BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

IN THE MATTER OF SECTION 401 WATER QUALITY CERTIFICATION FOR RELICENSING OF THE C.J. STRIKE HYDROELECTRIC FACILITY	)))))	**Docket No. 0102-01-06** **ORDER**

I. PROCEDURAL BACKGROUND

This contested case was initiated by a petition filed by Idaho Rivers United ("IRU") and American Rivers ("AR"), ("Petitioners"). Petitioners challenge the water quality certification for Idaho Power Company's ("IPC") C.J. Strike Hydroelectric facility issued pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, ("401 Certification") by Steven West, Regional Administrator of the Department of Environmental Quality ("DEQ") on September 13, 2001. The matter was assigned to Jean R. Uranga, the hearing officer appointed by the Board of Environmental Quality ("Board"). IPC sought and was granted the right to intervene in the proceedings.

DEQ and IPC filed separate motions for summary judgment in support of the 401 Certification. In addition, IPC challenged Petitioners' legal standing to initiate these proceedings. Petitioners filed a motion for summary judgment on the merits of their challenge to the certification and submitted affidavits of individual members in response to IPC's allegations regarding standing.

The motions were heard by the hearing officer on May 14, 2002. Thereafter, the hearing officer issued a Recommended Order on Motions for Summary Judgments ("Recommended Order") on June 14, 2002. The Recommended Order would hold that Petitioners lack standing to challenge

the 401 Certification. As a result, the hearing officer did not issue a recommended order on the motions regarding the validity of the 401 Certification.

Petitioners and DEQ filed exceptions to the Recommended Order. IPC filed a response to the exceptions. DEQ's exceptions to the Recommended Order concurred with Petitioners' claim that Petitioners have standing. DEQ also requested that the Board proceed to rule on DEQ's motion for summary judgment on the merits. IPC argued that the Board should adopt the hearing officer's conclusion that Petitioners lack standing to bring this contested case.

On September 10, 2002, the Board heard oral argument on the issue of standing only and deliberated the standing issue on September 10, October 16 and 17, 2002. Having fully considered the record and the oral and written arguments of the parties, the Board unanimously voted on October 17, 2002, to adopt in part and reject in part the hearing officer's Recommended Order.

II. THE DOCTRINE OF STANDING

Petitioners brought this action pursuant to Idaho Code § 39-107(5), the Idaho Administrative Procedure Act, Idaho Code § 67-5240, the Clean Water Act, 33 U.S.C. § 125 *et seq.*, and all statutes and rules of the State of Idaho implementing the Clean Water Act. Idaho Code § 39-107(5) provides:

> Any person aggrieved by an action or inaction of the department shall be afforded an opportunity for a fair hearing upon request therefor in writing pursuant to chapter 52, title 67, Idaho Code, and the rules promulgated thereunder.

DEQ's rules governing contested case appeals define an aggrieved person as follows:

> 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.

IDAPA 58.01.23.010.01.

Petitioners challenge the 401 Certification on behalf of their members in a representational

context and on behalf of the organizations themselves. Petitioners claim that they have both representational/associational standing and organizational first-party standing under federal and state law. We begin our analysis with an overview of federal standing principles.

A. Standing In Federal Courts

The concept of standing is grounded in Article III of the United States Constitution, which limits the judiciary to resolving "cases" or "controversies." U.S. Const. art. III, § 2. The term, standing, is found nowhere in Article III or within the rest of the Constitution. Yet, the doctrine is one tool the courts use to assure that they are not overstepping the judicial bounds of separation of powers and that they are deciding cases rather than governing society.

Over the past few decades, the United States Supreme Court has interpreted the standing requirement to include three elements. First, the plaintiff must have an injury in fact which is real, concrete and particularized, and actual or imminent, and not just speculative or hypothetical. Second, the plaintiff must show a causal connection between the injury suffered and the conduct complained of. Third, the plaintiff must establish redressability. In other words, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Friends of the Earth v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167, 180-181 (2000).

Under federal law, when an organization seeks associational or representational standing to represent its members, the organization must show that (1) its members would have standing to sue individually; (2) it is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit. Id.

In addition, the federal courts recognize, in limited circumstances, what the Ninth Circuit Court of Appeals has characterized as organizational first-party standing. The standard for

organizational first-party standing requires a concrete and demonstrable injury to the organization's interests, not just a setback to the organization's abstract social interests. Fair Housing of Marin v. Combs, 285 F.3d 899, 902 (9th Cir. 2002), relying on Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

The federal courts have also created what are known as prudential limits on the exercise of federal jurisdiction. These limitations include (1) the general limitation on raising another person's legal rights; (2) the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches; and (3) the requirement that a litigant's complaint fall within the zone of interests protected by the law invoked. For example, even if a court finds that the plaintiff has alleged an injury in fact, causation, and redressability, if the injury is one suffered by the general populace, it is deemed a generalized grievance and relegated to the legislative arena. *See* Allen v. Wright, 468 U.S. 737 (1984); Warth v. Seldin, 422 U.S. 490 (1975).

Like many legal doctrines, the application of the standing requirement has not always been consistent. In the early 1970s, the Supreme Court announced that federal courts were not open to plaintiffs who simply had an ideological concern for the environment. However, the Court also acknowledged that recreational and aesthetic injuries can amount to an "injury in fact" under certain circumstances. Sierra Club v. Morton, 405 U.S. 727 (1972). Nevertheless, in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) ("Lujan I"), plaintiffs who used lands "in the vicinity" of areas affected by the federal government's reclassification of lands were denied standing on the ground that they did not utilize a particular portion of the tract of land at issue. 497 U.S. at 889. Similarly, in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ("Lujan II"), plaintiffs who had no specific plans to return to foreign countries and the habitats of endangered species were denied standing to challenge reversal of a regulation that would have required interagency consultation for

activities that might jeopardize endangered species on the high seas and in foreign nations. The Court reasoned that "some day" intentions without any description of concrete plans do not support a finding of actual or imminent injury. 504 U.S. at 564. In Lujan II the Court also reiterated that when the plaintiff is not the object of the government action or inaction he challenges, standing is ordinarily "substantially more difficult" to establish. Id. at 562.

With respect to associational or representational standing, 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. See Warth, 422 U.S. 490. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. 422 U.S. at 511; see also Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977).

The Supreme Court has also recognized and set the standard for organizational first-party standing in cases involving the Fair Housing Act of 1968, 42 U.S.C. § 3604. In Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), the Court determined that the plaintiff organization had standing in its own right to sue under the Fair Housing Act because it alleged that Havens Realty's discriminatory practices injured its "ability to provide counseling and referral services for low-and moderate-income homeseekers" with the "consequent drain on the organization's resources." 455 U.S. at 379. This alleged injury, the Court concluded, was far more than a setback to the organization's abstract social interests and was a concrete and demonstrable injury to the organization's activities--an injury in fact. 455 U.S. at 379. Similarly, the Ninth Circuit Court of Appeals has held that a fair housing organization had direct standing to sue an apartment owner for alleged illegal housing discrimination because the organization allegedly suffered a drain on its

resources and frustration of its mission as a result of the apartment owner's conduct. Fair Housing of Marin v. Combs, 285 F.3d 899, 902 (9th Cir. 2002). It should be noted that the standing requirements outlined in Havens Realty and Fair Housing of Marin were rooted in the statutory standing provisions of the Fair Housing Act. The federal courts have not had occasion to address organizational first-party standing in cases involving the Clean Water Act.

However, in Friends of the Earth v. Laidlaw Envtl. Servs. Inc., 528 U.S. 167 (2000), the Supreme Court handed down a decision that addresses public interest suits and representational or associational standing under the Clean Water Act. There, the defendant operated a hazardous waste incineration facility and had violated its National Pollutant Discharge Elimination System discharge limits for mercury on 489 occasions between 1987 and 1995. Id. at 176. Friends of the Earth filed suit under the citizen suit provision of the Clean Water Act after the defendant and the state regulatory agency had settled the case for $100,000 in penalties. Subsequent to the settlement, the defendant violated the mercury limits in its permit thirteen additional times. Id. at 178.

The defendant argued that the plaintiffs could show no injury in fact because they could not show proof of harm to the environment from the mercury discharges. The Court disagreed, stating that it is not injury to the environment, but injury to the plaintiff that satisfies standing requirements. Id. at 181. The Court determined that the plaintiffs were persons for whom the defendant's violations would lessen the aesthetic and recreational value of the area. A summary of examples of the plaintiffs' affidavits is instructive:

> Curtis, who lived near the facility, stated that the river looked and smelled polluted, and that he would recreate downstream of the facility but for his concerns about pollution;
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> Patterson lived two miles from the facility and stated that she no longer picnicked, walked, bird watched and waded in the river because she was concerned about harmful effects from discharged pollutants. Patterson also testified that she and her

> husband would buy a home near the river but did not do so because of the discharges;
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> Moore stated that she lived twenty miles from the facility and would use the river south of the facility and land surrounding it for recreational purposes were she not concerned that the water contained harmful pollutants;
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> Sharp stated that he had canoed forty miles downstream of the facility and would like to canoe closer to Laidlaw's discharge point, but did not do so because of his concern that the water contained harmful pollutants.

528 U.S. at 182-83.

The Court concluded that these plaintiffs were different than those in Lujan I and II and held that the petitioners had standing to bring suit under the Clean Water Act because they made good faith allegations that the defendant's illegal pollution gave rise to a "reasonable concern" which in turn affected their economic, aesthetic, or recreational interests. Id.

Laidlaw has been applied fairly consistently by the Ninth Circuit Court of Appeals. For example, in Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141 (9th Cir. 2000), the court held that recreational use accompanied by a credible allegation of desired future use can be sufficient to demonstrate that environmental degradation of the area is injurious to that person. In addition, the court made clear that the plaintiffs need not have repeated contact with the resource they wish to protect to have standing. Id. at 1149-50. Similarly, in Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985 (9th Cir. 2000), plaintiffs who derived recreational and aesthetic benefits from using the bay next to defendant's shipyard but had curtailed their use because of concerns about pollution and contaminated fish were held to have demonstrated injury in fact as necessary to establish standing. Id. at 994.

In summary, Federal courts under Laidlaw and its progeny do not require that an economic interest be affected in order for a party to have standing to sue for alleged violations of the federal Clean Water Act.

B. Standing In Idaho Appellate Courts

State courts are not bound by the "case" or "controversy" requirements of Article III of the United States Constitution. However, Idaho appellate courts have adopted much of the federal standing principles and precedent and apply the following principles when deciding the issue of standing:

1. The doctrine of standing is imprecise and difficult to apply. Miles v. Idaho Power Co., 116 Idaho 635, 641, 778 P.2d 757, 763 (1989).

2. Standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated. Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000).

3. 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) (citations omitted). In other words, the party must show a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct. Miles at 641, 778 P.2d at 763.

4. "[A]n association has standing to bring suit on behalf of its members", *i.e.*, representational or associational standing, "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual

members in the lawsuit." Glengary-Gamlin Protective Ass'n v. Bird, 106 Idaho 84, 87-88, 675 P.2d 344, 347 (Ct. App. 1983).

5. Even if a showing can be made of an injury in fact, standing may be denied when the asserted harm is a generalized grievance shared by all or a large class of citizens. Miles at 641, 778 P.2d at 763. In other words, courts exist to adjudicate disputes not to create social policy. That is left to the legislative branch. *See, e.g.*, Idaho State AFL-CIO v. Leroy, 110 Idaho 691, 718 P.2d 1129 (1986).

6. When the plaintiff is not the object of the government action or inaction he or she challenges, standing is not precluded, but is ordinarily substantially more difficult to establish. Young v. City of Ketchum, 137 Idaho 102, 105, 44 P.3d 1157, 1160 (2002).

The Idaho Supreme Court has not had occasion to decide whether petitioners with aesthetic or recreational interests have standing to challenge agency conduct under federal or state statutes implementing the Clean Water Act. However, the Court has ruled on who is an aggrieved person in the context of the Idaho Administrative Procedure Act. In In Re Fernan Lake Village, 80 Idaho 412, 415, 331 P.2d 278, 279 (1958), the Court indicated that something other than an economic interest can be the basis for injury. Although, in that case, the Court found a city's objection to the incorporation of a nearby village too speculative to qualify as an injury for purposes of appeal, the Court noted that "an immediate pecuniary damage is not always prerequisite to the right of appeal." Id. (citations omitted). The Court stated: "Broadly speaking, a party or person is aggrieved by a decision when, and only when, it operates directly and injuriously upon his personal, pecuniary, or property rights." In re Fernan Lake, 80 Idaho at 415, 331 P.2d at 279 (citations omitted).

With respect to generalized aesthetic, recreational, and environmental concerns, the Idaho Supreme Court, in Selkirk-Priest Basin Ass'n, Inc. v. State of Idaho, 128 Idaho 831, 919 P.2d 1032 (1996), ("SPBA") determined that an environmental group did not have standing as an aggrieved party under the APA. There, a non-profit organization appeared before the Idaho Land Board and challenged compliance of a timber sale with environmental laws. The Court ruled that SPBA's affidavits were insufficient to establish an injury personal to any of its members that was not equally felt by all citizens of the county or state. SPBA, 128 Idaho at 835, 919 P.2d at 1036.

A similar result was reached in Boundary Backpackers. There, the Court determined that the only member affidavit sufficient to confer representational standing on organizations with environmental concerns was that of a commercial guide who stated that the challenged conduct would impact a substantial portion of his livelihood. Standing was denied to other members of the organization on the ground that their affidavits were insufficient to show injuries not suffered by all citizens of the county. Boundary Backpackers, 128 Idaho at 375, 913 P.2d at 1145.

The application of Boundary Backpackers and SPBA to the case before us is uncertain. The Idaho appellate courts have not had occasion to consider whether petitioners with recreational and aesthetic interests would have standing to bring a contested case concerning a 401 Certification issued pursuant to the water quality statutes relevant here and where petitioners fully participated in the public comment process before DEQ. Nor have the Idaho appellate courts had occasion to apply the analytic inquiry and principles articulated by the United States Supreme Court in Laidlaw. Therefore, we look for further guidance to the purpose and goals of those statutes under which the 401 Certification was issued -- the Clean Water Act, 33 U.S.C. § 125 *et seq.*, the Environmental Protection and Health Act ("EPHA"), Idaho Code § 39-101 *et seq.*, and the Idaho Water Quality Act ("IWQA"), Idaho Code § 39-3601 *et seq.*

III. RESTRICTING STANDING TO THOSE WHO SUFFER SOME TYPE OF ECONOMIC INJURY IS INCONSISTENT WITH THE BROAD INTERESTS THAT THE EPHA, IWQA, AND CLEAN WATER ACT WERE DESIGNED TO PROTECT.

The Environmental Protection and Health Act and the Idaho Water Quality Act provide broad authority to DEQ regarding the protection of public health and the environment and the reduction of environmental pollution. Idaho Code § 39-3601 states: "It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act . . . ." The Clean Water Act sets a "goal of water quality . . . which provides for recreation in and on the water . . . ." 33 U.S.C. § 1251(a)(2).

It is evident that the legislature, in enacting the EPHA and the IWQA, contemplated the impact of water pollution on aesthetic and recreational as well as economic interests. Idaho Code § 39-102 states: "It is therefore declared to be the policy of the state to provide for the protection of the environment and the promotion of personal health and to thereby protect and promote the health, safety and general welfare of the people of this state." Idaho Code § 39-103(15) and Idaho Code § 39-3602 (29) include injuries to recreational and aesthetic uses in the definition of water pollution.

Accordingly, the administrative policy of DEQ contemplates addressing injuries to aesthetic, recreational, and economic interests and substantial public involvement by both economic and non-economic interests in the development of actions needed to control sources of pollution affecting water-quality-limited water bodies.

IDAPA 58.01.02.003.124 states: "Members of each watershed advisory group shall be representative of the industries **and interests** affected by the management of that watershed . . . ." (Emphasis added.)

IDAPA 58.01.02.050.02 states:

050. Administrative Policy.

. . . .

02. Protection Of Waters Of The State.

a. Wherever attainable, surface waters of the state shall be protected for beneficial uses which for surface waters **includes all recreational use** in and on the water surface and the preservation and propagation of desirable species of aquatic life; (Emphasis added.)

IDAPA 58.01.02.052 states:

In providing general coordination of water quality programs within each basin, in carrying out the duties of the Basin Advisory Groups as assigned, and in carrying out the provisions of Sections 39-3601, et seq., Idaho Code, the Director . . . shall employ all means of public involvement deemed necessary, including the public involvement required under Section 67-2340 through Section 67-2347, Idaho Code, Section 051 of this rule or required in Chapter 52, Title 67, Idaho Code, and shall cooperate fully with the public involvement or planning processes of other appropriate public agencies.

Finally, DEQ's 401 Guidance document confirms the importance of public involvement at all stages in the process of reviewing a request for certification. The document provides for personal and public notice upon receipt of a request, public comment on draft certification decisions, and the opportunity to request a public hearing or meeting in order to submit oral comments on the draft certification to DEQ.

In sum, the Idaho Code, associated rules, and DEQ policy guidance documents clearly envision a full opportunity for involvement by stakeholders interested in aesthetic, recreational, and economic values in all water quality proceedings—an opportunity that is contrary to a narrow standing test that in all circumstances would only allow those with economic interests to bring a contested case.

IV. THE AFFIDAVITS SUBMITTED BY IRU ARE SUFFICIENT TO ESTABLISH AN INJURY IN FACT THAT IS FAIRLY TRACEABLE TO THE CHALLENGED CONDUCT.

The predominant theme of the affidavits submitted by IRU and AR is that DEQ's 401 Certification for the C.J. Strike project will not provide reasonable assurance that the affected water bodies will comply with the water quality standards of the State of Idaho.[1] The 401 Certification states:

> CERTIFICATION AND CONDITIONS
>
> Based on the foregoing, the Department hereby certifies pursuant to Section 401 of the Clean Water Act that, if IPC complies with the conditions listed below, there is a reasonable assurance the C.J. Strike facility will comply with applicable requirements of sections 301, 302, 303, 306 and 307 of the Clean Water Act and the Idaho Water Quality Standards.
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> 1. By January 1 of each year after the date of this certification, and until the C.J. Strike TMDLs are completed, IPC shall pay $50,000 to the Department to assist in the development of the C.J. Strike and Snake River-Succor Creek TMDLs.[2]
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> 2. After the C.J. Strike, Snake River-Hells Canyon and Snake River-Succor Creek TMDLs are completed, IPC shall implement those measures determined by the Department to be necessary to achieve allocations assigned to the C.J. Strike facility consistent with state and federal law requirements. The Department's final determination regarding such measures shall be a condition of this 401 certification. The Department shall attempt to reach agreement with IPC regarding such measures before making its final determination.

The Snake River and the Bruneau River in the vicinity of the C.J. Strike facility are designated for uses that include cold water biota, salmonid spawning, primary contact recreation,

[1] IPC raised the issue of Petitioners' standing on a motion for summary judgment. All inferences must, therefore, be resolved in favor of Petitioners as the non-moving party. I.R.C.P. 56. *See, e.g.*, SPBA, 128 Idaho at 833, 919 P.2d at 1034.

[2] Section 303 of the Clean Water Act requires states to identify waters that do not meet water quality standards. For those waters on the 303(d) list, states must develop Total Maximum Daily Loads (TMDLs). TMDLs are plans that determine the amount of pollutants a water body can receive and still meet water quality standards, and allocate a load of such pollutants to all sources. Clean Water Act, Section 303(d), 33 U.S.C. § 1313(d); 40 CFR § 130.7.

domestic water supply, and special resource waters. All parties agree that the Snake River in the vicinity of the C.J. Strike project fails to comply with Idaho Water Quality Standards as established by the state of Idaho under the Clean Water Act and state law. Thus, the affidavits submitted by IRU complain that the 401 Certification will not address the recreational injuries allegedly suffered by IRU members.

Ms. Eddy's affidavit states that she has hiked along the Snake River downstream of the C.J. Strike project and that in 2001, she camped and hiked near the reservoir. While there, she did not fish or swim in the reservoir because of her knowledge about water quality issues. Mr. Skinner states that he has camped, boated, hiked, bird watched, mountain biked, and flown within the area of the C.J. Strike project many times over his lifetime. In the last five years he has recreated in the area numerous times. He states that the current state of water quality in the middle Snake River prevents him from swimming there, that he has only swum in the area once to cool off and even then, he got out of the river quickly because of water quality concerns, and that he would visit the area more if the area supported clean water.

The Eddy and Skinner affidavits document recreational use and desired future use that is curtailed because of water quality concerns. The record establishes that the C.J. Strike project contributes to degraded water quality in the area and IRU alleges, on behalf of Ms. Eddy and Mr. Skinner, that the 401 Certification fails to provide reasonable assurance that water quality will improve. This allegation articulates a causal connection between the claimed injury and the challenged conduct. Thus, IRU has alleged through its members' affidavits, a distinct palpable injury that has a fairly traceable causal connection between the claimed injury and the challenged conduct.

Moreover, IRU, on behalf of its members fully participated in the DEQ public comment process on the 401 Certification and are formal parties to the Federal Energy Regulatory Commission ("FERC") relicensing proceedings for the C.J. Strike project. A finding that IRU lacks standing to bring a contested case on behalf of its members after having fully participated in the public comment process is inconsistent with DEQ's policy regarding the importance of public involvement by both economic and non-economic interests in the development of actions needed to control sources of pollution affecting water-quality-limited water bodies.

Accordingly, we conclude that cases holding that a grievance shared by a large percentage of the population should be resolved through the legislative process rather than judicial or quasi-judicial processes are inapplicable here. First, the goals of the Clean Water Act include restoration and maintenance of fishable, swimmable waters. Those values are aesthetic and recreational values. Restricting standing to only those who allege economic injuries is inconsistent with the purposes of the Clean Water Act, the EPHA and the IWQA. The injuries alleged here clearly fall within the zone of interests that these statutes are designed to protect and unlike more generalized grievances, cannot be redressed in the political arena through the voting process.

With respect to AR, however, we find that the affidavit of Mr. Masonis is insufficient to allege a distinct, palpable, and redressable injury related to the issuance of the 401 Certification. Mr. Masonis merely states that he has hiked in the vicinity of the C.J. Strike project and that he has rafted and fished in other Idaho rivers. He does not allege an injury personal to him that will result from the 401 Certification. Although AR, like IRU, fully participated in the DEQ public comment process and the FERC relicensing process, it has failed to meet the threshold requirement for associational standing—that any of AR's members would have the standing to sue in their own right.

V. PETITIONERS LACK ORGANIZATIONAL FIRST PARTY STANDING

IRU and AR do not meet the criteria for organizational first party standing. In Havens Realty and Fair Housing of Marin, the organizations were able to demonstrate that specific services to constituents were frustrated and financial resources reallocated as a result of the defendant's unlawful activity. Here, IRU and AR are public policy advocacy groups that, as a matter of course, engage in public debate and litigation to further organizational goals, one of which is improved water quality. Expressing those concerns through advocacy and litigation are part and parcel of IRU and AR's ongoing activities. IRU and AR's purely organizational concerns (as opposed to their individual member's concerns) about the C.J. Strike project's effect on water quality are too abstract to support a distinct, palpable, and personalized injury to the organizations themselves.

CONCLUSION

IRU and AR fully participated on behalf of their members in DEQ's 401 Certification public comment process for the C.J. Strike hydroelectric facility and asserted their members' recreational and aesthetic interests by becoming formal parties to the FERC relicensing proceedings. In addition, IRU submitted member affidavits alleging individualized and palpable injuries to their recreational and aesthetic interests that they assert will result under the terms of the 401 Certification for the C.J. Strike project. AR, however, failed to submit affidavits alleging distinct and personalized injuries to any of its members.

Because of its full participation in the DEQ public comment proceedings and the allegations of individualized and palpable injuries to its members, we find that IRU has representational standing to bring this contested case on behalf of its members. Although AR fully participated in the relevant public comment proceedings, AR did not submit member affidavits sufficient to meet the

standard for representational standing. In addition, neither IRU nor AR has established organization first-party standing.

The Board accepts that portion of the hearing officer's Recommended Order finding that IRU and AR do not have organizational first-party standing and finding that AR does not have representational standing. The Board finds that IRU has representational standing to bring this contested case. Therefore, the Board rejects that portion of the hearing officer's Recommended Order finding that IRU does not have representational standing and remands this matter to the hearing officer for a determination on the substantive claims raised by IRU.

DATED THIS _____ day of November 2002.

BOARD OF ENVIRONMENTAL QUALITY

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Paul Agidius

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Marti Calabretta

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Donald J. Chisholm

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Dr. Joan Cloonan

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Dr. Randy MacMillan

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Senator Marguerite McLaughlin

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Nick Purdy