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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

**IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY'S
INITIAL STATUS REPORT**

On May 9, 2024 the Idaho Board of Environmental Quality (“Board”) issued the *Final Order* remanding this matter to the Hearing Officer “for the development of further evidence regarding the ambient air concentrations of arsenic that will be produced by the [Stibnite Gold Project (“SGP”)] and whether those levels comply with the Air Rules.” Final Order at 23.

On June 12, 2024, the Board issued its *Order on Petitions for Reconsideration and/or Clarification of Final Order* (“Reconsideration Order”). The Board explained that “[t]he 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.” *Id.*

The Idaho Department of Environmental Quality (“DEQ”) submitted a proposed scheduling order on June 17, 2024. After email discussions among the Hearing Officer and the parties, the Hearing Officer issued his *Notice of Status and Scheduling Conference; Updated*

Disclosure on June 24, 2024 requesting status reports from the parties. On June 25, 2024, the parties met and conferred to discuss the scope of the issues on remand and a scheduling order. While the parties have come to an agreement on the scope of the issues, no agreement was met on the nature and schedule for the proceedings.

A. Issues on Remand

The parties agree that the appropriate scope of issues on remand are:

- 1) Whether DEQ acted reasonably in its use of the five-year rolling average in the ambient arsenic air concentration analysis. Final Order at 18-19.
- 2) Whether “non-West End Pit” production was limited, and what effect non-West End Pit production has on arsenic emissions. Final Order at 19-20.
- 3) Whether the “16/70 analysis performed by DEQ was equally or more protective of human and animal life and vegetation as what is provided for by the Air Rules” and whether the level of arsenic emissions from the SGP comply with the Air Rules. Final Order at 21-23.

Accordingly, these will be the only issues considered by the Hearing Officer on remand.

B. Schedule

DEQ proposes the following scheduling order for these remand proceedings:

- | | |
|--------------------|---|
| July 2, 2024- | Scheduling Conference |
| August 9, 2024- | DEQ submission addressing remand issues (including declarations and/or exhibits) |
| August 23, 2024- | Perpetua response to DEQ (including declarations and/or exhibits) |
| September 6, 2024- | Petitioners response to DEQ and Perpetua (including declarations and/or exhibits) |

- October 1, 2024- Hearing officer makes determination on the need of a hearing, including identification of the specific issues or sub-issues he wants the parties to present or argue.
- October 15, 2024- Hearing officer decision (if no hearing is requested)
- October 22, 2024- Hearing (if requested)
- November 15, 2024- Post-hearings briefs (simultaneous)
- December 15, 2024- Hearing officer decision

C. Proposed Procedures for Brief and at a Potential Hearing

One source of disagreement among the parties, specifically the opinion of Petitioners, concerns the nature and scope of presenting new factual evidence, as requested by the Board. Specifically, Petitioners believe that DEQ’s submission must be limited to explaining the record as it currently exists. Despite the clear language of the Board’s Reconsideration Order, Petitioners argue that it is inappropriate for DEQ to use later or new evidence to justify the permit.¹

In the Reconsideration Order, the Board explained that “[t]he 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.” Reconsideration Order at 7-8 (emphasis added); *see also* Final Order (“the Board of Environmental Quality remands this matter back for the development of further evidence regarding the ambient air concentrations of arsenic that will be produced by the SGP and whether those levels comply with the Air Rules) (emphasis added). “The parties will have an opportunity to supplement and develop a full factual record on

¹ Petitioners have indicated that if new evidence is presented they will ask for briefing on the acceptability of that evidence, as well as a hearing and decision, all before setting any further scheduling. This unnecessary effort would delay scheduling and briefing on the substantive issues for many months. The Board unequivocally remanded the arsenic issue for the development of new, additional factual evidence. Extensive time dedicated to the non-issue of whether DEQ and Perpetua can develop new evidence undermines the express purpose of the remand, is a delay tactic, and should be disregarded.

the arsenic issue before the Hearing Officer on remand.” Reconsideration Order at 7 (emphasis added).

To be clear, it is DEQ’s intent to more fully expound on and clarify its rationale for its decision on the arsenic issue. The Board has explicitly requested that DEQ do so through the “development of further evidence,” and DEQ will use this opportunity on remand to provide a more full and complete explanation of its decision regarding the arsenic issue. DEQ maintains that its arsenic decision is correct and that additional explanation of evidence in the record, as well as new testimony and evidence explaining and reinforcing DEQ’s rationale, will serve to clarify any confusion or uncertainty the Board has. This effort will likely necessitate the presentation of some new evidence and the reframing of existing evidence. But, DEQ is not presenting any new theory for its decision, nor is DEQ submitting data or evidence that was not relied upon by DEQ for its original agency decision. DEQ’s submission and supporting declarations will not be voluminous nor will they contain arguments and data that is novel or a surprise to Petitioners. Any new evidence presented will serve the simple purpose of providing additional detail, explanation, and clarification of the evidence, arguments, and rationale already in the record.

The issues on remand are not new to the parties. DEQ stands ready to present its submission in short order, as does Perpetua. Throughout this lengthy contested case, Petitioners, same as DEQ and Perpetua, were afforded considerable time to consult experts and understand the issues. Any suggestion that DEQ’s use of new facts or its clarification on the arsenic issue would necessitate significant time for Petitioners to respond is insincere, and such attempts to transform this narrowly tailored remand into a full-blown litigious proceedings should be avoided.

If the Hearing Officer determines that a hearing is necessary, DEQ requests that he identify specifically the issues or sub-issues to be presented. DEQ also requests that the Hearing Officer

indicate which, if any, witness he personally wants to testify and question. At the hearing, each party will have the opportunity to call witnesses. The other parties and the hearing officer will then have the opportunity to examine each witness. The party calling the witness will have the opportunity for redirect examination of their witness. DEQ defers to the Hearing Officer's discretion as to the number of days necessary to hold a potential hearing.

DEQ's suggested scope and course of the proceedings is reasonable, provides a manageable and effective, but efficient, resolution of the remand, and more importantly, it will serve the explicit purposes of the remand—to develop further factual evidence on the arsenic issue.

DATED: July 1, 2024.

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ Michael A. Short
Michael A. Short
Deputy Attorney General

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2024, a true and correct copy of the foregoing **IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY'S INITIAL STATUS REPORT** was served on the following:

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/s/ Michael A. Short _____