

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

THE L&R GROUP, LLC, an Idaho)	Agency Case No. 0106-23-01
Limited Liability Company,)	
)	OAH Case No. 23-245-02
Petitioner,)	
)	ORDER RE: RESPONDENT’S
v.)	RENEWED MOTION TO DISMISS
)	
IDAHO DEPARTMENT OF)	
ENVIRONMENTAL QUALITY,)	
)	
Respondent.)	
_____)	

Before the Hearing Officer is the Idaho Department of Environmental Quality’s Renewed Motion to Dismiss (filed on June 7, 2023). The Renewed Motion to dismiss is fully briefed, and the Hearing Officer has reviewed the motions and the briefing therein, and hereby makes the following **ORDER**.

BACKGROUND

Petitioner, The L&R Group, LLC (L&R), initiated this contested case by filing a petition on January 9, 2023. DEQ moved to dismiss the Petition as untimely and L&R sought leave to amend the Petition, which was granted on May 17, 2023.¹ Following the filing of L&R’s Amended Petition, DEQ renewed its motion to dismiss on the same grounds as the original motion. For the following reasons, that motion will be **GRANTED**.

This case involves a June 7, 2022, Modification Application and Operating Plan (Operating Plan) that L&R submitted to Respondent, the Idaho Department of Environmental Quality (DEQ); an August 16, 2022 letter DEQ sent to L&R conditionally approving the

¹ The Order granting L&R’s request to amend the Petition also addressed several other pending motions, none of which are relevant for purposes of this Order.

Operating Plan; and subsequent negotiations² about the Operating Plan, which ceased on December 5, 2022.

DEQ’s renewed motion to dismiss argues that L&R failed to timely file its petition in this case because its original petition was not filed until January 9, 2023, and DEQ’s administrative rules require petitions challenging DEQ’s actions or inactions to be filed within 35 days. IDAPA 58.01.23.060. DEQ argues that L&R is challenging the August 16, 2022 conditional approval, which occurred more than 35 days before L&R’s petition.

L&R makes several arguments in response. It argues that it seeks to challenge some inaction by DEQ on December 5, 2022, not the August 16 conditional approval of its Operating Plan. It also contends that post-August 16 negotiations between the parties concerning the Operating Plan and its conditional approval somehow toll the 35-day requirement. L&R argues that it is not challenging the August 16 conditional approval because it was not an agency order that started the 35-day clock. L&R also argues that the August 16 conditional approval was invalid, because L&R’s Operating Plan was deemed approved by the operation of law before August 16.

RELEVANT ALLEGATIONS

L&R makes the following material allegations in its Amended Petition relating to the timeliness of the petition:

1. “On June 7, 2022, L & R submitted the revised Operating Plan [to DEQ]”

¶ 33.

2. “Under the SWMR, L & R’s Modification Application was automatically approved without conditions by the Department’s inaction within sixty (60) days of submittal of its Modification Application and the Department’s acknowledgement of the same. Thus, the

² The parties dispute how long and when the “negotiations” ceased, including whether these conversations constituted “negotiations.” Despite that, resolution is unnecessary for purposes of this Order as this Hearing Officer does not find this a material fact necessary to determine the timeliness of this Petition.

Department's attempt to impose conditions on L & R's approved Operating Plan should be considered an improper attempt to modify an existing license under I.C. § 67-5254." ¶ 11.

3. "On August 16, 2022, the Department issued a letter informing L & R that its Operating Plan was approved, but that it was imposing conditions ('Conditional Approval'). A copy of this letter is attached to this Petition as **Exhibit 'E'** and incorporated as if fully set forth herein. Notably, the letter never stated that it was an 'Order' as defined in Title 67, Chapter 52 of the Idaho Code. Further, the letter did not meet the requirements for the contents of orders under I.C. § 67-5248. Instead, as shown below, the Department continued to negotiate the proposed conditions with other representatives of L & R." ¶ 36.

4. "On August 31, 2022, L & R stated in an email its position that the Department's attempts to impose conditions on the approved Operating Plan were untimely pursuant to IDAPA 58.01.06.32.03. While L & R initially cited a 30-day limit to approve or deny its application, L & R now acknowledges that the 60-day limit pursuant to IDAPA 58.01.06.32.03(c)(ii) would apply to approval of its Modification Application. Accordingly, it is L & R's position that it has an approved Operating Plan without conditions. Mr. Beeter subsequently indicated that this matter could be discussed this issue [sic] more at the upcoming meeting in September." ¶ 39.

5. "On September 16, 2022, L & R met with the Department to discuss each condition included in the Conditional Approval, as well as the related issue of timeliness. L & R raised the fact that under the applicable IDAPA (58.01.06.32.03(c)(ii)) its Operating Plan was already automatically approved without conditions because no response was provided by the Department within the timeframe provided under this section. The Department took the position that the Consent Order submission process somehow trumped the application of the IDAPA section for responding to a [sic] Operating Plan. No agreement was reached on the matter of whether the Conditional Approval was timely issued; but the parties then discussed each and every condition over approximately six (6) hours. During the meeting, L & R was led to believe at all times that the Department was going to continue to work with L & R to reach an agreement." ¶ 41.

6. "On September 23, 2022, the Department sent to L & R a document entitled 'Potential OP Revisions' which incorporated changes discussed at the meeting, including the removal of certain conditions and proposed modifications to the conditions. This document is attached to this Petition as **Exhibit 'H'** and incorporated as if fully set forth herein. This documentation was the August 16, 2022, letter but contained additional comments and proposed language. Significantly, p. 6, No. 2 of the comments indicates acknowledgement by the Department that L & R would still send in the future some modification to the language in Sections a. thru e of the Operating Plan. There was no objection to this as manifested by the Department at that time." ¶ 43.

7. "L&R responded within three days. Attached as **Exhibit 'I'** and incorporated as if fully set forth herein is a true and correct copy of a letter that L & R sent to Mr. Beeter on September 26, 2022, addressing item by item the revisions to the proposed conditions and Mr. Beeter's points as raised in his September 23, 2022, letter (the year at the top of this letter was an error, and should have read 2022 instead of 2021). Exhibit 'I' also sets out the items

discussed and agreed upon at the above meeting on September 16, 2022, and the revisions to the Operating Plan that still needed to be made. This letter also described L & R's concerns regarding conditions that were not supported by the relevant SWMR for a Tier II facility such as L & R, or by other specifically cited provisions of law.” ¶ 44.

8. “It took the Department more than a month to respond to L & R's September 23 [sic] letter. Attached as **Exhibit 'J'** and incorporated as if fully set forth herein is a true and correct copy of a letter from Mr. Beeter to L & R dated October 26, 2022. For the first time, the Department took the position that the Operating Plan was approved as of August 16, 2022, effectively attempting to negate all the subsequent negotiations at the September 16, 2022, meeting, the Department's September 23, 2022, email, and L & R's September 26, 2022, letter. Significantly, this Exhibit 'J' at the same time also contained new comments on the provisions of the Operating Plan, while attaching the September 26, letter as a reference. Included in Exhibit 'J' is a true and correct copy of the new comments provided by Mr. Beeter to L & R on October 26, 2022.” ¶ 46.

9. “The Department's position in its letter on October 26, 2022, and its accompanying comments are vague, confusing, conflicting and unclear to L & R. The Department's position also lacked any specific legal support. On the one hand, the letter indicates that the Department would not engage in further attempts to reach consensus. On the other hand, the accompanying comments suggest many of the proposed changes by L & R ‘appear to be agreeable’ and that the ‘Department will make its final determination’ based upon future submissions. *See* Exhibit ‘J,’ notes 1, 8, and 11.” ¶ 47.

10. “Thus, it was unclear from this October 26, 2022 letter whether the Department was attempting to impose the conditions set forth in its August 16, 2022 letter or whether it was incorporating L & R's September 26, 2022, letter with continued discussions through the Department's October 2022, comments.” ¶ 48.

11. “Attached as **Exhibit 'M'** and incorporated as if fully set forth herein is a true and correct copy of a letter L & R sent to Mr. Beeter on November 23, 2022, requesting clarification of the Department's position, addressing issues that still needed to be resolved, asking for the authority for the Department's actions, and providing notice of potential litigation. In addition, the letter expressly requested that the Department explain or reconsider its determination that the conditions in its August 16, 2022 letter were timely. Further, L & R expressly requested that the Department explain or reconsider conditions that were not based on the SWMR. This letter also requested a response from the Department by no later than November 30, 2022.” ¶ 52.

12. “Attached as **Exhibit 'N'** and incorporated as if fully set forth herein is a true and correct copy of an email from Mr. Beeter to L & R on November 25, 2022, indicating that the Department would not be able to respond by November 30, 2022, but if a response was not provided by the Department by December 5, 2022, Mr. Beeter would reach out to L & R. Notably, the Department delayed, and did not provide a substantive response by November 30 or December 5, 2022.” ¶ 53.

L&R’s Amended Petition seeks the following relief in the Relief Requested on page 20:

1. A determination that the June 7, 2022 Operating Plan be approved without conditions;
2. A declaration that the August 16, 2022 conditional approval is void and without effect;
3. A declaration that DEQ cannot revoke the Operating Plan due to a violation of the conditional approval;
4. A finding that the conditional approval is arbitrary and capricious;
5. A direction prohibiting DEQ from retaliating against L&R; and
6. An award of attorney's fees and costs.

DISCUSSION

L&R argues that it seeks to challenge DEQ's inaction on December 5 (DEQ's failure to respond to L&R's latest communication on November 23), not its action on August 16 conditionally approving L&R's June 7 Operating Plan. But L&R's Amended Petition contradicts this argument. The very first substantive allegation in paragraph 1 reads: "This action challenges the Conditional Approval of L&R's June 7, 2022 [Operating Plan]." Moreover, all the substantive relief requested is focused on the June 7 Operating Plan and the August 16 conditional approval. None of the requested relief seeks an order requiring DEQ to do something it failed to do on December 5.

Even if L&R were requesting relief requiring DEQ to respond to L&R's November 23 proposals, it is unlikely that the law would provide such relief. The Board of Environmental Quality's statutes do provide that "[a]ny person aggrieved by an action or inaction of the department shall be afforded an opportunity for a fair hearing upon request[.]" I.C. § 39-107(5). But this provision referencing "inaction" must be read in conjunction with the definition of "agency action" found within Idaho's Administrative Procedure Act. *See* I.C. § 67-5201(4).

“Agency action” means: (a) The whole or part of a rule or order; (b) The failure to issue a rule or order; or (3) An agency’s performance of, or failure to perform, any duty placed on it by law.” *Id.* (emphasis added). L&R cites no law that required DEQ to issue a rule or order or otherwise respond to L&R’s proposal by December 5. Instead, this Hearing Officer reads the “inaction” language in DEQ/BEQ’s statutes to relate to one of L&R’s first arguments and allegations in the Petition. That is, that the *failure* to approve the June 7 operating plan within 60 days by operation of law renders the plan automatically approved.

L&R argues that post-August 16 negotiations tolled IDAPA 58.01.23.060’s 35-day clock because L&R was exhausting administrative remedies. As DEQ points out, it is undisputed that DEQ and L&R made no tolling agreement. Nor does L&R allege that DEQ told it that DEQ would waive the 35-day requirement. L&R relies instead on *Petersen v. Franklin Cnty.*, 130 Idaho 176 (1997). *Petersen* does not apply to the facts in this case because L&R has not filed a petition for judicial review, which does require exhaustion of administrative remedies and a “final order” from the agency before the timeline begins to run. *Compare Petersen*, 130 Idaho at 183-84 (addressing Idaho Code § 67-5273(3) and stating that the appeal period is tolled during exhaustion of administrative remedies) and IDAPA 58.01.23.060 (requiring an administrative challenge within 35 days of the action or inaction without including an administrative exhaustion requirement).

L&R also argues that the August 16 conditional approval was not an order that started the 35-day clock, either because it did not comply with the form of order identified in Section 67-5248, Idaho Code, or because it was invalid because the Operating Plan already was deemed approved. Neither argument excuses L&R’s failure to timely challenge the conditional approval or at a minimum, the October 26 letter stating that the negotiations had ceased.

The arguments presented by L&R present a misunderstanding and misreading of Section 67-5248, Idaho Code. Under the Board of Environmental Quality's statutes, "[a]ny person aggrieved by an action or inaction of the department shall be afforded an opportunity for a fair hearing upon request[.]" I.C. § 39-107(5) (emphasis added). DEQ's contested case rules similarly provide that "[a]ny person aggrieved by an action or inaction of the Department may file a petition to initiate a contested case," IDAPA 58.01.23.002.02 (emphasis added), but "the petition must be filed thirty-five (35) days from the date of the action or inaction of the Department." IDAPA 58.01.23.060 (emphasis added). The 35-day clock is triggered by DEQ's action or inaction; that action or inaction need not be an order as described in section 67-5248. In fact, section 67-5248 governs forms of orders to be issued in a contested case,³ which does not occur until a person files a petition challenging agency action or inaction. DEQ's August 16 conditional approval might well be considered an "order" as broadly defined in the APA. *See* I.C. § 67-5201(15) ("'Order' means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons"). But the APA did not require DEQ's conditional approval to come in the form of a contested case order under section 67-5248. That is the type of order that would arise from these proceedings.

Finally, if L&R's argument is based on the contention that the August 16 conditional approval was invalid, then L&R is indeed seeking to challenge DEQ's action on August 16. By law, L&R needed to initiate that challenge within 35 days. IDAPA 58.01.23.060. It is undisputed that L&R failed to do so.

³ *See* I.C. § 67-5248(2) and (3) (specifically referring to contested cases).

IT IS ORDERED that DEQ's Renewed Motion to Dismiss is **GRANTED**. This dismissal is without prejudice to L&R's right to contest any future DEQ enforcement action based on its arguments about the validity of DEQ's conditional approval of L&R's Operating Plan.

RULE 730 NOTICE

This is a preliminary order of the Hearing Officer. It can and will be final without further action of the Idaho Department of Environmental Equality unless any party petitions for reconsideration before the Hearing Officer issuing this preliminary order. Any party may file a motion for reconsideration of this preliminary order with the Hearing Officer issuing the order within fourteen (14) days of the service date of this order. The Hearing Officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* I.C. § 67-5243(3).

Within fourteen (14) days after the (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the [Agency Head] or his designee. **Otherwise, this preliminary order will be come a final order of the agency.**

If any party appeals or takes exception to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the Agency Head. Written briefs in support of or taking exception to the preliminary order shall be filed with the Agency

Head or his designee. The Agency Head or his designee may review the preliminary order on its own motion.

If the Agency Head or his designee grants a petition to review the preliminary order, the Agency Head or his designee shall allow all parties an opportunity to file briefs in support of or taking exception to the preliminary order and may schedule oral argument in the matter before issuing a final order. The Agency Head or his designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The Agency Head or his designee may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Idaho Code Sections 67-5270 and 67-5272, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (1) a hearing was held; (2) the final agency action was taken; (3) the party seeking review of the order resides or operates its principal place of business in Idaho; or (4) the real property or personal property that was the subject of the agency action is located.

This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. *See* I.C. § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

IT IS SO ORDERED.

DATED July 28, 2023.

By /s/ Leslie M. Hayes
Leslie M. Hayes
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2023, I caused to be served a true and correct copy of the foregoing by the following method to:

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