RAÚL R. LABRADOR
Attorney General

SCOTT L. CAMPBELL
Deputy Attorney General
Chief, Energy and Natural Resources Division

HANNAH M.C. YOUNG, ISB #9781
Deputy Attorney General
Department of Environmental Quality
1410 N. Hilton, 2nd Floor
Boise, Idaho 83706
Telephone: (208) 373-0422
Facsimile: (208) 373-0481
Email: hannah.young@deq.idaho.gov

Attorneys for Respondent

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

IN THE MATTER OF AIR QUALITY PERMIT TO CONSTRUCT P-2019.0047

NEZ PERCE TRIBE, IDAHO CONSERVATION LEAGUE, and SAVE THE SOUTH FORK SALMON,

Petitioners,

v.

IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent,

and

PERPETUA RESOURCES IDAHO, INC.,

Intervenor – Respondent.

Agency Case No. 0101-22-01

OAH Case No. 23-245-01

RESPONDENT IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF AND RESPONSE TO PETITIONERS' OPENING BRIEF

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Respondent, the Idaho Department of Environmental Quality ("DEQ"), by and through the Office of the Attorney General, hereby submits this Brief and Response to Petitioners' Opening Brief.

INTRODUCTION

On June 17, 2022, DEQ issued a Permit to Construct ("PTC") to Perpetua Resources Idaho, Inc. ("Perpetua") for the Stibnite Gold Project ("SGP"). REC 1274. The PTC, which is the subject of this petition for review, was issued after a nearly three-year permitting effort by DEQ. *Id.* This effort included three extended public comment periods, two public informational meetings, frequent meetings with Perpetua, numerous requests for additional information from Perpetua, and four permit iterations. *Id*. Nez Perce Tribe, Idaho Conservation League ("ICL"), and Save the South Fork Salmon ("SSFS") (collectively, "Petitioners") challenge the permitted dust emissions covered by the PTC in this petition to the Board of Environmental Quality ("the Board").

Although Petitioners make many claims in their Opening Brief, they present no evidence or facts demonstrating that DEQ acted unreasonably or violated any rule or statute in issuing the PTC. Petitioners' arguments can primarily be summarized as a collection of gross oversimplifications and misstatements. The Hearing Officer, who carefully and thoroughly considered this matter for over a year after Petitioners first challenged the PTC issuance, also found Petitioners' claims unpersuasive, granting Summary Judgment in DEQ and Perpetua's favor. DEQ now urges the Board to do the same and find that the PTC meets all applicable legal requirements and to uphold the Hearing Officer's December 5, 2023 decision.

PROCEDURAL HISTORY

On July 22, 2022, Petitioners initiated a contested case, challenging DEQ's issuance of the PTC to Perpetua for the SGP. REC 0001-0028. Soon thereafter, the Board appointed a Hearing

Officer to oversee and decide the contested case. REC 0031-0032. On August 12, 2022, DEQ responded to the Petition, denying it committed any error in issuing the PTC. REC 0033-0039. That same day, Perpetua filed a petition to intervene in the contested case, as the permittee, which the Hearing Officer granted. REC 0040-0045.

On September 6, 2022, Perpetua filed a Motion to Dismiss the Petition, which DEQ joined. REC 0052-0124. The Hearing Officer ruled on the Motion to Dismiss on November 15, 2022, dismissing three of Petitioners' claims and partially dismissing an additional claim. REC 0160-0186. Thereafter, Petitioners were given leave to amend their Petition and an Amended Petition was filed on January 11, 2023. REC 0263-0292.

Petitioners filed a Motion for Summary Judgment on April 14, 2023, and DEQ and Perpetua filed their own Motions for Summary Judgment on May 12, 2023. REC 0319-0363; REC 1204-1232; REC 1276-1336. The Hearing Officer held a hearing on the motions on September 21, 2023. REC 3275-3279. On October 31, 2023, the Hearing Officer issued a *Memorandum Decision on Motions for Summary Judgment and Preliminary Order*, appearing to dismiss all of Petitioners' claims. REC 3280-3328. Because DEQ and Perpetua sought clarity on whether the Hearing Officer did intend to dismiss all of Petitioners' claims, they filed a Joint Motion for Reconsideration and/or Clarification on November 10, 2023. REC 3332-3341. On December 5, 2023, the Hearing Officer issued his *Amended Memorandum Decision on Motions for Summary Judgment and Preliminary Order* ("Preliminary Order"). REC 3372-3425. The Hearing Officer made it clear he dismissed <u>all</u> of Petitioners' claims. *Id*.

On December 15, 2023, Petitioners filed the Amended Petition for Review of Preliminary Orders ("the Petition"), initiating this appeal to the Board. REC 3426-3441.

STATEMENT OF FACTS

The Clean Air Act ("CAA") is the federal law that regulates air emissions from stationery and mobile sources. 42 U.S.C. § 7401, *et seq*. The Environmental Protection Agency ("EPA") has delegated the authority to implement the CAA in Idaho to DEQ. REC 1272. To implement the CAA in Idaho, DEQ promulgated the Rules for the Control of Air Pollution in Idaho, IDAPA 58.01.01 (the "Air Rules"). DEQ has received delegated authority from EPA for decades, and EPA has approved DEQ's CAA program year after year. *Id.* This delegation includes the authority to issue permits to qualifying facilities in Idaho. *Id.* DEQ's air quality permit program issues more than 100 permits a year. REC 1258. In writing these permits, DEQ staff use federal and state regulations as well as the internal guiding practices outlined in standard operating procedures. REC 1273. When DEQ receives a permit application for a "permit to construct," DEQ strives to issue the permit within 150 days, which includes the necessary time for a public comment period. *Id.*

Perpetua submitted an application for a permit to construct for the SGP on August 20, 2019. REC 0418. The SGP will consist of conventional open-pit mining, ore preparation, and gold extraction. REC 0415. DEQ expended extraordinary efforts to evaluate the application, consider public comments, and engage in highly technical decision-making to arrive at a legally and environmentally sound permit. *See* REC 1273-1274. DEQ engaged in three extended public comment periods, two public informational meetings, frequent meetings with Perpetua, and made many requests for additional information from Perpetua. REC 0418. DEQ determined Perpetua's application incomplete on three occasions. *Id.* Petitioners attempt to suggest that DEQ's three incompleteness determinations and multiple requests for supplemental information somehow indicate a failure or dereliction by Perpetua or DEQ. *See* REC 3464. They are wrong. In fact,

DEQ's relentless pursuit for necessary information, and Perpetua's willingness to provide it, demonstrate the parties' desire to prepare only a defensible, environmentally protective permit.

On June 17, 2022, DEQ issued the 43-page PTC and accompanying 505-page Statement of Basis for the SGP. *See* REC 0367-0914. Petitioners then initiated the contested case on July 22, 2022, challenging DEQ's issuance of the PTC. REC 0001-0028.

LEGAL STANDARDS

I. Standard of Review.

In a contested case proceeding, "the Board must determine whether DEQ has acted reasonably and in accordance with law." *In the Matter of Sunnyside Park Utilities' Application for Sewage Disposal Permit*, Final Order on Petition for Review of Preliminary Order, at 10 (BEQ Dkt. 0103-07-02, Apr. 7, 2009).[1] A court will affirm the Board's decision, should it be appealed, unless the court finds that DEQ and the Board's decision is in violation of constitutional or statutory provisions, is in excess of statutory authority, is made on unlawful procedure, or is arbitrary, capricious, or an abuse of discretion. *See* I.C. § 67-5279(3).[2] But, it is the Petitioners who have "the burden of proving by a preponderance of the evidence, the allegations in the petition." IDAPA 58.01.23.062. Thus, the Board must uphold DEQ's decision to issue the PTC unless it determines that Petitioners have in fact proven, by a preponderance of the evidence, that DEQ's decision was (1) unreasonable, (2) not in accordance with law, (3) issued upon unlawful procedure, and (4) was arbitrary, capricious, or an abuse of discretion.

[1] Publicly available at https://www2.deq.idaho.gov/admin/LEIA/api/document/download/5566.

[2] The Hearing Officer recognized the helpfulness of using the judicial standard of review in I.C. § 67-5279, "[b]ecause those are the standards that ultimately govern the disposition of this matter…" REC 3377. Further, and importantly, Petitioners use the judicial standard of review set out in I.C. § 67-5279 in asking for relief. REC 3474.

When reviewing the Hearing Officer's Preliminary Order, the Board has the authority to "exercise all of the decision-making power that [the Board] would have if [the Board] had presided over the hearing." I.C. § 67-5245(7). "This means that, in reviewing the Preliminary Order, the Board may review all of the evidence *de novo*…" *In the Matter of Sunnyside Park Utilities' Application for Sewage Disposal Permit*, at 2. "A de novo standard of review permits an appellate court to review all legal issues raised in the lower court, even if one of the issues was not addressed in the first instance, so long as there is a sufficient factual basis." *State v. Jay*, 167 Idaho 592, 598, 473 P.3d 861, 867 (Ct. App. 2020).

II. Agency Deference.

In a contested case, "[t]he agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." I.C. § 67-5251(5). Because agencies have technical, specialized expertise and knowledge, the Idaho Supreme Court has recognized that "[t]he actions of an agency… are afforded a strong presumption of validity." *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010). Agencies are "clothed with power to construe [the law] as a necessary precedent to administrative action." *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 854, 820 P.2d 1206, 1211 (1991). The Idaho Supreme Court has "long followed the rule that the construction given to a statute by the executive and administrative officers of the State is entitled to great weight and will be followed by the courts unless there are cogent reasons for holding otherwise." *Id*. (citations omitted). And an "agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial and competent evidence in the record." *Peck v. State, Dep't of Transp.*, 153 Idaho 37, 42, 278 P.3d 439, 444 (Ct. App. 2012) (citations omitted).

When an agency is interpreting its own rules, the court "applies a four-pronged test to determine the appropriate level of deference to the agency interpretation." *Duncan*, 149 Idaho at 3, 232 P.3d at 324. Under this test, the court must determine whether:

> (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present.

Id. Here, DEQ is responsible for administering the CAA and the Air Rules in Idaho. Therefore, when the agency is interpreting the language of the Air Rules, the Board should defer to DEQ's reasonable and practical interpretations.

ARGUMENT

I. DEQ acted reasonably and in accordance with all applicable law in excluding the Stibnite Access Road from the Ambient Air Boundary.

In the PTC, DEQ determined that the Stibnite Access Route ("the Route") was not accessible by the general public and was, therefore, not "ambient air," as that term is defined at 40 CFR § 50.19(c) and IDAPA 58.01.01.006.10. REC 3475. Petitioners claim the Route is in fact ambient air and that the Hearing Officer erred when he determined that DEQ had permissibly excluded the Route from the ambient air boundary. *Id.* The Hearing Officer established that DEQ had substantial evidence to find that Perpetua had the legal authority to preclude the general public from traveling over the Route, and that DEQ and EPA guidance supported DEQ's determination. *Id*. For the reasons discussed below, Petitioners fail to prove these allegations or demonstrate that DEQ acted unreasonably or in violation of any law.

A. DEQ reasonably relied on Perpetua's assertions regarding control of the Route, and the record supports DEQ's determination.

In support of this claim, Petitioners first argue that DEQ impermissibly relied on the assertions provided by Perpetua—primarily, Perpetua's statement in its permit application

regarding its control over the Route.[3] DEQ did exclude the Route from ambient air because, in part, Perpetua represented that it would have legal authority to prohibit access by the "general public" and the practical ability to do so. REC 1260; REC 1236-1240. DEQ's reliance on these assertions is completely reasonable. As the Hearing Officer stated:

> In the experience of the hearing officer, it is not unusual for an agency to rely on representations made in a permit application, even as to an issue as fundamental as the nature of the applicant's interests in the relevant property.

REC 3390. In advance of the hearing on the motions for summary judgment, the Hearing Officer asked the parties to provide any legal authorities addressing DEQ's ability to rely on representations made by a permit applicant and the extent to which DEQ is responsible for verifying that information. REC 3388. None of the parties provided any legal authority demonstrating DEQ was responsible for verifying factual information provided by the permittee. Id. This is both logical and practical, as DEQ cannot be expected to fact check every individual averment made by a permittee. This is also why permit applicants are required to certify that the information and statements provided in a permit application are "true, accurate, and complete." IDAPA 58.01.01.123. Perpetua certified that the information in its application was accurate. REC 3389. And, as the Hearing Officer pointed out, should it later be determined that Perpetua does not have legal control over the Route as it claimed it will, then Perpetua would be in violation of its permit. REC 3390.

[3] Petitioners cite *State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 715 P.2d 927 (1985), in support of the contention that "an agency determination can **only** be upheld where 'evidence supporting the agency decision is substantial when viewed in the light of the entire record, including the body of evidence opposed to the agency's view." REC 3477 (emphasis added). In *Hunnicutt*, the Court actually stated: "Nevertheless, reviewing courts should evaluate whether 'the evidence supporting that decision [under review] is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view.'" *Hunnicutt*, 110 Idaho at 261, 715 P.2d at 931 (citations omitted).

Petitioners discuss at length Perpetua's current process of seeking Forest Service approval for the SGP. REC 3479-3475. Petitioners contend that because the Forest Service has not yet approved the SGP, Perpetua does not have legal control over the Route. *Id.* Besides being an oversimplification, this discussion is irrelevant to DEQ's review of Perpetua's application and ultimate issuance of the PTC. Many things could change from the time a permittee submits an application. While DEQ may wish it had a crystal ball to see into the future, including what the Forest Service may or may not do regarding the SGP, DEQ can only permit a project based on the facts as they exist at the time the application is submitted. If circumstances do change, the permit may need to be modified, or the permittee could be in violation of the issued permit. The bottom line is that the agency record as it currently exists—namely Perpetua's assertions and the conditions of the PTC, discussed below—support DEQ's determination that Perpetua will have legal authority to exclude the general public from the Route.[4]

B. The PTC requires Perpetua to have the ability to restrict the general public from the Route.

The PTC itself requires that the "general public" be precluded from accessing the Route and requires that access for all guests be carefully managed. REC 0376. The Route will not be, as Petitioners contend, a "public access road." Permit Condition 2.7 requires a combination of security escort vehicles, manned guardhouses, locked gates, barriers, warning signs, and registration of all guests to the mine site. *Id*. Condition 2.7 also requires Perpetua to submit an Access Management Plan, which must include the specific measures Perpetua will use to discourage public access, including those included in Condition 2.7. *Id.* These conditions will be more than sufficient to notify a reasonable person that his or her presence is not permitted and

[4] Petitioners claim that the Hearing Officer ignored other facts in the record. REC 3478. It is unclear what the Petitioners are referring to. The only other information discussed is what the Forest Service may or may not end up approving regarding the project. This is not information that needed to be considered, as discussed above.

therefore punishable under I.C. § 18-7008 for criminal trespass and actionable under I.C. § 6-202 for civil trespass. Looking just at the "four corners" of the PTC, the Hearing Officer also found "Section 2.7 of the Permit to adequately require Perpetua to preclude access by the general public for the purpose of excluding the access road [the Route] from the definition of 'ambient air.'" REC 3393. It is disingenuous of Petitioners to call the Route a "public access road" when the PTC itself requires Perpetua to take all necessary actions to discourage public access.

C. DEQ and EPA guidance support DEQ's determination that the Route is not "ambient air."

Next, Petitioners claim that DEQ acted contrary to EPA and DEQ guidance in finding the Route does not qualify as "ambient air." In this way, the Petitioners are challenging DEQ's interpretation of its own rule, which should be afforded substantial deference. Petitioners also miscite EPA's 2019 "Revised Policy on Exclusions from 'Ambient Air,'" which does not require state agencies to apply the policy because they "retain the discretion to determine whether the steps taken by a source will be adequate to preclude public access." REC 1139.

However, DEQ's determination that the Route is not "ambient air" is supported by both DEQ and EPA guidance. The Hearing Officer summarized EPA's guidance well when he stated:

> According to EPA's 2019 ambient air policy: (1) it is appropriate to exclude areas from ambient air where measures are employed that are "effective in precluding access to the land by the general public;" (2) such measures can include physical barriers, but physical barriers are not required; (3) determinations by the agency are discretionary on a case-by-case basis; (4) the permit applicant must have the legal ability to preclude access by the general public and must employ measures that actually preclude the general public as a practical matter; (5) in evaluating the adequacy of the preclusion measures, the agency applies a "rule of reason" as to whether the general public will have access "under reasonably anticipated circumstances.

REC 3392. DEQ's modeling staff "evaluated EPA guidance on Ambient Air and outlined requirements the permit needed to address to manage access to the facility…" which was

"documented in Section 3.3.10 of the January 6, 2022, Modeling Memorandum from [DEQ staff person] Dr. Pao Baylon." REC 1260. When DEQ staff consulted with EPA on this issue, EPA Region 10 Meteorologist and Regional Modeling Contact, Dr. Jay McAlpine, stated:

> My understanding is the road is likely exempt from ambient air protections because it is fully under the control and surveillance of the source and unsupervised public access is precluded. It seems like a slam dunk, based on my understanding of EPA's revised ambient air policy.

REC 1240. DEQ's decision is in line with EPA's guidance, as the PTC requires Perpetua to take several measures to preclude access, as discussed, and Perpetua must have the legal ability to do so.

Similarly, DEQ's guidance focuses on the ways in which the permittee will discourage public access. REC 3392. The nature or remote location of the facility may discourage public access, or the permittee may take steps to prevent access. *Id.* If the general public is sufficiently precluded, it is reasonable to consider that the facility or specific area would not qualify as ambient air. *Id.* Petitioners rely on DEQ guidance language that states "if the general public [is] invited as part of the normal business conducted on the facility site" the area where the "public is invited is determined to be ambient air," and if the "general public [is] allowed on site as a part of a right-of-way easement or a common service road," then that road is "determined to be ambient air." Again, the general public is not invited, but meant to be precluded. This is not a "right-of-way easement" or "common service road." As one example, PTC condition 2.7 requires registration of all guests of a mine—surely no easement or common service road requires such registration.

DEQ's decision to differentiate between the "general public" and Perpetua's guests was not unreasonable or otherwise not in accordance with any law. DEQ's interpretation of the definition of "ambient air" is due considerable deference because: (1) DEQ is responsible for administration of this rule in issue; (2) its construction is reasonable; and, (3) the language of the rule does not

expressly treat the matter at issue. *See Preston v. Idaho State Tax Comm'n,* 131 Idaho 502, 960 P.2d 185 (1998). Thus, the Hearing Officer's Order should be affirmed, and the PTC should be upheld.

II. DEQ acted reasonable and did not violate any rule or statute by allowing Perpetua to submit certain plans later.

Pursuant to DEQ's discretion, the PTC requires Perpetua to develop plans and manuals and submit them to DEQ for approval at least 30 days prior to startup. REC 1264; REC 0367-0409. These plans and manuals include the Fugitive Dust Control Plan, the Haul Road Capping Plan, the Operation and Maintenance Manual, and the Stibnite Road Access Management Plan (collectively, "the Plans"). Petitioners claim that allowing Perpetua to submit the Plans later violates the Air Rules and CAA, and that "DEQ deferred addressing many issues during the PTC permitting process" by allowing Perpetua to "address those issues in the future through various plans." REC 3488. Petitioners contend that the PTC is partial and incomplete without the Plans themselves. This is a misstatement. DEQ did not defer addressing any issues, and the PTC contains all necessary conditions. As discussed below, DEQ is allowing Perpetua to provide additional detail in the required Plans. Petitioners fail to demonstrate that DEQ violated any rule or statute in using this customary practice of requiring plans be submitted later pursuant to the PTC.

A. Allowing Perpetua to submit the Plans later does not violate the CAA or the Air Rules.

Petitioners assert that "[n]o provision in the Air Rules authorizes DEQ to save portions of a PTC to be developed later, outside the normal PTC permitting process," and that the Air Rules require the Plans to be included in Perpetua's application and subject to public comment. REC 3488. Petitioners' Opening Brief regurgitates CAA regulations requiring legally enforceable procedures to protect air quality and requiring public comment on information submitted by an

applicant, as well as the Air Rules requiring that DEQ provide opportunity for public comment. REC 3488-89. Petitioners, however, do not provide any rule or regulation requiring that every detail and plan be included in the application or available for public comment. Instead, as the Hearing Officer recognized, there is no "outright prohibition of this practice [requiring detailed implementation plans after issuance of the PTC], and the language of Air Rule 211.01 provides DEQ with wide discretion regarding appropriate permit terms." REC 3406.

The PTC itself contains specific requirements that will ensure Perpetua complies with the Air Rules and CAA—that is, the PTC details "what" is required for compliance. The PTC conditions requiring that detailed plans be developed later merely mandates that Perpetua develop the specific details on "how" the PTC requirements will be achieved. Section 202 of the Air Rules specifies the requirements for a permit to construct application and identifies information required to be included in the application. IDAPA 58.01.01.202.01. Requisite information for new sources includes information related to the design of the source, nature and amount of emissions, the manner in which the source will be operated and controlled, and a schedule for construction. *Id.* The PTC does include all necessary information under Section 202. And DEQ may request any additional information necessary to make determinations under the Air Rules, IDAPA 58.01.01.202.03, while Section 211.01 also provides DEQ with flexibility and discretion to "impose any reasonable conditions."

During the public comment period, Petitioners submitted similar comments, raising concerns with the submission and review process of the Plans. PET 0922-0923. DEQ responded and explained that the PTC specifies minimum and substantive requirements for the Plans. *Id.* In addition, DEQ will exercise oversight, review, and approve the Plans, and publish the final plans

on its website. *Id*. Furthermore, all elements of the Plans will be incorporated and enforceable through the Final Permit. REC 0376; REC 0380; REC 0386.

Petitioners also claim that because the Plans have not yet been submitted, then "DEQ cannot reasonably claim that the Project will comply with the PM10 NAAQS and arsenic AACC." REC 3490. Petitioners utterly downplay what the PTC contains and what the Plans will actually entail. Using the Operation and Maintenance Manual ("O&M") as an example, the PTC contains at least ten substantive requirements, most of which contain additional related requirements, that must be in Perpetua's O&M. These requirements include, among other things, the following:

- Identify the manufacturer, model, date of manufacture, and maximum capacity (as-built) for each regulated emission source assigned a source ID, and for each control device in the service of ore concentration and refining, lime production, and concrete production (in Table 1.1).

- Establish operating ranges for control equipment, based on manufacturer specifications and conditions measured during performance testing [with six additional requirements following therein].

- Describe the procedures for proper operation, startup, and shutdown of control equipment, based on manufacturer specifications.

- Describe the schedule and procedures for routine inspection (Permit Condition 2.10), maintenance, repair, and replacement of control equipment.

- Describe the schedule and procedures for corrective action that will be taken if visible emissions are present from wet scrubber…, carbon filter…, baghouse…, or bin vent filter… control equipment at any time. Procedures should include how to determine whether filter cartridges are ruptured or are not appropriately secured in place, and how to determine whether the wet scrubber, condenser, and carbon filters are operating properly.

- Describe each monitoring device and methodology used to measure weight rates of materials to demonstrate compliance with each material throughput limit (Permit Conditions 3.5–3.9, 4.8–4.11, and 5.4–5.8). Procedures for proper installation, calibration, and maintenance shall be included.

- Describe each monitoring device and methodology used to measure the volumetric rates of materials to demonstrate compliance with the electrowinning cells and pregnant solution tank throughput limit (Permit Condition 4.12). Procedures for proper installation, calibration, and maintenance shall be included.

- Describe each monitoring device and methodology used to monitor pH, temperature, and free cyanide in each cyanide leach tank, each cyanide detox tank, and each tailings reclaim stream to comply with Cyanide Emissions Limit Compliance Monitoring (Permit Condition 4.18). Procedures for proper installation, calibration, and maintenance shall be included.

REC. 0378-0379. The PTC also contains the necessary operational conditions—conditions for drilling limits, blasting limits, daily hauling and excavating limits, life of mine hauling and excavating limits, and so on. REC 0386. In short, DEQ is relying on the PTC itself to ensure compliance with the Air Rules and CAA.

Petitioners also claim that allowing Perpetua to submit the Plans later deprives the public of meaningful involvement. REC 3490. Petitioners fail to cite any case law to support their position that public review is required for the Plans under the CAA or Air Rules. The relevant CAA jurisprudence affords broad discretion to states to develop permit conditions. *See Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). The Air Rules state that DEQ must provide an opportunity for public comment on its "proposed action, together with the information submitted by the applicant and the Department's analysis of the information." IDAPA 58.01.01.209.01.c.i. But, as previously discussed, DEQ underwent three extended public comment periods. REC 1274. DEQ responded to the many public comments received, at times making changes to the PTC based upon comments. *See* REC 1242. And, although not required, DEQ held two informational public meetings. REC 1274. DEQ is not denying the public an opportunity that they would otherwise be provided. The public has had many opportunities to engage with DEQ in the development of this PTC. Allowing Perpetua to submit the Plans later does not change that fact; the public was able to engage with DEQ on the development of the substantive requirements of the PTC, as required by IDAPA 58.01.01.209.01.c.i.

Petitioners cite inapposite cases, none of which support Petitioners' position that use of post-permit plans is prohibited. In *Waterkeeper Alliance v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005), environmental groups challenged an administrative rule promulgated by the EPA under the Clean Water Act ("CWA") to regulate water pollutants from concentrated animal feeding operations (the "CAFO Rule"). The CAFO Rule established non-numerical effluent limitations in the form of best management practices, rather than numerical effluent limitations. However, the Court determined that the CWA requires that (NPDES) permits include the effluent limitations the CAFO Rule deferred for inclusion in a post-permit nutrient management plan. *Id.* at 502. Additionally, "the CAFO Rule prevents the public from calling for a hearing about—and then meaningfully commenting on—NPDES permits before they issue." *Id.* at 503. For these reasons, "the CAFO Rule violates the plain dictates of 33 U.S.C. § 1251(e)." *Id.*

Waterkeeper is easily distinguished from the present case. For one, *Waterkeeper* challenges EPA's promulgation of an administrative rule and is not concerned with whether any specific permit adequately provides public participation, or whether any specific permit complies with federal emission requirements. Instead, *Waterkeeper* considers whether EPA's administrative rule allowing the inclusion of effluent limits in a post-permit plan violates the CWA. Here again, *Waterkeeper* is inapposite. The Plans Petitioners criticize are not meant to include emissions limitations required under the statute—those are provided in the PTC itself. Unlike the CAFO Rule's nutrient management plan, which deferred specific effluent limitations for formulation after issuance of a permit, the PTC mandates a litany of specific requirements, all meant to safeguard air quality and achieve compliance with the Air Rules. The post-permit plans required by DEQ will not include the conditions and limitations required by the CAA and Air Rules—they are

included in the PTC and were part of the public comment process. *Waterkeeper* simply does not support Petitioners' claim that the Plans deprive the public of meaningful involvement.

In *Env't Def. Ctr., Inc. v. U.S. E.P.A.,* 344 F.3d 832 (9th Cir. 2003), petitioners challenged an EPA rule to control pollutants from storm sewers (the "Phase II Rule"). Under the Phase II Rule, "dischargers may apply for an individualized permit with the relevant permitting authority, or may file a 'Notice of Intent' ('NOI') to seek coverage under a 'general permit.'" *Id.* at 853. "The Phase II Rule requires that each NOI contain information on an individualized pollution control program that addresses each of the six general criteria specified in the Minimum Measures." *Id.* The Court found that this scheme "constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable.'" *Id.* The Court concluded that EPA is "required to ensure that the individual programs adopted are consistent with the law." *Id.* at 856. Consequently, the aspect of the rule allowing coverage under an NOI was remanded. The Court noted however: "Our holding does not preclude regulated parties from designing aspects of their own stormwater management programs." *Id.*

Env't Def. Ctr. is also distinguishable from the present case, for many of the same reasons as the *Waterkeeper* case. *Env't Def. Ctr.* challenges an administrative rule, not a specific permit. Further, while the Phase II Rule provided an end-run around creating stormwater management programs or issuing permits without public comment, the PTC here did not. Instead, the PTC and its conditions for compliance with the Air Rules went through public comment. Only the details of implementation, not compliance and consistency with law, remain to be developed in the Plans. DEQ has satisfied the Ninth Circuit's admonishment that "programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity." *Id.* at 503.

Both *Waterkeeper* and *Environmental Defense Center* rested their holdings on express requirements under the Clean Water Act for public review of specific materials. The decisions are clearly distinguishable from Perpetua's Plans, which are not required by any express provision of the Air Rules (nor the CAA) to be included in the application, the Final Permit, or any part of the public comment process. The Board should accordingly not give any weight to these cited cases because they are factually and legally distinguishable. Instead, the Air Rules support DEQ's issuance of the permit and conditions for post-permit plans.

B. DEQ's Approach was reasonable and is customary practice.

Allowing Perpetua to submit the Plans later, but prior to startup, is both reasonable and consistent with DEQ's practice. REC 1265. As DEQ's Stationary Source Bureau Chief Mike Simon stated:

> It is common for the permit program to require certain plans, such as an O&M manual or FDCP to be prepared by the permittee post permit issuance. This allows the permittee to prepare a specific plan or manual based on the actual equipment purchased and installed, the manufacturer's instructions and recommendations, as well as the operational characteristics of the facility after construction is completed. DEQ uses its authority to require a permittee to develop and submit for DEQ approval Plans and Manuals in accordance with IDAPA 58.01.01.211.01 as reasonable permit conditions.

REC 1265. As to this explanation from Mr. Simon, the Hearing Officer found: "This is a logical explanation for deferring identification of the 'devices and methodologies' until later." REC 3407. Thus, the Hearing Officer held:

> Given that (a) there is a requirement in the Permit to monitor and record the amount of ore and development rock transported, and (b) the Petitioners have not offered expert testimony explaining how deferring identification of the specific "devices and methodologies" until later could be arbitrary, capricious, or an abuse of discretion, the hearing officer lacks discretion to conclude that DEQ committed reversible error.

Id.

Simply put, DEQ's rationale for deferring submittal of the Plans until later is justified because the PTC contains enforceable conditions and parameters which those Plans must include and achieve. DEQ made no special exceptions in this case, but simply followed its common, reasonable practice. Petitioners certainly disagree with this approach, but dislike is not the legal standard. DEQ exercised reasonable discretion in developing the PTC conditions and requiring the Plans with additional details be submitted later. DEQ did not violate the CAA or the Air Rules. Thus, the Board must affirm the Hearing Officer's Preliminary Order and find that DEQ acted reasonably and in accordance with all applicable law.

III. DEQ clearly demonstrated a reasonable basis for determining that Perpetua can achieve 93.3% dust control under the terms of the PTC.

Petitioners contend DEQ lacked a reasonable basis in determining that the SGP can achieve 93.3% dust control. REC 3494. Specifically, Petitioners argue "it is highly questionable whether 93.3% fugitive dust control is realistically attainable," and that "the Permit lacks sufficient conditions for DEQ to reasonably assume Perpetua will achieve such a high level of control." *Id.* Instead of attacking DEQ's underlying rationale, Petitioners summarily argue that "[b]ecause DEQ did not include such limits, conditions, and aggressive implementation measures in the Permit, it was arbitrary and capricious for DEQ to assume this high 93.3% would be achieved." REC 3496. Petitioners wrongly believe that without including specific limits "on the combinations, volumes, and frequencies for applying water sprays and chemical suppressants, as well as necessary monitoring and inspection" in the PTC itself, DEQ had no reasonable basis for assuming the SGP will achieve 93.3% dust control. REC 3499.

A. DEQ had a reasonable basis to determine Perpetua could achieve 93.3% dust control.

DEQ carefully and conscientiously studied this complex issue to ensure air standards were met. *See* REC 0924-0925; REC 1247-1248; REC 1260-1261. The 93.3%[5] control efficiency is based on a combination of dust suppressant chemical application (90% or higher) and watering (33% and higher) to increase road surface moisture. *See* REC 0509. As the Hearing Officer summarized, "DEQ has adduced expert testimony explaining the basis for the 93.3% control efficiency figure, an issue not within the common knowledge of the layperson." REC 3401. The Hearing Officer found that "Petitioners have not offered expert testimony to rebut" DEQ's efficiency figure. *Id.* Again, Petitioners have offered no evidence to contradict the Hearing Officer's reasoned decision, nor to suggest that DEQ's dust control figure is not adequately supported.[6]

Requiring Perpetua to achieve a 93.3% control efficiency was soundly within DEQ's discretion and supported by objective data that was reasonably relied upon. DEQ's evaluation to satisfy the requirements of Section 203 of the Air Rules included estimates of fugitive dust emissions from the Project's haul roads, including a dust control efficiency of 93.3%. *See* REC 0384. Conditions in the PTC will ensure that the control efficiency will be maintained through a combination of chemical dust suppressants (e.g., magnesium chloride or calcium chloride) and frequent watering, among other permit conditions. *Id.* Petitioners contend it is "highly questionable

[5] 93.3% control = (1-90%) * (1-33%).

[6] Petitioners seem to claim that "expert testimony" was offered "in the form of public comments and other submissions to DEQ made by the EPA." REC 3495. As the Petitioners know, the EPA is not considered an "expert" in the same manner DEQ is. As the Hearing Officer determined, because EPA is not a party to this case, they are not subject to discovery or cross examination, and are therefore not "experts." REC 3272. These vague references to "expert testimony" are disingenuous at best.

whether 93.3% fugitive dust control is realistically attainable." REC 3494. DEQ found otherwise, and Petitioners have not shown that DEQ's conclusion was unreasonable.

Petitioners have failed to show that DEQ's 93.3% control requirement is unachievable, nor have they actually demonstrated that 93.3% control would result in violations of Idaho's Air Rules. It is the burden of the party contesting an administrative agency's decision to show how the agency's decision was unsupportable. *See Grace at Fairview Lakes, LLC v. Idaho Department of Health and Welfare,* 172 Idaho 743, 748, 536 P.3d 382, 387 (2023). Petitioners have failed to meet that burden. DEQ determined that 93.3% dust control was both achievable and would protect air quality; the Board should uphold that determination and adopt the Hearing Officer's determination that "DEQ's adoption of the 93.3% control efficiency figure [was] adequately supported." REC 3402.

B. The PTC includes enforceable and sufficient conditions to ensure compliance with Idaho's Air Rules.

Petitioners' argument that the PTC "does not include a specific requirement to achieve 93.3% or any other level of dust control" fails. REC 3494. Petitioners mislead the Board, but the PTC speaks for itself. The PTC specifically requires that a dust control efficiency of 93.3% be maintained.

> Table 3.1 contains a description of control equipment used to control emissions from mining and ore processing activities.

Table 3.1 Mining and Ore Processing Control Device Descriptions

Emission Sources	Control Devices
Mining	
Excavating and hauling activities	Reasonable control & FDCP Chemical suppression and water sprays **Control efficiency: 93.3% for PM/PM10 (haul roads)** Haul road capping with low-arsenic quartzite

REC 0384 (PTC Table 3.1) (emphasis added). The Hearing Officer recognized this and determined that the PTC itself "includes a specific requirement that 93.3% control efficiency be achieved." REC 3403.

Next, Petitioners contend "the Permit lacks sufficient conditions for DEQ to reasonably assume Perpetua will achieve such a high level of control." REC 3494. But Petitioners recognize "the Permit includes conditions related to dust control" such as: monitoring and maintaining dust emission records (Permit Conditions 2.1-2.5) and development of a Fugitive Dust Control Plan ("FDCP") (Permit Condition 2.6). *See* REC 3497. Petitioners erroneously label these conditions "vague direction" and argue DEQ must include, in the PTC itself, details such as the exact dust suppressant types Perpetua will use and the frequency and rates of their use. REC 3499. Petitioners, however, "do not cite to any legal standard requiring additional requirements or otherwise explaining how the existing Permit provision is legally inadequate." REC 3403. Nonetheless, the PTC does include sufficient conditions for DEQ to believe Perpetua will achieve the required dust control level.

DEQ developed permit conditions to ensure the 93.3% control efficiency is maintained on a daily and annual basis, and Petitioners have not shown those conditions are unreasonable or unenforceable. According to EPA guidance, for source-specific permit provisions to be practically enforceable, they must specify: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, recordkeeping and reporting. REC 1157. DEQ ensured those enforceability criteria were met with respect to the 93.3% control efficiency. Not only did DEQ include that level of control in the PTC and find it achievable, but the PTC requires proper application of chemical dust suppressant and watering,

verified through daily visible emission monitoring and recordkeeping. *See* REC 0917, 0921, 0923, 0934, 0937.

DEQ's conclusion is well supported and reasonable. Condition 2.2 requires Perpetua to monitor the frequency and methods used to control fugitive dust at least once every 12 hours and maintain those records. REC 0374. Condition 2.4 requires daily facility-wide inspections of hauling activities to ensure the expected control efficiency is achieved. *Id.* Condition 2.5 mandates that fugitive dust control measures be applied to haul roads "on a frequency such that visible emissions from vehicle traffic on a haul road do not exceed 10% opacity." REC 0375. And if emissions exceed that level, Perpetua must take immediate corrective action until fugitive dust control is achieved. *Id.* These daily inspection and haul road opacity requirements are more stringent than in other permits that DEQ has issued. REC 1261.

The FDCP will also ensure compliance with fugitive dust requirements. Condition 2.6 establishes minimum and substantive requirements for the FDCP, including:

- posting and limiting the maximum speed of haul trucks;
- applying water or suitable dust suppressant chemicals to haul roads during the dry season and at other times as necessary to control fugitive dust;
- prior to onset of winter conditions, maintenance of the roads and any preventative dust suppression activities before the roads are frozen;
- developing specific criteria to determine what frequency and type (water and/or chemical) of dust suppressant and appropriate suppressant application rates;
- applying chemical dust suppressants consistent with manufacturer's instructions and recommendations;
- providing training to all relevant employees and conducting visible emissions evaluations by certified employees who are visible emission observers; and,
- at least once each year, evaluating FDCP requirements to identify additional requirements and evaluating the effectiveness of practices.

REC 0375-0376. The PTC "requires a more comprehensive and detailed FDCP than in any other minor source permit DEQ has issued." REC 1263. Thus, DEQ did not give "vague direction" to consider type, quantity, and rates of dust suppressants later in its FDCP; DEQ provided specific dust control conditions and detailed guidance on the requirements that must be contained in the FDCP.[7]

DEQ's imposition of minimum and substantive requirements in the Permit and through the FCDP was reasonable. It understood how uncommon and impractical it would be to establish specific numeric limits to control efficiency variables. *See* REC 1261-1262. Instead, the Permit, among other conditions, requires that chemical suppressants be applied in accordance with the manufacturer's instructions and recommendations and that the control effectiveness of the combination of dust suppressant chemicals and watering be verified daily. *See* REC 0374-0375. Petitioners have not satisfied their burden to show that DEQ unreasonably relies on the many permit conditions to achieve the required control efficiency.

Finally, Petitioners contention that Perpetua need only "describe what it will do to control dust, and then follow through on those plans" in order to comply with the PTC, is wholly without merit. REC 3495. Petitioners' straw man argument claims that if Perpetua "submits [] plans to DEQ, DEQ signs off on them, and Perpetua follows through and complies with the deficient plans, then Perpetua will be in compliance with the terms of the PTC – even though it will not achieve 93.3% dust control."[8] *Id.* This is wrong. As discussed, the PTC explicitly requires a 93.3% dust control efficiency. DEQ could not, and would not, approve a FDCP that falls below the expressly

[7] As discussed above in Section II, DEQ's use of plans to provide additional detail is in line with the Air Rules, and a reasonable, customary practice.

[8] This begs the question: what evidence do Petitioners have that adding more specific provisions to the permit—rather than the FDCP—will ensure that Perpetua controls its dust emissions?

stated Permit limit. Petitioners' contention to the contrary is disingenuous and must be disregarded. If Perpetua fails to achieve a 93.3% dust control level—verified through the visible emission inspections—they will be in noncompliance with the PTC.

In sum, the PTC requires Perpetua to achieve a 93.3% control efficiency. The experts at DEQ determined that 93.3% is both achievable and will comply with Idaho's air quality standards—Petitioners have proffered no evidence showing DEQ's decision is unsupported. The PTC contains express dust control requirements to ensure Perpetua's compliance. Moreover, despite being under no legal obligation to include additional requirements or conditions in the PTC, the PTC provides a plethora of conditions that will also ensure Perpetua complies with the PTC and achieves the target dust control number. Thus, DEQ's determination that the PTC would comply with the NAAQS was rational and supported by substantial evidence and Petitioners have failed to offer competent expert testimony or sound legal argument to the contrary. As such, the Board should affirm DEQ's determinations and adopt the Hearing Officer's well-reasoned opinion.

IV. DEQ's "project specific adjustment factor" clearly complied with the Air Rules, and DEQ used proper discretion and expertise to average arsenic emissions over the projected duration of the Mine.

Finally, Petitioners allege that DEQ created a "project specific adjustment factor" to "artificially dilute the ambient arsenic concentrations attributable to the SGP." REC 3499. According to Petitioners, DEQ violated the Air Rules by "artificially reduc[ing] the apparent arsenic exposure by spreading out the actual arsenic exposure resulting from the 16-year Project over a longer 70-year human lifetime." REC 3501. Accordingly, Petitioners claim the Hearing Officer "incorrectly interpreted the Air Rules" in allowing DEQ to use this "adjustment." REC 3506. Fundamentally, Petitioners misunderstand DEQ's analysis, which was not based on a

"qualitative" standard, as alleged. For the reasons discussed below, Petitioners fail to demonstrate that DEQ acted unreasonably or violated any applicable rule.

A. DEQ's use of the "project specific adjustment factor" is not contrary to the Air Rules.

There are four rule sections applicable to this claim. First, Air Rule Section 203.03 states that DEQ cannot issue a permit to construct for a new stationary source "unless the applicant shows to the satisfaction of the Department" that the following is met:

> Toxic Air Pollutants. Using the methods provided in Section 210, the emissions of toxic air pollutants from the stationary source… would not injure or unreasonably affect human health or animal life or vegetation as required by Section 161. Compliance with all applicable toxic air pollutant carcinogenic increments and toxic air pollutant non-carcinogenic increments will also demonstrate preconstruction compliance with Section 161 with regards to the pollutants listed in Sections 585[9] and 586.

IDAPA 58.01.01.203.03. Section 210 begins as follows: "In accordance with Subsection 203.03, the applicant must demonstrate preconstruction compliance with Section 161 to the satisfaction of the Department." IDAPA 58.01.01.210. Section 210 goes on at length to provide the methods by which DEQ and the permit applicant analyze the toxic air pollution emissions.

Section 161 then states: "Any contaminant that is by its nature toxic to human or animal life or vegetation must not be emitted in such quantities or concentrations as to alone, or in combination with other contaminants, injure or unreasonably affect human or animal life or vegetation. IDAPA 58.01.01.161. Accordingly, the language of Section 161 mirrors Section 203, both of which state that toxic air pollutants must not "injure or unreasonably affect human health or animal life or vegetation." That determination is made using the methods in Section 210.

[9] Section 585, Toxic Air Pollutants Non-Carcinogenic Increments, is not relevant to this case. Section 586 is discussed below.

Finally, Section 586 provides the acceptable ambient concentrations (AACC) for carcinogens, which includes arsenic compounds. Petitioners appear to focus on the AACC in Section 586, while discounting the Departments discretion under the other applicable rules.

The Hearing Officer accurately described the interplay between these rule sections well, stating:

> The use of the phrase "will also demonstrate preconstruction compliance" in Section 203.03 effectively creates two regulatory paths. First, the applicant and DEQ can use "the methods in Section 210" to show that emissions will not "injure or unreasonably affect human or animal life or vegetation." Section 210, in turn, consists of six-and-a-half pages of detailed, technical, complex regulations… Regardless, the relevant legal standard— "injure or unreasonably affect"—is not further defined within the Air Rules.
>
> Effectively, the second path—compliance with Sections 585 and 586—provides applicants with a safe harbor. If an applicant demonstrates "[c]ompliance with all applicable toxic air pollutant carcinogenic increments and toxic air pollutant non-carcinogenic increments…with regards to the pollutants listed in Sections 585 and 586," then satisfaction of Section 161 is automatic and application of the "injure or unreasonably affect" standard unnecessary… For arsenic compounds, the applicable AACC is 2.3E-04 µg/m3. So, if an applicant can demonstrate arsenic emissions will not exceed that AACC, then the Section 203.03 analysis for arsenic is over. As a matter of law, the legal standard of Section 161 is satisfied.

REC 3416-3417.

Regarding Perpetua's PTC, DEQ took the "first path," analyzing Perpetua's application under Section 210.12. REC 1242. Section 210.12 essentially "allows an applicant to demonstrate compliance with Section 161 through the quantitative standards in Section 586 instead of the qualitative toxicity standard." (emphasis added). REC 3417. The rule states:

> If the source's… approved T-RACT [reasonably available control technologies] ambient concentration at the point of compliance is less than or equal to the amount of the toxic air pollutant that would contribute an ambient air cancer risk probability of less than one to one hundred thousand (1:100,000), no further procedures for demonstrating preconstruction compliance will be required for that toxic air pollutant as part of the application process.

IDAPA 58.01.01.210.12.c. And the "ambient air cancer risk probability of less than one to one hundred thousand (1:100,000) (which amount is equivalent to ten (10) times the applicable acceptable ambient concentration listed in Section 586)." IDAPA 58.01.01.210.12.b. As Kevin Schilling, DEQ's Stationary Source Air Modeling Supervisor, explained:

> If T-RACT is used to control emissions from sources, then the allowable impact is ten times that of the AACCs, corresponding to a lifetime cancer risk of 1 in 100,000. The AACC conservatively represents a long-term exposure (70 years) that would result in a 1 in 1,000,000 cancer risk.

REC 1242. Perpetua proposed the T-RACT of using chemical suppressants on the roads to address arsenic emissions. REC 1268.

When DEQ completed the analysis, using very conservative assumptions, the analyses "resulted in modeled arsenic impacts exceeding a value of 10 times the AACC." REC 1242. Mr. Schilling explained DEQ's next steps as follows:

> Before undertaking an extensive revision of the conservative emission calculation approach used in the emission inventory and the air impact model, DEQ evaluated whether certain refinements in exposure calculations would be consistent with requirements of *Idaho Air Rules* and specifically with *Idaho Air Rules* Section 210 for carcinogenic TAPs.

REC 1242. Here, DEQ considered refining the assumed lifetime exposure to the relevant carcinogen, arsenic, from the stated 70-year period. *Id.* Perpetua had indicated that the SGP will only have a 16-year maximum project lifetime.[10] *Id.* Thus, "[t]o calculate a project-based arsenic concentration representative of the project, appropriate for comparison to the AACC (based on a 70-year exposure), the modeled impact was adjusted by the factor 16/70." *Id.*

[10] Perpetua importantly noted the following during its summary judgment briefing: "DEQ set the life-of-mine hauling and excavating limit at 788.4 million tons of ore and development rock. Whether this amount is mined in 16-years, the life of the mine, or 70 years, the lifetime exposure period, the total arsenic emissions will be the same, they would just be spread out over more time. Thus, the total arsenic exposure to public receptors will be the same irrespective of how long the mine is in operation." REC 1334.

"DEQ simply used this general approach to develop a project-specific adjustment factor for the SGP, using the 16-year maximum life of the project." REC 1244. Still, DEQ's calculations were as conservative as reasonably possible: the equation for calculating lifetime exposure risk to arsenic utilized the highest annual concentration from 14 different operational scenarios and repeated it over sixteen years, the lifetime of the mine. REC 0789. The annual arsenic emissions were based on a five-year rolling average of 135,000 tons of per day, for sixteen years. REC 0710. This total ore production is over fifty percent greater than the actual potential mine production. *Id*. Using worst-case scenarios, or overestimating expected emissions, is a common modeling strategy that ensures actual emissions do not exceed applicable air standards. *See* REC 1246.

DEQ's use of this "project specific factor" is supported by the Air Rules. Petitioners make much of the fact that DEQ used a "novel" approach. *See* REC 3501. But DEQ's approach still fits squarely within the confines of the Air Rules. DEQ used the AACC in Section 586. DEQ also used the methods for a T-RACT analysis in 210.12.c. Ultimately, Section 203, as well as Section 161, require DEQ to demonstrate that the SGP's arsenic emissions "would not injure or unreasonably affect human health or animal life or vegetation…" IDAPA 58.01.01.203.03. DEQ was able to demonstrate this using the conservative modeling and data specific to the project itself, all based upon Sections 586 and 210.

The Hearing Officer was persuaded by DEQ's expert testimony, finding:

> Mr. Schilling recognizes that the over-arching legal standard is the toxicity standard in Section 161 and explains why strict compliance with standards expressed as annual limitations is not always necessary to satisfy that standard, particularly when the exposure period is considerably shorter than the assumed 70-year exposure period on which the AACCs are based. Overall, he provides a thoughtful and conservative approach to ensuring arsenic emissions will not exceed the 1-in-100,000 lifetime cancer risk standard when T-RACT is used.

REC 3421.

Further, Section 210.12.d states the following: "The Department will include emission limits and other permit terms for the toxic air pollutant in the permit to construct that assure that the facility will be operated in the manner described in the preconstruction compliance demonstration." The analysis discussed above demonstrates that the PTC does "assure that the facility will be operated in the manner described in the preconstruction compliance demonstration." DEQ developed the PTC to include operational permit limits that were used in the preconstruction compliance demonstration of the Air Rules – conditions such as throughput limits, hours of operation, materials combusted, processed, and stored, etc. REC 0385. DEQ took the parameters in the analysis, including the 16-year life of mine, and set them as operational limits per Section 210.12.d.

B. DEQ did not rely on a qualitative standard and Petitioners misunderstand DEQ's approach.

Petitioners claim that the Hearing Officer's decision was in error "because it lets a general and qualitative provision trump the specific numeric provisions that apply." REC 3505. As discussed above, DEQ did not rely solely on the "qualitative provision" of Section 161. As discussed at length in Mr. Schilling's declaration, REC 1233-1255, DEQ conducted the T-RACT analysis set forth in Section 210 and relied upon the AACC in Section 586 as representative of the cancer risk for a specified exposure period. DEQ is simply arguing that it had discretion to use the data points that made most sense, including the project specific information regarding the life of the mine. And Section 161 supports this decision, as it requires, ultimately, that DEQ find that "the emissions would not injure or unreasonably affect human health or animal life or vegetation." DEQ came to that conclusion – using the AACC and T-RACT analysis.

In a series of what appear to be rhetorical questions (e.g. "what is the point of Section 203.03's directive to follow the methods in Section 210?"), Petitioners allege that DEQ's

interpretation renders Sections 586 and 210 as "superfluous." REC 3505. Petitioner is reaching. Clearly, DEQ relied upon Section 586. As Mr. Schilling states: "To calculate a project-based arsenic concentration representative of the project, appropriate for comparison to the AACC (based on a 70-year exposure), the modeled impact was adjusted by the factor 16/70." REC 1243. A T-RACT analysis was performed, using conservative modeling and data, under Section 210. *Id.* Although Petitioners clearly imply DEQ would do so, it is hard to imagine DEQ finding a permittee in compliance with Section 161 without ample modeling and data to come to such a conclusion. These rhetorical questions miss the point.

DEQ provided unrebutted expert testimony supporting its interpretation and implementation of the Air Rules. While Petitioners take issue with DEQ's interpretation, DEQ should be afforded deference in its interpretation as (1) DEQ is responsible for administration of the rules at issue, (2) its construction is reasonable, and (3) the language of the rules does not expressly treat the matter at issue. *See* Preston, 131 Idaho 502, 960 P.2d 185 (1998). The Board should affirm the Hearing Officer's decision and find that DEQ acted reasonably and in accordance with law.

CONCLUSION

DEQ takes very seriously its mission to protect public health and the environment. After an enormous effort, which included much stakeholder involvement, DEQ issued a permit that is legally and technically defensible. REC 1273. Petitioners have failed to prove that DEQ committed any errors in its thorough and diligent PTC analysis. Petitioners fail to demonstrate that DEQ acted unreasonably, violated any constitutional or statutory provisions, was in excess of statutory authority, issued the PTC on unlawful procedure, or acted in a manner that was arbitrary, capricious, or an abuse of discretion. Thus, the Board must deny Petitioners' appeal, affirm the

Hearing Officer's Preliminary Order, and find that DEQ acted reasonably and in accordance with law in issuing the PTC.

DATED: February 7, 2024.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

/s/ Hannah M.C. Young
HANNAH M.C. YOUNG
Deputy Attorney General
Attorneys for the Idaho Department of Environmental Quality

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2024, a true and correct copy of the foregoing RESPONDENT IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF AND RESPONSE TO PETITIONERS' OPENING BRIEF was served on the following via electronic mail to the indicated address:

Office of Administrative Hearings
P.O. Box 83720
Boise, ID 83720-004
filings@oah.idaho.gov
via electronic service

Dylan Lawrence
Hearing Officer
Varin Thomas, LLC
242 N. 8th St., Suite 220
Boise, ID 83702
dylan@varinthomas.com
via electronic service

Bryan Hurlbutt
Laurence ("Laird") J. Lucas
Advocates for the West
P.O. Box 1612
Boise, ID 83701
bhurlbutt@advocateswest.org
llucas@advocateswest.org
via electronic service

Krista K. McIntyre
W. Christopher Pooser
Wade C. Foster
Stoel Rives LLP
101 S. Capitol Blvd, Suite 1900
Boise, ID 83702
krista.mcintyre@stoel.com
christopher.pooser@stoel.com
wade.foster@stoel.com
via electronic service

Julia Thrower
Mountain Top Law PLLC
614 Thompson Ave.
McCall, ID 83638
jthrower@mtntoplaw.com
via electronic service

Ann Yribar
Deputy Attorney General
Energy and Natural Resources Division
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010
ann.yribar@ag.idaho.gov
via electronic service

Paula Wilson, Hearing Coordinator
Energy and Natural Resources Division
Office of the Attorney General
1410 N. Hilton St.
Boise, ID 83706
paula.wilson@deq.idaho.gov
via electronic service

/s/ DeAnne M. Chaffin
DeAnne M. Chaffin
Legal Assistant