

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

HECLA MINING COMPANY,)	
)	Docket No. 0102-03-13
)	
Petitioner,)	ORDER ON INTERVENTION
)	
v.)	
)	
THE IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY,)	
)	
Respondent,)	
)	
IDAHO CONSERVATION LEAGUE,)	
)	
Intervenor.)	
_____)	

PROCEDURAL BACKGROUND

In January 2003, the United States Environmental Protection Agency (“EPA”) issued a draft National Pollution Discharge Elimination System (“NPDES”) Permit (“Permit”) to Hecla Mining Company (“Hecla”), for the Lucky Friday Mine and Mill. On June 17, 2003, the Idaho Department of Environmental Quality (“IDEQ”) issued a Section 401 water quality certification (“401 Certification”), *see* Clean Water Act, 33 U.S.C. § 1341. On August 12, 2003, EPA issued a final NPDES Permit No. ID-000017-5, incorporating the 401 Certification.

On July 31, 2003, Hecla filed a *Petition for a Contested Case Proceeding and Request for a Stay of Certain § 401 Certification Conditions* (“Petition”) with the Board of Environmental Quality (“Board”). The Petition seeks review of specific conditions in IDEQ’s 401 Certification. On September 5, 2003, IDEQ filed *DEQ’s Response to Hecla’s Petition for Contested Case*. On September 10, 2003, the Idaho Conservation League (“ICL”) timely filed a

Petition to Intervene in the contested case proceeding. The *Petition to Intervene* was supported by the affidavits of Justin Hayes, ICL Program Director, and Dr. John Osborn, an ICL member. On September 17, 2003, Hecla filed an objection to ICL's petition, with a supporting affidavit of Mike Dexter, the Mine Manager for the Lucky Friday Mine. On October 6, 2003, ICL filed a *Reply in Support of its Petition to Intervene* with a second supporting affidavit by Justin Hayes.

On January 14, 2004, the hearing officer issued an *Order On Petition To Intervene* ("Order"), denying ICL's *Petition to Intervene*. On January 30, 2004, both ICL and IDEQ filed petitions seeking review of the Order. IDEQ's exceptions to the Order concurred with ICL's claim that the organization's pleadings and supporting affidavits meet the requirements for intervention in this proceeding. On February 13, 2004, Hecla filed a *Response to Petition For Review of Order Denying Intervention*, arguing that the Board should adopt the hearing officer's Order denying intervention.

On March 4, 2004, the Board, after fully considering the record and the oral and written arguments of the parties, unanimously voted to reject the hearing officer's Order and grant ICL's *Petition to Intervene*.

STANDARD FOR INTERVENTION

ICL's request for intervention is governed by the Rules of Administrative Procedure Before the Board of Environmental Quality, IDAPA 58.01.23.350, -351, and -353 ("IDEQ Rules"). Rule 350 provides that "[p]ersons 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." IDAPA 58.01.23.350. Rule 351 requires a potential intervenor to "state the direct and substantial interest of the potential intervenor" and, if seeking affirmative relief, the basis for granting it. IDAPA 58.01.23.351. A presiding officer in a contested case may grant intervention "if a petition to intervene shows [a]

direct and substantial interest in any part of the subject matter of the proceeding, does not unduly broaden the issues, and will not cause delay or prejudice to the parties.” IDAPA 58.01.23.353. “[A] permit applicant or permit holder may intervene as a matter of right in any contested case in which the permit is contested.” Id. Under the IDEQ Rules, intervention of persons other than a permit applicant or permit holder is not an express right but is subject to the sound discretion of the Board.

In a recent case, the Board had occasion to apply the administrative rules governing intervention in contested cases. *See J.R. Simplot Co. v. Idaho Department of Environmental Quality, Order on Intervention*, Docket No. 0101-03-07 (August 12, 2003). There, we concluded:

The plain meaning of the phrase “direct and substantial interest” suggests that more is required of a would-be intervenor than a generalized interest in the proceedings. To support a claim of direct and substantial interest, the allegations made in support of the claim must be factually supported and specific to the party making the claim. The would-be intervenor must articulate the unique way in which he or she will be affected by disposition of the case. Generalized grievances or concerns shared by all citizens do not suffice.

Id. at 4.

ICL’S AFFIDAVITS

ICL relies on two affidavits submitted by Justin Hayes, and one affidavit submitted by John Osborn. Unlike Mr. Osborn’s affidavit, Mr. Hayes’ affidavits show the unique way he will be affected by the outcome of the case. He specifically alleges that he has fished and waded the South Fork of the Coeur d’Alene River in the vicinity of the Hecla discharge and alleges the manner in which this discharge affects water quality and his ability to recreate in and near the river. He states that he will not return to the area until water quality improves. He also alleges how Hecla’s success on each of the issues raised in this proceeding will further impair, or delay

the restoration of, the water quality of the South Fork of the Coeur d'Alene River and thus, his and ICL's members' ability to safely recreate in the area.

The affidavits demonstrate the specific ways in which the health, safety, and recreational interests of Mr. Hayes, as an ICL member, will continue to be directly affected by the outcome of the case. Through Mr. Hayes' affidavits, ICL has shown a connection between each of the issues raised in the Hecla Petition and ICL's interests, and thus a direct and substantial interest sufficient for intervention.

We note, however, that this decision is not based on Mr. Hayes' assertions that his financial interest will be enhanced if Hecla complies with the terms and conditions of the 401 Certification. Aside from the fact that the risk of harm to him is highly speculative, this is not a proper forum to redress issues of corporate governance. The Board recognizes that Mr. Hayes has a direct and substantial interest in the outcome of these proceedings that is wholly independent of his interest as a minority share holder of Hecla.

Hecla's opposition to ICL's intervention is based primarily on the assertion that the allegations regarding water quality and the impact of Hecla's discharge on water quality are factually unsupported. Whether the facts alleged by ICL are ultimately found to be supported is not to be determined at this stage in the proceedings. Instead, the Board must only determine whether ICL has alleged sufficient facts to state a direct and substantial interest.

Finally, we find nothing in the pleadings and related documents indicating that ICL's participation in this contested case will unduly broaden the issues, cause delay, or prejudice Hecla. ICL represents that its participation may be limited to those issues already identified, at the hearing officer's discretion. This contested case is still in its initial stage and therefore, ICL's participation will not cause prejudice to Hecla or cause any delay in the proceedings.

We conclude that the quality of evidence presented in Mr. Hayes' affidavits is sufficient to show a direct and substantial interest in this contested case proceeding about the terms of the 401 Certification challenged by Hecla. The conclusion that ICL may intervene in this case on behalf of its members is based only on the affidavits of Mr. Hayes, in conjunction with the pleadings. We direct the hearing officer to use appropriate discretion to ensure that the proceedings are not unduly delayed and the issues are not expanded beyond those presented in Hecla's Petition.

ORDER

In consideration of the foregoing and as more particularly described above, IT IS HEREBY ORDERED that the *Petition for Intervention* filed by the Idaho Conservation League is GRANTED.

DATED this _____ day of _____ 2004.

BOARD OF ENVIRONMENTAL QUALITY

Paul Agidius

Donald J. Chisholm

Dr. Joan Cloonan

Craig D. Harlen

Dr. Randy MacMillan

Nick Purdy