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, Appellee.	Supreme Court No. CV-22-0290-PR Court of Appeals No. 1-CA-CV-21-0295 Maricopa County Superior Court No. LC2019-000264-001
RESOLUTION COPPER MINING, LLC, Intervenor/Appellee.	

INTERVENOR/APPELLEE RESOLUTION COPPER MINING, LLC'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Mining began more than a century ago on property near Superior now owned by Resolution Copper Mining, LLC. Since the federal Clean Water Act ("CWA") first required discharge permits, the mine has continuously held the requisite permit allowing it to discharge treated water containing regulated "pollutants." Its first permit was issued in 1975. After federal minimum standards for new and existing copper mines were adopted in 1982, the permit was modified to incorporate those standards. Subsequent permit modifications have imposed state-law discharge limitations an order of magnitude more stringent than the historical federal minimums. The result is that the federal new-source standards have become moot as far as the mine is concerned.

Nevertheless, the San Carlos Apache Tribe contends that the Arizona Department of Environmental Quality should have declared the mine a "new source" under the CWA. Why? Because, argues the Tribe, if the old mine is called a "new source," it can be prevented from discharging treated water of *any* quality under 40 C.F.R. § 122.4(i). No court has endorsed this proposition, which the Court of Appeals did not address and which is not before this Court. The Tribe's sole authority for this argument, *Friends of Pinto Creek v. United States Environmental*

Protection Agency, 504 F.3d 1007, 1009 (9th Cir. 2007), *cert. denied*, 555 U.S. 1097 (2009), involved a brand-new mine that did not exist in any form before 1982.[1]

In a divided opinion the Court of Appeals erroneously adopted the Tribe's argument that routine modifications Resolution made to the existing mine – primarily drilling another exploration shaft 300 feet from an old one – have created a "new source." The appellate court's error arose from its mistaken belief that designating the mine a new source was necessary to ensure that its discharges would be subject to the most stringent discharge limitations. Yet the mine's permit already imposes discharge standards that are far more stringent than federal new-source standards.

BACKGROUND

In 2004, Resolution Copper Mining LLC became the owner of the Resolution Copper Project near Superior. Separate Appendix to Resolution's Petition for Review ("APP") APP266-67. The mine was originally owned by Magma Copper Company and started production in 1910. APP260.

Magma's operations began on the western portion of the site, originally with a single shaft and later seven more. IOR 448 at 863:6-864:7, 880:23-881:3. It also drilled some 42 miles of underground tunnels. Final Environmental Impact

[1] *See* discussion *infra* at 19.

Statement ("FEIS") at ES-1.[2] In the 1970s, Magma drilled its first shaft on what is called the East Plant, Shaft 9. APP263. Because ores from Shaft 9 had to be processed at the West Plant, Shaft 9 was connected to the East Plant site via the Never Sweat Tunnel, located approximately 1,000 below ground surface and stretching for some two miles. APP263; IOR 446 at 708:2-4; IOR 448 at 864:8-10, 868:15-18, 872:11-16, 878:16-25, 879:17-22.

To enable evaluation of rock characteristics and conditions at depth, Resolution sank, in 2014, one additional shaft, Shaft 10. APP267. Shaft 10 is within the original Magma East Plant footprint, approximately 300 surface feet away from Shaft 9. IOR 448 at 860:11-13, 898:18-23; APP267. Shaft 10 is connected to Shaft 9 and the West Plant via the Never Sweat Tunnel. IOR 448 at 874:6-22. Resolution also deepened Shaft 9 by roughly 2,000 feet to approximate the depth of Shaft 10. *See* APP074 ¶¶ 19-20; IOR 188 at 2; IOR 448 at 865:3-867:11. The post-1982 drilling of Shaft 10 was the primary basis for the panel majority's determination that Resolution is a new source.

In 1975, the U.S. Environmental Protection Agency issued the mine the first in a series of National Pollution Discharge Elimination permits allowing it to

[2] USDA, Resolution Copper Project and Land Exchange Environmental Impact Statement, https://www.resolutionmineeis.us/documents/final-eis (last visited Sept. 12, 2023).

discharge treated stormwater, mine water, and mine seepage to a tributary of Queen Creek. Separate Supplemental Appendix to Resolution's Supplemental Brief ("SAPP") SAPP003-17; APP072 ¶ 6; APP072-73 ¶¶ 9, 13. Most of the water delivered to the Resolution treatment plant comes from not from process water but from pumping ("dewatering") to keep the mine works dry. That pumped groundwater contains naturally occurring metals. APP241; IOR 204 at 2-3. Resolution is not presently producing ore in commercial quantities. IOR 249 at NQB000560; IOR 448 at 896:15-25, 899:18-23. Although the mine's permit authorizes it to discharge treated water to the creek, the mine does not do so, but instead pipes it to an irrigation district 26 miles away. APP083 ¶ 85.

After ADEQ renewed the mine's permit in 2017, the Water Quality Board denied the Tribe's challenge, APP049-54, and the Superior Court affirmed, APP037-48. A divided Court of Appeals reversed. APP004-36.

ARGUMENT

A. The Clean Water Act's Regulatory Structure.

1. A federal-state partnership for regulating industrial discharges.

The CWA, passed in 1972, forbids the "addition" of any pollutant from a "point source" to "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1362(12)(A). The CWA "anticipates a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). To that end,

it empowers states to administer the federal permitting program, 33 U.S.C. § 1342(b), and also to set their own discharge standards (which, in turn, drive discharge limits), 33 U.S.C. § 1313(c).

Establishing water quality standards at the state level takes time, and Congress wanted to ensure that, in the interim, certain categories of industrial discharges were subject to minimum federal standards. It accordingly directed EPA to establish minimum standards for certain industries based on then-current technology. 40 C.F.R. § 440.104; *see also* National Pollutant Discharge Elimination System Permit Regulations, 49 Fed. Reg. 37998-01, 38039 (Sept. 26, 1984).

In 1982, EPA issued minimum standards for discharges of seven pollutants by copper mines. Those standards, not modified in the intervening four decades, are found in 40 C.F.R. §§ 440.100 to 440.105 ("Subpart J"). For one example, the new source performance standards ("NSPS") and existing source discharge limitations for copper mines have always been, for copper, 0.30 mg/L (milligrams per liter, or parts per million) for daily maximum and 0.15 mg/L for an average of 30 consecutive days. As shown below, the standards expressly apply to "mines" and their constituent facilities. They do not separately apply to "shafts" or other mine workings.

In 2002, EPA delegated authority to ADEQ to administer the program in Arizona. State Program Requirements; Approval of Application by Arizona to Administer the NPDES Program, 67 Fed. Reg. 79629-01, 79630 (Dec. 30, 2002).

2. The "new source" issue has no impact on the permit's discharge limitations.

The issue here is whether ADEQ erred by failing to recognize the presence of a "new source" in the form of Shaft 10 (or some other combination of recent installations) when it renewed Resolution's permit. As stated above, the Court of Appeals majority mistakenly believed that the mine would not be subject to the most stringent discharge limitations unless it was designated as a "new source."

Make no mistake. The mine that exists today is not a new mine. It's a very old mine, with modifications made within the footprint of that old mine. And Shaft 10 in a vacuum is not a new "source." It's a new component part of that very old mine. The majority's fear that, without a "new source" designation, the mine would be able to sidestep discharge limits is groundless.[3] The permit ADEQ issued to Resolution imposes limits on all surface-water discharges *that are stricter than the NSPS* for copper mining specified in 40 C.F.R. § 440.104.

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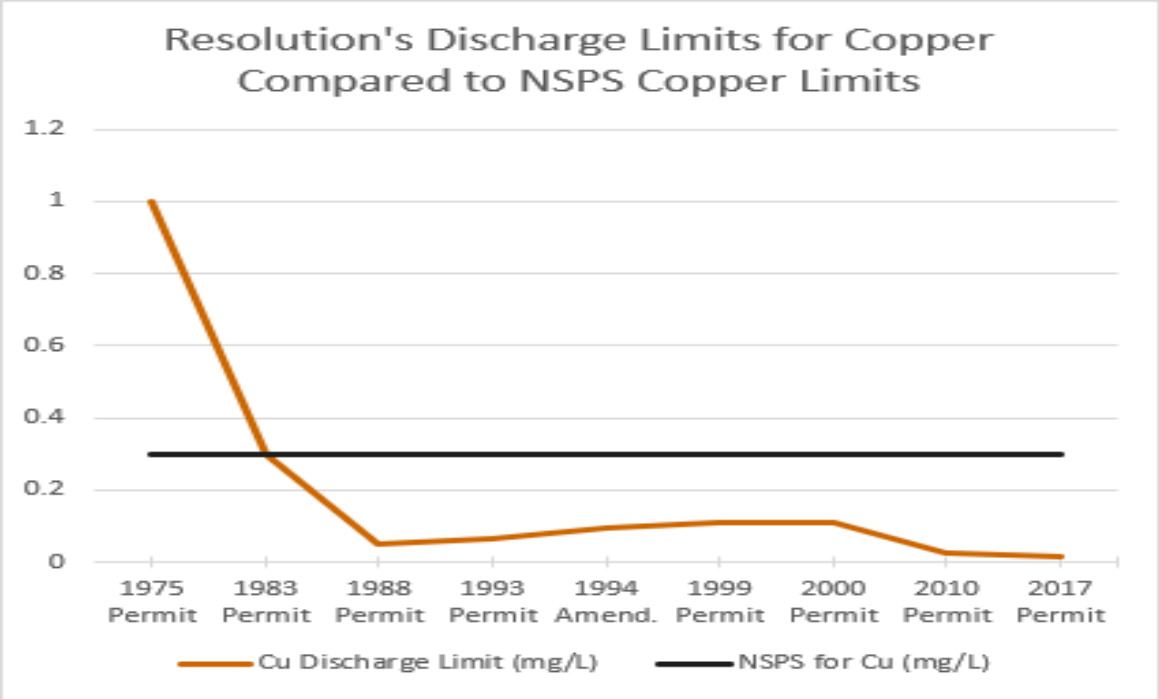
[3] *See* APP021-22 ¶ 60 ("A contrary result would mean Resolution could continuously sink shafts into its property and perpetually expand its mining site without being subject to NSPS so long as those structures were constructed on lands adjacent to its copper mining site.").

The administrative law judge traced this standard-setting history at length, making findings of fact that the Tribe did not dispute. *See* APP011 (Tribe did not dispute ALJ's findings); SAPP217-218 (*see* APP084 ¶ 97, explaining ADEQ Ex. 15, a table comparing NSPS limits imposed under federal law with those imposed on Resolution by ADEQ under Arizona law). For example, the NSPS for copper (converted to micrograms) is a daily maximum of 300 per liter and a 30-day daily average of 150 per liter. *See* 40 C.F.R. § 440.104; SAPP217-18 (showing conversion). The permit ADEQ issued to Resolution imposes limits that are far lower: a per-day maximum of 17 micrograms per liter and a 30-day daily average of 8.5 micrograms per liter. APP084 ¶ 97; SAPP217-18; APP181 at 17-25, APP182 at 1.[4]

[4] Discharge limits imposed by ADEQ are stricter because ADEQ's limits take into account the water quality of Queen Creek. When ADEQ reviews a permit application, it looks first to the concentration limits set by federal regulation, in this case, 40 C.F.R. § 440.104 (mine drainage). The federal minimum standards are called "technology-based effluent limitations" ("TBELs"). *See* IOR 442 at 48:22-49:6; IOR 158 at 3-3 Then ADEQ derives facility-specific "water quality-based effluent limits" ("WQBELs") based on the water quality of the body receiving the discharge. The agency imposes the more stringent of the two limits. IOR 442 at 61:6-13; 87:21-88:5 Because ADEQ undertakes this process with each renewal application, it from time to time has modified the concentration limits imposed on the mine. *See* 40 C.F.R. § 122.29(b)(3) (allowing permit modifications).

And this has been true for decades. As the graph below shows, the mine permit's discharge limit for copper, the main pollutant of concern, met the NSPS as of 1983 and has been *significantly lower* than the NSPS *since 1988.*[5]



In sum, the majority's opinion was based on a flawed premise: that branding an old mine that has been maintained, reclaimed, re-used and modernized as a new source was necessary to bring more stringent discharge limitations to bear. As the dissent pointed out, the majority then compounded that error by misapplying the new

[5] Concentration limits shown in the graph are daily maximum limits imposed by the series of permits issued to the mine. *See* SAPP007, SAPP019, SAPP035, SAPP055-56, SAPP071, SAPP097, SAPP113, SAPP136, SAPP175.

source criteria of 40 C.F.R. §§ 122.2 and 122.29. APP030-36 ¶¶ 78-99. To those criteria we now turn.

B. The Permit ADEQ Issued to Resolution Covers No "New Source."

1. Neither Shaft 10 nor the entire mine is a "new source" under 40 C.F.R. § 122.2.

As relevant here, the law first defines a "[n]ew 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 under section 306 of CWA which are applicable to such source.

40 C.F.R. § 122.2; *see also* 40 C.F.R. §§ 440.100 to 440.105 ("standards of performance" for copper mines and mills).

Because Resolution's post-1982 construction did not create a new source, ADEQ only modified the existing permit when it approved the renewal. "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' . . . ." *Nat'l Wildlife Fed'n. v. E.P.A.*, 286 F.3d 554, 568 (D.C. Cir. 2002).[6]

[6] ADEQ's decision to modify the existing permit rather than declare the mine a new source was entirely consistent with 40 C.F.R. § 122.29(b)(3) (allowing agency to modify permit when construction does not create a new source under Sections 122.2 and 122.29(b)(1) but "otherwise alters, replaces, or adds to existing process or production equipment").

As relevant here, the discharge limitations referenced in Section 122.2 apply to "[m]ines that produce copper . . . from open-pit or underground operations other than placer deposits." 40 C.F.R. § 440.100(a)(1). So if Resolution had constructed an actual new mine after December 1982, that hypothetical new mine would be a new source. That is the *Friends of Pinto Creek* case, *supra* at 1-2.

Here, Resolution has not constructed an entirely new mine – or any other type of new source. Shaft 10 and the other Resolution workings are components within the old Magma Mine, and the relevant performance standards apply to mines in their entirety, not to separate components of a mine. *See Mahelona v. Hawaiian Elec. Co.*, 418 F. Supp. 1328, 1335 (D. Haw. 1976) (generating station was existing "source," not the cooling-water discharge facility that controlled the station's discharge, because "while there are standards of performance governing steam electric generating plants, there are no regulations applicable solely to discharge facilities").

The definition of a "mine" to which the copper-mining standards apply is specified in Section 440.132(g). Under that regulation, 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, 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). *See also* Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54598-01, 54606 (Dec. 3, 1982).

The contention that Shaft 10 constitutes a distinct "mine" within the meaning of the regulation is insupportable. Mine shafts are *components* of a "mine" as Section 440.132(g) defines that term. With the other workings and above-ground structures, they all are among "the land and property placed under, or above the surface of the land, used in or resulting from the work of extracting metal ore . . . by any means or method." But none of those workings individually constitutes a "mine."

Moreover, Resolution's current plans to produce copper are contingent on, *inter alia*, a Congressionally mandated land exchange that has yet to occur and is vigorously opposed. *See, e.g.*, *San Carlos Apache Tribe v. U.S. Forest Service*, No. 2:21-cv-00068-DWL (D. Ariz.).[7] In the meantime, Resolution is using Shaft 10 and other new installations, all within the Magma Mine footprint, not to extract copper

[7] Resolution faces several regulatory hurdles before it can begin producing copper at the mine. In 2014, Congress enacted the Southeast Arizona Land Exchange and Conservation Act, 16 U.S.C. § 539p, which requires the Department of Agriculture to convey property near the existing mine to Resolution in exchange for conservation lands now owned by Resolution. The statute requires the exchange to be made after completion of an environmental impact statement. That statement was completed, challenged in court, and then withdrawn and remains pending. *See Apache Stronghold v. United States*, 56 F.4th 636 (9th Cir. 2022), *en banc opinion pending*; *San Carlos Apache Tribe v. United States*, CV-21-0068-PHX-DWL, and *Ariz. Mining Reform Coal. v. United States*, CV-21-00122-PHX-DLR.

but rather to explore the new ore body and to maintain and dewater the historic workings. The Tribe asserts (Resp. at 9) that Resolution intends to extract copper ore from Shaft 10 in the future, but even that is not so. Under the block-cave mine plan, Shaft 10 would be used for dewatering and ventilation, not to remove ore. *See* IOR 184 at 101-03.

The Tribe argues (Resp. at 11) that ADEQ's approach would allow a mine, once permitted, to expand forever without close analysis of discharge limits. But by the Tribe's reasoning, *each* such new installation would be "new source" subject to distinct permitting requirements as a "mine." *See* APP016 ¶ 45. The result would be that any one mine site would contain many, perhaps dozens or even hundreds, of individual "mines."

That contention ignores both common sense and the regulation's definition of "[m]ine" as "*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) (emphasis added). Textually, the majority and the Tribe reason that "all" in the phrase "all land and property" must not mean "all" but instead means "any," so that "any" new property installation that is "used in or resulting from the work of extracting metal ore or minerals" must be a distinct (new) source because it is a distinct (new) "mine." But that's not what Section 440.132(g) says. It says that "*all* land and property" used or

resulting from the mining of ore is defined together as the "mine." It's not surprising that neither the majority nor the Tribe cites case precedent to support their curious interpretation of the regulation.

The Tribe mischaracterizes (Resp. at 10) Resolution's position as "once any mining takes place on a site, no matter how comparatively insignificant or how long such activity had ceased, all subsequent activity is merely a continuation of the 'existing source.'" This is decidedly not a situation like the mine the Environmental Appeals Board analyzed in the case the Tribe cites, *In re Phelps Dodge Corp., Verde Valley Ranch Development*, 10 E.A.D. 460 (E.P.A. May 21, 2002) (in proceeding filed in 2001 concerning mine abandoned in 1953, company's continued maintenance of tailings did not put it within definition of "mine" in Section 440.132(g)).

The majority expressed concern that ADEQ's reasoning would allow continued construction by Resolution to forever elude compliance with new source performance standards. APP021-22 ¶ 60. As noted, *supra* at 7-8, that concern is mistaken.

2. Neither Shaft 10 nor the entire mine is a "new source" under 40 C.F.R. § 122.29(b)(1).

"New source" is further defined in 40 C.F.R. § 122.29(b), which states in relevant part:

> (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.

40 C.F.R. § 122.29(b).

Because neither Shaft 10 nor the mine as a whole qualifies as a "new source" under Section 122.2, ADEQ properly could have renewed Resolution's permit without any further analysis. That is because Section 122.29(b)(1) applies only to sources that are properly classified as "new" under Section 122.2. In any event, there can be no doubt that the permit includes no "new source" under Section 122.29(b)(1), if, for no other reason, than no mining of ore is currently underway.

The majority's conclusion to the contrary was based solely on 40 C.F.R. § 122.29(b)(iii), which turns on whether the "processes" of the new construction "are

substantially independent of an existing source at the same site."[8] In this determination, the agency "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." *Id.*

First, as for integration, Shaft 10 and the other mine components Resolution has constructed are and will remain decidedly integrated with the rest of the mine. The mine plan makes plain that Shaft 10 won't be used to remove ore; it will be used instead for dewatering and ventilation of the rest of the existing mine works. *See* IOR 184 at 101-03. Shaft 10 will work in conjunction with Shaft 9 (built in the 1970s) to ventilate the new workings. IOR 448 at 897:7-10, 931:2-8. It will work with Shaft 9 to dewater workings at the East Plant; the water collected will be pumped through the Never Sweat Tunnel, where it will be comingled with water from Shaft 8 for treatment and delivery to an irrigation district. APP082 ¶ 76; APP128 at 14-22. Further:

[8] All agree that the first two criteria under that section are irrelevant. *See* 40 C.F.R. § 122.29(b)(1)(i) (source "constructed at a site at which no other source is located"); *id*. (b)(1)(ii) (source "totally replaces the process or production equipment that causes the discharge of pollutants at an existing source").

- Shaft 10, the shaft Resolution drilled, is a mere 300 feet away from historic Shaft 9 – at a site that already had 42 miles of tunnels.[9] APP007 ¶ 10; IOR 448 at 865:3-20.
- Shaft 10 is connected not only to the adjacent Shaft 9, but also to the entire mine via the nearly two-mile-long Never Sweat Tunnel. IOR 448 at 867:12-19; APP241 (Permit diagram showing simplified mine process flow). That connection was made so Shaft 10 could be integrated with the West Plant. APP007 ¶ 11. Water collected in Shaft 10 is pumped to the West Plant for treatment – as is the case with water collected in Shaft 9. APP241; IOR 448 at 873:13-874:13. Water from both Shaft 9 and Shaft 10 is commingled with water pumped from the mine workings at the West Plant before treatment at the same plant. *See* APP241; IOR 448 at 874:6-22.
- Shaft 10 does not replace Shaft 9 or any other shaft, but instead is designed to work with the existing infrastructure. IOR 184 at 82-83. Shaft 10

[9] For the sake of comparison, ASARCO's Mission mine and complex in Sahuarita comprises some 29.7 square miles. Because some of that complex is on tribal land, it requires permits from both EPA and ADEQ. But neither agency ever treated the mine as a new source because of lateral movement within that giant footprint. IOR 443 at 333:1-337:18. Conversely, at the sizeable Black Mesa Peabody Coal mine, EPA did designate individual mine components as separate sources -- but only because there are independently applicable effluent standards (other than Subpart J) applicable to those sources. *Id*. at 337:23-343:1.

provides enhanced ventilation of the subsurface and another point of an entry and exit for mine personnel. IOR 448 at 897:7-10, 931:2-8; IOR 184 at 101, 103. Having more than one way to exit from a mile below ground is obviously an important safety feature.

- Beyond serving to transport mine water for treatment, the Never Sweat Tunnel also is the means by which potable water is and will be pumped from the West Plant to the East. IOR 184 at 83.
- The integration of Shaft 10 into the rest of the mine is further illustrated by its construction. Development rock from the construction of Shaft 10 and associated workings was carried through the Never Sweat Tunnel to the West Plant, using the same rail infrastructure used during operation of the historic Magma Mine. IOR 184 at 82.

As shown, multiple facilities at the West Plant are and will be interlocked functionally with multiple facilities at the East Plant. And, contrary to the Court of Appeals' conclusion, it's not like the two plants are just sharing utilities. *See* APP019-20 ¶ 57. The interlocking functions are critical to the continued exploration and maintenance of existing historic and modernized assets within the footprint of the historic Magma Mine.

As for the second factor the regulation cites, there can be no doubt that the mine as a whole and Shaft 10 are "engaged in the same general type of activity as

the existing source." *See* 40 C.F.R. § 122.29(b)(iii). As shown, Shaft 10 not only is critical to Resolution's continued exploration of the new ore body; it and the other new workings are critical to the continued maintenance (ventilation and dewatering) of existing workings. Neither in this court nor in the Court of Appeals has the Tribe argued otherwise.

The Tribe points to the "replicat[es], without replacing" language from the EPA Guidance. Resp. at 12; *see also* NPDES Permit Regulations, 49 Fed. Reg. 37998-01, 38044 (Sept. 26, 1984). But as Judge Paton explained, drilling a new shaft 300 lateral feet away from an existing one will not "replicate" the mining activity that Magma conducted on the west. This is not a situation like the EPA Guidance posits, in which an owner constructs a "new but identical and completely separate" unit at the site of "similar existing unit." APP033 ¶ 90; *see also* 49 Fed. Reg. at 38044 (positing two cases, (1) an original source replaced by a newly constructed identical plant, and (2) a new plant constructed beside an identical existing plant; both are "new source[s]").

And installing additional mine components or potentially adopting a different mining method, as here, does not convert an existing mine into a new source. *See* 49 Fed. Reg. at 38044 ("[I]f a facility increases capacity merely by adding additional equipment in one or two production steps . . . it will not be a new source.").

3. ADEQ did not otherwise err in considering 40 C.F.R. § 122.29.

Presumably referring to 40 C.F.R. § 122.29(b)(2), the Tribe also incorrectly asserts Resolution does not challenge the Court of Appeal's erroneous conclusion that Shaft 10 is subject to "independently applicable standards." Resp. at 4 n.1; *see also* APP016-18 ¶¶ 45-51. Resolution emphatically challenges the court's mistaken conclusion that Shaft 10 by itself is a "mine" and hence that the NSPS apply to the shaft "independently." Those NSPS apply to discharges from the mine as a whole and are imposed at the site's two outfalls. Shaft 10 is not subject to any standards other than the Subpart J standards that apply to the whole mine. The Tribe's Unwarranted Invocation of 40 C.F.R. § 122.4(i).

C. Permit Renewal Does Not Jeopardize Queen Creek Restoration.

Finally, although the issue is not before this Court, Resolution must respond briefly to the Tribe's contention that the mine must designated a "new source" now and consequently barred from discharging treated water of *any* quality to Queen Creek, lest the mine's discharge frustrate future water quality restoration efforts. *See* Opp'n Br. in Court of Appeals at 5, 21. That is not so.

Like other point sources that discharge water into the creek, the mine will have to comply with pollutant limitations that ADEQ will create during the Queen Creek Total Maximum Daily Load ("TMDL") process. *See* A.R.S. § 49-234; 33 U.S.C. §

1313(d). As part of this process, ADEQ will make final copper waste load allocations to each such source, including Resolution. A.R.S. § 49-234(D)(1).

Importantly, however, ADEQ has already prepared a draft TMDL, assigned a preliminary waste load allocation to Resolution, and determined that Resolution's permit limits would stay within its waste load allocation. Indeed, ADEQ's permit writer explained that Resolution's discharge would actually lower copper concentrations in Queen Creek. IOR 448 at 942:14-18; IOR 442 at 64:13-65:4; APP183-85 (ADEQ manager testifying that any discharge from the mine would actually lower the copper concentrations in Queen Creek).

CONCLUSION

Neither Shaft 10 nor the mine as a whole can be properly designated as a "new source" under the relevant regulations. This Court should vacate the Court of Appeals' decision and affirm the Superior Court's judgment. The dissent, the Superior Court, and the Water Quality Appeals Board all correctly approved the State of Arizona's renewal of the Resolution permit.

September 12, 2023

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