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**BEFORE THE IDAHO BOARD OF ENVIRONMENTAL QUALITY**

P4 PRODUCTIONS, L.L.C.,	)	Case No. <u>0111-11-01</u>
	)	
Petitioner,	)	<b>PETITION TO INITIATE</b>
	)	<b>A CONTESTED CASE</b>
v.	)	
	)	
IDAHO DEPARTMENT OF	)	
ENVIRONMENTAL QUALITY, a	)	
department of the State of Idaho,	)	
	)	
Respondent.	)	

Petitioner P4 Production, L.L.C. (“P4”) hereby petitions the Board of Environmental Quality to initiate a contested case pursuant to Idaho Code § 39-107(5) and the Rules of Administrative Procedure Before the Board of Environmental Quality, IDAPA 58.01.23, with respect to the Idaho Department of Environmental Quality’s final Point of Compliance (“POC”) determination for P4’s Blackfoot Bridge Mine (the “Mine”) and to revise the final POC determination in accordance with this Petition.

In support of this Petition, P4 states as follows:

- 1) IDAPA 58.01.11.401.01 authorizes Respondent, the Idaho Department of Environmental Quality (“IDEQ”), to set a point of compliance or points of compliance at which a mine operator must meet the ground water quality standards described in Subsection 150.01.

2) A point of compliance is defined as “[t]he vertical surface where the Department determines compliance with the ground water quality standards as provided in Subsection 400.05 and Section 401.” IDAPA 58.01.11.007.25.

3) Pursuant to IDAPA 58.01.11.401.03, points of compliance shall be set so that, taking into consideration the relevant factors set forth in Subsections 401.03.a through 401.03.h, outside the mining area boundary, there is no injury to current or projected future beneficial uses of ground water and there is no violation of water quality standards applicable to any interconnected surface waters.

4) Pursuant to IDAPA 58.01.11.401.04, IDEQ shall require ground water monitoring and reporting whenever it sets a point of compliance.

5) Pursuant to IDAPA 58.01.11.401.04.a, the ground water monitoring system shall be designed to:

- i. Represent the quality of background ground water that has not been affected by the mining activity; and
- ii. Represent the quality of ground water passing the point(s) of compliance in order to determine compliance with ground water quality standards or effectiveness of best management practices.

6) On May 14, 2010, following a number of meetings and discussions with IDEQ permitting staff, P4 submitted to IDEQ its *Request for Setting Points of Compliance* seeking points of compliance for the Mine.

7) In response to IDEQ’s comments on its original request, P4 submitted a revised *Request for Setting Points of Compliance* application to IDEQ on July 12, 2010.

8) Consistent with IDAPA 58.01.11.401.03, the revised request proposed points of compliance such that, outside the mining area boundary, no injury to current or projected future

beneficial uses of ground water and no violation of surface water quality standards applicable to interconnected surface water will occur.

9) The revised request also proposed a sampling frequency adequate to meet the requirements of IDAPA 58.01.11.401.04.

10) P4 submitted supplemental information to be incorporated into the application on August 6, 2010.

11) In a letter dated August 12, 2010, IDEQ determined that the application was complete in accordance with IDAPA 58.01.11.401.02.a.

12) On June 14, 2011 IDEQ issued its final Point of Compliance Determination (“Determination”) setting points of compliance for the Mine.

13) The Determination also establishes certain conditions, monitoring well locations, and sampling requirements for the points of compliance. Specifically, the Determination:

- a) Requires new point of compliance monitoring wells to be installed at least two years prior to the start of mining (although P4 may request a shortened time frame provided the shortened time frame does not compromise the purportedly needed background data set);
- b) Defines the surface discharge from the water management pond underdrain system as a point of compliance;
- c) Includes excessive point of compliance monitoring wells (e.g., three additional wells between MW-14 and MW-17, four additional wells to the north of the water management ponds, and two additional wells to the south of the water management ponds); and

- d) Requires excessive monitoring of certain wells or discharges (e.g., monthly and/or weekly sampling requirements applicable to the wells to the north of the North Pit, around the water management ponds, and at the discharge from the underdrain system).

14) By filing this Petition, P4 seeks the Board's review of the above-described conditions, and seeks a declaratory judgment by the Board stating that the conditions are unnecessary, inconsistent with the regulations and/or otherwise arbitrary and capricious and remanding the Determination to IDEQ to be revised in accordance with the terms proposed by P4 in its application and as restated herein.

15) Idaho Code § 39-107(5) provides that “[a]ny person aggrieved by an action or inaction of the department shall be afforded an opportunity for a fair hearing upon request therefor in writing pursuant to chapter 52, title 67, Idaho Code, and the rules promulgated thereunder.”

16) Under IDAPA 58.01.23.010.01, an “aggrieved person or person aggrieved” is “[a]ny person or entity with legal standing to challenge an action or inaction of the Department, including but not limited to permit holders and applicants for permits challenging Department permitting actions.”

17) To establish legal standing, a petitioner must allege or demonstrate an injury in fact and a substantial likelihood that the relief requested will prevent or redress the claimed injury. *See Martin v. Camas County ex rel. Bd. of Comm'rs*, 150 Idaho 508, 248 P.3d 1243 (2011); *Ciszek v. Kootenai County Bd. of Comm'rs*, 2011 WL 2040837, \*4 (Idaho May 26, 2011) (quoting *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006)). A petitioner

may meet this showing when a threatened harm is the basis of this injury. *See Ciszek*, 2011 WL 2040837 at \*4.

18) P4 has standing to initiate a contested case seeking Board review of these issues because P4 is the party that applied for the POC determination for the Mine and is adversely affected or aggrieved by the above conditions, monitoring well locations, and sampling requirements, and because the relief requested herein will prevent or redress the injury to P4.

***Installation of Monitoring Wells Two Years In Advance of Mining***

19) The Determination for the Mine is unnecessary, inconsistent with the regulations and/or otherwise arbitrary and capricious in that it imposes an obligation to conduct two years of ground water monitoring prior to the start of mining. That requirement provides that:

The new monitoring wells (point of compliance) must be installed at least two years prior to the start of mining; P4 may request a shortened time frame. DEQ will consider such requests, and may approve a shorter time frame if adequate justification is provided that doing so will not compromise the needed background data set. The purpose of this monitoring is to establish existing ground water quality at the points of compliance prior to initiation of mining activity.

*See* Determination at 6.

20) Requiring P4 to install monitoring wells two years prior to the start of mining is unnecessary because, in support of its request for a point of compliance, P4 submitted all information required by IDEQ regulations to establish points of compliance, including ground water monitoring and modeling data.

21) IDEQ has been working with P4 since 2005 with knowledge of and in support of P4's schedule for mining that is anticipated to begin as early as 2011.

22) P4 is aggrieved by this requirement because the timing of mining activity at the Mine is critical given the approaching depletion of phosphate ore mined from P4's currently

operating South Rasmussen Mine. P4 anticipates the initiation of site preparation activities for the new Mine as early as July 20, 2011, in order to assure a continued supply of phosphate ore to P4's elemental phosphorus manufacturing plant in Soda Springs.

23) The Determination's statements that "P4 may request a shortened time frame" and that "DEQ will consider such requests, and may approve a shorter time frame if adequate justification is provided that doing so will not compromise the needed background data set" do not mitigate the harm to P4 in this case, because: (1) IDEQ's consideration of a request for a shortened time frame could take weeks or even months, and time is of the essence to ensure that P4's production of phosphorus at its Soda Springs plant is not interrupted; (2) IDEQ has not provided P4 with any standard by which it will consider a request for a shortened time frame; (3) by including this provision in the Determination, IDEQ necessarily indicates that it believes the data already submitted by P4 is insufficient to establish the background data set and that additional background data is required, which P4 disputes; and (4) in any case, there is no guarantee that any such request for a shortened time frame would be granted.

***Definition of Surface Discharge from Water Management Pond Underdrain System as a Point of Compliance***

24) The Determination also designates as a point of compliance the discharge from the ground water drainage system designed to protect the integrity of two large water management ponds. Specifically, the Determination requires that:

The discharge from the drainage system is an additional point of compliance during periods of high ground water. The ground water drain system under the Water Management Ponds will capture leakage from the ponds if the water table is high enough for water to flow from the drainage pipe system that will be installed as part of the construction of the ponds. Under these conditions, the leakage will not move downward to the completion intervals of the existing monitoring wells or piezometers within the mine area. Therefore, when water is flowing from the ground water drainage system under the

ponds, the ground water drain system is the equivalent of a lateral well network and must be monitored for water quality purposes.

*See Determination at 5-6.*

25) The requirement to use the discharge from the ground water drainage system as a point of compliance is unnecessary, inconsistent with the regulations and/or otherwise arbitrary and capricious because the water collected from such system originates from under the ponds and does not represent ground water that is collected from a point at the vertical boundary of the mining area.

26) P4 has agreed and intends to monitor the quality of the discharge from the ground water drainage system.

27) However, P4 is aggrieved by the requirement to use the ground water collected from such system as a point of compliance because that water does not and cannot represent the quality of water at the vertical surface that corresponds with the boundary of the mining area.

#### ***Excessive Number of Monitoring Wells***

28) The Determination requires excessive point of compliance monitoring wells without justification or scientific basis in that it requires three additional wells between MW-14 and MW-17, four additional wells to the north of the water management ponds, and two additional wells to the south of the water management ponds. *See Determination at 3-4, 5.*

29) Installation of these monitoring wells is unnecessary, inconsistent with the regulations and/or otherwise arbitrary and capricious.

30) P4 is aggrieved by the requirement to install these wells because installing and performing the monitoring required at such wells will be unnecessarily burdensome and costly to P4.

***Excessive Frequency for Monitoring***

31) The Determination requires excessive monitoring of certain wells or discharges in that it requires monthly and/or weekly sampling of the wells to the north of the North Pit, around the water management ponds, and the discharge from the underdrain system. *See* Determination at 6-7.

32) Monitoring the wells and discharges at the frequency required by the Determination is unnecessary, inconsistent with the regulations and/or otherwise arbitrary and capricious.

33) P4 is aggrieved by the requirement to monitor the wells and discharges at this frequency because performing the monitoring at such frequency will be unnecessarily burdensome and costly to P4.

WHEREFORE, P4 respectfully prays that the Board initiate a contested case; conduct a contested case hearing; declare that the above-discussed conditions are unnecessary, inconsistent with the regulations and/or otherwise arbitrary and capricious; and remand the Determination to IDEQ with an order that IDEQ revise the Determination to:

- a) Remove the requirement that the new monitoring wells to be installed by P4 must be installed two years prior to the start of mining.
- b) Eliminate any reference to the discharge from the water management pond underdrain system as a point of compliance.
- c) Eliminate the excessive monitoring / point of compliance wells (*e.g.*, three additional wells between MW-14 and MW-17, four additional monitoring wells required to the north of the water management ponds, and two additional wells to the south of the water management ponds) and adopt

the point(s) of compliance proposed in P4's revised *Request for Setting Points of Compliance* for the Mine as supplemented.

- d) Eliminate the excessive monitoring requirements applicable to certain wells or discharges (e.g., monthly and/or weekly sampling requirements regarding the wells to the north of the North Pit, around the water management ponds, and at the discharge from the underdrain system) and either adopt the sampling schedule as proposed by P4 or provide a schedule for sampling that does not require excessive monitoring. With respect to this determination, except in limited circumstances associated, for example, with initial sampling or after evidence of exceedances of the ground water quality standard, any frequency more often than once per calendar quarter should be considered excessive.

Dated this 19th day of July, 2011.

Respectfully submitted,

**P4 PRODUCTIONS, L.L.C.**

By its attorney:



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**ATTORNEY FOR P4 PRODUCTIONS, L.L.C.**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th of July, 2011, a true and correct copy of the foregoing PETITION TO INITIATE A CONTESTED CASE was served on the following as indicated below:

BY HAND-DELIVERY

Hearing Coordinator  
Department of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706-1255



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