.132(a). The second term, "mine," is:

> [A]n *active mining area*, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning, or concentration of metal ores.

40 C.F.R. § 440.132(g) (emphasis added). The third and most expansive of the three terms, "site," means "the land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the facility or activity." 40 C.F.R. § 122.2.

¶42 These three terms are like nesting dolls in that an "active mining area" falls squarely within the definition of a "mine." Thus, if a source would qualify as an "active mining area," it would also qualify as a "mine." And because a "mine" and "active mining area" are each examples of "the land area where any 'facility or activity' is physically located or conducted," both an "active mining area" and "mine" neatly fit into the term "site." The term "site," however, cannot nest within the terms "mine" or "active mining area." *See infra* ¶ 44.

¶43 The State argues new additions to Resolution's mining site, including shaft 10, cannot be considered new sources because the only applicable standards are for "mines," which can only mean the "mine as a

whole." But the term "mine," as defined by 40 C.F.R. § 440.132(g) (defining "mines" in the ore mining context, including copper mining), does not mean the "mine as a whole." Instead, a "mine" is a discrete structure used for "extracting ore or minerals," such as shaft 10. *See* 40 C.F.R. § 440.132(g) (a mine "is an active mining area, *including all land and property* placed under, or above the surface of such land, *used in or resulting from the work of extracting metal ore or minerals* from their natural deposits by any means or method") (emphasis added); 40 C.F.R. § 440.132(a) (an active mining area "is a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted"); *see Marsoner*, 166 Ariz. at 488, 803 P.2d at 899.

¶44 If the State was correct in arguing we must look to the mining site "as a whole," then it would render the new source rule under 40 C.F.R. § 122.29 null as applied to new facilities at mining sites. *See Chaparral Dev. v. RMED Int'l, Inc.*, 170 Ariz. 309, 313, 823 P.2d 1317, 1321 (App. 1991) (this court harmonizes conflicting language of different parts of the statute to give effect to both); *Cleckner v. Ariz. Dep't of Health Servs.*, 246 Ariz. 40, 43, ¶ 9, 433 P.3d 1200, 1203 (2019) (this court strives "to give meaning to each word, phrase, clause and sentence so that no part of that legislation will be void, inert or trivial"); *see also Patterson v. Maricopa Cnty. Sheriff's Off.*, 177 Ariz. 153, 157, 865 P.2d 814, 818 (App. 1993) (applying statutory construction principles to read a portion of a rule in harmony with other parts of the rule to "give effect to the [framers'] intent behind" the rule). Indeed, the EPA wrote 40 C.F.R. § 122.29 to provide a framework to decide whether an

addition to a mining site is a new source. *See infra* ¶¶ 48–60.

¶45 Shaft 10 neatly falls within the description of a "mine," as opposed to a "site." As applied here, shaft 10 is an area of "land" (a 7,000-foot-deep hole) and "property" (a shaft is a man-made facility). *See* 40 C.F.R. § 440.132(g). Shaft 10 is located "under ... the surface of such land," and Resolution has used the shaft to implement its plans to "extract[ ] metal ore or minerals from their natural deposits." *See* 40 C.F.R. § 440.132(g). And because Resolution is using shaft 10 to further its expansion of the site to extract copper from the new ore body, shaft 10 is "a place where work or other activity related to the extraction, removal, or recovery of metal ore is being [or will be] conducted." *See* 40 C.F.R. § 440.132(a). Shaft 10, thus, squarely ***190 **681** falls within the plain meaning of the definitions of an "active mining area" and a "mine." As such, the EPA effectively provided an independently applicable standard for mining shafts—at least to the extent they qualify as "mines" or "active mining areas." *See Francis*, 243 Ariz. at 436, ¶¶ 9–10, 410 P.3d at 418 (interpreting interrelated statutes together to discern their meaning); *cf. Verde Valley Ranch Dev.*, 10 E.A.D. 460, 2002 WL 1315601, at *16 ("Phelps Dodge's active maintenance of the tailings site (i.e., sprinkling with water to reduce dust blowing off the site surface) over the past years ... cannot reasonably be categorized as active pursuit or processing of ore within the meaning of the copper mining NSPS."). Moreover, though the ALJ did not decide whether shaft 10 was a new source, the ALJ decided shaft 10 was a "mine" when the matter was before the OAH, in part, because Resolution was using it to further its mining activity, such as the production of mine drainage.

¶46 Further, contrary to the State's argument, the EPA's regulatory framework does not require us to consider all “active mining areas” within Resolution's mining “site” when determining whether a source is a new or existing source. Here, the State has confused the term “mine” with the term “site” when arguing we must consider “the mine as a whole.” *See* 40 C.F.R. §§ 122.2, 440.132(g). In contrast to the EPA's definition of a “mine,” the EPA's definition of a “site” includes “adjacent land used in connection with the facility or activity.” We cannot define a mining shaft as a “site” rather than a “mine” because of this additional requirement. Here, we have determined Resolution's shaft 10 is one “mine” of at least one or more “mines” or “active mining areas” operating within Resolution's mining “site.” We, therefore, need not determine whether the mining site “as a whole” is a new source.

¶47 Our interpretation of the EPA's regulations is consistent with the EPA's guidance on new sources, which we find persuasive. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (an administrative body's informal guidance on a regulation is not binding but may be persuasive “to the extent that those interpretations have the ‘power to persuade’ ”) (citations omitted). Indeed, the EPA provided several materials explaining parts of a discharger's site may be subject to NSPS while others are subject to existing source standards when the discharger constructs a new building, structure, or installation at a site. *See* Memorandum from Linda Boornazian, Director Water Permits Division, Office of Wastewater Management, and Mary Smith, Engineering & Analysis Division, Office of Science & Technology Office of Water, to Regional Water Division Directors, at 3 (Sept. 28, 2006) (“[I]f the new

source is a new installation of process equipment at an existing facility, part of the facility may be subject to existing source standards and other parts of the facility subject to new source standards."); NPDES Permit Regulations, 49 Fed. Reg. 37,998, 38044 (Sept. 26, 1984) (to be codified at 40 C.F.R. § 122.29(b)) ("[I]f a facility replicates an existing facility, the fact that it shares or uses common land with another source does not prevent it from being considered a new source.").

¶48 Resolution, nonetheless, argues its interpretation of the new source regulations, requiring this court to look to the "whole mine" when deciding whether shaft 10 is a new source, is consistent with EPA interpretations of a new source. Resolution cites past NPDES permits to support its proposition. Though EPA interpretations of regulations do not necessarily receive *Chevron* deference, "[c]ogent [federal] administrative interpretations ... warrant respect." *Alaska Dep't of Env't Conservation v. U.S. E.P.A.*, 540 U.S. 461, 488, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004). But Resolution's examples of past EPA permitting decisions are distinguishable from the permit here because none were for underground copper mines. Several of the cited EPA permits, for instance, were for coal mines, which are subject to "new source coal mine" standards. *See* 40 C.F.R. § 434.11(j)(1). Even so, those permits do not necessarily assist Resolution's proposition, and some even cut against it. Indeed, the regulatory definition of "new source coal mine" requires agencies to consider whether the regulated body created new shafts when deciding if a mine is a new source. *See* 40 C.F.R. § 434.11(j)(1) (a new ***191 **682** source may also arise from a "major alteration" to an existing site, such as the "construction of a new shaft"). A new

shaft, therefore, could be a "mine" and new source in the context of a coal mine as well.

C. Because Shaft 10 Is A "Mine" And Shaft 10 Produces Mine Drainage, Shaft 10 Is Subject To "Independently Applicable Standards."

¶49 For an agency to classify a source as a new source, the source must:

> (1) Be one of the types of sources the EPA has enumerated as being applicable to performance standards—here, the applicable regulation is 40 C.F.R. § 440.100 (listing the types of sources subject to copper mining standards)—and
>
> (2) Produce the type of wastewater discharge governed by the NSPS.

See 40 C.F.R. § 122.29(b)(2) (a source meeting the requirements of § 122.29(b)(1) "(i), (ii), or (iii) is a new source only if a [NSPS] is independently applicable to it"). Here, NSPS are independently applicable to shaft 10. First, as explained above, shaft 10 is a "mine" and, thus, is one of the types of sources specifically promulgated as applicable to the standards for copper. *See supra* ¶¶ 44–47. Second, shaft 10 is subject to NSPS under 40 C.F.R. § 440.104(a) because this standard applies to mine drainage from underground copper mining operations and shaft 10 produces mine drainage.

¶50 The dissent believes we embark on our analysis out of order. As explained above, ignoring whether a new construction is a mine undercuts the effect of entire sections of federal regulations. We decline this path and instead give force to every word of the regulations by considering whether shaft 10 is a mine. In doing so, traditional canons of statutory

interpretation guide our path. And ADEQ's own flow chart confirms our approach. *See Appendix A.*

¶51 Accordingly, the EPA has provided an independently applicable NSPS standard for shaft 10. But that does not end our analysis.

D. Shaft 10 Is A New Source Under The 40 C.F.R. § 122.29(b) Criteria.

¶52 Next, to determine whether shaft 10 is a new source, we must decide if it meets one of the three new source criteria under 40 C.F.R. § 122.29(b). Because we decide only whether the third criteria applies, we decline to address the parties' arguments about the other two criteria.

¶53 To be classified as a new source, a source must meet one of the following criteria: (1) "[i]t is constructed at a site at which no other source is located"; (2) "[i]t totally replaces the process or production equipment that causes the discharge of pollutants at an existing source"; or (3) "[i]ts processes are substantially independent of an existing source at the same site." 40 C.F.R. § 122.29(b)(1)(i)–(iii).

¶54 The State argues shaft 10 is not "substantially independent" from other structures on the site but is fully integrated, and thus should not be considered a new source. Because Resolution only recently built shaft 10, heavily modified other nearby existing structures to facilitate the use of shaft 10, and operated or has plans to operate shaft 10 for copper mining so as not to replace but replicate existing source's copper mining activity, we disagree.

¶55 In 1984, the EPA amended the third prong—regarding "whether the [source's] processes are substantially independent"—of the new source

analysis test by requiring agencies to consider factors: (1) “the extent to which the new facility is integrated with the existing plant”; and (2) “the extent to which the new facility is engaged in the same general type of activity as the existing source.” *See* NPDES Permit Regulations, 49 Fed. Reg. 37,998, 38,048 (Sept. 26, 1984) (to be codified at 40 C.F.R. § 122.29(b)(1)(iii)).

¶56 The application of the 40 C.F.R. § 122.29(b)(1)(iii) criterion presents an issue of first impression to this court. The State, Resolution, and the Tribe provided no authority other than federal guidance from the EPA, and—aside from that guidance—we also found none.

¶57 The State contends categorizing any new facilities in the mining site, such as shaft ***192 **683** 10, would contradict the EPA's intent when it amended 40 C.F.R. § 122.29(b)(1)(iii) by adding two additional factors. To support this proposition, the State cites the EPA's discussion of the policy and application of the “substantially independent” factor in NPDES Permit Regulations, 49 Fed. Reg., 37,998, 38,048 (Sept. 26, 1984). But the EPA's guidance on the new rule establishes shaft 10 is a new source. Under the first of the two new factors, the EPA explains:

> [A] minor change[, such as a plant's installation of a new purification step in its process, like a new filter or distillation column,] would be integral to existing operations and would not require the facility to be reclassified as a new source. However, on the other extreme, if the only connection between the new and old facility is that they are supplied utilities such as steam, electricity, or cooling water from the

> same source or that their wastewater effluents are treated in the same treatment plant, then the facility will be a new source.

Id. Here, shaft 10 falls in the latter category as shaft 10 is not some insignificant process added to Resolution's mining site. Instead, shaft 10 is a brand new 7,000-foot-deep mining shaft. And though shaft 10 uses other facilities from other areas of the mining site to assist in ore production, such as Resolution's use of shaft 9 to pass mine drainage from shaft 9 to shaft 10, other pertinent facts show shaft 10 is a new source. Resolution modified several of these pre-existing structures, such as the Never Sweat Tunnel, to facilitate its $500 million investment in shaft 10. Further, Resolution also built shaft 10 over 300 feet away—laterally from shaft 9—to construct a new underground mining operation to extract copper from the new and as yet untouched ore body in the EPS.

¶58 The EPA's guidance on the second factor—whether the source engages in the "same general type of activity as the existing source"—also cuts against the State's argument. Under the second factor, the EPA explains, "if the proposed facility is engaged in a sufficiently similar type of activity as the existing source, it will not be treated as a new source." *Id.* at 38,044. On first blush, Resolution's plans to use shaft 10 to mine copper appear to fall under the same type of activity at the mining site—specifically, copper mining. *See id.* ("For example, if a plant begins to produce a new product, e.g., nylon synthetic fiber, which is very similar to the product currently being produced by that plant, e.g., polyester synthetic fiber, using equipment that is essentially the same as the existing production equipment, this would likely be considered an existing source."). The

EPA, however, goes on to explain, "Of course, to the extent the construction results in facilities engaged in the same type of activity because it essentially replicates, without replacing, the existing source, the new construction would result in a new source." *Id.* On this precise point, the State's argument collapses in on itself.

¶59 Resolution built shaft 10, a completely new mining shaft, exceeding the depth of the nearest shaft (shaft 9) by over 2,000 feet bgs. And Resolution constructed shaft 10 approximately 300 feet away from shaft 9. Though Resolution repurposed shaft 9 to help facilitate mining in shaft 10 and no longer uses shaft 9 for mining ore, Resolution still has plans to expand shaft 9 by extending it to the same depth as shaft 10. And though Resolution has plans to stop using shaft 9 to extract copper ore, none of the parties have given us any reason to determine Resolution is using shaft 10 to replace shaft 9. Instead, Resolution built structures, such as shaft 10, to expand its mining site to begin mining the new, untouched ore body on the EPS—a feat BHP was unable to accomplish with the limited capabilities of older structures like shaft 9. Resolution also plans to use panel caving, a new and high-volume mining technique to access the untouched ore body, which Resolution's predecessors did not use when shaft 9 was producing ore. Resolution, thus, "replicated" the WPS when it constructed shaft 10 in the hopes of supplying over a quarter of our nation's copper needs. Indeed, the ALJ even referred to Resolution's site as being made up of "two non-contiguous areas," the EPS and the WPS, which the superior court adopted on appeal. Our determination is consistent with ADEQ's concession that "shaft 10 would be a new source" if it

had been subject to independently applicable performance standards.

***193 **684** ¶60 Moreover, the State's use of other portions of the EPA's guidance is unconvincing and, in fact, supports a contrary result to the one it urges us to adopt. The State, for instance, cites to a portion of the EPA's guidance explaining the "substantial independence test was aimed at ascertaining whether an existing source which undertakes major construction that legitimately provides it with the opportunity to install the best and most efficient production processes and wastewater treatment technologies should be required to meet new source performance standards at that facility." *See* NPDES Permit Regulations, 49 Fed. Reg. 37,998, 38,043 (Sept. 26, 1984). Indeed, Resolution built shaft 10 well after 1982 and at a time when it had "the opportunity to install the best and most efficient production processes and wastewater treatment technologies." *See id.* And because Resolution "undert[ook] major construction" when it recently dug shaft 10, the facility, according to the EPA's own words, "should be required to meet new source performance standards." *See id.* And, as the ALJ aptly observed, the State's argument "that any new buildings, structures, facilities, or installations constructed at a copper mine that began operations before Subpart J was promulgated" is inconsistent with the regulatory framework and EPA guidance. A contrary result would mean Resolution could continuously sink shafts into its property and perpetually expand its mining site without being subject to NSPS so long as those structures were constructed on lands adjacent to its copper mining site.

¶61 Accordingly, shaft 10—though not completely independent from other sources—is substantially separate to be classified as a new source under § 122.29(b)(1)(iii). Shaft 10, thus, is a new source and Resolution's mining site is subject to NSPS under 40 C.F.R. § 440.104(a).

IX. To Comply With The CWA And For ADEQ To Permit Resolution's Site, Resolution And ADEQ Must Finalize The Ongoing TMDLs For Queen Creek, And Resolution Must Show The Site Will Comply With Applicable Water Quality Standards.

¶62 The Tribe contends ADEQ may not issue the permit to Resolution because shaft 10 is a new source and Queen Creek is an impaired waterway. We disagree. Though permitting a new source for impaired waterways is more arduous, the CWA does not prohibit such an action. *See Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007, 1013 (9th Cir. 2007).

¶63 Because shaft 10 is a "new source" within the meaning of 40 C.F.R. § 122.2, ADEQ may not renew the permit until: (1) ADEQ finalizes a TMDL plan for the receiving water segment; (2) Resolution demonstrates the existence of sufficient copper load allocations to allow for the proposed discharge; and (3) Resolution demonstrates the existence of water quality compliance schedules for the segment. *See* 40 C.F.R. § 122.4(i); *Pinto Creek*, 504 F.3d at 1012.

¶64 The CWA preserves and restores the integrity of navigable waters by controlling both point and nonpoint pollution sources. 33 U.S.C. § 1251(a)(7). Point sources are discrete conveyances, including pipes, ditches, or other outfalls. 33 U.S.C. § 1362(14). "Nonpoint sources of pollution are non-discrete sources," such as agricultural runoff. *Pinto Creek*, 504

F.3d at 1011. Section 303 of the CWA requires states to identify waters not meeting applicable water quality standards. 33 U.S.C. § 1313(d)(1)(A). In Arizona, ADEQ prepares a list of those "impaired" waters and indicates the pollutant(s) causing impairment. A.R.S. § 49-232; *see also* 33 U.S.C. § 1313(d).

¶65 CWA section 303 also requires states to determine the maximum amount of a given pollutant an impaired water can absorb but still meet water quality standards. 33 U.S.C. § 1313(d)(1)(C). Using this determination, ADEQ develops TMDLs for impaired waters. A.R.S. § 49-234.A. TMDLs are informational tools establishing attainment targets for pollutants, allocating discharge amounts, and aiding with attainment planning. *See* 40 C.F.R. §§ 130.2(e)–(i), 130.7(c); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1127–29 (9th Cir. 2002). TMDLs are comprised of a water's waste load allocation ***194 **685** (WLA) and its load allocation (LA) plus a margin of safety. Overview of Total Maximum Daily Loads, Envt'l Prot. Agency, https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls (last updated Aug. 31, 2022). WLAs represent the sum-total pollutant allocations for all point sources. In contrast, LAs are the sum total allocations for nonpoint and background pollution. *Id.*

¶66 Special rules apply to permits authorizing a discharge into impaired waters. 40 C.F.R. § 122.4(i); *see also Pinto Creek*, 504 F.3d at 1011. Federal regulations broadly prohibit issuing a permit to a new source proposing to discharge into impaired waters. *See* 40 C.F.R. § 122.4(i); *Pinto Creek*, 504 F.3d at 1012. This ban, however, is not absolute. *Pinto Creek*, 504 F.3d at 1013. The relevant regulation reads in part:

No permit may be issued:

....

> (i) To a new source or new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards ... and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.
>
> 40 C.F.R. § 122.4.

¶67 This court reviews administrative regulations like statutes and interprets the regulations to further the intent of the enabling legislation. *Cooke v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 141, 144, ¶ 13, 302 P.3d 666, 669 (App. 2013). The plain meaning of subsection (i)'s first sentence lays out a default rule: no permit may be issued to a new source causing or contributing to a violation of water quality standards. *Cf. State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 240, ¶ 24, 229

P.3d 242, 252 (App. 2010) ("We look to the plain language ... because it is the best evidence of the legislature's intent."). Under this rule, it would be nearly impossible for a new source to obtain a permit to discharge into impaired waters. But, when reading the regulation as a whole, the operator of a new source has two clearly defined steps it may take to show it will not "cause or contribute" to a violation of water quality standards. *Cf. Stambaugh v. Killian*, 242 Ariz. 508, 509, ¶ 7, 398 P.3d 574, 575 (2017) (use context to interpret words and provisions).

32¶68 The EPA has interpreted 40 C.F.R. § 122.4(i)(1) and (2) to require a demonstration of sufficient loading capacity in a segment's WLAs to accommodate the new discharge in addition to the existence of compliance schedules. *In re: Carlota Copper Co.*, 11 E.A.D. 692, 765, 2004 WL 3214473, at *55 (EAB 2004). Stated more plainly, the party seeking the permit must show: (1) the segment's TMDL allocations can accommodate the proposed additional point source; and (2) existing point sources are subject to plans detailing the changes needed to bring the segment into compliance. *See Pinto Creek*, 504 F.3d at 1012–15. Once the operator of a new source establishes those two conditions, or if the director of the permitting department determines the department already has adequate information establishing those two conditions, the new source will not "cause or contribute" to continued water quality violations. 40 C.F.R. § 122.4(i).

¶69 Here, the CWA lists the tributary of Queen Creek—the proposed receiving water—as impaired for copper. Because of this impairment, ADEQ must finalize the TMDLs before issuing a permit for any new source. ADEQ, thus, erred in not finalizing the

TMDLs before renewing the permit. *See* 40 C.F.R. § 122.4(i); *see also Pinto Creek*, 504 F.3d at 1012.

***195 **686** ¶70 The parties devote most of their briefings to whether shaft 10 is a new source. Resolution, however, preserves one argument pertinent to 40 C.F.R. § 122.4(i). Resolution contends a discharge by itself "would not cause or contribute to [the] impairment of Queen Creek." In support, Resolution points to Andy Koester, Manager of the AZPDES Permit Unit, who testified Resolution would not cause or contribute to a violation of water quality standards if their discharges do not exceed the limitations of the permit. Though this nascent argument does not directly address 40 C.F.R. § 122.4, it may suggest the federal regulation's prohibition against permitting new sources does not apply. And to the extent Koester's argument does, we disagree.

33¶71 This court gives meaning to every word and provision in a regulation, rendering none superfluous. *See Garcia v. Butler*, 251 Ariz. 191, 194, ¶ 12, 487 P.3d 256, 259 (2021). Koester's testimony may be probative on whether the TMDL's load allocation can accommodate the proposed discharge—as required by 40. C.F.R. § 122.4(i)(1). Alternatively, the testimony may help demonstrate the existence of compliance schedules designed to bring the relevant segment of Queen Creek into compliance—as required by 40 C.F.R. § 122.4(i)(2). His testimony, however, does not allow us to ignore those requirements, essentially rendering them nugatory. Instead, Resolution must comply with all 40 C.F.R. § 122.4's requirements before ADEQ may issue an AZPDES permit. Further, during oral argument, Resolution said it is already subject to the most stringent standards for existing sources, so treating shaft 10 as a new source is merely a "labeling exercise." Indeed,

Resolution may easily comply with applicable water quality standards. But the law still requires Resolution to show it can do so after ADEQ finalizes the TMDLs. Until then, ADEQ may not issue a renewal of the permit.

CONCLUSION

¶72 We vacate the superior court's orders and the decision of the Board upholding the validity of the permit. We remand this matter to ADEQ for further proceedings consistent with this decision.

Appendix A

Is it a New Source?

New Source (40 CFR 122.2): Any building, structure, facility, or installation from which there is or could be a discharge of pollutants, the construction of which commenced:
a. After promulgation of standards of performance under CWA section 306, which are applicable to such source;

Does the source have an applicable performance standard?
(The applicable sources are demonstrated in Process Flow

No → Not a New Source

Yes → Was the source constructed after the promulgation of performance standards?

No → Not a New Source

Yes → Does it meet new source criteria in 122.29(b)? (See New Source Additional Criteria Flow Chart)

No → Not a New Source

Yes → New Source

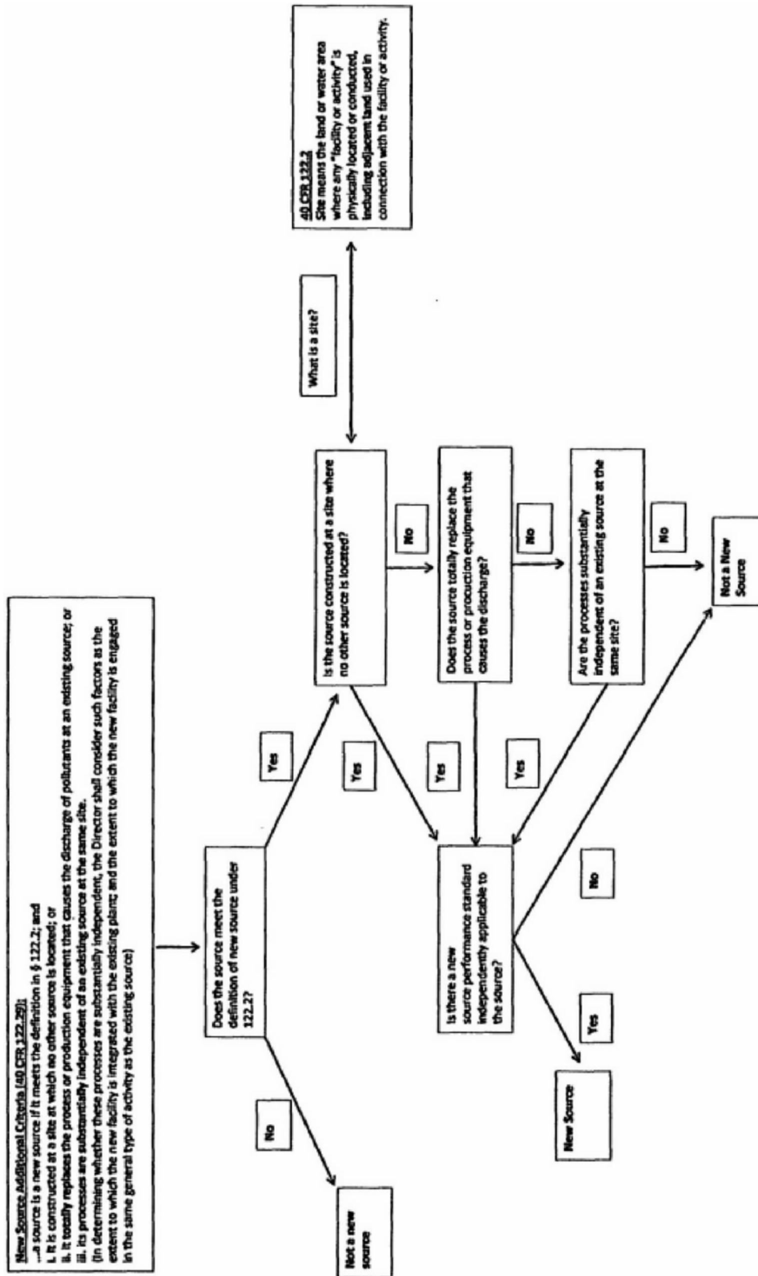
(Process Flow 2)
Is it one of the applicable sources in Subpart J? If yes, it has an applicable peformance standard.
(Mines must also meet the defiintion of mine below)

Title 40 › Chapter I › Subchapter N › Part 440 › Subpart J › Section 440.100
(a) The provisions of this subpart J are applicable to discharges from -
(1) **Mines** that produce copper, lead, zinc, gold, silver, or molybdenum bearing ores, or any combination of these ores from open-pit or underground operations other than placer deposits;
(2) **Mills that use the froth-flotation process alone** or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores, or any combination of these ores;
(3) **Mines and mills** that use dump, heap, in-situ leach, or vat-leach processes to extract copper from ores or ore waste materials; and
(4) **Mills** that use the cyanidation process to extract gold or silver.

What is a Mine?

Title 40 › Chapter I › Subchapter N › Part 440 › Subpart L › Section 440.132
"Mine" is an active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning, or concentration of metal ores.
"Active mining area" is a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.

Appendix B



PATON, J., dissenting:

¶73 While I concur with my colleagues as to the issues of mootness and the scope of our review, I respectfully dissent on two grounds.

¶74 First, in determining whether a construction is a new source, I would approach the CWA regulations in the order they are presented in the text of the regulation. Specifically, I do not agree that we are required to determine whether Shaft 10 is a "mine" in ***198 **689** order to determine whether it is a new source. Second, under either approach, I do not find that Shaft 10 is substantially independent of an existing source, and would therefore affirm the superior court's ruling.

I. Correct Order of Application

¶75 The parties have centered their dispute on whether Shaft 10 is a "mine" as defined by the independently applicable NSPS. But we would not reach this question if we let the regulations speak for themselves. The parties' constructed framework, adopted by the majority, does not follow the order the regulatory text provides. I am unpersuaded by ADEQ's interpretation of the regulations as presented in the Appendix A flowchart, and we are not bound to apply it. A.R.S. § 12-910(F).

¶76 The three-step framework I would apply comes from the text of the applicable regulations and statutes, along with commentary from the EPA's 2006 memorandum summarizing its requirements for determining whether a source is a new source. *See* Memorandum from Linda Boornazian, Director Water Permits Div., Off. of Wastewater Mgmt., and Mary Smith, Eng'g & Analysis Div., Off. of Sci. & Tech., to Regional Water Div. Dirs., New Source Dates for Direct and Indirect Dischargers, at

*3 (Sept. 28, 2006), (available at https://www.epa.gov/system/files/documents/2021-07/newsource_dates.pdf) ("2006 Memorandum"). An agency seeking to determine whether a construction is a new source under the CWA should ask the following:

> 1. Does the construction meet the definition of a new source in 40 C.F.R. § 122.2? *See also* 33 U.S.C. § 1316.
>
> a. Has there been a construction of a "building, structure, facility, or installation" that does or will "discharge pollutants?" 40 C.F.R. § 122.2; *see also* 2006 Memorandum at *4.
>
> b. Has construction commenced? 40 C.F.R. § 122.2; *see also* 2006 Memorandum at *5.
>
> c. Did construction commence subsequent to the promulgation (or proposal) of standards of performance applicable to the source? 40 C.F.R. 122.2; *see also* 2006 Memorandum at *6.
>
> If the answer to any subpart is no, the construction is not a new source.
>
> 2. If the answer to all subparts of Step 1 is yes, does the construction meet any of the following definitions of a new source in 40 C.F.R. § 122.29(b)(1)?
>
> a. Is the construction at a site at which no other source is located? 40 C.F.R. § 122.29(b)(1)(i).
>
> b. Does the construction totally replace the process or production equipment that causes the discharge of

pollutants at an existing source? 40 C.F.R. § 122.29(b)(1)(ii).

c. Are its processes substantially independent of an existing source at the same site? 40 C.F.R. § 122.29(b)(1)(iii).

If the answer to all subparts is no, the construction is not a new source.

3. If the answer to all subparts of Step 1 and any subpart of Step 2 is yes, is there an "independently applicable" new source performance standard? 40 C.F.R. § 122.29(b)(2).

a. If yes, the source is a new source. *Id.*

b. If no, "*the source is a new discharge.*" *Id.* (Emphasis added).

Section 122.2 determines whether the construction falls within regulated activity that *may* meet the new source definition. Section 122.29(b)(1) outlines the criteria for determining whether a source is a new source. And Section 122.29(b)(2) resolves whether the activity is a new source or, instead, a new discharge. It is this formula that I apply below.

II. Applying the Correct Test

¶77 As to Step 1, I am largely in agreement with the majority. If there is no new construction, there cannot be a new source. I agree that Shaft 10 is a new construction, and that copper mining is clearly regulated by standards of performance under section 306 of the Clean Water Act. *See* 40 C.F.R. § 440.100. The majority, however, reads the requirement for merely "applicable" standards of performance under Section 122.2 in ***199 **690** defining a new source with the requirement under Section 122.29(b)(2) for an "independently applicable"

standard of performance for an entirely different purpose. *Supra* ¶ 30.

¶78 As a result, the majority's analysis concerning whether or not Shaft 10 is a "mine" takes Step 3 out of order. Indeed, the majority and the parties take it as given that if there is an independently applicable new source performance standard, the construction necessarily meets the definition of a new source. *See supra* ¶¶ 30-32, 37-48; *but see* 40 C.F.R. § 122.29(b). But the text of Section 122.29 does not say this. Instead, it provides:

> A source *meeting the requirements* of paragraphs (b)(1)(i), (ii), or (iii) of this section is a new source only if a[n] [NSPS] is independently applicable to it. If there is no such independently applicable standard, *the source is a new discharger*. *See* [40 C.F.R. § 122.2].

40 C.F.R. § 122.29(b)(2) (emphases added). Section (b)(2) applies on its own terms *after* an agency finds that the definition of a new source in 40 C.F.R. §§ 122.2 and 122.29(b)(1) are met. *Id.*

¶79 Section (b)(2) provides that the reason we look for an "independently applicable [NSPS]" is to determine whether we are looking at a "new source" or "a new discharger." There is no third option, and the regulation presumes that the regulator has made a determination as to the 'new-ness' of the source by the time it reaches (b)(2). *Id.* In other words, once the regulator gets to Step 3, if the new construction is not a new source, it is a new discharger. But the purpose of (b)(2) is *only* to determine whether the new source is, in fact, a new discharger, subject to distinct regulations from a source. *See* 40 C.F.R. §

122.2 ("New discharger"). And in interpreting the regulations here, we do not reach (b)(2).

¶80 Further, in reading together Section 122.2's requirement with 122.29(b)(2)'s requirement, the majority and parties disregard the use of the word "independently," which only appears in Step 3 and not Steps 1 or 2. At Step 1, we are not concerned with whether a construction is a "mine" or not; we look at whether the "industrial categor[y]" is covered under regulations promulgated under Section 306 of the CWA. *See* 67 Fed. Reg. 31,129, 31,135. In 2002, the EPA clarified the purpose of regulations promulgated under Section 306:

> Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from *industrial categories*, and those limitations and standards are incorporated into permits issued under section 402 of the Act.

Id. (Emphasis added).

¶81 Consequently, in determining whether Step 1 is met, we need not determine whether Shaft 10 is in the form of a mine because, as a category, ore mining—and copper mining, specifically—is regulated. *See* 40 C.F.R. § 400.100. The construction in question is of a building, structure, facility, or installation that will discharge pollutants. The "construction commenced" because Shaft 10 was constructed and ancillary changes were made from 2014 onward. Finally, the "construction commenced" after the new source date for ore mining—December 3, 1982. *See* 2006 Memorandum, Appendix B ("Ore Mining and

Dressing”). Thus, I answer Step 1 in the affirmative; Shaft 10 meets the definition of a “new source” as described in Section 122.2.

¶82 ADEQ and the mine argue that because the mining site as a whole has existed since 1912, unless there is an independently applicable NSPS to a mining “shaft” rather than a mining “site” or “mine,” there cannot be a new source from the construction of Shaft 10. I believe this point is neither correct nor necessary for our purposes. *See supra* ¶¶ 37-48; *see also* 49 Fed. Reg. 37,998, 38,043-44. But rather than use this rule for its intended purpose and then look to Step 2 to narrow an otherwise broad definition, the parties, and the majority in turn, begin their test by combining parts of 122.2 and 122.29(b)(2) and muddling the purpose of both. The appropriate focus, as Step 2 provides, is not on abstract definitions of “mine” but on an inquiry into whether the construction is “substantially independent of an existing ***200 **691** source at the site.” 40 C.F.R. § 122.29(b)(1)(iii).

¶83 I believe that Step 1 is met and proceed to Step 2. Step 2 asks whether the construction meets a more narrow new source definition pursuant to Section 122.29(b)(1). I agree with the majority that (b)(1)(i) and (b)(1)(ii) do not apply here, *see supra* ¶¶ 52-56, and thus proceed to (b)(1)(iii).

¶84 Section 122.29(b)(1)(iii), or Step 2(c) in my framework, provides that a construction meets the definition of a new source if “[i]ts processes are substantially independent of an existing source at the same site.” ADEQ must consider a minimum of two factors in making this determination: (1) “the extent to which the new facility is integrated with the existing plant,” and (2) “the extent to which the new facility is engaged in the same general type of activity

as the existing source." *Id.* A construction is not a new source if it merely *could* operate substantially independently, unless, in fact, it actually does. 49 Fed. Reg. 37,998, 38,044 (rejecting a test based on whether a facility could operate substantially independently).

¶85 I would find on de novo review that Shaft 10 is not substantially independent from the existing source. Shaft 10 is "new construction but less than total replacement at existing facilities," *i.e.*, not a new source. *Id.* at 38,043.

¶86 As to factor (1), I would first consider Shaft 10's integration with the existing facilities. The primary means of integration the majority has considered are the Never Sweat Tunnel and Shaft 9, which dewater and ventilate Shaft 10. Dewatering and ventilation are not mere "supplied utilities," but are essential to *and components of* the mining process itself that are not analogous to the list of utilities the EPA states are insufficient for an integration finding. As a former miner and Arizona Mining Reform Coalition advocate testified before the ALJ, dewatering is "essential to underground operations" because without it the water content of the surrounding earth would flood drilled tunnels. The use of Shaft 9, the Never Sweat Tunnel, and Shaft 10 for interlocking systems of ventilation and drainage are not mere utilities (nor are they in any sense "supplied" in the sense that electricity or cooling water are) but are part of the mining process itself and essential physical features of the mine structure.

¶87 I note that even if dewatering and ventilation are mere utilities, the EPA has stated that these connections by themselves are insufficient for a finding that a construction is a new source, not that they cannot be considered as part of such a finding. *See* 49 Fed. Reg. 37,998, 38,043-44. Even

assuming these are utilities, they nonetheless support a finding of the substantial integration of Shafts 9 and 10.

¶88 Shaft 8 also assists in draining groundwater from Shafts 9 and 10, pumping the water through the Never Sweat Tunnel. Further, the mine plans to add additional tunnels for conveying ore to the West Plant Site, including a tunnel for that purpose planned for construction at a depth similar to the Never Sweat Tunnel that would connect directly to Shaft 10. Shaft 9 is also likely to be used for extraction of water itself, as well as development rock. Physically, in addition to the Never Sweat Tunnel, various drill holes connect Shafts 9 and 10, conveying water from Shaft 9 to Shaft 10.

¶89 Looking at the industrial system as a whole, it is apparent that—whether or not Shaft 10 *could* function independently—it does not. Shaft 10 is designed to be fully integrated into the mining process, physically attached to Shaft 9 by lateral tunnels and the Never Sweat Tunnel, as well as to the West Plant Site by a tunnel yet to be constructed. In other words, there is little independent about the construction, and I would find that it does not meet the first half of the (b)(1)(iii), or Step 2(c) test, the extent to which the new facility is integrated with the existing plant.

¶90 The EPA provides clarifying scenarios for the second half of the test in (b)(1)(iii)—whether "the construction results in the facilities or processes that are engaged in the same general type of activity as the existing source." 49 Fed. Reg. 37,998, 38,044; 40 C.F.R. § 122.29(b)(1)(iii). In the first scenario, if a plant begins to produce a new product that is very similar to the product currently being produced, it "would likely be considered ***201 **692** an existing

source." 49 Fed. Reg. 37,998, 38,044. But if a plant producing a final product in an industrial process adds new equipment to produce raw materials for that product, it would likely be considered a new source. *Id.* A second analogy concerns whether the construction "replicates, without replacing" the existing source. *Id.* The regulations give the example of opening the second of two power plants at the same site and concludes the second is a new source. *Id.* But there is no similar replication here. The Magma deposits are exhausted. It is not possible to open a second "factory" when the first is largely shuttered. There is no evidence suggesting why a mere change in mining technique should be determinative as to whether or not the "same general type of activity" is occurring. 40 C.F.R. § 122.29(b)(1)(iii). The function of the source is still the same—copper mining. Consequently, I would find that in weighing the two factors that the EPA has expressly required ADEQ to consider, Shaft 10 is not substantially independent and, therefore, cannot be considered a new source.

¶91 Thus, I would not reach Step 3 of the new source framework I outlined, which would require us to determine whether Shaft 10 is a new source or a new discharge. Such a consideration is unnecessary because Shaft 10, as a construction, is part of an existing source.

¶92 The majority concludes differently for a few reasons, the first being that Shaft 10 is at least 300 feet away from Shaft 9. In this fact-specific inquiry, Shaft 9 is physically connected across those 300 feet with drill holes that drain water into Shaft 10 for pumping. In this context, 300 feet of separation means little when the physical architecture is nonetheless connected, and the site as a whole relies on interconnected mechanisms for ventilation and

dewatering. Further, the Never Sweat Tunnel itself, connecting Shaft 9 and the West Plant Site, is roughly 10,000 feet in length. The scale of the mine's architecture dwarfs the distance between the two shafts. Shaft 10 is merely one component of a revised industrial process—the start of the copper mining process that is continued at various plant sites.

¶93 Second, the majority suggests that Resolution has " 'replicated' the [West Plant Site]" by constructing Shaft 10. *Supra* ¶ 59. In so doing, the majority suggests that the sheer volume of copper supply expected of Shaft 10 is relevant. This is at odds with EPA guidance which provides "if a facility increases capacity merely by adding additional equipment in one or two production steps to remove a 'bottleneck' " it is not a new source. 49 Fed. Reg. 37,998, 38,044. I also disagree with the majority that the cost of construction or future plans for Shaft 9 weigh in favor of finding Shaft 10 substantially independent. *See supra* ¶¶ 56-60. In my view, the former matters little and the latter demonstrates integration all the more. If the majority means to suggest that the cost somehow demonstrates that Resolution could have installed better equipment, I disagree. Facts such as where filtration equipment is installed in the dewatering or pumping process as installed in Shaft 10, or whether the technology has greatly changed since the last permit are not before us, and we therefore cannot make such a judgment even on de novo review.

¶94 Nor do I make much, as the majority does, of the change in mining technique from adits and tunnels to panel caving. *Supra* ¶ 59. The regulations do not distinguish between existing and new sources by way of method, and I cannot find anything in the record

that would allow us to make such a determination on de novo review.

¶95 The EPA guidance states that "if a power company builds a new, but identical and completely separate power generation unit at the site of a similar existing unit, the new unit will be a new source." 49 Fed. Reg. 37,998, 38,044. Accordingly, the majority makes much of Resolution's goal of mining a new orebody. But as was testified to before the ALJ in this case, "[a] mine is constantly constructing ... [t]hat's the nature of a mine." A mine is always "blasting, moving, or blasting more" and while ADEQ applied this fact to the wrong component of the analysis (*i.e.*, Step 1) it is relevant to my determination of Step 2: digging a new shaft to pursue more ore is not replication or duplication. *See* 49 Fed. Reg. 37,998, 38,044. Instead, it is the ***202 **693** continuation of an industrial process as an existing source, or at most an expansion of capacity as permitted without the finding of a new source. *See id.*

¶96 Again, to be fair to the majority, the EPA's list of analogies from 1984 is underinclusive. *See* 49 Fed. Reg. 37,998, 38,043-44. When dealing with complex industrial systems, looking for tidy analogies to only a smattering of categories such as "factory" or "power plant" is not always helpful. And if we and the parties are left asking ourselves (as we did at oral argument) "just how is a mine like a dentist's office," one might reasonably question the usefulness of analogies at all. Nonetheless, to the extent these analogies are persuasive, they point to Shaft 10 being a component of a larger existing industrial process, not an independent construction.

¶97 Whatever a decision to mine another nearby ore body is, it is certainly not akin to opening a new power plant. The product of a mine is ore. It is necessary to

move earth to get it and thus a mine will be continually constructing by adits and tunnels or otherwise. A mine by its nature will—as Resolution's senior manager of Environment Permitting and Approvals testified before the ALJ—"chas[e] the vein" as Magma did for decades, moving from west to east "in search of new orebodies." Shaft 10 is more of the same.

¶98 The ore itself is a necessary input for this industrial process and is a substantially similar input as that which Magma sought prior to the construction of Shaft 10. Shaft 10 is not a full replacement of the facilities already present, as it relies heavily on Shaft 9, the Never Sweat Tunnel, and the panoply of facilities at the site to perform its function. Its mechanisms rely on, and in turn, support through Shaft 9, in dewatering and ventilation. Both processes are essential to ore mining and are not mere "utilities" ancillary to the process. *See* 49 Fed. Reg. 37,998, 38,043. It is in the nature of the mine as it existed before Shaft 10 to pursue ore and therefore Shaft 10 is not substantially independent.

¶99 In short, I find that Shaft 10 is not a new source that would require ADEQ to issue TMDLs before permitting discharge from Shaft 10. Because we must affirm an agency's decision "if there is substantial evidence in support thereof, and the action taken by the agency is within the range of permissible agency dispositions authorized by the governing statute," I would affirm the ruling of the superior court notwithstanding the fact it, and ADEQ, performed the new source analysis incorrectly. *Holcomb v. Ariz. Dep't of Real Estate*, 247 Ariz. 439, 446, ¶ 26, 451 P.3d 795, 802 (App. 2019).

¶100 I respectfully dissent.

***San Carlos Apache Tribe, et al. v. State of Arizona, et al.*, Superior Court of Arizona, Maricopa County, LC2019-00264-001 DT (Mar. 25, 2021).**

Honorable Sigmund Popko

JRAD RULING – ADMINISTRATIVE DECISION AFFIRMED

Appellants, SAN CARLOS APACHE TRIBE and the ARIZONA MINING REFORM COALITION, seek judicial review of an administrative decision of Appellee, ARIZONA WATER QUALITY APPEALS BOARD. That Board upheld a decision of Appellee, ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, to renew AZPDES Permit# AZ0020389 (the "Permit") issued to Appellee-Intervenor, RESOLUTION COPPER, LLC.[1] This Court has jurisdiction pursuant to A.R.S. §§ 12-905(A) and 49-323. For the following reasons, this Court affirms.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[2]

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[1] The State of Arizona is also named as a party-appellee. In addition, two named appellants, the Concerned Citizens and Retired Miners Coalition and Save Tonto National Forest, were dismissed from this review proceeding by minute entry dated March 4, 2020. The Board appears in these review proceedings as a nominal party.

[2] Because the parties are familiar with the factual and procedural history of this case, it is not recounted in full detail here. This Court must "view the evidence in a light most favorable to upholding" the administrative decision. *Baca v. Arizona Dept. of Econ. Sec.*, 191 Ariz. 43,46 (App. 1997).

Resolution Copper, LLC ("RC") owns and operates a copper mine site located in the mountains outside of Superior, Arizona. The relevant site is, to a very large extent, the same site as the previous Magma Copper Mine site. Active ore extraction took place on the site from about 1912 until about 1996. After that time, however, activity still took place on the site, including dewatering of at least one mine shaft. Dewatering was halted in 1998. In 2004, RC took operational control of the site. It restarted dewatering operations in 2009. It also proposed to actively mine copper ore from the "Resolution Deposit." Mining that deposit necessitates the construction of a new mine shaft ("Shaft # 1 0") as well as certain support structures such as a truck wash bay, a water treatment plant, a concentrator, and a tunnel connecting the east and west portions of the site.

It is undisputed that the various past and present owners/operators of the site have obtained the necessary pollutant discharge permits from either the EPA or ADEQ and that the site has been continually permitted ever since such permits were required.[3] RC last sought renewal of the Permit from ADEQ during July 2015. ADEQ renewed the Permit in January 2017.[4] Appellants appealed to the Board which referred the matter to the Office of Administrative

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[3] Just because a site is permitted to discharge pollutants, however, does not mean that pollutants were, in fact, discharged. There is evidence in the record that RC has not discharged any wastewater into Queen Creek because a local irrigation district has been purchasing the water that would otherwise be discharged into Queen Creek. Of course, the fact that RC has refrained from discharging permitted wastewater in the past is no guarantee that it will continue to do so in the future.

[4] The record shows that the Permit was first issued to Magma Copper Company by the EPA during 1975.

Hearings for an evidentiary hearing. The hearing was held over the course of seven days during February 2018. The ALJ's recommended decision found for Appellees on all but one issue. As to the new source issue, the AU recommended that the Board remand the matter to ADEQ for the purpose of conducting a new source analysis pursuant to 40 C.F.R. § 122.29(b). The ALJ, however, did not conclude that RC's new constructs were, in fact, "new sources."

The Board acted consistently with the ALJ's recommendation. After hearing from the parties, the Board ordered ADEQ to submit the required new source analysis. In so doing, the Board authorized ADEQ to disregard certain factual findings and conclusions of law reached by the ALJ. ADEQ subsequently issued the required analysis, and the Board engaged in further review. After considering the new ADEQ analysis and hearing from the parties, the Board affirmed ADEQ's renewal of the Permit. Appellants timely sought judicial review.

SCOPE AND GENERAL STANDARDS OF REVIEW

The prescribed standard of review for judicial review of administrative decisions is a deferential one.

> The court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E). This Court does not substitute its judgment for that of the agency. *DeGroot v. Arizona Racing Comm 'n*, 141 Ariz. 331, 336 (App. 1984) ("A trial court may not function as a "super agency" and substitute its own judgment for that of the agency

where factual questions and agency expertise are involved.").

When an ALJ makes recommended findings of fact and conclusions of law, but an agency later rejects or modifies those recommendations, this Court's jurisdiction is limited to reviewing the final agency decision. See *Smith v. Arizona Long Term Care Sys.*, 207 Ariz. 217, 220, ¶ 15 (App. 2004). See also A.R.S. § 41-1092.08(B). Thus, in this case, this Court reviews the Board's final decision dated June 25, 2019. A.R.S. § 49-323(B) ("Final decisions of the board are subject to appeal to superior court pursuant to title 12, chapter 7, article 6.") (emphasis added) (footnote omitted).[5]

The Board's standard of review of ADEQ's decision to renew the Permit is similarly deferential.

> Decisions by the director shall be affirmed by the appeals board unless, considering the entire record before the board, it concludes that the director's decision is arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid.

A.R.S. § 49-324(C).

ISSUES ON REVIEW

Appellants jointly argue that the Board's determination that RC's new constructs on the mine site were not "new sources" was reached contrary to law, arbitrarily or capriciously, and was not supported

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[5] The Board's rules permit it to incorporate by reference an AU's recommended findings of fact and conclusions of law. A.A.C. R2-17-125(D). Any such findings and conclusions so incorporated are part of the Board's final decision and subject to this Court's review.

by substantial evidence. They also argue that the Board improperly allowed ADEQ to disregard certain of the AU's recommended findings of fact and conclusions of law. The Coalition separately argues that the Board improperly failed to award it its reasonable attorneys' fees and costs incurred during the administrative proceedings.

DISCUSSION

DEFERENCE TO ADMINISTRATIVE AGENCY LEGAL INTERPRETATIONS

It has long been Arizona law that a court is not bound by an administrative agency's legal interpretations. See, e.g., Alvord v. State Tax Comm 'n, 69 Ariz. 287, 292 (1950). Nonetheless, courts have given weight to administrative legal interpretations. !d. See also *Di Giacinto v. Arizona State Ret. Sys.*, 242 Ariz. 283, 286, ~ 9 (App. 2017) (giving "great weight" to an agency's interpretation of its own regulations); *Phelps Dodge Corp. v. Arizona Dept. of Water Res.*, 211 Ariz. 146, 153; ~ 25 (App. 2005) (giving "considerable deference"). *See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *But see Stambaugh v. Killian*, 242 Ariz. 508, 512, ~ 25 (2017) (Bolick, J., concurring) (questioning whether deference to administrative legal interpretations erodes separation of powers principles).

The Arizona legislature has recently spoken on this issue. A statute now instructs that

> [i]n a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous

> determination that may have been made on the question by the agency. Notwithstanding any other law, this subsection applies in any action for judicial review of any agency action that is authorized by law.

A.R.S. § 12-910(E) (as amended by Laws, 2018, ch. 180, § 1 (H.B. 2238)) (eff. 4/11/2018). ADEQ, however, argues that this provision does not apply because the underlying administrative proceeding was brought by Appellants against the state, ADEQ, and the Board but not the "regulated party"- RC. Respondent ADEQ Combined Answering Brief, filed 6/18/2020, at pp. 10--11. See also Combined Response Brief of Appellee Resolution Copper Mining, LLC, filed 6/19/2020, at pp. 4-6.

This Court concludes that A:R.S § 12-910(E), as amended in 2018, applies to this case. The clause at issue begins "in a proceeditig brought by or against the regulated party, the court shall decide ... " (emphasis added). The "proceeding" referred to in the statute means the judicial review proceeding in which the "court" must make determinations. That the underlying administrative hearing initially only involved Appellants and ADEQ as the permitting agency does not avoid the operation of the 2018 amendments.[6]

Moreover, the Permit at issue is held by RC, making it the real party in interest. ADEQ offers no explanation as to why it makes sense for a court to give deference to administrative legal interpretations when the real party in interest only becomes a named

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[6] RC intervened in the appeals before the Board. Order Granting Motion to Intervene by Resolution Copper Mining, LLC, dated 2/13/2017.

party by intervention but not when that same real party was a named party from the beginning of the administrative hearings.

Accordingly, and pursuant to A.R.S. § 12-910(E), this Court may not "defer" to ADEQ's legal interpretations of either the applicable statute or regulations. However, refraining from giving deference is not the same thing as refusing to give consideration. *See Thomas & King, Inc. v. City of Phoenix*, 208 Ariz. 203, 206, ~ 8 (App. 2004) ("While we give the administrative interpretation of a statute or ordinance some weight, we need not defer to an agency's legal conclusions and may substitute our own.") (emphasis added). The legislature did not define "deference," but in legal parlance to "defer" or give "deference" to another entity carries the connotation that the entity's "action, proposal, opinion, or judgment should be presumptively accepted." "Deference," BLACK'S LAW DICTIONARY (11th ed. 2019). This Court may, therefore, give thoughtful consideration and the weight it believes due to an agency's interpretations of statutes and regulations with which it is charged with implementing while at the same time not harboring a belief that the agency's interpretation is entitled to a presumption of acceptance.

NEW SOURCE ANALYSIS

Neither party was able to cite any case law with facts similar to those presented here and addressing the issue whether new constructs at a mine site constitute, either singly or cumulatively, a "new source" within the meaning of the applicable controlling regulations, 40 C.F .R. § 122.2 and §

122.29(b)(l-2).[7] Neither has this Court's research uncovered any published decision, federal or state, addressing a similar fact pattern. Thus, like the ALJ, the Board, and the parties, this Court must wrestle with the applicable statutes and regulations directly.

Appellees have consistently argued that RC's new constructs are not, by definition, new sources within the meaning of the regulations. After reviewing the applicable statutes and regulations, the record, and after considering the parties' respective arguments, this Court agrees with ADEQ.

> New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:
>
> (a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or
>
> (b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

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[7] Many of the federal regulations at issue in this case have corresponding state regulations. E.g., A.A.C. R18-9-A901(25) ("new source" definition); R18-9-A905(A)(1)(e) (incorporating by reference the July 1, 2003 version of 40 C.F.R. § 122.29). No party has suggested that resolution of this appeal turns on any difference between the text of a federal regulation and a corresponding state regulation. The parties have almost exclusively relied on citations to federal statutes and regulations. Accordingly, this Court does the same.

40 C.F.R. § 122.2 (italics in original) (underscoring added). The parties agree that in this case the section 306 "standards of performance" is a reference to the New Source Performance Standards ("NSPS") applicable to copper mines found in 40 C.F .R., Part 440, Subpart J. These NSPS became effective as of December 3, 1982. ADEQ 6 [NQB015289].

Another regulation reinforces the requirement that there must be a NSPS "independently applicable" to any putative new source. Otherwise, it is not a new source within the meaning of applicable regulations.

(b) Criteria for new source determination.

> (1) Except as otherwise provided in an applicable [NSPS], a source is a "new source" if it meets the definition of "new source" in § 122.2, and
>
> (i) It is constructed at a site at which no other source is located; or
>
> (ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
>
> (iii) Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.
>
> (2) A source meeting the requirements of paragraphs (b)(l) (i). (ii),

> or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. See § 122.2.

40 C.F.R. § 122.29(b)(1-2) (italics in original) (underscoring added).

When analyzing whether something is a new source within the meaning of these regulations, it is crucial to understand why the distinction between existing sources and new sources was first recognized.

> The distinction between existing and new sources is not based on special concerns arising from the new addition of pollutants to a water body. Rather, Congress recognized that the ability to use the [improved] pollution control equipment differed between existing and new sources.

Jeffrey M. Gaba, New Sources, New Growth and the Clean Water Act, 55 ALA. L. Rev. 651,656 (2004). See also 49 Fed. Reg. 38043 (Sept. 26, 1984) [AMRC 000332] ("This [existing source new source] distinction is based on the concept that new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies.").

On the facts of this case, however, the reason behind the distinction between the two types of sources does not apply because that reason has already been fulfilled. There was testimony at the administrative hearing that even had RC's new constructs been deemed new sources within the meaning of the applicable regulations, the effluent

discharge limits allowed under the Permit would not have changed. In other words, the Permit already requires compliance with the most stringent effluent discharge limits required by law. Transcript, 02/05/2018, at pp. 60: 1-61 : 1; 147:22-148:3. See also Combined Response Brief of Appellee Resolution Copper Mining, LLC, filed 06/19/2020, at p. 1:13-2:19 (arguing that the Permit already requires compliance with the most stringent effluent discharge limits). Appellants have not challenged this assertion.

Given this fact, then, it appears that Appellants' motivation for opposing the Permit is not to require compliance with more stringent effluent discharge requirements, but to stop issuance of the Permit altogether as part of an effort to halt mining at the site. Queen Creek is an "impaired" waterway, and federal law apparently makes it extremely difficult, if not impossible, for a new source to obtain a permit to discharge effluent into impaired waterways. See generally *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-1012 (9th Cir. 2007) (discussing 40 C.F.R. § 122.4(i) and its proscription of discharges into bodies of water that fail to meet applicable water quality standards). Thus, the Court is mindful that Appellants are taking a distinction between existing sources and new sources that was created in one context and seeking to apply it in an entirely different context.

An independently applicable NSPS is an essential part of the definition of "new source." Without such an NSPS there can be no "new source." A review of Subpart J reveals, however, that the applicable effluent limitations operate on "mines," "mills," or both. 40 C.F .R. § 440.100. "Mine" is defined extremely broadly and includes all of the equipment that is involved extracting ore and working with it. !d. §

440.132(g). More specifically, the NSPS applicable to copper mines applies to "mine drainage from mines." !d. § 440.104. "'Mine drainage' means any water drained, pumped, or siphoned from a mine." !d. § 440.132(h). Thus, Subpart J operates on the mine as a whole and the effluent discharges from it and not to any particular construct associated with the mine.

This reading of the regulations is supported by a case cited by the parties that addresses the meaning of a new source in the context of electric power generation. In *Mahelona v. Hawaiian Elec. Co., Inc.*, 418 F. Supp. 1328 (D. Haw. 1976), an electric company sought to continue its discharge of cooling water into the ocean. To do so it needed an NPDES permit.[8] One issue before the court was whether the electric company's cooling water discharge facility was a "new source" for NPDES purposes. The court noted that while the cooling water discharge facility met the "literal" definition of “source,” it was not a "new source" as defined by law, in part, because there were no federal "regulations applicable solely to" the cooling water discharge facilities. *Id.* at 1335.[9] Instead, the court looked to what was generating the effluent in the first instance, the steam electric generating plants. /d. (citing 40 C.F.R. Part 423). Likewise, and as did the Board, this Court looks at the mine as a whole as the operative unit for the new source analysis.

This Court has considered Appellants' contrary readings and interpretations of the regulations. It

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[8] The cooling water was considered a regulated "pollutant" under applicable law.

[9] In addition, the court further ruled that, under the facts of that case, the cooling water discharge facility was not even a "source" under the statutory definition, let alone a "new source." *Mahelona*, 418 F. Supp. at 1335.

concludes that the above reading is the one consistent with legislative intent, especially in light of the fact that the Permit already requires compliance with the most stringent effluent discharge standards. Accordingly, the Board's determination that there was no "new source" within the meaning of the applicable regulations was not unlawful, arbitrary or capricious, an abuse of discretion, or lacking in a substantial basis.[10]

BOARD REMAND TO ADEQ

As noted above, after receiving the AU's recommended decision, the Board held further proceedings. At the conclusion of those proceedings, the Board remanded the matter to ADEQ for the purpose of" conducting a new source analysis as required by 40 C.F .R. § 122.29(b)." Board Order, dated 11/19/2018, at p. 1 [WQAB 35].[11] In so doing, and after receiving written submissions from the parties, it permitted ADEQ to disregard certain of the ALJ's recommendations so ADEQ could perform a new source analysis without being restricted by them.

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[10] ADEQ is required to notify EPA when it issues or renews AZPDES permits, and the EPA plays a monitoring role over state-issued discharge permits notwithstanding its delegation of permit authority to a state. See Combined Response Brief of Appellee Resolution Copper Mining, LLC, filed 6/19/2020, at p. 5:17-27 (discussing various federal statutes and regulations). While federal oversight does not relieve this Court of its obligation to correctly interpret the law, EPA is empowered to step in and take action if it believed the Permit is inappropriate. *See id.*

[11] Indeed, it was the AU's recommendation that ADEQ be required to perform a more complete new source analysis. AU Decision, dated 10/15/2018, Conclusion of Law,-¶ 71.

Appellants now object that the Board's action in this regard is grounds for overturning the Board's final decision and vacating the Permit.

First, this Court concludes that it lacks jurisdiction to review the Board's November 19, 2018 order. This Court may only review the Board's "final" decisions. A.R.S. § 49-323(B). *See also* A.R.S. §§ 12-901(2), -902, -905(A). The November 19 order remanded the matter to ADEQ for further analysis which the Board would then consider in making its final decision. Thus, the November 19 order itself was not a final decision subject to judicial · review under the Administrative Review Act. *See Arizona Physicians IPA, Inc. v. Western Arizona Reg 'I Med. Ctr.*, 228 Ariz. 112, 114, W 10--11 (App. 2011). If a party believed that the November 18 order contained terms in excess of the Board's authority, that party should have sought review by way of special action. See id. at 114, ¶ 12. *See also Johnson Utilities LLC v. Arizona Corp. Comm 'n*, 1 CA-CV 18-0170, 2019 WL 190295, at~ 15 (mem. dec.) (Ariz. App. Jan. 15, 2019) (noting that agency interlocutory orders "are generally only reviewable · through discretionary special action review").[12]

Second, even if this Court had jurisdiction to review the Board's remand order, it would find that Appellants have waived this issue. The Board issued the remand order to ADEQ on November 19; 2018. ADEQ submitted the required new source analysis on February 15, 2019 [WQAB 40]. It was only after that submission, on March 8, 2019 (109 days later), that Appellants first objected to the Board's remand procedure of requiring ADEQ to submit the new

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[12] Cited for persuasive value only pursuant to Rule 111(c)(1)(C), Rules of the Supreme Court of Arizona.

source analysis and allowing ADEQ to disregard specified recommendations.[13] If Appellants believed the Board engaged in an improper procedure, Appellants should have objected within a reasonable time after the Board's November 19 order. They should not have refrained from objecting by waiting to see if ADEQ's supplemental new source analysis would have benefitted them in some fashion. See A.A. C. R2-17-126(A) (requiring motions to rehear or review be filed within 30 days of decision complained of).[14] For this reason also, this Court does not address the issue.[15]

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[13] Although Appellants did argue that ADEQ should ,only be allowed to disregard one of the AU's recommended conclusions of law; Appellants did not argue to the Board that it was arbitrary to allow ADEQ to ignore any recommendations until after ADEQ submitted the supplemental new source analysis. Cf Appellants' Joint Statement Regarding Specific Conclusions of Law the Water Quality Appeals Board Should Reject, dated November 13, 2018 [WQAB 33] with Coalition Appellants' Motion to Review and Reconsider the Board's November 19, 2018 Order, dated 03/08/2019 [WQAB 42].

[14] The rule technically only applies to the Board's final decisions, but Appellants cited the rule as support for their motion to reconsider. Coalition Appellants' Motion to Review and Reconsider the Board's November 19, 2018 Order, dated 03/08/2019, at p. 2:3. See also ADEQ's Response in Opposition to the Coalition Appellants' Motion to Review and Reconsider the Board's November 19, 2018 Order, dated 03/25/2019, at pp. 2-3 (arguing untimeliness of Appellant's motion).

[15] To the extent Appellants assert that the Board failed to comply with A.R.S. § 41-1092.08(B) by failing to notify the state legislature's presiding officers of its rejection of certain of the ALJ's conclusions of law, this Court notes that the Board made such a notification by letter dated August 19, 2019 [WQAB 60]. The statute does not set any deadline by which an agency must notify the presiding officers nor does it provide any consequence for an agency's failure to seasonably notify the presiding officers. Had the Board not issued its August 19letter, a

THE BOARD'S DECISION RE ATTORNEYS' FEES AND COSTS

Lastly, the Coalition challenges the Board's denial of its attorneys' fees and costs incurred during the administrative hearings before the OAH and the Board. Prior to the Board's final decision of June 25, 2019, the Coalition filed its application for attorneys' fees and costs. The Coalition cited A.R.S. § 41-1007 as the statutory authority for its request [WQAB 38]. ADEQ responded in opposition [WQAB 39]. In its final administrative decision, the Board denied the Coalition's application.

This Court reviews the Board's decision on this issue applying the same standard of review found in A.R.S. § 12-910(E) ("The court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.").

Under the statute, fees and costs may only be awarded if both the following are true:

> 1. The agency's position was not substantially justified.
>
> 2. The [applicant] prevails as to the most significant issue or set of issues unless the reason that the person prevailed is due to an intervening change in the law.

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remand for that purpose may have been the appropriate remedy. *See Ruben v. Arizona Med. Bd.*, 1 CA-CV 18-0079, 2019 WL 471031, at~ 30 (mem. dec.) (Ariz. App. Feb. 7, 2019) (cited for persuasive value pursuant to Rule 111(c)(l)(C), Rules of the Supreme Court of Arizona.

A.R.S. § 41-1007(A). ADEQ and the Coalition, unsurprisingly, take opposing views with respect to each of the two requirements.

Because both requirements must be true, this Court must affirm the Board's decision even if only one requirement is not met. A.R.S. § 12-910(E). The record shows that ADEQ's position from the beginning of the permit renewal process was that RC's new constructs at the mine site were not, by definition, "new sources" because there were no NSPS independently applicable to them. As explained above, this Court agrees with that reading of the applicable regulations. In light of that agreement, this Court cannot also agree that ADEQ's "position was not substantially justified." Accordingly, the Board's decision denying an award of attorneys' fees and costs pursuant to A.R.S. § 41-1007 is affirmed.

CONCLUSION & ORDERS

This Court is not unaware of the controversy created by the proposed resumption of mining at the old Magma Mine site. Portions of the population are concerned about environmental degradation generally and harm that would come to land held sacred by local tribes. Other portions welcome the resumption because of the economic benefits and jobs it would bring to the area. The Court is not insensitive to these competing values. As a private citizen and human being, this judicial officer may very well have views on the subject. The Court's decision, however, must be based, not on any such personal views, but, rather, on a dispassionate analysis of the law as best this Court can understand it in light of the record and the parties' briefs.

IT IS THEREFORE ORDERED affirming the Board's Final Administrative Decision dated June 25, 2019 in its cause numbers 17-00 I and 17-002.

IT IS ALSO ORDERED remanding this matter to the Board and/or ADEQ for further proceedings, if any.

IT IS ALSO ORDERED that no further matters remain pending afld this ruling constitutes this Court's final decision for purposes of Rule 13, Rules of Procedure for Judicial Review of Administrative Decisions, and Rule 54(c), Arizona Rules of Civil Procedure.

IT IS ALSO ORDERED signing this ruling as a formal order of the Court.

The Hon. Sigmund G. Popko

Judicial Officer of the Superior Court

***San Carlos Apache Tribe, et al. v. State of Arizona, et al.* Office of Administrative Hearing, No. 17-001-WQAB (Oct. 15, 2018).**

ADMINISTRATIVE LAW JUDGE DECISION

HEARING: February 5, 6, 7, 8, 9, 12, and 13, 2018

AMINISTRATIVE LAW JUDGE: Thomas Shedden

FINDINGS OF FACT

Introduction and Background[16]

1. On April 24, 2017, the Arizona Water Quality Appeals Board ("Board") issued a Notice of Hearing setting the above-captioned consolidated matter for hearing on June 7, 2017 at the Office of Administrative Hearings in Phoenix, Arizona. The matter was continued and the hearing was conducted on February 5, 6, 7, 8, 9, 12 and 13, 2018.[17]

2. This matter arises under the auspices of the federal Clean Water Act, 33 U.S.C. §§ 1251 – 1387 and Arizona's implementation of that program under ARIZ. REV. STAT. sections 49-255.01 – 265 (generally referred to as the "AZPDES" program). The implementing administrative rules are found at 40 C.F.R. Parts 122, 123 and 4401, and Ariz. Admin. Code Title 18, Chapter 9, Article 9. To administer this program, the Arizona Department of Environmental Quality ("ADEQ") issues AZPDES permits that regulate discharges of pollutants from point sources to navigable waters.

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[16] Subheadings are used to assist the reader and the information in any subsection is not necessarily applicable solely to that subsection.

[17] The docket for this matter is publicly accessible at https://portal.azoah.com/oedf/documents/17-001-WQAB/index.html .

3. At issue are two appeals of ADEQ's decision to issue to Resolution Copper Mining LLC ("RCM")[18] a renewal of Permit No. AZ0020389 (the "Permit"), Authorization to Discharge Under the Arizona Pollutant Discharge Elimination System.

4. RCM is constructing an underground copper mine and related facilities in Pinal County. RCM's mine includes new and proposed works, and works that were previously used by Magma Copper and BHP Copper. Part of RCM's mine is on land that was formerly part of the Magma mine, but part is also on lands never owned or developed by Magma or BHP.

5. Appellants raised a number of issues in their appeals, but the evidence they presented was limited primarily to whether RCM's activities constitute a new source as defined in the Code of Federal Regulations, and whether the Permit ensures compliance with the water quality standard for copper.

6. Permit No. AZ0020389 was originally issued to Magma Copper Company by the U.S. Environmental Protection Agency ("EPA") on August 31, 1975. The permit has been in effect since 1975 through renewals issued to Magma, BHP Copper Inc., and RCM, first by EPA, then by ADEQ.[19]

7. On December 18, 2017, ADEQ and RCM filed a Request for Judicial Notice. Through Case Management Order No. 8 dated January 17, 2018, the

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[18] Resolution Mining Company LLC is an LLC between Resolution Copper Company, a wholly owned subsidiary of Rio Tinto (55%) and BHP Copper, Inc. (45%), a wholly owned subsidiary of BHP Billiton.

[19] EPA granted primacy to ADEQ to administer the AZPDES program (Arizona's version of the NPDES) on December 5, 2002.

tribunal took judicial notice of the facts set forth in paragraphs 1, 2, and 4 through 41 of Appendix A to that Request for Judicial Notice, and as to Exhibits 1 through 33 filed in support of the Request. Among other things, those facts provide information related to the history of the Permit.[20]

8. RCM's application for the Permit was filed with ADEQ on July 9, 2015. ADEQ deemed the application administratively complete on August 7, 2015.

9. On January 19, 2017, ADEQ issued to RCM the Permit, which has an effective date of January 23, 2017 and an expiration date of January 22, 2022.

10. The Arizona Mining Reform Coalition, the Concerned Citizens and Retired Miners, and Save Tonto National Forest (generally referred to as the "Coalition Appellants" or the "Coalitions"), filed with ADEQ a single Notice of Appeal on December 19, 2016.

11. The San Carlos Apache Tribe filed with ADEQ a Notice of Appeal on December 21, 2016, and filed with the Board an Amended Appeal on February 16, 2017.

12. While the appeals were pending at the Board, the Board consolidated the two matters and granted RCM's motion to intervene.

13. The Permit authorizes RCM to discharge pollutants to an unnamed wash tributary to Queen Creek near the Town of Superior, which is in the middle Gila River Basin. More specifically, the Permit authorizes RCM to discharge "mine site stormwater runoff from Outfall 001 and treated mine water,

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[20] The Motion and Appendix are at docket entry 56, and the exhibits at entries 59 and 61.

industrial water and seepage pumping from Outfall 002 from the Superior Operations in Pinal County [.]".

14. The Superior Operations (or mine) are located along the northern boundary of the Town of Superior. Surface facilities are located 0.22 miles north of Queen Creek in two non-contiguous areas identified as the West Plant Site ("WPS") and the East Plant Site ("EPS"). The WPS is located immediately northwest of the Town of Superior. The EPS is located two miles east of the Town near the intersection of Highway 177 and U.S. Highway 60.[21]

15. Outfalls 001 and 002 are side-by-side and both are located at Township 2S, Range 12E, Section 4, Latitude 33° 17' 02" N, Longitude 111° 07' 06" W.[22]

16. The EPS and WPS site are connected by the Never Sweat Tunnel that Magma constructed in during the 1970s. Other connections between the two sites have been backfilled.

17. Magma Copper began mining at the WPS in about 1912, and mining occurred in that area until 1996, at which time BHP owned the mine. Dewatering continued until May 6, 1998, when the dewatering pumps in the mine were shut off and the underground workings were allowed to fill with water.

18. After an "earn-in" period, RCM took control of the operations in 2004 and proposes to construct and operate an underground copper mine at the EPS, with ore being transferred to, and processed at, the WPS.

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[21] Exhibit AMRC 13, Figures 1.1 and 1.2 show the EPS and WPS, with figure 1.2 also showing the Magma workings and RCM's Shaft 10. Exhibit AMRC 8, Figures 1.5-3a and 1.5-3b show the EPS with the lateral extent of the Magma mine (aka Legacy Mine), and RCM's proposed mining area and features.

[22] Outfall 002 was added in 2010; prior to that time all discharges were through Outfall 001.

19. In March 2009, RCM started dewatering the existing Magma facilities to facilitate a feasibility study for its proposed copper mining operation. Prior to that time, the facility was considered by RCM to be an inactive metal mining facility.

20. Since 2004, RCM has constructed facilities including Shaft 10, a cooling tower, rock stockpiles, wash bays, and a Mine Water Treatment Plant ("MWTP"). RCM has plans to build a concentrator at the WPS and at least one tunnel to connect the EPS with the WPS.

The Issues for Hearing

Issue 1 – Is RCM a New Source

21. 40 C.F.R. §122.29(b), Criteria for new source determination, sets out the process for determining whether a "source" is a "new source." As pertinent to this matter, in essence, the regulation requires a finding that the source is a "new source" as defined in §122.2 and that it either "totally replaces the process or production equipment that causes the discharge of pollutants at an existing source" or its "processes are substantially independent of an existing source at the same site."

22. Appellants contend that RCM's activities are such that the mine is a "new source" as defined in the Code of Federal Regulations.

23. In their appeals, each Appellant also contended that RCM is a new discharger, but during the proceedings, each withdrew that allegation. Although the Tribe reasserted this allegation in its closing argument, it presented no substantial evidence on the issue.

24. ADEQ does not agree that RCM is a new source because mining at the site began in 1912, which was

before the performance standards for copper mines were promulgated, and because these standards apply to mines, not mine shafts or the other features that RCM has constructed.

25. This issue is addressed below.

Issue2: Whether the effluent limitation for copper will ensure compliance with the water quality standards

26. Appellants assert that the Permit's effluent limitation for copper will not ensure compliance with the applicable water quality standard. This issue is addressed below.

Issue 3: Whether removal of the 2010 permit's limit on total dissolved solids violates the CWA's anti-backsliding provision

27. The 2010 permit included provision that prohibited discharges with total dissolved solids (TDS) of greater than 1200 milligrams per liter ("mg/l"). At RCM's request, ADEQ eliminated this requirement from the Permit.

28. Appellants contend that this was a violation of the Clean Water Act. ADEQ found that elimination of the TDS limitation was not a violation of the CWA's antibacksliding provision because RCM provided new information warranting the change.

29. This issue is addressed below.

Issue 4: Simultaneous discharge from 001 (stormwater) and 002 (mine drainage)

30. Appellants assert that ADEQ failed to consider the impact to the receiving water of a simultaneous discharge from Outfalls 001 and 002.

31. ADEQ presented credible evidence showing that in developing the Permit limits, ADEQ

considered simultaneous discharges from both outfalls.

Issue 5: The Public Meeting

32. Among the facts for which Judicial Notice was taken, is a description of the public-comment and public-hearing process for the Permit. Those facts show that ADEQ conducted two public hearings, with the second conducted because there was only one member of the public in attendance at the first.

33. Appellants presented no substantial evidence or legal argument to show that there was a violation of statute or rule.

Issue 6: Whether the draft fact sheet failed to disclose pertinent information or otherwise misled the public

34. Appellants presented no substantial evidence or legal argument to show that ADEQ's draft fact sheet was in violation of statute or rule.

Issue 7: Whether the Appellants meet the requirements to bring an appeal

35. In its Closing Argument, ADEQ argues that none of the Appellants meet the requirements to bring an appeal, which requirements are set out in ARIZ. REV. STAT. section 49-323.

36. In ADEQ's answers to Appellant's appeals, it did not assert that Appellant's did not meet the requirements of section 49-323, nor did it request that the appeals be dismissed on that basis.

37. In ADEQ's disclosure statements, it did not assert as a legal theory that Appellants did not meet the requirements of section 49-323.

38. ADEQ first raised the issue in Motions to Dismiss filed May 23, 2017. Those Motions were

denied in Case Management Order No. 3 issued on July 20, 2017.

39. In its Closing Argument, ADEQ asserts that:

> (1) The San Carlos Apache Tribe is not adversely impacted and will not with reasonably probability be adversely impacted by the Permit issued by ADEQ and therefore has no standing to challenge ADEQ's issuance of the Permit under ARIZ. REV. STAT. section 49-324(A).
>
> (2) Appellants Concerned Citizens and Retired Miners and Save Tonto National Forest are unincorporated associations and therefore lack the capacity to challenge ADEQ's issuance of the Permit. And,
>
> (3) Appellant Arizona Mining Reform Coalition, Inc. failed to comply with ARIZ. ADMIN. CODE section R2-17-103(A) and therefore lacks the capacity to challenge ADEQ's issuance the Permit.

40. In its Response Brief, ADEQ adds that the Concerned Citizens and Retired Miners and Save Tonto National Forest do not have standing to bring an appeal.

Witnesses at hearing

ADEQ

41. Andy Koester, Manager of the AZPDES Permit Unit, who was the supervisor during the processing of RCM's application. Mr. Koester supervised ADEQ's permit drafters as part of the process, and he also drafted ADEQ's Summary and Response to Public

Comments for the Permit on behalf of ADEQ. Mr. Koester testified about ADEQ's processes and the decisions it made regarding issuance of the Permit.

42. Jason Sutter, Senior Surface Water Hydrologist – Mr. Sutter has been involved with ADEQ's TMDL study of Queen Creek throughout the life of that study.

RCM

43. Casey McKeon, Ph.D. – RCM's Environmental Manager. Dr. McKeon has worked at RCM since 2005. Dr. McKeon testified about current and historic activities at the RCM site, including preparing applications for permits.

44. Under subpoena issue at the request of the Appellants, Victoria Peacey, RCM's Senior Manager of Environment, Permitting and Approvals. Ms. Peacy testified about current and historic activities at the RCM site, including preparing applications for permits.

The Coalitions

45. Roy Chavez – Chairperson of, and spokesperson for, the Concerned Citizens and Retired Miners Coalition. Mr. Chavez testified about the Concerned Citizens and as to his and other members' concerns about potential environmental impact of RCM's proposed discharges.

46. John Krieg - President of Save Tonto National Forest. Mr. Krieg lives approximately ten miles downstream from the RCM mine and he gets his water from the aquifer beneath Queen Creek. Mr. Krieg testified about Save Tonto National Forest and about his personal concerns about the potential environmental impact of RCM's proposed discharges.

47. Roger Featherstone – one of the founders of the Arizona Mining Reform Coalition and now its Board secretary. Mr. Featherstone testified about the Reform Coalition, the other two Coalition Appellants, and as to his personal concerns about the potential environmental impact of RCM's proposed discharges.

48. Henry Munoz – a member of both AMRC and the Concerned Citizens and Retired Miners Coalition. He has lived in Superior for 62 years, he has been its mayor and its town manager, and he is a former miner. Mr. Munoz testified about his involvement with the two Coalitions and as to his personal concerns about the potential environmental impact of RCM's proposed discharges.

49. Danette Schepers – a member and supporter of the Arizona Mining Reform Coalition who resides in Superior. Ms. Schepers and her husband own property on both sides of Queen Creek about six or seven miles downstream of RCM's Outfalls. The Schepers' well is approximately 500-600 feet from Queen Creek. Ms. Schepers testified as to their use of water from the aquifer, her enjoyment watching wildlife in and near Queen Creek, and as to her concern that RCM's proposed discharges might impact the quality of water in her well and affect the wildlife in the area.

The Tribe

50. Terry Rambler – the Tribe's elected Council Chairman and an enrolled member of the Tribe. Mr. Rambler testified about the structure of Tribe's government and the governing Council's duties and responsibilities. Mr. Rambler is a 100%, "fullblooded" Apache whose family and clan have historic ties to the land in the Queen Creek area. Mr. Rambler testified

as to his and other Apaches' relationship to the land in general and the Queen Creek area specifically.

51. Vernelda Grant – the San Carlos Apache Tribal Historic Preservation Officer (i.e., the cultural official dealing with historic preservation issues on and off tribal lands). Ms. Grant has expertise in Southwestern and Apache archaeology. Ms. Grant testified as to her duties working to protect Apache historic and cultural resources within the Tribe's traditional homelands, traditional cultural properties in the Queen Creek watershed, the importance of the Apache names for such places, the use of those "place names" in prayer and oral histories, and the power that these place names carry.

52. Ms. Grant explained that she was reluctant to provide too many specific details about these sites because "collectors" were often trying to learn where the sites are located.

53. James T. Wells, PhD, PG – Chief Operating officer at L. Everett & Associates, an environmental consulting firm that assists clients with water quality and soil quality issues. Dr. Wells has been involved in similar professional work for about twenty-five years. Dr. Wells testified about operations at the RCM site, the Queen Creek watershed, and as to his opinions about the Permit and related environmental issues.

54. John R. Welch, Ph.D. - an archaeology professor at Simon Fraser University and the director of the school's professional graduate program in heritage resource management. Dr. Welch is a Registered Professional Archeologist who has worked on cultural and historic issues with all the Arizona Apache tribes, the Bureau of Land Management, and various private employers. Dr. Welch testified as the Apaches' historic homelands, including lands that had

been ceded to the United States, and he provided background or foundation evidence for various documents that had been accepted into evidence.

55. Seth Pilsk – a botanist and ethnobotanist who has been employed by the Tribe since 1990, and who has been a coordinator for the Tribe's Elders Cultural Advisory Council. Mr. Pilsk testified about the Apache Natural World Project, and its efforts to learn about traditional cultural elements of the natural world, including plants, animals, humans, elements of the earth and sky, place names and geography. He also testified as to the Apaches' use of plants, animals and foodstuffs that are present in the Queen Creek area, and the sacred nature of those plants, animals and foodstuffs.

56. Mr. Pilsk explained that he was hesitant to testify because he had gained information that the elders did not believe belonged in the "white world."

57. Dee Randall – Forest Manager for the Tribe's Forest Resource Program. Mr. Randall is an enrolled member of the Tribe. Mr. Randall testified as to the four guiding principles by which the Tribe manages its forest lands, Traditional Ecological Knowledge (TEK), and about various Apache clans.

The Resolution Ore Body

58. RCM will be mining ore from what is now known as the Resolution ore body located at the EPS. Although Magma owned this ore body, it is a separate ore body from that which Magma mined.[23]

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[23] Exhibit SCAT 26, at page 5, shows the Magma ore body (identified as the Replacement Ore body), historic workings (horizontal lines emanating from Shaft 9), and the Resolution ore body (marked as the >1% copper zone).

59. The Resolution ore body is a porphyry type deposit containing about 1 to 1.5% copper, whereas the Magma ore was a replacement body with a high percentage of copper (up to 5%).

60. The Resolution ore body ranges from about 4500 to 7000 feet below ground surface (“bgs”), which is about is about 2000 feet deeper than the Magma ore body. The footprint area of the Resolution ore body is a little over one square mile and the ore body is up to 1600 feet thick.

61. The Magma mine was mined using adits and tunnels.

62. The RCM ore will be mined using panel caving, which is a variation of the high-volume mining technique known as block caving. In this method, caving is induced by undercutting the ore zone removing its ability to support the overlying rock material, causing it to collapse. As the ore is extracted from the bottom of the mine, fractures will gradually propagate upward through the geologic sequence and will eventually intersect the ground surface (i.e., there will be ground subsidence).

63. Ore from the RCM mine will be sent via a yet-to-be-built underground tunnel to the WPS for processing.

Existing and Proposed Works

64. Magma Copper began mining at the WPS in about 1912. As Magma “chased the vein” of copper, it constructed eight shafts (Nos. 1 through 8) on the west side of Superior (i.e. at the WPS).

65. Although the Magma ore body was not located under the EPS, in the 1970s, Magma constructed Shaft 9 at the EPS to facilitate continued mining of the Magma ore body. Shaft 9 and the EPS are

connected to the WPS through the Never Sweat Tunnel.

66. When the Magma mine was operational, the Never Sweat Tunnel was used to transport copper ore from Shaft 9 to the processing facilities at the WPS.

67. Some of the underground workings at the Magma mine were backfilled after the mine closed in 1996. The majority of stoped areas within the mine were backfilled with a 10:1 ratio of cement and tailings; portions of tunnels and drifts were backfilled; and connections between the east and west sides of the mine at the 3200, 3300 and 3500-foot levels were backfilled.

68. The majority of the Magma mine's shafts and tunnels are no longer in operation or accessible. Exceptions include the Never Sweat Tunnel and Shafts 8 and 9. Of the preexisting Magma mine workings, RCM plans to continue to use Shaft 9 and the Never Sweat Tunnel, both of which were used by RCM during its construction of Shaft 10. RCM may also use other existing shafts, but not the tunnels.

69. Shaft 9 was used for support during construction of Shaft 10 (e.g. ventilation), and when RCM's mine is operational it will continue to be used for support purposes, but not for extraction of ore.

70. RCM constructed Shaft 10 between 2008 and December 2014 at a ballpark, estimated cost of $500 million. Shaft 10 is located about 300 feet from Shaft 9.

71. Underground work to rehabilitate and extend the Never Sweat Tunnel in preparation of sinking Shaft 10 began in September 2006; pre-development, surface level work on the shaft began in February 2007; actual sinking of the shaft began in January 2010; and Shaft 10 was completed in 2014.

72. Shaft 10 is thirty feet in diameter and extends to 6943 feet bgs. Shaft 9, extends to 4882 feet bgs, but RCM plans to extend Shaft 9 to about the same depth as Shaft 10.

73. RCM's development-rock was transported through the Never Sweat Tunnel to the WPS. The mineralized development rock was stockpiled at the Loadout Intermediate Stockpile and the inert rock was used for construction and the reclamation of the existing Magma facilities.

74. RCM does not necessarily consider the mineralized development rock to be ore, but it will process that rock once its mill is operational.

75. There are several connections between Shafts 9 and 10.

76. Water (mine drainage) drains from Shaft 9 into Shaft 10. This water, and mine drainage flowing directly into Shaft 10, is pumped out and conveyed through the Never Sweat Tunnel to the WPS, where it commingles with drainage water from the historic Magma workings at the WPS, and is treated in the MWTP. The WPS is dewatered through Shaft 8.

77. From 2012 through 2016, RCM removed about 628 gallons of water per minute from Shafts 9 and 10, which is effectively the inflow into those facilities.

78. From 1963 until pumping stopped in 1998, Magma was removing an average of 542 gallons per minute from its mine. Between 2009 and 2012, RCM dewatered the existing mine, removing both the water that had accumulated between 1998 and 2009 and the inflows occurring during that time.

79. Stormwater at the WPS is conveyed to Indian Pond (aka CP-105 Pond), which has a storage capacity of 68 acre-feet. Indian Pond is equipped with pumps

capable of pumping 2000 gallons per minute. Usually the stormwater is pumped to the MWTP for treatment, but it can be pumped to Tailings Pond 6 for evaporation.

80. Stormwater discharges through Outfall 001 are permitted only in the 100-year, 24-hour storm event.

The Mine Water Treatment Plant

81. The MWTP became operational during 2010-permit term.

82. The MWTP uses chemical precipitation and a high density sludge process with hydrated lime and soda ash to remove dissolved metals and sand filtration to remove the remaining suspended solids.

83. The main source of the water sent to MWTP is from dewatering the underground mine workings, but small volumes of industrial water and seepage pumping are also sent to MWTP, as is stormwater from the WPS.

84. Mr. Koester testified that the terms “mine water” (the term used in the Permit) and “mine drainage” are used interchangeably. He also testified that “industrial water” includes water from the cooling tower blow-down, and that “seepage pumping” would include any water that is pumped from any seeps coming from containment areas.

85. Although authorized to discharge the treated mine water/drainage and stormwater, rather than discharging that water, RCM delivers it to the New Magma Irrigation and Drainage District. RCM’s intention is to continue to send its treated water to New Magma, rather than discharging it.

86. There were no discharges to either outfall during the term of the 2010 permit, during which time

discharges from Outfall 002 were not allowed because the MWTP effluent had total dissolved solids exceeding the 2010 permit limit of 1200 mg/l.

The Receiving Water

87. The Permit authorizes RCM to discharge "mine site stormwater runoff from Outfall 001 and treated mine water, industrial water and seepage pumping from Outfall 002 from the Superior Operations in Pinal County [.]". Outfalls 001 and 002 are both located at Township 2S, Range 12E, Section 4, Latitude 33° 17' 02" N, Longitude 111° 07' 06" W.

88. The receiving water is an unnamed wash tributary to Queen Creek in the middle Gila River Basin. The wash drains to the Creek in the segment between the headwaters and the Town of Superior Wastewater Treatment Plant outfall, which is identified as Reach 14A.

89. The designated uses for the receiving water are Aquatic and Wildlife warm water (A&Ww), Partial Body Contact (PBC), Fish Consumption (FC), and Agricultural Livestock watering (AgL)

90. The receiving water is listed on the section 303 impaired-waters list for copper (2002), lead (2010), and selenium (2012).

91. As of the hearing dates, ADEQ had not completed the total maximum daily load or "TMDL" for the receiving water. Because RCM is an existing discharger, the Permit's allowable copper discharges are being incorporated into the TMDL calculations.

Discharge Limitations

92. As pertinent to this matter, there are two classes of discharge limitations: TBELs (or technology-based effluent limitations) and WQBELs

(or water quality based effluent limitations). These limits exists for a number of pollutants.

93. The WQBELs are set by the State and are based on the receiving water's designated uses. The applicable narrative water quality standards are described in ARIZ. ADMIN. CODE section R18-11-108, and the applicable numeric water quality standards are listed in section R18-11-109 and Appendix A of Title 18, Chapter 11, Article 1.

94. TBELs are promulgated by the EPA (and listed in the Code of Federal Regulations). The TBELs for copper mines are found at 40 C.F.R. 440, Ore Mining and Dressing, Subpart J and apply to mine drainage.[24]

95. For copper mines, there are three TBELs: best practicable technology ("BPT"), best available technology ("BAT"), and the new source performance standards ("NSPS").[25] Because ADEQ found that RCM is not a new source, the NSPS were not applied, and the TBELS used for the Permit were BAT and BPT.

96. To determine the appropriate effluent limitations for a permit, the most stringent TBEL is determined. Then that TBEL is compared to the applicable WQBELs, with the more stringent of the two being applied. This is done for each specific pollutant.

97. Mr. Koester prepared Exhibit ADEQ 15 as a demonstrative aid to show the effluent limitation guidelines applicable the Permit. There is a typographical error in the exhibit in that the units for

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[24] Mr. Koester considered "TBEL" and "effluent limitation guideline" to effectively be synonymous.

[25] There is a fourth TBEL, best conventional pollutant technology, but that TBEL does not apply to copper mining.

total suspended solids ("TSS") should be mg/l not g/l, and on page two, the subheadings under the Maximum Allowable Discharge Limits have been reversed.

Whether RCM is a New Source

98. Appellants argue that Shaft 10, Shaft Nos.9 and 10 Area Intermediate Rock Stockpile and Loadout Intermediate Rock Stockpile, the East Plant CCTs, and the Wash Bay & Expanded Wash Bay are new sources within the meaning of 40 C.F.R. §§ 122.2 and 122.29.

99. Mr. Koester testified that while processing RCM's application, ADEQ did not consider 40 C.F.R. § 122.29, because it found that RCM did not meet the definition of new source found in 40 C.F.R. § 122.2.

100. Mr. Koester testified to the effect that ADEQ considers the entirety of the former Magma mine site and the proposed RCM site (and any adjacent land and infrastructure) to be the source from which there may be a discharge of pollutants. ADEQ also considers the entire mine to be the "site" and the "facility" as those terms are defined in the applicable regulations.

101. ADEQ takes the position that the mine is the only source (i.e. that Shaft 10, the stockpiles, the CCT and the wash bays are not themselves sources).

102. As such, and considering that construction at the Magma mine began in the early 1900s (before the 40 C.F.R. Part 440, Subpart J Effluent Limitation Guidelines for copper mines were promulgated), ADEQ did not assess whether any particular building or structure located at the RCM site was a new source.

103. In its November 18, 2016 Response to Public Comments addressing the "new source" issue, ADEQ stated:

> The standards of performance under section 306 of the Clean Water Act applicable to ore mining are listed in 40 CFR 440, Subpart J. The technology based effluent limitation guidelines and the new source performance standards for ore mining were both promulgated in 1982. The current RCM[ ] site was previously the Magma mine that was in operation from 1912 to 1995. The RCM[ ] operations and construction is not a New Source because the operation is on a site that was active as an ore mine prior to 1982.

Exhibit RCM 58 p. 8 (underscore added).

104. In its answer to the Coalitions' Notice of Appeal, ADEQ responded as follows to the Coalitions' allegation that RCM mine was a new source:

> Outfalls 001 and 002 are existing sources because they do not meet the definition of a new source. A new source designation requires that a building, structure, facility, or installation that may discharge pollutants commence construction after promulgation of the standards of performance for that source. A.A.C. R18-9-A901(25); 40 C.F.R. 122.2. The standards of performance for copper ore mining were promulgated in 1978 (originally promulgated under the Base and Precious Metals Subcategory). See 43 Federal Register 29771. This

> Permit is for Outfalls 001 and 002 which are part of a facility that was constructed and began operations in 1912. Because this Permit is for a facility that was constructed prior to 1978, it is not a new source.

ADEQ Answer p.5 (underscoring added).

105. In its Prehearing Disclosure, ADEQ provided that:

> ADEQ determined that the renewal of the Permit was for an existing discharger and existing source based on the definitions found in A.A.C. R18-9-A901, 40 C.F.R. 122.2 and 122.29.
>
> ****
>
> Also, ADEQ determined that the facility was constructed and discharged pollutants prior to the promulgation of standards for copper ore mining; therefore, it does not meet the requirements of a new source. See A.A.C. R18-9-A901(25). The expansion of the existing mine does not create a new discharger or new source based on the statutory and regulatory definitions.

ADEQ Prehearing Disclosure pp. 3-4 (underscore added).

106. In its Opening Statement, ADEQ provided that:

> ADEQ personnel will then testify that using the definitions contained within this regulatory program, Outfall 002 is not a new source. A new source requires that a building, structure,

> facility, or installation that may discharge pollutants commence construction after promulgation of the standards of performance for that source. ADEQ will testify that the standards for copper mining were promulgated in 1978, well after the beginning of operations at the mine. Therefore, Outfall 002 is not a new source.

ADEQ Opening Statement p. 8 (underscoring added).

107. In its Closing Argument, ADEQ provided:

> ADEQ properly issued the AzPDES permit no. AZ0020389 because the Resolution Copper mine is not a new source under the Clean Water Act. The mine does not meet the definition of "new source" contained in 40 C.F.R. § 122.2 because it was in operation prior to the promulgation of new source performance standards in 1982. This determination is consistent with all prior permits issued by both ADEQ and the US EPA. Moreover, as mines work ore deposits, they necessarily add features to facilitate those mining operations. Those features are not new sources because there are no performance standards that apply to them. This is true of open pit mines as well as underground mines. The permitted source is the mine, not particular features within the mine. This determination is supported by not only the language of the applicable statutes and rules, but also by EPA guidance. Further, Appellants' arguments that the

> mine is a new source are … inconsequential as well as incorrect because ADEQ included water quality standards (WQS) based limits in the permit, and the WQS-based limits are more stringent than the rule-based new source performance standards.

ADEQ Closing Argument pp. 2 -3 (underscore added).

108. RCM's Permit application shows that the rock stockpiles produce stormwater and rock water, the CCT produces blowdown water, and the wash bays produce wash and stormwater, all of which is treated in the MWTP and permitted to be discharged through Outfall 002. During the hearing, ADEQ, through Mr. Koester's testimony, acknowledged that Shaft 10 is a structure at the mine that is "related to the extraction, removal or recovery of metal ore" at the RCM site, and that water pumped out of Shaft 10 is "mine drainage."

109. There is no dispute that Shaft 10, the rock stockpiles, the CCT, and the expanded wash bay were constructed after the Subpart J performance standards were promulgated.

110. Nevertheless, according to Mr. Koester, prior to issuing the Permit, ADEQ did not independently assess whether Shaft 10 was, itself, a new source under 40 C.F.R. § 122.2 and 122.29 because there are "no performance standards associated with a shaft."

111. Mr. Koester provided similar testimony to the effect that because there are no performance standards specifically for rock stockpiles, CCTs, or wash bays, ADEQ did not assess whether any of these mine features were new sources within the meaning of the applicable regulations.

112. At the hearing, through Mr. Koester's testimony, ADEQ took the position that any site with a copper mine that began operations prior to the applicability date of the Subpart J Guidelines could never be a new source under 40 C.F.R. § 122.2.

113. Thus, according to ADEQ, regardless of what copper-mining features RCM adds or constructs, even if it conducts copper mining operations in other parts of Pinal County, as long as RCM treats the mine drainage on the existing site, these new features will not be new sources. Mr. Koester testified to the effect that these new features would not be new sources because by adding more structures RCM is just expanding the Magma mining operations and producing more mine drainage.

114. Mr. Koester testified that because ADEQ had determined that RCM did not meet the threshold definition of "new source" under 40 C.F.R. § 122.29(a), it was not necessary for ADEQ to also address the additional new-source criteria in § 122.29(b).

115. Mr. Koester spoke to EPA's Elizabeth Sablad about the relationship between 40 C.F.R. § 122.2 and §122.29, and she confirmed that the analysis is a two step process. But Ms. Sablad did not provide an opinion as to whether ADEQ's determination that RCM is not a new source was correct, and EPA did not have a copy of RCM's permit application or any other documents relating to the specific buildings or structures located at the RCM site.

116. Although ADEQ did not consider 40 C.F.R. § 122.29(b) when evaluating RCM's application, during the hearing, ADEQ took the position is that RCM

would not be a new source if those criteria were considered.[26]

117. Mr. Koester testified that even if RCM was a new source, the applicable discharge limitations would not be more stringent than those in the Permit. Appellants argue that RCM's discharges will contribute to the violation of water quality standards, so no permit can be issued to RCM based on 40 C.F.R. § 122.4.

118. When adopting the new source criteria found in 40 C.F.R. § 122.29, EPA provided the following comment in the Federal Register:

> [EPA suspended the existing rule in response to] industry criticism that the language of the third criterion … was overly broad and could be interpreted as classifying some structures as new sources that more appropriately should be considered as modifications of existing sources. On the same day, (45 FR 59343), EPA proposed that, in those situatio ns where there was new construction but less than total replacement at existing facilities, the classification decision should be based on the degree to which the constructed facility functions independently of the existing source. The substantial independence test was aimed at ascertaining whether an existing

[26] For its part, in a Motion for Summary Judgment filed on December 18, 2017, RCM argued that although Shaft 10, the rock stockpiles, the CCTs, and the wash bays were sources, these were not new sources within the meaning of § 122.29(b). RCM's Motion was denied in Case Management Order No. 8 issued on January 17, 2018. In its Closing Argument, RCM reasserted its position.

source which undertakes major construction that legitimately provides it with the opportunity to install the best and most efficient production processes and wastewater treatment technologies should be required to meet new source performance standards at that facility….

***

Today's amendment, therefore, adds two factors to be examined in deciding if new processes are substantially independent of existing facilities.

The first factor is the degree of integration of a new process with existing processes. Under this first factor, if the new facility is fully integrated into the overall existing plan, the facility will not be a new source. For example, a plant may decide to improve the quality of a product by installing a new purification step into its process, such as a new filter or distillation column. Such a minor change would be integral to existing operations and would not require the facility to be reclassified as a new source. However, on the other extreme, if the only connection between the new and old facility is that they are supplied utilities such as steam, electricity, or cooling water from the same source or that their wastewater effluents are treated in the same treatment plant, then the new facility will be a new source.

[Standing alone, that a new process or plan uses existing wastewater treatment equipment, is not sufficient to rule out finding that it is a new source.]

A newly constructed facility can clearly meet the statutory definition of "source," which covers any "building, structure, facility, or installation from which there is or may be the discharge of pollutants" (section 306(a) of the Act). When a similar claim was raised in *Mahelona v. Hawaiian Electric Co.*, 9 ERC 1625 (D. Hawaii 1976), the Court held that the point source was the facility generating the discharge, not the system treating it.

The second clarifying factor that EPA has added is the extent to which the construction results in facilities or processes that are engaged in the same general type of activity as the existing source. Under this second factor, if the proposed facility is engaged in a sufficiently similar type of activity as the existing source, it will not be treated as a new source…. Of course, to the extent the construction results in facilities engaged in the same type of activity because it essentially replicates, without replacing, the existing source, the new construction would result in a new source.

The test in § 122.29(b)(1)(iii) [CPR § 122.66(1)(iii)] will continue to be whether the processes of the new facility are substantially independent.

> ***
>
> In a similar situation, if a facility replicates an existing facility, the fact that it shares or uses common land with another source does not prevent it from being considered a new source. The same criteria would be applied on a case specific basis.
>
> 49 FR 37998 New Source Criteria at § V (underscoring added).

119. EPA's September 28, 2006 Memorandum "New Source Dates for Direct and Indirect Dischargers," (Exhibit ADEQ 6) provides:

> This memorandum summarizes EPA regulatory requirements for determining what sources are new sources. Specifically, this document provides a summary of relevant regulatory criteria for consideration in this determination as well as a listing of applicable new source dates used in making new source determinations.
>
> ***
>
> If construction results in a new source, the discharger will be affected differently depending on what changes occurred at the site. The discharger's entire facility may be subject to new source standards, or, if the new source is a new installation of process equipment at an existing facility, part of the facility may be subject to existing source standards and other parts of the facility subject to new source standards.

***

The term “source” means any building, structure, facility or installation from which there is or may be a discharge of pollutants. Because the statute broadly defines “construction” as “any placement, assembly, or installation of facilities or equipment” a number of activities may give rise to new source status….

***

EPA emphasizes that a source, whether it is a direct or indirect discharger, may be either something as large-scale as a facility or something as small as a piece of equipment installed as part of an existing operation. The CWA defines “source” to include “any building, structure, facility, or installation” and defines construction to include “any placement, assembly, or installation of facilities and equipment.” Thus, under the CWA, “construction” refers both to the construction of any building, structure, or facility, and to the installation of equipment. A “new source,” then, is the placement, assembly or installation of facilities or equipment which commenced after the new source date and which satisfies the other regulatory criteria discussed below….

***

[T]he “source” of a discharge from an industrial operation is the facility generating the discharge, not the system

treating it. *Mahelona v. Hawaiian Electric Company, Inc.*, 418 F. Supp 1328 (Aug. 27, 1976), 49 Fed. Reg. 38044 (Sept. 26, 1984). More specifically, the source of the discharge is the production or wastewater generating processes of the operation. The treatment system used to reduce pollutants in the waste stream, on the other hand, is not the source of the discharge....

***

One type of [construction] activity is the "placement, assembly, or installation of facilities or equipment." 40 CFR 122.29(b)(4)(i)(A), ... The scope of the activities covered highlights the fact that the regulations capture not only the construction of a new or renovated building, structure, or facility, but also smaller scale activities, such as the installation of equipment (e.g., a new process tank).

***

If construction commenced after the new source date, there is a possibility that the source could be considered a new source if it meets the regulatory criteria on 40 CFR 122.29(b) or 403.3(m)(1). However, if the construction begins before the new source date, the source will generally be considered an existing source, not subject to new source standards, unless there was other construction after the new source date which constitutes a "total replacement"

> or is “substantially independent from the existing source” (see 40 CFR 122.29(b)(ii) and (iii) and 40 CFR 403.3(m)(1)(ii) and (iii)). Similarly, <u>if construction commenced before the new source date, and ends after the new source date, the source would generally be considered an existing source, unless there was other construction after the new source date which constitutes a total replacement or is substantially independent from the existing source</u>.

(Underscoring added.)

120. RCM had entered into evidence a number of other permits and facts sheets and elicited testimony about those documents from Mr. Koester to the effect that the RCM Permit was consistent with these other permits in that they too consisted of only one source. In most cases however, Mr. Koester was not familiar with the permits or fact sheets and had not seen these before the hearing.

Whether the Permit’s effluent limitation for copper ensure compliance with the applicable water quality standards

121. Appellants assert that the Permit will not ensure compliance with Arizona’s water quality standards for copper applicable to Queen Creek because: (1) ADEQ failed to include a mass-based limit on the discharge of copper in violation of 40 C.F.R. § 122.45(f)(1) and ARIZ. ADMIN. CODE section R18-9-A905(A)(3)(e); (2) based on the Draft TMDL, RCM’s discharges of copper will prevent Queen Creek from ever attaining the copper water quality standard; and (3) ADEQ should not have calculated the water quality standard for copper

based on the hardness of the water samples submitted by RCM.

122. In setting the Permit limits, ADEQ followed its normal practices, which are for the most part set out in EPA's Technical Support Document (Exhibit ADEQ 3) and EPA's Permit Writer's Manual (Exhibit ADEQ 2).

Mass-based limits

123. The Permit limits RCM's discharges of copper to a daily maximum of 17 micrograms (ug) per liter and a maximum monthly average of 8.5 ug/l.

124. Because the Permit does not include either a mass-based limit on copper discharges or a limit on RCM's discharge flow rate, there is no limit on the mass of copper that RCM can discharge.

125. Arizona's water quality standards for copper are expressed in concentrations, not mass.

126. 40 C.F.R. § 122.45 provides in pertinent part: "(f) Mass limitations. (1) All pollutants limited in permits shall have limitations, standards or prohibitions expressed in terms of mass except: … (ii) When applicable standards and limitations are expressed in terms of other units of measurement".

Total Maximum Daily Load

127. A total maximum daily load (or TMDL) is the maximum amount, or load, of a water quality parameter that can be carried by a surface waterbody on a daily basis without causing an exceedance of surface water quality standards. TMDL calculations are made for waters listed as impaired on the State's 303(d) list.

128. Because Queen Creek is impaired for copper, ADEQ is developing a TMDL for the Creek, but as of the hearing dates, it was in draft form. The TMDL

does not need to be finalized before ADEQ can issue an AZPDES permit.

129. The draft TMDL shows that for the impaired reaches of Queen Creek to meet applicable water quality standards and the TMDL, reductions in the daily loading of dissolved copper must occur.

130. Any discharge of copper to Queen Creek adds an additional load to the creek.

131. Although RCM's MWTP has a maximum capacity of 2700 gallons per minute, the Permit does not limit the discharge flow-rate because there is no regulatory maximum for flow rates.

132. Because the Permit does not limit the flow rate at which RCM may discharge, in the draft TMDL ADEQ accounted for discharges from RCM through concentration-based waste load allocations ("WLA").

133. EPA recognizes that concentration-based WLAs can be appropriate when discharge volumes are not known.

134. Consistent with its policy, even though the Permit shows a maximum flow rate from the MWTP, ADEQ used a concentration-based WLA because there is no prescribed limit on the discharge flow-rate. Mr. Sutter explained that ADEQ's policy has been applied to other TMDLs that were approved by EPA.

135. Mr. Sutter testified that as long as RCM remains in compliance with its concentration-based WLA, it will be in compliance with the TMDL. This is the case because even though RCM's discharges would add additional loading to the Creek, the discharge would also increase the flow rate in the Creek, which would cause the target load to increase as well.

Average Hardness

136. Copper is a hardness-dependent metal, meaning the standards vary based on the hardness of the receiving water. This is because the toxicity of copper in water is dependent on the hardness of the water, with the toxicity increasing as the hardness of the water decreases.

137. As such, the water quality standards for copper are specified not as fixed concentrations but rather as a set of formulas in which hardness is a variable.

138. As pertinent to this issue, ADEQ received from RCM ten to twelve samples of the receiving water from Queen Creek that were analyzed for hardness, and sixty-five samples of effluent from the MWTP that were analyzed for hardness and for copper.

139. Mr. Koester considered sixty-five samples to be an unusually high number, and he explained that because the samples were being statistically analyzed, more samples is better.

140. The receiving-water samples were taken from monitoring locations known as QCAMP-1, which is approximately 370 feet upstream of the confluence of Queen Creek and the unnamed wash into which Outfall 002 discharges, and QCAMP-2, which is located approximately 335 feet downstream from that unnamed wash and Queen Creek. These locations are also referred to as AMP-1 and AMP-2.

141. The hardness of the RCM samples ranged from 53 mg/l to 270 mg/l, with an average of 128 mg/l. The hardness of the water in Queen Creek's Reach 14A increases going downstream and the hardness upstream of RCM's discharge point is lower than downstream of that discharge point.

142. There is no rule specifying what hardness value must be used. Using the average hardness has been ADEQ's practice since it began issuing AZPDES permits, and that practice has been approved by EPA.

143. When setting permit limitations, ADEQ conducts an analysis to determine whether there is a "reasonable potential" for a water quality standard to be exceeded. For copper, ADEQ considers both acute and chronic toxicity, with the limits for chronic toxicity being more stringent than those for acute toxicity. As such, in setting permit limitations, ADEQ uses the average value for hardness rather than the lowest value because the average value better reflects conditions related to chronic toxicity.

144. ADEQ used the 128 mg/l average to determine the water quality criterion for the receiving water, because it found this value to be representative of the portion of Reach 14A to which RCM discharges. Using 128 mg/l hardness, ADEQ calculated the water quality standard to be 11 ug/l.

145. For the sixty-five effluent samples provided by RCM, the average copper level was 2.7   g/l, the maximum was 9.7   g/l, and the standard deviation was 1.8   g/l.

146. Based on this data and statistical analysis methods set out in the Technical Support Document (Exhibit ADEQ 3), ADEQ set the Permit limits for copper at 8.5 ug/l on a monthly average basis and 17 ug/l as the daily maximum.

147. Considering these values, ADEQ determined that there was less than a 1% probability that RCM's discharges would exceed the standard of 11 ug/l. Mr. Koester's opinion was that this means that the discharge of treated effluent from RCM will not cause

or contribute to a violation of a water quality standard.

148. RCM's sixty-five effluent samples had a hardness of between 350 and 400 mg/l. As such, the toxicity of the copper in RCM's samples is less than it would be in water with a hardness of 128 mg/l.

149. Reach 14A is usually dry, meaning that any discharge that occurs is likely to be to a dry river bed, and the toxicity of the discharges would be a function of the hardness of the effluent.

150. Mr. Koester was of the opinion that in a discharge during a rain event, it is likely that the hardness in the Creek would be increased above the average value of 128 mg/l because the effluent's average hardness is greater than 128 mg/l.

151. Mr. Koester determined that as long as RCM's discharges meet the Permit's discharge limitations, the discharges will meet the water quality standard for Queen Creek and will not cause or contribute to a violation of the water quality standard.

Whether removal of the effluent limitation for TDS violate the anti-backsliding rule

152. In order to implement the Clean Water Act's goal of continued further progress towards eliminating pollutant discharges, EPA established an "antibacksliding" policy reflected in the NPDES regulations at 40 C.F.R. § 122.44. This provision prohibits the reissuance of an NPDES or AZPDES permit with limitations, standards, or conditions less stringent than those in the previous permit unless the circumstances on which the previous permit was issued have materially and substantially changed, with that change constituting cause for a permit modification.

153. The 2010 permit includes a limit on total dissolved solids (TDS) of 1200 mg/l. Although installing a reverse osmosis unit was not a condition of the 2010 permit, RCM planned to meet the 1200 mg/l limit by constructing an RO unit, but this was not done.

154. In its application for this Permit, RCM requested that the 1200 mg/l limit on TDS be removed and ADEQ agreed to do so, finding that there was no backsliding violation.

155. When the 2010 permit was issued, the MWTP was not operational, so no effluent was available for whole effluent toxicity (WET) tests. Instead, WET testing was conducted on simulated effluent from a bench-scale study. That WET testing showed failures at TDS of 1200 mg/l, which was adopted as the 2010 permit limit.

156. The MWTP became operational during the 2010-permit term and with the current application, RCM submitted the results from WET tests of samples for MWTP effluent taken in 2013 to 2015.

157. RCM also submitted TDS influent and effluent data from 2009-2015. The TDS concentration has declined from an estimated average of 6000 mg/L in 2009 to the current average concentration of 2100 mg/l.

158. The WET testing results demonstrated that all three surrogate WET species passed acute and chronic toxicity testing criteria at TDS concentrations of 1900 to 2140 mg/l. ADEQ found that this data suggest the TDS is not causing toxicity.

159. The Permit requires RCM to conduct WET testing in any month for which the TDS exceeds 2140 mg/l.

160. The WET testing results for effluent from the MWTP is information that was not available when the 2010-permit was issued, and that information would have justified application of a less stringent TDS effluent limit if the information had been available in 2010. Consequently, the removal of the TDS limit is allowed pursuant to the exception listed in 40 C.F.R. § 122.44(l)(2)(B)(1).

161. ADEQ also considered the Clean Water Act section 402(o)(3)'s absolute limitation on backsliding. Because there are no applicable TDS standards to be applied, ADEQ determined that the removal of the TDS limit does not result in a violation of the anti-degradation requirements.

Information about the Coalition Appellants

162. Arizona Mining Reform Coalition ("AMRC") is a not-for-profit conservation organization. AMRC was unincorporated until 2017, and became incorporated on June 14, 2017.

163. AMRC is an association of groups and individuals that provides educational and technical assistance to its members and the general public. Its mission is to ensure that responsible mining contributes to healthy communities, a healthy environment, and when all costs are factored in, a net benefit to Arizona.

164. AMRC consists of sixteen member groups and about 5200 individual members. Save Tonto National Forest and Concerned Citizens and Retired Miners Coalition are unincorporated associations and are both organizational members of AMRC.

165. AMRC has participated in agency decisions regarding RCM, and to Mr. Featherstone's recollection, it has participated in every permitting decision to date.

166. Save Tonto National Forest is an organization whose purpose includes educating its members and the public about RCM and advocating against adverse environmental effects from the mine. Save Tonto National Forest has approximately 30 to 40 members in the Superior area and as many as 200 members in total.

167. Save Tonto National Forest participates in meetings with the National Forest Service regarding RCM.

168. Concerned Citizens and Retired Miners Coalition is an organization formed for the purpose of supporting responsible mining and protecting theenvironment. Concerned Citizens and Retired Miners Coalition has approximately thirty active members.

169. Concerned Citizens and Retired Miners Coalition joined this AZPDES permit appeal to advance its interests, and it actively participates in public meetings about the RCM mine.

Information about the San Carlos Apache Tribe

170. The San Carlos Apache Tribe is a federally recognized Indian Tribe.

171. The Tribe is located on the San Carlos Apache Reservation ("Reservation") of approximately 1.8 million acres in eastern Arizona.

172. The Reservation is located within the much larger aboriginal territory of the Tribe, which once covered many millions of acres throughout eastern New Mexico, most of Arizona, and into the Republic of Mexico.

173. The lands within the Queen Creek and Middle Gila River watersheds were a part of the Apache aboriginal homelands. Mr. Rambler explained that to

the Apaches, these ancestral lands will always be their land.

174. The Tribe has an Amended Constitution and Bylaws adopted in 1954. The Tribe's governing body is the San Carlos Council. Article V, Section 1 sets forth the Council's duties.

175. The Tribe's government, acting through the Council, officially opposes RCM because it believes that the mine will harm the Apache people, the Apache ancestral homeland, and the Apache way of life.

176. The Tribe's individual members do not have the financial wherewithal, the legal knowledge, or the equipment and supplies need to appeal ADEQ's decision to issue the Permit.

177. Mr. Rambler testified to the effect that the Council has a duty to protect the well-being, health, and safety of the Tribe's members, to preserve and promote Apache culture, and to represent the Tribe and act in all matters that concern the welfare of the Tribe and its members.

178. As an elected official, Mr. Rambler is concerned that discharges from RCM will affect the Apache way of life because those discharges will affect the water in the area.

179. The Apache people believe that it is through respect for the land, the animals and the environment that they are tied to their Creator, and that this respect makes Apache prayers powerful.

180. Some Apaches have clan origins from the Queen Creek area, particularly the Pinal Band or Cottonwood Band called T'iis Tsebán Band, and the Surrounded by Rocks Clan, Tse Binest'i'e.

181. Members of the these bands, including Mr. Rambler and his brother, go to places in the Queen Creek watershed and use those places for prayers and prayer services.

182. Tribal members including Mr. Rambler and his brother collect plants in the area including along the Queen Creek riparian areas.

183. A "Traditional Cultural Property" is a property or place that is eligible for the National Register of Historic Places because of its association with a community's cultural practices and beliefs that are rooted in the community's history and, maintains the continuity of that community's traditional practices and customs.

184. There are at least five Apache Traditional Cultural Properties within the Queen Creek watershed. These are places that have been identified in Apache oral histories, prayers and songs, and that have significance to Apaches as part of origin stories, unique ecosystems and unique mountain ranges, for prayers, and for gathering plants and foodstuffs.

185. The Tonto National Forest required RCM to alter its test-drilling plans to avoid impacting Apache cultural resources located in the Queen Creek watershed.

186. The Western Apache Natural World Project acquires traditional cultural information from Apache elders about all elements of the natural world including plants, animals, birds, reptiles, insects, humans and human anatomy, elements of the earth, elements of the sky, place names and geography, and almost anything having to do with what the Apache people consider to be alive.

187. The Western Apache Natural World Project also acquires information about pre-reservation diet,

the lifestyle that supported that diet, and traditional Apache healthcare and support systems to deal with chronic healthcare problems facing Apaches today.

188. The Western Apache Natural World Project has identified over 500 Apache plants that are used for food, medicine, as well as other things that Apache people use for everyday and ceremonial life, and many of them are found in the Queen Creek area.

189. Streams, seeps and springs are important in Apache culture and tradition because of the importance of water to the Apache people and that it comes from Mother Earth.

190. Apaches believe when the land is natural, just as it was created, it is at is most powerful.

191. Apache traditional life and culture is rooted in the natural world and following the natural cycles of the world. The Apache people rely upon traditional values to leave minimal impacts on their world, the land and the environment. These traditional values are known as Traditional Ecological Knowledge.

192. Traditional Ecological Knowledge principles have been recognized by various federal agencies.

CONCLUSIONS OF LAW

1. The burden of proof at an administrative hearing falls to the party asserting a claim, right or entitlement. A party asserting an affirmative defense bears the burden of proving that defense. The standard of proof on all issues in this matter is that of a preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119.

2. A preponderance of the evidence is:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to

> a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

3. Decisions by ADEQ's Director shall be affirmed by the Water Quality Appeals Board unless, considering the entire record before the Board, it concludes that the Director's decision is arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid. ARIZ. REV. STAT. § 49-324(C).

4. "Statutes shall be liberally construed to effect their objects and to promote justice." ARIZ. REV. STAT. § 1-211(B).

5. The primary goal when construing statutes is to fulfill the legislature's intent, with the entire statutory scheme being given effect. *Backus v. State of Arizona*, 220 Ariz. 101, 104, 203 P.3d 499, 502 (2009) (citations omitted).

6. Statutes and rules are construed using the same principles. *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011).

7. Statutes should be interpreted to provide a fair and sensible result. *Gutierrez v. Industrial Commission of Arizona*; *see also State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968) ("Courts will not place an absurd and unreasonable construction on statutes.").

8. Each word, phrase, clause, and sentence of a statute or rule must be given meaning so that no part

will be void, inert, redundant, or trivial. *See Deer Valley, v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).

9. "We construe words and phrases according to the common and approved use of the language. A.R.S. § 1-213 (2002). 'In determining the ordinary meaning of a word, we may refer to an established and widely used dictionary.'" *United Dairymen of Arizona v. Rawlings*, 217 Ariz. 592, 596, 177 P.3d 334, 338 (App. 2008) (quoting *State v. Mahaney*, 193 Ariz. 566, 975 P.2d 156 (App. 1999).

10. "In Arizona, 'arbitrary action' has been characterized as 'unreasoning action, without consideration and in disregard of the facts and circumstances.' …. An 'arbitrary' action is one taken 'capriciously or at pleasure,' or an action taken 'without adequate determining principle.'" *Maricopa County Sheriff's Office v. Maricopa County Employee Merit System Commission*, 211 Ariz. 219; 119 P.3d 1022 (2005)(citations omitted).

11. Any person who is adversely affected by ADEQ's issuance of the Permit or who may with reasonable probability be adversely affected by that action and who has exercised any right to comment on the action as provided in section 41-1092.03 may appeal ADEQ's decision. ARIZ. REV. STAT. § 49-323.

12. For purposes of the AZPDES permit program:

> "Person" means an individual, employee, officer, managing body, trust, firm, joint stock company, consortium, public or private corporation, including a government corporation, partnership, association or state, a political subdivision of this state, a commission, the United States government or any

federal facility, interstate body or other entity.

ARIZ. REV. STAT. § 49-201(27)

13. 40 C.F.R. § 122.2 provides the following definitions:

> ***
>
> New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:
>
> (a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or
>
> (b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.
>
> ***
>
> Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

14. 40 C.F.R. §122.29 "New sources and new dischargers," provides inpertinent part:

> (a) Definitions.
>
> (1) New source and new discharger are defined in §122.2.
>
> [….]

(2) Source means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.

(3) Existing source means any source which is not a new source or a new discharger.

(4) Site is defined in §122.2;

(5) Facilities or equipment means buildings, structures, process or production equipment or machinery which form a permanent part of the new source and which will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.

(b) Criteria for new source determination. (1) Except as otherwise provided in an applicable new source performance standard, a source is a "new source" if it meets the definition of "new source" in §122.2, and

(i) It is constructed at a site at which no other source is located; or

(ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

> (iii) Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.
>
> (2) A source meeting the requirements of paragraphs (b)(1)(i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. See §122.2.
>
> (3) Construction on a site at which an existing source is located results in a modification subject to §122.62 rather than a new source (or a new discharger) if the construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (b)(1) (ii) or (iii) of this section but otherwise alters, replaces, or adds to existing process or production equipment….

15. 40 C.F.R. §122.4 provides that "No permit may be issued: …. (i)To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards."

16. 40 C.F.R. Subpart L, "General Provisions and Definitions," at § 440.132. "General definitions, "provides:

> (a) "Active mining area" is a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.
>
> ***
>
> (g) "Mine" is an active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning, or concentration of metal ores.
>
> ***
>
> (h) "Mine drainage" means any water drained, pumped, or siphoned from a mine.

17. "The term 'construction' means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises." 33 U.S.C. § 1316(A)(5).

18. 40 C.F.R. §122.44 "Establishing limitations, standards, and other permit conditions," provides in pertinent part:

> (l) Reissued permits. (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit …. [(l)(2)] (B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance….

Whether RCM is a new source

19. ADEQ considers the former Magma mine site, the proposed RCM site, and any adjacent land and infrastructure to be the "source," the "site," and the "facility" as those terms are defined in the applicable regulations. ADEQ also asserted that Outfalls 001 and 002 are the "source."

20. In doing so, ADEQ misconstrues the applicable regulations, because these terms have separate and distinct meanings under those regulations.

21. "Site" means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity. 40 C.F.R. § 122.2. This definition shows that a "site" and "facility" are not synonymous under the rules.

22. A comparison of the definition of "site" to that of "source" (any building, structure, facility, or installation from which there is or may be a discharge of pollutants), 40 C.F.R. § 122.29, shows that "site" and "source" also have different meanings under the applicable rules

23. ADEQ's interpretation of these words also runs afoul of principles of statutory construction because ADEQ has not given each word independent meaning. *See Deer Valley*. In addition, the EPA guidance shows that the Outfalls are not sources because these are not the facilities that generate the waste. See September 28, 2006 Memorandum, Exhibit ADEQ 6.

24. ADEQ's determination that Shaft 10 and the other features are not new sources as defined in 40 C.F.R. § 122.2 was in error because it was based on an incorrect and improper reading of the applicable rules.

25. ADEQ takes the position that any new buildings, structures, facilities, or installations constructed at a copper mine that began operation before Subpart J was promulgated can never be a new source. This is not consistent with 40 C.F.R. § 122.29, 49 FR 37998 "New Source Criteria", or the EPA's September 28, 2006 Memorandum that show that new buildings, structures, facilities, or installations constructed at a site with an existing source can themselves be new sources.

26. ADEQ also asserts that it was not necessary to conduct an analysis under § 122.29(b) because there are no performance standards for shafts, stockpiles, CCTs, or wash bays, but rather the only performance standard is for "mines." ADEQ has however misconstrued the applicable regulations.

27. ADEQ concedes that Shaft 10 and these other features are producing mine drainage. By definition,

mine drainage means "any water drained, pumped, or siphoned from a mine." (Underscore added.) As such, Shaft 10 and these other features are by definition mines and subject to the Subpart J standards.

28. ADEQ's determination that 40 C.F.R. § 122.29(b) did not apply because features at the RCM site were constructed prior to the promulgation of Subpart J was in error, and on the facts of this matter, ADEQ was required to apply § 122.29(b)'s criteria for new source determination.

29. Even accepting that construction at the Magma mine started before Subpart J was promulgated, as EPA's September 28, 2006 Memorandum shows, to determine whether RCM's construction constitutes a new source requires an analysis of whether those new features constitute a total replacement of, or are substantially independent from, the existing source.

30. ADEQ and RCM argue that if the § 122.29(b) analysis was conducted, that analysis would show that Shaft 10 and the other features are not new sources. Appellants argue the opposite. Because ADEQ did not conduct that analysis, the tribunal has no authority to address that argument. See ARIZ. REV. STAT. § 41-1092.07(F)(6)(scope of the hearing is limited to facts officially noticed).

31. And assuming that the tribunal is allowed to consider this argument, it has not been proven that Shaft 10 and the other features are not new sources.

32. ADEQ argues that it would not matter if Shaft 10 and the other features are new sources, because the Permit's effluent limitations are as strict as those that a new source would be subject to. But this argument fails to account for 40 C.F.R. § 122.4(i)'s prohibition on discharges from new sources.

33. By failing to properly apply the applicable definitions, ADEQ has acted "without adequate determining principle," and its decision is arbitrary. See Maricopa County Sheriff's Office.

34. The matter should be remanded to ADEQ to allow it to conduct an analysis as required by 40 C.F.R. § 122.29(b).

Whether the effluent limitation for copper will ensure compliance with the water quality standards

35. In setting the Permit limitations, ADEQ followed its standard procedures, which have been accepted by EPS, in determining the Permit's effluent limitation for copper.

36. ADEQ provided credible evidence showing that the effluent limitation for copper ensures compliance with the applicable water quality standard.

37. The Appellants have not shown that ADEQ's decision was arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid.

Whether removal of the 2010 permit's limit on total dissolved solids violates the CWA

38. ADEQ's decision to eliminate from the Permit the requirement that prohibited discharges with total dissolved solids (TDS) of greater than 1200 mg/l was not a violation of the anti-backsliding provision because the WET testing results RCM provided ADEQ is new information that would have justified eliminating this provision from the 2010 permit had those test results been available at that time. See 40 C.F.R. § 122.44(l)(2)(B)(1).

39. The requirements of RCM's Aquifer Protection Permit are not at issue in this matter.

40. The Appellants have not shown that ADEQ's decision was arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid. Simultaneous discharge from 001 (stormwater) and 002 (mine drainage).

41. ADEQ presented credible evidence showing that in developing the Permit limits, ADEQ considered simultaneous discharges from both outfalls.

42. The Appellants have not shown that ADEQ's action was arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid.

The Public Meetings

43. Appellants presented no substantial evidence or legal argument to show that ADEQ committed a violation of statute or rule.

44. The Appellants have not shown that ADEQ's action was arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid.

Whether the draft fact sheet failed to disclose pertinent information or misled the public

45. Appellants presented no substantial evidence or legal argument to show that there was a violation of statute or rule.

46. The Appellants have not shown that ADEQ's action was arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid.

Whether the Appellants meet the requirements to bring appeals

47. In its Closing Argument, ADEQ argues that none of the Appellants meet the requirements to bring an appeal, which requirements are set out in Ariz. Rev. Stat. section 49-323.

48. In its answer to Appellants' appeals, ADEQ was required describe the relief it was requesting. ARIZ. ADMIN. CODE § R2-17-109(3). In ADEQ's answers, it did not assert that Appellant's did not meet the requirements of ARIZ. REV. STAT. section 49-323, nor did it request that the appeals be dismissed on that basis.

49. In ADEQ's disclosure statements, it did not assert as a legal theory that Appellants did not meet the requirements of section 49-323. In its disclosure statement, ADEQ was required to provide the legal theories on which its response was based, including citations of pertinent legal authorities. ARIZ. ADMIN. CODE § R2-17-110(A)(2).

50. ADEQ first raised the issue in Motions to Dismiss it filed on May 23, 2017. In its Motions, ADEQ argued that the Coalition Appellants are not "persons" within the meaning of sections 49-323 and 49-201(27), and that the Tribe could not show that it will suffer the requisite harm. Those Motions were denied in Case Management Order No. 3 issued on July 20, 2017.

51. In its Closing Argument, ADEQ asserts that:

> (1) The San Carlos Apache Tribe is not adversely impacted and will not with reasonable probability be adversely impacted by the Permit and therefore has no standing to challenge ADEQ's issuance of the Permit under section § 49-324(A).
>
> (2) Appellants Concerned Citizens and Retired Miners and Save Tonto National Forest are unincorporated associations and therefore lack the

> capacity to challenge ADEQ's issuance of the Permit. And,
>
> (3) Appellant Arizona Mining Reform Coalition, Inc. failed to comply with section R2-17-103(A) and therefore lacks the capacity to challenge ADEQ's issuance of the Permit.

52. ADEQ's arguments are effectively that of an affirmative defense in which it bears the burden of proof. See ARIZ. ADMIN. CODE § R2-19-119 (burden on the proponent of a motion and burden on party asserting an affirmative defense).

The Tribe

53. ADEQ asserts that the Tribe has no "standing" to bring its appeal. ADEQ's argument conflates standing, "which is a prudential doctrine by which courts eschew deciding issues when the plaintiff fails to allege a sufficient injury … with the question of who is statutorily authorized … to file objections in [a WQAB] administrative proceeding under" section 49-323. *See Ariz. Dep't Water Res. v. McClennen*, 238 Ariz. 371, 376, 360 P.3d 1023, 1028 (2015)(citation omitted).

54. Although section 49-323 requires an appellant to show it will, or with reasonable probability may be, adversely affected by ADEQ's action, that statute has "has nothing to do with satisfying standing to file a lawsuit. Rather, [as pertinent to this matter] it allows certain persons to file objections to" ADEQ's decision to issue the Permit. *Id.* at 377, 360 P.3d at 1029.

55. As such, the relevant inquiry is whether the Tribe meets the statutory requirements set out in section 49-323(A). The preponderance of the evidence shows that the Tribe does meet those requirements.

56. The Tribe is a person within the meaning of sections 49-201(27).

57. The Tribe presented substantial, credible evidence showing that within the meaning of section 49-323(A), it is a "person who may with reasonable probability be adversely affected by" ADEQ's issuance of the Permit. The Tribe's evidence on this point went virtually unchallenged, and was wholly unrebutted.

58. To the extent that the standards for judicial standing should be considered, the Tribe presented substantial, credible, and unrebutted evidence supporting a finding that it meets the associational standing requirements as described in *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 712 P.2d 914 (1985), and that it meets the requirements of the *parens patriae* doctrine as described in *Snapp v. Puerto Rico*, 458 U.S. 592 (1982).

The Coalition Appellants

59. In ADEQ's Closing Argument, it asserts that because the Concerned Citizens and Retired Miners and Save Tonto National Forest are unincorporated associations, they lack the capacity to challenge ADEQ's issuance of the Permit, and that the Arizona Mining Reform Coalition, Inc. did not file an appeal and so does not meet ARIZ. ADMIN. CODE section R2-17-103(A).

60. In its Response Brief, ADEQ asserts that for the reasons raised in its Closing Argument, the Coalition Appellants do not have standing. ADEQ also adds that Concerned Citizens and Retired Miners and Save Tonto National Forest are not jural entities.

61. As set out above, the proper inquiry is not whether the Coalition Appellants meet the standing requirements used in the court system, but rather

whether these Appellant meet the statutory requirements of section 49-323.

62. Section 49-323 on its face does not include a requirement that a person be a jural entity, and ADEQ provided no legal authority showing that the statute has such a requirement.

63. As defined in section 49-201(27), a "person" includes an "association." An "association" is "2. A gathering of people for a common purpose; the persons so joined.

3. An unincorporated organization that is not a legal entity separate from the persons who compose it." Black's Law Dictionary 148 (10th ed. 2014); see also American Heritage College Dictionary 87 (4th ed. 2002) (An "association" is "2. An organized body of people who have some interest, activity, or purpose in common; society.").

64. The preponderance of the evidence shows that Concerned Citizens and Retired Miners and Save Tonto National Forest are persons within the meaning of section 49-201(27) and meet the requirements to bring an appeal set out in section 49-323.

65. The Arizona Mining Reform Coalition before its incorporation also met the definition of a person. The issue with respect to the Arizona Mining Reform Coalition is whether its incorporation rendered it a new organization/person such that the appeal from the unincorporated association was no longer valid.

66. ADEQ presents no substantial evidence or legal argument to show that the Arizona Mining Reform Coalition's appeal was rendered inoperative by its decision to incorporate while the matter was pending.

67. The preponderance of the evidence shows that Arizona Mining Reform Coalition is a person within the meaning of section 49-201(27) and meets the requirements to bring an appeal set out in section 49-323.

Conclusion

68. ADEQ erred when it determined that Shaft 10 and the other mine features were not new sources as defined in 40 C.F.R. § 122.2 because it did not properly apply the applicable regulations' definitions. By failing to properly apply the applicable definitions, ADEQ has acted "without adequate determining principle," and its decision on this issue was arbitrary. See Maricopa County Sheriff's Office.

69. Appellants have not shown that any of ADEQ's other decisions were was arbitrary, unreasonable, unlawful or based upon a technical judgment that is clearly invalid.

70. The preponderance of the evidence shows that the Coalition Appellants and the Tribe meet the requirements to appeal ADEQ's decision to issue the permit.

71. Considering the above, the matter should be remanded to ADEQ to allow it to conduct an analysis as required by 40 C.F.R. § 122.29(b).

ORDER

IT IS ORDERED that this matter is remanded to ADEQ to allow it to conduct an analysis as required by 40 C.F.R. § 122.29(b);

IT IS FURTHER ORDERED that the remainder of Appellants' appeals are denied.

In the event of certification of the Administrative Law Judge Decision by the Director of the Office of

Administrative Hearings, the effective date of the Order is five days after the date of that certification.

Done this day, October 15, 2018.

/s/ Thomas Shedden

Thomas Shedden

Administrative Law Judge

MATERIAL STATUTES & REGULATIONS

28 U.S.C. § 1257 – State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

33 U.S.C. § 1251 – Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides

for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

. . . .

40 C.F.R. § 122.2 - Definitions

The following definitions apply to parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

. . .

Discharge when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

. . .

New discharger means any building, structure, facility, or installation:

(a) From which there is or may be a "discharge of pollutants;"

(b) That did not commence the "discharge of pollutants" at a particular "site" prior to August 13, 1979;

(c) Which is not a "new source;" and

(d) Which has never received a finally effective NPDES permit for discharges at that "site."

New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

(a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or

(b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

. . .

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

. . . .

40 C.F.R. § 122.4 – Prohibitions (applicable to State NPDES programs, see § 123.25)

No permit may be issued:

. . .

(i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2) is to be included in the fact sheet to the permit under § 124.56(b)(1) of this chapter.

40 C.F.R. § 122.29 – New sources and new dischargers

(a) *Definitions.*

(1) *New source* and *new discharger* are defined in § 122.2.

(2) *Source* means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.

(3) *Existing source* means any source which is not a new source or a new discharger.

(4) *Site* is defined in § 122.2;

(5) *Facilities or equipment* means buildings, structures, process or production equipment or machinery which form a permanent part of the new source and which will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.

(b) *Criteria for new source determination.*

(1) Except as otherwise provided in an applicable new source performance standard, a source is a "new source" if it meets the definition of "new source" in § 122.2, and

(i) It is constructed at a site at which no other source is located; or

(ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

(iii) Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.

(2) A source meeting the requirements of paragraphs (b)(1) (i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. See § 122.2.

(3) Construction on a site at which an existing source is located results in a modification subject to § 122.62 rather than a new source (or a new discharger) if the construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (b)(1) (ii) or (iii) of this section but otherwise alters, replaces, or adds to existing process or production equipment.

(4) Construction of a new source as defined under § 122.2 has commenced if the owner or operator has:

(i) Begun, or caused to begin as part of a continuous on-site construction program:

(A) Any placement, assembly, or installation of facilities or equipment; or

(B) Significant site preparation work including clearing, excavation or

removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

(ii) Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility engineering, and design studies do not constitute a contractual obligation under the paragraph.

. . . .

40 C.F.R. § 440.102 - Effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology (BPT).

Except as provided in subpart L of this part and 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT):

. . . .

40 C.F.R. § 440.103 - Effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

Except as provided in subpart L of this part and 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT):

. . . .

40 C.F.R. § 440.104 – New source performance standards (NSPS)

Except as provided in subpart L of this part any new source subject to this subsection must achieve the following NSPS representing the degree of effluent reduction attainable by the application of the best available demonstrated technology (BADT):

(a) The concentration of pollutants discharged in mine drainage from mines that produce copper, lead, zinc, gold, silver, or molybdenum bearing ores or any combination of these ores from open-pit or underground operations other than placer deposits shall not exceed:

Effluent Characteristic	Effluent Limitations	
	Maximum for any 1 day	Average daily values for 30 consecutive days
	Milligrams per liter	
Cu	0.30	0.15

40 C.F.R. § 440.132 – General definitions

(a) "Active mining area" is a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted, except, with respect to surface mines, any area of land on or in which grading has been completed to return the earth to desired contour and reclamation work has begun.

. . .

(g) "Mine" is an active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning, or concentration of metal ores.

(h) "Mine drainage" means any water drained, pumped, or siphoned from a mine.

. . . .