

Bryan Hurlbutt (ISB # 8501)
Laurence (“Laird”) J. Lucas (ISB # 4733)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
208.342.7024
bhurlbutt@advocateswest.org
llucas@advocateswest.org

Attorneys for Nez Perce Tribe and Idaho Conservation League

Julia Thrower (ISB # 10251)
Mountain Top Law PLLC
614 Thompson Ave.
McCall, ID 83638
208.271.6503
jthrower@mtntoplw.com

Attorney for Save the South Fork Salmon

**BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO**

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

) Agency Case No. 0101-22-01
) OAH Case No. 23-245-01
)

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

) **PETITIONERS’ MOTION FOR**
) **CLARIFICATION AND/OR**
) **RECONSIDERATION**
)

Petitioners,)
)
)

v.)
)
)

IDAHO DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
)

Respondent,)
)
)

and)
)
)

PERPETUA RESOURCES IDAHO, INC.)
)
)

Intervenor-Respondent.)
)
)

INTRODUCTION

Petitioners Nez Perce Tribe, Idaho Conservation League (“ICL”), and Save the South Fork Salmon (“SSFS”) hereby seek clarification and/or reconsideration from the Idaho Board of Environmental Quality (the “Board”) regarding the relief granted in the May 9, 2024 Final Order. In the Order, the Board found three ways DEQ acted unreasonably and violated the Rules for the Control of Air Pollution in Idaho, IDAPA 58.01.01 (“Air Rules”), when it analyzed arsenic ambient air concentrations for the Stibnite Gold Project. First, DEQ unreasonably used a five-year rolling average in its arsenic calculations allowing for “considerable daily and annual increases in exposures which are contrary to the limits set forth in the Air Rules.” REC 3713. Second, there was insufficient evidence to support a 50% reduction in emissions from non-West End Pit production and no enforceable permit conditions to support that reduction. REC 3714. Third, DEQ violated the Air Rules by using a project-specific adjustment factor for arsenic emissions and failed to provide sufficient evidence of the cancer risk from using the adjustment factor. REC 3715-17. Based on these errors, the Board “remand[ed] this matter to the Hearing Officer for further factual development in accordance with the terms of this order.” REC 3717.

Petitioners respectfully request that the Board clarify, or order on reconsideration, that the Permit to Construct (“PTC”) approved by DEQ is set aside or vacated while on remand for DEQ to reevaluate the PTC application, or an amended application, in accordance with the terms of the Order. While the effect of the Order seems to mean that the PTC is not valid unless and until DEQ corrects the deficiencies the Board identified, the Order does not specifically say so. This creates a risk that, without clarification or reconsideration, Perpetua might begin construction and operation of the Stibnite Gold Project before DEQ resolves the Board’s concerns on remand or even without DEQ ever resolving those concerns. Surely this cannot be.

BASIS FOR CLARIFICATION AND/OR RECONSIDERATION
**Clarification or Reconsideration Is Warranted to Set Aside or Vacate the PTC Approval
Until DEQ Issues a New Decision**

Throughout the proceedings before the Board, Petitioners requested that if the Board ruled in Petitioners' favor on any issue, including the arsenic issue, then DEQ's approval of the PTC must be set aside or vacated (effectively, the same thing) and remanded. *See* REC 3432, 3433, 3435, 3437, 3439 (Amended Petition); REC 3475, 3480, 3483, 3490, 3493, 3499, 3506-07 (Pet'rs' Opening Br.); C-REC 3649, 3653, 3667, 3668, 3671 (Pet'rs' Reply); Tr. 66:15-17, 74:13-17, 76:17-21 (Mar. 14, 2024 Hearing). Neither DEQ nor Perpetua contested the propriety of this relief, nor did they argue for any alternative relief. *See* C-REC 3512-44 (DEQ Opp. Br.); C-REC 3546-601 (Perpetua Opp. Br.); Tr. (Mar. 14, 2024 Hearing). While the Board ruled in Petitioners' favor on the arsenic issue and remanded for further proceedings, the Order never addressed whether or not DEQ's issuance of the PTC was set aside or vacated.

Setting aside agency action is not just an appropriate remedy, it is required by the Idaho Administrative Procedure Act ("Idaho APA"). Under the Idaho APA, agency action must be affirmed unless the agency's decision was "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3). "If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary." *Id.* (emphasis added). Here, the Board did not affirm DEQ's action in issuing the PTC. It found that DEQ "Did Not Act Reasonably and in Accordance with the Law When it Analyzed the Ambient Arsenic Air Concentrations for the [Stibnite Gold Project]." REC 3717. Thus, under the Idaho APA, DEQ's action should be set aside.

Setting aside DEQ's action is in line with the Board's practice.¹ For example, in *Sunnyside Park*, after DEQ denied Sunnyside's permit application to expand its subsurface sewage system, and after a hearing officer issued a preliminary order upholding DEQ's denial, the Board issued a Final Order reversing DEQ for not acting reasonably and in accordance with law under the Idaho APA and setting aside and vacating DEQ's action. *In re Sunnyside Park Utilities' Application For Sewage Disposal Permit*, Docket No. 0103-07-02 (Apr. 7, 2009). The Board explained:

Setting aside the permit denial will allow DEQ to process the application again, or to process an amended application should Sunnyside decide to submit one, and in so doing, identify the facts and circumstances that should be considered, apply its expertise to the facts and circumstances that should be considered, apply its expertise to the facts and issues, and provide adequate explanation for its decision.

Id. at 12.

Here, setting aside DEQ's issuance of the PTC will allow DEQ to process the application again, or process an amended application should Perpetua decide to submit one. This will allow DEQ to apply its expertise to the facts and circumstances; to determine whether to issue, issue with conditions, or deny the application;² and to provide an adequate explanation with supporting information and analysis for its decision consistent with the Board's Order.

¹ Vacating and remanding is also consistent with the practice of the Idaho Supreme Court. *See In re Variance ZV2011-2*, 156 Idaho 491, 496 (vacating and remanding arbitrary agency action for further proceedings consistent with the Court's opinion).

² Under the Air Rules, DEQ has three options when evaluating a PTC application: approve the application; conditionally approve the application; or deny the application. *See* Air Rules 209.01.b & c.v. Additionally, DEQ "may impose any reasonable conditions" on the facility in the PTC. Air Rules 211.01. On remand, DEQ should have this full suite of options available when it reviews the PTC application (or an amended application) consistent with the Board's Order. Without clarification or reconsideration to explicitly set aside or vacate the PTC, the Order might be interpreted as limiting DEQ's options on remand to just one predetermined outcome: develop additional facts to support the approved PTC as is.

Finally, setting aside or vacating DEQ’s approval of the PTC is also required to comply with the Air Rules. Section 203 prohibits DEQ from issuing a PTC unless the applicant shows that the source “would comply with all applicable local, state or federal emissions standards” and using the methods in Section 210 “the emissions of toxic air pollutants . . . would not injure or unreasonably affect human or animal life or vegetation.” Air Rules 203.01. The Board held that DEQ unreasonably determined that the Stibnite Gold Project would comply with applicable arsenic standards and would not injure or unreasonably affect health. The Board remanded the permit “for the development of further evidence regarding ambient air concentrations of arsenic” and to consider “whether those levels comply with the Air Rules.” REC 3717. If Section 203 prohibits DEQ from issuing a PTC in the first instance when applicable Air Rules requirements are not met, then surely an already-issued PTC cannot remain valid when, like here, the Board finds that those same Air Rules requirements have not been met.

In summary, leaving the PTC in place during remand when the Board found that it fails to comply with arsenic standards is at odds with the Idaho APA, *Sunnyside Park*, and the Air Rules. It also puts public health at risk. Without clarifying or ordering on reconsideration that DEQ’s approval of the PTC is set aside or vacated, the Order could be interpreted to allow Perpetua to begin construction and operations during remand before DEQ determines—or without DEQ ever determining—that the Stibnite Gold Project complies with the Air Rules.

CONCLUSION

For the reasons above, Petitioners respectfully request that the Board clarify or reconsider the remedy in its May 9, 2024 Final Order and now order that the PTC, while on remand, is set aside, vacated, or otherwise invalid until DEQ makes a new decision on the PTC application, or an amended application, consistent with the Board’s order.

Dated: May 23, 2024

Respectfully submitted,

/s/ Bryan Hurlbutt

Bryan Hurlbutt

*Attorney for the Nez Perce Tribe and the
Idaho Conservation League*

/s/ Julia S. Thrower

Julia S. Thrower

Attorney for Save the South Fork Salmon

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2024, a true and correct copy of Petitioners' foregoing Motion was served on the following:

By email and U.S. Mail:

Office of Administrative Hearings
P.O. Box 83720
Boise, ID 83720-0104
filings@oah.idaho.gov

By email only:

Hannah M.C. Young
Deputy Attorney General
Department of Environmental Quality
1410 N. Hilton, 2nd Floor
Boise, ID 83706
(208) 373-0422
hannah.young@deq.idaho.gov
*Attorney for Respondent Idaho Department
of Environmental Quality*

Krista McIntyre
W. Christopher Pooser
Wade Foster
Stoel Rives, LLP
101 S. Capital Blvd., Suite 1900
Boise, ID 83702
(208) 389-9000
krista.mcintyre@stoel.com
christopher.pooser@stoel.com
wade.foster@stoel.com
*Attorneys for Intervenor Perpetua Resources
of Idaho, Inc.*

Ann Yribar
Deputy Attorney General
Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010
ann.yribar@ag.idaho.gov
*Attorney for the Idaho Board of
Environmental Quality*

Dylan B. Lawrence
Varin Thomas, LLC
242 N. 8th St., Suite 220
Boise, ID 83702
(208) 345-6021
dylan@varinthomas.com
Hearing Officer

Paula Wilson, Paralegal
Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706
paula.wilson@deq.idaho.gov
Hearing Coordinator

/s/ Bryan Hurlbutt
Bryan Hurlbutt