

Keen, Shelley

From: Keen, Shelley
Sent: Friday, March 20, 2020 10:36 AM
To: 'Roger Warner'
Subject: RE: 25-14419 Amended Preliminary Order

Roger,

Sorry for the slow response. We've been tending to operational matters that may enable us to maintain some sense of business as usual.

The extension request for Permit 25-14419, as originally submitted, did not have enough evidence to overcome the Idaho Code § 42-204 requirement that work start within a year to "commence the excavation or construction of the works" and proceed "diligently and uninterruptedly" thereafter. The request stated that no work had been done, and it included no documentation of the circumstances surrounding the need to relocate the Idaho Falls facility. It was after the proof due date and the notice of lapsing when IDWR received good documentation of the fact that the Idaho Falls relocation was unanticipated and involuntary. Idaho Code § 42-218a states, "The original priority date of a lapsed permit shall not be reinstated except upon a showing of error or mistake of the department." IDWR did not err in its decision to deny the extension request as it was originally presented, i.e. with very little explanation and no supporting documentation.

You might be heartened to know that Senate Bill 1316 (the "RAFN" bill), which was signed by the Governor and becomes law on July 1, 2020, eliminates the requirement to start excavation or construction within a year and to proceed diligently thereafter. The change may actually give IDWR latitude to apply "good cause" even more broadly in the future. However, it may also put more burden on the permit holder to explain and document why IDWR should find "good cause." IDWR may need to revise its request form before July 1.

Regards,

Shelley

Shelley Keen
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From: Roger Warner [mailto:rog.rmea@gmail.com]
Sent: Wednesday, March 18, 2020 12:50 PM
To: Keen, Shelley <Shelley.Keen@idwr.idaho.gov>
Subject: RE: 25-14419 Amended Preliminary Order

Shelley,

Thank you for the order re-instating the permit. I have one question.

I don't understand why was the priority date was advanced when the original Request-For-Extension-of-Time form was receipted on November 18, 2019 and the Proof due date was January 1, 2020?

In that original Request, the applicant wrote, *"We had to move our Idaho Falls location and develop that facility first. This project was put on hold because of that."* In the recent order, item 4 states that the "Department issued a Preliminary Order Denying Request for Extension of Time ("Preliminary Order") because the Permit Holder had not demonstrated good cause for an extension, as required by Idaho Code 42-204(6)." (emphasis added)

The "good cause" referred to herein did not change between the statement made on the original request for extension of time and the Response to Request for Documentation . In the original petition, the applicant requested an extension based upon a brief but truthful explanation of an unanticipated situation that occurred to his business. The only difference was that additional evidence supplied to the Department seemed to now convince the Department that the Applicant was truthful in his original request for an extension.

I struggle understanding what level of evidentiary standard now constitutes "good cause." I am grateful that we must have achieved that level with the supplemented information received by the Department but I was unsure. Hence, my follow-up phone call after sending you the material. But do we now have a new level of evidentiary standard applied to extension of time requests? And if so...when and how did it change?

Shelley... wasn't it possible to have just rescinded the preliminary order and reinstated the permit without advancing the priority date on the basis that the original request for extension of time was timely and was actually a valid "good cause?"

Thanks for providing some time to read this. I value my friends especially in these crazy times we find ourselves in.

Warm regards,

Roger

W. Roger Warner, Hydrologist

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Check out our Rocky Mountain Environmental Associates Facebook page!

From: Judd, Debbi [<mailto:Debbi.Judd@idwr.idaho.gov>]

Sent: Wednesday, March 18, 2020 8:54 AM

To: akm@sunnysidegardens.net; Jerry Rigby <jrigby@rex-law.com>; Roger Warner <rog.rmea@gmail.com>
Subject: 25-14419 Amended Preliminary Order

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