

BEFORE THE BOARD OF HEALTH AND WELFARE

STATE OF IDAHO

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Office of the Attorney General
DEQ-IDHW

IDAHO RIVERS UNITED,)	
)	Docket No. 0113-95-28
Petitioner,)	
)	PRELIMINARY ORDER
vs.)	ON MOTION FOR
)	SUMMARY JUDGMENT
IDAHO DEPARTMENT OF HEALTH)	
AND WELFARE,)	
)	
Respondent.)	
)	
)	

Petitioner, Idaho Rivers United ("IRU") has appealed the decision by the Idaho Department of Health and Welfare Division of Environmental Quality ("DEQ") to issue a permit to Walker Mining Co., Inc. (Applicant) under The Rules for Ore Processing by Cyanidation, IDAPA 16.01.13000-999 (hereinafter the "Regulations"). IRU initially raised three (3) issues on appeal as follows:

1. Was DEQ required to hold a public meeting prior to issuance of a draft permit?
2. Did DEQ fail to properly consider and respond to IRU's comments regarding the permit application?
3. Was DEQ required, by regulation, to deny the permit application as incomplete on its face?

DEQ filed its motion for summary judgment supported by the affidavits of Martin Bauer, DEQ Bureau Chief of the Construction Permits Bureau, and Joe Baldwin, DEQ Environmental Hydrogeologist. IRU responded with the Affidavit of Marti Bridges. IRU also

withdrew Issue No. 1 with respect to the requirement of a public meeting.

Scope of Summary Judgment

At the outset it is important to clarify the scope of the IRU appeal. IRU has appealed the issuance of the Walker permit based on faults it contends occurred in DEQ's permitting process. Specifically not at issue in this summary judgment proceeding is any question as to whether the actual facility constructed under the permit does, or does not, comply with applicable regulations. At issue in this appeal is only whether DEQ's permitting process followed applicable regulations.

Findings of Undisputed Facts on Summary Judgment.

1. That on January 12, 1995, DEQ received an Application for Permit from Walker Mining Co., Inc. under the rules for processing by cyanidation. (Affidavit of Martin Bauer, Paragraph 3 and Exhibit "A").

2. That prior to receipt of the Application, Michelle Baldwin, an environmental hydrologist employed by the Idaho Department of Health and Welfare Division of Environmental Quality met with Jack Walker, (owner of Walker Mining Co., Inc.) and Jerry Yoder, also an employee of DEQ, to discuss the proposed ore

processing facility. At this meeting Mr. Walker described generally the manner in which the facility would be operated. Mr. Walker also described the process used at his mill to produce the slimes that would be used in the cyanidation process and the location of the mill in relation to the anticipated location of the ore processing facility. (Affidavit of Joe Baldwin, Paragraph 3).

3. On January 26, 1995, DEQ received a copy of the U.S. Forest Service approved plan of operations for Walker's mine along with documents associated with the approved plan of operations. (Affidavit of Martin Bauer, Exhibit "H").

4. On February 8, 1995, DEQ sent a letter to Walker Mining Co., Inc. indicating that DEQ needed additional information to process Walker's Permit Application, including an engineering report, plans and specifications for construction and design and more detail in operating plans. (Affidavit of Martin Bauer, Exhibit "C").

5. On February 23, 1995, DEQ received engineering drawings of the facility from Walker Mining Co., Inc. which consist of two pages of drawings entitled "General Layout of Carbon in Leach Pilot Plant System for Walker Mining". (Affidavit of Martin Bauer, Exhibit "B").

6. On April 6, 1995, DEQ mailed notice of receipt of the Walker Application to various parties interested in the Application including Petitioner, Idaho Rivers United. The notice which was mailed included the following language with respect to review of materials:

"AVAILABILITY OF MATERIALS FOR PUBLIC REVIEW:
Any person may review the application related documents at the following location; Idaho Department of Health and Welfare, Division of Environmental Quality, 1410 N. Hilton Street, Third Floor, Boise, Idaho 83706-1255 (208) 334-5898." (Affidavit of Martin Bauer, Exhibit "I").

7. On April 7, 1995, Joe Baldwin, Jerry Yoder, Dick Rogers (also an employee of DEQ) and Larry Mashburn (the engineer for Walker Mining Co., Inc.) met. At this meeting, DEQ was provided with the following information:

- A. One to two 55 gallon drums of slimes per day would be processed at the facility;
- B. A 20 mesh screen would be used to screen out the carbon;
- C. The settling tank would be a plastic lined container;
- D. The facility would be probably not operate more than one to two weeks per season;
- E. There is an 8 hour leach process;
- F. A powdered chlorine will be used;
- G. About 2 gallons of carbon per pass will be used in the cyanidation process;
- H. An approximately 5 gallon bucket of cyanide will last 3 to 4 years and this cyanide may be brought in by plane;
- I. The facility will be covered by a roof and is self contained. (Affidavit of Joe Baldwin, Paragraph 4).

8. On April 13, 1995, notice of a proposed issuance of a permit to construct and operate an ore processing by cyanidation facility was issued, sent for publication, and mailed to various interested parties including Petitioner. Included in this notice was essentially identical language as referenced above with respect to review of the application and related documents at the location

of the Division of Environmental Quality. (Affidavit of Martin Bauer, Exhibit "J").

9. A draft permit was subsequently prepared by DEQ. (Affidavit of Martin Bauer, Exhibit "D").

10. On April 20, 1995, DEQ published notice of proposed issuance of permit. (Affidavit of Martin Bauer, Exhibit "J").

11. On April 21, 1995, DEQ received correspondence from Idaho Rivers United requesting a public meeting on the Walker Application. (Affidavit of Martin Bauer, Exhibit "F").

12. On April 28, 1995, DEQ published notice of a public meeting on this application indicating a public meeting to be held May 16, 1995 at 7:00 p.m. at the Division of Environmental Quality, 1410 N. Hilton, Boise, Idaho, in Conference Room C. Incorporated in this notice was an indication that any person may review the application and related documents at the Idaho Department of Health and Welfare, Division of Environmental Quality, 1410 N. Hilton Street. (Affidavit of Martin Bauer, Exhibit "K").

13. On May 5, 1995, DEQ received written comment from Petitioner, Idaho Rivers United, requesting that the Walker Permit Application be returned as incomplete and listing the following specific details which were missing in the permit which Idaho Rivers United believes should have been included:

- A. Bonding
- B. Surface and subsurface description of proposed facility site
- C. Characterization of the local hydrologic regime

- D. Run on, run off analysis
- E. Details of spent ore disposal area
- F. Leak detection/monitoring system
- G. Process containment
- H. Water management strategy
- I. Surface and groundwater monitoring
- J. Discharge response plan
- K. Seasonal closure strategy
- L. Permanent closure strategy
- M. Disposal of spent ore
- N. Employee education program
- O. Design drawings and specifications certified by a registered professional engineer (Affidavit of Martin Bauer, Exhibit "G").

14. On May 16, 1995, a public meeting was held pursuant to the above-referenced notice of public meeting. (Affidavit of Martin Bauer, Paragraph 6). A representative of Rivers United attended the hearing. (Affidavit of Marti Bridges, Paragraph 7).

15. That Martin Bauer and his staff determined that DEQ had sufficient information to make decisions regarding the design concept, environmental protection, and public health, and to ensure compliance with the rules for ore processing by cyanide and other applicable rules. (Affidavit of Martin Bauer, Paragraph 7).

16. On June 8, 1995, the final permit authorizing the cyanide process was issued by DEQ to Walker Mining Co., Inc. The permit was for a pilot facility to process no more than 150 tons of slimes from the Walker Mining Co., Inc. ball mill. The permit required

that the carbon and pulp cyanide plant be constructed and operated in accordance with the permit application dated January 9, 1995 submitted by Jack A. Walker and engineering drawing submitted on March 23, 1995."

17. The permit was accompanied by a fact sheet for ore processing by cyanide dated April 11, 1995 and a Fact Sheet Addendum dated June 5, 1995. The Fact Sheet Addendum contains among other things, a summary of significant comments. With respect to Idaho Rivers United, the fact sheet addendum contained the following:

"Idaho Rivers United, Idaho Fish and Game - Southwest Region and the Idaho Conservation League commented on the incompleteness of the application submitted by Mr. Walker.

The Idaho Division of Environmental Quality (DEQ) on February 8, 1995 requested more information from the Walker Mining Co., Inc. On March 31, 1995, engineering plans of the proposed facility were submitted by Mr. Walker. Subsequent discussions with the engineer, Larry Mashburn, P.E. provided further information as to the size and potential environmental impacts of the proposed project. Mr. Mashburn, as engineer for project, also signed the application for an ore processing by cyanidation permit.

Idaho Rivers United commented that drafting of a permit prior to the requested public meeting was not consistent with the regulations. The regulations say that a public meeting may be held prior to the drafting of a permit, but does not require that the meeting be held first.

communication from IRU was simply the letter dated April 21, 1995 requesting a public meeting.

In response to IRU's letter, DEQ held a public meeting. After the public meeting and the close of the public comment period, a final permit was issued on June 8, 1995. Attached to the permit is a Fact Sheet Addendum dated June 5, 1995 which contains, among other things, a summary of significant comments. With respect to IRU, the fact sheet addendum contains the following:

"Idaho Rivers United, Idaho Fish and Game - Southwest Region and the Idaho Conservation League commented on the incompleteness of the application submitted by Mr. Walker.

The Idaho Division of Environmental Quality (DEQ) on February 8, 1995 requested more information from the Walker Mining Co., Inc. On March 23, 1995, engineering plans of the proposed facility were submitted by Mr. Walker. Subsequent discussions with the engineer, Larry Mashburn, P.E.. provided further information as to the size and potential environmental impacts of the proposed project. Mr. Mashburn, as engineer for project, also signed the application for an ore processing by cyanidation permit.

Idaho Rivers United commented that drafting of a permit prior to the requested public meeting was not consistent with the regulations.

The regulations say that a public meeting may be held prior to the drafting of a permit, but does [sic] require that the meeting be held first."

No other document issued in conjunction with or prior to the permit deals with IRU's comments.

In support of its claim that DEQ failed to consider the written comments of May 5, 1995, IRU points to the fact sheet and

The regulations say that a public meeting may be held prior to the drafting of a permit, but does [sic] require that the meeting be held first."

(Affidavit of Martin Bauer, Exhibit "E").

ANALYSIS

Summary Judgment Standard.

IDAPA 16.05.03100.04 authorizes disposition of a contested case without a hearing by way of summary judgment.

Rule 56, I.R.C.P. provides for bringing motions for summary judgment. On a motion for summary judgment, the Tribunal must determine whether the pleadings, depositions and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, then the moving party is entitled to judgment as a matter of law. Wells v. United States Life Ins. Co., 119 Idaho 160, 804 P.2d 333 (Ct. App. 1991); Boise Car & Trust v. Waco, Inc., 108 Idaho 780, 702 P.2d 818 (1985); I.R.C.P. 56(c). The standard for summary judgment requires the Tribunal to construe the facts in favor of the non-moving party and to draw all reasonable inferences from the record in favor of the non-moving party. Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986); Meridian Bowling Lanes, Inc. v. Meridian Athletic Ass'n, Inc., 105 Idaho 509, 670 P.2d 1294 (1983); Anderson v. Ethington, 103 Idaho 658, 651 P.2d 923 (1982).

A party against whom summary judgment is sought may not merely rest on allegations contained in the pleadings, but must come forward and produce admissible evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact. See I.R.C.P. 56(e); Clarke v. Prenger, 114 Idaho 766, 760 P.2d 1182 (1988); Worthen v. State, 96 Idaho 175, 525 P.2d 957 (1974); Tri-State Nat'l Bank v. Western Gateway Storage Co., 92 Idaho 543, 447 P.2d 409 (1988).

Did DEQ Fail to Properly Consider and Response to IRU's Comments Regarding the Jack Walker Permit?

IDAPA Section 16.01.13400.04 (Public Comment and Public Meetings), states that "all written comments shall be considered by the director in making the final decision." IDAPA Section 16.01.13450.02 (Final Permit Decision) states in part:

"All written comments and information received during the comment period, together with the Department's final permit and the response to relevant written comments shall be made available to the public. This response shall: . . .

B. Briefly describe and respond to all relevant written comments on the draft permit or denial."

DEQ received written comments from IRU on May 5, 1995. In these comments IRU requested that the Walker permit application be returned as incomplete and listed approximately fifteen (15) perceived omissions in the permit. The sole other written

submits the Affidavit of Marti Bridges, an employee of IRU. Bridges claims to have been "informed" by unidentified persons that DEQ's staff was instructed to ignore IRU's comments about the incompleteness of the Walker application. However, there is no foundation for this statement within the Affidavit.

To counter IRU's claim, DEQ submits the Affidavits of Joe Baldwin and Martin Bauer. These affidavits detail the actions and consideration given the permit by those in the department assigned to do so. These Affidavits are unrefuted in their substance by IRU.

It is clear from the Affidavits of Baldwin and Bauer that the completeness of the Walker application was in fact considered in the application process. DEQ itself requested additional information from Walker before it moved forward with processing the application. According to the Affidavits of Baldwin and Bauer, DEQ considered itself to have sufficient information to allow the director to make necessary application review decisions concerning design concept, environmental protection, and public health.

IRU also argues that DEQ failed to respond to IRU's written comments. The verb "respond" is defined in Webster's New Collegiate Dictionary (1973) as, "[T]o say something in return; make an answer."

Contrary to IRU's position, the Fact Sheet Addendum both describes IRU's comments and answers them. The Fact Sheet Addendum notes that IRU commented that the permit was incomplete. The Fact Sheet Addendum goes on to answer this comment in the next

paragraph, to the effect that DEQ also considered the completeness of the application and had requested and received additional information from the applicant.

Likewise, the Fact Sheet Addendum evidences consideration and response to IRU's comment regarding issuance of a draft permit prior to holding a public hearing.

It is clear from the record on summary judgment that DEQ did both consider IRU's written comments and respond to them. DEQ reviewed the information submitted with the application, found it to be incomplete, and requested additional information. There is nothing in the record to support a contention that DEQ proceeded forward in granting a permit even though DEQ felt that it did not have sufficient information to do so.

Therefore, summary judgment on this issue should be granted in favor of DEQ.

Was DEQ Required, By Regulation, to Deny the Permit Application as Incomplete on its Face?

IRU's second remaining basis for its appeal is its contention that DEQ was required by the regulations to reject the Walker application as incomplete on its face.

DEQ, in its Summary Judgment Motion, argues that the record establishes, without contradiction, that it had sufficient information to render its permitting decision based upon 1) the written application, 2) subsequent documentary information furnished by the Applicant, 3) additional verbal information

furnished by the Applicant at meetings with DEQ, 4) the Forest Service approved Plan for Operation of the Walker Mine, and 5) the specifics of the site and the type of cyanidation operation at issue.

In response, IRU first argues that the application itself, without reference to other written or verbal information, had to include a discussion of each and every requirement under IDAPA 16.01.13100.03 or be rejected as incomplete. IRU objects to the Department's reliance on any information not specifically included in the application in making its permitting decision.

IRU argues second, that even if an application can be supplemented after it has been initially submitted, the regulations require that any subsequent information used to support issuance of a permit must be reduced to written form as an amendment to, or part of a supplement to, the application. Simply put, it is IRU's argument that the sole source of information for the permitting decision must come from the application, either as initially submitted or as subsequently amended or supplemented.

The regulations charge DEQ with the responsibility for insuring that cyanidation facilities do not interfere with the beneficial uses of the waters of the state and do not endanger public safety or the environment. DEQ is the state agency with the experience and expertise to properly analyze the criteria established by the regulations. One would certainly hope that the Department has built and will continue to build, a bank of knowledge and expertise in these areas. To limit DEQ's analysis

only to the information contained in the permit itself would render valueless the Department's own bank of knowledge.

IDAPA 16.01.13100 only requires that the Applicant submit information "in sufficient detail" to allow DEQ to make the necessary application review decisions. This regulation does not limit DEQ's analysis solely to the information in the application, and IRU has not shown any regulation which specifically prohibits DEQ from looking to other sources of information in making its permitting decision or in deciding how much detail is sufficient for that decision.

In addition, it simply does not make sense that DEQ should be so limited. To prohibit DEQ from using other knowledge it has at its disposal, either in favor or against issuance of a permit, simply because the information was not within the scope of the application, would be a waste of the very expertise that the DEQ should be building and maintaining. Therefore, DEQ's decision to rely on information not specifically within the written application is not grounds for reversal of the permit approval.

IRU takes particular issue with DEQ's consideration of information obtained verbally from representatives of the Applicant. IRU argues that DEQ's consideration of verbal information denies the public an important right of participation in the permitting process. IRU'S argument appears to imply conscious effort by DEQ to mislead the public, and to conceal information from the public regarding the basis for the permit issuance and the timing of DEQ's decision to issue the permit.

IRU cites the following regulations as the basis for its contention public involvement in the permitting process prohibits use of verbal information by DEQ:

IDAPA 16.01.13400 (public involvement in permit procedures), along with

IDAPA 16.01.13100.03 (requiring the application to be in writing) and

IDAPA 16.01.13002.14 (defining a permit as any written authorization

The public involvement in the permitting process is clearly set out in IDAPA 16.01.13400 and its sub-parts. The public is entitled to notice of 1) receipt of application, 2) any public meeting, 3) issuance of a draft permit or a decision to deny the application for a permit, and 4) an appeal that has been granted. IDAPA 16.01.13400.01. The public is entitled to submit oral and written comment at a public meeting if one is held. IDAPA 16.01.13400.04. As discussed above, DEQ must consider the public comment in the permitting process. IDAPA 16.01.13450.02.b.

The record is clear and unrefuted that DEQ gave the public notice that it had received the Walker application. One of the entities to whom notice was specifically mailed was IRU. DEQ gave the public notice of its decision to issue a draft permit, once again specifically notifying IRU. DEQ made its file, including the application and other relevant documentation, available to the public for inspection. IRU chose not to take the opportunity to inspect the file. DEQ held a public meeting which was advertised in the fashion required by the regulations at which the public,

including IRU was given the opportunity to comment on the application. DEQ considered and responded to written comments received from the public, including IRU.

IRU is attempting to expand the scope of the regulations beyond their clear meaning. Nowhere in the regulations is there an indication that the public, or an entity such as IRU acting on behalf of the public, can prohibit DEQ from meeting with representatives of an applicant or from using the results of those meetings in its decision making process. In addition, nothing in the record, including the Affidavit submitted by IRU substantiates in any fashion the implication in IRU's written argument that some sort of a concerted effort was made to conceal information from IRU or the general public. Nor is there any substantiation for IRU's written argument that a personal relationship existed between Wallace Cory of DEQ and Jack Walker which resulted in a decision to grant the final permit at issue prior to public notice, hearing and consideration of public comment.

Based on the applicable regulations and the record on summary judgment, there is nothing to support IRU's contention that DEQ's use of verbal information obtained from representatives of the Applicant in its decision making process was improper.

Lastly, IRU takes exception to DEQ's reliance on the distinctive characteristics of the proposed facility and on the specifics of the site where the proposed facility is located.

The proposed facility is entirely self contained within steel tanks located above ground and covered by a roof. The total

capacity is 1,500 gallons, as compared with literally millions of gallons of liquid which is collected and deposited in outdoor ponds in the typical cyanidation process permitted by DEQ. Because of the relatively small size and the self contained nature of the facility at issue, DEQ did not require that the application specifically deal with certain areas of IDAPA 16.01.13100.03 and IDAPA 16.01.13200 which DEQ did not believe were relevant to its permitting decision.

In its Motion for Summary Judgment, DEQ focuses on the requirement in IDAPA 16.01.13100.03 that the information required in the application must be "in sufficient detail to allow the Director to make necessary application review decisions concerning design concept, environmental protection and public health". DEQ argues that the amount of information required in the application, and for the permitting process in general, is relative, in part, to the type and size of the facility involved.

IRU argues that the type and size of the facility involved has no bearing on the issue, and that DEQ does not have the flexibility to disregard any element set out in the regulations, and specifically any element set out in IDAPA 16.01.13100.03.

The intent of the regulations is to ensure that process water and process-contaminated water generated in ore processing operations that utilize cyanide as the primary leaching agent and pollutants associated with the cyanidation process are safely contained, controlled, and treated so that they do not interfere with the beneficial uses of the waters of the state and do not

endanger public safety or the environment. IDAPA 16.01.13001.02. As discussed above, DEQ is charged with the responsibility of achieving that goal.

Contrary to IRU's argument, the regulations do contain specific elements of flexibility with respect to how DEQ discharges its responsibility. For example, it is clearly incumbent on the DEQ under IDAPA 16.01.13300.03 to determine the amount of information "sufficient ... to make necessary application review decisions concerning design concept, environmental protection and public health." The same flexibility is reiterated in IDAPA 16.01.13100.03.g regarding topographical information to be included in the application. Sub-section g. also recognizes "the need for practicable design flexibility in order to meet site specific operating and environmental protection criteria." IDAPA 16.01.13200 also incorporates flexibility based upon site specific information with respect to compliance with specific standards for water quality protection.

It is clear from an overall view of the regulations that DEQ does have the discretion to determine the type and specificity of the information that it deems necessary to do its job. IRU's singular focus on IDAPA 16.01.13100.03.a. through h. ignores the flexibility contained in the lead-in language to those sub-sections and the flexibility contained in other parts of the regulations.

Once again, the record on summary judgment is unrefuted that DEQ made its determination that the areas in which IRU deemed the application insufficient were either covered by subsequent

information furnished to the Department or were not relevant to the Department's decision making process based in part on the site specifics of the proposed facility. The regulations clearly express an intention that DEQ have the discretion to adjust the information needed for its permitting decisions to fit the site specifics of the proposed project. Therefore, DEQ's exercise of that discretion in its decision making process is not grounds for reversal of its permitting decision.

CONCLUSION

IRU's appeal focusses on the process by which DEQ arrived at its decision to issue the Walker permit. IRU contends that DEQ did not follow proper procedure with respect to consideration of and response to IRU's written comments. However the record clearly reflects both consideration and response. IRU contends that it was not proper procedure for DEQ to use information from written and verbal sources outside of the application itself. IRU contends that it was not proper procedure for DEQ to use the specific characteristics of the proposed facility and its site in deciding how much information was "sufficient" for it to make its permitting decision. The regulations do not support these arguments. Therefore, summary judgment is proper on both remaining issues on appeal.

It appears from the pleadings and from the comments of counsel that this summary judgment is dispositive of all remaining issues raised by the IRU appeal. Therefore, this Order is a preliminary

Order for final disposition of the appeal under I.C. 67-5243 and is subject to the review procedures set out below.

Notification of Procedure for Petition for Review of Preliminary Order Under I.C. §67-5245.

This Preliminary Order will become a final Order without further notice unless a Petition for Review is filed in the manner set forth below.

A Petition for Review of a Preliminary Order must be filed with the Department at the following address within fourteen (14) days the date of this Preliminary Order.

Administrative Procedures Coordinator
Administrative Procedures Section
Department of Health and Welfare
Legal Services Division
450 W. State Street, 10th Floor
Boise, Idaho 83720

The basis for review must be stated in the Petition.

Upon receipt of a Petition for Review, the Department shall allow all parties to file exceptions to the Preliminary Order, to present briefs on the issues, and may allow parties to participate in oral argument. The Department shall:

- (a) Issue a final Order in writing within fifty-six (56) days of the receipt of 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 show;

(b) Remand the matter for additional hearing; or

(c) Hold additional hearings.

DATED: This 25th day of June, 1996.



Kent E. Nelson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of June, 1996, a true and correct copy of the within and foregoing document was served upon:

Laird J. Lucas
Land and Water Fund of the Rockies
P.O. Box 1612
Boise, Idaho 83701
Facsimile: 342-8286

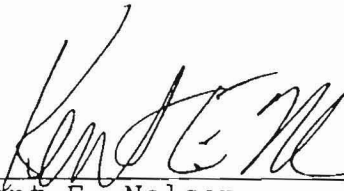
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