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Hearing Officer

BEFORE THE IDAHO BOARD OF ENVIRONMENTAL QUALITY

MARK SOLOMON, a natural person, FRIENDS OF THE CLEARWATER, a non-profit corporation, and the IDAHO CONSERVATION LEAGUE, a non-profit corporation, Petitioners, v. THE IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent, and The Potlatch Corporation, Intervenor.	Docket No. 0101-03-01 ORDER DENYING RECONSIDERATION OF MOTION TO DISMISS, MOTION FOR SUMMARY JUDGMENT AND OTHER PRELIMINARY MATTERS

This matter is before the Hearing Officer on 'Intervenor Potlatch Corporation's Motion for Reconsideration of Order Regarding Motion to Dismiss, Motion for Summary Judgment and Other Preliminary Matters' and 'Respondent Department of Environmental Quality's Motion for Reconsideration' in the above entitled matter.

The Petition challenges the issuance by IDEQ of separate Tier 1 air emissions permits to Potlatch's Clearwater Lumber Division (Clearwater) and to Potlatch's Idaho Pulp and Paperboard and Consumer Products Division (IPPD/CPD). The Petition

essentially seeks to have IDEQ issue only one permit for the operation of both divisions. If one of the facilities is in reality a support facility for the other, then one permit should issue for both.

It was concluded in the earlier Order denying motions for summary judgement that Clearwater and IPPD/CPD are clearly closely interrelated facilities and substantially rely on each other in their operations. Petitioners argue that Potlatch is seeking separate permits to avoid (or make difficult) enforcement should future violations of the permits occur. However, the law and regulations allow Potlatch to seek and be granted separate permits under present circumstances, upon demonstrating that Clearwater and IPPD/CPD are 'separate' facilities. IDEQ had no choice but to grant the requested permits based on all presently available facts and evidence.

Potlatch ("Intervenor") seeks reconsideration on the ground that the Hearing Officer committed error in failing to grant Potlatch's motion for summary judgment and to dismiss with prejudice the Petition filed by Mark Solomon, Friends of the Clearwater ("FOC") and the Idaho Conservation League ("ICL") (collectively, "Petitioners").

Summary Judgement:

The standard of review for summary judgment has been set forth in a long line of cases, the most recent being *Meikle v. Wadson*, 2003 Opinion No. 48, Filed February 18, 2003. *Meikle* sets forth the following:

> Summary Judgment shall be rendered *if the pleadings, depositions and admissions on file together with the affidavits, if any, show 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.* I.R..C.P. 56 (c). This court liberally construes the record in favor of the party opposing the motion and draws all reasonable and conclusions in that party's favor. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). If reasonable persons could reach differing conclusions or draw

conflicting inferences from the evidence, summary judgement must be denied *Harris v. Department of Health and Welfare*, 123 Idaho, 295, 298, 847 P2d 1156, 1159 (1992). *** However, if the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

Id at 3, 4. Additional cases set forth further summary judgment guidance:

"In making this determination, all allegations of fact in the record in the record, and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion." *City of Kellogg v. Mission Mountain Interests Lmt., Co.*, 135 Idaho 239, 243, 16 P.3d 915, 919 (2000). The burden of proving the absence of material facts is upon the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 126, 127 (1988). The burden of establishing the absence of a genuine issue of material fact rests at all times the party moving for summary judgment. *Tingley v. Harrison,* 125, Idaho 186, 189, 867, P.2d 960, 963 (1994).
In order to meet its burden, the moving party must challenge in its motion and establish through evidence the absence of any genuine material fact on an element of the non-moving parties' case. *Thompson v. Idaho INS Agency*, Inc.126 Idaho 527, 530, 887 P.2d 1031, 1038 (1994).

Standing:

To establish standing, Petitioners bear the burden of demonstrating 1) an injury which is real, concrete and particularized, actual and imminent, and not just speculative or hypothetical; 2) there is a causal connection between the injury suffered and the conduct complained of and, 3) that a decision in their favor will redress the injury. *In the Matter of Section 401 Water Quality Certification for Relicensing of the C.J. Strike Hydroelectric Facility*, Docket No. 0102-01-06, (Order at 3, November 4, 2002).

An injury-in-fact has been demonstrated where the aesthetic and recreational value of the affiant is lessened by the complained-of activity. *Friends of the Earth v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167 at 181-183 (2000).

Petitioner organizations must also show that 1) their members would have standing to sue individually; 2) they are seeking to protect interests that are germane to

their purposes; and 3) neither the claim asserted nor the relief requested requires the organizations' members to participate in the lawsuit. *Id* .at 180-181.

The "Supreme court has long recognized that an association may have standing to assert the claims of its members even where the association itself has suffered no injury from the challenged activity." *In the Matter of Section 401 Water Quality Certification for Relicensing of the C.J. Strike Hydroelectric Facility*, Docket No. 0102-01-06, (Order at 5, November 4, 2002).

In Idaho, the law regarding standing as set forth in *Laidlaw* is not so clearly articulated. As stated in *C.J. Strike*, "Nor have the Idaho appellate courts had occasion to apply that analytic inquiry and principles articulated by the United States Supreme Court in *Laidlaw*." *Id.* at 10.

In the *Boundary Backpackers* case, the Idaho Supreme Court held that "To satisfy the case or controversy requirement of standing, a litigant must "allege or demonstrate an injury in fact and a substantial likelihood that the relief requested will prevent or redress the claimed injury." *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) as cited in *In the Matter of Section 401 Water Quality Certification for Relicensing of the C.J. Strike Hydroelectric Facility*, Docket No. 0102-01-06, (Order at 8, November 4, 2002).

In *Young v. City of Ketchum*, the Idaho Supreme Court stated that the demonstration of an injury in fact and redressability requires "a showing of a 'distinct palpable injury' and a 'fairly traceable causal connection between the claimed injury and the challenged conduct." *Young v. City of Ketchum*, 137 Idaho 102, 44 P.3d 1157 (2002) quoting *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757 (1989).

Potlatch's Arguments:

Potlatch submitted that the Hearing Officer committed error when he failed to grant Potlatch and Idaho Department of Environment Quality (IDEQ) summary judgment as a matter of law. Potlatch argues that the Hearing Officer "erroneously found that Petitioners have legal standing to peruse this proceeding before the Board of Environmental Quality (the "Board"); (2) erroneously failed to dismiss Petitioners' objection to air quality modeling; and (3) erroneously found that genuine issues of material fact exist regarding whether Potlatch's Clearwater wood products division (Clearwater) and the Idaho Pulp and Paper Division "(IPPD)" "(Consumer Products Division) (CPD)" are separate facilities for the purposes of title five permitting.

Potlatch argues that "because Petitioners failed to prove essential elements of their case, no genuine issues of material fact can exist." The Hearing Officer agrees that if Petitioners fail to prove essential elements of their case, that summary judgement will be appropriate, however, all reasonable inferences and conclusions must be considered as favoring the Petitioners at this stage of the proceeding.

Potlatch relies on *Rebound v. Idaho Department of Health and Welfare*, case number 0101-99-07, Order Affirming Decision of the Hearing Officer (February 28, 2000), and *In the Matter of Section 401 Water Quality Certification for Relicensing of the C.J. Strike Hydroelectric Facility*, Docket No. 0102-01-06, (Order, November 4, 2002).

Citing *Strike* (page 3) Potlatch points out that a petitioner must demonstrate (1) an injury which is real, concrete, and particularized, and actual and imminent, and not just speculative and hypothetical; (2) a causal connection between the challenged action in the injury; and (3) likelihood that the injury will be regressed by favorable decision. Citing

Strike (page 5), Potlatch points out that an organization must demonstrate (1) it's members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organizations purpose; (3) neither the claim asserted nor the relief requested require the protection of individual members of the lawsuit.

At issue is (1) that the Petitioners have met the foregoing standards and (2) is it necessary these standards be met at this early stage of the proceeding before discovery has taken place and before evidence is presented at hearing.

Lujan is cited for the principle that because elements of standing are an indispensable part of Petitioners' case on summary judgment, each element must be supported by proof with specific facts. However, if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence, summary judgement must be denied. *Lujan v. Defenders of Wildlife* 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 251 (1992).

In the earlier order denying summary judgement, it was concluded by the Hearing Officer that Mr. Solomon's affidavit contained the minimal necessary facts to confer standing on Mr. Solomon at this stage of the proceeding. It was also noted that Mr. Solomon is a member of the organizations seeking standing and the ability of a member to have standing is one basis for developing organizational standing. It was also noted that Mr. Solomon testified, submitted argument, and participated in the underlying IDEQ hearing prior to the issuance of this permit.

Potlatch argues that the Hearing Officer appears to allow the merits of the petition to influence his decision on the standing issues. Brief at 5. However, the petition is a pleading that must be considered in determining that there is no genuine issue of fact.

At page six of its brief, Potlatch argues that the Hearing Officer relies on speculative and hypothetical injury to find that Petitioners have standing. Potlatch describes the Hearing Officer's statement as to potential injuries as "exactly the sort of factually unsupported, generalized and hypothetical statement that fails to distinguish these Petitioners from any other citizen in the area and cannot be relied upon to show standing." However, even if Potlatch's view and conclusion as to these statements is accurate, the Petitioners are entitled a liberal construction of the record and to a decision that conflicting inferences from the evidence will result in denial of summary judgement.

On page 8 of its brief, Potlatch argues that the Hearing Officer is arbitrarily establishing a new lower standard for standing in a contested case proceeding. Potlatch however, suggests an unreasonable standard wherein a petitioner would be required to prove every element of a potential case prior to discovery and argument on the issues.

On page 9 of their brief, Potlatch submits that the Hearing Officer erred in failing to conclusively deny Petitioners claim regarding air dispersion modeling. The earlier order indicated that "Petitioner has not demonstrated that modeling must be an aspect of this permit process. The Hearing Officer is not convinced that modeling has any relation to the issuance of two permits rather than one."

On page 9 of its Response to Petitioner's Petition to Review, Potlatch states "Moreover, one cannot see how this alleged material mistake is related to the issuance of these two permits since IDEQ did not perform and was not required to perform ambient

air analysis (specifically, IDEQ was not required to identify an ambient air boundary) to issue the two permits involved in this proceeding." However, on page 1 of Exhibit E, the letter written from Lisa J. Kronberg to Susan J. Flieder regarding the issuance of two separate permits for Clearwater and PPD, Kronberg states "Notably, IDEQ must consider the air between these two (2) separate facilities as ambient air for permitting purposes."

While the Hearing Officer continues to hold his foregoing view as to modeling, this claim was not inclusively disposed of because of the inferences that the Petitioners are entitled to. It is not inconceivable that Petitioners might establish some basis in fact or law that modeling should have been part of IDEQ's assessment of property in this permit. No additional light is thrown on this issue in the Petitioners' current briefing that would alter the Hearing Officer's view.

Potlatch also maintains that Hearing Officer erred in finding that genuine issues on material fact exist on the question of whether Clearwater and IPPD/CPD are separate facilities for the purposes of title five permitting. Potlatch maintains that "the inquiry in the use, exchange and conveyance of other resources, such as the by-product (I.E. wood scrap or steam), between Clearwater and IPPD/CPD is immaterial in determining if Clearwater and IPPD/CPD are separate facilities." Although there is substantial information in the record for the position taken by Potlatch and IDEQ, when one considers that every inference must be given to the Petitioners position, material facts continue to exist relating to the separateness of the facility. The record shows that only slightly more than 50 percent of the wood material received by Clearwater leaves as finished wood products. This potentially leaves a substantial amount of material in the

"by-product" category. Little or no statistical evidence regarding this production exists in the record.

In that the determination of separateness is a prerequisite to the issuance of the requested permit, it would have been reasonable to require Potlatch to produce data supporting the figures that were used.

Although Potlatch maintains that the Hearing Officer rejected IDEQ's determination to issue two permits to Potlatch based on his assessment that IDEQ's review of information regarding the flow of by-product was inadequate, this is an inaccurate view of the decision. The Hearing Officer has not rejected IDEQ's determination in any way. The Hearing Officer has simply rejected the motions to dismiss and motions for summary judgement formulated by Potlatch and IDEQ.

Potlatch argues that all IDEQ had to do was focus on the two digit SIC code, which focuses on the two products produced by the facility of facilities and ignores the extensive interrelationship of materials and services which Clearwater and IPPD/CPD provide each other. Potlatch further alleges that the Hearing Officer mischaracterized the valuation of Gary McCutchen as "evidence." It is the Hearing Officers' view that the affidavit and analysis provided by Mr. McCutchen was the equivalent of expert testimony supporting the merits of the position taken by Potlatch and IDEQ. It still seems fair to allow Petitioners to respond with similar analysis. The most expeditious way to achieve this it to take additional evidence and testimony at hearing.

IDEQ's Arguments:

The Idaho Department of Environmental Quality (IDEQ), joined Potlatch's Motions for Dismissal and Summary Judgment and joins the Motion for Reconsideration.

IDEQ also persuasively argues that the affidavits of the Petitioners are inadequate to prevail on the standing issue. IDEQ argues that the same process would be followed in enforcing the permits whether one permit was issued or two permits. "What matters is determining whether the specific source is out of compliance." Motion for Reconsideration at 5.

"The issuance of multiple PTCs (permits to construct) doesn't make it more difficult to enforce the PTC term or condition that is being violated." Motion for Reconsideration at 6.

It appears IDEQ did not 'agree' with Potlatch that less than fifty percent of the total by-product of wood fuel and chips used by IPPD is supplied to Clearwater; rather DEQ accepted Potlatch's submittal as true, accurate and complete, per IDAPA 58.01.01.124.

"If it is the Hearing Officer's ruling that DEQ is legally required to do more than it did, such a conclusion must be finally determined by the board of environmental quality immediately as numerous decisions are made on a daily basis based on information submitted by a facility without independent DEQ investigation." Motion for Reconsideration at 6.

The state cites *Badell v. Beeks,* 115 Idaho 101, 102, 765 P2d 126, 127 (1988) for its position that Petitioners must make a showing sufficient to establish the existence of each essential element of a case on which they bear the burden on proof at a hearing. Motion for Reconsideration at 7.

IDEQ discusses the fact that the agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of evidence. Motion for Reconsideration at 8. IDEQ's experience and technical competence are not in dispute.

IDEQ also argues that requiring modeling would be inconsistent with The Rules for the Control of Air Pollution in Idaho IDAPA 58.01.01.300. Motion for Reconsideration at 9.

The Petitioners' Arguments:

Petitioners argue that the issuance of two permits at the inter-related site could inhibit the ability of regulatory agencies to enforce clean air regulations. Petitioners apparently believe that the issuance of one permit rather than two will enhance the ability to enforce the Potlatch regulations.

Standing

In Petitioner's Reply to Motions for Reconsideration, Petitioners assert that, while they agree that a demonstration of standing at the earliest possible juncture is ideal, there is no law to support Potlatch's and DEQ's position that such a demonstration must be made in an affidavit filed simultaneously with the petition and in no other way, at no other point in time. Reply at 3.

Petitioners argue that the Board in *Rebound*, supra, urged an early demonstration of standing, but did not define exactly how or when that showing must take place and cited no case law in support of its statement general policy. Reply at 3.

Petitioners request a broad definition of standing, which would include not only the asserted aesthetic and recreational injuries to Solomon and members, but also the time Solomon has put into the public process (as the Board considered in *C.J. Strike*, supra),

and looking beyond only Solomon's affidavit to the Petition, Petitioner's Response to Motions for Summary Judgment, and oral argument at the hearing. Reply at 5,8.

"The determination of standing must be based on the 'totality of the motions, affidavits, depositions, pleadings, and attached exhibits, not merely to portions of the record in isolation." Reply at 11 citing *Doe v. Durtschi,* 110 Idaho 466, 716 P.2d 1238 (1986).

A primary issue regarding standing in this case is the causal connection between the injury-in-fact and the issuance of two permits as opposed to one. Petitioners have stated that "[i]n this process the Court must look to the totality of the motions, affidavits, depositions, pleadings, and attached exhibits," to determine standing, and the Hearing Officer must also do so. Reply at 2 citing *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

A review of the totality of the information before the Hearing Officer follows.

In his Affidavit, Mark Solomon stated that he is a member in good standing of both the Idaho Conservation League and Friends of the Clearwater for the purposes of protecting the human and natural environment from water and air pollution. Affidavit of Mark Solomon p. 1.

In their Petition for Contested Case Proceeding, Petitioners set forth the injuries to Mr. Solomon and other members, including being exposed to pollution, diminished visibility of the Hells Canyon Wilderness Area, odor, endangerment to health, and diminished quality of living, working and recreating in the areas surrounding the Potlatch facility due to the pollution emitted therefrom. Petition for Contested Case Proceeding at 3.

In their Response to Potlatch Corporation's Motion to Dismiss or, Alternatively, Motion for Summary Judgment, Petitioners argue that they will be adversely affected by the issuance of two Tier 1 permits versus a single permit because two permits will render "the ability of IDEQ to monitor and enforce air quality standards dramatically more difficult." Response at 21.

This causal connection is further set forth in Petitioners' Reply to Potlatch and Idaho Department of Environmental Quality's Motions for Reconsideration wherein it states with regard to Mr. Solomon "The inability of IDEQ to enforce air quality standards for a large industrial complex located in a deep canyon environment where the air becomes easily trapped, impairs his aesthetic and recreational enjoyment of the area, as well as his health." Reply at 5.

Have the Petitioners' asserted an injury that is real, concrete and particularized, and actual and imminent as opposed to just speculative or hypothetical? Petitioners assert that Potlatch's argument that the harm alleged by Petitioners is "speculative" "flies in the face of countless Ninth Circuit environmental rulings involving challenges to everything from construction of power plants to logging of forests." Reply at 6. "One never knows with certainty what will be the exact environmental consequence of a given action, but that does not prevent plaintiffs in environmental cases from seeking to prevent governmental action that doesn't fully take into account what the environmental consequences will be and disclose that information to the general public." Reply at 6.

Petitioners repeatedly cite *C.J. Strike,* supra, and point out the similarities between that case and this one: "Like *C.J. Strike*, Petitioners here participated in the public process through their member Mark Solomon . . . the Clean Air Act and the Department's policy

to allow those who participated in the underlying administrative process standing to initiate a contested case are applicable . . . Finally . . . the concern articulated here by Petitioners is that the Department's certification of Potlatch as two separate facilities for permitting purposes 'fails to provide reasonable assurance' that air quality standards will be met." Reply at 9.

In their Reply, Petitioners identify the concrete and particularized harm as being "the complete inability of the only governmental agency currently responsible for enforcing the Clean Air Act to ensure that air quality standards are met." Reply at 9-10. Further, that the air pollutants that Potlatch injects into the Lewiston airshed cause considerable damage, specifically to Petitioners. Reply at 10. Petitioners specifically assert the causal connection between the harm and the issuance of two permits as being "the probability of protracted periods during which the public is exposed to unsafe levels of toxic air pollutants." Reply at 14.

Petitioners argue that the issuance of two permits at the inter-related site could inhibit the ability of regulatory agencies to enforce clean air regulations. Petitioners apparently believe that the issuance of one permit rather than two will enhance Potlatch Corporation's accountability for emissions violations at this site. Petitioners argue that "Clearwater is unregulated because EPA and IDEQ have failed to finalize the regulatory guideline to establish limits that would apply to Clearwater." Reply at 13. Therefore, Petitioners assert, if IDEQ did detect exceedances of methanol/VOCs at the single fence perimeter surrounding both operating divisions, under two Tier 1 permits, if Potlatch could provide data from IPPD to verify that it was meeting permit limits, IDEQ would be faced a known source, Clearwater, for which it has no enforcement authority because

methanol is not a regulated pollutant under existing permits. Reply at 13. The result could be a protracted violation of air quality standards "while IDEQ tries to figure out what to do next." Reply at 13-14. However, under a single permit, IDEQ could insist that the Potlatch facility as a whole comply with NAAQs. Reply at 14.

Because Petitioners have asserted an injury (impairment to aesthetic and recreational value), a cause (air pollutants that Potlatch injects into the Lewiston airshed cause considerable damage specifically to Petitioners/ the probability of protracted periods during which the public is exposed to unsafe levels of toxic air pollutants), and that their injury would be redressed by the issuance of only one permit, thereby making enforcement easier for DEQ to handle, they have minimally demonstrated standing.

Modeling:

In Petitioner's Petition to Review, it is asserted that by Intervenor's request for separate Tier I permits, it has changed the ambient air boundary of the two facilities. "No ambient air quality modeling has been performed using the new ambient air boundary and, thus, new modeling must be ordered using appropriate models." Petition at 6. "Potlatch cannot claim that it constitutes two separate facilities with respect to the support-facility concept, while utilizing ambient air quality modeling that assumes that it is a single, indivisible operating entity." Petition at 7.

Petitioner asserts that IDEQ accepted modeling for two separate side by side facilities without requiring an assessment of impacts of each on the property of the other, and that this was a mistake considering IDEQ's own Air Quality Modeling Guideline and its Air Pollution Control Rules. Petition at 8. Further, "IDEQ still has an obligation under

its own regulations cited previously in Petitioners' briefs to reopen permits if it determines a "mistake" has been made." Petition at 7.

Conclusion:

The Hearing Officer maintains his decision regarding standing. The determination as to the separateness of the two facilities remains an issue of genuine fact. Summary Judgment under the present circumstances would be premature.

Decision:

That the Motion of Potlatch and IDEQ for Reconsideration of the Order pertaining to dismissal and summary judgement in the above Petition be denied. This matter shall proceed to hearing.

DATED this 14th day of June 2003.

William L. Herrington
Hearing Officer