BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

MARK SOLOMON, a natural person, FRIENDS OF THE CLEARWATER, a non-profit corporation, and the IDAHO CONSERVATION LEAGUE, a non-profit corporation,	)	Docket No. 0101-03-01
Petitioners,	)	ORDER
v.	)	
THE IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, a political subdivision of the State of Idaho,	)	
Respondent,	)	
and	)	
POTLATCH CORPORATION,	)	
Intervenor.	)	

I. PROCEDURAL BACKGROUND

This case was initiated by Mark Solomon, Friends of the Clearwater ("FOC"), and the Idaho Conservation League ("ICL") (collectively, "Petitioners") with the filing of a Petition for a Contested Case Proceeding ("the Contested Case Petition"). Petitioners challenge the issuance by the Idaho Department of Environmental Quality ("IDEQ") of separate Tier I air emissions permits to Potlatch Corporation's ("Potlatch") Clearwater Lumber Division and to Potlatch's Idaho Pulp and Paperboard and Consumer Products Division. Petitioners challenge IDEQ's

action on two grounds. First, Petitioners allege that the Potlatch facilities comprise one "facility" as that term is defined for air quality permitting purposes and therefore, IDEQ should have issued a single Tier 1 permit, rather than two Tier 1 permits. Second, Petitioners allege that IDEQ used an inappropriate air dispersion model to assess ambient impacts from the Potlatch facilities.

After being granted permission to intervene in the case, Potlatch filed motions to dismiss and for summary judgment, seeking the dismissal of the Contested Case Petition on the basis that Petitioners lack standing and that IDEQ's actions were proper as a matter of law. IDEQ joined in Potlatch's motions. The Hearing Officer denied the motions on May 12, 2003, in an Order Regarding Motion to Dismiss, Motion for Summary Judgment and Other Preliminary Matters (the "Initial Order"). Potlatch and IDEQ moved for reconsideration of that order. On June 16, 2003, the Hearing Officer denied reconsideration in an Order Denying Reconsideration of Motion to Dismiss, Motion for Summary Judgment and Other Preliminary Matters (the "Reconsideration Order").

In the Initial Order and Reconsideration Order, the Hearing Officer concluded that the Petitioners have legal standing to challenge IDEQ's action. At Potlatch's request, the Hearing Officer certified the portion of the Reconsideration Order on standing as a preliminary order to enable the Idaho Board of Environmental Quality's ("Board") review. *See* Order to Certify Standing Decision on June 23, 2003 (the "Preliminary Order"). Pursuant to Idaho Code § 67-5245 and IDAPA 58.01.23.730, Potlatch filed a Petition for Review seeking the Board's review of the Hearing Officer's Preliminary Order on standing. On October 22, 2003, the Board heard oral argument and deliberated the issue of standing only. After fully considering the record and the oral and written arguments of the parties, the Board unanimously voted to reject the Hearing

Officer's determination that Petitioners have standing to bring this contested case. Accordingly, this contested case is dismissed.

II. THE TIER I PERMITS

Title V of the federal Clean Air Act ("CAA"), 42 U.S.C. § 7401 *et seq*., requires Idaho to establish an operating permit program for major stationary sources of air pollution. *See* CAA §§ 501-507 (42 U.S.C. § 7661). The Environmental Protection Agency ("EPA") administers Title V under rules set forth in 40 C.F.R. Part 70 ("Part 70"). IDEQ implements Title V and Part 70 pursuant to Idaho's Tier I operating permit program, as provided in the Rules for the Control of Air Pollution in Idaho, IDAPA 58.01.01 *et seq*. Title V is designed to enable the major source, the regulatory authority, and the public "to better understand the requirements to which the source is subject, and whether the source is meeting those requirements." 56 Fed. Reg. 21712, 21713 (May 10, 1991). Title V requires the incorporation of requirements that are currently applicable to a major source into a single comprehensive document—a Title V permit or, in Idaho, a Tier I operating permit. The permits do not impose new substantive requirements or limitations on a major source nor do they allow a source to operate new emission units or to emit additional emissions. "Title V permits do not impose additional requirements on sources but, to facilitate compliance, consolidate all applicable requirements in a single document." New York Public Interest Research Group v. Whitman, 321 F.3d 316 (2d Cir. 2003).

III. THE REQUIREMENTS OF STANDING

Petitioners brought this action pursuant to Idaho Code § 39-107(5) and the Rules of Administrative Procedure before the Board of Environmental Quality, IDAPA 58.01.23 *et seq.*, ("IDEQ Rules of Procedure").

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.

IDEQ'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.

In a previous case, 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) ("C.J. Strike Order"), the Board summarized the doctrine of standing in the federal and state courts and explained what a petitioner must show in order to have standing to pursue a contested case before IDEQ. The petitioner to a contested case proceeding can be either an individual or an organization. In order to satisfy standing, an individual petitioner must demonstrate: (1) an injury in fact which is real, concrete and particularized, and actual or imminent, and not just speculative or hypothetical; (2) a causal connection between the challenged action and the injury; and (3) the likelihood that the injury will be redressed by a favorable decision. C.J. Strike Order at pp. 3, 8.

An organization may obtain associational or representational standing on behalf of its members. Id. at 5, 8-9. To achieve standing on behalf of its members, an organization must show that: (1) its members would otherwise have standing to sue individually; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires participation of individual members in the lawsuit. Id. The federal courts have also recognized and set the standard for what the Ninth

Circuit Court of Appeals has characterized as organizational first-party standing in limited circumstances. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Fair Housing of Marin v. Combs, 285 F.3d 899, 902 (9th Cir. 2002). Organizational first-party standing requires far more than a setback to an association's abstract interests. Havens Realty Corp., 455 U.S. at 379. It requires a concrete injury to the organization's activities, *e.g.*, an inability to deliver services or a drain on the organization's financial resources. Id.

To survive Potlatch's summary judgment motion on the issue of standing, Petitioners had to submit affidavits or other evidence showing through specific facts that individual or organizational petitioners would be directly affected by the issuance of two rather than one permit to Potlatch's facilities. For the purposes of the summary judgment motion, all inferences must be resolved in favor of Petitioners as the non-moving party. I.R.C.P. 56; Selkirk-Priest Basin Ass'n. Inc. v. State of Idaho, 128 Idaho 831, 919 P.2d 1032 (1996).

IV. THE SUFFICIENCY OF THE EVIDENCE SHOWING STANDING

A. PETITIONER SOLOMON

To support their claims of injury, Petitioners submitted the Affidavit of Mark Solomon. Mr. Solomon's affidavit states that he is able to view air emission plumes and detect odor from the Potlatch complex at his residence, which is twenty-five (25) miles from Potlatch's facilities. In addition, Mr. Solomon avers that he is exposed to emissions from Potlatch's facilities during visits to Lewiston, Idaho. He also states that he was exposed to elemental chlorine gas on a tour of the Potlatch facilities in 1990. The affidavit does not articulate any injury derived from the observed plumes or odor, nor does it allege any activity that is hampered by these observations or alleged exposures.

In Petitioners' briefing papers, they posit that the issuance of two permits inhibits IDEQ's ability to enforce the permitting requirements and that injury will result from this diminished

enforcement capacity. Specifically, Petitioners argue that Mr. Solomon will be adversely affected by the issuance of separate permits because the two permits will render "the ability of IDEQ to monitor and enforce air quality standards dramatically more difficult." Petitioners' Response Brief at 21. Petitioners also allege that there is a probability of protracted periods during which the public will be exposed to unsafe levels of toxic air pollutants (because of DEQ's diminished enforcement capacity), (Petitioners' Reply Brief at 14), and characterize the harm to Mr. Solomon resulting from the issuance of separate permits as "the complete inability of the only governmental agency currently responsible for enforcing the Clean Air Act to ensure that air quality standards are met." Petitioners Reply Brief at 9-10.

We cannot find any testimony or evidence in the record, through affidavit or otherwise, to support the inference that two permits are more difficult to enforce than one permit. While it is conceivable that there would be instances in which the existence of two permits would make IDEQ's job more challenging, "[s]tanding is not an ingenious academic exercise in the conceivable but . . . requires, at the summary judgment stage, a factual showing of perceptible harm." Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1992) (citations omitted). Moreover, "[i]t is the reality of the threat of injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." Los Angeles v. Lyons, 461 U.S. 95, 107-108, n.8 (1983).

None of Mr. Solomon's allegations of injury are causally connected to the challenged action, the issuance of two Tier I operating permits to Potlatch. Even if Mr. Solomon were to sufficiently allege an injury from the observations described in his affidavit, the Tier I permits do not authorize any new emissions or alter the nature of the facilities or their operations. The permits simply re-state existing limitations and authority previously determined by IDEQ to apply to the Potlatch facilities. Even if a single permit were re-issued for the two facilities, the

same substantive requirements would exist and apply. We conclude, therefore, that Mr. Solomon's affidavit fails to demonstrate the required elements for standing—injury, causal connection, and redressability.

Finally, Petitioners rely on the C.J. Strike Order in advancing the argument that Mr. Solomon's participation in the public comment process, in and of itself, satisfies standing. Petitioners' reliance on the C.J. Strike Order is misplaced. We did not hold in C.J. Strike that participation in the public comment process alone was sufficient to confer standing. We held that an organization, Idaho Rivers United ("IRU"), had standing to represent its members in the 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 IRU's participation in the public comment process, led the Board to find that IRU had standing. In contrast, Mr. Solomon's affidavit is more akin to the affidavit submitted by an American Rivers ("AR") member in the C.J. Strike case, which was insufficient to confer standing because the affiant failed to allege an injury personal to him that would result from the challenged conduct. Accordingly, we declined to find standing even though AR, like IRU, fully participated in the public comment process. We reach the same conclusion here.

B. PETITIONER IDAHO CONSERVATION LEAGUE

Because we find Mr. Solomon's affidavit insufficient to confer individual standing, his affiliation with ICL is insufficient to confer associational or representational standing on the organization. We therefore turn to the sufficiency of the evidence submitted in the context of organizational first-party standing.

Petitioner ICL submitted the Affidavit of Rick Johnson, the Executive Director of ICL, to support its claim to standing. In his affidavit, Mr. Johnson describes ICL's purpose, which is "to

protect Idaho's water, air, wildlands and wildlife through citizen action, public education, and professional advocacy." Affidavit of Rick Johnson at ¶ 2. Like Mr. Solomon's affidavit, Mr. Johnson's affidavit does not explain how the issuance of separate Tier 1 permits will cause injury to its members or to its organizational mission. Nor did ICL submit any evidence showing that the issuance of separate Tier I permits will interfere with the delivery of specific services to ICL's members or with its primary activities which include citizen action, public education and professional advocacy. Instead, the affidavit reports on the general concerns and allegations of ICL members about Potlatch's contribution to air quality problems in the Lewiston area. ICL's purely organizational concerns about Potlatch's effect on air quality are too abstract to support a distinct, palpable, and personalized injury to the organization itself and therefore, we find that ICL does not have organizational first-party standing to bring this contested case.

C. PETITIONER FRIENDS OF THE CLEARWATER

FOC submitted no affidavit or other evidence to show its organizational purpose or how this purpose is frustrated by the IDEQ permit actions and thus has not provided any grounds upon which to confer organizational first-party standing.

V. CONCLUSION

In consideration of the foregoing, Potlatch and IDEQ's motions for summary judgment are **GRANTED**.

This is a final order of the Board. Pursuant to Idaho Code §§ 67-5270, -5272, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which (i) a hearing was held; (ii) the final agency action was taken; (iii) the party seeking review of the order resides, or operates its principal place of business in Idaho; or (iv) the real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of the service date of this final order. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED this ____ day of December 2003.

BOARD OF ENVIRONMENTAL QUALITY

_____
Paul C. Agidius

_____
Donald J. Chisholm

_____
Dr. Joan Cloonan

_____
Craig D. Harlen

_____
Dr. Randy MacMillan

_____
Nick Purdy

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of December 2003, a true and correct copy of the **ORDER** was served on the following by U.S. Mail, postage prepaid and addressed as follows:

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