

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](mailto:bhurlbutt@advocateswest.org)  
[llucas@advocateswest.org](mailto: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](mailto: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	)	<b>PETITIONERS’ RESPONSE</b>
CONSERVATION LEAGUE, and SAVE	)	<b>OPPOSING DEQ/PERPETUA’S</b>
THE SOUTH FORK SALMON	)	<b>MOTION FOR RECONSIDERATION</b>
	)	
Petitioners,	)	
	)	
v.	)	
	)	
IDAHO DEPARTMENT OF	)	
ENVIRONMENTAL QUALITY,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
PERPETUA RESOURCES IDAHO, INC.	)	
	)	
Intervenor-Respondent.	)	
_____	)	

Petitioners Nez Perce Tribe, Idaho Conservation League, and Save the South Fork Salmon hereby oppose the Joint Motion for Reconsideration and/or Clarification of Final Order filed by DEQ and Perpetua on May 23, 2024. Petitioners respectfully request that the Board deny DEQ and Perpetua's request to reevaluate the merits, as the merits issues should be fairly and fully considered on remand, not on a one-sided motion for reconsideration.

This matter has been pending since June 17, 2022, when Petitioners filed the Petition to Initiated Contested Case. In that very first filing, Petitioners alleged that DEQ's arsenic averaging tactics violated the Air Rules because the Air Rules require meeting an annual arsenic concentration (the acceptable ambient concentrations of carcinogen or "AACC"). REC 0016, 19, 25–26. Throughout the proceedings before the Hearing Officer, Petitioners repeatedly and consistently argued that the AACC is an annual average that Perpetua must meet. REC 0335-36, 0360-62 (Opening SJ Br.); REC 2363-68 (Reply SJ Br.); TR 0019 (SJ Hearing). Petitioners made the same allegation and argument to the Board. REC 3437 (Am. Pet. for Rev.); REC 3469-506 (Opening Br.); C-REC 3667–71 (Reply Br.); TR 0070–71, 95 (Board Hearing).

On reconsideration, DEQ and Perpetua suggest that the Board made a mistake when it assumed that the arsenic AACC is an annual value, and they submit "new evidence" for the Board to correct this alleged oversight.<sup>1</sup> But DEQ and Perpetua could have presented this "new evidence" in any of their many filings over the last two years.<sup>2</sup> Instead, they try to introduce it now on reconsideration and without a full and fair opportunity for Petitioners to respond.

---

<sup>1</sup> The annual nature of the AACC underlies each of the three ways the Board found DEQ acted unreasonably and failed to follow the Air Rules, as Petitioners intend to show on remand.

<sup>2</sup> Though DEQ and Perpetua now file their motion for reconsideration together, they filed separate responses to the petitions and filed separate briefs on the merits, totaling eight such written filings on the merits before the Hearing Officer and the Board. *See* Corrected Record Docs 021, 028, 038, 043, 054, 055, 096, 097.

DEQ and Perpetua’s “new evidence” is that the toxic air pollutants (“TAPs”) and AACCs in the Air Rules were based on EPA’s Unit Risk Factors (“URFs”), which were based on a 70-year lifetime. While the URFs did inform the TAPs rulemaking, DEQ and Perpetua ignore evidence from the TAPs rulemaking which confirms that the Board rightly concluded: the AACCs are annual averages; and there are specific, limited exceptions to meeting the AACCs, including the short-term source exception for facilities that operate for five years or less.

For example, DEQ explained in a July 13, 1992 meeting package in support of the TAPs rulemaking:

For short term sources (usually less than five years in duration), such as remediation projects, a probability of greater than one in a million risk (over [ ] 70 years) will generally be acceptable to account for the decreased term of exposure. It is not acceptable however, for exposed individuals to receive a full 70 year exposure during the life of a short term project.

*See* Exh. 1 to Tiedemann Decl. (filed herewith) at Attach. 7 (emphasis added). Allowing a full 70-year exposure during the life of the 16-year Stibnite Gold Project is exactly what DEQ did here. This is “not acceptable” under the Air Rules, and the Board rightly rejected this in its Final Order.

DEQ and Perpetua’s effort to introduce “new evidence” to the Board on a one-sided motion for reconsideration following years of litigation underscores that revisiting the merits without a remand and a full and fair opportunity to respond is prejudicial to Petitioners and undermines the Board’s ability to reach the correct result. For these reasons, the Board should deny DEQ and Perpetua’s motion for reconsideration and should allow these issues to be developed on remand with equal opportunities for the parties to provide evidence, argument, and response.

Dated: June 3, 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 June 3, 2024, a true and correct copy of Petitioners' foregoing Response, and the Declaration of William Tiedemann (and all exhibits thereto), and 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](mailto: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](mailto: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](mailto:krista.mcintyre@stoel.com)  
[christopher.pooser@stoel.com](mailto:christopher.pooser@stoel.com)  
[wade.foster@stoel.com](mailto: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](mailto: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](mailto:dylan@varinthomas.com)  
*Hearing Officer*

Paula Wilson, Paralegal  
Department of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706  
[paula.wilson@deq.idaho.gov](mailto:paula.wilson@deq.idaho.gov)  
*Hearing Coordinator*

*/s/ Bryan Hurlbutt*  
Bryan Hurlbutt