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DEQ Hearings Coordinator  
DOCKET NO. \_\_\_\_\_

BEFORE THE DEPARTMENT OF HEALTH AND WELFARE

STATE OF IDAHO

REBOUND; THE INTERNATIONAL )  
BROTHERHOOD OF ELECTRICAL )  
WORKERS, LOCAL 73; and THE )  
UNITED ASSOCIATION OF PLUMBERS )  
AND STEAMFITTERS, LOCAL 44 )

Case No. 0101-99-07

Petitioners, )

vs. )  
IDAHO DEPARTMENT OF HEALTH AND )  
WELFARE, )

ORDER AFFIRMING DECISION OF  
THE HEARING OFFICER

Respondent. )  
\_\_\_\_\_ )

THIS MATTER CAME ON FOR HEARING before the Idaho Board of Health and Welfare on February 17, 2000. Teresa A. Hampton, Esq., represented Petitioners REBOUND, International Brotherhood of Electrical Workers, Local 73, and United Association of Plumbers and Steamfitters, Local 44. The Department of Health and Welfare, Division of Environmental Quality was represented by Deputy Attorney General Darrell G. Early. Intervenor Rathdrum Power was represented by Krista McIntyre, Esq. The Board of Health and Welfare has fully considered the record and the oral and written argument of the parties. After deliberating on February 28, 2000, the Board unanimously voted to affirm the decision of hearing officer Jean Uranga, who issued a preliminary Order on Motions to Dismiss on January 19, 2000.

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In September, 1995, Respondent DEQ issued a permit to construct a power plant in Rathdrum, Idaho. (P. 80 of agency Record.) The permit was renewed in October 1997. (P. 95 of Record.) In April, 1999, a modification of the permit was sought that would change the name of the owners to Rathdrum Power LLC, provide additional auxiliary equipment to operate a gas turbine combined cycle power plant, and change the gas turbine equipment from a Siemens V84.3 to a General Electric PG7241(FA). (P. 89 of Record.) After a public comment period and a public hearing, the modification of the permit to construct was issued to Rathdrum Power on October 29, 1999. (P. 208 of Record.) Petitioners filed an appeal on December 3, 1999. Rathdrum Power was permitted to intervene on December 28, 1999. (P. 257 of Record.)

Respondent and Intervenor filed motions to dismiss on December 23 and January 3, respectively, raising the question of standing and asking the hearing officer to rule on the merits as a matter of law because there were no genuine issues of material fact. After oral argument and briefing, the hearing officer concluded that Petitioners lacked standing to initiate a contested case with the Department of Health and Welfare by attempting to appeal the permit modification. (Pp. 348-9 of Record.) Because of the ruling on the issue of standing, the hearing officer did not address the other issues presented by the motions. Petitioners appealed to the Board of Health and Welfare on February 2, 2000. Respondent and Intervenor requested an expedited hearing before the Board, which was granted by the Chairman after consideration of the requests and Petitioners' objection.

Appeals to the Board of Health and Welfare are authorized by Idaho Code § 39-107(6), which provides that "any person aggrieved by an action or inaction of the department of health and welfare shall be afforded an opportunity for a fair hearing" in accordance with the Idaho Administrative Procedure Act. The Idaho Supreme Court has held that a person is aggrieved

when and only when, [a decision] operates directly and injuriously upon his personal, pecuniary, or property rights. . . . To render a party aggrieved by an order, so as to entitle him to appeal therefrom, the right invaded must be immediate, not merely some possible, remote consequence, or mere possibility arising from some unknown and future contingency; although it has been held that an immediate pecuniary damage is not always prerequisite to the right of appeal.

In the Matter of Fernan Lake Village, 80 Idaho 412, 415 (1958). In Fernan Lake, the City of Coeur d'Alene was found not to be directly and injuriously affected by the incorporation of the village, which action was alleged to harm the city's ability to grow. The Idaho Supreme Court

held that statements of injury which are too speculative and conjectural do not constitute injury in fact. Whether we follow federal or state cases, this is a fundamental principle. For example, Lujan v. Defenders of Wildlife required “(1) actual or imminent injury that is concrete and particularized, (2) causal connection between the challenged conduct and the injury, and (3) likelihood that the injury would be redressed by favorable judicial action.” 504 U.S. 555, 559-61.

The Board recognizes the principle of organizational standing. Advocacy for the benefit of the environment will be enhanced by competent debate on environmental issues by organizations adequately funded to present legitimate, scientific evidence and arguments on the issues. To participate in the process, however, the organizations must meet the test for organizational standing, i.e., (1) the members would otherwise have standing to sue in their own right; (2) the interest the organization seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested require participation of individual members in the lawsuit. Glengary-Gamlin Protective Association v. Bird, 106 Idaho 84, 87-8 (Ct.App. 1983), which relied on the standard set forth by the U.S. Supreme Court in Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

REBOUND is described by the affidavit of its executive director as “an activity of the Seattle/King County Building and Construction Trades Council, a tax exempt organization.” (Affidavit of Otto W. Herman, Jr., p. 285 of Record.) The affidavit further states that its membership consists of local affiliates of Building Trades Unions located throughout the Pacific Northwest, including one of the other two named Petitioners, IBEW Local 73 in Spokane. (Affidavit, pp. 286-7 of Record.) The affidavit states that REBOUND has participated in the course of eleven years in “many community/environmental/permitting issues” including five power generation projects, a pipeline project and three resort developments in the State of Washington, as well as expansion of a cement plant and air emissions from fuel barge loading in Oregon.

One of the requirements of organizational standing is that the members of the organization themselves have standing to sue. By affidavit, REBOUND identified the Spokane Electrical Workers local as its member related to this case. IBEW Local 73’s bylaws do not reveal any statement of focus on air quality, environmental protection or health advocacy, but do reflect the not-unexpected purposes of organizing the electrical industry, resolving disputes

between employers and employees by arbitration if possible, and securing adequate pay, among others. (Record, p. 291.) An additional stated purpose of IBEW Local 73 to "by legal and proper means to elevate the moral, intellectual and social conditions of our members, their families and dependents, in the interest of a higher standard of citizenship" does not reveal that the environmental and health interests involved in this appeal are among the purposes of the organization. There is no assertion that the local itself has sustained an injury. Therefore, it does not appear that IBEW Local 73, as a member represented by the organization REBOUND, has established any basis for standing in this matter.

REBOUND provided several affidavits from members of IBEW Local 73 in an attempt to establish a chain of standing from individual members to the local to the representative organization. Petitioners have provided no authority for such an extended basis for standing, and the Board concludes that since the member represented by REBOUND, the local union, does not have standing, the organization likewise lacks standing under the first part of the Glengary test as to the local.

In addition, several form statements were provided to the hearing officer stating that individuals as residents of the Rathdrum Prairie area ask that REBOUND represent their interest in the plant, asserting that "We have serious concerns about the air quality associated with this plant." (Pp. 322-7 of Record.) Since REBOUND's membership is described as including local Building Trades Unions, it is not clear that individual residents are members. In any event, these statements provide only unsupported speculative statements of future harm, and do not differentiate these individuals from everyone else in the area. Therefore, even if these individuals could be regarded as members of REBOUND, they lack standing.

Therefore, REBOUND has failed to establish that it satisfies the first part of the Glengary-Gamlin test, that its members have standing to sue in their own right.

In evaluating the question of standing, the Board has considered the parties' oral and written arguments on the pertinent Idaho cases, which were relied on by the hearing officer: Miles v. Idaho Power, 116 Idaho 635 (1989); Boundary Backpackers v. Boundary County, 128 Idaho 371 (1996) and Selkirk Priest Basin Association v. State, 128 Idaho 831 (1996). As noted above, this case presents the difficulty that the member represented by REBOUND, the local union, does not appear to have standing. However, it is also necessary to consider the locals as the

representing organizations since they are also named Petitioners. The assertion of standing also fails as to them since there is no showing that the interests at issue are germane to their purpose, as discussed above.

In addition, the standing of the two locals is supported by several form affidavits provided by individual union members, which contain only the following conclusions unsupported by any facts establishing how the modification of the permit results in injury to them:

The permit issued by the Department of Health and Welfare's Division of Environmental Quality will contribute to air pollution in my immediate vicinity, and I will be injured in fact. The permit issued will negatively impact me and my family's health, safety, and welfare. I am an aggrieved party.

The record also contains the affidavit of Scott Smith, a resident of Spokane who is a member of the plumbers and steamfitters local, which he asserts is also a member of REBOUND. (Pp. 294-5 of Record.) There is an additional affidavit by Scott Smith, presumably the same individual, which states that the Spokane area, where he lives, has significant carbon monoxide pollution; that the Rathdrum Power project has the potential to emit a minimum [sic] of 92.3 tons per year according to the permit; that wood burning bans occur during the winter months; and that when burn bans occur, he must use alternate fuel sources, with a resulting increase in expenses. (Pp. 316-7 of Record.)

The affidavit of Douglas Barnard, upon which Petitioners most heavily rely, states that his enjoyment of his summer home five miles from the plant will be negatively affected by the environmental impact of the plant. He avers that increases in pollution from the plant and subsequent deterioration in air quality will diminish his use of his property and its value. He further states that a reduction in emissions would provide a degree of remedy for the damage to his property. (Pp. 319-320 of Record.)

The Board concurs with the hearing officer's conclusion that these affidavits do not demonstrate direct injury to Petitioners or their members. Neither affidavit demonstrates a causal link between the *increased* emission permitted by the permit modification and diminishment in use and value of their property or increased expenses. The affidavits contain speculation and do not distinguish affiants from any other citizens of the area.

The only technical support for Petitioners is the affidavit of John Williams, who asserts that the permit did not provide adequate emission limits for auxiliary boilers and fuel preheater, resulting in potential excessive emissions of nitrous oxide, not the carbon monoxide referred to by Smith. However, Mr. Williams' affidavit contains no information establishing his credentials to offer this opinion beyond having "been involved in the review of power plant air permits for the last fifteen years." (Pp. 329-30 of Record.) The Board concludes that Mr. Williams' affidavit does not establish or support those of other individuals that there is a specific harm to Petitioners' members that has been linked to the permit modification or that has a different impact on them than any other residents of the area.

Therefore, the Board concludes that the two union locals have failed to establish standing under the first two tests for organizational standing: that the members represented by the organization have standing in their own right, and that the interests the organization seeks to protect are germane to the organization's purpose.

In rebuttal during oral argument before the Board and in their brief, Petitioners assert that standing is required under the Clean Air Act, 42 USC § 7661a(b)(6), which requires states to have procedures for judicial review by "any person who participated in the public comment process" as well as an applicant for a permit or any person who could obtain judicial review under applicable law. Petitioners did participate in the public comment process. (P. 4 of Record.) However, this provision has been narrowed from its literal meaning by interpretation of the EPA to require that states provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution. This regulatory interpretation was relied on in Commonwealth of Virginia v. Browner, 80 F.3d 869, 875 (2996). This issue was not argued to the hearing officer so the Board is without the benefit of her study of the issue. (Transcript of January 13, 2000, argument; Petitioner's Response to Motion to Dismiss, pp. 274-282.)

Petitioners assert that the Board is faced with a preliminary decision that violates public participation requirements of the Clean Air Act and that EPA will take steps to withdraw approval of Idaho's program on this basis. Petitioners' Post-Argument Brief at 5, 10. A letter from EPA regarding an Oregon Supreme Court decision on representational standing is appended to the brief, but will not be considered by the Board since it is not part of the record.

Petitioners now argue that the Idaho jurisprudence cited above on the issue of standing creates an impermissibly higher standing hurdle than that required in federal court. The Board does not agree with that interpretation of Idaho case law and does not assume that the Idaho appellate courts would run afoul of Article III standing if this case were presented to them.

The standards articulated for standing in the Idaho cases are not different from those articulated in the federal cases briefed by the parties. The differences in outcome among the various cases is not based on the type of interest asserted – health, economic, environmental, aesthetic, or recreational – but on the type of harm to the person who claims to be aggrieved. When speculative and generalized harm is averred, standing is denied as in Lujan and Selkirk Priest Basin Association. When concrete and particularized injury and a causal connection between the action and injury that is remediable are established, standing has been granted as in Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., \_\_\_ U.S. \_\_\_, 120 S.Ct. 693 (2000), and Miles.

In conclusion, the Board concludes that REBOUND lacks standing because its members do not have standing to sue in their own right, either as member union locals or as individual residents of the area, assuming these individuals are members. IBEW Local 74 and Pipefitters and Steamfitters Local 44 lack standing because the interests involved in this appeal are not germane to their organizations' purpose, and because their individual members lack standing in their own right.

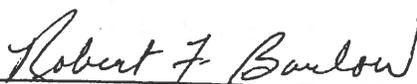
If organizations wish to participate in the process, they can identify as parties those individual aggrieved members whose interests they wish to protect, and assert those rights to relief and interests at the earliest stages of the proceedings. The efficiency of administrative proceedings would be greatly enhanced for the agency and all interested parties if organizations would take this approach to standing.

Identification of parties having individual standing at the earliest stages of the proceedings will help ensure that a quality presentation focused on the interests of the aggrieved party is made. For an organization to attempt to boot-strap itself into organizational standing after the standing issue has been raised wastes resources at a critical stage of the proceedings and may force the organization to revise its position when its true "clients" are identified.

The hearing officer found that none of the identified members had individual standing and the Board affirms that decision. The hearing officer did not rule specifically on the issue of organizational standing. The Board believes that REBOUND and the other Petitioners did not have the requisite focused purpose of representation of their members on environmental issues to sustain a finding of organizational standing under the Glengary-Gamlin and Washington Apple test.

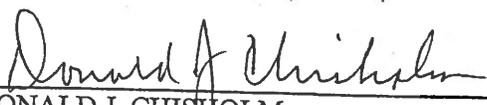
NOW, THEREFORE, the Idaho Board of Health and Welfare hereby ORDERS that the decision of the hearing officer be, and is hereby AFFIRMED.

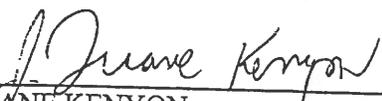
DATED this 28<sup>th</sup> day of February, 2000.

  
\_\_\_\_\_  
ROBERT F. BARLOW, Chairman

  
\_\_\_\_\_  
G. BERT HENRIKSEN, Vice-Chairman

  
\_\_\_\_\_  
MARTI CALABRETTA

  
\_\_\_\_\_  
DONALD J. CHISHOLM

  
\_\_\_\_\_  
QUANE KENYON

  
\_\_\_\_\_  
JANET F. PENFOLD, Secretary

  
\_\_\_\_\_  
RICHARD T. ROBERGE, M.D.

This is a final Order of the agency. Pursuant to § 67-5270, et. seq., Idaho Code, any party may appeal to district court by filing a petition in the county in which:

- 1) a hearing was held,
- 2) the final agency action was taken,
- 3) the party seeking review of the order resides, or
- 4) the real 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 date of mailing of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28<sup>th</sup> day of February, 2000, a true and correct copy of the foregoing ORDER AFFIRMING DECISION OF THE HEARING OFFICER was served on the following as indicated below:

Paula J. Saul, Hearing Coordinator  
Idaho Division of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706

Krista McIntyre  
STOEL RIVES, LLP  
101 S. Capitol Blvd., Ste. 1900  
Boise, ID 83702

Darrell G. Early  
Deputy Attorney General  
Idaho Division of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706

Teresa A. Hampton  
HAMPTON & ELLIOT  
P.O. Box 1352  
Boise, ID 83701-1352

Debra L. Cline

JEAN R. URANGA  
Hearing Officer  
714 North 5th Street  
P.O. Box 1678  
Boise, Idaho 83701  
Telephone: (208) 342-8931  
Facsimile: (208) 384-5686  
Idaho State Bar No. 1763

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BEFORE THE DEPARTMENT OF HEALTH AND WELFARE

STATE OF IDAHO

REBOUND; THE INTERNATIONAL )  
BROTHERHOOD OF ELECTRICAL )  
WORKERS, LOCAL 73; and UNITED )  
ASSOCIATION OF PLUMBERS AND )  
STEAMFITTERS, LOCAL 44, )

Appellants. )

-vs- )

THE IDAHO DEPARTMENT OF )  
HEALTH AND WELFARE, )

Respondent. )

and )

RATHDRUM POWER, LLC, )

Intervenor. )  
\_\_\_\_\_ )

Docket No. 0101-99-07

ORDER ON MOTIONS TO DISMISS

This matter is before the Hearing Officer on the Motions to Dismiss filed by the Respondent, Idaho Department of Health and Welfare, Division of Environmental Quality, and the Intervenor, Rathdrum Power, LLC. All parties submitted written briefing and argument. A hearing was conducted on the Motions on January 13, 2000. Teresa Hampton appeared by and on behalf of the Appellants;

the Idaho Department of Health and Welfare appeared by and through its attorney of record, Darrell Early; and the Intervenor appeared by and through its attorney, Krista McIntyre.

The undisputed facts establish that in September 1995 a permit was granted to a predecessor to Rathdrum Power to construct an electric generating project located near Rathdrum, Idaho, in Kootenai County. The DEQ granted a two-year extension on the permit and, on April 2, 1999, Rathdrum Power filed a timely application to modify the existing permit. The DEQ established a public comment period on this application. In addition, while not required to do so, DEQ held a public hearing on October 12, 1999, at which REBOUND submitted comments. DEQ granted the requested permit modification and issued a new permit to construct an electric generating project to Rathdrum Power on October 29, 1999.

On December 3, 1999, REBOUND filed a document entitled "Appeal of Contested Case." This appeal was signed by "Jeffrey Soth for the Appellants" and listed REBOUND, the International Brotherhood of Electrical Workers, Local 73, and the United Association of Plumbers and Steamfitters, Local 44, as Appellants. The appeal alleges that the Rathdrum Power project did not demonstrate compliance with IDAPA regulations, the Clean Air Act Amendment and Title III of the Clean Air Act. The appeal states:

The organizations are appealing this action pursuant to Idaho Department of Health and Welfare Rules and Regulations, Title 5, Chapter 3, "Rules Governing Contested Case Proceedings and Declaratory Rulings".

The appeal further alleges generally that members of the Appellants

live, work and seek recreation in the project vicinity and will be harmed by proposed levels of pollution which may cause harm and may contribute to deleterious health effects.

The only applicable statute which would support the request for appeal is Idaho Code §39-107(6) which provides:

Any person aggrieved by an action or inaction of the department of health and welfare 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.

The Rules for the Control of Air Pollution in Idaho provide that, with respect to administrative appeals, persons may be entitled to appeal final agency actions authorized under the chapter pursuant to IDAPA 16.05.03. IDAPA 16.01.01.003. Neither Idaho Code §39-107(6) or the Rules Governing Contested Case Proceedings and Declaratory Rulings defines a "person aggrieved".

However, the Administrative Procedure Act, Idaho Code §§67-5270(2) and (3) both refer to judicial review by "a person aggrieved" by a final agency action or order. In the case of In the Matter of Fernan Lake Village, 80 Idaho 412, 331 P.2d 278 (1958), the Idaho Supreme Court ruled that the term "person aggrieved" did not include a city that could not show a direct tangible interest in a matter. The Court determined that an aggrieved person is one who is directly and injuriously affected by the decision and 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.

\* \* \* \* \*

"The mere fact that a person may be hurt in his feelings, or be disappointed over a certain result, or be subjected to inconvenience, annoyance or discomfort, or even expense, does not constitute him a party 'aggrieved,' since he must be aggrieved in a legal sense. To tender a party aggrieved by an order, so as to entitle him to appeal therefrom, the right invaded must be immediate, not merely some possible, remote consequence, or mere possibility arising from some unknown and future contingency; although it has been held that an immediate pecuniary damage is not always prerequisite to the right of appeal." 80 Idaho at 415.

A similar result was reached in the case of Boundary Backpackers v. Boundary County, 128 Idaho 371, 913 P.2d 1141 (1996). In that case, three non-profit membership groups filed an action to declare an ordinance unconstitutional. The Court relied upon the Idaho Supreme Court case of Miles v. Idaho Power Company, 116 Idaho 635, 778 P.2d 757 (1989), regarding rules for determining standing. A determination of standing must focus on the party seeking relief, and not the issues the party wishes to adjudicate. The litigants must allege or demonstrate an injury in fact and a citizen may not challenge a governmental action where the injury is one suffered alike by all citizens of the jurisdiction. See also, Selkirk-Priest Basin Ass'n v. State, 128 Idaho 831, 919 P.2d 1032 (1996).

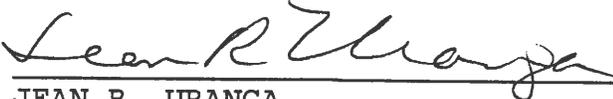
Based upon the foregoing, the Hearing Officer concludes that none of the Appellants or its members are "persons aggrieved" by the modification to the permit since the agency action has not directly and injuriously affected their personal, pecuniary or property rights. Consequently, Appellants lack standing to initiate a

contested case proceeding with the Department of Health and Welfare by attempting to appeal the permit modification granted to Rathdrum Power, LLC. Based upon the foregoing, the Motion to Dismiss is granted. As a result of this ruling, it is unnecessary to address further issues raised in the Motions to Dismiss.

In light of this decision, the hearing scheduled for January 24, 2000, is vacated.

Pursuant to Idaho Code §67-5245 this is a Preliminary Order which will become a Final Order without further notice, unless a Petition for Review is filed with the agency head, or with any person designated for that purpose by rule of the agency, within **fourteen (14) days** after the issuance of this Preliminary Order. If a Petition for Review is filed, the basis for review must be stated on the Petition. Further, pursuant to IDAPA 16.05.03102.04 no motion for reconsideration of any preliminary, recommended or final decision shall be granted, unless otherwise provided by law or agency rule.

DATED This 19<sup>th</sup> day of January, 2000.

  
\_\_\_\_\_  
JEAN R. URANGA  
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 19<sup>th</sup> day of January, 2000, I served true and correct copies of the foregoing ORDER ON MOTION TO DISMISS by faxing and mailing copies thereof to:

Teresa A. Hampton  
Hampton & Elliott  
Attorneys at Law  
P.O. Box 1352  
Boise, Idaho 83701  
Via Fax No. 384-5476

Darrell G. Early  
Deputy Attorney General  
Natural Resources Division  
Environmental Quality Section  
1410 N. Hilton, 2<sup>nd</sup> Floor  
Boise, ID 83706-1255  
Via Fax No. 373-0481

Krista McIntyre  
Stoel Rives, LLP  
Attorneys at Law  
101 S. Capitol Blvd., Suite 1900  
Boise, ID 83702  
Via Fax No. 389-9040

Paula Junae Saul  
DEQ Hearings Coordinator  
Natural Resources Division  
Environmental Quality Section  
1410 N. Hilton, 2<sup>nd</sup> Floor  
Boise, Idaho 83706-1255  
Via Fax No. 373-0481

  
\_\_\_\_\_  
JEAN R. URANGA