State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
Board of Environmental Quality

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Dirk Kempthorne, Governor
C. Stephen Allred, Director

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

November 12 & 13, 2002

The Board of Environmental Quality convened on November 12, 2002 at 8:45 a.m. at:

Idaho Department of Environmental Quality
1410 N. Hilton, Conference Rooms A & B
Boise, Idaho

ROLL CALL

BOARD MEMBERS PRESENT:
Paul C. Agidius, Chairman
Dr. J. Randy MacMillan, Vice-chairman
Marti Calabretta, Secretary
Donald J. Chisholm, Member
Dr. Joan Cloonan, Member
Marguerite McLaughlin, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT:
None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:
C. Stephen Allred, Director
Debra Cline, Management Assistant to the Board
Nancy Bowser, Water Quality Program
John Brueck, Hazardous Waste Regulation Policy Coordinator
Jess Byrne, Resource Officer
Barry Burnell, Life Sciences Discipline Lead
Doug Conde, Deputy Attorney General, DEQ
Keith Donahue, Deputy Attorney General, DEQ
Dean Ehlert, Remediation Program
Paula Gradwohl, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Phyllis Heitman, Management Assistant
Jason Jedry, Administrative Services
Sharon Keene, Customer Resources
Kate Kelly, Administrator, Air Quality Program

Larry Koenig, Administrator, State Planning and Special Projects
Lisa Kronberg, Air Quality Program
Dave Mabe, Administrator, Water Quality Program
Chris Mebane, Water Quality Program
Jon Sandoval, Chief of Staff
Dr. Ron Sheffield, University of Idaho
Tim Teater, Air Quality Analyst

OTHERS PRESENT:
Beth Baird, Boise City
Gayle Batt, Idaho Water Users Assoc.
Ed Bulgin, Amalgamated Sugar Co.
Beth Elroy, Monsanto
Jane Gorsuch, Intermountain Forest Association
Doug Hardesty, U.S. EPA
Lujin Jin, Idaho Department of Health & Welfare, Division of Health
Linda Jones, Holland & Hart
Lloyd B. Knight, Idaho Cattle Assoc.
David Lindsey, Woodgrain Millwork
Jack Lyman, Idaho Mining Assoc.
Brent Olmstead, Milk Producers of Idaho
Hugh O'Riordan, Givens Pursley
Julie Pence, Times News
Representative Don Pischner, Idaho Legislature
Alan Prouty, J. R. Simplot Co.
Dick Rush, Idaho Assoc. of Commerce & Industry
Suzanne Schaefer, SBS Associates LLC
Elke Shaw-Tulloch, Idaho Department of Health & Welfare, Division of Health
Dr. Ron Sheffield, University of Idaho
Rick Warren, Glanbia Foods
Jim Werntz, U.S. EPA

- All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality. To obtain a copy, contact the Board assistant.

WORKSESSION

Chairman Paul Agidius called the meeting to order and noted that an item had been added to the agenda. Larry Koenig, Administrator, State Planning and Special Projects, will provide a short presentation on the long-range plan.

LONG-RANGE ENVIRONMENTAL PLAN

Larry Koenig, Administrator, State Planning and Special Projects, presented a draft letter to Governor Kempthorne for the Board's review and approval (Attachment 1). The letter discusses the Board's efforts to draft an Idaho long-range environmental plan and asks for the Governor's support for legislation to develop the plan. It will serve as the basis for the Board's

discussion with the Governor when they meet tomorrow. A legislative concept paper was also prepared to outline the intent of the legislation.

Marguerite McLaughlin questioned why the legislation was being proposed for 2005 instead of 2004. Director Allred explained that 2005 seemed more feasible given the budget constraints and the time needed to develop a plan with comprehensive input and coverage.

- **MOTION**: Don Chisholm moved the Idaho Board of Environmental Quality approve the letter to Governor Kempthorne regarding the long-range environmental plan as drafted and request that it be signed by Chairman Agidius and hand-delivered to the Governor's office today.
  SECOND: Dr. Randy MacMillan
  VOTE: Passed by unanimous vote.

- **STATUS REPORT ON WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0205 (TEMPORARY RULE)**

Chris Mebane provided an update on the status of this rulemaking. It is not being presented for approval by the Board at this time. The rule resulted from a petition from the Idaho Association of Commerce and Industry in April 2002. The EPA submitted extensive comments on the rule. The EPA feels the rule is premature since Idaho is in the process of developing more comprehensive procedures for potentially taking primacy of the NPDES program. EPA currently administers the NPDES program and stated they will follow their own reasonable potential to exceed procedures, regardless of what the state adopts in rules. DEQ will continue to work to resolve the matter and the rule will stay on the books as a proposed rule. DEQ will bring the rule to the Board when it is ready for adoption.

Dick Rush, IACI, commended DEQ for their efforts to negotiate a solution to this matter. Mr. Rush reminded that this rule is needed not only by the City of Boise and certain industries, but also by the Idaho Association of Cities and the Mining Association. As new permits are filed, many other communities and businesses throughout the state may face the same problems as the City of Boise, and there will be a continued need for this rule. Mr. Rush clarified that IACI's intent in petitioning for this rule was not just to deal with the City of Boise permit, there are others who have an interest in this issue.

Chris Mebane explained the temporary rule was adopted by the Board at its August 2002 meeting, and DEQ simultaneously proposed it for action as a pending rule. The temporary rule will expire at the end of the legislative session, but it will remain on the books as a proposed rule. At some point, the rule will have to either be vacated or adopted as a permanent rule.

Jack Lyman, Idaho Mining Association, urged the Board to adopt the temporary rule as a permanent rule.

Mr. Mebane stated it is DEQ's intent to let the temporary rule expire and continue negotiations with the stakeholders on the proposed rule. He noted that Robin Finch, Association of Idaho Cities, indicated there are 29 municipal permits that are required to monitor for metals, and they may affected by this rule.

Director Allred pointed out that if the legislature directs DEQ to obtain primacy of the NPDES program, they will have to adopt rules for the program and this rule would be moot. Doug Conde added that both the Clean Water Act and the federal rules state that, as the permitting authority, EPA has to make the determination whether there is a reasonable potential to exceed. If DEQ gains primacy and is the permitting authority, DEQ will make that determination.

AGENDA ITEM NO. 4 **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0202 (PENDING RULE) *(PERMIT STREAMLINING)***

Kate Kelly, Administrator of the Air Quality Division, stated the comments on the rule and DEQ's responses to the comments were distributed to Board members for review. Ms. Kelly presented a brief background on the Clean Air Act and the Idaho Air Quality Program. As the Clean Air Act changed over the years, Idaho's Air Quality Program responded to those changes by adding on programs. This rule is an attempt to streamline the permitting process.

Lisa Kronberg explained the adjustments to the permit to construct application requirements for toxic air pollutants and discussed examples of how the rule would be applied. Dr. Joan Cloonan stated she participated in the rulemaking when the toxic standards were originally adopted. It was a compromise regulation. The lists of toxic pollutants were based on literature data such as OSHA numbers, and the Department added safety factors to those numbers. They were accepted based upon the fact that they would only apply to incremental increases of those toxic pollutants. The matter was very controversial and there were extensive discussions with industry.

Kate Kelly clarified the numbers in the tables of toxic pollutants are risk-based and are an indicator that there might be a potential for a health impact. They would trigger DEQ to look at a particular situation in more detail. These numbers are different from an ambient standard, which sets a limit that cannot be exceeded. This is a different regulatory mechanism.

Chairman Agidius was concerned that when the toxic numbers were originally established, they only applied to incremental increases, and this rule now proposes to look at the cumulative effect. He questioned whether both sides of the rule should be revisited. Lisa Kronberg explained this would require reviewing over 500 toxic pollutants and different combinations and amounts to determine what levels would be acceptable.

Director Allred explained there are situations in the state where continuous additions of new sources at a facility have resulted in ambient air levels of toxic pollutants, such as chloroform, high enough to cause concern. A single addition at the increment level is not a problem, but the current rule allows a facility to continue to add new sources repeatedly. The cumulative effect could cause a serious problem, but the current rule does not give DEQ the authority to stop an unhealthful level from developing. A single facility could add a thousand new sources, as long as each one did not exceed the increment level. The proposed rule would give DEQ, as part of the new source review process, the ability to ask the facility to perform a risk analysis to investigate further what the effect of the addition would be. A risk analysis would not automatically be required; it would only be requested in the rare cases where DEQ felt the proposed addition, when combined with the rest of the sources at a facility, might cause a health concern.

Dr. Joan Cloonan asked for confirmation that the proposed rule says that only the emissions from the modification or new source are not to exceed the increment amount, and that it does not say that the cumulative emissions from the whole facility will not exceed the incremental amount. Lisa Kronberg confirmed Dr. Cloonan's understanding of the proposed rule. She added that there is no fundamental change to the toxic air pollutant. It is still increment by increment, and now it's just under the permit to construct program.

Dr. Joan Cloonan and Chairman Agidius thought the wording was confusing and could be interpreted to mean that the total or cumulative emissions from a facility (not just the modification or new source) could not exceed the increment amount. Lisa Kronberg suggested a change to Section 203.03. to read, " . . . the emissions of toxic air pollutants from the new stationary source or modification . . " Dr. Cloonan felt the addition of the word new helped, but was still concerned with the language in Section 203.03. regarding acceptable ambient concentrations. Kate Kelly will work with Dr. Cloonan to develop clarifying language for presentation at tomorrow's meeting.

Kate Kelly reviewed each of the changes in the rule. Most of the remaining changes were housekeeping changes or annual updates to federal rules. A change is proposed to Section 710 to change the grain loading standard back to the process weight rate standard, because EPA did not approve the change. EPA stated technical justification was needed before the grain loading standard could be used.

Lisa Kronberg discussed proposed changes to provide clarification of the process for handling the expiration and renewal of Tier II operating permits. The initial language was changed in response to comments from industry.

Rob Sterling, Micron Technology and Chair of the IACI Air Quality Subcommittee, briefly discussed the history of the Clean Air Act, the incremental changes over time, and the complexity of the regulations. While IACI is very supportive of the concept of streamlining the program and doing comprehensive permit perform, they feel changes must be made very carefully because of the cascading effects they can have on other regulatory programs. He noted that EPA also recognizes the need to reform the permit to construct program. They (EPA) have been talking to the stakeholders for over ten years, but have made no changes due to the complexity of the program and the various interests and changes people want to make.

Mr. Sterling stated that IACI believes the Tier II changes in the proposed rule are being considered out of context, and suggested they be withdrawn for consideration at a later time. Comprehensive permit reform should be discussed with all of the issues on the table. Mr. Sterling felt the time was not right for comprehensive permit reform of the state rules. The state rules have undergone such significant change over the last ten years (115 rulemaking actions), they are considerably out of date with what is currently approved by EPA in the state implementation plan (SIP). Recently, EPA and the regulated community worked together to conform the state rules with the federal rules with the express purpose, for the first time in ten years, of incorporating the state rules into the SIP and making them consistent. Earlier this year, EPA proposed a federal register notice incorporating the state rules into the SIP. This would be the first time in ten years that the state would be consistent with what EPA has approved. In addition, a number of regulated industries have Title V permits for the first time, and many of the permits require a Tier II permit. He suggested it would be more appropriate to allow DEQ and the regulated community time to gain experience with all of the newly issued permits and to

learn how the different programs will function together. After DEQ and the regulated community are experienced, they will be able to address permit reform and know what changes need to be made.

Rob Sterling discussed the history of the regulation of hazardous air pollutants and toxics in Idaho. The state toxics program was developed due to an absence of action by EPA. EPA is now undergoing comprehensive risk analysis of toxic pollutant public health risks across the country. Mr. Sterling asserted that the toxic rules in the state of Idaho are no longer necessary because EPA is taking a comprehensive approach. He felt the changes proposed by DEQ were significant and caused tremendous uncertainty for the regulated community.

Dr. Randy MacMillan asked what the consequences would be if the Board did not adopt the proposed rule. Chairman Agidius asked what the effect would be if the portion of the rule dealing with toxic pollutants were not adopted. Kate Kelly responded that if the change to Section 203.03 is not made, it would automatically be presumed that any incremental increase in toxic air pollutants would be protective of public health, as long as the increase was below the levels set out in 585 and 586. DEQ has other authorities it can use if there is concern about an imminent health threat as the result of a permit to construct. However, she felt the process was not as clear, and it is not proactive. The action is not taken before a PTC is granted and before a facility has made the modification or addition. Ms. Kelly emphasized the continuing need for a state toxics program in Idaho. She stated there was not a comprehensive nature to EPA's efforts on this issue, and there is still a definite need for the states to supplement what is happening at the federal level with their independent programs.

Rob Sterling believed the modifications discussed by Lisa Kronberg to Section 203.03 would be acceptable, but his main concern was that Section 203.03 (as proposed) still strikes the last sentence. This is the most important factor for industry. The last sentence in Section 203.03 was a significant point of agreement when the rule was originally negotiated. It adds certainty and clarifies what constitutes compliance. There is uncertainty that DEQ may require some additional process or requirement that is not defined in these rules.

Lisa Kronberg discussed an alternative to provide industry more certainty. DEQ could initiate a negotiated rulemaking process to set an emission limit for a facility if a PTC caused concern. Rob Sterling stated industry was amenable to dealing with threats from toxic pollution, if a threat exists. He felt the toxics rules should be applied on an incremental change as they are currently established and the last sentence in Section 203.03 should not be deleted. If DEQ has other authorities to deal with specific situations, it appears the concerns of all parties would be addressed.

Lisa Kronberg noted that the other authorities mentioned were under the Tier II rules. If DEQ makes a determination that there is not compliance with any rule, it can require a facility to get a Tier II permit and demonstrate compliance with Section 161. Such action would only be taken in an extreme situation where there was concern for the public health. Kate Kelly noted that this action would be taken after a new source or modification had been constructed.

Chairman Agidius asked if situations existed where incremental changes have resulted in problems due to the cumulative effect. Kate Kelly stated DEQ suspected such situations existed, but noted that a documented case was not needed to proceed with rulemaking.

Dr. Joan Cloonan asked what criteria DEQ would use to determine if a risk existed that would trigger additional investigation. Kate Kelly stated it would be on a case-by-case basis. DEQ would use professional judgment to determine if a risk analysis should be performed to determine if there was a potential for a health impact. Existing risk analysis protocols would be used.

Don Chisholm felt the last sentence of Section 203.03 was problematic because it appears to be a guarantee to industry that if they have a PTC they will not be in violation, even though the cumulative data may establish a Section 161 violation. The Department would then be left with using its other authorities in an uphill battle to try to counteract what has already been done. He felt the incremental approach was not very satisfactory in addressing the cumulative effects of toxic pollutants. He wondered how giving such a "blank check" could accomplish the goal of protecting the public health.

Marti Calabretta asked to what degree IACI represented small businesses and rural communities. Rob Sterling was uncertain of the exact membership, but stated that individuals who participated in the IACI Air Quality Subcommittee included representatives from both large and small businesses in Idaho. Attendees included small fiberglass operators, a representative of lumber mills of varying sizes, and on occasion non-IACI members such as dry cleaners. Ms. Calabretta asked how the IACI science committee communicated with its members and others to make them aware of its discussions and the possible impact of its activities. Mr. Sterling responded that meeting announcements, minutes, proposed rules and comments are distributed via email to the IACI membership list. Ms. Calabretta asked if IACI received feedback or comments from its members, other than large corporations, who might be affected by these regulations. Dick Rush stated IACI has 300 members; about three-quarters are small businesses, and many are organizations such as the Idaho Farm Bureau or the Idaho Forest Products Industry who represent many small businesses. He noted that most city chambers of commerce are also members. The DEQ response to comments (on this rule) was distributed to members, but the short timeframe did not allow much time for members to respond.

Marti Calabretta asked if IACI provided any advice or consulting services, through staff or some other link, for small businesses that might be affected by the air quality regulations. Dick Rush stated that IACI works with the Idaho Legislature and the regulatory agencies to express the opinions and ideas of industry. They try to ensure that the laws and regulations are reasonable, well thought out, and based on science. IACI normally does not get involved in issues with a specific company.

Rob Sterling reminded that when this rule was originally negotiated in the early 1990's, it was widely acknowledged that given the tremendous uncertainty about using occupational data to extrapolate to public health impacts, the rule was a compromise. The continuing lack of data makes it very difficult to establish ambient criteria and risk levels. Changes have also been proposed to some of the toxic numbers in the tables, and it is unclear how those changes will affect sources that are currently in compliance with the rules. Kate Kelly clarified that some of the changes were simply typographical corrections, and others were made to reflect changes that were made to the occupational standard at another level.

Alan Prouty, Director of Environmental and Regulatory Affairs for J. R. Simplot Company, expressed a number of concerns regarding the proposed rule. He felt the proposed changes to Section 203 were intended to look at the cumulative impacts of toxic pollutants, and

therefore felt it was important that the section include a reference back to Section 161 to establish certainty for industry. Simplot believes no changes are needed to the toxics rules because public health is already being protected by EPA actions and existing regulations for criteria pollutants. Mr. Prouty asserted that DEQ has not demonstrated any need for a change or provided any specific examples as to why there is an issue in the state. He commented that given the current economy and business climate in Idaho, the last thing industry needs is a change to a regulatory program that causes uncertainty and unnecessary cost without any economic or environmental benefit.

Alan Prouty discussed the proposed changes to the Tier II rules. He stated Simplot wholeheartedly agreed with Mr. Sterling's comment that it was time to let the air program rest while DEQ and industry learn how the permits will work. A comprehensive evaluation of the permit processes can then be done. Simplot operates in a number of other states, and Idaho is the only state with duel operating permits (Tier I and Tier II). Industry does not understand why EPA is supposedly telling Idaho that Tier II permits are needed. There is a great deal of controversy within the regulated community about the role of Tier II permits. Mr. Prouty felt the rules should not be changed and suggested DEQ have more fundamental discussions with the regulated community regarding the purpose of Tier II permits.

Director Allred asked if Simplot wanted the permits to expire every five years. Mr. Prouty thought it would be ideal to have a permit that would almost automatically renew every five years, but felt the matter should be addressed in terms of what makes sense for the overall Tier II program. Industry is accustomed to a five-year renewal cycle for permits. Director Allred asked if it was a substantial cost to submit a permit every five years. Mr. Prouty confirmed that it was, but stated that most Simplot sites were Tier I facilities that were required by federal law to make renewal applications.

Don Chisholm asked if Mr. Prouty would be in favor of amending the existing rule to correct errors to the existing compounds in Section 585 and 586 and to change the numbers when a more liberal standard is proposed. Mr. Prouty stated he had not fully reviewed the changes being proposed, but did not oppose the correction of honest errors.

Krista McIntyre, Stoel Rives, pointed out that there are significantly more pollutants regulated by the state program than the federal program (534 and 188 respectively). She questioned whether regulation of the additional 346 pollutants was necessary to protect public health, stating that there has never been a formal demonstration by DEQ of the need to regulate these pollutants. Stoel Rives filed a public records request with DEQ to obtain all of the data DEQ relied upon to develop the toxic air pollutant rules (TAPs), but they received none of the data referred to in the original rulemaking. Ms. McIntyre stated this information is needed to evaluate the actual substantive data DEQ relied upon, and what methodology or deliberative process was used to identify these pollutants and the proposed levels.

Krista McIntyre questioned what the Board's standard was to adopt this rule. The Administrative Procedures Act requires the Board to determine that the rule is necessary and feasible in order to adopt it. She felt there was not sufficient information available to the Board for them to determine that the proposed changes to the TAPs rules are necessary or feasible.

Ms. McIntyre said it appeared to be DEQ's intent, (based on the language in their response to comments) to provide a direct means to evaluate the cumulative impact of a

proposed increase in toxic air pollutants when considered in conjunction with current toxic emissions from the facility.

Ms. McIntyre agreed with the comments made by Mr. Sterling and Mr. Prouty that the air program needed time to rest to see how the three permits (PTCs, Tier II, and Tier I) should be best integrated for sources in Idaho.

Kate Kelly noted that the original notice of rulemaking contained a list of the changes proposed to the toxics table with a detailed explanation of why each change was made.

Jack Lyman, Idaho Mining Association, believed the proposed rule did not meet the statutory requirements set out in House Bill 658 that was passed unanimously by the Idaho Legislature last session. The bill requires that any rulemaking conducted by DEQ must clearly state if the rule is broader in scope, more stringent or regulates an activity not regulated by the federal government. It further requires DEQ to identify which portions of a proposed rule are broader in scope, more stringent, or regulate an activity not regulated by the federal government. The IMA believes the proposed rule falls under these requirements, and that the rulemaking notice was deficient in identifying specifically where it may be broader in scope, more stringent, or regulates an activity not regulated by the federal government. Mr. Lyman warned that the Legislature took this issue very seriously, and if the Board adopts this rule, they may be subject to vigorous questioning as to why the particular provisions of this law were not met as intended.

Doug Conde, Deputy Attorney General, explained the notice of proposed rulemaking for this rule (on page 3 of the public notice) contained an entire paragraph identifying Sections 585 and 586 as containing toxic air pollutants that are not included in the federal government's list of hazardous air pollutants. The paragraph explains at length why these sections could potentially be viewed as more stringent or regulating something that is not regulated by the federal government. Mr. Conde added that it is not a clear case as to whether these sections are or are not more stringent or regulating something not regulated by the federal government.

Director Steve Allred pointed out the language regarding the stringency issue was suggested and approved by the Department's legal counsel from the Deputy Attorney General's Office. DEQ does not use its discretion to determine what to identify as being more stringent, but relies on the deputy attorney general to ensure the legal requirements are met.

AGENDA ITEM NO. 5 **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0203 (PENDING RULE) (*TITLE V FEES*)**

Director Steve Allred briefly reviewed the status of the negotiations for this rule. The Governor's office has been negotiating with IACI to reach consensus on a rule that will generate the necessary fees to operate the Title V program. They are close to developing a final rule and hope to have it ready to present at tomorrow's Board meeting. The rule will be in a little different format than the rule proposed by DEQ, but will use the same concepts. Director Allred said it was difficult because the Title V program requires the total cost of operating the program to be paid by the regulated industries. This can be a very heavy burden when the number of businesses involved in the program is diminishing. It is hoped the final rule will support the program for the next two years. During that time, the regulated community could seek relief through federal legislation.

Jim Wertz, Director, EPA Idaho Operations Office, explained how EPA determines the presumptive minimum amount that is required to operate the Title V program. The presumptive minimum is a guidance or minimum bar set by EPA under the 1990 Clean Air Act amendments. It is based on tons of emissions and is adjusted annually based on the consumer price index. The amount each state charges its Title V sources varies widely depending on the type and number of industries in the program. Once a state has records on what it costs to operate the program, the fee can be adjusted to fit their needs. The presumptive minimum is not what EPA would charge to run the program. If EPA had to run Idaho's Title V Program, they would charge significantly more. They do not have the resources to run the program and would have to contract for much of the work. EPA did an initial analysis, and estimates it would cost them roughly twice what the state of Idaho's estimates are to run the program. This estimate did not include several issues which could potentially push the cost much higher.

Doug Hardesty, EPA, added that the presumptive minimum was established because EPA was afraid some states might not charge enough and would not be able to implement the program adequately. States were initially asked to submit details of how they would run the program for approval. If they submitted an estimate lower than the presumptive minimum, they had to provide a detailed analysis and justification of why the lower amount would be enough to run the program.

Dr. Randy MacMillian asked if the fee structure proposed by DEQ and the alternate proposal would provide adequate funding levels for the Title V Program. Mr. Hardesty thought both would provide adequate funding; but noted that when Idaho's program was initially submitted for approval, EPA expressed concern and identified issues regarding the fees. EPA gave the program interim approval, and the state has worked on those issues. When Idaho tried to get final approval for the program, EPA again expressed concern and questioned whether Idaho was collecting enough fees to fully run the program. At that same time, EPA began a process of evaluating all state programs to determine adequacy of fees and if the fees were being managed properly. Since they believed the upcoming full-scale evaluation would be a more comprehensive evaluation than the approval process, EPA gave the Idaho Title V program full approval, but deferred the fee analysis portion to the full Title V fee program evaluation to determine whether or not Idaho was collecting adequate fees. That process has not yet been completed for Idaho.

Dr. Joan Cloonan questioned what the fees were paying for. It appears that the inspections and compliance monitoring that were initially part of the general program, are now being charged to the Title V program. Kate Kelly, DEQ Air Quality Program Administrator, clarified that since the beginning of the Title V program, costs for inspections and compliance monitoring for Title V facilities have always been charged to the Title V fund. Dr. Cloonan observed that there are tasks that DEQ might have done otherwise if a facility opted out of the Title V program. Kate Kelly stressed that there is very explicit guidance as to what is and is not charged to the Title V program, and all DEQ staff working on air issues are provided with that guidance.

DEQ estimated the cost for operating the Title V program based on the EPA Compliance Guidance Document. Kate Kelly explained the document is a national comprehensive strategy for how state agencies can assure compliance is maintained at Title V facilities. The EPA issued the strategy in 2001, and DEQ has been in the process of implementing the strategy. It will have a major impact on the Title V program. The compliance monitoring strategy involves review of

reports and monitoring information, and inspections that are much more comprehensive than any done in the past. DEQ will sponsor training for Title V facilities. There will obviously be costs incurred by DEQ.

Director Allred pointed out that the scope of work DEQ does in the Title V program is based upon detailed guidance from the EPA. The Clean Air Act and EPA's regulations very clearly stipulate what has to be included in the scope of the Title V program. There is not a lot of flexibility in that area. Doug Hardesty noted that when EPA reviewed the details of the Idaho Title V program, they stated that the scope of the Idaho program was "minimally acceptable."

Chairman Paul Agidius announced that the negotiated rule would be presented at the formal Board meeting tomorrow, and asked that public comment be reserved until that time.

AGENDA ITEM NO. 6 **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0204 (PENDING RULE) (*STANDARD FOR HYDROGEN SULFIDE*)**

Director Steve Allred noted that a modified rule was distributed to Board members. The modified rule relies totally on a one-hour standard of 35 parts per billion for hydrogen sulfide. The rule also specifies the point of compliance and the method of measurement. The changes resulted from comments received by DEQ.

DEQ very recently received a document from the University of Idaho regarding testing they conducted on hydrogen sulfide levels. DEQ has not had an opportunity to thoroughly review and study the document; however, a quick review seems to indicate that the rule would impact more businesses than DEQ had anticipated. Based on this new information, DEQ is uncertain what the impact of the rule would be on businesses. DEQ does not know what the circumstances were or how the sampling was done for the University of Idaho study.

Marti Calabretta asked if information existed to show how many individuals in the community would be affected by a hydrogen sulfide standard at any given level. Director Allred responded that the Idaho Division of Health had developed and distributed that type of information at previous meetings. DEQ used that information to develop a risk management strategy in setting the level. DEQ has no additional information on the impacts of any given hydrogen sulfide level on individuals other than what was previously submitted by the Division of Health.

Nick Purdy asked if DEQ was comfortable that the 35 ppb level was a health standard and not an odor standard. Director Allred stated he was comfortable with the recommendations of the Division of Health on a health standard for hydrogen sulfide. He stated he was not qualified to determine whether the 35 ppb level was adequate to protect public health and deferred the question to the Division of Health staff. Many of the comments and testimony argued that DEQ was going beyond the public health issue and was instead trying to deal with an odor issue. Director Allred stated DEQ carefully considered these concerns and reviewed the issue to focus on what they hoped to accomplish in setting the standard. They isolated their efforts to set a health standard to address the concerns of the impacts of chronic exposure to hydrogen sulfide on human health. DEQ then decided to eliminate the 24-hour standard and the 400 ppb instantaneous standard since they did not have a meaningful impact on the goal of

protecting public health from the impacts of chronic exposure. A one-hour standard is also consistent with other standards.

Elke Shaw-Tulloch, Bureau Chief for the Bureau of Environmental Health and Safety, Division of Health, Idaho Department of Health & Welfare, expressed confidence in the analysis they prepared based on the information supplied by DEQ. The numbers they selected are based on peer-reviewed literature and multiple studies pointing to the same outcome. The Idaho Division of Health (IDOH) reviewed several sources of information on hydrogen sulfide, and in particular the toxicological profile developed by the federal Agency for Toxic Substances and Disease Registry (ATSDR). These profiles are typically the backbone of the data used to develop health assessments and consultations. The profiles are relied upon heavily because the information they present has been reviewed extensively to ensure the public health agencies are comfortable with it. Correspondence to DEQ from IDOH (Attachment 2) explains the profile, how the information is reviewed, and how ATSDR derives their health-based standards.

Ms. Shaw-Tulloch emphasized that IDOH did not prepare its analysis and recommendations from a perspective of odor. They looked at, as do ATSDR and EPA, the level at which you actually see a health effect, and then set a health-based standard below that level. You do not want to set a standard at which you see health effects. The recommendations of IDOH were used as the foundation for the level proposed by DEQ in this rule. There have been modifications to the original proposal. She stressed that IDOH prescribed a health-based recommendation they believe in, the Board must now make a decision on what it feels is best for the state of Idaho. The IDOH recommendation did not take economic impacts or the feasibility of enacting the standard into consideration; it is strictly a health-based recommendation for the Board's use in making a decision.

Marti Calabretta asked if any studies were conducted to learn what amount of the population was at risk of chronic exposure from hydrogen sulfide, such as those living around existing dairies. Ms. Shaw-Tulloch replied that no such studies were conducted. In establishing a recommended level, protective factors are added to make sure all of the people, including the sensitive population, are protected regardless of what community they live in. She further explained how minimal risk levels and EPA reference concentrations are established. (a written discussion can be seen in Attachment 2 to these minutes).

Board members discussed the difficulty of setting a standard due to conflicting literature, the lack of documented cases of medical problems due to chronic hydrogen sulfide exposure, and inadequate information on the health affects of chronic hydrogen sulfide exposure at certain levels.

Don Chisholm felt it was not reasonable to insist on exact scientific proof as to what the precise level should be. He believed the Board would be abdicating its responsibility if it failed to adopt a standard because they could not prove the precise number at which an adverse health impact occurs or because they are uncomfortable with how safety factors are applied. He supported adopting a standard, even if it is a one-hour standard of 100 ppb, and adjusting it later if scientific literature proves it should be at some other level. There can be no human studies, but there are people from the Filer area who have testified before the Board about the health effects they have suffered. Hydrogen Sulfide is not just a nuisance issue in terms of it being an annoyance; it is a nuisance issue in terms of it being oppressive to the people. It is affecting their mental activities and their sense of well being. He urged the Board to set a standard with a

reasonable safety factor to get something on the books. Once the standard is in place, it can be adjusted as needed.

Nick Purdy stated he tended to agree with Mr. Chisholm's comments. Although the Board's responsibility is to protect human health, there are quality of life issues that overlap and need to be considered. He suggested a two-year grace period to allow DEQ to work with entities to bring them into compliance and to test the standard to see if is too high or too low. This time could also be used to work with the Department of Agriculture to develop best management practices to ensure compliance.

Chairman Agidius stated he could not support setting a standard at this point. From the information presented, it seems unclear what the appropriate level should be. He felt it was unclear how the IDOH recommendation went from 2,000 ppb to 35 ppb.

Dr. Randy MacMillan felt confident that a level of 35 ppb would be adequate to protect, but wondered if higher levels such as 100 ppb or 1000 ppb would also be protective of public health. He mentioned that hydrogen sulfide is just one of many gases and toxic chemicals that come from organic matter under anaerobic conditions. The Board should consider that a standard for hydrogen sulfide will also be protective of human health from those other compounds as well. He asked how EPA developed their safety factor of 1000, and what the science was behind how the safety factor is put into play.

Jim Wertz, EPA, discussed how risk assessment is performed using safety and uncertainty factors. The process uses extensive debate among scientific professionals and best professional judgment is used. Because human testing cannot be done, the best process is to rely on the best professional judgment of scientists and health professionals. Levels sometime need to be adjusted up or down.

Dr. Ron Sheffield, University of Idaho, discussed the ASTDR report. He noted that the report explains in detail how the 1000 safety factor was selected. It is very specific and very clear. It is consistent with EPA and ASTDR risk assessment protocol and is the same procedure used with other gases. A study was conducted with a genetically altered mouse that responds to asthmatic conditions more sensitively than humans. Using the base of 2000 ppb, a safety factor of 10 was applied to convert mouse data to human data, a second factor of 10 was applied for the most sensitive group (asthmatics), then a final factor of 10 was added as a typical externalities to address errors or omissions that might have occurred (10x10x10=1000). Dr. Sheffield stated his main concern with the study was that the first factor of 10 that was applied to convert mouse data to human, was already taken into account by the selection of that specific genetically altered mouse. Others in the scientific community have also questioned this issue.

Dr. Sheffield discussed the *Survey of Hydrogen Sulfide Sources in Southern Idaho* that he conducted (Attachment 3). He noted a correction on Page 3 in the first paragraph. It should read, "Ambient concentrations of H_2S (Figure 2) were found to potentially exceed the proposed standards at ~~two~~ three of twenty-six (~~8~~ 11%) food processing facilities visited." In September 2002, the survey was requested by the United Dairymen of Idaho, Milk Producers of Idaho, other agricultural organizations, and local planning and zoning representatives who wanted to know how the proposed standard would affect them.

The goals of the survey were to:

- Expand upon the H_2S monitoring database collected by DEQ;
- Assess the level of H_2S from potential sources in Southern Idaho; and,
- Proactively begin working with these industries, business, farms, and municipalities to address these emissions in the light of a potentially new ambient air standard in Idaho.

The results of the survey found that:

- Half of the 18 dairies surveyed were found to potentially exceed the proposed 35 ppb one-hour standard. The dairies that were surveyed were identified as being odor problems by the community.
- Three of the 25 food processing plants surveyed exceeded the 20 ppb standard that was previously proposed; however, none exceeded the currently proposed 35 ppb one-hour standard.
- Two of the 13 wastewater treatment plants surveyed exceeded the 35 ppb one-hour standard. The wastewater facilities at many small communities were well below the standard.
- The H_2S levels measured at miscellaneous sites such as asphalt plants, beef feedlot, egg farm, manure hauling, mink ranch, sheep lot, and a swine farm, all measured well below the 35 ppb one-hour standard. The levels were within the background conditions measured across the state.

Don Chisholm noted that none of the facilities measured would have exceeded a 100 ppb one-hour standard. He asked if the facilities surveyed represented a fair sampling of such facilities across the state. Dr. Sheffield responded that the survey represented one month of sampling during warm October weather transitioning into cold November weather, which is not the best time of year to do this kind of sampling. Dr. Sheffield warned that this was a very limited, non-random study, and the data should not be extrapolated to all potential sources. In order to get a fair sampling of all potential sources, a study would need to be done with randomized samples over a period of at least one year.

Dr. Randy MacMillan commended the entities that were coming forward on a voluntary basis and working with Dr. Sheffield to reduce their hydrogen sulfide levels.

Kate Kelly noted that the survey was done using hand-held jerome meters to measure total reduced sulfur, and asked if there was certainty it was hydrogen sulfide that was being measured. Dr. Sheffield stated it was a conservative estimate of what may potentially be there. He felt comfortable using a jerome meter as a screening tool to see if a facility would potentially be in excess of a proposed standard; however, he noted it would not be a reliable enough instrument to measure compliance. Kate Kelly pointed out there is a difference between the type of equipment used in the study and how reliable the results are, and that used by DEQ in its monitoring last summer.

Dr. Sheffield reported on the activities and studies being conducted by the committee working on the Agricultural Odor Management Rules for the state. The rules are intended to identify the sources of odor across the state and develop odor control plans to address and alleviate the odor off the property. Dr. MacMillan asked if by controlling odors, the plans would also control hydrogen sulfide, and at what level. Dr. Sheffield stated that would be a goal of the plans. Full chemistry work will be performed on selected gas samples to determine all of the

compounds of the gas and their potential effects. Some of the sites where samples were taken had other more prevalent odors created by compounds other than hydrogen sulfide. He noted that the Odor Management Rules would not replace the proposed hydrogen sulfide standard because they are for agricultural sites only.

Brent Olmstead, Executive Director of the Milk Producers of Idaho (MPI), testified against the proposed hydrogen sulfide standard. He observed that DEQ seemed to be unsure of how to address the matter because this is the third standard they have proposed in four months. This rulemaking has cost the MPI over $12,000 to date. The dairy industry feels the DEQ proposal is strictly an odor standard. The consultants hired by MPI have indicated that 1,000 ppb is the health impact stage. The permit streamlining rule being proposed by DEQ contains a hydrogen sulfide standard that is 12 ½ times more lenient than the proposed standard in this rule.

Mr. Olmstead felt the appropriate way to address the problem was through the odor rules being proposed by the Department of Agriculture. Those rules are set up to identify and correct the problem. He felt the health of the people and the economy of the state would be better served by an approach that would solve the problem, rather than just enforcing against the problem. He believed the Board would not find an "acid" test to tell them what precise level would guarantee against health problems. The studies they have reviewed indicate that a standard of 1,000 ppb will protect human health.

Mr. Olmstead discussed the lack of documentation of health problems caused by hydrogen sulfide exposure. The MPI has many members that live or work on dairies ten hours a day and do not suffer health problems such as increased respiratory problems or neurological problems. A recent study done by ATSDR in Nebraska showed no difference between the control group and the non-exposed group in neuro-behavorial patterns. ATSDR is conducting another study on other health impacts of hydrogen sulfide that should be complete in about two years.

Mr. Olmstead discussed the feasibility of the proposed rule and the problems some facilities may have in controlling hydrogen sulfide. He assured the Board that the dairy and food processing industries are working on the odor issue. If the odor problems are solved, hydrogen sulfide emissions will be controlled from a public health prospective. Monitors in the Cedar Draw and Filer area have shown dramatic decreases of up to 70% this summer. Levels have only reached 40 ppb a few times, and last year the levels reached 500 – 1,000 ppb several times. A great deal of money was spent and processes changed to bring about these results. These efforts will continue and new technology will be researched to try to resolve the problem.

Mr. Olmstead summarized by saying that the MPI feels 35 ppb is a ridiculously low standard and the proposed rule will create problems for industry. They feel DEQ is premature in proposing the standard based on the science presented and requested the proposed rule be withdrawn.

Dr. Randy MacMillan expressed empathy for the individuals living in Cedar Draw and believed they had made a powerful case for health problems in the area. He felt the Board responded to the concerns of these citizens by requesting DEQ to investigate setting a health-based standard for hydrogen sulfide. Dr. MacMillan wanted assurance that the nuisance odor rules being developed by the Department of Agriculture would address the public health issues associated with hydrogen sulfide.

Brent Olmstead pointed out that one of the dairies in the Cedar Draw area has been operating under an odor management plan directed by the Department of Agriculture for the last 18 months. Provisions of the plan resulted in a 70% decrease in the hydrogen sulfide levels; however, it has not solved the problems for the people in Cedar Draw or the dairy. The MPI is working with two dairies in the area to investigate different types of systems and technology to address the problems.

Dick Rush stated IACI is strongly opposed to the proposed rule. He observed there seems to be more questions than there are answers on this issue. He felt the rule would bring uncertainty to the regulated community. He stated it would be very difficult for businesses to operate with the proposed enforcement procedure where reviews would be triggered by odor complaints. The rulemaking appears to have started from complaints in a certain area of Idaho. The Department of Agriculture and others are working to resolve those problems. The proposed rule broadens the regulation to include many other businesses and areas that were not part of the initial complaint. Mr. Rush stated IACI's willingness to work with DEQ to resolve any problems its members may have, and hoped something could be worked out to avoid this additional regulation.

AGENDA ITEM NO. 7: RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-0201

John Brueck, Hazardous Waste Regulatory and Policy Coordinator for DEQ, explained this docket is the annual hazardous rulemaking update. The rule incorporates changes made during the past year to EPA regulations. Idaho law requires the state rules to stay consistent with federal rules to maintain primacy of the program. Mr. Brueck reviewed each of the changes.

AGENDA ITEM NO. 8: INDIVIDUAL/SUBSURFACE SEWAGE DISPOSAL RULES, DOCKET NO. 58-0103-0201

Barry Burnell, Life Sciences Discipline Lead in Technical Services, discussed the proposed rule. The rule addresses primarily reasonable access to central wastewater treatment facilities. It sets out seven factors to provide direction to the DEQ Director and the regulated community on how to evaluate whether or not a project has reasonable access to a central wastewater treatment facility. This rule was presented as a temporary rule last year, and the Board recommended DEQ proceed with rulemaking for a proposed rule, rather than a temporary rule. DEQ published the rule as a proposed rule in the Administrative Bulletin in July 2002, and public comment was taken. A public hearing was conducted, but no one wished to present testimony.

The rule was also presented to the Joint Legislative Environmental Common Sense Committee on September 5, 2002, where DEQ was directed to conduct further negotiations with the Building Contractors Association of Southwest Idaho. DEQ met with the BCA on September 16 and 18. Additionally, a meeting was held with the Idaho Association of Counties on September 17 to discuss and address their concerns. Changes were made to the rules as a result of the meetings and were reviewed with the Joint Legislative Environmental Common Sense Committee on October 3.

Mr. Burnell reviewed the history of the rules and the most recent revisions made to the rules. A complete summary of the changes can be seen in the Response to Comments (Attachment 4). Key changes included:

- A definition for "bedroom" was added at the recommendation of the District Health Department. The definition is needed because it is one of the ways used to estimate wastewater flow from single-family dwellings. At the request of the BCA, the same factors used by the International Building Code were used to establish the definition.
- Language was added to the definition of "failing system" to clarify that a failing system was one that may pose a risk to human health and the environment.
- Deleted the proposed requirement for a minimum one-acre lot size. The required separation distance from a domestic well to a drain field still results in some acreage requiremnts for parcels.
- Additional elements were added to the reasonable access guidance to provide that the central wastewater system in question has issued a "will serve" letter, and that they have existing capacity.
- Establishes a timeframe of 24 months to complete a project.
- Sets a distance of 200' per lot from the property line of the development to the collection line to be used to determine if there is reasonable access. Mr. Burnell noted the distance element is not intended to be used on its own, but rather as a trigger to indicate that an economic analysis or engineering feasibility study should be reviewed to determine if the project is economically viable.
- Sets a cost of 200% for comparison of offsite sewer line construction to the estimated cost of construction of subsurface sewage treatment and distribution systems. If offsite development costs exceed onsite subsurface sewage costs by 200%, then it is not economically feasible.
- States that the local jurisdiction should have a mechanism to ensure that the cost to extend wastewater collection lines to the property line of the development is borne with rough proportionality to the benefit derived by all potential users from the improvement.
- States there should be an easement or right-of-way from the property to the central wastewater treatment collection facility.
- Deletes the exemption from licensure requirement for public works contractors and specifies that homeowners and residents (if the pass an exam) may install their own systems.
- Adds an additional 250 gallons per bedroom to the minimum capacity requirement for septic tanks for single-family dwellings and mobile homes with more than four bedrooms. This provision was requested by the counties, Building Contractor's Assoc., and the district health departments.

Don Chisholm questioned why the issue of lift stations was not addressed in the rules. Lift stations are a major cost that can make a project unfeasible. He felt it would be a substantial long-term benefit to the state if there were a program to assist with the financing of lift stations. Mr. Burnell stated there is a clause in the rules that addresses geologic and topographic features that is intended to consider lift stations. He discussed the use of innovative alternatives such as hybrid systems and step systems. He noted that when DEQ looks at reasonable access of a project, they give close review and evaluation to such situations and cost is a major consideration in the decision.

Barry Burnell stated that DEQ will conduct a separate negotiated rulemaking to set the wastewater flow standards for single-family dwellings. The counties, Building Contractor's Assoc., and the health districts requested the separate rulemaking to review wastewater flows from single-family dwellings.

He noted DEQ has modified the rule to accommodate the concerns of the counties, health districts, and to address the majority of the concerns of the Building Contractors Association.

The Board adjourned at 5:15 p.m.

NOVEMBER 13, 2002

Chairman Agidius called the Board meeting to order at 8:30 a.m.

ROLL CALL

BOARD MEMBERS PRESENT:
Paul C. Agidius, Chairman
Dr. J. Randy MacMillan, Vice-chairman
Marti Calabretta, Secretary
Donald J. Chisholm, Member
Dr. Joan Cloonan, Member
Marguerite McLaughlin, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT:
None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:
C. Stephen Allred, Director
Debra Cline, Management Assistant to the Board
Nancy Bowser, Water Quality Program
John Brueck, Hazardous Waste Regulation Policy Coordinator
Jess Byrne, Resource Officer
Barry Burnell, Life Sciences Discipline Lead
Doug Conde, Deputy Attorney General, DEQ
Keith Donahue, Deputy Attorney General, DEQ
Dean Ehlert, Remediation Program
Paula Gradwohl, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Phyllis Heitman, Management Assistant
Jason Jedry, Administrative Services
Sharon Keene, Customer Resources
Kate Kelly, Administrator, Air Quality Program
Lisa Kronberg, Air Quality Program
Dave Mabe, Administrator, Water Quality Program
Chris Mebane, Water Quality Program
Jon Sandoval, Chief of Staff
Tim Teater, Air Quality Analyst

OTHERS PRESENT:
Beth Baird, Boise City
Gayle Batt, Idaho Water Users Assoc.
Ed Bulgin, Amalgamated Sugar Co.
John Chatburn, Idaho State Dept. of Agriculture
John Eaton, BCASWI
Beth Elroy, Monsanto
Senator Bob Geddes, Idaho Senate
Jane Gorsuch, Intermountain Forest Association
Linda Jones, Holland & Hart
Lloyd B. Knight, Idaho Cattle Assocation
Jack Lyman, Idaho Mining Association
Krista McInytyre, Stoel Rives
Greg Nelsen, Idaho Farm Bureau
Brent Olmstead, Milk Producers of Idaho
Hugh O'Riordan, Givens Pursley
Teresa Perkins, U.S. DOE
Representative Don Pischner, Idaho Legislature
Christopher Pooser, Stoel Rives
Alan Prouty, J. R. Simplot Co.
Dick Rush, Idaho Assoc. of Commerce & Industry
Suzanne Schaefer, SBS Associates LLC
Dr. Ron Sheffield, University of Idaho
Rick Simmons, Monsanto
Rob Sterling, Micron
Rick Warren, Glanbia Foods

PUBLIC COMMENT PERIOD – THE BOARD ALLOWS UP TO 30 MINUTES FOR THE PUBLIC TO ADDRESS THE BOARD ON ISSUES NOT SPECIFICALLY SHOWN AS AGENDA ITEMS.

Jack Lyman, Idaho Mining Association (IMA), discussed the Nationwide Permitting Program operated by the U.S. Corps of Engineers (Corps) under the Clean Water Act. The IMA supports the program because it greatly reduces the time, staff, and money it takes to acquire a permit. The State of Idaho has rejected many of the nationwide permits and put additional conditions on several others. This action forces companies to apply for individual permits in Idaho.

Mr. Lyman was specifically concerned about a recent draft letter from DEQ to the Corps denying a number of Nationwide Permits and placing conditions on others. The letter specifically denies Nationwide Permit No. 44 regarding mining, and states that the permit cannot be used for hardrock mining or phosphate mining. The IMA feels this is an important policy decision that should not be made at the staff level, but should be made by the Board.

The IMA requested that the Board ask DEQ not to send the draft letter in its present form, and to direct DEQ to bring the matter before the Board to explain and justify these actions and get approval by the Board.

Dr. Randy MacMillan noted there have been questions in the past regarding the Board taking action on such matters before DEQ has taken action on the permit. He asked for further clarification as to what specific action was requested prior to DEQ taking action on the 401 certification. Jack Lyman asserted that the actions proposed in the draft letter have significant policy implications that should have been reviewed by the Board. He believed the Board should have had input and ultimate approval over the actions taken by DEQ. It might be that the Board would agree with DEQ that hardrock mining and phosphate mining should not be eligible for Nationwide Permits in Idaho; however, they have not had the opportunity to make that decision, and the IMA was not allowed an opportunity to discuss the matter with the Board. Mr. Lyman felt such important policy decisions should be made by the Board with public input. These decisions are being made by DEQ staff in the regions. He stressed that he was not requesting the Board to approve a specific 401 Certification on a project; but felt that when denials such as the one on Permit No. 18 for Simplot contain such policy implications, the Board should be a party to the decision.

Don Chisholm commented that the issue would have to come before the Board either in the form of a rulemaking or a contested case. The Board is currently not empowered to make policy decisions on a day-to-day basis. Jack Lyman felt rulemaking or a contested case would not be the best way to address the problem. He believed the statute creating the Board provided broad policy-directing authority to direct what DEQ does in this type of matter.

Marti Calabretta commented, as a reclamation manager, she was familiar with the Nationwide Permit process and individual permits from the Corps. She pointed out that the draft letter does not deal with a specific permit, it would make all businesses (not just mining) go though the fullest possible permit process. The Nationwide Permit Program was designed by the Corps to expedite their administrative process; it can be completed in two months instead of a year. Ms. Calabretta felt the Nationwide Permit Program had been a great benefit to the state in getting necessary restoration work done. When entities must use the regular permit program (instead of the Nationwide Permit) it costs substantially more in dollars, resources, and time. Projects are likely to be delayed and lose a season.

Ms. Calabretta observed that it seemed like a "broad stroke" for DEQ to say out of hand that no hardrock or phosphate mining would be eligible for a Nationwide Permit when the Board has no knowledge of why the decision was made.

Dr. Joan Cloonan discussed the Nationwide Permit process and observed that the effect of the draft letter was to modify the Nationwide Permit for the State of Idaho for five years. She felt there was an effect of rulemaking because there is a general applicability and it applies to whomever would be eligible for a Nationwide permit. Jack Lyman stated he did not want to impose rulemaking on the Board, DEQ, or regulated industry and believed there were other ways to deal with the matter and still allow public comment and review.

Nick Purdy felt the request was similar to another contested case where the Board was asked to make a decision on a matter before DEQ had made a decision. He felt it would be inappropriate for the Board to act while the letter was in draft form. Once the final letter is sent, the matter can be appealed to the Board. Mr. Purdy would then favor bringing the matter before the Board so the facts can be reviewed and the public can be involved.

Director Steve Allred pointed out there have been many parties involved in this process. He clarified that DEQ is required to provide public notice and take comment before a final decision is made. DEQ developed a policy on the 401 Certification process as part of a lawsuit settlement, and that process was used in this matter. Once the final certification is issued through the Director, it can be appealed to the Board. Each individual permit would not have to be appealed separately. The draft letter would be treated as a 401 Certification, and once the Board made a decision, all Nationwide permits would be subject to that decision. He felt this was an appropriate issue for the contested case process, and that it should be addressed as a contested case to ensure proper notice and due process. As the relationship between the Board and the Department develops, it is important to look at the responsibilities assigned to each. If the responsibilities are mixed, there could be a loss of due process.

Ms. Marti Calabretta suggested the Board request that DEQ not respond until the Board has an opportunity to review the matter and determine what is in the purview of the Board in terms of advising the Department versus what the Board's actions are in terms of having direct authority. She asked that the Board be provided copies of the draft letter and communications from Jack Lyman. The matter could then be addressed later in the meeting.

Don Chisholm felt it would be inappropriate for the Board to take any action at this time because the matter was not an agenda item. He suggested the Department prepare a briefing for the Board that included an explanation of the process and what discretion was given to staff in making policy decisions on permits. The Board can then decide how it would like to proceed.

Chairman Agidius agreed that the Board should not take action at this time and requested DEQ staff to brief the Board on the matter. The matter can be placed on a future agenda if needed.

Jack Lyman asked about the status of the final letter, and when it might be issued. Director Allred stated the Department would be glad to provide a briefing on the matter. He cautioned this was a controversial issue that would likely be appealed to the Board in one way or another; therefore, the Board should be careful not to bias itself.

Nick Purdy strongly opposed Board involvement in the matter at this point. He felt the matter should follow the appropriate channels and be addressed through the contested case process. He feared Board involvement in such matters where clear authority did not exist could lead to inappropriate involvement that could be viewed as attempting to micro-manage the Department.

Marguerite McLaughlin felt the Board should review the draft letter and correspondence from Mr. Lyman and hear a short briefing by staff at the end of the meeting.

Dr. Joan Cloonan asked if the actions of the letter would be stayed if an appeal were filed with the Board. Doug Conde responded that according to the administrative rules, the actions set out in the letter would be effective when it was submitted in final form, unless the party filing an appeal specifically requested the hearing officer or Board to stay the action.

Jack Lyman reiterated his belief that the letter, by modifying Permit No. 44 to exclude hardrock and phosphate mining in Idaho from the Nationwide Permit, had tremendous implications for the mining industry and was an issue that was properly before the Board before

the letter is finaled and submitted. He was not sure the IMA would have a basis or means to file a contested case before the Board. He stressed his belief that this is an important policy decision that is an appropriate role for the Board. No other state has made the decision to exclude hardrock and phosphate mining from Nationwide Permit No. 44. He stated it was unclear who made the decision in Idaho, but believed the Board should decide the matter.

Chairman Agidius directed staff to supply Board members with copies of the draft letter and the correspondence from Jack Lyman. The matter was continued to the end of the meeting.

Dick Rush, Vice President of Natural Resources for the Idaho Association of Commerce and Industry (IACI), presented a request to have the temporary rule for Water Quality Standards and Wastewater Treatment Requirements (reasonable potential to exceed (RPE)) made a permanent rule. The temporary rule will expire at the end of the legislative session. IACI filed the petition to initiate the rulemaking, and supports making the temporary rule a permanent rule. Under the Clean Water Act (CWA), EPA and many other states have recognized that certain RPE procedures are protective of water quality. The RPE procedures set out in the temporary rule adopted by the Board are consistent with procedures used and approved around the U.S. The procedures fill a gap in state law and are also consistent with the CWA requirements and the Idaho Legislature's directives. Without a state RPE procedure, EPA Region 10 will follow its own procedures, which can and do result in the imposition of effluent limits that are not necessary to comply with water quality standards. The cost of pollution control technology needed to comply with these unnecessary limits is often very expensive to municipalities and industry.

Representative Don Pischner discussed the serious economic problems and chronic unemployment in the Silver Valley. He commented that there are more health problems from chronic unemployment than all the pollution combined. He asked for the Board's assistance with an issue involving Sunstrand, a small industry with 30 employees that manufactures fiberglass pipe for heating and ventilation ductwork. The company received a letter from DEQ stating they must get a Title V permit and must submit a check for $10,000 with the application. The company is overwhelmed with the complexity and expense of the process and asked Representative Pischner for assistance. Sunstrand believes their current level of emissions does not require them to be part of the Title V Program. They are also working on developing a carbon scrubber to reduce their emissions that they will also manufacture. Representative Pischner questioned whether the goals of the Program were to increase enforcement or compliance and asked if economic impact was considered. He urged the Department and the Board to regulate to improve efficiency, not to punish.

Director Allred assured that compliance was the goal of the Department and enforcement was a last resort. He was not familiar with the Sunstrand case, but will look into the matter. He discussed the challenges of the fee issue and funding the Title V Program.

Kate Kelly, Administrator, Idaho Air Quality Programs, briefly discussed the Title V Program. A facility must have a Title V permit if it emits ten tons of toxic air pollutants or more. She was not certain what the $10,000 fee was for in this specific case, but noted there is a possibility that if a facility is found to have been operating in a manner that would have placed it in the Program, they would be required to pay a certain amount of back fees. This policy is used to ensure equitable treatment of all facilities that take part in and fund the program.

AGENDA ITEM NO. 1: **ADOPTION OF SEPTEMBER 10, 2002 MINUTES**

- **MOTION**: Don Chisholm moved the Board adopt the September 10, 2002 minutes as prepared.
  SECOND: Dr. Joan Cloonan
  VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 2: **DIRECTOR'S REPORT**

Director Steve Allred briefly discussed legislation DEQ is preparing for submission including a bill regarding the Coeur d'Alene Lake Management Plan.

AGENDA ITEM NO. 3 **PETITION TO INTERVENE/GLANBIA FOODS, INC. APLICATION FOR WASTEWATER LAND APPLICATION PERMIT, DOCKET NO. 0117-02-04**

Chairman Paul Agidius announced that copies of correspondence from Barry Woods and Tom Arkoosh were distributed to Board members yesterday. A confidential memo from Harriet Hensley, legal counsel to the Board on the matter, was also distributed. Chairman Agidius noted that the matter involved a question as to whether a contested case existed at this time.

- **MOTION**: Don Chisholm moved the Idaho Board of Environmental Quality deny the Petition to Intervene in the Glanbia Foods, Inc. Application for Wastewater Land Application Permit on the grounds that there is no contested case in which the Petitioners can intervene at this time.
  SECOND: Marguerite McLaughlin
  DISCUSSION: Doug Conde, Deputy Attorney General, briefed the Board on the process followed by the Department for wastewater land application permits and discussed the opportunities for public involvement. In addition to the usual meetings and hearings, DEQ staff also met with the neighbors who live adjacent to the proposed land application site, and had an additional meeting with the engineer they (the neighbors) had hired. A follow-up conference call was held to discuss the changes DEQ made in response to their comments.
  VOICE VOTE: Motion carried unanimously.

Harriet Hensley asked what notice would be provided to the petitioners of further action on this permit. Doug Conde stated DEQ would publish notice in the newspaper as well as sending individual notice to the parties who filed the petition to intervene.

Rick Warren, Environmental Director for Glanbia Foods, stated he understood the challenge DEQ faced in the permitting process and appreciated their efforts to negotiate a resolution in this matter. He pointed out that the petitioners have expressed concern about their property rights and the effects the permit might have on them, but it appears little consideration is being given to Glanbia's property rights. He was glad the Board determined there was not a contested case at this time, while still giving audience to their concerns. He noted that one concern of the petitioners was that the land application site would decrease the property values. That claim was also made 12 years ago when Glanbia first came to the area; however property values have increased three to four fold in that area. Another claim was that the groundwater quality would be impacted; but all available information on groundwater gradient indicates the groundwater has not been affected.

Harriet Hensley recommended the Board send a letter to the Petitioners notifying them of the Board's decision in this matter. Staff will prepare a letter as recommended.

AGENDA ITEM NO. 4 **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0202 (PENDING RULE) (PERMIT STREAMLINING)**

Kate Kelly, Administrator, Idaho Air Quality Program, presented this docket designed to clean up a number of issues in the air quality rules. The changes are needed to correct errors in the rules, do some routine updating, provide certainty to the regulated community, and ensure protection of public health. The notice of rulemaking provided detailed information on all proposed changes. Ms. Kelly explained each of the changes, the public comment received, and changes made to the proposed rule to respond to those comments.

Dr. Randy MacMillan noted that DEQ was proposing to drop from the proposed rule Sections 585 and 586 regarding toxic air pollutants. He asked for an explanation of the ACGIH ceiling levels referred to in those sections. Doug Conde responded the ACGIH was the American Conference of Governmental Industrial Hygienists. Rob Sterling added that the ACHIH establishes threshold limit values.

Chairman Agidius provided copies of a suggested motion for the Board's consideration that would implement the housekeeping portions of the proposed rule without implementing the changes to Sections 106, 203, 401, 404, 405, 585, and 586.

Dr. MacMillan asked if DEQ intended to move forward with an overall streamlining effort if the Board adopted the rule with the deletions proposed in the suggested motion. Director Allred discussed the need to streamline the Air Quality Program to make it efficient for everyone. DEQ will work with industry to develop a set of objectives and then ask a working-level committee to draft suggested changes in procedures, which will probably require substantial changes to the rules. Director Allred hoped this could be accomplished before the 2004 legislative session. It will be a huge effort, but is important as a cost efficiency for government and the regulated community.

Marti Calabretta appreciated the clarification that the suggested motion was made at the direction of Chairman Agidius. She questioned Chairman Agidius' reason for deleting the changes to Sections 401, 404, and 405 since she heard no testimony regarding the expiration and renewal of Tier II Operating Permits. Under the current rule, they must be written to expire within five years. Chairman Agidius responded that Rob Sterling and Dick Rush testified that they would like those sections to remain unchanged at this time. Dick Rush and Rob Sterling confirmed their request that those sections remain unchanged at this time.

Dr. Joan Cloonan stated she was encouraged that DEQ planned to move forward with a more comprehensive revision and examination of the air quality regulations. She felt it was necessary the streamlining be done considering the whole picture because of the interrelationship of the various pieces.

- **MOTION**: Dr. Joan Cloonan moved the Idaho Board of Environmental Quality adopt the Rules for the Control of Air Pollution in Idaho as initially proposed under Docket No. 58-0101-0202, with the exception of the following sections: 106, 203, 401, 404, 405, 585, and

586. Those listed sections have been withdrawn from this rulemaking and will remain in effect as they are currently codified in the Idaho Administrative Code.

SECOND: Don Chisholm

VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 5 **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0203 (PENDING RULE)**

Chairman Paul Agidius deferred action on this agenda item to later in the meeting because the parties were still printing and proofing the negotiated settlement on this rule.

AGENDA ITEM NO. 6 **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0204 (PENDING RULE) (STANDARD FOR HYDROGEN SULFIDE)**

Director Steve Allred stated there have been changes to the proposed rule based on comments that were received. The rule was designed to be a health-based standard, but some felt the rule appeared to be an odor standard. DEQ analyzed the information gathered to determine what would protect the public health without giving the appearance of an odor standard. The 24-hour standard and ceiling level were deleted from the rule, and DEQ decided to use only a one-hour standard. The one-hour standard was selected because it is consistent with other ambient air standards.

The point of compliance was changed to the first receptor (residence) outside of the property boundary. The specified standard of measurement was also added to the rule. It is defined as a qualified analytical instrument, not the hand-held screening equipment that has been used in some monitoring.

Dr. Randy MacMillan felt it was important for the Board members to have a better understanding of how a toxic like hydrogen sulfide works in order to determine an appropriate standard for public health protection. He felt it was not clear what the highest dose was that would still be protective of public health. Determination of that is important because of the potential economic impact of the regulation. It is also important not to unnecessarily alarm the public about a substance.

Dr. MacMillian questioned whether the traditional safety factors the Idaho Dept. of Health applied were appropriate. He proposed the Board delay action on the rule and instruct DEQ to ask the Department of Health to conduct some additional consultation with independent analyzers of risk. He also suggested DEQ contact renal biochemists and real cellular biologists to look at potential biochemical mechanisms of hydrogen sulfide toxicity. DEQ could then submit that information to expert independent risk analyzers for an independent analysis of public health risk at different levels of hydrogen sulfide in the ambient air. EPA has staff who do this kind of analysis, and may be able to assist.

Dr. MacMillan discussed how different levels of toxic elements impact different individuals. He felt it was important to set an ambient standard for hydrogen sulfide because it is a toxic gas.

Paul Agidius stated he would also like to request a review to determine if a one-hour standard is the most appropriate timeframe.

Nick Purdy agreed with both of the comments. He had a concern about the narrowness of the one-hour stand. The way its written it cannot be exceeded more than once in a 30-day period. In the livestock industry when they are breaking into a silage pit or starting to clean pens, they could immediately be in violation. Language should be added to recognize those special events. He felt more explanation was needed on how the tests are going to be taken – for example, what hour of the day. Some have suggested a manual be developed setting out the correct procedures so that each time a test is taken, it is taken in the same way and analyzed in the same way.

Marguerite McLaughlin was concerned that the scientists do not agree on the situation. She questioned how the Board would know who to agree with when there are such broad differences.

Dr. MacMillan thought there was probably not much more science available, and there would be disagreement. The type of question he wanted answered before he takes a position was, "if our hydrogen sulfide level is 1000 ppb, how much greater is the health risk than if it was 0 ppb?"

Marti Calabretta agreed with Dr. MacMillan's thought process, and also believed it was important not to alarm the public unnecessarily. She stressed that the levels being discussed would not solve the odor problems for the communities of the Magic Valley. The Board may want to express its concern to the Department of Agriculture or planning and zoning, but it appears they are already aware because the new dairies do not seem to be causing problems. She felt it was important to be clear that some future action by DEQ, using a health standard, will not rid these communities of their odor problems.

Dr. Joan Cloonan stated it would be helpful to have an understanding from DEQ how they will deal with violations, what the consequences of violations are, and what the remedies are.

Don Chisholm commented that a tremendous amount of time, energy, and expense has gone into this effort to date. It now appears to be the consensus that further time, effort, and expense should be put into additional studies. After reviewing all of the materials supplied to the Board, it appears the scientific literature has been thoroughly exhaustive and all available studies seem to have been reviewed. He felt further risk analysis would not change the situation. The Board will still have to deal with unknown factors, and must make a decision based on the information before it.

Mr. Chisholm noted that industry complained that so much time and expense was spent on this rulemaking effort when all that was needed was an odor standard. He questioned why industry and agriculture interests did not come to the table to discuss where the standard should be set. He urged industry to step up to the table and become partners in solving the problem, and not just engage in delay tactics. It is clear that hydrogen sulfide is a toxic substance at certain levels, and a standard should be set. The limited resources of the state would be best used if all parties worked toward setting a realistic standard and not just delay action with more studies.

Chairman Agidius stated he would not be comfortable with making a judgment on the information currently before the Board. He felt it was unclear why the proposed number was picked, and did not feel he could make a sound judgment on an issue so important to the state of Idaho without a clear roadmap.

- **MOTION**: Dr. Randy MacMillan moved the Idaho Board of Environmental Quality direct DEQ, hopefully in concert with Idaho Department of Health, to consult with scientists knowledgeable about the biochemical process of cellular metabolism, the Krebs tricarboxilic acid cycle, electron transport and hydrogen sulfide mechanisms of action to provide experts of risk analysis with appropriate information needed to advise the Board as to the public health risks of hydrogen sulfide exposure at 20 to 1000 ppb for one hour. He further move that DEQ report back to the Board at its next official Board meeting or when their task is done.

  SECOND: Dr. Joan Cloonan

  DISCUSSION: Marguerite McLaughlin questioned why a level of 20 ppb was selected. Dr. Mac Millan stated that 20 ppb was a concentration or an ambient air level that had been proposed in some other literature as protective of public health. The EPA RFC was .7 ppb. So there are recommendations out there that ambient hydrogen sulfide levels to protect public health be very low.

  Ms. McLaughlin observed that this issue seems to have developed from problems in Southern Idaho with dairies. She feared using such a low number would continue to confuse the situation with odor problems.

  Dr. MacMillan stated he would be willing to change his motion to 35 ppb. He felt there was very high confidence that 0 to 35 ppb is protective of public health. What we don't know at this point, is whether 100 ppb or 200 or 400 or 1000 ppb is equally protective.

  AMENDMENT: Dr. MacMillan revised his motion to say, "35 ppb to 1000 ppb for one hour."

  SECOND: Dr. Joan Cloonan seconded the revised motion.

  DISCUSSION: Ms. Calabretta questioned how much the additional studies might cost and whether DEQ had the funds to complete the requested tasks. The Board increasingly is going to be asked to set regulations based on health risk assessments. This may be an opportunity to determine what is involved in such an assessment that involves toxicology dose and availability or exposures so that the Board understands this for future projects. She hoped that something could be put together in a package so industry shares some of the costs and the universities, as well as the Department of Health and Welfare are involved.

  Dr. MacMillan felt it was important that it be an independent risk analysis. Marguerite McLaughlin questioned whether EPA could be considered an independent source.

  VOICE VOTE: Motion carried: 5 Ayes (Agidius, Calabretta, Cloonan, MacMillan, Purdy); 2 Nays (Chisholm, McLaughlin)

The Board directed the Department to respond to the following questions regarding the hydrogen sulfide standard when it is brought back before the Board:

- An analysis to determine if a one-hour standard is the best time frame to use.
- How DEQ will handle enforcement of a violation under the proposed rules and what legal actions will be taken.
- A description clarifying how testing and monitoring will be conducted.

Kate Kelly requested the minutes and the text of the motion be prepared in detail and carefully reviewed by the Board so staff can clearly understand the direction provided by the

Board. Ms. Kelly stated budget and financial issues will be reviewed and the Board will be notified if there is a problem.

Director Allred stated it was important to understand that this analysis and the rulemaking were undertaken at the request of the Board because of the concerns brought to the Board by the citizens. DEQ tried to provide a full public discussion of the issue and present all the information necessary for the Board to make a decision. Director Allred expressed the Department willingness to again respond to the Board's direction to provide additional information and stressed that these actions are done as an effort to support the Board and fulfill the Department's responsibilities to the public.

Chairman Agidius agreed with the Director's comments and reiterated that the Board did request the information on the hydrogen sulfide issue and is now asking for more information before it makes a decision. He hoped this clarified the matter and that the public would understand.

Nick Purdy complimented the extraordinary efforts of Kate Kelly and DEQ to collect public opinion and provide extensive opportunities for public participation on this issue.

Marguerite McLaughlin felt further studies would not make the decision any easier or solve the problem facing the Board.

AGENDA ITEM NO. 7 **RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-0201 (TEMPORARY RULE)**

John Brueck presented the annual update of this rule to maintain consistency with the U.S. EPA regulations.

- **MOTION**: Dr. Randy MacMillan moved that the Idaho Board of Environmental Quality adopt the Rules and Standards for Hazardous Waste as presented in the final proposal under Docket No. 58-0105-0201.
  SECOND: Marti Calabretta
  VOTE: Motion carried unanimously.

AGENDA ITEM NO. 8 **INDIVIDUAL/SUBSURFACE SEWAGE DISPOSAL RULES, DOCKET NO. 58-0103-0201 (PENDING RULE)**

Barry Burnell, Life Sciences Discipline Lead in Technical Services, explained this rule is needed to protect public health from ground water degradation due to nitrate contributions from septic systems in areas where subdivisions may be better served by central wastewater facilities. The rule will provide greater detail to DEQ and the health districts in making decisions as to when central wastewater treatment facilities are reasonably accessible for new development and for issuing subsurface sewage disposal permits. DEQ conducted negotiated rulemaking in February and March of 2002. The rule was presented to the Board as a temporary rule in April 2002, and the Board directed DEQ to proceed with the rule as a proposed rule. A public hearing was held on July 18, 2002, but no testimony was received. DEQ also met twice with the Environmental Common Sense Committee, and three times with interested parties to provide additional opportunities to negotiate the rule. DEQ made 14 changes to the proposed rule in response to the comments received during the public comment period and the meetings.

Mr. Burnell provided a brief history of the rule and the revisions made over the last 31 years. He reviewed the changes made to the rule (shown on pages 12 and 13 under the Response to Comments, Attachment 4).

Nick Purdy expressed concern regarding the "one-acre rule." The rule was deleted from this rule, but the matter is at the discretion of each county or health district. Mr. Purdy feared the issue could be enforced in an arbitrary fashion. Barry Burnell discussed the history of how minimum lot size for individual sewer and water situations has been handled. It is not up to individuals or supervisors to set minimum lot sizes; it is done by the health districts' boards. There are also some counties who have adopted their own minimum lot sizes. The Rathdrum Praire Aquifer and Panhandle District Health Department have set a five acre minimum lot size over the Aquifer to protect the water source. Madison County also has its own ordinance that requires lot sizes less than two acres to use enhanced treatment devices. Ada and Canyon County also have county ordinances setting minimum lot size.

Don Chisholm noted that DEQ publishes a technical guidance manual to provide guidance to the health districts. Nick Purdy noted there have been situations in Blaine County where the health district approves a lot size according to the guidance, and the county supercedes the decision and requires a larger size. Mr. Purdy was concerned that individuals without the proper expertise were making such decisions.

Don Chisholm commented this was an issue he would like to see addressed in the State's long-term environmental plan. Different agencies seem to be going in different directions and making decisions that do not make sense.

Doug Conde discussed the latitude the health districts have in making decisions. They are acting under a memorandum of understanding with DEQ to implement programs governed by rulemaking adopted by the Board. The health districts have their own rulemaking authority; however, when the district boards adopt rules they are given to DEQ for review. Planning and zoning also uses environmental setbacks.

- **MOTION**: Don Chisholm moved the Idaho Board of Environmental Quality adopt the Individual/Subsurface Sewage Treatment and Disposal Rules as presented in the final proposal under Docket No. 58-0103-0201.
  SECOND: Dr. Joan Cloonan
  VOTE: Motion carried unanimously.

AGENDA ITEM NO. 9 **WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0201 (PENDING RULE)**

Nancy Bowser, Senior Water Quality Analyst, presented this docket to adopt and implement a public wastewater operator certification program.

- **MOTION**: Marguerite McLaughlin moved that the Idaho Board of Environmental Quality adopt the Water Quality Standards and Wastewater Treatment Requirements as presented in the final proposal under Docket No. 58-0102-0201.
  SECOND: Dr. Joan Cloonan
  VOTE: Motion carried unanimously.

AGENDA ITEM NO. 10 **CONTESTED CASE AND RULE DOCKET STATUS REPORTS**

Paula Gradwohl, Administrative Rules Coordinator for DEQ, reviewed the contested case report. A request for stay of permit conditions has been filed by the J. R. Simplot Company on their Tier I Air Quality Operating Permit.

Director Allred reported that a number of such appeals are expected as the Department plans to issue a large number of permits before the end of the year.

Two new rulemakings are beginning for air quality permits by rule, one for hot mix asphalt and one concrete batch plants. DEQ hopes to bring these two rules to the Board as temporary rules in February 2003.

AGENDA ITEM NO. 11 **LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT**

a. Set 2003 Board Meeting Schedule

Board members discussed possible issues and sites to visit in the Treasure Valley including a Title V facility, meeting with COMPASS regarding their actions with the Treasure Valley airshed, an overview and analysis of the Clean Air Act, and a presentation by Boise Region staff regarding the airshed.

The Board proposed meetings for:

- February 19 & 20 in Boise
- April 23 & 24 in Boise
- June 18 & 19 location to be decided
- August 20 & 21 location to be decided
- October 22 & 23 in Boise
- November 12 & 13 in Boise

➢ **MOTION**: Marti Calabretta moved the Board adopt the proposed schedule.
SECOND: Dr. Randy MacMillan
VOTE: Motion carried unanimously.

Marti Calabretta asked to be included in future Board field trips and remain on the mailing list for meeting information. Chairman Agidus extended an invitation to Senator Calabretta to attend all future Board field trips and activities.

David Mabe, Administrator of the State Idaho Water Quality Program, reported on the Nationwide permit question discussed earlier in the meeting. He provided a brief explanation of the Nationwide Permit Program operated by the Corps of Engineers. The Corps partners at the state level with the Idaho Department of Water Resources on many of the cases, and DEQ has the responsibility to perform a 401 Certification for the permits under the Clean Water Act.

DEQ had to submit a certification on the Nationwide Permits to the Corps by March of 2001, but there were two problems. A certification letter was sent to the Corps certifying the

Nationwide Permits with conditions. The timeframe required by the Corps did not allow DEQ adequate time to conduct the public comment process, so a statement was added to the certification letter stating that DEQ would go through public comment and may re-certify depending on the comments received. The other problem was that the regional conditions on the Nationwide Permit were not completed at the time DEQ had to certify the permit. Those regional conditions have since been completed. DEQ is now in the process of evaluating the public comments, looking at the regional conditions to the Nationwide Permit (which line up fairly closely with the conditions DEQ originally made in its state letter), communicating with other agencies involved in different parts of this program to see if they want their specific areas certified or denied, and then preparing a final certification letter to be submitted to the Corps.

DEQ has always issued certification letters with a number of exemptions; and two general conditions that are always included are the Bull Trout Conservation Plans and TMDL compliance. However, this year the Corps stated that they are not staffed to look at those two conditions, and will instead send DEQ a copy of the application for review.

At this point, with the comments received, the process changes made, and the regional conditions; DEQ is now re-assessing all of those issues to determine if they want to continue to deny some of the Nationwide Permits. Mr. Mabe suspected that some of the permits would continue to be denied. He stated the draft letter circulated earlier in the meeting was prepared by staff for review. It has not been reviewed yet, the response to comments has not been completed, and the letter has not been finalized. DEQ is still in the process of considering what should be in the final certification letter. The three issues DEQ will look at are: 1) are we providing adequate environmental protection with the Nationwide Permits; 2) are we wasting staff time that could be better spent on higher priority issues by denying the permit and then reviewing 401 Certifications on each individual permit; and 3) are we causing the applicants undue complications. These are the policy-level decisions that DEQ will consider before it issues a final certification letter.

Chairman Agidius reminded that the matter was not on the agenda and not before the Board for action. Marti Calabretta thanked the Board for allowing the issue to be heard.

Director Allred pointed out that this matter could be appealed to the Board once DEQ issues a decision. Earlier in the meeting, it was asked how the action in the letter could be stayed pending an appeal. The Director reviewed that matter and found that DEQ could issue the decision, without submitting the final letter to the Corps. This would allow a party to appeal the matter to the Board, while staying the action.

Nick Purdy asked that the Board be copied on the final decision.

AGENDA ITEM NO. 5 **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0203 (PENDING RULE)**

Kate Kelly explained the purpose of this rule docket is to revise the Title V program fee and registration provisions. The Clean Air Act amendments of 1990 created the Title V program as an umbrella program that includes all the requirements for a facility from an air quality standpoint. DEQ has obtained authorization from the EPA to implement a Tier I air quality operating permit program under Title V of the federal Clean Air Act. A Title V permit contains a number of monitoring, reporting and inspection compliance provisions that DEQ must act on. The federal Clean Air Act mandates that the full cost of the administration and implementation

of the program be funded by a fee imposed on the facilities regulated under the program. The fee structure is also required by law to include an incentive to reduce emissions.

The current fee structure is a combination of an emission based fee and service based fees. It does not generate enough money to support the program. The program has operated for the last two years on the accrued balance and fees collected. The account will be exhausted by the end of the year and a revised fee structure must be put in place to ensure sufficient funding and continued compliance with federal requirements. The fee issue has been a challenging problem, and extensive public outreach was conducted during this rulemaking. DEQ communicated with all Title V program participants and held numerous informational meetings and hearings. A proposed rule was published in September 2002 for public comment, and many negative comments were received. DEQ responded to the comments and held extensive negotiations with industry to try to develop a rule that would address the concerns of the regulated community.

Ms. Kelly distributed a revised rule and noted it was different from the rule proposed in the September bulletin and the rule distributed with the response to comments last week. She emphasized that it was not substantially different in structure from the previous rules, and the format remains the same. Although it will generate slightly less than what the budget predicts will be needed to operate the program, DEQ supports the rule and feels it will be adequate for the next two years. The rule will have to be revisited after that time.

All Title V permits will be issued by the end of the year, and DEQ will enter a new implementation phase of the Title V program. DEQ made projections on the cost of the implementation based on research of the Clean Air Act requirements and costs experienced by other states. DEQ estimates it will cost 2.3 million dollars (that figure may go up with cost of living increases) to implement this phase. Detailed packages were prepared documenting the projected cost. As part of that effort DEQ closely studied the Title V Act, regulations, and EPA guidance to determine precisely what costs were required to be charged to Title V, what costs could not be charged to Title V, and what costs were allowed to be charged to Title V but could be charged elsewhere. After a detailed analysis, DEQ put all costs that were not required to be charged to Title V under different budgets, or deferred the costs until another source of funding could be identified. In short, DEQ made every effort to minimize the costs to the Title V program.

DEQ feels the combination of an emission based fee and service based fees is an equitable way to distribute the cost between the different sizes and types of facilities in the program.

Historically, the Department of Energy (DOE) has been a significant contributor to the program. They make a lump sum payment to DEQ in the form of a grant instead of paying Title V fees for INEEL. In recent years, there have been discussions regarding whether this will continue. DEQ negotiated to have the payment made for the next year to help the program.

To better interface with the availability of information and state fiscal year cycles, the rule proposes to change the dates for submission of registration information and fee payments.

The rule contains a shortfall provision that guarantees 1.1 million dollars will be generated under the emission based fee charges. Added to the fees for services, this should provide adequate funding for the program.

Kate Kelly explained how the fee for service charges would be billed. Language will be added to clarify that facilities will be charged for services performed in the previous calendar year and that the fee will be for actual time and expenses incurred by the Department. She noted that the $7,500 cap on fees for services limited how much the Department could be reimbursed. There are facilities that far exceed the $7,500 cap in the course of a year.

Marti Calabretta suggested it might be helpful for facilities to have a running tally of what they owed for services. Kate Kelly noted the issue came up during negotiations with industry. DEQ expressed a willingness to work on a facility-by-facility basis to get them the information they need. Director Allred pointed out the Department needed to be careful not to create a process where it cost more to collect the fee than the fee was worth.

Paul Agidius questioned if the delay in the collection procedure would allow the cash flow the Department needed to provide the services. Director Allred stressed the importance of getting a fee schedule in place that would generate more than the existing rule. The Department will do its best to fulfill the requirements of the Title V program with what is proposed. The consequences of not getting a rule in place could be disastrous to industry.

Dr. Joan Cloonan asked if site visits included inspections in terms of service. Kate Kelly confirmed that inspections were included in site visits. Dr. Cloonan asked about the applicability of the fees for service for facilities that got a Tier II synthetic miner permit. Kate Kelly indicated the fees would only apply for the portion of year before the Tier II permit was issued

Doug Conde asked for assurance on compliance with the Administrative Procedures Act. The proposed rule seems to vary quite a bit from the original proposal. The Act requires that if you vary from the original proposal, you must show that it is a logical outgrowth of the original proposed language in the rule, and that the notice that was provided to the public is broad enough in scope to give the public notice of this final rule. Mr. Conde felt the notice was broad enough, but asked how the language in the final proposal carried forward the same concepts that were in the original proposal.

Kate Kelly responded that the proposed fee structure continues to use a combination of service and emissions based calculations to allow for an equitable allocation of fee payments among the facilities and to comply with the requirement of state statute that the fee have an incentive for emissions reductions. The final rule is actually closer to the one that was in place in some components, but closer to the one that we proposed in other components. It appears to be a logical outgrowth of all the discussions that have taken place. There is a lot of comment on the record from the extensive outreach over the past year and a half on proposals and discussion of proposals. Notice has gone out many times to all Title V facilities. The parties should be aware that this issue was going on and that there was going to be discussion in the future of what the actual rule would contain when it was adopted.

Mr. Conde asked if there were comments that suggested this type of an alternative. Kate Kelly confirmed that a proposed alternative submitted by the Idaho Association of Commerce and Industry closely matched what we are proposing now.

- **MOTION**: Dr. Joan Cloonan moved that the Idaho Board of Environmental Quality adopt the Rules for the Control of Air Pollution in Idaho, Docket No. 58-0101-0203 as presented in the proposal which was distributed to the Board the 13th of November 2002, and amended during Board discussions in Section 06.b.
  SECOND: Don Chisholm
  DISCUSSION: Chairman Agidius asked if there was any testimony or anyone from industry who wanted to object to the rule as presented.

  Teresa Perkins, DOE Idaho Operations Office and INEEL, testified regarding the radionuclide fee components of the rule at Section 389.05 and 389.08. These sections are applicable only to DOE facilities that release radionuclides. The fee is based on the potential to emit, rather than actual emissions. DOE and INEEL have been working with DEQ for quite some time about their concerns regarding the radionuclide fee. When DEQ proposed modifications to the Title V fee rule, they (DEQ) proposed to delete the radionuclide fee sections. DOE and INEEL are now very concerned and unhappy to learn that the radionuclide fee has been put back in place in this latest version of the proposed rule. Ms. Perkins stated they have attended many meetings and worked for the last year and a half with DEQ and industry to try to reach consensus on this matter. The bottom line is that if industry pays less, INEEL has to pay more; so they were unable to come to consensus on the radionuclide fee rule. DOE and INEEL have no significant objections to the format of the rest of the rule. They have gone through legal reviews on this matter and are very serious about pursuing whatever actions necessary to remove the radionuclide fees from the rule. DOE and INEEL feel the fees illegal and discriminatory and place additional fees on DOE, more than any other source has to pay. There is no basis in the expense that DEQ has to incur to regulate DOE in this respect. The regulation does not address any other radionuclide emission sources or any other hazardous air pollutants; therefore, there is no basis in risk or any other legitimate regulatory basis that DOE can see. The fees for radionuclides are also inconsistent with the fees for other pollutants in Idaho. All others can be based on actual emissions, while the DOE radionuclide fee is based on permitted limits or potential to emit. Ms. Perkins asked the Board to reconsider adopting the rule as proposed, and asked that Sections 389.05 and 389.08 be deleted and Section 389.07, related to the shortfall, be modified to say if Subsection 389 and total or the total rules from 389 through 399 are less than the proposed requirement, then the shortfall process will go into effect.

  Chairman Agidius asked if DOE were proposing to pay no fees. Ms. Perkins responded that DOE/INEEL would pay fees on its criteria air pollutants based on the same fee schedule as the rest of industry.

  Don Chisholm asked what the dollar impact of the proposal would be. Ms. Perkins said there would be no impact this year; they would pay the $500,000. The dollar impact in future years is unclear. She estimated they would probably pay around $150,000 per year in fees (instead of the $500,000 required by the rule as presently proposed).

  Kate Kelly explained that the radionuclide registration language is a result of historic negotiations and has not changed since 1994. The section has not been implemented by DEQ due to the grant arrangement. There is a concern about the emission versus dose situation, and singling out the DOE in this manner in a rule. All the fee calculations used to be based on potential to emit, but that was changed to actual emissions several rulemakings ago; only

the radionuclide language was carried over without that change. In the rule published in the Administrative Rules Bulletin, DEQ proposed to delete the radionuclide language because they viewed it as problematic both from a technical and fairness standpoint. However, in order to reach consensus on the rule, the language was put back in. She commented that others might want to address why they feel it is important to keep the language in the rule.

Doug Conde thought the argument raised was the equal protection in the constitution argument. He pointed out that DEQ could treat different individuals differently if there is a rational basis for the different treatment. Just the fact that the DOE facility is treated differently than other air sources does not automatically mean that it is unconstitutional. Mr. Conde stated he has not reviewed the matter, but thought there may be reasons why that type of a facility would create different issues for the agency, such as different costs, level of scrutiny, and risks involved.

Nick Purdy asked if DOE would object to a different rate for services to bring up the revenue shortfall if the radionuclide language were removed. Teresa Perkins said they would not object. She stated their main concern focused on the radionuclide fee, but what they are really trying to achieve is some equity. If a different rate for services were proposed only for DOE, that would not be reasonable.

Teresa Perkins noted that during the negotiations, DEQ presented information on what each facility cost DEQ. There was not a big difference between what it cost DEQ to regulate INEEL versus other facilities of their size.

Don Chisholm suggested that since DOE has already agreed to pay the $500,000 lump sum for the coming year, that the Board move forward with the proposed rule to get something in place and revisit the radionuclide issue and try to have a solution to address DOE's concerns by the November 2003 Board meeting. Ms. Perkins stated that if the solution were to leave the radionuclide components in place, DOE would object. From a legal standpoint, they feel it is important to address this issue at this time. She could not say that DOE would not take further action. Discussions up to this point have indicated that DOE feels this is an appropriate time to act to resolve this issue.

Director Allred asked if an appeal of the radionuclide provision would stay the rule, or if the rule would remain in force until overturned. Doug Conde thought the rule would stay in effect until it was overturned, unless they were able to convince the court to stay the effectiveness pending the appeal.

Dr. Joan Cloonan noted that the radionuclide section is not being changed, it is the same as it has been since 1994. She suggested that another option might be for DOE to petition the Board for a separate rulemaking to address the radionuclide section. Director Allred felt the best option might be to move forward with the proposed rule and address the radionuclide section in a separate rulemaking. He believed there was a fairness issue, but stressed the importance of getting a rule in place or the Title V program will be in jeopardy. INEEL could be as adversely affected as other industry. He felt without the $500,000 lump sum payment from DOE, Idaho would be unable to maintain the Title V program.

Marti Calabretta called for the question.

VOICE VOTE: Motion carried unanimously.

The Board extended its appreciation and thanks to outgoing Board member Marti Calabretta for her service to the Board and stated they looked forward to working with her again as she serves in the Idaho Legislature.

The meeting adjourned at 3:30 p.m.

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Paul C. Agidius, Chairman

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Marti Calabretta, Secretary

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Debra L. Cline, Management Assistant and Recorder