BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

The J.R. Simplot Company Air Quality Tier I Operating Permit No. 077-00006 (Don Siding Plant) Petitioner, v. Idaho Department of Environmental Quality, Respondent.	Docket No. 0101-03-07 **AMENDED ORDER ON PETITION TO INTERVENE**

On January 28, 2003, the J.R. Simplot Company (Simplot) filed a Petition for a Contested Case Proceeding and Request for a Stay of Permit Conditions with The Idaho Board of Environmental Quality. On February 21, 2003, the Idaho Conservation League (ICL), an Idaho Non-Profit Conservation Organization with approximately 3000 resident members filed a Petition to Intervene 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 (The Rules). Simplot filed an Objection to ICL'S Petition to Intervene on February 28, 2003. ICL filed a Reply In Support on March 5, 2003. The standard for Intervention is set forth in Rule 350 of The Rules:

> Persons 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.

Rule 351 of The Rules requires that a petition "...state the direct and substantial interest of the potential intervenor...." and if seeking affirmative relief, the basis for granting it.

In support of its request to intervene, ICL has attached to its Reply In Support an affidavit of John Schmidt, the Secretary of the Board of Directors of ICL and a resident of Pocatello. It has also attached a copy of an Order rendered by the Board in a contested case, In the Matter of Section 401 Water Quality Certification for Relicensing of the C.J. Strike Hydroelectric Facility.

The decision appears to discuss the law relating to the issue of standing of two conservation groups to initiate a contested case regarding the water quality certification for a hydroelectric dam pursuant to the Clean Water Act, 33 U.S.C. section 1341. Whether the concept of "direct and substantial interest" and the issue of "standing" are substantially similar will not be discussed at length here. Suffice it to say that even taking into consideration the holdings of the Idaho Appellate Courts on the issue of "standing" ICL has not demonstrated a direct and substantial interest in its Petition to Intervene or in the supporting Affidavit of John Schmidt. Rather, ICL has made no specific allegation that any particular matter at issue before the Board is anything other than a generalized grievance shared by all or a large class of citizens. See Miles v. Idaho Power Company, 116 Idaho 635 (1989). Further, the Affidavit of John Schmidt does not establish a palpable injury with a fairly traceable causal connection between the claimed injury and the challenged conduct. Miles, Supra. For instance, Mr. Schmidt make a general allegation that "I have developed a mild form of asthma since moving to Pocatello and I have heard numerous stories from others about how

they have suffered respiratory illnesses since locating to the Pocatello area. Doctors specializing in respiratory ailments have also indicated to me that they have concerns about how unhealthy our valley's are is." Such general statements could possibly have been much more specific, could have been provided by doctors specializing in respiratory ailments and their patients and related in substance to the Tier II operating permit being contested by the J. R. Simplot Company. However, ICL did not provide such information.

Based upon the forgoing analysis IT IS HEREBY ORDERED that the Petition to Intervene filed on behalf of The Idaho Conservation League is denied.

Petitioners shall have 14 days after the service date of this order to request reconsideration or appeal this order to the Presiding Officer or the Idaho Board of Environmental Quality.

DATED this 8th day of April, 2003.

STEVEN A. THOMSEN
Hearing Officer

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STATE OF IDAHO

The J.R. Simplot Company Air Quality Tier I Operating Permit No. 077-00006 (Don Siding Plant) Petitioner, v. Idaho Department of Environmental Quality, Respondent.	Docket No. 0101-03-07 ORDER ON MOTION FOR RECONSIDERATION

The Idaho Conservation League (ICL) has requested Reconsideration regarding the Amended Order on Petition to Intervene of April 8, 2003. That Amended Order denied ICL's Petition to Intervene in a Contested Case Proceeding filed by the J.R. Simplot Company. The J. R. Simplot Company has filed its Objection to ICL'S Motion For Reconsideration and Supporting Points and Authorities dated April 22, 2003 and ICL filed ICL'S Reply In Support Of Motion For Reconsideration on April 23, 2003.

Idaho Code §39-107 and IDAPA §58.01.23.001.03 provide the opportunity to initiate a contested case proceeding to any person aggrieved by an action or inaction of the Department. An aggrieved person is any person or entity with legal standing to challenge an action or inaction of the

Department. IDAPA § 58.01.23.010.01. IDAPA § 58.01.23.011 provides for liberal construction of the rules. It further provides that the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to a contested case proceeding conducted before the agency. IDAPA §§ 58.01.23.350 and .351 allow for intervention into a contested case proceeding by persons who claim a direct and substantial interest in the proceeding. The petition to intervene may not unduly broaden the issues, or cause delay or prejudice to the parties. See IDAPA § 58.01.23.353.

ICL claims that it is an aggrieved entity with legal standing to challenge the action of the Department in granting Air Quality Tier I Operating Permit # 077-00006 to the J. R. Simplot Company on December 24, 2002. Simplot has filed a petition for a contested case proceeding regarding the permit and ICL wishes to intervene as an entity with a direct and substantial interest in the contested case proceeding. ICL argues that it would have legal standing to petition the Board of Environmental Quality for a contested case proceeding in its own right as a matter of law because of the language of The Clean Air Act found at 42 U.S.C. § 7661a(b)(6). That language reads as follows:

> (b) Regulations - The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:
> (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. *(Emphasis added)*

Because ICL participated in the public hearing process regarding the Simplot permit request, they believe the Clean Air Act gives them automatic standing to seek judicial review in state court regarding issuance of the permit. ICL reasons further, that if they have standing to sue in state court, then they have standing to initiate a contested case proceeding and therefore have met the lessor standard of a direct and substantial interest in the proceeding.

However, ICL's reliance on the Clean Air Act is misplaced. The act certainly guarantees that those who demonstrate standing have access to the state courts in certain circumstances. However, it is still necessary to establish standing to sue in state court even if one has participated in the public hearing process. The act itself does not grant standing as ICL maintains. Standing to sue still requires an allegation or demonstration of injury in fact, a fairly traceable causal connection between the claimed injury and the challenged conduct and a substantial likelihood that the relief requested will prevent or redress the claimed injury. See Miles v. Idaho Power Company, 116 Idaho 635 (1989) and Boundary Backpackers v. Boundary County, 128 Idaho 371 (1996). There is no guarantee that ICL has standing to sue in State Court under the Clean Air Act or standing to initiate a contested case proceeding pursuant to the Rules of Administrative Procedure. However, that is not the issue to be decided here. It is simply the hearing officer's opinion that the Clean Air Act itself does nothing to help ICL establish a direct and substantial interest as contemplated by IDAPA §§ 58.01.23.010.01 (regarding aggrieved persons) or 58.01.23.350 (regarding intervention).

The affidavit of ICL member, John Schmidt refers to anecdotal evidence that to some residents of Bannock and Power Counties is almost part of our history and folklore and which regards stories of pollution caused ailments and injuries to the environment. However, the direct and

substantial interest claimed by ICL is no more clear after reading any additional material submitted by ICL.

ICL's Request for Intervention into the contested case proceeding at issue here is denied on reconsideration.

Either party may petition the Board to review this Order denying Intervention. Petitions for review shall be filed within fourteen (14) days after service of the order. Responses shall be filed within fourteen (14) days after service of the petition for review. The Board may schedule oral argument in the matter before issuing a final decision.

DATED this 5th day of May, 2003.

Steven A. Thomsen
Hearing Officer