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Re: Public comment on the Action Memorandum, Administrative Record, and Removal Actions at the Stibnite site

On behalf of the organizations listed below, we submit the following comments on the Action Memorandum, Administrative Record, and Removal Actions associated with the Administrative Settlement Agreement and Order on Consent (ASAOC) signed by the U.S. Environmental Protection Agency (EPA) on January 15, 2021, with Midas Gold Corp. and its subsidiaries for removal actions at the Stibnite Mining District in Idaho.

The removal actions involve activities on Forest Service lands and constitute a major federal action that may significantly affect the quality of the human environment. The removal actions are also a component of a highly controversial proposal by Midas Gold Corp., now Perpetua Resources, to undertake new, and vastly larger, mining activities on federal public lands in the Payette National Forest--activities that would undo any environmental benefits of the removal

action and which raise serious concerns about the intent behind and legality of the removal action.

The undersigned organizations, which represent local, state, and national conservation organizations with decades of experience working on public lands, mining, and water quality issues in Idaho, object to the following actions:

**1. The EPA has failed to document the basis for applying “time critical” to the Phase 1 removal actions, and failed to provide an opportunity for pre-decisional public comment.**

The ASAOC and Action Memorandum was signed on January 15, 2021, by the EPA and Forest Service in the last days of the Trump Administration without opportunity for public review and comment. The lack of opportunity for the public to participate in the selection of the removal actions was predicated upon the decision that Phase 1 removal actions were “time-critical,” or removal actions that must be initiated within six months after signing of the ASAOC. Under CERCLA regulations, EPA is not required to prepare technical analysis (engineering evaluation/cost analysis) for time-critical removal actions. Nor is it required to notice the public and provide an opportunity to comment on the removal actions selected. The determination that a removal action is time-critical thus has significant implications to the public’s ability to review, comment, and affect the response actions selected.

Here, the Action Memorandum fails to justify or provide a basis for the decision to determine that Phase 1 removal actions are “time critical.” The Action Memorandum recognizes that the water quality impacts that the removal action proposes to partially address have been ongoing for decades. Furthermore, the EPA, Forest Service, and Midas Gold/Perpetua Resources have conducted extensive discussions for at least three years regarding these releases,<sup>1</sup> indicating that the required urgency to implement a time-critical removal action was not present. Yet there is no rationale in the Action Memorandum or the Administrative Record as to why these removal actions must be initiated now so that the EPA could bypass the requirements for technical analyses of and public comments on potential removal actions. Rather, it appears that EPA is improperly using the “time-critical” response as a means to circumvent technical review and meaningful pre-decisional public comment to advance the political demands of Perpetua Resources.

Moreover, the regulations for time-critical removal actions apply when the lead agency determines “that less than six months exist before on-site removal activity must begin.” 40 C.F.R. 300.415(n)(2). In this case, the on-site removal actions must be initiated by July 15, 2021,

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<sup>1</sup><https://midasgoldcorp.com/investors/news/2021/midas-gold-reaches-agreement-to-begin-environmental-restoration-at-abandoned-mine-site-and-announces-relocation-to-united-states/>

within six months of the January 15, 2021 ASAOC and Action Memorandum. Yet, according to the Forest Service, on-site removal activities have not been initiated.<sup>2</sup> The company is currently conducting cultural surveys. Thus, it appears that on-site activities are not anticipated to occur anytime soon. This is particularly disturbing considering that the EPA made the determination that the situation warranted initiation of these removal actions within six months of signing the ASAOC.

We ask that the EPA please clarify which on-site removal actions are currently underway; if this is a time-critical removal action and on-site actions have not been initiated, why; and the factors the EPA considered to determine which removal actions to begin with at the site. Further, we request an additional comment period, once the supporting documents are provided, as described in 40 CFR 300.825(b).

**2. Even if EPA properly identified phase 1 as “time-critical,” EPA failed to establish that the removal actions “contribute to the efficient performance of any anticipated long-term remedial actions with respect to the release concerned.” See 40 CFR 300.415(d) and 42 USC 9604(a)(2).**

EPA should explain how these removal actions “contribute to the efficient performance of any anticipated long-term remedial actions with respect to the release concerned.” 42 U.S.C. 9604(a)(2). Interestingly, phase 2 and 3 of the proposed removal actions are tied to a controversial proposed mining operation. Were these actions determined by “the extent the President deems practicable?” *Id.* How does EPA know that the removal actions identified in the ASAOC will not be undone by current or future proposed mining operations? Do these actions impede future remedial plans? How are these actions consistent with a long-term remedy? To what extent are the releases at this site addressed by the proposed removal actions?

**3. The removal actions are entirely inadequate, and the Administrative Record fails to provide data or analysis to demonstrate why these removal actions were selected or whether these removal actions will be effective in providing water quality benefits.**

The removal actions are wholly inadequate to address the contamination issues at the site. The primary source of contamination – the Yellow Pine Pit – is not addressed. One of the few actual requirements, which would remove 325,000 tons of toxic mine waste, accounts for only 2-3% of the 10-15 million tons of legacy mine waste on the site. Under the agreement, the contaminated waste is simply being moved to another on-site location. The removal actions identified in Phase

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<sup>2</sup> Personal communication, Todd Leeds, the Forest Service on-site coordinator, communication with John Rygh, Save the South Fork Salmon.

2 and 3 are entirely optional and dependent on future mining approval,<sup>3</sup> in which a decision is now postponed until 2023.

The Administrative Record, Action Memorandum, and ASAOC fail to provide sufficient data or analysis to evaluate or predict the effectiveness of the proposed removal actions at remediating the releases at the site. Where is the analysis that demonstrates that there will be water quality benefits from these limited removal actions? How significant will they be? Are there other alternatives that were considered? Is this the most effective alternative? Why were these specific removal actions (e.g., this tonnage of waste rock tailings) selected? From the Administrative Record and Action Memorandum, these removal actions do not seem to have the proper level of documentation and justification. If the Yellow Pine Pit is a major contributor of hazardous releases, why isn't it considered for removal?

The Action Memorandum and Administrative Record fail to provide adequate data or analysis to support the removal action choices and to analyze their effectiveness at addressing the releases. For the stream diversion project in Phase 1 alone, the Action Memorandum identifies a lengthy list of information needs that are necessary to understand the potential impacts of this removal action:

- Procedures for addressing and protecting any cultural resources in the areas in which stream diversion will occur;
- Description of estimated background water quality at selected locations upstream and downstream of the proposed diversions;
- Identification of Remedial Action Objectives (may be narrative rather than numerical) and performance goals (e.g., to convey flows up to a design criterion around the identified Source Areas);
- Identification of technologies (e.g., unlined or lined ditches, pipes; excavation equipment; and erosion prevention methods);
- Identification of Removal Action Alternatives (e.g., liner types, conveyance routing, outfall locations). Each alternative shall be developed to the conceptual design level;
- Evaluation of Removal Action Alternatives;
- Schedule and estimated cost for recommended Removal Action;
- Biological Assessment that characterizes baseline conditions of existing habitat in and around TCRA areas; addresses potential project impacts that the projects may have on threatened or endangered species, their habitat, and their food stocks; and describes

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<sup>3</sup> ASAOC, p. 1, "The Work in the subsequent Bridge Phase, Phase 2 and Phase 3 are not required under the ASAOC until the Respondents elect to do that Work as provided in the ASAOC and the Agencies agree to the performance of the Work by Respondents." See ASAOC p. 2, Respondents assert that the restoration and water quality benefits envisioned under Respondent MGII's PRO are contingent on Respondent MGII's ability to secure the necessary permits and operate a mine in the Stibnite Mining District.

- best management practices and conservation measures designed to avoid or minimize any negative impacts;
- A Clean Water Act Section 404 analysis memorandum, if the recommended removal action alternative will impact jurisdictional wetlands. The memorandum shall document the information gathered regarding practicability and cost, long and short-term effects from all proposed alternatives; minimization of adverse effects, and an analysis of the need for any mitigation;
  - Procedures for processing design changes and securing the Agencies' review and approval of such changes to ensure changes are consistent with the objectives of the Removal Actions;
  - Procedures for coordinating with EPA regarding compliance with EPA's Off-Site Rule, as applicable.

There are similar information needs that remain essential to understanding the potential impacts of the proposed tailings and waste rock removal actions.

Moreover, if this is a time-critical removal action for which on-site removal actions must be initiated within six months of the date from which the EPA determined removal actions were necessary (January 15, 2021), these activities must be initiated by July 15, 2021. Yet, we are unable to find the data and analysis (identified above) in the Administrative Record that indicate that these removal actions have begun. For example, where is the identification of removal action alternatives (e.g., liner types, conveyance routing, outfall locations); conceptual design level development of each alternative; evaluation of removal action alternatives and schedule and; estimated cost for recommended removal action?

Of the 35 documents in the Administrative Record, 28 are simply chapters of the Stibnite Gold Project DEIS, which the EPA insists is a separate process and which is based on an outdated mine plan. The ASAOC, Action Memorandum, and Administrative Record completely fail to provide information to support the choice of these removal actions, and to demonstrate that these removal actions meet the ARARs and will provide long-term effectiveness and performance. The Administrative Record is so sparse it also fails to include the comments that were submitted to the EPA on the ASAOC by Earthworks, Idaho Conservation League, Save the South Fork Salmon, and Idaho Rivers United, and the letters and comments from the Nez Perce Tribe.

#### **4. The adit studies are inadequate to understand the most appropriate removal action.**

The Action Memorandum includes an Adit Study in Phase 1, which would characterize sources of contamination from former mine adits that could be subject to optional Phase 2 evaluation and removal actions.

“Adit Study. Characterizing sources of contamination from former mine adits for the optional Phase 2 evaluation and removal actions of each of the five adits that will be conducted under a separate Action Memo.”

There is already considerable water quality data available for the mine adits, and yet other robust data collection and analysis (e.g., hydrological data/analysis) is not required. We can find no information in the Administrative Record that provides a basis for why additional source characterization was selected for a time critical removal action, and other important data collection and analysis wasn't. The proposed work does not appear to further the effort to develop removal and/or remedial actions for the adits. If the EPA considers hazardous releases at the site to be subject to time critical removal status, why are the adit releases excluded? What is the basis for these decisions?

**5. The EPA has reduced the financial assurance for the removal action, without disclosing the appropriate data and analysis to support that reduction.**

We understand that the EPA reduced Perpetua's financial assurance for the proposed removal actions from \$16.6 million in the October 2020 draft of the ASAOC to \$7.5 million in the final ASAOC signed on January 15, 2021.<sup>4</sup> It also appears that Perpetua's status as a “start-up” company and the company's financial condition were a factor in this consideration.<sup>5</sup> Perpetua should not receive favorable treatment from EPA. Financial assurance should be particularly robust for a company like Perpetua with no prior experience in mining. As stated in the ASAOC:

“Midas Gold has no current mining operations and are presently funded entirely by investor capital that has been raised only through the prospect of future mining. Midas Gold will not have ongoing operating revenue unless they are able to commence future mining operations in the Stibnite Mining District.”

Moreover, Barrick Gold, a major investor in Perpetua's Stibnite Mine proposal, has a long history of negative environmental and cultural impacts in regions where the company works. The proposed removal activities will take place in areas the Nez Perce Tribe, State of Idaho, and others have invested millions of dollars to promote habitat and ecosystem restoration, and a single mishap could undo years of prior work. For these reasons alone, we recommend the EPA reinstate the highest level of financial assurances and hold Perpetua Resources and their backers to the high standards this region deserves.

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<sup>4</sup> Nez Perce Tribal Executive Committee, Response to January 12, 2021, Government -to-Government Consultation with EPA Regarding the Draft ASAOC for the Stibnite Mine Site, January 14, 2021.

<sup>5</sup> *Id.*

EPA also failed to publicly disclose the financial assurance calculations to demonstrate that the reduced financial assurance amount is adequate to complete the ASAOC work. We are particularly troubled by this lack of transparency, given EPA's frequent urging of other agencies to provide financial assurance calculations for public review during the NEPA process. Where are the financial assurance calculations in the Administrative Record? Where is the analysis that documents the reasons for decreasing the financial assurance? Without adequate financial assurance, there is no guarantee that the work will be completed if Midas Gold, now Perpetua Resources, is unable or unwilling to complete the work, once it commences. There is also a history of other AOCs and removal actions at Stibnite. These should be included in the Administrative Record. It is important to understand the removal actions that preceded this one.

**6. The estimated costs are not included in the Action Memorandum.**

Section 5, which is titled "Proposed actions and estimated costs," does not include the estimated costs of the various removal actions. What are those costs?

**7. The EPA should make clear the hazardous releases and/or contamination covered under the ASAOC, and those which are not covered by the ASAOC.**

A recent letter from the EPA to Perpetua makes clear that the ASAOC does not provide broad liability protection under CERCLA for the remaining legacy issues at the Site.<sup>6</sup> Perpetua Resources remains a potentially responsible party (PRP) at the site, and could be liable for clean-up costs for the remaining legacy waste.

"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."<sup>7</sup>

The EPA has stated that the ASAOC is not intended to provide response actions for all existing metal-laden contamination at the site.<sup>8</sup> Yet, there is no information in the administrative record that delineates or discloses what contamination and/or discharges at the site are covered under the ASAOC and which are not. We request clarification on this important information.

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<sup>6</sup> U.S. EPA letter from Calvin Terada to Laura Sayer, Perpetua Resources Corps. April 28, 2021

<sup>7</sup> Id.

<sup>8</sup> U.S. EPA, Regional Administrator, Michelle Pirzadeh, Letter to Earthworks, et al., April 29, 2021.

**8. The EPA and Forest Service have inappropriately intertwined Perpetua’s proposed removal actions with its plans for new, vastly larger, and unpermitted mining activities at the site.**

Most of the cleanup actions identified in the Action Memorandum and ASAOC (Phase 2 and 3) are contingent on the approval of the company’s new plans for mining at Stibnite, creating an inappropriate incentive for the EPA and Forest Service to permit the Stibnite Gold Project, with the ostensible goal for “restoration” of the area. Yet, the ASAOC mischaracterizes Perpetua’s plan of operations - the Stibnite Gold Project - as “restoration,”<sup>9</sup> and infers that “redevelopment” of the Stibnite Mining District is the most beneficial outcome.

The proposed mine plan will not result in “restoration” of the site, and should not be characterized as such. The initial proposed plan of operations (MODPRO) will result in a substantially greater disturbance footprint than the original legacy pollution.<sup>10</sup> The Draft Environmental Impact Statement (DEIS) predicts significant and lasting harm to the environment from the proposed mine plan (Alternative 2), including:

- The direct loss of or injury of 100,000 fish<sup>11</sup> and the net loss of up to 26% of critical habitat for Chinook Salmon and 28-70% of critical habitat for Bull Trout, even with mitigation;<sup>12</sup>
- A significant increase in water temperature, with temperature criteria violations predicted downstream of the project for several decades post-closure;
- Post-closure, long term contamination of groundwater of unknown extent due to Yellow Pine pit backfill;<sup>13</sup>
- Groundwater pollution below the Hangar Flats and West End DRSFs [Development Rock Storage Facilities];
- The generation of contaminated mine water that will require active water treatment in perpetuity, and inadequate analysis to determine the effectiveness of passive and active water treatment to mitigate water quality impacts;<sup>14</sup>

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<sup>9</sup> See ASAOC, p. 1, “Respondents intend to simultaneously mine and engage in environmental restoration of the Site to improve water quality and address other historic contamination left behind by former operators.” See ASAOC p. 3, “This ASAOC establishes the framework to address certain areas in the Stibnite Mining District through an iterative, phased restoration approach, ...”

<sup>10</sup> USDA Forest Service, Stibnite Gold Project, Draft Environmental Impact Statement, August 2020.

<sup>11</sup> *Id.* Table 4.12-2b.

<sup>12</sup> *Id.* P. 4.12-69.

<sup>13</sup> U.S. Environmental Protection Agency, Letter to Linda Jackson, Payette National Forest Supervisor, Comments on Stibnite Gold Project Draft EIS, November 18, 2020.

<sup>14</sup> *Id.*



- The use of the existing historical mine waste to build new waste facilities – spreading mine contamination across the site, with unknown effects;<sup>15</sup>
- The generation of 32 pounds of mercury emissions per year, with inadequate analysis to determine impacts.<sup>16</sup>

Please see the letter from EPA Region 10, which articulates its ongoing “significant concern regarding potential impacts to water quality and aquatic resources,” and the identification of “potential disproportionately high and adverse impacts to tribal populations.”<sup>17</sup> In December, a new mine plan was submitted (MODPRO2), the Forest Service is requiring a Supplemental Environmental Impact Statement to analyze the potential effects of the new plan.

Even if it were appropriate to intertwine the two processes (permitting and remediation), the proposed removal actions fall far short of the robust, comprehensive clean-up plan repeatedly promised by Midas Gold. The ASAOC and Action Memorandum with its lack of public review and inadequate analysis, is particularly inappropriate, given Midas Gold’s inexperience with mining and its entire financial reliance on future mining activities. According to the ASAOC,

“Midas Gold has no current mining operations and are presently funded entirely by investor capital that has been raised only through the prospect of future mining. Midas Gold will not have ongoing operating revenue unless they are able to commence future mining operations in the Stibnite Mining District.”

The Stibnite Mining District is located in the headwaters of the South Fork Salmon River, an iconic and economically important watershed with salmon and steelhead fisheries of local, state and national interest. It is also the traditional lands of indigenous peoples, who have relied on these resources for a millennium. Activities within this watershed – even proposed remediation activities – must undergo rigorous scrutiny and be subject to public review, particularly those proposed by a mining company with no history of mining and no source of ongoing operating revenue.

**We urge the EPA and Forest Service to rescind the ASAOC and Action Memorandum, and initiate a comprehensive clean-up plan for the Stibnite Mining District legacy pollution, with a remedial investigation/feasibility study and advance public review. Alternatively, if EPA insists on proceeding with this limited “time critical removal action,” it must demonstrate that the removal action contributes to the efficient performance of any**

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> U.S. Environmental Protection Agency, Letter to Linda Jackson, Payette National Forest Supervisor, Comments on Stibnite Gold Project Draft EIS, November 18, 2020.

**anticipated long-term remedial actions in the Stibnite Mining District and begin as soon as possible to eliminate the threat to public health and welfare.**

Sincerely,



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