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BEFORE THE DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

IN THE MATTER OF IPDES PERMIT NO.
ID0020443

CITY OF BOISE,
Petitioner,
v.
IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Respondent.

Docket No. 0125-22-02

**DECISION AND ORDER RE
MOTION TO DISMISS**

This matter came before the Hearing Officer on the Motion of the Respondent (IDEQ) to dismiss the petition filed in this matter by the City of Boise.

FINDINGS OF FACT

1. The City of Boise has two water renewal facilities, the Lander Street Water Renewal Facility and the West Boise Water Renewal Facility.
2. These facilities operate under two IPDES permits.
3. A pipe breakage event occurred on April 17, 2022 near the intersection of the roads Chinden Blvd and N. Maple Grove in Garden City, Idaho.
4. This breakage resulted in the release of material on or near the intersection and into the Boise River.

5. The City of Boise reported the incident to IDEQ and undertook remediation efforts.
6. Additionally the City of Boise issued a written report on the matter on April 22, 2022.
7. On May 11, 2022 IDEQ issued a letter to the City of Boise which referenced a Notice of Noncompliance for a violation of the IDPES permit as a result of the release of materials from the breakage.
8. No fine or penalty was imposed on the City of Boise.
9. The City filed a Petition for Review on June 15, 2022, asserting that the May 11, 2022, letter improperly characterized the materials which were released in the event and that this characterization has potential impact in the City's ongoing compliance efforts with the IPDES permits.

CONCLUSIONS OF LAW

1. IDEQ has filed a Motion to Dismiss alleging a number of grounds.
2. The first ground alleged is that the petition was untimely.
3. An examination of the matters presented renders the determination of timeliness of the Petition unnecessary. The nondisputed facts currently presented do not provide sufficient evidence to establish the exact nature of the subject letter of May 11, 2022 and in turn the effect of that letter in light of the preemptive language found under IDAPA 58.01.23.002. It is unclear from the limited record whether the letter is a "final permit decision" under IDAPA 58.01.25.107.04, an informal enforcement action or exactly what. These issues and that of

broader questions of potential jurisdiction limitations will not be addressed as other matters raised are dispositive.

4. IDEQ further asserts that the City's Petition should be dismissed based upon an argument that the City lacks standing as it is not an aggrieved party and/or that the Petition fails to state a claim upon which relief can be granted.

5. IDEQ argues that in order to present a viable claim for relief the City of Boise must establish the basis of an injury and that the City is therefore an "aggrieved party". IDEQ contends that the subject letter caused no injury, and therefore the City of Boise has no standing.

6. The letter, while indicating that a violation had occurred, did not impose any penalty save that of the assessment of a violation. While IDEQ asserts that the City of Boise was not injured, and as a result is not an aggrieved party, the determination that a violation did exist was made. One which was assigned to the event. A threat of enforcement of a penalty or demand for action is not necessary. Further, whether called an informal or formal enforcement action, or something different entirely, it is acknowledged that a violation of the permit occurred. Assessing a violation is itself an injury.

7. Notwithstanding the existence or nonexistence of an injury, IDEQ further contends that the petition fails to state a cognizable claim for which relief can be granted. An argument continuing the assertion in essence, that absent reversal of the finding of a violation, no claim brought in the Petition presents an available remedy.

8. The City of Boise contends that a harm results not from the underlying finding of a violation, but instead that in the letter issued by IDEQ, the material which was

discharged, was characterized incorrectly. It is claimed that IDEQ erred in describing the material as a “sanitary sewer overflow” rather than one of a “sewage sludge” discharge. The City of Boise asserts that this characterization error presents grounds for overturning the basis of the violation notice. The clarification request is then the claimed remedy.

9. While the issuance of the violation notice may constitute an injury for purposes of qualifying as an aggrieved party, *see e.g. In the Matter of Section 401 Water Quality Certification for Relicensing of the C.J. Strike Hydroelectric Facility*, Docket No. 0102-01-06, Order (November 4, 2002), the matter is ultimately moot in light of the acknowledgement by the parties that the subject event, whether a sanitary sewer overflow or a sewage sludge discharge, represents grounds for a violation notification. Even with a determination that an injury may have occurred as a result of the violation notice being issued, the requested remedy is rendered moot in light of the fact that IDEQ imposed no consequence greater than the violation notice. The alleged characterization error has not been shown to have actionable consequence.

10. This is especially true in light of the fact the City of Boise has advanced no showing that a change in characterization of the nature of the violation would provide any greater relief. Even if the basis for finding a violation was changed, the violation would still exist. No evidence or argument in support of the claim that this relief has impact or consequence has been advanced save for a generalized claim of a need for clarification based upon alleged inconsistency with past enforcement actions and a hypothetical future impact arising from uncertainty with future regulatory reporting. This is insufficient, however, to establish that an effective remedy would result from the relief requested. Again, no dispute exists that the events at issue were a violation. The City has presented

no response to the assertion by IDEQ that this renders the matter moot and subject to dismissal.

11. Based upon the above, the Motion to Dismiss filed by IDEQ is GRANTED
IT IS SO ORDERED.

DATED this 27th day of July, 2022.

By David V. Nielsen
David V. Nielsen
Hearing Officer

NOTIFICATION OF RIGHTS

This is a preliminary order of the presiding officer and will become final without further action of the Board unless any party appeals to the Board by filing a petition for review of the preliminary order; and within fourteen (14) days of the service date of this preliminary order, any party may take exceptions to any part of this preliminary order by filing a petition for review of the preliminary order. Otherwise, this preliminary order will become a final order of the Board. The basis for review must be stated in the petition. The Board may review the preliminary order on its own motion.

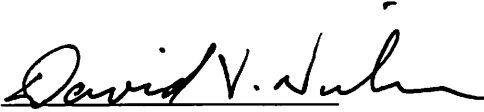
If any party files a petition for review of the preliminary order, the Board will allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The hearing coordinator will issue a notice setting out the briefing schedule and date and time for oral argument. The Board will issue a final order within fifty- six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good

cause shown. The Board may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 2022, I served a true and correct copy of the foregoing by delivering the same to each of the following party, by the method indicated below, addressed as follows:

<p>Mary R. Grant Deputy City Attorney Office of the City Attorney P O Box 500 Boise, ID 837701-0500 mrgrant@cityofboise.org</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E- Mail</p>
<p>Brent King Office of the Attorney General 1410 N. Hilton, 2nd Floor Boise, ID 83706 brent.king@deq.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E- Mail</p>
<p>Paula Wilson Hearing Coordinator Idaho Department of Environmental Quality 1410 N. Hilton, 2nd Floor Boise, ID 83706 paula.wilson@deq.idaho.gov</p>	<p><input type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand-Delivered <input type="checkbox"/> Overnight mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E- Mail</p>


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