

IN THE SUPREME COURT  
STATE OF ARIZONA

SAN CARLOS APACHE TRIBE,

Appellant,

v.

STATE OF ARIZONA, ARIZONA  
WATER QUALITY APPEALS  
BOARD, ARIZONA  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Appellees.

RESOLUTION COPPER  
MINING, LLC,

Intervenor/Appellee.

Supreme Court No.  
CV-22-0290-PF

Court of Appeals Div. One No.  
1-CA-CV-21-0295

Maricopa County Superior Court  
No. LC2019-000264-001

BRIEF OF *AMICI CURIAE* AMERICAN EXPLORATION AND  
MINING ASSOCIATION, NATIONAL MINING ASSOCIATION,  
ARIZONA MINING ASSOCIATION, AND MONTANA MINING  
ASSOCIATION IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICI CURIAE

*Amici curiae*,<sup>1</sup> American Exploration & Mining Association (“AEMA”), National Mining Association (“NMA”), Arizona Mining Association (“AMA”), and Montana Mining Association (“MMA”) (together “*Amici*”), are leading national and state mining associations whose members have been active since the 19th century in the entire mining life cycle, beginning with prospecting and exploration, advancing through development and mineral extraction and processing, and concluding with mine reclamation and closure.

AEMA is a 128-year-old, 1,400-member national trade association representing the mineral development and mining industry, with members residing in 45 states, including Arizona. Its members range from the largest independent, global mine owners to small exploration companies. AEMA is the recognized national representative for the exploration sector, the junior mining sector, and mineral developers interested in maintaining access to public lands.

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<sup>1</sup> Pursuant to Rule 16(b)(2), A.R.C.A.P., no counsel for a party authored this brief in whole or in part and no person or entity other than Amici, their members, and their counsel made a monetary contribution to its preparation or submission.

The NMA is a national trade association whose 250-plus members include most of the domestic producers of metals, coal, agricultural and industrial minerals; manufacturers of mining equipment; and firms serving the mining industry. NMA's members explore for and develop minerals on federal, state, and private lands throughout the U.S., including in Arizona. NMA's members produce a range of commodities, including many defined as "critical" by the U.S. Geological Survey ("USGS"), and all of which are essential to U.S. economic and national security, supply chains, and energy and infrastructure priorities.

The AMA is a non-profit corporation comprised of entities engaged in mining and mineral processing in Arizona. In 2022, AMA member companies produced approximately 74 percent of the nation's newly-mined copper and significant amounts of associated co-products (gold, silver, selenium, tellurium and molybdenum). Arizona's hardrock mining industry employs approximately 13,645 people directly and 47,262 indirectly and contributes an estimated \$14.2 billion to the Arizona economy annually.

The MMA is a trade association dedicated to serving its members by protecting and promoting the hard rock mining industry in Montana

for more than forty years. MMA members are engaged in the exploration, production, and processing of minerals, including gold, silver, copper, molybdenum, platinum group, and industrial minerals including talc, limestone and cement. MMA's membership also includes associate businesses that provide essential goods and services. A key component of MMA's service to its members is monitoring and acting on issues of concern to the mining industry at the state, regional and national levels.

*Amici's* mining members routinely seek permits under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, including the mine drainage discharge permit renewal at issue in the court of appeals' opinion in *San Carlos Apache Tribe v. State*, No. 1 CA-CV 21-0295 (Nov. 15, 2022) ("Opinion"). The Opinion contains numerous misconceptions about mine operations and material errors in interpreting and applying the CWA federal "new source" regulations<sup>2</sup> that will adversely affect *Amici's* members if the Opinion is not reversed. *Amici* can provide valuable

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<sup>2</sup> The federal regulations at issue in this case have corresponding state regulations (e.g., A.A.C. R18-9-A901(25) ("new source" definition); A.A.C. R18-9-A905(A)(1)(e) (incorporating by reference the July 1, 2003 version of 40 C.F.R. § 122.29)). However, the parties and the Court of Appeals almost exclusively relied on citations to federal statutes and regulations thereby extending the Opinion to nationwide application.

information, perspective, and argument to help the Court evaluate the issues in this case from a national perspective, adding to the insights and argument of the parties.

### **PETITIONERS' ISSUES ADDRESSED BY *AMICI***

1. Did the Opinion misinterpret the term “mine” under 40 C.F.R. § 440.132(g) in concluding that Shaft 10 is a mine?
2. Did the Opinion misinterpret the “new source” provision in 40 C.F.R. § 122.29 in concluding that Shaft 10 was a “new source” under 40 C.F.R. § 122.2 and 40 C.F.R. § 122.29?

### **MATERIAL FACTS**

*Amici* adopt the statement of facts presented by Intervenor Appellee, Resolution Copper Mining, LLC (“RCM”) in the “Background” section of RCM’s Petition for Review.

### **REASONS TO GRANT REVIEW**

The Opinion concerns a routine five-year renewal of a CWA discharge permit required at many mines in the United States. Minerals are fundamental to the U.S. economy, its infrastructure, and renewable energy expansion. In 2020, non-fuel minerals produced at U.S. mines contributed \$98.2 billion to the U.S. economy; while domestic raw and

recycled minerals produced mineral materials worth \$810 billion.<sup>3</sup> With long development lead times, multi-million-dollar development costs, and decades-long operations, the mining industry requires regulatory stability.

The Opinion misinterprets the definition of the term “mine” under 40 C.F.R. § 440.132(g). The Opinion properly quotes from that provision, noting that a “mine” includes “all land and property” “used in or resulting from the work of extracting metal ore or minerals from their natural deposits.” *Id.* Yet, the Opinion determines that a single feature at the RCM mine—Shaft 10—is a mine. *Amici’s* members are continuously exploring, expanding mining operations, and modifying mining and recovery technologies to locate and recover more ore; that is the essence of a mine. Unless vacated by this Court, the Opinion’s cribbed definition of “mine” to include a single shaft creates regulatory uncertainty for mining operations, and regulators, nationwide and could lead to unnecessary, duplicative permitting requirements and associated costs—

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<sup>3</sup> U.S. Geological Survey, *Mineral Commodity Summaries 2023* (2023) at 5, <https://pubs.usgs.gov/periodicals/mcs2023/mcs2023.pdf>.

and could threaten the economic viability of an industry critical to the U.S.'s national security, economy, and energy priorities.

Magnifying the problems caused by the Opinion's narrow interpretation of the definition of a "mine," the Opinion also errs in its analysis of the federal CWA "new source" regulations in 40 C.F.R. §§ 122.2 and 122.29 to conclude that the "mine" is also a "new source," subject to these new source regulations. That serious error has implications for all *Amici* members' future mine operation modifications.

The Opinion's analysis of the new source regulations is a matter of first impression and, as applied to the mining sector, is the most expansive treatment of the issue by any federal or state court. If an individual shaft is interpreted to be subject to Section 306 of CWA, then all mining operation modifications could be subjected to changed discharge permit standards in the context of each CWA discharge permit five-year renewal—an approach never taken by the EPA or Arizona. As such, the Opinion could establish incorrect precedent beyond RCM's mine and Arizona.

## **I. Shaft 10 is Not a “Mine”**

The Opinion misinterprets the definition of a mine. Shaft 10 is not itself a “mine”; it is a component of an existing mine that has been operating since 1912 and has been permitted under the CWA for decades. If it stands, the Opinion would mean that every new mine component, such as each new shaft, building, waste rock pile, etc., would be subject to duplicative and burdensome permitting. If this interpretation is not reversed, it will further protract mine permitting and cripple future mine development or expansion.<sup>4</sup>

### **A. “Mine” is Broadly Defined**

A mine is a location where minerals, known as “ore,” are extracted from natural deposits. *See* 47 Fed. Reg. 25,682, 25,683 (June 14, 1982). Mines may be located on private property and/or public lands open for mineral entry under the General Mining Laws (30 U.S.C. § 22 *et seq.*). The geographic extent of a mine on public lands is established by its mining claims (*see* 43 C.F.R. Part 3833 (U.S. Bureau of Land

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<sup>4</sup> Permitting delays already reduce a typical mining project’s value and disincentivize investment in US operations. *See* SNL Metals & Mining, *Permitting, Economic Value and Mining in the United States* (2016) at 7, [https://nma.org/wp-content/uploads/2016/09/SNL\\_Permitting\\_Delay\\_Report-Online.pdf](https://nma.org/wp-content/uploads/2016/09/SNL_Permitting_Delay_Report-Online.pdf).

Management); 36 C.F.R. Part 228 (U.S. Forest Service)) and its approved operations are set by its mine plan of operations (*see* 43 C.F.R. Subpart 3809; 36 C.F.R. § 228.5).

A mine necessarily includes the ore body and access to ore via shafts, tunnels, or open pits. *See, e.g.*, 47 Fed. Reg. 25,682, 25,684 (June 14, 1982) (noting that “mining follows the ore body”). A mine generally includes drill sites; processing facilities such as mills, smelters, and flotation circuits; waste rock and tailing disposal areas; support facilities, structures, and buildings; and access routes. *See, e.g.*, 47 Fed. Reg. 25,682, 25,683-25,684 (June 14, 1982); 43 C.F.R. § 3809.401; 36 C.F.R. §§ 228.4-228.5. Given that a mine’s purpose is to produce ore, mines frequently expand as exploration identifies new ore sources. A mine plan for a mine on public lands can be modified at any time during operations to expand the mine or incorporate new or different facilities or operations. *See* 43 C.F.R. § 3809.430; 36 C.F.R. § 228.4(e). Mines on private lands can similarly be modified at any time to expand, add facilities, or change operations.

Turning to the relevant CWA definition, for purposes of the National Pollution Discharge Elimination System (NPDES) permit

program under Section 402 of the CWA, 33 U.S.C. § 1342, the EPA defines a “mine” as:

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.

40 C.F.R. § 440.132(g).

Applying these definitions to the RCM mine, the ADEQ properly considered all mining claims and areas within RCM’s mine plan of operations as within the definition of the “mine.” The undisputed facts establish that the mining site includes “two non-contiguous areas identified as the West Plant Site (the ‘WPS’) and the East Plant Site (the ‘EPS’)” (Opinion ¶¶ 5–6) that are approximately two miles apart and connected by the Never Sweat Tunnel. “The mining site included two large copper-ore deposits. The first was . . . located in the WPS. The second is . . . located in the EPS.” *Id.* Both ore deposits were owned by Magma Copper Company, the original mine owner. *Id.*; Petitioner’s Appendix to Petition for Review, APP080 ¶ 58. The mining site includes ten mine shafts, including Shaft 10 which is at issue in this case, a mine

water treatment plant (“MWTP”) which treats all mine drainage (defined in 40 C.F.R. § 440.132(h)), and various other ancillary facilities. *Id.* ¶¶ 6, 9, 11.

### **B. The Opinion Erred in Defining “Mine”**

Despite describing the “mining site” broadly, as summarized in the preceding paragraph, the Opinion erroneously concludes that Shaft 10—by itself—is a mine.<sup>5</sup> The Opinion incorrectly characterizes a “mine” as a “*discrete structure* used for ‘extracting ores or minerals.’” Opinion ¶ 43 (emphasis added). While the Opinion correctly cites 40 C.F.R. § 440.132(g) to define “mine,” it errs by inserting the words “discrete structure” in the definition. Those words do not appear anywhere in the EPA definition; indeed, they are contrary to the EPA’s broad definition of a “mine,” which includes “all land and property” “used in or resulting from the work of extracting metal ore or minerals from their natural deposits.” 40 C.F.R. § 440.132(g). A single mine shaft simply does not include the necessary facilities to remove ore from a natural deposit,

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<sup>5</sup> *Amici* agree with the dissent that the “mine” determination is not necessary to evaluate whether Shaft 10 is a “new source” under the CWA. Opinion ¶ 74 (dissent). However, because the Opinion rests its “new source” analysis upon its erroneous definition of “mine,” the Opinion must be overturned.

provide access, or ventilate and dewater the shaft. Shaft 10 is no exception; it, alone, does not meet the EPA’s definition of “mine.” Shaft 10 is not a mine.

The Opinion further confuses the meaning of “active mining area” and “mine” by using these defined terms interchangeably. See Opinion ¶ 42 (“[I]f a source would qualify as an ‘active mining area,’ it would also qualify as a ‘mine.’ . . . [B]oth an ‘active mining area’ and ‘mine’ neatly fit into the term ‘site.’”); Opinion ¶ 45 (asserting the EPA “provided an independently applicable standard for mining shafts—at least to the extent they qualify as ‘mines’ or ‘active mining areas’”). This failure to distinguish two different terms violates a fundamental rule of statutory construction—that all provisions should be given meaning. See *State v. Francis*, 243 Ariz. 434, 435 ¶ 6 (2018).

Shaft 10 is not a mine and, for that reason alone, the Opinion must be overturned.

## **II. Shaft 10 Is Not a New Source**

The Opinion erred by, *inter alia*, misinterpreting 40 C.F.R. § 122.29(b) to define “new source” incorrectly. See Opinion ¶¶ 49, 52–57, and 61. The Opinion compounds its error by failing to hue to the

language in § 122.29(b)(2) (*id.* ¶ 49) and creating its own, new “substantially separate” test (*id.* ¶ 61). Lastly, the majority has a fundamental misunderstanding of the CWA Section 306 standards of performance in concluding that “shaft 10 is subject to [new source performance standards] under 40 C.F.R. § 440.104(a).” *Id.* ¶ 49. No Section 306 standards apply to an individual shaft.

**A. The Opinion Erred by Misinterpreting 40 C.F.R. § 122.29(b)(1)(iii)**

The EPA regulations at the heart of this dispute—40 C.F.R. §§ 122.2 and 122.29 must be read together to define “new source” under the Clean Water Act. Section 122.2 defines “new source” as: “[A]ny 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 . . . .” 40 C.F.R. § 122.2. Section 122.29(b) then establishes the additional criteria that also must be met for a source to be a “new source” under the CWA.<sup>6</sup> 40 C.F.R. § 122.29.

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<sup>6</sup> These two provisions must be read together in light of the statement in 40 C.F.R. § 122.29(b)(1) that “a source is a ‘new source’ if it meets the definition of ‘new source’ in § 122.2, *and* . . . .” 40 C.F.R. § 122.29(b)(1) (emphasis added).

Addressing 40 C.F.R. § 122.2 first, there is no dispute that the EPA adopted standards of performance for the Ore Mining and Dressing Point Source Category, Copper, Lead, Zinc, Gold, Silver, and Molybdenum Ores Subcategory in December 1982. 40 C.F.R. Part 440, Subpart J. Mining started at the RCM mine in 1912. Opinion ¶ 6. The construction of Shaft 10, the cooling tower, and other mine facilities began in 2008. Accordingly, those facilities that were constructed after 1982—including Shaft 10—meet the § 122.2 definition.

Similarly, there is no dispute that neither criterion in 40 C.F.R. § 122.29(b)(1)(i) or (ii) are met for Shaft 10. Section 122.29(b)(1)(i) is not met because Shaft 10 is not at “a site at which no other source is located”; the shaft is a component of the existing RCM mine. *See* Opinion ¶ 5. Likewise, 40 C.F.R. § 122.29(b)(1)(ii) is not met because Shaft 10 does not “totally replace[ ] the process or production equipment that causes the discharge of pollutants at an existing source [the RCM mine]”. *See, e.g.,* Opinion ¶ 11 (“Resolution uses shaft 8 to dewater the WPS . . . shaft 9 to support shaft 10, such as for ventilation and flowing mine drainage from shaft 9 to shaft 10 . . . [and] actively uses the Never Sweat Tunnel to pump mine drainage from shaft 10 to the WPS, where the MWTP

processes it.”); *id.* ¶ 59 (stating that “none of the parties have given us any reason to determine Resolution is using shaft 10 to replace shaft 9”).

Where the Opinion goes astray is in its reading of the third criterion in 40 C.F.R. § 122.29(b)(1)(iii), evaluating whether Shaft 10 “processes are substantially independent of an existing source at the same site” to incorrectly conclude that Shaft 10 is a “new source.” The Opinion errs in concluding that Shaft 10 is not integrated with the existing mining operations because “shaft 10 is not some insignificant process.” Opinion ¶ 57. This “standard” is improper. The EPA’s first factor to determine whether a source is “substantially independent” is “the extent to which the new facility is integrated with the existing plant.” 40 C.F.R. § 122.29(b)(1)(iii). The EPA has determined that “management of mine drainage is an integral part of most mining systems.” 47 Fed. Reg. 25,682, 25,684 (June 14, 1982). Thus, the integrated use of multiple shafts, including Shaft 10, and the Never Sweat Tunnel for mine drainage management, along with the “use of other facilities from other areas of the mining site to assist in ore production” (Opinion ¶ 57), all reflect that Shaft 10 is integrated with the existing plant.

The second factor the EPA considers to determine whether a source is “substantially independent” 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). The EPA explains that “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.” 49 Fed. Reg. 38,044 (Sept. 26, 1984). Here, the purpose of Shaft 10 is to access and obtain more ore, as an integral part of the RCM mine. This is “a sufficiently similar type of activity as the existing source,” making Shaft 10 an existing source. The Opinion errs in its consideration of this factor by concluding that Shaft 10 replicates the existing RCM mine. Opinion ¶¶ 58–59.

In short, none of the factors in 40 C.F.R. § 122.29(b)(1) are met regarding Shaft 10. The Opinion erred in concluding the contrary. The court of appeals should have concluded that Shaft 10 is not a new source and affirmed the superior court’s decision.

## **B. No New Source Performance Standard Applies to Shafts**

The court of appeals compounded the errors noted above by determining that Shaft 10 has “a new source performance standard [that]

is independently applicable to it” under 40 C.F.R. § 122.29(b)(2), rather than concluding its analysis with 40 C.F.R. § 122.29(b)(1).

In developing the CWA point source discharge standards for the ore mining industrial category, the EPA conducted a detailed and extensive study of the ore mining and dressing industry, 47 Fed. Reg. 25,682 (June 14, 1982), including copper mines. *Id.* at 25,685, 25,715-25,717. The EPA only subcategorized mines based upon two factors: (i) ore type (e.g., base and precious metals (including copper)); and (ii) whether the facility is a mine or a mill. *Id.* at 25,690. The EPA adopted the 40 C.F.R. § 122.29(b)(2) new source performance standards for copper mines and mills. *See* 40 C.F.R. Part 440, Subpart J. There are no new source performance standards for individual shafts. *See* 40 C.F.R. §§ 440.100(a) and 440.104(a).

Shaft 10 is not a new source and the court of appeals erred in finding the contrary. If an individual shaft is interpreted to be subject to Section 306 of CWA, then all mining operation modifications could be subjected to changed discharge permit standards in the context of each CWA discharge permit five-year renewal, a result that would have serious adverse impacts on the mining industry nationally.

## CONCLUSION

The Opinion could have disruptive consequences for the mining industry, and industry regulators, nationwide. For all of the foregoing reasons, this Court should grant review and vacate the court of appeals' Opinion.

Respectfully submitted this 18<sup>th</sup> day of April, 2023.

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