

**BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO**

IN THE MATTER OF PETITION
FOR REVIEW OF HWMA/RCRA
HAZARDOUS WASTE
TREATMENT AND STORAGE
PERMIT RENEWAL FOR THE
AMWTP

TAMI THATCHER,
Petitioner,

v.

IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Respondent.

Docket No. 0105-19-01

**AMENDED ORDER ON
IDAHO DEPARTMENT OF
ENVIRONMENTAL
QUALITY'S MOTION TO
DISMISS**

PRELIMINARY STATEMENT

This is a preliminary order of the presiding officer. It can and will become final without further action of the Board unless any party appeals to the Board by filing with the hearing coordinator a petition for review of the preliminary order;

Within fourteen (14) days of the service date of this preliminary order, any party may take exceptions to any part of this preliminary order by filing with the hearing coordinator a petition for review of the preliminary order. Otherwise, this preliminary order will become a final order of the Board. The basis for review must be stated in the petition. The Board may review the preliminary order on its own motion.

If any party files a petition for review of the preliminary order, the Board shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The hearing coordinator shall issue a notice setting out the briefing schedule and date and time for oral argument. The Board will issue a final order within fifty-six (56)

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days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good cause shown. The Board may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition for judicial review 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.

The petition for judicial review must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of a petition for judicial review in district court does not itself stay the effectiveness or enforcement of the order under review.

FACTS AND PROCEDURAL HISTORY

The Idaho Department of Environmental Quality (“Department”) is the state agency tasked with administering Idaho's hazardous waste program in lieu of the EPA. Idaho Code § 39-4401 *et seq.* To administer RCRA, the state passed the Hazardous Waste Management Act of 1983 (“HWMA”), Idaho Code § 39 - 4401, *et seq.*, and the Department promulgated the Rules and Standards for Hazardous Waste (hereinafter “Hazardous Waste Rules”), IDAPA 58.01.05, *et seq.* The Department issues HWMA/RCRA permits to facilities in Idaho that treat, store or dispose of hazardous waste including the permit at issue in this matter. Idaho Code § 39-409; IDAPA 58.01.05.012.

On December 5, 2017, the DOE and Fluor, the DOE's contractor, submitted a HWMA/RCRA partial permit renewal application for the Advanced Mixed Waste Treatment Project (“AMWTP”) at the Idaho National Lab (“INL”).

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The AMWTP is located at the Radioactive Waste Management Complex ("RWMC") at the INL, and has several mixed waste management units that store, characterize, and treat mixed waste. Mixed waste is waste that is both hazardous and radioactive. IDAPA 58.01.05.010 [40 CFR § 266.210]. Mixed waste is regulated by the Department for its chemically hazardous properties and by DOE for its radioactive properties. *Id.* The HWMA/RCRA partial permit specifies how the mixed waste must be treated, characterized, and stored.

A timely partial permit renewal application was submitted by the DOE and Fluor and, therefore, the existing partial permit remained effective beyond the expiration date. IDAPA 58.01.05.012 [40 CFR § 270.51]; Idaho Code § 67-5254. The Department issued a notice of deficiency to the DOE on May 3, 2018, requesting clarification and revisions to several items in the renewal application. After reviewing the revised application, the Department determined the application complete on August 9, 2018, and prepared the draft partial permit (hereinafter "the Draft Permit").

On September 28, 2018, the Department put the Draft Permit out for public comment, proposing to approve the Draft Permit pursuant to IDAPA 58.01.05.013. TAMI THATCHER ("Petitioner") submitted two sets of written comments on the Draft Permit and provided verbal testimony at a public hearing in Idaho Falls on November 7, 2018. On April 18, 2019, the Department issued a response to all public comments made on the Draft Permit.

On April 18, 2019, the Department issued the final HWMA/RCRA partial permit for the AMWTP to the DOE and Fluor (hereinafter "the Final Permit"). On May 21, 2019, Petitioner timely filed a Petition for Review of HWMA/RCRA Hazardous Waste Treatment and Storage Permit Renewal ("Petition"). On June 14, 2019, the Department filed a Motion to Dismiss the Petition. On July 11, 2019, a scheduling conference was conducted, and the hearing officer granted Petitioner until July 26, 2019 to file a response to the Department's Motion to Dismiss. Petitioner filed her response on July 12, 2019.

LEGAL STANDARD – Petitions for Review

The Rules of Administrative Procedure Before the Board of Environmental
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Quality expressly permit a case to be disposed of through a motion to dismiss, pursuant to the Idaho Rules of Civil Procedure. IDAPA 58.01.23.212.03, 58.01.213.01. In an Idaho Rule of Civil Procedure 12(b)(6) "motion to dismiss for failure to state a claim upon which relief can be granted, "the question is whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief." *Orrock v. Appleton*, 147 Idaho 613, 618, 213 P.3d 398,403 (2009). A 12(b)(6) motion looks only at the pleadings to determine whether a claim for relief has been stated. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). Dismissal of a petition under IDAPA 58.01.212.03 is proper if the petition contains no allegations which, if proven, would entitle Petitioner to the injunctive relief it claims. *Bissett v. State*, 111 Idaho 865, 727 P.2d 1 293 (Ct. App. 1986).

**PETITIONER LACKS STANDING AS AN AGGRIEVED PARTY TO
CHALLENGE THE HMWA/RCRA PERMIT**

The Department argues that Petitioner is not an aggrieved party to the HWMA/RCRA partial permit and does not have standing to pursue this petition. Petitioner claims that 40 CFR 124.10 (Appeal of RCRA, UIC, NPDES, and PSD Permits) grants her automatic standing as a result of her comments to the draft permit.

The Idaho Rules and Standard for Hazardous Waste contained in IDAPA 58.01.05 clearly state that all administrative appeals relating to agency actions, including permits for hazardous waste shall be governed by IDAPA 58.01.23. IDAPA 58.01.05.996. Thus, 40 CFR 124.19 does not apply in this proceeding.

An "aggrieved person" under IDAPA 58.01.23.010.01 is "any person or entity with **legal standing** to challenge an action or inaction of the Department..." (emphasis added). In *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989), the Court stated three basic propositions concerning legal standing:

1. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated."
2. "[T]o satisfy the case or controversy requirement of standing, litigants

generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury."

3. "[A] citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction."

Further, an aggrieved party 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. *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). A party is "aggrieved" from a decision when it operates directly and injuriously upon personal, pecuniary, or property rights. *Dr. Peter Rickards v. Idaho Department of Health and Welfare*, Docket 0101-92-12, (December 21, 1992).

First, Petitioner's arguments focus on issues she wishes to be included and/or addressed in the Final Permit not injury resulting from the Final Permit. Petitioner argues safety and disposal issues regarding 4 burst canisters that are unrelated to the Final Permit and requests additional considerations and chemical analysis studies related to (or because of) these incidents. However, Petitioner does not set forth facts/arguments related to the Final Permit that demonstrate the Department's failure to address these issues. These arguments in relation to the Final Permit are speculative and hypothetical. Petitioner fails to point out any issues with the Final Permit that would lead to real, concrete, actual, or imminent damages to her or her property rights.

Second, Petitioner has not alleged or demonstrated an injury in fact and a substantial likelihood that her requested relief will prevent or redress any injury. Petitioner argues potential injury to workers and potential violations of the permit if waste is mishandled. However, standing requires injury in fact not the potential of injury. From review of Petitioner's arguments, this hearing officer

cannot identify any specific injury in fact allegations argued by Petitioner.

Third, the issuance of the Final Permit does not directly or injuriously impact her personal, pecuniary, or property rights. Petitioner argues the risks posed by the wastes managed at INL to the workers and potentially the community but does not demonstrate how she will be personally injured by issuance of the Final Permit. Petitioner does not produce any facts that approval of the Final Permit will injure her directly or affect her property rights.

Petitioner cites concerns for worker safety but is not personally employed at or involved with the waste management efforts at AMWTP. As a result, Petitioner does not have legal standing to challenge the Final Permit on the behalf of INL workers.

Finally, Petitioner does not allege any injury that is unique to her and not suffered alike by all citizens. Petitioner's arguments related to burst drums at the INL did not injure her or any other general citizen. Again, Petitioner does not have standing to assert claims on behalf of INL workers. Petitioner's arguments related to chemical compatibility analysis are speculative and do not support arguments related to her injury. Likely, if any major issue occurs with the waste management at the INL, it would have an affect on all citizens in the area and not a unique injury to Petitioner. Petitioner has failed to allege injury unique to her.

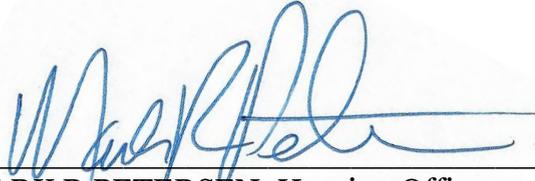
Based on the foregoing, the Petitioner has failed to allege facts in the petition that if true, would show she is an aggrieved party, as required by IDAPA 58.01.23.

CONCLUSION

Petitioner lacks the legal standing as an aggrieved party under IDAPA 58.01.23.010.01. As a result, it is the recommendation of the presiding officer that Petitioner's Petition be dismissed.

The hearing scheduled for November 18, 2019 is hereby vacated pending review by the Board.

DATED: September 24, 2019.



MARK R. PETERSEN, Hearing Officer

CERTIFICATE OF SERVICE

I certify that on September 24, 2019, a true and correct copy of the foregoing document was served on the following by the method indicated:

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