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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

INTERVENOR-RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' AMENDED PETITION FOR REVIEW OF PRELIMINARY ORDERS

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KEY TO TERMS AND ABBREVIATIONS

AACC	Acceptable Ambient Concentration for a Carcinogen
AMP	Access Management Plan
CAA	Clean Air Act, 42 U.S.C. § 7401, *et seq*.
DEQ	Respondent Idaho Department of Environmental Quality
EPA	United States Environmental Protection Agency
FDCP	Fugitive Dust Control Plan
Final Permit	Air Quality Permit to Construct No. P-2019.0047, issued June 17, 2022
HAP	Hazardous Air Pollutant
HRCP	Haul Road Capping Plan
Idaho Air Rules	Rules for the Control of Air Pollution in Idaho, IDAPA 58.01.01
Midas Gold	Midas Gold Idaho Inc., Perpetua's predecessor
NAAQS	National Ambient Air Quality Standards
O&M Manual	Operations and Maintenance Manual
Perpetua	Intervenor-Respondent Perpetua Resources Idaho, Inc.
Petitioners	Petitioners Nez Perce Tribe, Idaho Conservation League, and Save the South Fork Salmon
PM	Particulate Matter
Preliminary Order	Amended Memorandum Decision on Motions for Summary Judgment and Preliminary Order, dated Dec. 5, 2023
Project	Stibnite Gold Project
RBLC database	RACT/BACT/LAER Clearinghouse database
SIP	State Implementation Plan
TAP	Toxic Air Pollutant
T-RACT	Toxic Air Pollutant Reasonably Available Control Technology

Intervenor-Respondent Perpetua Resources Idaho, Inc. ("Perpetua") submits this opposition to the Amended Petition for Review of Preliminary Orders (the "Amended Petition") and Opening Brief submitted by Nez Perce Tribe, Idaho Conservation League, and Save the South Fork Salmon ("Petitioners").

INTRODUCTION

The Stibnite Gold Project (the "Project") is a pioneering approach to mining precious and critical minerals. Not only will it afford Valley County and resident Idahoans with economic benefits, the Project will restore a contaminated mine site that was abandoned by the federal government. Through an agreement with the United States Forest Service (the "Forest Service") and the United States Environmental Protection Agency ("EPA"), Perpetua is committing millions of dollars to pre-permitting cleanup of contaminated conditions it did not cause. Perpetua's restoration efforts at the site are ongoing, even while it procures the many permits needed to construct and operate the Project.

The Idaho Department of Environmental Quality's ("DEQ") issuance of Permit to Construct No. 2019.0047 (the "Final Permit") is the first of the many permits needed for the Project. The Final Permit authorizes construction of the Project, which is a minor source in a remote Idaho landscape designated in attainment with National Ambient Air Quality Standards ("NAAQS"). DEQ developed the Final Permit after a three-year process, which included four requests for supplemental information and air quality analyses from Perpetua, three draft permits, three extended public review and comment opportunities, and two public information meetings.

In July 2022, following the extensive scrutiny and review by DEQ and the public, Petitioners filed this contested case challenging the Final Permit. This Board appointed a Hearing Officer to decide Petitioners' challenges. Over the past 18 months, the parties participated in discovery, extensive motion practice, and a summary judgment hearing. In December 2023, the

Hearing Officer issued an Amended Memorandum Decision on Motions for Summary Judgment and Preliminary Order (the "Preliminary Order") granting DEQ and Perpetua's motions for summary judgment and dismissing the contested case. Now Petitioners seek review of the Preliminary Order, presenting the same opinions and critiques that were thoroughly addressed by DEQ during the permitting process and by the Hearing Officer during the contested case process.

Petitioners dislike DEQ's decision making in the Final Permit and ask the Board to substitute Petitioners' opinions and preferences for DEQ's substantive work and discretion. The Idaho Administrative Procedure Act leaves agencies with the ability to judge how to interpret data and deal with scientific uncertainty and to decide which scientific and technical analyses to accept or reject. DEQ is delegated responsibility to make such determinations in air quality preconstruction permitting. After repeated attempts to substitute their preferences for DEQ's, Petitioners now ask the Board to second-guess the experience, expertise, scientific analyses, expert judgments, and reasoned conclusions of DEQ.

To that end, in their Opening Brief, there is much that Petitioners conveniently ignore about the Final Permit and the exhaustive process to get to this point. Petitioners ignore that DEQ followed EPA guidance and acted reasonably to determine the Project's ambient air boundary. They ignore that DEQ thoroughly assessed future fugitive dust emissions and exercised its discretion in establishing protective fugitive dust controls. They ignore that an effective permit must conservatively regulate the expected mining activities while affording operational flexibility to the permittee. They ignore that an effective permit must protect the NAAQS through practically enforceable permit conditions that are consistent with DEQ programs, practices, and policies manifested in the Final Permit.

Overall, Petitioners ignore the expertise reflected in DEQ's careful, deliberative, thorough, and conservative analysis. Petitioners ignore that DEQ is better suited, and legally authorized, to make policy decisions based on scientific uncertainty and has the discretion to impose "any reasonable conditions upon an approval." IDAPA 58.01.01.211.01. And Petitioners ignore the dense record supporting the Hearing Officer's ruling and that they failed to carry their burden to show DEQ's decision making was arbitrary and capricious, was an abuse of discretion, or violated the law. Perpetua respectfully asks the Board to affirm the Hearing Officer's Preliminary Order and dismiss Petitioners' contested case petition.

EVIDENCE RELIED ON

In opposition to Petitioner's Amended Petition, Perpetua[1] relies on the Agency Record (cited as "REC") certified and transmitted to the Board on December 15, 2023. The Agency Record includes DEQ's permit file, the documents submitted during summary judgment proceedings, and the Hearing Officer's Preliminary Order and other orders. In addition, DEQ and Perpetua have submitted a motion to supplement the administrative record to include DEQ's response to an EPA letter referenced in Petitioner's Amended Petition and Opening Brief.

STATEMENT OF UNDISPUTED FACTS

I. The Project and permit history.

A. The Project will develop gold and antimony resources and restore a previously mined and contaminated mine site.

The Project is located in the Stibnite Mining District, a contaminated legacy mining area the federal government abandoned in 2012 after decades of mining.[2] The Project is designed to

[1] In the permit record, Perpetua is referred to as "PRI."

[2] In a series of consent decrees approved by the federal courts, settling federal agencies (including the United States Department of Agriculture, the United States Department of the Interior, the United States Department of Commerce, the United States Department of Defense,

produce precious metals from the previously mined landscape, as well as critical minerals necessary for the country's energy transformation and national security. REC 415, 417, 1758. The Project has a 16 year life span, as there are only 16 years of ore available to be mined and processed. REC 1949. As part of the Project, in 2021, Perpetua committed millions of dollars to pre-permitting cleanup and to remediate and restore the contaminated site under a voluntary administrative settlement agreement with the Forest Service and EPA. The initial phase to improve water quality is nearly complete.

The Project is approximately 10 miles east of the small community of Yellow Pine, Idaho. REC 415, 1758. The Project is remote, bounded by a mountainous landscape with elevations ranging from 6,000 to 8,500 feet above sea level. REC 1758. Between December and February, the area has an average snow depth of between 21 and 68 inches and receives 6 inches in average precipitation. REC 1759. Between March and May, the average snow depth is between 66 and 84 inches, and the area receives another 6.1 inches in average precipitation. *Id*. From June to November, the average precipitation is 7 inches. *Id*.

The Project includes both patented mining claims, which Perpetua owns and controls, and unpatented mining claims located on national forest land. REC 894, 1758. Because portions of the Project are on national forest land, Perpetua submitted a Plan of Restoration and Operations (which we refer to as the "mine plan") to the Forest Service for approval in 2016. *See* 36 C.F.R. pt. 228; REC 894-895. The mine plan has since been refined to reduce the environmental

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EPA, and the United States General Services Administration) and other parties were released from past and future response costs in the Stibnite Mining District for pennies on the dollar. *See Mobil Oil Corp. v. United States of America*, Civil Action No. 99-1467-A (E.D. Virginia) (consent decree filed June 26, 2000); *United States of America v. Estate of J. J. Oberbillig*, Case No. CV 02-451-S-LMB (D. Idaho) (consent decree filed March 18, 2004); *United States of America v. Bradley Mining Co.*, Case Nos. 3:08-CV-03968 TEH and 3:08-CV-05501 TEH (N.D. Cal.) (consent decree filed April 19, 2012).

impacts and footprint of the Project. *See* REC 2163.

The Forest Service's approval of the mine plan will confirm the Project's operational boundary and authorize Perpetua to exclude the general public from the Project. *See* 30 U.S.C. § 612(b); 36 C.F.R. pt. 228, subpt. A. Perpetua's permit to construct application and the Final Permit are based on the mine plan, and Perpetua cannot begin to construct the Project until it obtains approval of the mine plan and secures other governmental authorizations.

B. DEQ issued the Final Permit after multiple requests for additional information, multiple public comment periods, and multiple draft permits.

In August 2019, Perpetua applied to DEQ for a permit to construct a minor source. REC 418. DEQ's review of Perpetua's application was thorough and comprehensive. A typical permit to construct with a public comment period is processed in 150 days. REC 1259 [Simon Decl. at 4]. DEQ's review of Perpetua's application took much longer.

Over three years, DEQ repeatedly asked Perpetua to supplement the application with additional information before determining the application complete, offered three extended comment opportunities to solicit public feedback, and held two public informational meetings. REC 418-420, 459, 1258 [Simon Decl. at 3]. Petitioners fully participated and repeatedly criticized DEQ's evaluations and proposed controls of particulate matter ("PM") and toxic air pollutant ("TAP") emissions. *See* REC 915-1000. Petitioners also engaged directly with DEQ staff throughout the permitting process requesting information, analysis, and explanations of DEQ's ongoing work. *See*, *e.g.*, REC 2147-51, 2152-56, 2157, 2310-14.

In response to Petitioners' formal comments, DEQ requested, and Perpetua provided, additional information such as updated hazardous air pollutant ("HAP") and TAP emission inventories and modeling analyses. *See* REC 418-420, 631-633, 1258 [Simon Decl. at 3]. With that information, DEQ conducted additional modeling evaluations of PM emissions and

additional analyses of TAP emissions and enhanced the enforceable permit requirements. *See* REC 627-628. All in all, DEQ asked Perpetua to supplement the application with additional information four times, prepared three draft permits (dated July 14, 2020, February 8, 2021, and December 9, 2021), and provided thorough responses to Petitioners' public comments. *See* REC 418-420, 631-633, 915-1000, 1258 [Simon Decl. at 3].

This multi-year, comprehensive process culminated in the issuance of the Final Permit on June 17, 2022. REC 367-409. Petitioners not only participated directly and indirectly in the permit development, their comments informed DEQ's requests and reviews, plus the permit content developed by DEQ over the three-year permitting process.

II. PM_{10} fugitive emissions from the Project were conservatively estimated by DEQ.

DEQ implements air quality permitting through the Idaho Air Rules, IDAPA 58.01.01 *et seq*. The Idaho Air Rules establish requirements for applicants and DEQ that govern the issuance of permits to construct for new and modified air emission sources. IDAPA 58.01.01.200-227. Under Section 203 of the rules, no permit to construct can be issued unless the applicant demonstrates "to the satisfaction of the Department" that the proposed project "would not cause or contribute to a violation of any ambient air quality standard" (or NAAQS) and that emissions of a TAP "would not injure or unreasonably affect human or animal life or vegetation." IDAPA 58.01.01.203.03.

PM_{10} emissions from the Project represent the largest emissions for this minor source. Emissions from stationary sources and fugitive sources of PM_{10} were estimated in the permit application materials. As DEQ recognized, air emission impact analyses for mining operations "typically involve considerable uncertainty and variability" in both emission-affecting parameters and dispersion-affecting parameters. REC 945. DEQ mitigated the uncertainties and variabilities with a conservative approach (i.e., overstating emissions and impacts) and analyzed

the proposed emissions and modeling to fulfill the requirements of Section 203. REC 917-919, 944-945, 927-928; *see generally* REC 1246-1252 [Schilling Decl. at 14-20].

There are four general steps for determinations based on modeling assessments.

Step 1: Calculate estimated air emissions from all appropriate sources of air pollution. This step typically utilizes the maximum capacity of each source of emissions, an emission factor that represents the best available information to estimate emissions, and an emission control efficiency if an emission control device or practice is used to reduce emissions. EPA's AP-42, *Compilation of Air Pollutant Emissions Factors*, is a commonly used reference for emission factor information for air pollution sources, such as unpaved roads.[3] Acceptable emissions estimation methods vary and often require site-specific parameters.

Step 2: Characterize each air pollution source. Each emission source must be characterized by its initial air dispersion type (e.g., point, volume, or area) and initial air dispersion parameters (e.g., initial exhaust temperature and velocity, length, width, and height of the emitting source), and source location.

Step 3: Use the EPA approved air dispersion model to predict the downwind impacts of the emissions from all sources. The model inputs include the emissions from each source estimated in Step 1, the source characterizations from Step 2, the local terrain and meteorological conditions, and other model inputs.

Step 4: Run the model. The final step is running the model for all pollutants and the appropriate averaging periods to inform DEQ's determinations. In the case of Perpetua's permit, DEQ ran the model for many emissions scenarios to reflect the dynamic operational plan

[3] U.S. EPA, Technical Air Pollution Rules, AP-42, https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors-stationary-sources.

involved in mining activity.

DEQ issues a permit to construct when it is satisfied that the proposed emissions will not cause or contribute to a violation of a NAAQS and the TAP emissions would not injure or unreasonably harm human health, animal health, or vegetation. *See* IDAPA 58.01.01.203. The permitting record before DEQ, including the Final Permit, the Statement of Basis, and the Response to Comments, details the agency's analyses and decision making. As explained below, that record shows that DEQ repeatedly executed the steps outlined above to address different scenarios and to complete conservative assessments and satisfied the requirement to produce and issue the Final Permit in conformity with the Idaho Air Rules.

III. The Stibnite Access Route.

Because DEQ must be satisfied that a project's proposed emissions do not adversely impact compliance with the NAAQS, the boundary of the project's "ambient air" is important. Both EPA and the Idaho Air Rules define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." 40 C.F.R. § 50(e); IDAPA 58.01.01.006.10. EPA's longstanding guidance provides that the ambient air boundary depends on the source's control of the area and the measures it takes to preclude the general public's access to the land. *See* REC 1138, 1341.

The Stibnite Access Route refers to a seasonal (non-winter) road that will pass through the Project. REC 415, 1758. Petitioners suggest—without any factual support—that the Stibnite Access Route is a Forest Service requirement of the Project and that Perpetua will be unable to preclude general public access to the route. *See* Opening Br. at 20-21. Petitioners are incorrect. The record reflects that public comments from local residents revealed a significant interest in access through the Project. *See* REC 676, 893-895, 1758. Individuals in the Johnson Creek and

Yellow Pine areas who use Stibnite Road to access Thunder Mountain Road and points beyond were particularly concerned about changes that would lengthen travel time. *See id*.

In response to those concerns and at the encouragement of the Forest Service, Perpetua's predecessor, Midas Gold Idaho Inc. ("Midas Gold"), evaluated numerous access options through and around the Project. REC 893-895. Perpetua's mine plan identifies the Stibnite Access Route as a route that would safely address local interests. *Id*.; *see also* REC 676. As noted above, once approved, the mine plan will affirm the Project's operational boundary and construction of the Stibnite Access Route, as well as Perpetua's authority to preclude general public access from the Project. Operations of the Project do not rely on the presence of the Stibnite Access Route and the road is not a Forest Service requirement.

Given the importance of establishing the Project's ambient air boundary, early in the permitting process, Midas Gold engaged with DEQ on the Stibnite Access Route to determine if the route could be excluded from ambient air. *See* REC 1237 [Schilling Decl. at 5]. DEQ contacted EPA, which indicated that the road would be exempt from the Project's ambient air because it will be fully under Perpetua's control and surveillance, and general public access would be precluded. REC 1240 [Schilling Dec. at 8], 1254, 1350-1351, 1496-1497. The Forest Service has recognized this conclusion too. *See* REC 2558, 2637.

IV. DEQ analyzed arsenic emissions and determined that they would not exceed the lifetime risk limit established by the Idaho Air Rules.

Under IDAPA 58.01.01.203, no permit to construct can be issued unless the applicant demonstrates "to the satisfaction of the Department" that the proposed emissions of a TAP "would not injure or unreasonably affect human or animal life or vegetation." Following the second public comment period, DEQ and Perpetua reevaluated TAP emissions in response to concerns expressed by Petitioners. REC 697. DEQ determined that a refined analysis of TAP

emissions, particularly arsenic, was needed to demonstrate preconstruction compliance with the Idaho Air Rules. *Id.*

On October 5, 2021, Perpetua submitted the *Stibnite Gold Project (SGP) Permit to Construct Application TAP Addendum* (the "TAP Addendum"). *Id*. The TAP Addendum reassessed conformity with TAP permitting requirements, refined TAPs evaluations to demonstrate compliance with applicable TAP increments, revised and refined operational parameters affecting TAP emissions, and refined TAP air impact analyses. *See id.* Specifically, the TAP Addendum evaluated arsenic emissions after considering reasonably available control technology ("T-RACT") and operational adjustments.[4] REC 699. The refined TAP analysis included many layers of conservative assumptions, including continual operation of the worst-case operational scenario; operation at maximum allowable rates for the entire averaging period; and no reduction in wintertime emissions from fugitive sources, thus discounting the emission suppression effects of increased moisture. *Id.*

Once the modeled carcinogenic TAP concentrations were obtained they were adjusted to account for the finite, 16-year life of the Project and the related finite exposure risks. REC 710, 1947. This was accomplished by multiplying the highest annual concentrations from the modeling scenarios by 16 years and then dividing by 70 years. *Id*. Multiplying the highest annual concentration of arsenic by 16 years allowed DEQ to determine the maximum concentration of arsenic an offsite receptor would be exposed to during the 16-year operational period. Dividing this maximum concentration by 70 years allowed DEQ to evaluate the lifetime health risk from

[4] As part of its reevaluation of TAP emissions, Perpetua proposed, and DEQ approved, T-RACT controls including installing and operating dust collection systems on drilling rigs, capping haul roads with clean development rock, and using chemical dust suppressant with frequent watering on roads. *See* REC 1291-1292.

that maximum exposure. *Id*. Through this process, DEQ determined that the maximum lifetime exposure concentration of carcinogenic TAPs were below regulatory thresholds and complied with the Idaho Air Rules. REC 710-11.

CONTESTED CASE BACKGROUND

I. Petitioners filed an amended contested case petition after the Hearing Officer partially dismissed the initial petition.

In July 2022, Petitioners filed a contested case petition asking the Board to set aside and remand the Final Permit. REC 1-27. In their petition, Petitioners repeat the same critiques made during the multiple public review periods, seeking to substitute their preferences for DEQ's expertise, pressing for more review and work by DEQ, and alleging that the Final Permit violates the federal Clean Air Act ("CAA"), 42 U.S.C. § 7401, *et seq*., and the Idaho Air Rules. *See id*. Petitioners remain dissatisfied with the Final Permit and urge the Board to substitute Petitioners' preferences for DEQ's reasoned decision making. *See id*.

The Board appointed a Hearing Officer to consider and decide Petitioners' contested case petition. REC 31. Perpetua was allowed to intervene, REC 44, and filed a motion to dismiss the petition, which DEQ joined. REC 52-76. The Hearing Officer partially granted the motion to dismiss. REC 160-185. In his order, the Hearing Officer categorized Petitioners' allegations into 13 claims and dismissed Claims 3, 4, and 10 in full and Claim 8 in part. REC 167-168, 184-185. That prompted Petitioners to file a motion to amend their contested case petition, which DEQ and Perpetua did not oppose. REC 190-192, 194-223.

After the Hearing Officer granted the motion to amend, REC 255-256, Petitioners filed an amended contested case petition in January 2023, REC 263-292. The amended contested case petition adds allegations reviving, of the dismissed claims, only Claim 3. *See generally* REC 209-210 (¶ 40), 219-220 (¶ 70).

II. The Hearing Officer dismissed the amended contested case petition and found DEQ's decision making was reasonable and not in violation of the Idaho Air Rules.

After the parties exchanged discovery, Petitioners moved for summary judgment. REC 319-363. DEQ and Perpetua filed cross-motions for summary judgment. REC 1204-1231, 1276-1335. After summary judgment briefing was completed, Petitioners moved to supplement the administrative record with a letter sent by EPA Region 10 to the Director of DEQ on August 10, 2023, regarding the Final Permit. REC 3137-3142. Petitioners also moved to stay the contested case on the grounds that DEQ should be given time to respond to the EPA letter, REC 3108-3112, and that Petitioners should be allowed to amend their contested case petition again, REC 3190-3197. DEQ and Perpetua opposed Petitioners' motions, REC 3236-3257, and sought to exclude the EPA letter, REC 3097-3102.

The Hearing Officer denied Petitioners' motions to stay and to amend their contested case petition. REC 3265-3270. As for the Petitioners' motion to supplement the record with the EPA letter, the Hearing Officer allowed admission of the EPA letter but limited how it could be considered. REC 3271-3273. The EPA letter could not be used to add new allegations of error on the part of DEQ or add factual information that was not already part of the record. REC 3272. Nor could the EPA letter "be used as a proxy for expert testimony from the Petitioners." *Id*. Petitioners have not sought Board review of those rulings, but still reference the EPA letter in their Amended Petition, REC 3429, and their Opening Brief, Opening Br. at 13-14, 36.

The Hearing Officer conducted a summary judgment hearing on the parties' motions in September 2023. *See* TR 1-57. On October 31, 2023, the Hearing Officer issued a Memorandum Decision on Motions for Summary Judgment and Preliminary Order. REC 3280-3327. The Hearing Officer's order denied Petitioners summary judgment and granted DEQ and Perpetua summary judgment on Claims 1, 2, 5, 6, 7, 9, 11, 12, 13 and the remainder of Claim 8. REC

3325. The Hearing Officer did not address Claim 3, believing the claim was dismissed. *See* REC 3281. That prompted DEQ and Perpetua to move for reconsideration and/or clarification requesting the Hearing Officer to reconsider whether Claim 3 was revived in Petitioners' amended contested case petition and should be addressed. *See id*. REC 3332-3333, 3335-3340.

On December 5, 2023, the Hearing Officer granted DEQ and Perpetua's motion for reconsideration and/or clarification and issued the Amended Memorandum Decision on Motions for Summary Judgment and Preliminary Order (which, as noted, is referred to as the "Preliminary Order"). REC 3367-3370, 3372-3424. In the Preliminary Order, the Hearing Officer granted summary judgment to DEQ and Perpetua on Claim 3, thereby dismissing the whole of Petitioners' amended contested case petition. REC 3422. Previously, on November 14, 2023, Petitioners filed a Petition for Review of Preliminary Order. REC 3342-54. December 15, 2023, Petitioners filed the Amended Petition for Review of Preliminary Orders (which is referred to as the "Amended Petition"). REC 3426-3439.

III. Petitioners' Amended Petition seeks Board review of Claims 2, 3, 8, 9, 11, and 12.

Petitioners' Amended Petition seeks Board review of some, not all, of the issues they raised in their amended contested case petition. Petitioners do not seek review of Claim 1 (dismissed on summary judgment, REC 3397-3399), Claim 4 (dismissed on motion to dismiss, REC 172-173), Claim 5 (dismissed on summary judgment, REC 3407-3409), Claims 6 and 7 (dismissed on summary judgment, REC 3410-3415), Claim 10 (dismissed on motion to dismiss, REC 178-179), and Claim 13 (dismissed on summary judgment, REC 3393-3397).

As for the remaining claims (Claims 2, 3, 8, 9, 11, and 12), Petitioners contend the Hearing Officer erred in holding that: (1) DEQ's determinations that Perpetua has legal control to exclude and will adequately preclude the general public from the Project were not arbitrary and capricious, or an abuse of discretion (Claims 11 and 12); (2) DEQ's determination that the

Final Permit's enforceable conditions will achieve 93.3% control of fugitive dust was not arbitrary and capricious or an abuse of discretion (Claims 2 and 8); (3) DEQ's determination that post-construction operational plans must be submitted for approval 30 days before the start of construction was not arbitrary and capricious, an abuse of discretion, or a violation of the Idaho Air Rules (Claim 3); and (4) DEQ's evaluation of the health risks from arsenic was not a violation of the Idaho Air Rules (Claim 9). As discussed below, Petitioners fail to meet the burden of proof required to support their claims of error before the Board.

IV. DEQ and Perpetua seek to supplement the record with DEQ's November 2023 response to the EPA letter.

On November 22, 2023, DEQ's Director responded to the EPA letter, thoroughly addressing each of EPA's issues and defending the Final Permit. DEQ's response, having come after the Hearing Officer's Preliminary Order, is not part of the administrative record. For that reason, DEQ and Perpetua have jointly sought to supplement the record with DEQ's response consistent with the limited purpose for which the Hearing Officer allowed consideration of the EPA letter. Because the EPA letter is part of the record on a limited basis, it is only appropriate that the record include DEQ's response with the same limitations.

STANDARD OF REVIEW

I. The Board must decide whether DEQ acted unreasonably or in violation of the law.

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). According to the Board, "[t]his means that, in reviewing the Preliminary Order, the Board may review all of the evidence *de novo*." *See In the Matter of Sunnyside Park Utilities' Application for Sewage Disposal Permit*, Final Order on Petition for Review of Preliminary Order, at 2 (BEQ Dkt. 0103-07-02, Apr. 7,

2009). The Board has also recognized that it "must determine whether DEQ has acted reasonably and in accordance with law." *Id*. at 10.

Under the Board's contested case rules, Petitioners have "the burden of proving by a preponderous of the evidence, the allegations in the petition." IDAPA 58.01.23.062. The rules also authorize the Board to consider motions for summary judgment, governed by the Idaho Rules of Civil Procedure ("I.R.C.P."). IDAPA 58.01.23.162.02, .410. Under I.R.C.P. 56(a), the Board "must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A moving party must support its assertion by citing particular materials in the record or by showing the "materials cited do not establish the … presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact[s]." I.R.C.P. 56(c)(1)(B).

As the Hearing Officer observed, it is also "important to understand the standards that will ultimately govern judicial review of the Board's decision." REC 3377. That is particularly true here because Petitioners challenge the Final Permit based on the standard for judicial review for adjudicative agency actions under the Idaho Administrative Procedure Act, Idaho Code § 67-5201 *et seq*. *See* Opening Br. at 15 (citing Idaho Code § 67-5279(3); REC 263-292 (¶¶ 4, 35, 52, 61, 69, 72), 338. Under that standard, an agency action may only be overturned if it is (a) in violation of constitutional or statutory provisions, (b) in excess of statutory authority, (c) made on unlawful procedure, (d) not supported by substantial evidence, or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3).

There are additional principles regarding the Idaho Administrative Procedure Act's standard worth addressing. The party challenging the agency decision must demonstrate that the agency erred in a manner specified in Section 67-5279. *Wheeler v. Idaho Dep't of Health &*

Welfare, 147 Idaho 257, 260, 207 P.3d 988, 991 (2009). Thus, by relying on the judicial review standard, Petitioners have invited a review process. Under Idaho law, it is DEQ's role to resolve factual issues in determining whether and under what conditions to issue a permit to construct, supported by the permitting record before it. *See* Idaho Code § 39-115. It follows that the Board's function is to decide whether DEQ's issuance of the Final Permit violated the law, was arbitrary and capricious, or was an abuse of discretion.

That means Petitioners present no disputes of material fact—indeed their Opening Brief identifies none—and instead only question the legal conclusions made by DEQ based on the facts underlying the Final Permit. The Board's review is limited to determining whether DEQ acted unlawfully as Petitioners allege. A violation of law speaks for itself. An "arbitrary and capricious decision occurs where the decision was reached in an unreasonable manner or based on clearly erroneous findings." *Floyd v. Bd. of Ada Cnty. Comm'rs*, 164 Idaho 659, 668, 434 P.3d 1265, 1274 (2019). "Clearly erroneous applies where factual findings are not supported by substantial and competent evidence." *Id*. "An abuse of discretion standard examines whether the [agency] acted within the boundaries of its discretionary decision and applicable legal standards, and reached a decision by exercising reason." *Id*.

II. The Board may defer to DEQ's technical expertise and special skill.

In addition to the standards above, the Idaho Administrative Procedure Act speaks to the deference the Board may afford DEQ in reaching a decision in a contested case: "[t]he agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Idaho Code § 67-5251(5); *see also* IDAPA 04.11.01.600. Also the Board may take official notice of "generally recognized technical or scientific facts within the agency's specialized knowledge." Idaho Code § 67-5251(4)(b); *see also* IDAPA 04.11.01.602. Thus Idaho law explicitly recognizes that "the agency's repeated exposure to a specialized subject matter is a

source of specialized knowledge that is useful in evaluating evidence." Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 319 (1994).

Deference is particularly appropriate here. DEQ is granted primary authority to determine specific, source-by-source emission limitations in air quality permitting. *See* Idaho Code § 39-115 (granting DEQ the authority to issue pollution source permits); *see also* REC 1272 (¶ 7). As the United States Supreme Court recognized in *Train v. NRDC*, 421 U.S. 60, 79 (1975), "so long as the ultimate effect of a State's choice of emission limitations is compliance with the [NAAQS], the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." Thus the Board may give due consideration and deference to the technical expertise and special skill of DEQ, as the Hearing Officer did. *See* REC 3378.

The deference the Board may give DEQ is illustrated by the deference courts give agencies, when reviewing an agency action. First, Idaho courts defer to agency interpretations of law. *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862-63, 820 P.2d 1206, 1219-20 (1991). When an agency is entrusted with administering a statute, the courts may defer to the agency's interpretation of a statute or rule if the interpretation is reasonable and not contrary to its express language. *See id.* at 862, 820 P.2d at 1219. Generally, the Idaho Supreme Court finds agency interpretations of statutes and rules are "reasonable unless the agency relied on erroneous facts or law in its determination." *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 4, 232 P.3d 322, 325 (2010) (citing cases). Stated differently, an agency's interpretation of a rule or statute is unreasonable when it "is so obscure and doubtful that it is entitled to no weight or consideration." *Simplot*, 120 Idaho at 862, 820 P.2d at 1219 (citation omitted).

Second, consistent with the Idaho Code § 67-5251(5) and IDAPA 04.11.01.600 noted above, the reviewing courts defer to the agency when reviewing a scientific determination in its particular field of expertise. *See Simplot*, 120 Idaho at 859, 820 P.2d at 1216 ("[T]he expertise of an agency is often useful in technical areas of the law where the risk of failing to understand all of the implications of a decision are great."); *Grindstone Butte Mut. Canal Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 175, 182, 627 P.2d 804, 811 (1981) (noting that the Court will temper its review with deference to the expertise of the Idaho Public Utilities Commission when considering testimony that is technical in nature); *see also* Idaho Code § 67-5251(5).

ARGUMENT

Applying those standards to this case, the Hearing Officer correctly granted summary judgment in favor of DEQ and Perpetua and dismissed Petitioners' contested case petition. Petitioners appeal the issuance of the Final Permit based on alleged errors in the preconstruction permitting process. That process requires DEQ to reach decisions through the exercise of discretion and through its scientific and technical expertise. Summary judgment on contested cases has been found appropriate where the action being challenged involved a discretionary decision reached by the exercise of DEQ's special skill and expertise. *See, e.g.*, *In re: Permit Applicant Garnet Energy LLC (Permit No. 0027-00081)*, Dkt. No. 0101-01-10, Order Granting Motion for Summary Judgment (Feb. 22, 2002).

I. The Hearing Officer correctly held that DEQ followed EPA guidance and properly exercised its discretion in excluding the Stibnite Access Route from ambient air (Claims 11 and 12).

Petitioners contend that DEQ's decision to exclude the Stibnite Access Route from ambient air protections was arbitrary and capricious and an abuse of discretion for two reasons. Opening Br. at 16-24. First, they argue that Perpetua does not have legal control to preclude the general public from the Project. *Id*. at 17-21. Second, they argue that the Final Permit does not

adequately preclude the general public. *Id*. at 22-24. The Hearing Officer disagreed and rightly so. REC 3384-3393. Petitioners simply dispute DEQ's exercise of discretion and take a view of ambient air that is far narrower than what EPA and DEQ guidance allows.

A. EPA guidance on ambient air and agency discretion.

The term "ambient air" is not defined in the CAA. EPA filled this gap by defining "ambient air" as "that portion of the atmosphere, external to buildings, *to which the general public has access*." 40 C.F.R. § 50.1(e) (emphasis added). Idaho similarly defines "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access." IDAPA 58.01.01.006.05. EPA has long recognized that an applicant need not demonstrate the impact of a source's emissions on air within areas to which general public access is restricted. *See* REC 1138, 1341, 1805.

Thus, EPA has consistently exempted "the atmosphere over land [1] owned or controlled by the source and [2] to which the public access is precluded by a fence or other physical barriers" from "ambient air." REC 1138. In 2019, EPA broadened the "fence or other physical barriers" element and recognized that physical boundaries are not the only way in which to preclude public access. REC 1146. Specifically, EPA recognized that other measures (such as video surveillance, monitoring, clear signage, and routine security patrols) may be effective in deterring or precluding access to the land by the general public. *Id*. EPA gives the example that clearly visible "No Trespassing" signs in conjunction with some degree of fencing or other physical and/or non-physical barriers may be effective to preclude access by the general public in appropriate situations. REC 1147.

Also important, EPA recognizes a source's "ambient air" is reviewed based on an individual, case-by-case basis. REC 1147-1148. As EPA explains in the 2019 guidance:

> The EPA will apply a rule of reason in evaluating the effectiveness of any measure proposed by a source … this evaluation should address relevant factors, such as the nature of the measure used (e.g., physical or non-physical), source location, type and size of source and property to be excluded, surrounding area (including the proximity, nature, and size of the population in the area), and other factors affecting whether members of the general public would readily be able to trespass upon or otherwise have access to the source's properties.

REC 1147. Air agencies "should consider all relevant information provided by the source or other interested parties, or otherwise available regarding the effectiveness of the measures to prevent public access." *Id*. Thus air agencies exercise discretion in determining whether a permit condition is appropriate to ensure that the source administers selected measures in a manner that maintains continued public health protection. *Id*.

B. DEQ acted within its discretion to accept Perpetua's representation that it will have legal authority to preclude access by the general public.

Petitioners contend that the Hearing Officer erred in finding that DEQ could rely on Perpetua's representations that it will legally control the Project and the Project's operational boundary. Opening Br. at 17-21. Petitioners present a primary misunderstanding in their Opening Brief: that Perpetua will not have legal authority to preclude public access from the Stibnite Access Route. *Id*. The record does not support Petitioners, and the Hearing Officer was correct to reject their unsupported assertion for two reasons.

First, DEQ was satisfied with Perpetua's representation that it will have sole and complete control of general public access to the Stibnite Access Route, including complete closure when necessary. REC 676-677, 936. As the Hearing Officer observed, Midas Gold, Perpetua's predecessor, certified the truth of the following representation:

> Midas Gold will legally control the SGP, an active industrial site where mining activities will occur, such as heavy equipment operation. Most areas of the mine will require strict safety protocols and controlled access. Midas Gold has established an operations boundary to identify the area where public access will be excluded. Public access inside the operations boundary will be restricted for

> the life of the mine by physical barriers at points of potential access, including the current Stibnite Road point of entry and proposed site access via the Burntlog Route, as well as natural features of the landscape that prevent access.

REC 1807. Indeed, in the permit to construct application, Perpetua certified that, "based on information and belief formed after reasonable inquiry, the statement and information in this and any attached and/or referenced document(s) are true, accurate, and complete in accordance with IDAPA 58.01.01.123, 124." REC 1508; *see also* REC 1507, 1721. Perpetua also informed DEQ that the Stibnite Access Route was included in the mine plan and was subject to the Forest Service's approval. *See* REC 894-895, 2163.

Unlike DEQ and the Hearing Officer, Petitioners ignore that the Final Permit is a *preconstruction* permit, that construction of the Project has not begun, and that construction cannot begin until Perpetua obtains the Forest Service's approval of the mine plan. Petitioners' argument that Perpetua does not have control of the Project now is nothing more than misdirection. The Project is located on a combination of private land and public national forest land, and Perpetua is required to obtain authorization from the Forest Service. The mine plan establishes the Project's operational boundary and its approval will provide Perpetua with authority to preclude public access for safety and operational reasons.

Perpetua's application for a permit to construct and DEQ's approval of the Final Permit is based on the proposed operational boundary. If the Forest Service does not approve the mine plan, the Project will not proceed. If there is no Project, Perpetua has no need for the Final Permit. These sequential realities do not invalidate Perpetua's representation that it "will legally control" the Project and "has established an operations boundary to identify the area where public access will be excluded." DEQ can, and must, rely on the representations of permit

applicants, and the record supports that its reliance on Perpetua here was reasonable and supported.[5]

Second, Petitioners are wrong that Perpetua will not obtain legal authority to preclude the general public from the Stibnite Access Route once the Forest Service approves the Project's mine plan. On page 20 of their Opening Brief, Petitioners challenge Perpetua's control over the road by misrepresenting statements made in an Air Quality Specialist Report prepared for the Forest Service (the "USFS Report"), REC 2605-2985, and a May 2021 memorandum developed for the Forest Service by Stantec Consulting Services, REC 2557-2558. According to Petitioners, the mine plan *requires* Perpetua to provide public access through the Project and thus Perpetua will not have legal ability to preclude public access. Opening Br. at 20-21. This reading of the USFS Report and Stantec memorandum is fundamentally wrong and misleading.

As the record demonstrates, Perpetua volunteered to construct the Stibnite Access Route for limited connectivity to Thunder Mountain Road and points beyond. REC 985. Perpetua is not legally obligated to construct the Stibnite Access Route and has sole and complete control over construction, operation, and use of the road, including complete closure of the road when necessary for safety or operational reasons. REC 676-677, 936. The USFS Report and the Stantec memorandum merely *report* what Perpetua volunteered to do and will do once the mine plan is approved. *See* REC 2557-2558, 2625, 2637-2638, 2677, 2684.

[5] Petitioners also criticize the Hearing Officer's observations that DEQ has broad enforcement authority and that in his experience, agencies typically rely on representations made in permit applications. *See* Opening Br. at 18, 21 (citing REC 3390). The Hearing Officer simply recognized what is obvious. DEQ must rely on the representations of permit applicants to fulfill its permitting authority. And when there is a violation of the Idaho Air Rules, including IDAPA 58.01.01.123, .124, and .125. DEQ can enforce the violation and bring civil and criminal enforcement actions against violators. *See* Idaho Code §§ 39-108, 39-109.

The USFS Report simply states that public access through the Project will be provided by a new route through the Project. REC 2677. It also observes that in the operational boundary, "public access would be prohibited, or restricted through such measures that are accepted as means to control public access (EPA 2019a) as Perpetua security checkpoints, physical barriers at points of potential access road and trail entry, and security surveillance patrols." REC 2637. The USFS Report does not require the Stibnite Access Route, nor does it treat the road as the ambient air boundary. *See* REC 2637-2638. In fact, the USFS Report references the Stantec memorandum, REC 2737, which concludes that the road is not ambient air:

> After review of all pertinent information associated with other cooperating agencies, *it is Stantec's understanding that the public access road can be justifiably excluded from ambient air consideration*. The State agency responsible for issued air permits has excluded the road because of restriction measures put in place consistent with their rules and requirements in the permit.

REC 2558 (emphasis added). The Stantec memorandum also observed, "*EPA Region X has accepted DEQ's conclusions*." *Id*. (emphasis added).

Thus Petitioners' argument that Perpetua does not have the legal ability to preclude public access is disingenuous, as they ignore and misrepresent the record. *See* Opening Br. at 20-21. Moreover, as explained below, the Final Permit illuminates the many ways the general public will be legally and physically precluded from accessing the Stibnite Access Route.

C. DEQ acted within its discretion in determining that the Stibnite Access Route is exempt from ambient air.

As the Hearing Officer held, DEQ conformed to EPA guidance and exercised reasonable discretion in excluding the Stibnite Access Route from the Project's ambient air. REC 3390-3393. While Petitioners raise several questions in their Opening Brief and may have different opinions on how DEQ should have established the ambient air boundary, they fail to meet their burden to show that DEQ's decision is arbitrary and capricious, or an abuse of discretion. *See*

Opening Br. at 22-24. As evidenced by the record, DEQ conducted a thorough review of this issue. In deciding that the Stibnite Access Route is excluded from ambient air, DEQ reached a reasonable determination consistent with the definition of ambient air and agency guidance.

As noted earlier (at p. 9), DEQ and Perpetua recognized from the beginning the importance of establishing the ambient air boundary to permit the Project. *See* REC 1240 [Schilling Decl. at 8]. In 2018, DEQ contacted EPA Region 10, which gave this guidance regarding the Stibnite Access Route: "If the public access road is only accessible to public traveling in automobiles under the escort, supervision, and monitoring of Midas personnel (they mentioned a pilot car as a possibility), and there are no stopping points with public access along the road, then the road is not ambient air." REC 1350. In 2020, EPA Region 10 reiterated that the road would be exempt "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 1496, 1240 [Schilling Decl. at 8].

DEQ analyzed the ambient air boundary issue using EPA's guidance. *See* REC 676-677, 935-936, 958. As to the second element (measures precluding public access), DEQ evaluated how Perpetua would restrict access and prohibit the public from freely accessing the Stibnite Access Route. REC 676-677, 936. DEQ considered that Perpetua would preclude general public access to the road by (1) establishing manned access gates at points prior to the ambient air boundary; (2) employing physical barriers at points of potential access; (3) posting signs warning the public against entry into the site; (4) implementing routine patrolling and surveillance for unauthorized individuals; and (5) only allowing registered guests access to or through the facility. *Id.*; *see also* REC 1807-1809.

Nevertheless, Petitioners liken the Stibnite Access Route to a right-of-way easement or common service road and argue that individuals traveling the Route are the general public. Opening Br. at 24. They also contend that the Final Permit does not preclude access to the general public. *Id*. at 23. But unlike a right-of-way or common service road, members of the general public will not be permitted to freely access the Stibnite Access Route. REC 376 (Condition 2.7); *see also* REC 676-677, 935-936. In Condition 2.7, DEQ conditioned the Final Permit on the establishment of an Access Management Plan ("AMP") prohibiting the general public from freely accessing the Stibnite Access Route. REC 376.

Under Condition 2.7, "Only registered guests of the facility will be allowed access to or through the facility. Those seeking to be a guest for the sole purpose of passing through the facility to another destination shall be provided a registration sheet that explains Perpetua's requirements for accessing the site and identified potential hazards of the site." *Id*. Those that seek access must be required to register at the access gate and will be informed that they are proceeding as guests rather than members of the general public. *Id*. Perpetua must also install locked gates and barriers for the two primary access points, plus post warning signs, require registration by users seeking access, and more. *Id*. Also the measures specified in the AMP will be incorporated by reference into the Final Permit and will be enforceable permit conditions. *Id.*

Despite those restrictions, Petitioners persist that those accessing the Stibnite Access Route cannot be considered "guests of the mine," yet they ignore DEQ's record and reasoned analyses and simply argue the semantics of a "guest." *See* Opening Br. at 23-24. But based on Condition 2.7 and Perpetua's barriers to entry, only registered vehicles and their passengers will be permitted entry onto the Stibnite Access Route. REC 376. Vehicles will be supervised, cannot stop, and must check out at the egress point. *See id*. The elaborate measures at both entry and

egress locations, plus supervision of vehicles requiring continuous movement without stopping along the route, reinforce Perpetua's control of the road, in contrast to a county road or other thoroughfare that is uninhibitedly open to the general public.

Thus, the measures required by the Final Permit preclude access by the general public and support DEQ's well-reasoned decision to exclude the Stibnite Access Route from the ambient air boundary. *See REDOIL v. U.S. EPA*, 716 F.3d 1155, 1165 (9th Cir. 2013) (holding that EPA's grant of an ambient air exemption conditioned on a safety zone was a permissible interpretation of the ambient air regulation and EPA's 2019 guidance).

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In sum, as the Hearing Officer found, Perpetua demonstrated it has the legal and practical ability to preclude the general public from the Stibnite Access Route consistent with EPA's 2019 Guidance. REC 3384-3393. After thorough deliberation and consultations with EPA Region 10, DEQ concluded the Stibnite Access Route was properly excluded from the ambient air boundary based on the Project's individual circumstances. *See* REC 1236-1240 [Schilling Decl. at 4-8], 1254, 1350, 1496, 2558, 2737. Just as the Ninth Circuit upheld EPA's decision in *REDOIL*, the Board should uphold DEQ's determination on the Project's ambient air boundary.

II. The Hearing Officer correctly held that the Idaho Air Rules do not require Perpetua to develop work plans for DEQ approval before issuance of the Final Permit (Claim 3).

DEQ lawfully required future development of the AMP, Fugitive Dust Control Plan ("FDCP"), Haul Road Capping Plan ("HRCP"), and Operations and Maintenance Manual ("O&M Manual"). Petitioners' arguments that the Final Permit is incomplete and the work plans violate the CAA and the Idaho Air Rules ignore the permit record and DEQ's well established practice and are legally unfounded. *See* Opening Br. at 29-34. Pursuant to DEQ's discretion, the Final Permit requires Perpetua to develop the work plans, include specific provisions in the

plans, and submit them to DEQ for approval prior to startup. REC 375-376 (Condition 2.6 (FDCP) and Condition 2.7 (AMP)), 378-380 (Condition 2.20 (O&M Manual)), 385-386 (Condition 3.13 (HRCP)). As the Hearing Officer held, DEQ did not violate the CAA or the Idaho Air Rules or act arbitrarily and capriciously. REC 3406-3407.

A. Petitioners cannot challenge DEQ's issuance of a permit to construct for failure to comply with the CAA.

At the start, the Board must reject Petitioners' allegations that DEQ's issuance of the Final Permit violates the CAA. *See* Opening Br. at 29-32. The CAA and part 51 regulations delineate the required contents of SIPs. *See* 42 U.S.C. § 7410(a). In other words, the federal provisions describe "the general *types* of emissions standards and limitations that a SIP must contain"—they establish "requirements for *SIPs*, not *sources*." *NRDC v. S. Coast Air Quality Mgmt. Dist.*, 694 F. Supp. 2d 1092, 1105, 1111 (C.D. Cal. 2010) (emphases in original), *aff'd*, 651 F.3d 1066 (9th Cir. 2011). EPA must approve a SIP so long as it satisfies those requirements. *See* 42 U.S.C. § 7410(k)(3).

This distinction between SIPs and sources is important here. EPA "is plainly charged by the Act with the responsibility for setting the [NAAQS]. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations." *Train*, 421 U.S. at 79. Thus, EPA has "no authority to question the wisdom of a State's choices of emission limitations." *Id*. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the [NAAQS], the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id*.

The CAA and part 51 regulations require that SIPs provide for an opportunity for public comment on "information submitted by owners and operators [and] [t]he public information must include the agency's analysis of the effect of construction or modification on ambient air

quality, including the agency's proposed approval or disapproval." 40 C.F.R. § 51.161. EPA approved Idaho's SIP, including DEQ's specific preconstruction rules. IDAPA 58.01.01.200-223. Because the CAA and the part 51 regulations establish requirements for SIPs, not sources, the only relevant question now is whether DEQ complied with the Idaho Air Rules.

B. The Idaho Air Rules do not require work plans to be submitted with permit to construct applications or circulated for public comment.

The Idaho Air Rules do not require that work plans be developed at all, let alone that they be prepared before construction commences or be available for public comment before a preconstruction permit can be issued. *See* IDAPA 58.01.01.211.01. Section 202 of the Idaho 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 "[s]ite information, plans, descriptions, specifications, and drawings showing the design of the stationary source, facility, or modification, the nature and amount of emissions (including secondary emissions), and the manner in which it will be operated and controlled." IDAPA 58.01.01.202.01.a.i. DEQ may request any additional information necessary to make determinations under the Idaho Air Rules. IDAPA 58.01.01.202.03.

Petitioners cite Section 202.01 and argue the work plans at issue were required "plans" to be submitted as part of Perpetua's permit application and to be circulated for public comment. Opening Br. at 30. There is no textual support that the AMP, FDCP, HRCP, and O&M Manual are "plans" as that term is used in Section 202.01. Petitioners fail to present any argument to support their interpretation of the term. Moreover, DEQ's interpretation of its rules, plus its authority to determine an application complete, are entitled to deference. *See* IDAPA 58.01.01.202.03; *see also* Idaho Code § 67-5251(5); IDAPA 04.11.01.600.

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. As such, Petitioners' argument that Perpetua's application is incomplete or that these plans must be made available for public comment is legally incorrect. *See* Opening Br. at 29. Following the Idaho Air Rules, DEQ's review of Perpetua's application was an exemplar of this process: it included four requests for additional information to supplement the application, three extended public comment opportunities, two informational meetings requested by the public, and three iterations of draft permits. REC 418-419, 459. Notably, none of DEQ's incompleteness letters to Perpetua requested that the work plans be included in the permit application.

DEQ confirmed that requiring work plans after issuance of the Final Permit and prior to startup for DEQ review and approval complies with the Idaho Air Rules, its discretion under the rules, and agency practice:

> DEQ contends the requirement to review and approve each Plan and Manual after the permit is issued and prior to facility startup is sufficient, reasonable, and appropriate to ensure compliance with applicable requirements…[;] 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.

REC 1264 [Simon Decl. at 9]. DEQ explains that this is standard protocol, because more information becomes available after the permit application is submitted and approved and prior to startup, such as actual equipment purchased and installed, and the operational activities that are actually implemented after construction is completed. REC 1265 [Simon Decl. at 10].

In the end, Petitioners fail to point to any legal obligation in the Idaho Air Rules that requires AMPs, FDCPs, HRCPs, or O&M Manuals be circulated for public comment and review. In the absence of such rules, Petitioners try to shift the burden to Perpetua and DEQ by

arguing that "[n]o provisions in the Air Rules authorize DEQ to save portions of a PTC to be developed later." Opening Br. at 29. But it is Petitioners' burden to show DEQ's failure to comply with a legal obligation. And there are no such Idaho Air Rules because the rules do not require these documents in the application or in the public review process. The Hearing Officer was correct in finding DEQ did not violate the Idaho Air Rules and that "the language of Air Rule 211.01 provides DEQ with wide discretion regarding appropriate permit terms." REC 3406.

C. DEQ's decision for Perpetua to develop and submit the work plans for approval before starting construction was not arbitrary or capricious.

Contrary to Petitioners' accusations, DEQ is not "shielding" work plans from public review. Opening Br. at 32. Petitioners contend that DEQ failed to develop important permit conditions for work plans. However, DEQ included permit conditions prescribing great specificity for Perpetua's work plans. *See* REC 375-376 (Condition 2.6 detailing specific requirements of the FDCP and Condition 2.7 detailing specific requirements of the AMP), 378-380 (Condition 2.20 detailing specific requirements of the O&M Manual), 385-386 (Condition 3.13 detailing specific requirements of the HRCP), 932-933. DEQ also requires that the work plans "ensure compliance" with pertinent requirements. *See*, *e.g.*, REC 375 (Condition 2.6: "The Permittee shall develop and maintain a FDCP to ensure compliance with fugitive dust requirements (Permit Conditions 2.1-2.5) and also fugitive dust best management practices…in accordance with IDAPA 58.01.01.799.").

In addition, while the work plans are not required by any rule to be submitted at all, DEQ will exercise oversight, review and approve the work plans, and publish the final plans on its website. *Id*. Perpetua shall submit the plans to DEQ for approval at least 30 days prior to startup. REC 375-376 (Condition 2.6 (FDCP) and Condition 2.7 (AMP)), 378-380 (Condition 2.20 (O&M Manual)), 385-386 (Condition 3.13 (HRCP)); *see also* REC 932. Furthermore, elements

of the work plans, including recordkeeping and reporting requirements, will be incorporated and enforceable through the Final Permit. *Id*.

The method by which DEQ addressed the work plans in the Final Permit is consistent with DEQ's practice and is reasonable. *See* REC 1265 [Simon Decl. at 10]. It allows the permittee to prepare a specific plan or manual based on information that is not available at the permit to construct phase, such as the actual equipment purchased and operational characteristics of the facility. *Id*. Petitioners disagree with the approach executed by DEQ, but disagreement is not the legal standard. DEQ exercised reasonable discretion in developing the permit conditions related to the work plans. *See* REC 3406-3407. DEQ's approach did not violate the CAA governing SIPs, nor the Idaho Air Rules governing sources.

D. Petitioners' legal authority from the Clean Water Act is distinguishable and inapplicable to DEQ's preconstruction permitting process.

Petitioners fail to cite any case law to support their position that public review is required for work plans under the CAA or Idaho Air Rules for permits to construct. *See* Opening Br. at 29-34. This is not an oversight. There is no legal authority for Petitioners to reference. The relevant CAA jurisprudence affords broad discretion to states to develop permit conditions. *See Train*, 421 U.S. at 79. As demonstrated above, to issue the Final Permit lawfully, the work plans need not be included with applications or published for public comment and review as part of the preconstruction review process. In the absence of such authority, Petitioners cite two Clean Water Act cases to support their position on the work plans ignoring the distinct statutory requirements of that statute. Opening Br. at 31-32, 34.

In the first case, *Waterkeeper Alliance, Inc. v. U.S. EPA*, the plaintiff sought review of the National Pollution Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (the "CAFO Rule"). 399

F.3d 486, 492 (2d Cir. 2005). The plaintiff argued that the permitting scheme established by the CAFO Rule violated the Clean Water Act's public participation requirements because it did not require nutrient management plans, which constitute effluent limitations, to be made available to the public. *Id.* at 503. Under the Clean Water Act, effluent limitations are specifically identified in the list of items that public participation should be provided for. 33 U.S.C. § 1251. As such, the Second Circuit held the CAFO Rule "violates the plain dictates of 33 U.S.C. § 1251(e)." *Waterkeeper Alliance*, 399 F.3d at 504.

Similarly, in *Environmental Defense Center, Inc. v. EPA,* the Ninth Circuit held that Notices of Intent ("NOI") are functional equivalents to permits under the Clean Water Act's general permit option, and EPA's failure to require review of NOIs available to the public contravened the express requirements of the Clean Water Act. *Env't Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 (9th Cir. 2003).

The Board should not give any weight to *Waterkeeper Alliance* and *Environmental Defense Center* because they are factually distinguishable and inapposite. Both relate to an entirely different federal law and permitting scheme and address information that is expressly required by the Clean Water Act to be provided to the public. The facts underlying these decisions are clearly different from Perpetua's work plans, which are not required by any express provision of the Idaho Air Rules (or the CAA) to be included in the application, the Final Permit, or any part of the public comment process. Rather, the Idaho Air Rules and relevant CAA jurisprudence provide that DEQ has broad discretion in development of permit conditions. *Train*, 421 U.S. at 79; IDAPA 58.01.01.211.01.

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In sum, the Idaho Air Rules do not require DEQ to review and approve work plans during

the preconstruction permit review process, nor is public review appropriate for the specific operational choices implemented by the permittee in those plans. Moreover, DEQ placed the specific requirements for content of the work plans in plain sight within the Final Permit. As the Hearing Officer held, the Idaho Air Rules support DEQ's decision and discretion not to require Perpetua to develop work plans before issuance of the Final Permit. *See* REC 3406-3407.

III. The Hearing Officer correctly held that DEQ acted reasonably in determining that a 93.3% control efficiency for fugitive dust emissions from the Project's haul roads will meet the PM_{10} NAAQS and arsenic AACC (Claims 2 and 8).

To satisfy the requirements of Section 203 of the Idaho Air Rules, DEQ's evaluation included estimates of fugitive dust emissions from the Project's haul roads, including a dust control efficiency of 93.3%. *See* REC 431, 456, 917. Petitioners insist DEQ lacked a reasonable basis to determine that Perpetua will achieve a 93.3% control efficiency.[6] Opening Br. at 35-40. The Hearing Officer disagreed and found DEQ's selected control efficiency was reasonable and that the Final Permit includes enforceable limits and conditions to achieve that level of control. REC 3399-3403. The record fully supports the reasonableness of DEQ's determinations and the Hearing Officer's ruling. Petitioners' objections are simply a difference of opinion and provide no basis to conclude DEQ acted unreasonably.

A. DEQ acted reasonably and within its discretion in determining that 93.3% control efficiency for fugitive dust from haul roads is attainable.

Contrary to Petitioners' contention, the Final Permit includes a specific requirement to achieve 93.3% control of fugitive dust on the Project's haul roads. *See* Opening Br. at 35-36. The requirement is set forth in Conditions 1.2 and 3.2 of the Final Permit. REC 369, 384; *see also* REC 3399-3400. And as the Hearing Officer ruled, DEQ reasonably established the 93.3%

[6] Before the Hearing Officer, Petitioners also argued that DEQ's fugitive dust determinations violated the Idaho Air Rules. *See* REC 344, 2340. Petitioners do not present that argument here.

control efficiency based on a combination of dust suppressant chemical application (90% control) and watering (33% control) to increase road surface moisture.[7] *See* REC 3401-3402 (citing REC 917, 923-924). Petitioners do not offer alternative values; nor do they contest that chemical suppressant and water are commonly used together to control fugitive dust emissions from unpaved roads. *See generally* REC 912, 917, 924, 1245 [Schilling Decl. at 13], 1838.

Rather, Petitioners suggest, without argument or support, that it is "highly questionable whether 93.3% fugitive dust control is realistically attainable." Opening Br. at 35; *see also id*. at 36-37. They also make much of DEQ's recognition that meeting the 93.3% control efficiency for fugitive dust from the haul roads "requires conscientious efforts, vigilant inspection and monitoring, and a comprehensive [Fugitive Dust Control Plan]." *See id*. at 37, 39 (citing REC 456). Petitioners simply ignore DEQ's robust, reasoned, and rational analysis and decision making reflected in the permit record. DEQ relied on two sources to conclude a 93.3% control efficiency was achievable.

The first source was EPA's AP-42 guidance, which is commonly used for emission factor information for air pollution sources. DEQ relied on studies referenced in AP-42 Section 13.2.2, Unpaved Roads (2006), which supports a control efficiency over 90% when chemical and water suppressants are used in combination. *See* REC 917, 912, 1260-1261 [Simon Decl. at 5-6], 1838. As DEQ noted, the referenced test reports show that chemical suppressant alone can achieve 90% to 99% control efficiency and 98% for magnesium chloride in particular. REC 546-547.

[7] 93.3% control = (1-90%) * (1-33%). DEQ explained in its response to comments that it could have listed the control efficiencies separately for chemical (90% control) and water (33.3% control), but it chose to combine the control efficiency as 93.3% to emphasize the importance of using chemical and water suppressants in combination. REC 923-924.

Section 13.2.2 of AP-42 also provides that watering alone can achieve 75% to 95% control efficiency. REC 548, 808 (Figure 13.2.2-2), 1838.

To bolster its analysis, DEQ also reviewed a second source, EPA's RACT/BACT/LAER Clearinghouse ("RBLC") database. REC 924. The RBLC database identifies 10 major stationary source projects using chemical dust suppressants or a combination of chemical suppressants and watering with 90% to 98% control efficiency. REC 912-913. While Petitioners sought to discredit most of the 10 projects as unrepresentative, DEQ found the database provided additional support that a 90% or greater control efficiency is achievable, in various states with similar operations, by treating unpaved roads with chemical suppressants. REC 923-925.

To be sure, the RBLC database reports the *minimum* control efficiency required for the 10 projects, not the projects' achieved maximum control efficiency. REC 912-913. When using chemical suppressants alone, two of the RBLC projects identified a 90% control efficiency and one of the projects a 98% control efficiency. REC 913. As the permitting authority familiar with the database, DEQ concluded the database identified projects—including gold, cement and concrete, steel, and quarry projects—referencing control efficiency of 90% *or greater* for unpaved roads. REC 924, 912-913. DEQ found those and the other projects representative of circumstances presented by Perpetua. REC 924.

DEQ also found that fugitive dust from the haul roads was likely to be controlled at levels greater than 93.3% during wintertime conditions when the site receives an average snow depth of 21-68 inches and 6 inches of average precipitation. REC 924-925. Petitioners ignore all this work by DEQ. Ultimately DEQ chose to rely on empirical data gleaned from AP-42 and the RBLC database rather than Petitioners' unsupported critiques of DEQ's professional analyses. *See* REC 917, 924, 986 (noting that Petitioners did not demonstrate that their assumptions "were more

accurate or appropriate than data provided" and accepted by DEQ). DEQ reasonably supported its finding that the 93.3% control efficiency for chemical dust suppression and watering was both achievable and conservative. As the Hearing Officer correctly ruled, Petitioners have not shown that DEQ's conclusion was unsupported or unreasonable. *See* REC 3401-3402.

B. DEQ acted within its discretion to impose daily monitoring and other substantive conditions to ensure a 93.3% control efficiency.

The Hearing Officer also rejected Petitioners' contention that the Final Permit lacks sufficient and enforceable conditions to ensure a 93.3% level of control of fugitive dust from the haul roads will be met. REC 3402-3403. Petitioners argue that DEQ should have accepted EPA's advice and included conditions on the type, quantity, application rate, and frequency of dust suppressants. Opening Br. at 37-40. But as the Hearing Officer noted, they cite to no legal authority that DEQ was *required* to include those conditions, because there is none. REC 3403. Further, DEQ developed numerous permit conditions to ensure the 93.3% control efficiency is maintained on a daily and annual basis, and as the Hearing Officer held, Petitioners have not shown those conditions are unsupported, unreasonable, or unenforceable. *See id*.

1. DEQ imposed daily monitoring, dust control application, and other conditions to ensure the 93.3% control efficiency will be met.

Under the Idaho Air Rules, DEQ has the discretion to impose "any reasonable conditions upon an approval." IDAPA 58.01.01.211.01; *see also* IDAPA 58.01.01.651 ("All reasonable precautions must be taken to prevent particulate matter from becoming airborne."). Petitioners simply want different conditions to control haul road fugitive dust emissions from those imposed by DEQ and ask the Board to substitute their choices for DEQ's. Yet they cannot prove by a preponderance of the evidence that the conditions imposed in the Final Permit are arbitrary and capricious or unreasonable. Moreover, Petitioners ask the Board to view each condition in isolation for adequacy, without considering how the Final Permit's numerous conditions operate

together to require and verify compliance with the 93.3% fugitive dust control efficiency.

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 Final Permit and find it achievable (as just explained), the Final Permit required, among other things, the proper application of dust suppressant chemicals and watering as verified through daily visible emission monitoring and recordkeeping. REC 917, 921, 923, 934, 937.

DEQ's conclusion is amply supported by the record and reasonable. Conditions 2.2, 2.4, 2.5, 2.6, and 2.8 provide enforceable conditions for achieving 93.3% haul road dust control by the proper application of dust suppressant chemicals and watering. 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 374. Condition 2.4 requires daily facility-wide inspections of hauling activities to ensure the expected control efficiency is achieved. *Id*. Condition 2.5 requires fugitive dust control measures at all times to ensure no more than 10% opacity and immediate corrective action if the limit is not met. REC 375. The daily inspection and haul road opacity requirements are more stringent than in other permits that DEQ has issued. REC 1261 [Simon Decl. at 6].

Those conditions also refute Petitioners' complaints that DEQ did not include "vigilant inspection and monitoring" to ensure compliance. *See* Opening Br. at 37-40. As for monitoring, Condition 2.4 again establishes a daily monitoring time interval. REC 374. As for recordkeeping,

chemical suppressant and water applications must be recorded every 12 hours under Condition 2.2, dust complaints must be recorded under Condition 2.3, and all inspections and corrective actions must be recorded under Condition 2.4. *Id*. In addition, Condition 3.13 requires haul road inspections and silt content sampling. REC 385-386. And Condition 7.10 establishes detailed recordkeeping requirements for monitoring records, and Condition 7.11 requires documentation and reporting of excess opacity emissions. REC 406-407.

Moreover, Conditions 2.6 and 2.8 require a FDCP, which must be submitted to DEQ for approval 30 days prior to startup, and once approved, will be incorporated into the permit and enforceable. REC 375-376. The FDCP itself ensures compliance with the Final Permit's fugitive dust requirements. Condition 2.6 establishes and details 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 375-376 (Condition 2.6). Thus, DEQ did not give "vague direction" to consider type, quantity, and rates of dust suppressants later in its FDCP. *See* Opening Br. at 38. As DEQ explained in response to Petitioners' criticisms, the Final Permit requires Perpetua to apply dust suppressants in proper amounts and proper frequencies as local conditions dictate and also requires daily inspections to ensure the 93.3% control efficiency is met. REC 917, 921, 923, 934, 937. Ultimately, the Final Permit "requires a more comprehensive and detailed FDCP than in any other minor source permit DEQ has issued." REC 1263 [Simon Decl. at 8].

DEQ rightly recognized the challenge of achieving fugitive dust controls at the 93.3% control efficiency. REC 456. As noted, Petitioners attempt to use DEQ's acknowledgment against it, *see* Opening Br. at 37, 39-40, but it illustrates that DEQ's choices in establishing Conditions 2.1 to 2.8 were deliberate, rational, and reasonable. For instance, DEQ reasoned that frequent inspections "once every 12 hours ensures that both daytime and nighttime operations will be observed, to confirm that sufficient fugitive dust control measures are applied as assumed in demonstrations of compliance with NAAQS on a 24-hour basis." REC 724. DEQ also considered the Final Permit's surrogate production limits (discussed below) and that a 93.3% level of control could be met and likely exceeded during wintertime conditions, when modeling showed possible violations of the PM_{10} NAAQS. REC 924-925, 995-996.

Rather than affording passing consideration to achieving 93.3% control levels, DEQ directly confronted the challenge and developed robust permit conditions to assure future permit compliance. DEQ's imposition of minimum and substantive requirements in the Final Permit and through the FDCP was reasonable. DEQ understood how uncommon and impractical it would be

to establish specific numeric limits to control efficiency variables advocated by Petitioners. Instead, the Final Permit 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. As the Hearing Officer concluded, Petitioners have not satisfied their burden to show that the many permit conditions imposed by DEQ will not achieve the expected control efficiency. REC 3403.

2. DEQ also established surrogate production limits and other requirements to ensure the 93.3% control efficiency is achievable.

Petitioners also ignore the other enforceable conditions DEQ imposed to control fugitive dust emissions from the haul roads. As DEQ explained, emissions limits and parameters associated with estimating emissions are not commonly included in permits for fugitive dust sources. REC 923, 939-940. Instead, DEQ uses production limits and monitoring and recordkeeping requirements, which it did here. *Id*. In Condition 3.5, DEQ established daily hauling and excavation limits of 180,000 tons/day and 135,000 tons/day on a five-year rolling basis. REC 385; *see also* REC 917, 939. It did so because daily production limits directly limit "hauling operations and associated emissions" and "serve as surrogate emissions limits for PM, PM_{10}, $PM_{2.5}$, HAP and TAP from fugitive sources." REC 722, 923, 939-940.

DEQ also recognized the importance of the silt content parameter in estimating fugitive dust emissions and ensuring compliance with the PM_{10} NAAQS. REC 918. In response to Petitioners' and EPA's comments, DEQ imposed Condition 3.13, which requires Perpetua to cap haul roads with material having a maximum of 4% silt content and to develop a HRCP to ensure the limit is met. REC 385-386; *see also* REC 918, 938-939. Further, as just discussed, DEQ imposed Conditions 2.1 to 2.8 to require fugitive dust emission limits (to ensure that visible

emissions do not exceed 10% opacity) and control requirements (such as the application of water and chemical dust suppressants to haul roads). REC 374-376, 456.

Equally important are the monitoring and recordkeeping requirements DEQ imposed. As DEQ explained, "[s]uch monitoring includes the monitoring of maximum road silt content [and] monitoring of production levels to verify estimated vehicle miles traveled (VMT) used in fugitive road dust emission calculations." REC 928. Indeed, Condition 3.13 requires sampling and monitoring of the maximum road silt content, and Condition 3.16 requires daily, monthly, and yearly hauling and excavating monitoring. REC 386. And, again, Condition 2.6 requires Perpetua to develop and maintain the FDCP to ensure compliance with Conditions 2.1 to 2.5. REC 375-376. The FDCP must include precautions to minimize fugitive dust emissions, such as maximum speed limits, monitoring and maintenance of haul roads, and frequency of chemical dust suppressant and watering. *Id*.

Finally, Petitioners overlook the conservative assumptions that overestimated fugitive dust emissions from the haul roads and modeled maximum PM_{10} impacts. EPA's method for estimating haul road fugitive dust emissions predicts higher emissions for more miles traveled and a heavier vehicle weight. *See* REC 1163-1164. Thus, DEQ also justified its choice of conditions because the emissions were "[c]alculated at maximum daily processing rates" and "would tend to be conservatively estimated." REC 431. At the 180,000 tons/day production limit (or 65,700,00 tons/year), DEQ modeled all hauling scenarios to capture the maximum case hauling distance of 16,415 miles per day (or approximately 500,000 miles per month). *Id*. But the Project's peak production rate is actually 116,964 tons/day (or 42,692,000 tons/year), *id*., and the peak hauling mileage is approximately 116,700 miles per month, far less than modeled, REC

722. And where the conservatism of some emissions calculated was questioned, "DEQ required enhanced monitoring and record-keeping," such as Conditions 3.13 and 3.16. REC 92.

In sum, the entire premise of Petitioners' challenge is wrong–there is no legal requirement for DEQ to include the type, quantity, application rate, and frequency of dust suppressants to control fugitive dust emissions from the haul roads. Petitioners also ignore the actual conditions DEQ chose to impose and its justification for establishing fugitive dust controls, surrogate production limits, and enhanced monitoring and recordkeeping requirements. Petitioners may disagree with DEQ's choices, but they have not shown that DEQ lacked a reasonable basis for such conditions.

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After exhaustive review (much of it in response to Petitioners' public comments), DEQ concluded that fugitive dust emissions from the Project's haul roads will neither cause nor contribute to violations of the PM_{10} NAAQS and the arsenic AACC. *See* IDAPA 58.01.01.203. Petitioners disagree with DEQ's assessments and prefer that it use a lower control efficiency and add more permit limits and conditions to control operations. The Hearing Officer was correct in ruling that Petitioners have not shown that DEQ's choices were unreasonable, unsupported, or irrational. REC 3399-3403.

IV. The Hearing Officer correctly held that DEQ reasonably exercised its discretion in evaluating the health risks from arsenic (Claim 9).

Petitioners argue that "[t]he Hearing Officer ignored the plain language of the Air Rules" by holding that DEQ appropriately found that emissions of arsenic would not injure or unreasonably affect human health or the environment. Opening Br. at 40. However, it is Petitioners who ignore the plain language of the Idaho Air Rules. Petitioners fault DEQ for using a "project specific adjustment factor" to account for the actual operational life of the Project, but

ignore that this project specific adjustment is envisioned by the Idaho Air Rules and well within DEQ's discretion. *See id.*

Following the second public comment period and in response to Petitioners' comments, Perpetua modeled carcinogenic TAPs emissions using an emission inventory that included T-RACT controls, as authorized by Section 210 of the Idaho Air Rules. *See* REC 1944. Typically a source will have an indefinite or unknown operational life, so the Idaho Air Rules require that the source's TAP emissions do not exceed the T-RACT adjusted AACC, which is 10x the AACC listed in Section 586 of the Idaho Air Rules.[8] Section 210.12. This ensures that over a 70-year human life, the ambient air cancer risk from the source's emissions over that period do not exceed one in 100,000. REC 1243 [Schilling Decl. at 11].

However, here the Project does not have an indefinite operational life. Instead, the Project will only operate for 16 years. *See* REC 698, 710, 1947. Accordingly, DEQ used a project specific adjustment factor, authorized under the authority granted to it by Section 210.12, to evaluate whether the TAP emissions from the Project, and specifically arsenic emissions, from the Project would be less than the TAP Standards established in Section 210 and Section 586. REC 710-711.

Arsenic is the primary TAP of concern from the SGP. REC 435. Arsenic is a carcinogen, and the concerns for health impacts from arsenic exposure are from a long-term exposure basis. *See* REC 698, 1243 [Schilling Decl. at 11]. Thus, to reflect the long-term health impacts from sources with indefinite operational spans, the carcinogenic increments reflected in Section 586 are based on a 70-year lifetime exposure. REC 963, 1242-1243 [Schilling Decl. at 10-11].

[8] The Idaho Air Rules were established primarily to regulate well-defined, consistent pollutant emitting processes of an indefinite life. REC 1240 [Schilling Decl. at 8], 1243 [Schilling Decl. at 11].

Notably, before the rules were updated in 2022,[9] the Idaho Air Rules defined "Toxic Air Pollutant Carcinogenic Increments (AACCs)" as "[t]hose ambient air quality increments based on the probability of developing excess cancers over a seventy (70) year lifetime exposure to one (1) microgram per cubic meter (1 μg/m3) of a given carcinogen and expressed in terms of a screening emission level or an acceptable ambient concentration for a carcinogenic toxic air pollutant." IDAPA 58.01.01.006.125 (2022); REC 1243. So, while the AACC is stated in annual averages, these values were developed to be protective where a facility emits at the level reflected in the AACC over the entire 70-year exposure period. *See* REC 963, 1242-1243. In other words, when adjusted for T-RACT, the concentration established by the AACC assumes that if 100,000 people spend a lifetime (24 hours per day, every day, for 70 years) at the maximum receptor point, one person "may" develop cancer.

Again, here, the Project will operate, and potentially generate arsenic emissions, for only 16 years. REC 698. Thus, there will be no arsenic generating activity at the Project after year 16. To account for the actual operational period, DEQ evaluated whether arsenic emissions from the Project would, when evaluated over a 70-year period, be less than or equal to the AACC as required by Section 210.12. REC 69, 719. Conservatively, DEQ took the highest annual modeled concentration of arsenic and assumed that that concentration would be repeated for each year of operations, 16 years. REC 710, 1243. DEQ then averaged this exposure across 70 years, which is the lifetime exposure period that forms the basis of the AACCs and which is required to be evaluated by the Idaho Air Rules. REC 710, 963, 1243. DEQ then compared the lifetime arsenic exposure from the Project, on an annual basis, to the AACC for arsenic, as provided in Section

[9] *See* Executive Order No. 2020-01 (requiring State rules to be streamlined).

586, and determined that the maximum lifetime exposure would be approximately 41% of the AACC. REC 714.

When interpreting a rule, such as Section 210.12, "[t]he language of the rule … should be given its plain, obvious and rational meaning." *Wheeler v. Idaho Transp. Dep't*, 148 Idaho 378, 384, 223 P.3d 761, 767 (Ct. App. 2009) (citing *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001)). Petitioners fault DEQ for ensuring that its evaluation of arsenic emissions from the Project was equivalent to the AACC. But DEQ's approach is envisioned and permitted by the plain language of Section 210.12, which requires that DEQ must:

> Compare the source's or modification's approved T-RACT ambient concentration at the point of compliance for the toxic air pollutant 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) (which amount is equivalent to ten (10) times the applicable acceptable ambient concentration listed in Section 586).

IDAPA 58.01.01.210.12.b. Following this evaluation, then

> [i]f the source's or modification's approved T-RACT 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. Thus, under Section 210.12.b and c, DEQ must evaluate the arsenic emissions and determine if they are less than or equal to the amount of TAP that would contribute to an ambient air cancer risk probability of less than one to 100,000.

As described by Section 210.12, this air cancer risk probability is equivalent to the AACC listed in Section 586. However, the AACC was based on a 70-year exposure period, while the life of the Project is only 16 years. To determine whether the emissions from the 16-year Project were actually equivalent to the AACC, DEQ applied a project specific adjustment

factor to evaluate the arsenic emissions from the Project on the same basis as the AACC – 70 years. REC 710-11; REC 1243 [Schilling Decl. at 11].

Importantly, unlike the other subsections of Section 210 that require the source to demonstrate that its TAP emissions will be at or below the AACC, Section 210.12 contains no such explicit requirement.[10] For instance, Section 210.06 requires that the source's "uncontrolled ambient at the point of compliance" be "*less than or equal to the applicable acceptable ambient concentration*." IDAPA 58.01.01.210.06.b (emphasis added); *see also* IDAPA 58.01.01.210.08.b, 210.10.b, 210.11.c. Had DEQ intended to require that annual emissions from the Project meet the AACC each and every year, it would have said as much in Section 210.12. It did not.

Instead, Section 210.12 requires that DEQ evaluate the acceptable air cancer risk that is "equivalent to" the value found in the AACC. "Equivalent" does not mean "exactly." It means "equal in value, force, amount, effect, or significance." *Equivalent, Black's Law Dictionary* (11th ed. 2019). So here, DEQ must determine whether the Project's arsenic emissions, released over 16 years, have the same cancer risk value as the value found in the AACC that is based on emissions over 70 years. Petitioners can hardly argue that 16 years is equivalent to 70 years. DEQ appropriately conducted its evaluation of the arsenic emissions from the Project by annualizing the worst-case modeled emissions from the Project for the 16-year operational life over the 70-year period upon which the AACCs are based. When DEQ applied the project

[10] Petitioners conveniently ignore the portions of Section 210.12.b and c that require DEQ to compare arsenic emissions to the amount of emissions that would "contribute an ambient air cancer risk probability of less than one to one hundred thousand." *See* Opening Br. at 42. Instead, Petitioners rewrite Section 210.12 to make it seem like DEQ must determine whether the arsenic emissions are less than or equal to the AACC in every year that the Project operates. *Id.* This is not what Section 210.12 requires.

specific adjustment factor, it complied with the plain language of the Idaho Air Rules to determine that the Project met the requirements of Section 210.12.

Not only did DEQ comply with the plain language of the Idaho Air Rules, it also complied with the intent of the Idaho Air Rules. When interpreting a rule, the Board must construe the rule as a whole to give effect to DEQ's intent in enacting the rule. *See State v. Besaw*, 155 Idaho 134, 142, 306 P.3d 219, 227 (Ct. App. 2013). Section 161 demonstrates DEQ's intent in requiring a preconstruction compliance demonstration for TAPs–that TAP emissions do not "injure or unreasonably affect human or animal life or vegetation." Section 586 establishes acceptable levels of carcinogenic air pollutants: if a receptor were exposed to each year for 70 years, this would not result in an increased cancer risk. These AACCs are designed to be both protective and enforceable for projects that have an indefinite operating life. REC 1243 [Schilling Decl. at 11]. Section 210.12 requires that arsenic emissions from the Project not exceed an ambient concentration that would be greater than one to 100,000.

Clearly then, the intent of the Idaho Air Rules is to ensure that emissions from a source do not create an unacceptable cancer risk and are not otherwise injurious to life and health. However, Petitioners ignore the intent of the Idaho Air Rules and argue that unless the ambient concentration in each year of the Project meets the exact value of the AACC, DEQ erred, irrespective of the relative cancer risk of the arsenic emissions from the Project. Opening Br. at 43.[11]

[11] Petitioners focus on DEQ's explanation at the hearing on summary judgment to argue that DEQ made up a new regulatory exception to evaluate arsenic emissions from the Project. That is not what occurred. As explained by DEQ in the record, REC 710-711, 719, and Kevin Schilling's declaration, REC 1242-1243, DEQ used a project specific adjustment factor to ensure that its comparison of arsenic emissions from the Project was equivalent to the AACC. Part of the confusion regarding this claim is caused by Petitioners' ever-shifting theory of how DEQ

DEQ conducted a thorough review of Perpetua's potential arsenic emissions and determined that the Project would comply with Section 210.12. DEQ made repeated requests for additional information related to TAPs emissions from the Project. *See* REC 419-420, 1926. At DEQ's request, Perpetua prepared a TAP Addendum that analyzed TAP emissions using T-RACT controls, production limits,[12] and emission inventory refinements. REC 1944. Also, at DEQ's request, Perpetua conducted an arsenic modeling analysis comparing the worst-case modeling analysis, used to determine preconstruction compliance, and an assessment of the actual arsenic concentrations expected from the actual mining operations. REC 1949. The arsenic emissions produced from the actual operating analysis are only 19% of the worst-case scenario. REC 1950. This searching evaluation demonstrates that DEQ complied with the intent of the Idaho Air Rules.

Here, DEQ complied with both the plain language of Section 210.12 and the intent of the Idaho Air Rules in finding that the arsenic emissions from the Project would have a lifetime ambient air cancer risk less than or equal to one to 100,000. *See* REC 1244 [Schilling Decl. at 12]. As the Hearing Officer recognized, DEQ provided "a thoughtful and conservative approach

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erred. In their opening summary judgment brief Petitioners seemed to argue that DEQ violated the Idaho Air Rules, although they never explicitly stated as much. REC 361-362. In their reply brief, Petitioners changed tack and argued that DEQ's arsenic analysis was arbitrary and capricious, apparently abandoning their previous position. REC 2368. Now, they shift again and attempt to make more explicit their theory that DEQ violated the Air Rules. Opening Br. at 40. Perpetua and DEQ have been required to respond to Petitioners' ever evolving argument, which is reflected in the past explanations of why the Final Permit was lawfully issued.

[12] 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.

to ensuring arsenic emissions will not exceed the 1-in-100,000 lifetime cancer risk standard when T-RACT is used." REC 3421. That is all the Idaho Air Rules require, nothing more.

In sum, as the Hearing Officer concluded, DEQ complied with both the letter and the intent of the Idaho Air Rules in evaluating arsenic emissions from the Project. REC 3415-3422. DEQ concluded, after extensive evaluation of the potential arsenic emissions, that the Project would not result in impacts to ambient air that exceed TAP increments of Section 586. *See* REC 719. The Board should uphold DEQ's well-reasoned determination as consistent with the Idaho Air Rules.

CONCLUSION

The Board should deny Petitioners' Amended Petition for Review of Preliminary Orders and affirm the Hearing Officer's Amended Memorandum Decision on Motions for Summary Judgment and Preliminary Order.

DATED: February 7, 2024.

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CERTIFICATE OF SERVICE

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

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