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DEQ-IDHW

BEFORE THE BOARD OF HEALTH AND WELFARE
STATE OF IDAHO

DR. PETER RICKARDS,)
)
) Petitioner,)
)
 vs.)
)
) IDAHO DEPARTMENT OF HEALTH)
) AND WELFARE,)
)
) Respondent.)
)
 and)
)
) U.S. DEPT. OF ENERGY,)
)
) Permittee.)
 _____)

Docket No. 0101-92-12

O R D E R

The Board, having reviewed the Hearing Officer's Findings of Fact, Conclusions of Law, and Proposed Decision and Order on Motions for Summary Judgment, filed December 21, 1992, and;

Exceptions having been filed by the Petitioner, Dr. Peter Rickards, the Permittee, U.S. Department of Energy, and the Division of Environmental Quality, and all parties having been afforded an opportunity to file Briefs and present Oral Argument to the Board on June 17, 1993, pursuant to IDAPA 16.05.03102, the Findings of Fact, Conclusions of Law and Proposed Decision and Order on Motions for Summary Judgment of the Hearing Officer shall

be adopted in full as the FINAL DECISION AND ORDER of the Board of Health and Welfare. A copy of above-referenced documents are attached and incorporated herein.

Judicial Review of this Final Order may be had pursuant to Section 67-5215, Idaho Code.

DATED this 17th day of June, 1993.

FIVE MEMBERS AFFIRMED THE DECISION:

Robert C. Stanton

ROBERT STANTON, Chairman

Maureen Finnerty

MAUREEN FINNERTY, Vice Chair

Wylla Barsness

WYLLA BARSNESS, Secretary

John Bermensolo

JOHN BERMENSOLO

Member

G. Bert Henriksen

G. BERT HENRIKSEN

Member

Absent + Excused

DONNA L. PARSONS

Member

Donna L. Parsons
Secretary

THE FOLLOWING MEMBER DISSENTED FROM THE DECISION:

Marguerite G. Burge

MARGUERITE G. BURGE

Member

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of June, 1993, I mailed a true and correct copy of the foregoing ORDER to the following named individuals by First Class Mail:

Dr. Peter Rickards

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Mark Olsen

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Cheryl Johnson
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Department of Health and Welfare

Idaho Dept. of Health & Welfare
 Administrative Procedure Section
 RECEIVED & FILED
 DEC 21 1992
 DOCKET NO. _____

BEFORE THE BOARD OF HEALTH AND WELFARE

STATE OF IDAHO

DR. PETER RICKARDS,)	
)	
Petitioner,)	Docket No. 0101-92-12
)	
v.)	HEARING OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF
IDAHO DEPARTMENT OF HEALTH)	LAW, AND PROPOSED
AND WELFARE,)	DECISION AND ORDER
)	ON MOTIONS FOR
Respondent,)	SUMMARY JUDGMENT
)	
and)	
)	
UNITED STATES DEPARTMENT OF)	
ENERGY, IDAHO OPERATIONS)	
OFFICE,)	
)	
Permittee/Respondent.)	

Before the Board are two motions for summary judgment: (1) "Respondent/Permittee's Motion For Summary Judgment" dated August 24, 1992, and (2) "Respondent Idaho Department Of Health And Welfare's Motion For Summary Judgment," dated September 1, 1992. The hearing on the motions commenced on October 15, 1992, and was continued to and completed on November 18, 1992. The Petitioner Dr. Peter Rickards ("Petitioner") was present and represented himself. The Respondent Idaho Department of Health and Welfare, Division of Environmental Quality ("DEQ") was represented by Lore Bensel, Deputy Attorney General. The Permittee/Respondent U.S. Department of Energy, Idaho Operations Office ("DOE") was represented by Mark Olsen, Counsel.

Having considered the briefs, affidavits, administrative record, summary judgment hearing transcript, and argument presented in this matter, the Hearing Officer submits the following findings

of fact, conclusions of law, and proposed decision and order:

I. GENERAL FINDINGS OF FACT.

A. Procedural History.

This contested hearing involves an appeal of the grant of a Permit To Construct An Air Pollution Emitting Source (Permit No. 0340-0001) ("Permit") issued to DOE by DEQ on March 3, 1992. Specifically, the Permit covers the operations at many of the pilot plants and pilot plant support facilities located at the Idaho Chemical Processing Plant ("ICPP") on the grounds of the Idaho National Engineering Laboratory ("INEL"). Administrative Record ("AR"), Vol. I, Application and Completeness. Only three of the pilot plants regulated by the Permit are allowed to process radioactive materials. Those three pilot plants are the Electrolytic Dissolver Pilot Plant ("EDPP"), the Fluorinel Pilot Plant/Fountain Dissolver Mockup ("FPP/FDM") and the Solvent Extraction Pilot Plant ("SEPP"). See AR, Vol. II, Final Action, State of Idaho Permit To Construct An Air Pollution Emitting Source ("Air Quality Permit") at pp. 17-23 and 28-30; Affidavit of Robert Nebeker ("Aff. of Nebeker") at ¶¶ 10 and 11.

Pursuant to IDAPA § 16.05.03100, Petitioner filed his Petition For Contested Case ("Petition") on or about April 10, 1992. In the Petition, Petitioner alleged violations of the National Environmental Policy Act (42 U.S.C. Chapter 55) ("NEPA") and the National Emission Standards For Hazardous Air Pollutants (40 CFR Part 61) ("NESHAPS"). The Petition also disputed technical findings and determinations made by DEQ with regard to the Best Available Control Technology ("BACT") for the control of radionuclide emissions at the EDPP, FPP-FDM, and the SEPP.

DOE submitted a Petition to Intervene in this action on June 17, 1992, based on the fact that it is the recipient of the Permit and that any action taken during the administrative proceeding will directly and substantially affect DOE's continuing

operations at the INEL. The Hearing Officer held that DOE was a Permittee/Respondent to this action and deemed the Petition to Intervene withdrawn as moot. "Order On Petition To Intervene," Docket No. 0101-92-12 (July 1, 1992).

Following a prehearing conference held by telephone conference call on July 8, 1992, a schedule was set for, among other things, the conduct of discovery and prehearing motions. "July 8, 1992, Prehearing Conference Order" ("Prehearing Order") Docket No. 0101-92-12 (July 20, 1992). Pursuant to the Order, all prehearing motions were to be filed on or before September 18, 1992. All discovery was to be completed on or before October 19, 1992. In the event a motion for summary judgment was filed, a hearing would be set at least 28 days from the filing of the motion. Any brief and affidavits in opposition to the motion were due at least 14 days before the hearing; any reply briefs were due at least 7 days before the hearing. Prehearing Order at ¶¶ 3 and 5.

DOE moved for summary judgment on all issues on August 28, 1992. "Respondent/Permittee's Motion For Summary Judgment," Docket No. 0101-92-12 (August 28, 1992). In support of its motion, DOE submitted a memorandum and the affidavits of Robert Nebeker, Bryan T. Collins, and Brian Palmer. DEQ moved for summary judgment on all issues on September 2, 1992. "Respondent Idaho Department Of Health And Welfare's Motion For Summary Judgment," Docket No. 0101-92-12 (September 2, 1992). In support of its motion, DEQ submitted a memorandum, certified copies of the Administrative Record for the Permit, and the affidavits of Susan J. Richards and Martin Bauer. Both motions were set for hearing on October 15, 1992. "Notice Of Hearing On Motion For Summary Judgment; Order," Docket No. 0101-92-12 (September 3, 1992).

In response to the motions for summary judgment, Petitioner submitted a memorandum ("Petitioner's Rebuttal Of Respondent's Motion For Summary Judgment") on September 24, 1992. DOE submitted a reply brief on October 5, 1992; DEQ submitted a reply brief and second affidavits of Bauer and Richards on October 8, 1992.

The hearing on the motions for summary judgment commenced

on October 15, 1992. Present at the hearing were the Petitioner Dr. Peter Rickards, representing himself; Mark Olsen, Office of the Chief Counsel, representing DOE; and Lore Bensel, Deputy Attorney General, representing DEQ. The parties agreed that at issue were the following:

1. The Petitioner's alleged standing to challenge the issuance of the Permit;
 2. DEQ's alleged noncompliance with NESHAPS in issuing the Permit, specifically
 - a. violation of the 10 millirem standard;
 - b. use of incorrect efficiency rating figure for High Efficiency Particulate Air ("HEPA") filters; and
 - c. failure to include the concentration of short-lived radionuclides in dosage calculations;
 3. DEQ's alleged failure to use BACT; and
 4. DEQ's alleged failure to consider NEPA compliance.
- Transcript Of Proceedings ("Tr.") Vol. I (October 15, 1992), p. 7, l. 25 to p. 8, l. 21.

During the course of the hearing, it became apparent that the Petitioner had submitted no affidavits or other sworn or certified documentation to support his contentions in opposition to the motions for summary judgment while, at the same time, the Petitioner's contentions were contradicted by the sworn and certified documentation submitted by DOE and DEQ. Over the objection of DEQ and after extensive discussion, the Petitioner was given until October 28, 1992, to submit sworn or certified documentation in support of his allegations, with opportunity given to DEQ and DOE to respond to the Petitioner's supplemental documentation. Tr. Vol. I (October 15, 1992), p. 18, l. 14 to p. 32, l. 22; p. 34, l. 1 to p. 35, l. 13. After hearing argument on the issue of standing, the parties agreed to continue the hearing on the motions for summary judgment to November 18, 1992. In addition, the parties agreed to limit the time of oral argument on each issue. Tr. Vol. I, p. 86, l. 24 to p. 87, l. 20.

On October 26, 1992, the Petitioner submitted a memorandum

("Supplement To Original Rebuttal Of Respondent's Motion For Summary Judgment") but no affidavits or other sworn or certified documentation. DOE submitted a supplemental reply brief on November 9, 1992. DEQ submitted a second reply brief and third affidavit of Martin Bauer on November 12, 1992. The continued hearing on the motions for summary judgment was held on November 18, 1992, and argument completed on that date.

B. Facts Leading Up To Petition For Contested Hearing.

In December of 1990, DOE submitted an Application for Permit to Construct an Air Pollution Emitting Source ("Application for PTC"), with supporting documents, to DEQ. The Application for PTC covers the construction and operation of seventeen pilot plants and pilot plant support facilities at the Idaho Chemical Processing Plant ("ICPP"), part of the Idaho National Engineering Laboratory ("INEL"). Aff. of Nebeker at ¶ 8. Administrative Record ("AR") Vol. I, Application and Completeness, ICPP Pilot Plant Facility Permit to Operate Application Dated November 1990 ("Application Dated Nov. 1990"). Previously, permission to operate most of the pilot plants has been obtained through Conditional Permit To Construct Exemptions approved by DEQ in accordance with IDAPA § 16.01.01012,02.g. Affidavit of Martin Bauer in Support of DEQ's Motion For Summary Judgment ("Aff. of Bauer") at ¶ 5. The application requested that the EDP, the FPP/FDM, and the SEPP be allowed to process radioactive materials under the Air Quality Permit. See AR, Vol. II, Final Action, State of Idaho Permit To Construct An Air Pollution Emitting Source ("Air Quality Permit") at pp. 17-23 and 28-30; Aff. of Nebeker at ¶ 11.

DEQ reviewed DOE's application in accordance with IDAPA §16.01.01012,13. It determined that the operations governed by the application constituted "modifications" as defined in IDAPA §16.01.01012,02. Aff. of Bauer at ¶ 7; Affidavit of Susan J. Richards in support of DEQ's Motion for Summary Judgment ("Aff. of Richards") at ¶ 7. DEQ also determined that the proposed

modifications of the EDP, the FPP/FDM and the SEPP were "major modifications" as defined in IDAPA § 16.01.01003,55 any increase in radionuclide emissions is considered "significant" by DEQ under IDAPA §16.01.01003,86.b. Aff. of Bauer at ¶ 8; Aff. of Richards at ¶ 8.

On January 16, 1991, DEQ determined that additional information was necessary to properly process the permit application and provided DOE with a list of specific questions to be answered by DOE. DEQ and DOE met and discussed the requested information and on June 19, 1991, DOE submitted a revised application. DEQ determined that the application was complete on July 17, 1991. Aff. of Richards at ¶ 6; AR, Vol. I, Application and Completeness, ICPP Pilot Plant Facility Permit to Operate Application Dated May 1991 ("Application Dated May 1991").

In October 1991, DEQ issued a proposed Air Quality Permit and a public notice pursuant to IDAPA § 16.01.01012,13. AR, Vol. II, Proposed Permit; AR, Vol. I, Contents at pp. iii-v. The public comment period began October 23, 1991 and extended until November 22, 1991. A public hearing was held on November 12, 1992 by DEQ in Idaho Falls where the public was invited to present oral and or written comments on the proposed Air Quality Permit. AR, Vol. II, Hearing Transcript.

The public hearing was recorded and transcribed. AR, Vol. II, Hearing Transcript. Additionally, written comments were solicited from the public and those unable to attend the public hearing. Petitioner submitted a series of statements and questions during the public comment period (AR, Vol. II, Public Comments, Letter to Lowder from Rickards dated November 20, 1991) to which DEQ responded (AR, Vol. II, DEQ Response). The Hearing Officer appointed to conduct the public hearing issued his findings and recommendations. AR, Vol. II, Public Hearing Summary; Aff. of Richards at ¶ 17.

After consideration of the public comments and Hearing Officer's recommendations, DEQ determined that DOE was in full compliance with the provisions of IDAPA § 16.01.01012 including

compliance with all applicable local, state and federal emission standards. Aff. of Bauer at ¶ 10; Aff. of Richards at ¶ 18. DEQ issued the Air Quality Permit on March 3, 1992. AR, Vol. II, Final Action, Letter from Green to Rothman dated March 3, 1992.

Pursuant to IDAPA § 16.05.03100, Petitioner filed his Petition for Contested Case on April 10, 1992.

II. GENERAL CONCLUSIONS OF LAW.

A. Authority.

The Board of Health and Welfare has jurisdiction over contested case proceedings involving appeals of decisions regarding Air Quality Permits pursuant to Section 39-105(1), 39-107(6), and 39-110 through 39-112 of the Idaho Code.

B. Standard Of Review.

The review of this matter was conducted de novo pursuant to the statutory directive that an opportunity be afforded to all parties to a contested case to respond and present evidence and argument on all issues involved. I.C. §67-5209(c).

C. Standards For Granting Summary Judgment.

1. The Applicability Of The Idaho Rules Of Civil Procedure And The Idaho Rules Of Evidence.

The regulations governing contested cases expressly permit cases to be disposed of through the use of motions for summary judgment. IDAPA § 16.05.03100,04. However, the regulations do not set forth the standards to be used in evaluating a motion for summary judgment. Since the statutory and decisional law in Idaho on summary judgment arises out of the summary judgment provisions

of the Idaho Rules of Civil Procedure ("IRCP"), these rules and the court interpretations of them provide guidance in evaluating the submissions of the parties.

Looking to the body of law interpreting the IRCP does not conflict with the provision in the regulations that the Idaho Rules of Civil Procedure ("IRCP") "shall not apply" in contested cases. IDAPA 16.05.03100,11. In its entirety, the sentence in the regulation provides that "[a]s contested case proceedings and hearing are informal, the Idaho Rules of Civil Procedure shall not apply." The regulation indicates that strict rules of procedure are not followed in contested proceedings.

The two provisions are harmonized by applying the evidentiary standards established in the rules and cases for summary judgment with allowance for the fact that contested administrative hearings are informal in nature. Cf. University of Utah Hospital and Medical Center v. Bethke, 101 Idaho 245, 248, 611 P.2d 422 (1980) (courts are required to give effect to every word, clause and sentence of a statute, where possible); Bingham Memorial Hospital v. Idaho Department Of Health and Welfare, 112 Idaho 1094, 1096, 739 P.2d 393 (1987) (The principles of statutory construction also apply to rules and regulations promulgated by administrative agencies, including the Department).

Accordingly, for purposes of this decision, only evidence meeting the requirements of IRCP 56 was considered.

2. The Standards For Granting Summary Judgment Under The IRCP.

Under the IRCP, summary judgment shall be granted to the moving party if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Idaho Rules of Civil Procedure 56(c); Werner v. American-Edwards Labs., Inc., 113 Idaho 434, 745 P.2d 1055 (1987). Although the party moving for summary judgment

carries the burden of showing that there are no disputes of material fact and that the party is entitled to judgment as a matter of law, the non-moving party also must meet certain evidentiary requirements:

[A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

IRCP 56(e). The affidavits submitted in support of or against the motion "shall set forth facts as would be admissible in evidence:"

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

IRCP 56(e); East Lizard Butte Water Corp. v. Howell, ___ Idaho ___, 837 P.2d 805, 807 (1992). A mere scintilla of evidence is insufficient to create a material issue of fact. East Lizard Butte, 837 P.2d at 807; Nelson v. M. L. Steer, et al., 118 Idaho 409, 410, 797 P.2d 117 (1990).

3. The Petitioner's Pro Se Status.

The fact that Petitioner was appearing pro se does not require that a different standard be applied to Petitioner. In a case similar to this proceeding, the Idaho Supreme Court affirmed a decision granting summary judgment against a pro se litigant who relied on an unsworn statement to oppose an affidavit submitted by the moving party. Golay v. Loomis, 118 Idaho 387, 797 P.2d 387 (1990). The Court found that a pro se is entitled to no special consideration: "'Pro se litigants are held to the same standards and rules as those represented by an attorney.'" Golay, 118 Idaho at 392 (quoting Golden Condor, Inc. v. Bell, 112 Idaho 1086, 1089,

n. 5, 739 P.2d 385 (1987) and State v. Sima, 98 Idaho 643, 570 P.2d 1333 (1977)).

The principle set forth in Golay is equally applicable in administrative proceedings. Although, by regulation, hearings are less formal than a court proceeding, the same standards apply to all parties. Nothing in the Administrative Procedure Act or the IDAPA authorizes a different standard to be applied to a pro se litigant.

4. Burden Of Proof.

The contested case proceeding rules (IDAPA Title 5, Chapter 3) assume that the Petitioner has the burden of proof. See IDAPA 16.05.03101,16 ("At any contested case hearing, the Party having the burden of proof (usually the Petitioner or Complainant) shall be the first to present testimony"). The rules are consistent with decisions of the Board which place the burden of proof on a petitioner challenging the issuance of a permit. See Rickards v. Idaho Department of Health and Welfare, Docket Nos. 0101-91-02 and 0101-90-44, "Findings Of Fact, Conclusions Of Law, And Decision" at 8 (October 24, 1991).

III. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DECISION WITH RESPECT TO THE ISSUE OF STANDING.

A. Findings Of Fact.

The Petitioner alleges that he is a user of Route 20 (which passes by INEL, that he is a resident of Twin Falls, Idaho, and that the issuance of the Permit will result in radionuclide emissions of more than 10 millirems per year under either normal or accidental circumstances. Tr. Vol I, p. 35, l. 15 to p. 37, l. 5; Petition For Contested Case ¶ 4.

The following facts are unrebutted:

HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT - 10

DEQ determined that the addition of the three pilot plants would not cause INEL, in its entirety, to exceed the 10 mrem/yr standard. Aff. of Richards at ¶ 16. The dosage calculation at this point in the permitting process only took into consideration releases that are caused by normal operations of the pilot plants, including releases that are more likely than not to occur. Releases from accidents are not considered at this point in the process. Aff. of Bauer at ¶ 20; Aff. of Richards at ¶ 27; 40 CFR §§ 61.08(b), 61.93, and 61.94.

B. Conclusions Of Law.

The Petitioner failed to establish that he has standing to initiate the Petition.

Idaho Code Section 39-107(6) provides that "[a]ny person aggrieved" by an action of the Department has standing to initiate a contested hearing on the action. A party is "aggrieved" for a decision when it operates directly and injuriously upon personal, pecuniary, or property rights. The right invaded must be immediate, not merely some possible, remote consequence, or mere possibility arising from some unknown and future contingency. In Re Fernan Lake Village, 80 Idaho 412, 415, 331 P.2d 278 (1958). For standing, in addition to distinct injury, a party must also demonstrate a traceable causal connection between the claimed injury and the challenged conduct. Miles v. Idaho Power Co., 116 Idaho 635, 641, 778 P.2d 757 (1989).

Based on the dosage calculations, the radionuclide emissions at INEL comply with NESHAPS.

The Petitioner failed to show that he is an "aggrieved party" as that term is used in Idaho Code Section 39-107(6). Even assuming as facts the Petitioner's allegations of residence and use of Highway 20, those facts alone are insufficient to establish that the Petitioner has standing to initiate this Petition. Petitioner's alleged right invaded is too speculative, and Petitioner has failed to establish a connection between the claimed

injury and the challenged conduct. Miles, 116 Idaho at 641.

C. Proposed Decision.

Summary judgment should be entered against the Petitioner and the Petition dismissed on the ground there is no dispute of material fact and that DOE and DEQ are entitled to judgment as a matter of law on the ground that Petitioner lacks standing to initiate the Petition.

IV. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DECISION ON THE ISSUE OF DEQ'S ALLEGED NONCOMPLIANCE WITH NESHAPS IN ISSUING THE PERMIT.

Assuming that the Petitioner has standing, the following findings of fact, conclusions of law, and proposed decision on the issue of DEQ's alleged noncompliance with NESHAPS in issuing the Permit are set forth.

A. Findings of Fact.

No evidence was submitted by Petitioner in support of his allegation that DEQ failed to comply with NESHAPS in issuing the Permit.

The following facts are unrebutted:

a. Alleged Violation of The 10 Millirem Standard.

DEQ reviewed the calculations submitted by DOE demonstrating compliance with NESHAPS. DEQ determined the emission calculations used in the determination of the Annual Effective Dose Equivalence ("AEDE") to be reasonable and conservative. AR, Vol. I, Application and Completeness, Application Dated May 1991 at p. 3-126; Aff. of Richards at ¶ 10. See Aff. of Nebeker at ¶ 15a; AR, Vol. I, Application and Completeness, Application Dated May 1991 at pp. 3-126, 3-127, 3-179, 3-242; Aff. of Richards at ¶ 11.

Dosages were calculated based on normal operations. Aff. of Bauer at ¶ 20; aff. of Richards at ¶ 27. Emissions that might result from a criticality are not deemed "normal" or "more likely than not" to occur and were not included in dosage calculations. Aff. of Richards at ¶ 28; Affidavit of Brian Palmer In Support Of DOE's Motion For Summary Judgment ("Aff. of Palmer") at ¶¶ 4-11; Aff. of Nebeker at ¶¶ 15-28. Releases that are not routine, but are more likely than not to occur, were included in the calculations of emission releases. Aff. of Richards at ¶ 14.

DEQ determined that the addition of the three pilot plants would not cause the INEL, in its entirety, to exceed the 10 mrem/yr standard required in NESHAPS. DEQ also developed stack-based emission limits and other emission standards that provide assurances that the calculated doses will not be exceeded during normal operations. Aff. of Richards at ¶ 16.

b. Alleged Use Of Incorrect Efficiency Rating Figure For High Efficiency Particulate Air ("HEPA") Filters. DEQ approved DOE's determination that the size of particle that is most effective at penetrating HEPA filters is 0.3 microns in diameter. Particles smaller in size than 0.3 microns are filtered primarily due to diffusion and interception mechanisms. Additional filtering results from straining and inertial impaction. Therefore, if pollution control equipment utilizing a HEPA filter is designed to control 0.3 micron particles, it is equally, or even more, effective at controlling less penetrating particles that are either larger or smaller than 0.3 microns. Aff. of Richards at ¶ 9. See Affidavit of Bryan T. Collins in Support of DEQ's Motion for Summary Judgment ("Aff. of Collins") at ¶¶ 8-17.

Petitioner claimed, without substantiation, that HEPA filters were not 99.97% efficient for smaller than .3 micron particles. Petition For Contested Case ¶ 3(c). The unrebutted evidence, however, provided that the HEPA filters are designed and tested to remove greater than 99.97% of the 0.3 micron particles -- the particles that are most penetrating. Particles larger and smaller than 0.3 microns are filtered at a higher percentage. Aff. of

Collins at ¶¶ 7-18, 21-22; Aff. of Richards at ¶ 29.

c. Alleged Failure To Include The Concentration Of Short-lived Radionuclides In Dosage Calculations. The Petitioner claims, without evidence, that DOE should have included the concentration of short-lived radionuclides in the dosage calculations. The evidence submitted by DEQ showed that short-lived radionuclides such as radioactive iodine will not be produced during normal operations at the facilities. See Aff. of Nebeker at ¶ 29; AR, Vol. II, Public Comments, Notegram dated January 8, 1992 from Nebeker to Kouri; Aff. of Richards at ¶ 12, 32. No short-lived radionuclides from a criticality were included in the dosage calculations since the NESHAPS calculation at this point in the process does not consider accidents such as criticalities and since DEQ determined that a criticality involving any of the three pilot plants was highly unlikely because of procedures used to prevent criticalities. Aff. of Richards at ¶¶ 13, 15.

B. Conclusions Of Law.

State regulations require owners or operators seeking and obtaining a Permit To Construct to comply with NESHAPS emission standards for radionuclides. IDAPA § 16.01.01012,05 and § 16.01.01003,30. The State of Idaho has not established an emission standard for radionuclides that is separate from federal standards but, instead, implements the federal emission standards for radionuclides (other than radon from DOE facilities) that is contained in NESHAPS. Aff. of Bauer at ¶ 17; 40 CFR §§ 61.90 - 61.97.

Compliance with the NESHAPS standards is determined by calculating the highest effective dose equivalent to any member of the public at any off-site point where there is a residence, school, business or office. 40 CFR § 61.94(a). The dosage calculation only takes into consideration releases that are caused by normal operations of the pilot plants. 40 CFR §§ 61.08(b), 61.93, and 61.94; See also "Preamble To The National Emission

Standards For Hazardous Air Pollutants; Radionuclides (Preamble)," 54 Fed. Reg. 51654, 51657 (1989).

Great deference is generally given to an agency determination which involves special skill or technical areas of expertise. Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 103, 103 S.Ct. 2246, 2255 (1983). DOE's and DEQ's decision not to include short-lived radionuclides in the calculation of the AEDE was consistent with NESHAPS. 40 CFR §§ 61.08(b), 61.93, and 61.94. Therefore, the Hearing Officer concludes that DEQ issued the Permit pursuant to and in compliance with NESHAPS.

C. Proposed Decision.

Summary judgment should be entered against the Petitioner on the issue of alleged noncompliance with NESHAPS on the ground there is no dispute of material fact and that DOE and DEQ are entitled to judgment as a matter of law.

V. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DECISION ON THE ISSUE OF DEQ'S ALLEGED FAILURE TO USE BACT IN ISSUING THE PERMIT.

Assuming that the Petitioner has standing, the following findings of fact, conclusions of law, and proposed decision on the issue of DEQ's alleged failure to use BACT in issuing the Permit are set forth.

A. Findings Of Fact.

The Petitioner claims that DEQ ignored the BACT requirements because the Petitioner questions the efficiency of the HEPA filters (discussed earlier in this decision) and because DEQ did not require additional containment structures. Petitioner submitted no evidence in support of his contentions.

The following facts are unrebutted:

DEQ determined that the use of testable HEPA filters, and the structures associated with the filters, constitutes BACT for each of the three pilot plants. The off-gas produced during operation of each of the three pilot plants is passed through at least one HEPA filter before being emitted to the atmosphere. Aff. of Richards at ¶ 20; AR, Vol. II, Final Action, Air Quality Permit at pp. 18, 22 and 28.

HEPA filters are generally accepted as BACT for the control of radionuclides. Aff. of Collins at ¶¶ 19 - 25; Aff. of Richards at ¶¶ 35 - 38 and Exhibits A, B, and C.

The proposed containment structures are sufficient to control normal emissions. Aff. of Bauer at ¶ 21; Aff. of Richards at ¶ 39.

B. Conclusions Of Law.

State regulations require that any applicant for a Permit To Construct a major modification propose and implement the best technology available for controlling emissions from the permitted emission unit. IDAPA § 16.01.01012,07.a and § 16.01.01003,16. Only normal operations are involved in the analysis of BACT. § 16.01.01003,61.

The use of HEPA filters, with all of their associated structures as described in the application submitted by DOE constitutes BACT in this case. Therefore, the Hearing Officer concludes that DEQ issued the Permit pursuant to and in compliance with BACT requirements.

C. Proposed Decision.

Summary judgment should be entered against the Petitioner on the issue of alleged failure to use BACT on the ground there is no dispute of material fact and that DOE and DEQ are entitled to judgment as a matter of law.

VI. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DECISION ON THE ISSUE OF DEQ'S ALLEGED FAILURE TO CONSIDER NEPA COMPLIANCE.

Assuming that the Petitioner has standing, the following findings of fact, conclusions of law, and proposed decision on the issue of DEQ's alleged failure to consider NEPA compliance in issuing the Permit are set forth.

A. Findings Of Fact.

Petitioner contends that prior to issuance of an air permit, DEQ must determine the adequacy of DOE's compliance with NEPA and DOE Order 5480.5.

The pilot plants are not located in a nonattainment area. 2d Aff. of Richards ¶ 5.

B. Conclusions Of Law.

The Petitioner's contention that DEQ should determine the adequacy of DOE's compliance with NEPA and DOE Order 5480.5 as part of the Permit issuance process is not authorized by Idaho statute or regulation. Cf. Idaho Code § 39-105 and IDAPA § 16.01.1012,15. The Board has expressly rejected the contention that NEPA compliance is part of the review process conducted by DEQ for the issuance of a permit. Rickards v. Idaho Department of Health and Welfare, Docket Nos. 0101-91-02 and 0101-90-44 ("Findings Of Fact, Conclusions Of Law, And Decision" October 24, 1991).

C. Proposed Decision.

Summary judgment should be entered against the Petitioner on the issue of the alleged failure of DEQ to review compliance with NEPA or DOE Order 5480.5 before issuing the Permit on the ground there is no dispute of material fact and that DOE and DEQ are entitled to judgment as a matter of law.

VII. PROPOSED ORDER.

Based on the foregoing findings of fact, conclusions of law, and proposed decisions, the Hearing Officer proposes the following ORDER:

Based upon a review of the record and the findings of fact, conclusions of law and decision of the Board of Health and Welfare, it is hereby ORDERED that Permit No. 0340-0001 regarding the Permit To Construct An Air Pollution Emitting Source issued to the U.S. Department of Energy, Idaho Operations Office for the pilot plants and pilot plant support facilities located at the Idaho Chemical Processing Plant have been issued in compliance with all governing laws, rules, and regulations and is AFFIRMED.

Dated:

December 18, 1992

Kathleen P. Allyn
Kathleen P. Allyn, Hearing Officer