

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

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

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

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

Petitioners,

v.

IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Respondents,

and

PERPETUA RESOURCES IDAHO, INC.,

Intervenor-Respondent.

ORDER ON PETITIONS FOR
RECONSIDERATION AND/OR
CLARIFICATION OF FINAL ORDER

I. INTRODUCTION

On July 22, 2022, the Nez Perce Tribe, the Idaho Conservation League, and Save the South Fork Salmon (collectively “Petitioners”), filed a *Petition to Initiate Contested Case: Air Quality Permit to Construct P-2019.0047 (Jun. 17, 2022)*, seeking review of the Idaho Department of Environmental Quality’s (“DEQ”) issuance on June 17, 2022 of Air Quality Permit to Construct P-2019.0047 (“PTC”), to mining company Perpetua Resources Idaho, Inc.

(“Perpetua”) for its proposed Stibnite Gold Project (“SGP”). REC 0001–0028. Perpetua filed a Petition to Intervene in the matter on August 12, 2022. REC 0040–0043. A Hearing Officer was appointed and the parties participated in discovery and ultimately filed cross-motions for summary judgement. REC 319–322, REC 1204–1206, REC 1276–1278. On October 31, 2023, the Hearing Officer issued a *Preliminary Order*. REC 3280–3328. On November 14, 2023, the Petitioners filed a *Petition for Review* of the *Preliminary Order*. REC 3342–3356. On December 5, 2023, the Hearing Officer issued an *Amended Preliminary Order*. REC 3372–3425. In response, the Petitioners filed an *Amended Petition for Review* that requested review by the Board of Environmental Quality of both the October 31, 2023 *Preliminary Order* and the December 5, 2023 *Amended Preliminary Order*. REC 3426–3441. On May 9, 2024 the Board issued a *Final Order* in this matter. REC 3695–3720. On May 23, 2024, Petitioners filed their *Petitioners’ Motion for Clarification and/or Reconsideration*. REC 3721–3727. On May 23, 2024, DEQ and Perpetua filed a *Joint Motion for Reconsideration and/or Clarification of Final Order* and *Memorandum in Support of Joint Motion for Reconsideration and/or Clarification of Final Order*. REC 3728–3751. On June 3, 2024, Petitioners filed *Petitioners Response Opposing DEQ/Perpetua’s Motion for Reconsideration*. On June 4, 2024, DEQ and Perpetua filed a *Joint Motion to Strike Petitioner’s Response*.

RELIEF REQUESTED

1. Petitioner’s Requests

Petitioners request the Board of Environmental Quality clarify or reconsider its *Final Order* to set aside or vacate the PTC while on remand or to order an amended Application for Permit to Construct be filed with DEQ.

2. DEQ and Perpetua’s Requests

DEQ and Perpetua request the Board of Environmental Quality:

1. Reconsider its issuance of a final order in this matter.
2. Reconsider its decision regarding DEQ's analysis of arsenic ambient concentrations and issue a final order that finds DEQ acted reasonably and in accordance with law.
3. Reconsider its decision regarding DEQ's analysis of arsenic ambient concentrations and reopen the proceedings before the Board and hold additional hearings on the analysis before issuing a final order.
4. Reconsider and/or clarify its instructions on remand so that the Hearing Officer and the parties directly address the sufficiency of evidence the Board seeks to affirm the PTC.

ANALYSIS

1. Petitioner's Motion for Reconsideration is Denied

Petitioners assert that the Board of Environmental Quality is required to set aside the PTC under I.C. § 67-5279(3). That provision, however, applies to judicial review by a court of an agency action and is not applicable in this matter.

Petitioners further cite *In the Matter of Sunnyside Park Utilities' Application for Sewage Disposal Permit*, Final Order on Petition for Review of Preliminary Order, at p. 10 (BEQ Dkt. 0103-07-02, April 7, 2009) for the proposition that the PTC must be set aside. In *Sunnyside*, DEQ denied an application for permit but failed to provide sufficient reasoning for the denial. *Id.* at 11. The Board of Environmental Quality found:

Simply put, we are unable to tell exactly what criteria DEQ chose to apply in determining whether Idaho Falls' central wastewater system was reasonably accessible to the subdivision. Since we cannot determine that DEQ's reasoning and conclusion were rational, the permit denial must be set aside. Setting aside the permit denial will apply 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 issues, and provide an adequate explanation for its decision.

Id. at 11–12. Unlike in *Sunnyside*, DEQ provided, in this matter, extensive reasoning for its issuance of the PTC. The Board of Environmental Quality found that DEQ’s decision in four of the five issues brought for review were supported by sufficient evidence and that DEQ acted reasonably in making those decisions. The fifth issue brought for review has been remanded to the Hearing Officer for additional fact finding. But the remand has no effect on the Board of Environmental Quality’s decision on the first four issues for which there was sufficient evidence. Because DEQ has been upheld on most of its decisions in the PTC it does not make sense to set aside or vacate the entire PTC or to require the applicant to file a new application for permit. Therefore, the *Petitioners’ Motion for Clarification and/or Reconsideration* is denied.

2. DEQ and Perpetua’s Motion for Reconsideration and/or Clarification is Denied in Part and Granted in Part.

As outlined below, the Board of Environmental Quality grants DEQ and Perpetua’s request to clarify the effective date of the *Final Order*, denies the request to reconsider its decision on the ambient arsenic concentration issue, denies the request to reopen the proceedings before the Board or hold additional hearings before the Board on the arsenic issue, and denies the request to provide additional clarification on the issues for remand.

A. The Board of Environmental Quality Clarifies its Decision as to the Effective Date of the Final Order.

When reviewing a petition for review of a preliminary order, the Board of Environmental Quality must: “(a) Issue a final order in writing, within fifty-six (56) days of the receipt of the final briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties, or for good cause shown; (b) Remand the matter for additional hearings; or (c) Hold additional hearings.” I.C. § 67-5245(6)(a)–(c). DEQ and Perpetua argue that the disjunctive “or” in this section means that the Board may *either* issue a final order or

remand the matter for additional hearings, but not do both. However, I.C. § 67-5246(1) seems to contemplate that the only type of order an agency head may issue is a final order: “If the presiding officer is the agency head, the presiding officer shall issue a final order.”

In this matter, the Board of Environmental Quality found that sufficient evidence existed to support DEQ’s findings in four of the five issues brought for review and that DEQ acted reasonably in making those decisions. The Board of Environmental Quality’s decision on those matters is final. However, the Board also found, with regard to the ambient arsenic air concentration analysis, that there was not sufficient evidence to support DEQ’s analysis and that further factual development was needed on that issue. Consequently, the Board remanded that issue to the Hearing Officer. So that issue is not yet final.

This split decision creates some ambiguity as to the nature of the order that the Board of Environmental Quality must issue in this matter. The Board recognizes that if it issues a final order that issuance will trigger certain time frames under I.C. §§ 67-5270 and 67-5273 under which the parties must seek judicial review of that final order. Those time frames would likely overlap with any proceedings being held by the Hearing Officer on remand, creating a situation in which the parties must simultaneously seek judicial review under I.C. § 67-5270, while at the same time engaging in a remand proceeding before the Hearing Officer on the arsenic issue. The Board of Environmental Quality recognizes that this may create confusion in the record and likely does not result in judicial economy.

Idaho Code Section 67-5246(5) provides: “*Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. . . .*” (emphasis added); *see also* IDAPA 58.01.23.730.03. This provision provides the Board of Environmental Quality some discretion to determine a different timeframe

for when its order becomes “effective” for purposes of triggering judicial review deadlines under I.C. §§ 67-5270 and 67-5273. While the Board’s decision is final as to the first four issues, it is not final as to the arsenic issue. Therefore, the Board will stay issuance of a final order on all five issues until the remand before the Hearing Officer is complete and all statutory deadlines for review of the Hearing Officer’s Orders have run. The order will still be a “Final Order,” but it will not be considered “effective” for purposes of I.C. §§ 67-5246(5), 67-5270, and 67-5273 until the Hearing Officer has issued an order on the arsenic issue and all statutorily-allowed administrative review of that issue has been completed. At that point, all five issues will be considered “final” and appealable under I.C. §§ 67-5270 and 67-5273. This will allow a full factual record to be developed for the arsenic issue and will prevent the parties from having to simultaneously file for judicial review and engage in additional fact finding before the Hearing Officer. Therefore, the Board of Environmental Quality grants DEQ and Perpetua’s motion for clarification of the effective date of the *Final Order*.

B. The Board of Environmental Quality Denies the Request to Reconsider its Decision on the Ambient Arsenic Concentration Issue.

DEQ and Perpetua argue that the Board of Environmental Quality misunderstood or was mistaken in its decision on the ambient arsenic air concentration analysis. In support of their positions, DEQ and Perpetua present additional evidence that is not a part of the record in this case. DEQ and Perpetua also make new arguments that were not briefed or argued by the parties. When reviewing a preliminary order, the Board of Environmental Quality’s findings of fact “must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” I.C. § 67-5248(2). The agency record of a contested case consists of all items enumerated in I.C. § 67-5249(1)(a)–(g) (pleadings, evidence received, matter officially noticed, record prepared by the hearing officer and transcript of the

proceeding, staff memos or data, and orders). Unless an exception exists, “the agency record constitutes the exclusive basis for agency action in contested cases under this chapter or for judicial review thereof.” I.C. § 67-5249(3), *see also* IDAPA 04.11.01.650.01, *Masterson v. Idaho Dep't of Transp.*, 150 Idaho 126, 130, 244 P.3d 625, 629 (Ct. App. 2010) (holding a hearing officer in a contested case erred by relying on materials that were not made part of the record.).

The Board of Environmental Quality will not accept new evidence or arguments regarding the ambient arsenic air concentration analysis and will not reconsider its decision on that issue. The parties will have an opportunity to supplement and develop a full factual record on the arsenic issue before the Hearing Officer on remand. Therefore, DEQ and Perpetua’s request for the Board to reconsider its decision on the arsenic issue is denied.

C. The Board of Environmental Quality Denies the Request to Reopen the Proceedings or Hold Additional Hearing before the Board.

DEQ and Perpetua request the Board of Environmental Quality reopen the proceedings before the Board or hold additional hearings. The Board will not reopen the proceedings before it or hold additional hearing in this matter. The parties will have an opportunity to develop a full factual record on the arsenic issue before the Hearing Officer on remand. Therefore, DEQ and Perpetua’s request to reopen or hold additional proceedings before the Board of Environmental Quality is denied.

D. The Board of Environmental Quality Denies the Request for Additional Clarification or Instructions to the Hearing Officer.

DEQ and Perpetua request the Board of Environmental Quality provide clarification and instructions to the Hearing Officer regarding the proceedings on remand, including determining what evidence may be submitted and how the issue must be framed. The Board will not limit the scope of the proceedings on remand or the types of evidence that may be presented, other than to

restate that they must focus only on the development of additional factual evidence on the ambient arsenic air concentration analysis performed by DEQ for the PTC. As stated above, the other four issues brought before the Board have been finally decided and cannot be reopened on remand. The parties will have a full opportunity before the Hearing Officer on remand to define the scope of those proceedings and evidence that may be presented. Therefore, DEQ and Perpetua's request for additional clarification and instruction for the Hearing Officer on remand is denied.

CONCLUSION

Based on the foregoing, it is hereby ordered:

1. Petitioner's Motion for Clarification and/or Reconsideration is Denied
2. The Joint Motion for Reconsideration and/or Clarification of Final Order is Granted in Part and Denied in Part.
 - a. The Board of Environmental Quality Clarifies its Decision as to the Effective Date of the Final Order.
 - b. The Board of Environmental Quality Denies the Request to Reconsider its Decision on the Ambient Arsenic Concentration Issue.
 - c. The Board of Environmental Quality Denies the Request to Reopen the Proceedings or Hold Additional Hearing before the Board.
 - d. The Board of Environmental Quality Denies the Request for Additional Clarification or Instructions to the Hearing Officer.

Dated this 12th day of June, 2024



Mark Bowen
Chairman, Idaho Board of Environmental Quality

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2024, a true and correct copy of the foregoing was served on the following:

Hannah Young
Michael Short
Deputy Attorney General
Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706
hannah.young@deq.idaho.gov
michael.short@deq.idaho.gov

Bryan Hurlbutt
Laird Lucas
Advocates for the West
P.O. Box 1621
Boise, ID 83701
bhurlbutt@advocateswest.org
llucas@advocateswest.org

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

Julia Thrower
Mountain Top Law PLLC
614 Thompson Ave.
McCall, ID 83638
jthrower@mtntoplw.com

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

Dylan Lawrence
Varin Thomas LLC
P.O. Box 1676
Boise, ID 83701
Hearing Officer
dylan@varinthomas.com

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

/s/ Paula J. Wilson
Paula J. Wilson, Paralegal
Energy and Natural Resources Division
Office of the Attorney General
1410 N. Hilton
Boise, Idaho 83706
paula.wilson@deq.idaho.gov