



June 1, 2021

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PLEASE CONFIRM RECEIPT

Dear Honorable Vilsack, Mr. Bonnie, Ms. Christiansen, Ms. Farnsworth, and Ms. Jackson:

Re: Demand for New DEIS for Perpetua's (formerly Midas Gold) proposed Stibnite Gold Project

The undersigned organizations received an e-mail from the Forest Service,¹ stating that the two letters our organizations sent to the Forest Service related to the proposed Stibnite Gold Project were sent outside of the public comment period for the Draft Environmental Impact Statement (DEIS) process. As such, the Forest Service stated that the letters would not be considered as "submitted during a designated opportunity for public comment and therefore will not be

¹ E-mail from Sitka Pence, NEPA Planner, Forest Service (May 3, 2021) (Attachment 1).

considered for the filing of an objection,” unless our objection issue “is based on new information that arose after the opportunities for comment.” (36 CFR 218.8(c)).

We write to emphasize that the two letters are based on significant new information that became available after the opportunity for public comment on the DEIS, as already stated in our letters.² We also write to underscore that there is additional data and analyses that should have been, but were not, included in the DEIS and that are now available to the agency, and should be made available to the public for review and comment in a new DEIS.

When an agency is presented with “new information that may alter the results of its original environmental analysis,” it must “prepare a supplemental EIS when there are ‘significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.’” *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557-58 (9th Cir. 2000) (citing 40 C.F.R. § 1502.9(c)(1)(ii)). “Failing to do so ‘insulate[s] [the agency’s] decision-making process from public scrutiny. Such a result renders NEPA’s procedures meaningless.’” *W. Watersheds Proj. v. Schneider*, 417 F. Supp. 3d 1319, 1333 (D. Idaho 2019) (quoting *California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982)).

The following information is significant, is relevant to environmental concerns, and is new, as it was neither available to nor previously and adequately considered by the agencies prior to release of the DEIS to the public. Thus, this new information must be fully reviewed in a new DEIS, subject to full public review under NEPA, the National Historic Preservation Act (“NHPA”) and other applicable federal laws.

1. The ModPro2.

If an agency makes substantial changes to the proposed action that are relevant to environmental concerns, it must prepare a new DEIS. *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011). Perpetua Resources submitted a revised plan of operations (ModPro2) to the Forest Service in December 2020, shortly after the public comment period closed on the DEIS. The ModPro2 is a major change to the proposed action, as it includes a revised transportation route, transmission lines, waste management and disposal, water management, processing facilities and reclamation and closure.³

² Letter to the Honorable Kevin Shea, Robert Bonnie, Vicki Christiansen, and Linda Jackson, re a new Draft Environmental Impact Statement for the proposed Stibnite Gold Project (Feb. 8, 2021); Letter to Linda Jackson, Forest Supervisor, Payette National Forest, re Stibnite Gold Project Air Quality Issues (Apr. 28, 2021) (Attachment 2).

³ Midas Gold, Stibnite Gold Project, Refined Proposed Action ModPro2, Table A-1 (Dec. 2020) (ModPro2).

The proposed design in the ModPro2 departs significantly from the alternatives previously described in the DEIS and likely includes significant new impacts that were not previously analyzed in the DEIS. Some of the significant changes in the ModPro2 include:

- Expansion of disposal of waste rock to Hanger Flat Pit backfill;
- Expansion of the Tailings Storage Facility (TSF) volume;
- Creation of lined water storage pond, titled “Stibnite Lake” on Yellow Pine pit backfill;
- Additional run of mine ore stockpile west of Scout Ridge;
- Re-handling and processing of waste rock from Hangar Flats Development Rock Storage Facility (DRSF) above-grade portions of Hangar Flats pit backfill, if supported by gold prices;
- Piping of Midnight Creek under haul roads, and diversion of the lower portion of West End Creek; and
- Addition of a surface water intake.

These and other changes in the ModPro2 may have significant impacts that bear on environmental concerns, and thus must be disclosed and analyzed in a new DEIS.

For example, changes to where and how much waste rock will be deposited, and changes to the size and/or volume of DRSF or the TSF may have significantly different environmental impacts than previously disclosed due to localized geological and chemical differences of these areas, which may have a significant impact on the quality of ground and surface water.

Additionally, although the elimination of rapid infiltration basins might have some environmental benefits, there might be downsides as well. The creation of the Stibnite Lake is a component of the ModPro2 that was not present in the alternatives already analyzed. It is a significant change with no prior analysis of if or how it will impact water quantity, water quality and habitat for ESA-listed fish species. Without a full and detailed review, including disclosure and opportunity for public comment, there is no way to meaningfully evaluate the potential effects in compliance with NEPA.

Although an agency has “some flexibility to modify alternatives canvassed in the draft EIS to reflect public input,” *Block*, 690 F. 2d at 771, the variations in the ModPro 2 are major, are not qualitatively within the spectrum of the alternatives already discussed in the DEIS, and primarily reflect Perpetua’s desires, not public input. Thus, the Forest Service must prepare a new DEIS for public review and comment. *See Russell Country Sportsmen*, 668 F.3d at 1045.

2. Studies completed after release of the DEIS and closing of public comment period.

The DEIS for the Stibnite Gold Project was already fundamentally flawed, with major gaps in data and analysis. The DEIS acknowledged these gaps, with a lengthy list of incomplete or unavailable information that it deemed “relevant to reasonably foreseeable significant adverse impacts,” 40 CFR §1502.22(b)(2), and/or “essential to a reasoned choice among alternatives.”⁴ If the missing information is “relevant to reasonably foreseeable significant adverse impacts” and is “essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant,” such as is the case here, the agency must include that information in the EIS. *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 496 (9th Cir. 2014). It did not, and therefore the agency must include this information in a new DEIS so that the public and the agency can make a “reasoned choice among alternatives.”

The list of missing information and analyses is not limited to, but includes:

- Waste rock management plan;
- Environmental legacy management plan (reclamation plan);
- Water management plan; and
- Modeling data necessary to determine the project-specific copper criteria for fish.

The U.S. Environmental Protection Agency (EPA) also outlined major gaps in the data and analyses in the DEIS,⁵ including:

- The need for additional analysis to support the effectiveness of proposed active and passive water treatment processes to mitigate anticipated water quality impacts;
- The need for improved analysis of potential impacts to surface water quality, particularly including impacts of mercury methylation and mercury deposition;
- Lack of clarity and specificity regarding the antimony, arsenic, and mercury thresholds that would be utilized to ensure that reclamation cover materials are protective of human health and the environment; and
- A lack of information to support the effectiveness and long-term success of on-site mitigation for impacts to wetlands and aquatic resources.

Furthermore, the EPA’s comments were based on the Mod Pro and not the ModPro2.

⁴ USDA Forest Service, Stibnite Gold Project, Draft Environmental Impact Statement, Table 4.1-1, p. 4.1-3 and 4.1-4 (Aug. 2020).

⁵ U.S. Environmental Protection Agency, Letter to Linda Jackson, Review of Draft Environmental Impact Statement for Stibnite Gold Project (Nov. 18, 2020) (Attachment 3).

The ModPro2 acknowledges that “the timing of completion of some studies and analysis conducted during preparation of the DEIS did not allow for some results to be fully considered in the DEIS effects analysis.”⁶ These include:

- Updated geological and mineral resource modeling;
- Aquifer testing in the Meadow Creek valley and subsequent hydrogeologic modeling changes;
- Revised geochemical characterization of development rock and ore, which included additional metallurgical testing to confirm geochemical characteristics of the resultant tailings;
- Updated site wide geochemical modeling for life-of-mine and post-closure, including predicting modeling of the proposed mine features and anticipated potential impacts to surface water and groundwater quality; and
- Updated water balance modeling.⁷

In addition to acknowledging the incomplete analysis components in the DEIS, the ModPro2 itself cites numerous unfinished supporting documents. In fact, nearly half of the references cited in the ModPro2 are still “*in progress*,” with date “TBD,” including the water management plan, reclamation and closure plan, mitigation plans, stream designs, and monitoring plans.⁸

Brown and Caldwell (in progress [a]). Stibnite Gold Project Environmental Monitoring and Management Plan. Being prepared for Midas Gold Idaho, Inc. Date TBD.

Brown and Caldwell (in progress [b]). Stibnite Gold Project Water Management Plan. Being prepared for Midas Gold Idaho, Inc. Date TBD.

Brown and Caldwell (in progress [c]). Stibnite Gold Mitigation Plan. Being prepared for Midas Gold Idaho, Inc. Date TBD.

Brown and Caldwell and Rio ASE (in progress). Fisheries and Aquatic Resources Mitigation Plan. Being prepared for Midas Gold Idaho, Inc. Date TBD.

Brown and Caldwell, McMillen Jacobs Associates and BioAnalysts (in progress). Fishway Operations and Management Plan. Being prepared for Midas Gold Idaho, Inc. Date TBD.

Rio ASE (in progress). Stream Design Report Stibnite Gold Project. Being prepared for Midas Gold Idaho, Inc.

⁶ ModPro2 at p. 3.

⁷ *Id.* at p. 4.

⁸ *Id.* at p. 92.

Tetra Tech (in progress [a]). Conceptual Mitigation Plan Stibnite Gold Project. Being prepared for Midas Gold Idaho, Inc.

Tetra Tech (in progress [b]). Reclamation and Closure Plan Stibnite Gold Project. Being prepared for Midas Gold Idaho, Inc.

Tetra Tech (in progress [c]). Wildlife Habitat Mitigation Plan. Being prepared for Midas Gold Idaho, Inc. Date TBD.

Point blank, the ModPro2 is incomplete, only containing assurances that the documentation-- which is relevant to the reasoned choice among alternatives--is forthcoming. These reports remain a work in progress, and yet the ModPro2 includes resource impact conclusions (hypothetically supported) in what seems to be an attempt to portray the environmental analyses as complete. They are not; thus the agency must include these analyses, once complete, in a new DEIS for public comment and review. *See Native Vill. of Point Hope*, 740 F.3d at 496.

3. Change of no action alternative due to ASAOC.

Perpetua Resources (as Midas Gold) has entered into an Administrative Settlement Agreement and Order on Consent (ASAOC) for removal actions that fundamentally change the “no action” alternative by altering baseline conditions.⁹ The ASAOC stipulates that the removal actions in Phase 1 are being conducted as time critical removal actions, and include the relocation of waste rock and tailings, with the objective of improving on-site water quality conditions before mining occurs (if permitted).¹⁰ An accurate baseline is “essential” for an informed analysis, 40 C.F.R. §1502.22, and necessary to “determine what effect the project will have on the environment.” *Great Basin Res. Watch v. BLM*, 44 F.3d 1095, 1101 (9th Cir. 2016).

Here, the baseline conditions have changed from when the analyses in the DEIS was performed. An accurate baseline, or no action alternative, is essential to provide a baseline for comparison with the action alternatives. In other words, the accuracy of the baseline is “critically important” to the comparison of the environmental effects. *N. Carolina Wildlife Fed’n v. N. Carolina Dep’t of Transp.*, 677 f.3d 596, 599 (4th Cir. 2012).

Moreover, the change in baseline conditions may further alter the actual impacts of each of the action alternatives. The agency must therefore re-evaluate the environmental impacts against the appropriate baseline, and disclose those analyses to the public in a new DEIS for review and comment.

⁹ Administrative Settlement Agreement and Order on Consent, CERCLA Docket No. 10-2021-0034 (ASAOC).

¹⁰ *Id.* at p. 2 (“This ASAOC establishes the framework to address certain areas in the Stibnite Mining District through an iterative, phased restoration approach, including securing removal actions that can occur before mining begins in the Stibnite Mining District.”).

In addition, the EPA took the unusual step of submitting a letter in the public record clarifying previous misstatements by Perpetua claiming that the ASAOC absolves them of any liability related to unpermitted discharges occurring on properties they own or manage under their mining claims:

Based on the information collected prior to the ASAOC, EPA believes that Perpetua Resources may be liable under Section 107(a) of CERCLA with respect to the Site, as an owner and/or operator of the Site. However, EPA understands that Perpetua Resources and its representatives have made public statements that the ASAOC determined that Midas Gold (now Perpetua Resources) will no longer be responsible for liability associated with legacy waste left by previous operators.

The scope of liability protection provided to Perpetua Resources/Midas under the ASAOC is limited. Upon the effective date of the ASAOC, and on the condition that Perpetua Resources satisfactorily completes the required work under Phase 1 of the ASAOC, Perpetua Resources/Midas was granted a covenant not to sue for only the work in specific areas of the Site specified under Phase 1. The ASAOC does not provide Perpetua Resources broad liability protection under CERCLA for the remaining legacy waste at the Site; therefore, Perpetua Resources remains a PRP for the remaining waste.

A new DEIS would be helpful in clarifying the status of potentially responsible parties for site cleanup.

4. New air emissions data submitted by Perpetua to the State agency.

The DEIS is based on outdated air emissions data, and it failed to include a cumulative air quality impacts assessment and a human health risk assessment.¹¹ In September 2020, the Idaho Department of Environmental Quality (IDEQ) released for public comment a draft Permit to Construct (PTC) for the Stibnite Gold Project. After review of the draft PTC and emissions data submitted by Perpetua (as Midas Gold), several commenters, including some of the organizations listed on the letter, made substantial comments about the insufficiency of dust control efficiencies, lack of detail in several some of the analyses, an underestimation of the potential emissions, and failure to consider all potential sources of emissions.¹²

¹¹ See *supra* n.2.

¹² Letter from Save the South Fork Salmon to Whitney Rowley, Idaho Department of Environmental Quality (Oct. 12, 2020 and Nov. 11, 2020); Letter from Idaho Conservation League to Morrie Lewis, Idaho Department of Environmental Quality (Oct. 12, 2020 and Nov. 11, 2020); Letter from Nez Perce Tribe to Whitney Rowley, Idaho Department of Environmental Quality (Oct. 12, 2020 and Nov. 11, 2020); Letter from Ian von Lindern to Idaho Department of Environmental Quality (no date) (Attachment 4).

In response to these comments, IDEQ requested further information from Perpetua, particularly updated hazardous and toxic air pollutant emissions. This additional new information from Perpetua confirmed that the previously reported potential emissions were significantly underestimated.¹³ None of this information was presented to the Forest Service prior to release of the DEIS.

Perhaps even more concerning is the fact that IDEQ has disclosed that it is omitting nearly 99 percent of potential hazardous air pollutant emissions from both regulation and its analysis of the potential environmental and human health impacts.¹⁴ Comment letters from several organizations as well as EPA identified the lack of consideration of all fugitive and non-fugitive hazardous air pollutant emissions in the draft PTC as a major flaw in the analysis.¹⁵ The impact of these potential hazardous air pollutant emissions was not evaluated in the DEIS though they threaten air quality and human health. These previously unaccounted for emissions may also be deposited on Forest Service land and in nearby rivers, causing negative impacts to water quality and potential harm to ESA-listed fish species. None of this information was available at the time the DEIS was released for public comment.

This new emissions data and information is relevant to environmental concerns, bears on the proposed action or its impacts, and will significantly “alter the results of its original environmental analysis.” *Friends of the Clearwater*, 222 F.3d 557-58. The Forest Service must therefore prepare a new DEIS.

5. Inadequately addressed impacts to Tribal populations.

EPA’s review of the DEIS identifies “potential disproportionately high and adverse impacts to tribal populations,”¹⁶ which were not adequately addressed in the DEIS. The EPA letter states that E.O. 12898 requires agencies to address disproportionately high and adverse impacts, as appropriate, to the greatest extent practicable, and concludes that “It is unclear how the draft EIS proposes to do this.”¹⁷

¹³ Letter from Midas Gold to Morrie Lewis, Idaho Department of Environmental Quality re: Response to IDEQ November 20, 2020 Request for Information (Dec. 17, 2020) (Attachment 5).

¹⁴ Idaho Department of Environmental Quality, Statement of Basis re: Permit to Construct No. P-2019.0047 (Feb. 18, 2021), available at: <https://www.deq.idaho.gov/deq-to-hold-public-informational-meeting-on-draft-air-quality-permit-to-construct-for-midas-gold/>.

¹⁵ Letter from Save the South Fork Salmon to Whitney Rowley, Idaho Department of Environmental Quality (Mar. 19, 2021); Letter from Idaho Conservation League to Morrie Lewis, Idaho Department of Environmental Quality (Mar. 19, 2020); Letter from TerraGraphics Foundation to Idaho Department of Environmental Quality (Mar. 19, 2021); Letter from U.S. Environmental Protection Agency to Whitney Rowley, Idaho Department of Environmental Quality (Mar. 19, 2021) (*see* Attachment 2).

¹⁶ *Supra* n.5.

¹⁷ *Id.*

Conclusion

The revised plan Perpetua submitted shortly after the public comment period closed, additional and new data and analyses, changes to the baseline (no action alternative), and missing information and analyses that were not complete before release of the DEIS all constitute major changes to the proposed action that will result in significant environmental impacts that were not evaluated in the DEIS and represent new information relevant to environmental concerns that would result in significant environmental impacts not evaluated in the DEIS. Rushing forward to release a final EIS and relying on the objection review process to resolve these issues, while cutting out the public and ignoring important information, violates NEPA. The Forest Service must, therefore, prepare and release for public comment a new DEIS.

It is concerning that when we informed the Forest Service of these deficiencies, the official response was a May 3, 2021 email stating that the issues we raised would likely not be considered until after the release of the draft Record of Decision and final EIS when the objection period starts - and then only if we can demonstrate that this information is based on new information.¹⁸ This response from the Forest Service signaled that the agency is preparing to sidestep this new relevant information, defend moving straight to a draft Record of Decision and keep members of the public from raising these points in the objection phase, instead of taking steps now to remedy the situation as required by law.

Please note that Perpetua has caused significant and ongoing delays in the NEPA process by failing to provide timely and adequate data and analyses. Perpetua repeatedly tried to cast blame on the agencies and NEPA process for the extended timeline,¹⁹ when in fact, Perpetua was, and continues to be, the primary source of delay from repeated changes to its plan of operations and delinquency in providing the requisite information necessary for analyzing the potential impacts.²⁰ Perpetua continues that pattern with ModPro2, which contains broad generalizations but inadequate detail or analyses to understand the potential impacts.

Proceeding now with a final EIS and draft Record of Decision is a violation of NEPA. We reiterate our request that the Forest Service withdraw the DEIS, require a new DEIS, and resume the process of public notice, review and comment.

¹⁸ *Supra* n.1.

¹⁹ Midas Gold, Letter to Mr. David Rosenkrance, Deputy Regional Forester, re: Midas Gold Review of FS Agreement No. 2017 0412-Stibnite Gold-MU-01. August 24, 2018.
<https://www.dropbox.com/s/gto7rc4h2e73yd5/August%2024%2C%202018.pdf?dl=0>.

²⁰ E-mail correspondence, Gina Owens to Kathryn Conant and Keith Lannom, re: scheduling issues, February 15, 2019. Keith Lannom, Forest Service, Letter to Laurel Sayer, Midas Gold, re: SOPA schedule, August 28, 2018.
<https://www.dropbox.com/s/3o758xaml3xrz7f/FW%20%20UPDATE-%20Stibnite%20Gold%20Project%20%20%20%20.msg.eml.pdf.SGP%20-%20Oct%202018%20SOPA%20Update-signed.pdf?dl=0>.

We look forward to your response.

Sincerely,



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