ARIZONA SUPREME COURT

SAN CARLOS APACHE TRIBE, Appellants. v. STATE OF ARIZONA; ARIZONA WATER QUALITY APPEALS BOARD; and DEPARTMENT OF ENVIRONMENTAL QUALITY, Appellees, RESOLUTION COPPER MINING, LLC, Intervenor/Appellee.	Arizona Supreme Court No. CV-22-0290-PR Court of Appeals Division One No. 1 CA-CV- 21-0295 Maricopa County Superior Court No. LC2019-000264-001

SUPPLEMENTAL BRIEF OF PLAINTIFF/APPELLANT SAN CARLOS APACHE TRIBE

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INTRODUCTION

The San Carlos Apache Tribe ("Tribe") appears in this matter out of its deep, historical, and cultural relationship to Queen Creek. For the Tribe, Queen Creek is a living, spiritual being, a source of food, medicine, and a place for religious practice.[1] Queen Creek deserves no less protection than what the Clean Water Act ("CWA") provides to all waterways across the country, and not just for the Tribe but for all Arizonans. Historic mining in the area has already caused Queen Creek to fail the CWA's water quality standards, and now Resolution Copper Mining, LLC ("Resolution") would discharge more copper effluent into Queen Creek from the newly constructed Shaft 10.

If Shaft 10 is not recognized as a new source, the safeguards Congress intended will not protect Queen Creek, and its life will be at risk. Shaft 10 is a "new source" under the CWA, requiring Resolution to meet new source performance standards and demonstrate that Queen Creek can accommodate its additional discharge. The Arizona Department of Environmental Quality ("ADEQ") must fulfill its charge and require that Resolution meet all conditions necessary to obtain a new source permit.

[1] *See* the testimony of Dee Randall (ROA 425, Transcript - February 7, 2018, pp. 549:17-550:21), Vernelda Grant (ROA 425, pp. 632:8-634:4), and Chairman Terry Rambler (ROA 426, Transcript - February 8, 2018, pp. 582:7-22, 587:10-588:23).

Before a new source may discharge pollutants into a waterway, it must obtain a new source permit. A source of water pollution is a "new source" under the CWA when it is: (1) constructed after new source performance standards are promulgated; (2) independent in fact from other sources; and (3) independent for purposes of regulation. *See* 40 C.F.R. § 122.29(b). Resolution's Shaft 10 meets all three prongs. Both in fact and under the law, Shaft 10 is a "new source."

First, Resolution began construction of Shaft 10 in 2008, long after the EPA promulgated new source performance standards for copper mines in 1982.

Second, Resolution constructed Shaft 10 (and associated infrastructure) to reach a previously untouched ore body employing a method never-before used on site, block-cave mining. Further, Resolution has converted remaining infrastructure from nearby, long-shuttered operations to support Shaft 10. Existing shafts and tunnels that once extracted and removed ore from a now exhausted body, will instead support Shaft 10 as it extracts ore from the new body. Instead of mining ore, those shafts and tunnels will transport ore, ventilate Shaft 10, and dewater Shaft 10. Using this new construction and new method, Resolution estimates that Shaft 10 will more than replicate the entire site's total copper production since 1912 every three years.

Third, Shaft 10 itself meets the regulatory definition of a "mine." Shaft 10 is an active mining area "used in or resulting from the work of extracting metal ore."

See 40 C.F.R. § 440.132(a). Looking solely to Shaft 10, it meets the regulatory definition a "mine," and the CWA regulates its discharge.

Accordingly, Shaft 10 meets § 122.29(b)'s three-prong test. Shaft 10 is new construction that is independent in fact and independent for regulation. Because Shaft 10 is a "new source" under the CWA, this Court should determine that ADEQ cannot regulate its discharge simply by renewing Resolution's existing source permit. Instead, ADEQ must ensure that Resolution meets all conditions necessary for a new source permit.

ISSUES FOR REVIEW

Between the three issues presented by ADEQ and Resolution, this Court has granted review on two questions:

(1) Is Shaft 10 a "new source" under 40 C.F.R. § 122.2?
(2) Is Shaft 10 substantially independent under 40 C.F.R. § 122.29(b)(1)?[2]

Although these two issues concern the first and second prongs of § 122.29(b), ADEQ and Resolution argue that Shaft 10 is not a new source under § 122.2 using analysis suited for the third prong (*i.e.* that Shaft 10 is not a "mine" as defined in

[2] The third issue ADEQ raised on which the Court did not grant review concerns whether 40 C.F.R. § 122.4(i) requires it to promulgate TMDLs before issuing a new source permit, not whether Shaft 10 is independent for regulation under the third prong.

§ 440.132). Because the third prong addresses the substance of ADEQ and Resolution's argument, this supplemental brief addresses all three prongs in turn.

STANDARDS OF REVIEW

This court reviews questions of law *de novo*, including an administrative agency's "legal interpretation of a statute." *Eaton v. Ariz. Health Care Cost Containment Sys.*, 206 Ariz. 430, ¶ 7 (App. 2003). Ordinary principles of statutory construction govern federal regulations, which are viewed as a "consistent and harmonious whole." *State v. Green*, 248 Ariz. 133, ¶ 8 (2020). Reviewing courts will modify or vacate an agency action that is contrary to law, arbitrary and capricious, unsupported by substantial evidence, or an abuse of discretion. A.R.S. § 12-910(F).

ARGUMENT

The CWA imposes its most stringent performance standards on "new sources" such as Shaft 10. *See* 40 C.F.R. § 122.29(b). Section 122.29(b)(1) provides "a source is a 'new source' if it meets the definition of 'new source' in § 122.2" and meets one of three criteria establishing that it is independent in fact from other sources that may be on site. Additionally, a source meeting these

criteria "is a new source only if a new source performance standard is independently applicable to it." *Id.*[3] Shaft 10 satisfies all three prongs.

1. Shaft 10 was constructed ***after*** applicable standards were promulgated.

The first prong examines whether the new construction meets the definition of "new source" in § 122.2, which provides:

> 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 . . . .

(Emphasis added). For purposes of § 122.2, *only* the new construction is at issue and nothing else on site. The primary question is whether that construction began after performance standards were promulgated. Accordingly, a proper new source analysis begins by comparing two dates: (1) the date construction began on Shaft 10; and (2) the date *potentially* applicable performance standards were promulgated. Because the third prong turns on whether regulations independently apply to the new construction, the first prong principally focuses on when

[3] New construction that is independent in fact but does not meet this third prong is a "new discharger." § 122.29(b)(3). Like with new sources, the CWA prohibits issuing permits to new dischargers if the discharge will cause or contribute to a violation of water quality standards. § 122.29(b)(1)(i)-(iii). Nevertheless, an agency may still issue a new source or new discharger permit if it promulgates Total Maximum Daily Loads (TMDLs) and available load allocations can accommodate the new discharge. *Id.*

construction began.[4] As such, this formulation uses "potentially" because the third prong may reveal that new source performance standards do not apply.[5] As such, the first prong primarily turns on these dates.

Here, Shaft 10 is a "building, structure, facility, or installation" that will discharge copper effluent, a pollutant. Since 2008, Resolution has also constructed numerous structures supporting Shaft 10—a truck wash bay, water treatment plant, concentrator, and cooling tower. Resolution has even expanded the Never Sweat Tunnel that connects the East and West Plant Sites to support Shaft 10. Further, all Parties agree the relevant performance standards are those for copper mines, which were promulgated in 1982. *See* 40 C.F.R. Part 440, Subpart J. Because Resolution began construction almost thirty years after standards were promulgated, Shaft 10 is a "new source" as defined in § 122.2.

ADEQ and Resolution attempt to avoid this obvious conclusion by arguing that performance standards do not apply to Shaft 10 because the CWA only regulates the mine as a whole, and construction on the mining sites first began in the early 1900s. This argument prematurely analyzes the second prong

[4] The first prong also considers whether the new construction will discharge pollutants. All Parties agree Shaft 10 will discharge copper effluent, a pollutant.

[5] Even if the first prong required an analysis of whether performance standards apply to new construction as ADEQ and Resolution assert, and even if it is somehow shown that new source performance standards do not apply to Shaft 10, this would not end the inquiry. Instead, ADEQ would be required to conduct a new discharger analysis and meet all conditions precedent before issuing or renewing a discharge permit. *See* 40 C.F.R. §§ 122.2, 122.4(i), 122.29(b)(2).

(independent in fact) and third prong (independent for regulation). This approach also disregards the plain text of § 122.2 and collapses the entire analysis into the first prong.[6] Fatally, this framework depends on a lay-person's notion of a "mine," not the specific regulatory definition. *See* § 440.132(a), (g); (Section 3, *infra*). Indeed, this mine-as-a-whole approach patently contradicts the express regulatory definition. *See* § 440.132(a), (g); (Section 3, *infra*).

Contrary to this erroneous mine-as-a-whole approach, § 122.2 does not consider when construction on the ***entire site*** began. No, § 122.2 specifically focuses on when construction of "any building, structure, facility, or installation" begins. Section 122.2 considers the new construction—whatever it is—without regard for anything else on site. By the plain text of § 122.2, the proper inquiry under the first prong belongs solely on the new construction, however great or small.

The bottom line is that all Parties agree Shaft 10 will discharge copper, that copper effluent is a pollutant, and that copper mining standards apply to Shaft 10's discharge, whether it is a mine itself or just part of a larger whole. As such, the focus under § 122.2 is simply the date when construction of Shaft 10 began. Because the applicable date of comparison is 1982, and because Resolution began

[6] Ironically, Resolution insists the Court of Appeals conflated analysis of the first prong with the "new source eligibility requirements under § 122.29(b)(2)" (*i.e.* the third prong), when that is exactly what Resolution and ADEQ's mine-as-a-whole theory does. (*See* Resolution's Petition for Review, pp. 6-7).

constructing Shaft 10 almost 30 years later in 2008, the first prong is satisfied. Shaft 10 is a new source.

2. Shaft 10 is "substantially independent" from other sources on site.

The second prong of § 122.29(b) provides that new construction is a "new source" if it is independent in fact from any existing sources that may be on site. *See* § 122.29(b)(1). Subsection (b)(1) provides:

> [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.

(Emphasis added). Below, the Parties focused on Subsection (iii), whether Shaft 10 is "substantially independent of an existing source at the same site."[7] The regulation provides two factors as guidance: (1) "the extent to which the new facility is integrated with the existing plant"; and (2) "the extent to which the new

[7] As all prior mining operations ceased in 1996, Shafts 8 and 9 no longer produce mining discharge (though they may transport such discharge that Shaft 10 produces). Because extraction will not take place in those shafts, Shaft 10 and the new, block-cave mining technique will completely replace the process and production equipment causing discharge on site. Accordingly, the Court might remand for a determination of whether Shaft 10 totally replaces the prior mine(s) under subsection (b)(1)(ii) if it does not or cannot determine that Shaft 10 is substantially independent of existing sources on site.

facility is engaged in the same general type of activity as the existing source." § 122.29(b)(1)(iii).

Regarding integration, minor additions like "a new purification step" would be highly integrated, while sharing "utilities" or a "treatment plant" would constitute nominal integration. 49 Fed. Reg. at 38,044 (Sept. 26, 1984). Regarding types of activity, "replicat[ing] without replacing[] an existing source . . . would result in a new source." *Id.*

Shaft 10 is substantially independent from "existing" sources on site. First, Shaft 10 is not a minor addition, but a "$2 billion investment" in an entirely "new underground mining operation to extract copper from the new and as yet untouched ore body[.]" (Opinion at ¶ 57.) Moreover, Shaft 10 is not integrated into existing operations. Rather, those operations have long ceased, and Resolution has reconstructed and repurposed dormant infrastructure so that it supports ore extraction through Shaft 10 rather than vice versa.

Since 2008, Resolution has constructed many new facilities in service of Shaft 10, including a truck wash bay, water treatment plant, cooling tower, concentrator, and has also expanded the Never Sweat Tunnel connecting the East and West Plant Sites. To the extent the new treatment plant is the final source of discharge, it "totally replaces the process or production equipment that causes the discharge of pollutants at an existing source."

Further, the copper ore extractive processes "are substantially independent" from all prior mines at the East and West Plant Sites as Shaft 10 replaces all equipment and processes previously used for extraction of copper ore, and seeks to extract ore using a new method from an entirely new, separate body. Indeed, the majority of the existing mine shafts and tunnels are no longer in operation or even accessible, and some were backfilled after operations ceased in 1996. (*See* RCM APP081, ¶ 67).

The Grandfather's Axe Paradox[8] illustrates the total reorientation of the Superior site around Shaft 10, though with some modification. Instead of replacing both head and handle and debating whether one wields the same axe, Resolution has taken the handle, attached it to an industrial machine, and insists it wields the same axe. Shaft 10 has swallowed up whatever remained of the prior mine's infrastructure so that Resolution can exponentially increase production using a method never-before used on site. By no measure is Shaft 10 merely a part or extension of the same mine that Magma and BHP exhausted in 1996. On the contrary, the prior mining infrastructure is no longer being used to extract copper ore but has been recommissioned to serve Shaft 10.

[8]*See* Levin, Noah, ed. "Introduction to Philosophy and the Ship of Theseus," in Ancient Philosophy Readers, an Open Educational Resource, NGE Far Press, 2019, https://open.library.okstate.edu/introphilosophy/chapter/ship-of-theseus/.

Second, although Shaft 10 would also extract copper ore like prior sources once did, Resolution will mine the new ore body using a method never-before used on site, block-cave mining. Rather than traditional mining methods that "chase the vein" by extracting and removing copper-rich ore from the top down, block-cave mining relies on collection infrastructure constructed below the ore body. (RCM APP260-64). Once constructed, Resolution will ignite a chain reaction causing the ore body (and all rock and earth above it) to progressively break apart and fall into collection areas, causing the ground above to subside. (RCM APP080, ¶ 62). ADEQ and Resolution cannot simply gloss over the stark differences between block-cave mining and all previous mining activity that ceased almost thirty years ago.[9] The bottom line is that Resolution will not use Shaft 10 to conduct the same general type of activity that Resolution conducts or conducted with its existing infrastructure.

[9] The total cessation of all other copper ore extraction further establishes that that Shaft 10 is substantially independent from prior mining operations. Mines "produce a saleable product," whereas *inactive* mines "may be temporarily closed, undergoing reclamation and closure, permanently closed, or abandoned." EPA, Ore Mining and Dressing Preliminary Study Report (Sept. 2011), RCM-172 at 1-2. In other words, a "mine" requires the "*active pursuit and processing of new ore*" as opposed to "treatment of long-abandoned mining waste." *In Re: Phelps Dodge Corporation, Verde Valley Ranch Development*, 10 E.A.D. 460, 2002 WL 1315601, at *16 (emphasis added); *see also Resisting Envtl. Destruction on Indigenous Lands v. U.S. E.P.A.*, 716 F.3d 1155, 1161 (9th Cir. 2013) (published opinions by EPA's Environmental Appeals Board interpreting regulations warrant heightened deference).

Further, Shaft 10 "essentially replicates, without replacing, the existing" mines on site, if any "existing" mine can be found as no ore extraction has taken place anywhere on site since 1996.[10] (*Id*. at ¶ 59.) Moreover, Resolution predicts that Shaft 10 will more than replicate all prior mine production—from 1912 to 1996—every three years.

Resolution's incredible investment in Shaft 10, its scale, anticipated production, the extent to which Resolution has reconstructed all existing infrastructure to serve Shaft 10, and the stark change in the mining method (type of activity) all demonstrate that Shaft 10 is independent in fact from all "existing sources" on site. Shaft 10 is a new source.

3. Shaft 10 is subject to "independently applicable standards."

The third prong of § 122.29(b) provides that new construction is a new source if it is independent for purposes of regulation. Subsection (b)(2) states that new construction meeting the second prong (Subsection (b)(1)(i)-(iii)), "is a new source only if a new source performance standard is independently applicable to it." If no such standard applies, "the source is a new discharger. *See* § 122.2."[11]

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[10] If the Court determines that Shaft 10 totally replaces other mining equipment; Shaft 10 remains a new source. Looking to the second prong, total replacement is another category demonstrating independence in fact. *See* § 122.29(b)(1)(ii) (new construction a new source when it "totally replaces the process or production equipment").

[11] Whether regulations independently apply to new construction determines whether it is a "new source" or "new discharger," **not** whether a new source permit

§ 122.29(b)(2). As such, the third prong considers whether the new construction, standing alone, would be subject to a new source performance standard.[12]

Here, all Parties agree that the relevant performance standards are those for copper mines, which are found in 40 C.F.R. Part 440, Subpart J. To determine whether Subpart J's performance standards apply to Shaft 10, it is necessary to determine whether Shaft 10 meets the regulatory definition of a mine—it does.

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is required. *See* 40 C.F.R. § 122.29(b)(2) ("If there is no . . . independently applicable standard, the source is a new discharger."). Section 122.2 defines "new discharger" as:

> any building, structure, facility, or installation:
> (a) From which there may be a "discharge of pollutants;"
> (b) That did not commence the []discharge . . . 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."

Even if this Court determines Shaft 10 is not independently subject to performance standards, ADEQ would still need to perform a new discharger analysis before renewing Resolution's permit. If Shaft 10 is a new discharger, ADEQ cannot issue a permit for Shaft 10 until it promulgates TMDLs and Resolution demonstrates that sufficient load allocations are available to accommodate Shaft 10's discharge. *See* § 122.4(i).

[12]The question is not whether the new construction is subject to a different performance standard than other sources on site. New construction that does not meet Subsection (b)(2) is not classified as an existing source, but a "new discharger." The key distinction between a new source and new discharger is not whether an existing source permit can be issued, but whether there is a new source performance standard. *See* § 122.2. Subsection (b)(2) does **not** exempt new construction from new source performance standards.

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***." § 440.132(g) (emphasis added). Further, 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." § 440.132(a) (emphasis added). As such, "mines" are focused on extraction and only include areas where active extraction takes place or that directly facilitate extraction.[13]

By contrast, the regulatory definition of a "mine" does ***not*** include areas used for removal or recovery of metal ore. As such, a "mine" is an active mining area, but not all active mining areas are "mines." Just the same, not every active mining area on the Superior mining sites are part of "the mine." ADEQ and Resolution's mine-as-a-whole theory misunderstands this key distinction and, instead, rests on common notions of what a mine is, even though it contradicts the express regulatory definition.

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[13] To illustrate, areas used in and resulting from extraction include those where blasting, paneling, and collection occur. *See* Resolution Copper, *Resolution Copper Mining Method* (Nov. 8, 2012), available at: https://youtu.be/a-pWzUb6How?si=NiZvHWJc9N8X7Ck0 (last visited Sept. 12, 2023). Although substantial subsidence will result from extracting the new ore body, it is not necessary for the instant purpose to determine whether that subsidence will be a mine within the meaning of § 440.132(g) simply because the subsidence area will "result from" extraction. *See* Resolution Copper, *Resolution Copper Subsidence Overview Animation* (Jun. 14, 2018), available at https://youtu.be/n21gHDPFFK8?si=4214-dRlEEZzxFjL (last visited Sept. 12, 2023).

Of course, it is the regulatory text that controls, not colloquial conceptions. Under § 440.132, neither "mine" nor "active mining area" describes the "mine as a whole." Instead, an "active mining area" consists of "a place" where "extraction, removal, or recovery" occurs, and a "mine" is a subset of these areas where extraction occurs or occurred. *See* § 440.132(a), (g). Applying these definitions, a road on which mining trucks transport ore from the extraction point to an on-site processing plant is an active mining area because it facilitates ore removal. The road, however, is not a "mine" or part of the mine under § 440.132(g). Likewise, although a smelter may be an active mining area because it is used in recovery of metal ore, it is not a "mine" or part of the mine according to express regulatory definition. Neither are "mines" because they are not used in or result from *extraction*. Under applicable regulations, the haul road and smelter are not part of the mine (though they are active mining areas and part of the larger site). According to § 440.132(g), the mine is a place where ore is extracted.

ADEQ and Resolution's mine-as-a-whole argument is more consistent with the regulatory definition of a "site." *See* § 122.2 ("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."). This definition is broader than both "mine" and "active mining area." Indeed, the all-encompassing area that ADEQ and Resolution conceive of as "the mine" is the site. Further, that

site may consist of multiple mines and certainly includes several active mining areas. *See* 40 C.F.R. § 122.29(b)(1); (Opinion, ¶ 47) (quoting EPA Memorandum (Sept. 26, 1984) (different sources on a site may be subject different standards), ADEQ-6 at 3).

To be sure, ADEQ and Resolution's mine-as-a-whole argument conflates the three distinct definitions of "mine," "active mining area," and "site" to avoid the conclusion that Shaft 10 is a mine. *See* §§ 122.2, 440.132(a), (g). ADEQ and Resolution lean heavily on the language "including all land and property" in the definition of "mine," but ignores that such "land and property" is included only if it is "used in or resulting from the work of extracting metal ore." 40 C.F.R. § 440.132(g). Read in harmony with the definition of "active mining area" and "site," the regulatory definition of "mine" ***does not*** include active mining areas used for removal or recovery of metal ore, but only those areas directly engaged in extraction. *See* 40 C.F.R. § 440.132(a); *see Green*, 248 Ariz. 133, ¶ 8.

Here, Resolution will use Shaft 10 to extract copper ore from an untouched ore body that is entirely separate from, 1.2 miles distant from, and 2,000 feet deeper than the ore body that Shafts 8 and 9 exhausted. (RMA APP080, ¶ 60). These factors, in addition to the low-grade ore that Resolution will extract from Shaft 10, required Resolution to employ a new method and to construct new infrastructure and extraction mechanisms. (*Id.*, ¶¶ 60-62).

Shaft 10 in and of itself is a mine. By contrast, Shafts 8 and 9, the Never Sweat tunnel, and all other new improvements that Resolution has constructed amount to active mining areas. As Resolution will use them in the new operation, these are not mines because they will not be used in or result from extraction, which takes place in Shaft 10. *See* § 440.132(a), (g). Instead, Resolution will use these to ventilate and dewater Shaft 10, to remove and process ore, and to treat Shaft 10's discharge. As such, they are not "mines" within the regulatory definition.[14] *See id.*

ADEQ and Resolution's "mine-as-a-whole" theory runs roughshod over the plain text of § 440.132 and § 122.2, and leads to absurd results. As the Court of Appeals reasoned, the mine-as-a-whole theory would allow mining companies to "perpetually expand its mining site" without ever being subject to new source performance standards—an outcome plainly "inconsistent with the regulatory framework and EPA guidance." (Opinion, ¶ 60).

Even the administrative law judge below pointed out the folly of adopting this theory: "according to ADEQ, regardless of what copper-mining features [Resolution] adds or constructs, even if it conducts copper mining operations in

[14]Resolution may argue that Shafts 8 or 9 are existing mines because they were used in or resulted from prior extraction. Whether they are "existing mines" is not relevant to this analysis because § 122.29(b) focuses only on the new construction.

other parts of Pinal County, as long as [Resolution] treats the mine drainage on the existing site, these new features will not be new sources." (RCM APP088, ¶ 113). To consider Shaft 10 to be one and the same with existing, dormant mines on site simply because its drainage will eventually reach the original site is absurd and does not flow from the governing regulations. By treating Shaft 10 as the same source as the shuttered mines, ADEQ contradicts controlling federal regulations and violates its charge. This Court should reject ADEQ and Resolution's framework that disregards the federal regulation's plain text and gives existing permit holders *carte blanche*.

Because Resolution will use Shaft 10 to extract ore, it will be an "active mining area" and, more specifically, a "mine" under the CWA. *See* § 440.132. Because Shaft 10 meets the regulatory definition of a mine, and because Subpart J promulgates new source performance standards for copper mines, these regulations independently apply to Shaft 10. Accordingly, Shaft 10 is independent for regulation and is a new source under the CWA.

4. Environmental impacts have escalated since ADEQ issues the original permit.

There is no debate that Queen Creek is an impaired waterway.[15] Queen Creek serves almost 82,000 people and has 18 total contaminates in its drinking

[15] Queen Creek Total Maximum Daily Load Fact Sheet, ADEQ, https://legacy.azdeq.gov/environ/water/assessment/download/queencreek.pdf

water, eight of which already exceed the Environmental Working Group's health guidelines.[16] The quality of the riparian habitat along this reach of the creek is degraded because of previous mining activities in the area, and the addition of new or additional pollutants by Resolution would further threaten the ecosystem and health of the communities that depend upon the watershed, including the Tribe and its members who rely upon it to fulfill long-standing, historic, cultural and religious purposes.[17] This Court should hold ADEQ to its charge and require it to regulate Shaft 10 as the new source that it is.

CONCLUSION

Resolution constructed Shaft 10 after new source performance standards were adopted for copper mines, Shaft 10 is independent in fact, and Shaft 10 is independent for purposes of regulation. As such, Shaft 10 is a new source, and ADEQ's decision to renew Resolution's existing source permit violated §§ 122.4(i) & 122.29.

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[16] EWG's drinking water quality report, https://www.ewg.org/tapwater/system.php?pws=AZ0407033 (tests conducted by the water utility and provided to the Environmental Working Group by the Arizona Department of Environmental Quality, as well as information from the U.S. EPA Enforcement and Compliance History database (ECHO)).

[17] EA, Funding Assistance for the Town of Superior Queen Creek Riparian Restoration, p. 3-2. November 2002. https://static.azdeq.gov/wqd/swqip/eaf_queencreekriparian_2002.pdf.

ADEQ and the Water Quality Appeals Board both failed to apply governing federal regulations. Accordingly, their decisions to treat Shaft 10 as part of the existing source was contrary to law, arbitrary and capricious, unsupported by substantial evidence, and an abuse of discretion. This Court should reverse the superior court and remand the case with instructions to enter judgment determining that Shaft 10 is a new source.

DATED: September 12, 2023

DEPARTMENT OF JUSTICE

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