

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

STATE OF IDAHO

J.R. SIMPLOT COMPANY, Air Quality Tier I)
Operating Permit and Permit to Construct Number 077-)
00006 (Don Siding Plant),)

Petitioner,)

v.)

IDAHO DEPARTMENT OF ENVIRONMENTAL)
QUALITY,)

Respondent.)

Docket No. 0101-03-07

ORDER ON INTERVENTION

PROCEDURAL BACKGROUND

On December 24, 2002, the Idaho Department of Environmental Quality (“IDEQ”) issued Air Quality Tier I Operating Permit No. 077-00006 (“Don Tier I Permit”) for the J.R. Simplot Company’s (“Simplot”) phosphate fertilizer manufacturing plant located in Pocatello, Idaho (“Don Siding Plant”). On January 28, 2003, Simplot filed a *Petition for Contested Case Proceeding, Petition for a Declaratory Ruling, and Request for a Stay of Permit Conditions* (“*Contested Case Petition*”) with the Idaho Board of Environmental Quality (“Board”), seeking review of specific conditions of the Don Tier I Permit. The Board appointed a hearing officer to preside over the proceedings. On February 21, 2003, the Idaho Conservation League (“ICL”)

filed a timely *Petition to Intervene* in the contested case pursuant to Rule 58.01.23.350 and Rule 58.01.23.351 of the Rules of Administrative Procedure Before The Board of Environmental Quality (“IDEQ Rules” or “Rules”). On February 28, 2003, a timely objection to ICL’s *Petition to Intervene* was filed by Simplot. IDEQ did not take a position before the Hearing Officer on ICL’s request for intervention.

The Hearing Officer denied ICL’s *Petition to Intervene* in two orders: the *Amended Order on Petition to Intervene* dated April 8, 2003, and the *Order on Motion for Reconsideration* dated May 5, 2003 (collectively, the “Orders”). On May 12, 2003, ICL submitted to the Board a *Petition for Review of Orders Denying Intervention*. Simplot filed a response objecting to ICL’s request for intervention and IDEQ submitted a *Memorandum Regarding Intervention* in which the agency argues that ICL has not met the standard for intervention required by the Rules. On May 28, 2003, the Board, after fully considering the record and the oral and written arguments of the parties, by majority vote, affirmed the Hearing Officer’s decision to deny ICL’s *Petition to Intervene* in this contested case. Board member Donald J. Chisholm participated in the hearing and deliberations, but declined to join in the opinion.

STANDARD FOR INTERVENTION

ICL’s request for intervention is governed by IDEQ Rules 350, 351, and 353. Rule 350 provides that “[p]ersons not petitioners or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party.” IDAPA 58.01.23.350. Rule 351 requires a potential intervenor to “state the direct and substantial interest of the potential intervenor” and if seeking affirmative relief, the basis for granting it. IDAPA 58.01.23.351. A presiding officer in a contested case may grant intervention “if a petition to intervene shows [a] direct and substantial

interest in any part of the subject matter of the proceeding, does not unduly broaden the issues, and will not cause delay or prejudice to the parties.” IDAPA 58.01.23.353. “[A] permit applicant or permit holder may intervene as a matter of right in any contested case in which the permit is contested.” *Id.* Under the Rules, intervention of persons other than a permit applicant or permit holder is not an express right but is subject to the sound discretion of the Board.

The phrase “direct and substantial interest” is not defined in the Rules, nor have we found a ready and convenient definition elsewhere. However, the Idaho Public Utilities Commission (“PUC”) has had occasion to apply similar rules, which state:

Rule 71. Order Granting Intervention Necessary. Persons not original parties to a proceeding who claim a direct and substantial interest in the proceeding may petition for an Order from the Commission granting intervention to become a party.

Rule 72. Form and Content of Petitions to Intervene. The Petition must . . . concisely state the direct and substantial interest of the petitioner in the proceeding.

In applying these rules, the PUC has determined that statements describing generalized grievances do not meet the direct and substantial interest test. For example, in a case involving approval of a special contract for electric service, the PUC found a petition to intervene submitted by the Idaho Rural Council defective because only general allegations were made that the decision in the case might impact residential customers. *See In The Matter of the Joint Application of Idaho Power Company and FMC Corp.*, Case No. IPC-E-97-13, Order No. 27551.

Similarly, in a case involving the sale and transfer of a domestic water system, the PUC initially denied intervention to petitioners whose claim was that they would be directly affected by the outcome of the case. *See In the Matter of the Joint Application of United Water Idaho Inc. and Barber Water Corporation*, Case No. UWI-W-99-2, Order No. 28048. However, after

the petitioners filed additional statements listing numerous specific questions they alleged could only be answered if granted intervenor status as well as an economic interest in the sale, the PUC granted intervention. That decision was based upon a finding that petitioners had provided the PUC “with further information and succeeded in clearly articulating a direct and substantial interest in this proceeding and further identified the ramifications of not being granted intervention rights.” In the Matter of the Joint Application of United Water Idaho Inc. and Barber Water Corporation, Case No. UWI-W-99-2, Order No. 28062 at 2.

The reasoning of the PUC informs our decision here. The plain meaning of the phrase “direct and substantial interest” suggests that more is required of a would-be intervenor than a generalized interest in the proceedings. To support a claim of direct and substantial interest, the allegations made in support of the claim must be factually supported and specific to the party making the claim. The would-be intervenor must articulate the unique way in which he or she will be affected by disposition of the case. Generalized grievances or concerns shared by all citizens do not suffice. To hold otherwise would invite participation in contested cases from persons with only mere concern or tangential interest in the contested matter. With these principles in mind, we examine the sufficiency of the statements presented by ICL to support their direct and substantial interest claim.

ICL’S CLAIMS

ICL makes three arguments. First, “ICL asserts that as a matter of law it would have legal standing to petition the Board of Environmental Quality for a contested case hearing in its own right. . . .” and that “ICL plainly meets the lesser standard for intervention” *ICL’s Motion for Reconsideration*, p. 2. In advancing this argument, ICL relies upon a recent order of the Board (*see, In the Matter of Section 401 Water Quality Certification for Relicensing of the*

C.J. Strike Hydroelectric Facility, Docket Number 0102-01-06, November 4, 2002). There, the Board decided that ICL had standing to represent its members in a contested case proceeding because the member affidavits contained factual assertions showing distinct, individualized, and palpable injuries that could be redressed by the proceeding and a causal connection between the alleged injury and the challenged conduct. This, in conjunction with ICL's participation in the public comment process, led the Board to find that ICL had standing.

Whether ICL is an aggrieved party with standing pursuant to IDAPA 58.01.23.010.01 is not at issue here.¹ The issue is whether the quality of evidence presented in ICL's petition and supporting documents is sufficient to show a direct and substantial interest in litigation about the terms of the Don Tier I Permit challenged by Simplot.

ICL's second argument is that "the Clean Air Act and federal regulations mandate that ICL be provided standing where, as here, it has participated in the public process for the Don Siding Tier I issuance." *ICL's Motion for Reconsideration*, p. 3. In advancing this argument, ICL relies on language of the Clean Air Act found at 42 U.S.C. ¶ 7661a(b)(6). That language reads as follows:

(b) Regulations. . . . (6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

¹ **58.01.23.010.01. Aggrieved Person Or Person Aggrieved.** Any 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.

Petitioner's arguments concerning intervention seem to be predicated on the assertion that all persons interested in clean air and who participate in the public comment process have a right to participate in related contested cases as full parties. There is no such right. The Board may allow intervention as a matter of discretion. Thus, the Hearing Officer rejected the theory that the Clean Air Act bestows automatic standing or the right to intervene upon persons who participated in the relevant public hearing process. We do so as well. We have been provided with no case law, regulations, or policy guidance documents that support the notion that this statutory provision alone entitles ICL to seek review and intervene automatically. To the contrary, Commonwealth of Virginia v. Browner, 80 F.3d 869, 877-878 (4th Cir. 1996), cited by both ICL and Simplot, holds that § 7661a(b)(6) merely ensures that the Clean Air Act does not inadvertently diminish standing rights previously granted under state laws, and does not require public comment participants to otherwise have standing under existing state law. Id. at 877.

Finally, we turn to the argument that ICL's petition and supporting documents are factually sufficient to meet the direct and substantial test. ICL relies on the affidavit of one of its members, Mr. John Schmidt, to demonstrate the requisite level of interest to qualify for intervention. Mr. Schmidt's affidavit states that he developed asthma since moving to Pocatello and that he has heard numerous stories from others about how they have suffered respiratory illnesses since locating to the Pocatello area. He alleges that doctors specializing in respiratory ailments have told him of concerns about air quality in the area. He states that he has been personally involved in advocating for improved air quality in Pocatello for many years and that the Don Siding facility's Clean Air Act compliance is of high importance to him and other ICL members. Mr. Schmidt also opines on the importance of thorough monitoring, particularly monitoring citizen complaints concerning foul odors emanating from the plant.

We agree with the Hearing Officer that these statements do not articulate a direct and substantial interest in the contested case proceeding, but instead represent generalized concerns and interests. With respect to Mr. Schmidt's assertion about developing asthma since moving to Pocatello, we find nothing in the affidavit connecting this assertion to the disposition of the contested case, the Don Tier I Permit, or the more specific concerns about monitoring odor complaints. The affidavit does not describe Mr. Schmidt's activities in the area or how he will be affected if Simplot is successful in eliminating specific permit conditions. He does not allege that his asthma is environmentally induced by air pollution from the Don Siding Plant or that his activities will be curtailed if Simplot is successful in its challenge to the Don Tier I Permit terms. To the contrary, the petition and affidavit articulate a generalized interest in air pollution in Pocatello and the emissions from the Don Siding Plant; however, a generalized interest in clean air is not enough to establish the right to intervene.

Moreover, the nexus between ICL's generalized concerns about air quality and the specific conditions of the permit challenged by Simplot is unclear. The only reference to Simplot's challenges to the permit terms in the *Petition to Intervene* and supporting documents is in Mr. Schmidt's affidavit. There, Mr. Schmidt states: "As one example of a specific issue of concern for myself and ICL, the Tier I permit requires Simplot to monitor citizen complaints concerning foul odors emanating from the plant, yet I understand that Simplot is challenging that requirement in this case." See *Affidavit of John Schmidt*, ¶ 7, dated March 5, 2003. Although his observations are accurate, Mr. Schmidt makes no connection between Simplot's challenge to the odor monitoring requirements and the specific effect on him personally should those terms be revised as a result of the contested case proceeding. Because Mr. Schmidt's overall concerns about the volume of pollution in Pocatello and the stringency of controls at the Don Siding Plant

are not particularized concerns, ICL has not demonstrated that it or its members are uniquely situated. Interests that are shared by all citizens do not meet the standard for intervention.

**ICL IS NOT PRECLUDED FROM FURTHER INVOLVEMENT
SHOULD THE PERMIT BE REVISED**

Disposition of this matter will not impair or impede ICL's ability to protect its interest should the terms of the Don Tier I Permit be revised. Many administrative steps will precede a final decision on the permit terms. If changes are made as a result of the contested case, a new draft permit will be distributed to the public for comment. *See* Transcript of Oral Argument dated June 19, 2003, at 38, L. 11. The draft permit will also be resubmitted to the Environmental Protection Agency for review. *Id.* at 38, L. 19. If ICL is unhappy with the result, the organization has recourse to this Board and to the courts by filing a contested case action, provided it fulfills all legal and factual requirements prerequisite to such an action.

ORDER

In consideration of the foregoing and as more particularly described above, IT IS HEREBY ORDERED that the Petition for Intervention filed by the Idaho Conservation League is DENIED.

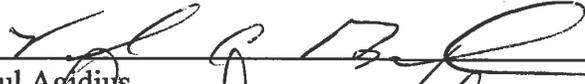
THIS IS AN INTERLOCUTORY ORDER. *See* IDAPA 58.01.23.710.

Any party or person affected by an interlocutory order may petition the presiding officer issuing the order to review the interlocutory order. The presiding officer issuing an interlocutory order may rescind, alter or amend any interlocutory order on the presiding officer's own motion, but will not on the presiding officer's own motion review any interlocutory order affecting any party's substantive rights without giving all parties notice and an opportunity for written comment.

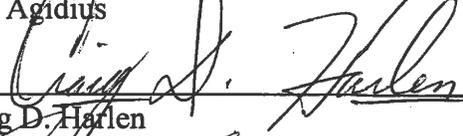
IDAPA 58.01.23.711.

DATED this 13th day of August 2003.

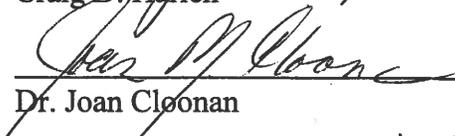
BOARD OF ENVIRONMENTAL QUALITY



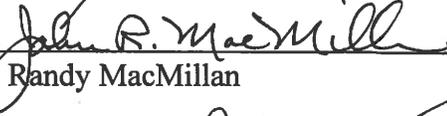
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of August 2003, I caused to be served a true and correct copy of the foregoing **ORDER ON INTERVENTION**, by the method indicated:

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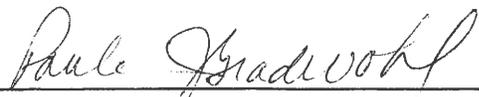
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