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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.

Case Docket No. 0101-22-01  
OAH Case No. 23-245-01

**JOINT MOTION TO  
SUPPLEMENT RECORD WITH  
DEQ RESPONSE TO EPA LETTER**

Respondent Idaho Department of Environmental Quality (“DEQ”) and Intervenor-Respondent Perpetua Resources Idaho, Inc. (“Perpetua”) jointly move to supplement the administrative record with DEQ’s response to a letter the United States Environmental Protection Agency (“EPA”) sent to DEQ’s Director. Previously, the Hearing Officer granted Petitioners’ motion to supplement the record with the EPA letter, subject to certain limitations. Fairness and completeness dictate that the Board of Environmental Quality (the “Board”) supplement the record with DEQ’s response, subject to the same limitations. This motion is supported by the Declaration of Tiffany Floyd (“Floyd Decl.”) and brought pursuant to Idaho Code § 67-5245(7) and IDAPA 04.11.01.600.

### **BACKGROUND**

Petitioners filed a contested case petition challenging DEQ’s issuance of Permit to Construct No. 2019.0047 (the “Final Permit”). REC 1-27, 263-292.<sup>1</sup> The Final Permit is a preconstruction permit that authorizes Perpetua to construct the Stibnite Gold Project (the “Project”). After the Board assigned a hearing officer to hear the contested case, the Hearing Officer heard the parties’ competing motions for summary judgment and on October 31, 2023, issued a Preliminary Order dismissing the contested case petition. REC 3280-3327. The Hearing Officer later issued an Amended Preliminary Order. REC 3372-3424. On March 14, 2024, the Board is scheduled to hear Petitioners’ Amended Petition for Review of Preliminary Orders.

This motion arises because once discovery and summary judgment briefing was completed before the Hearing Officer, Petitioners moved to supplement the administrative record with an August 10, 2023 letter sent by EPA Region 10 to the Director of DEQ, regarding EPA’s concerns with the Final Permit. REC 3137-3142. Over DEQ and Perpetua’s objections, *see* REC

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<sup>1</sup> Citations to “REC” are references to the Agency Record, which was certified and transmitted to the Board on December 15, 2023.

3236-3257, the Hearing Officer partially granted Petitioners’ motion to supplement the record, REC 3271-3273. While allowing the admission of the EPA letter, the Hearing Officer limited the purposes for which it could be considered. The EPA letter cannot be used (1) to add new allegations of error, (2) to add factual information that was not already part of the record, or (3) “as a proxy for expert testimony from the Petitioners.” REC 3272. Petitioners have not asked the Board to review of the Hearing Officer’s rulings. Neither have DEQ and Perpetua.

There is more to the story, however.

On October 13 and 23, 2023, DEQ and EPA staff met to discuss EPA’s concerns with the Final Permit. Floyd Decl. at ¶ 4. On November 22, 2023, DEQ’s Director formally responded to the EPA letter with a 31 page “Response to the August 10, 2023 EPA Region 10 Letter to Idaho DEQ.” *Id.* at ¶ 5, Ex. A. In the transmittal letter, the DEQ Director explained that the supporting materials detailed the information DEQ and EPA staff discussed in the technical meetings and that “[i]t is our understanding that through those meetings and conversations, DEQ addressed all of EPA’s concerns that were identified in your August 10, 2023, letter and that the PTC issued by DEQ to Perpetua Resources on June 17, 2022, is protective of the National Ambient Air Quality Standards and meets the requirement of the Clean Air Act.” *Id.*, Ex. A.

DEQ and Perpetua now move the Board to supplement the administrative record with DEQ’s response to ensure DEQ’s response to the EPA letter is fairly and completely reflected.

### **ARGUMENT**

When reviewing a Preliminary Order, “[t]he head of the agency ... for the review of preliminary orders shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.” Idaho Code § 67-5245(7). Thus the Board has the authority to take evidence to assist in the development of the administrative record. *See* IDAPA

04.11.01.600; *see also* IDAPA 04.11.01.413 (allowing a hearing officer to accept evidence in the record), 606 (allowing the agency head to rule on objections to the admission of evidence).<sup>2</sup>

Supplementing the record before the Board to include DEQ's response to the EPA letter is necessary to ensure fairness and the completeness of the record. The EPA letter concerned four issues: (1) whether the Project is a major stationary source under the CAA; (2) whether fugitive dust from the Project's haul roads will cause or contribute to a violation of the PM<sub>10</sub> NAAQS; (3) whether Perpetua has the legal right to exclude the general public for purposes of the ambient air boundary; and (4) whether the Permit includes sufficient measures to exclude the general public from the entirety of the Project for the ambient air boundary.

Only two of those issues—the second and the third issues—are raised in Petitioners' Amended Petition for Review of Preliminary Orders. Petitioners reference the EPA Letter in their Amended Petition, REC 3429, and their opening brief, *see* Opening Br. at 13-14, and contrary to the Hearing Officer's order, rely on EPA's "public comments and other submissions to DEQ" as "expert testimony," *Id.* at 36. *See also Id.* at 8, 33, 35-36, 38. Having come after the Hearing Officer's Preliminary Order, DEQ's response is not part of the administrative record. Thus Petitioners do not acknowledge DEQ's response to the EPA letter, which thoroughly addressed and rejected each of EPA's concerns. *See* Floyd Decl. at ¶ 5, Ex. A.

If the EPA letter is relevant to these proceedings, then DEQ's response is equally relevant. It is only fair and equitable to supplement the administrative record with DEQ's response to ensure the record is complete and accurately reflects the resolution of the EPA letter. For those reasons, the Board should allow the admission of DEQ's response under the same

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<sup>2</sup> The Board's contested case rules incorporate Section 413 and Sections 600-606 of IDAPA 04.11.01. *See* IDAPA 58.01.23.003.08., 13.

conditions the Hearing Officer allowed consideration of the EPA Letter. Just as the EPA letter cannot be used to add new allegations of error or factual information that was not already part of the record or “as a proxy for expert testimony from the Petitioners,” neither can DEQ’s response to the EPA letter. *See* REC 3272.

Thus, DEQ’s response should only be considered to the extent it is relevant to alleged errors that are already within the scope of this contested case proceeding and includes factual information or data that is already within the existing the record. Again, that includes only the second and the third issues raised in the EPA letter, which DEQ addressed during the Final Permit’s multiple public comment periods and addressed again in the response to the letter. Thus no new factual information or data are raised. To that end, supplementing the record to include DEQ’s response to the EPA letter does not require additional hearings, further factual development, or remand to the Hearing Officer. Nor will the admission of DEQ’s response prejudice Petitioners.

### **CONCLUSION**

In sum, because Petitioners were allowed to supplement the record with the EPA letter, the Board should be aware of DEQ’s thorough response and dismissal of the EPA letter. To ensure fairness and the completeness of the record, the Board should supplement the record with DEQ’s response, subject to the same limitations the Hearing Officer admitted the EPA letter.

DATED: February 7, 2024.

DEPARTMENT OF ENVIRONMENTAL  
QUALITY

/s/ Hannah M.C. Young

Hannah M.C. Young  
Deputy Attorney General

Attorney for Respondent

DATED: February 7, 2024.

STOEL RIVES LLP

/s/ W. Christopher Pooser

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## CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2024, a true and correct copy of the foregoing was served on the following:

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