



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

February 19 & 20, 2003

The Board of Environmental Quality convened on February 19, 2003 at 9:00 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
Donald J. Chisholm, Member
Dr. Joan Cloonan, Member
Marguerite McLaughlin, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT:

Dr. J. Randy MacMillan, Vice-chairman

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

C. Stephen Allred, Director
Debra Cline, Management Assistant to the Board
Jess Byrne, Resource Officer
Doug Conde, Deputy Attorney General, DEQ
Paula Gradwohl, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Jason Jedry, Administrative Services
Sharon Keene, Customer Resources
Kate Kelly, Administrator, Air Quality Program
Dave Mabe, Administrator, Water Quality Program
Michael McIntyre, Water Quality Program
Jon Sandoval, Chief of Staff

OTHERS PRESENT:

Peter Anderson, Hearing Officer
Martin Bauer, Micron Technology
Kirby Vickers, JUB Engineering

Gary Burkett, Consultant for Glanbia Foods
Murray Feldman, Holland & Hart
Robbin Finch, City of Boise
Harriet Hensley, Deputy Attorney General, Natural Resources Division
Joe James, Attorney at Law
Linda Jones, Holland & Hart
Mark Short, Glanbia Foods
Rick Warren, Glanbia Foods

- ❖ 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 at (208) 373-0465.

CONTESTED CASE HEARING – *GLANBIA FOODS, INC. V. DEQ, DOCKET NO. 0117-03-05*

Chairman Paul Agidius stated the hearing in this matter was vacated and no executive session will take place. Peter Anderson, the Hearing Officer appointed by the Board, presented a status report.

Peter Anderson stated this case involves an appeal and petition for contested case hearing filed by Glanbia Foods regarding their wastewater land application permit No. LA 0013-02. Glanbia applied for a waiver to the non-growing season hydraulic load limit in the permit from DEQ. DEQ denied the waiver. Glanbia then filed the petition for contested case and requested an expedited hearing to take place before March 2003. A series of pre-hearing conferences were held, and motions to intervene were filed by other parties (Ben Gnesa, Barry Wood, Travis and Heather Williams, John and Carrie Arkoosh and Bill and Karen Arkoosh). Mr. Anderson issued an order expediting the hearing and set a schedule. At a final pre-hearing conference held on February 14, 2002, the parties agreed to vacate the hearing and have a status conference before the Board instead, while they continued to negotiate toward settlement. If the parties are not able to reach an agreement, they may request mediation.

Harriet Hensley, Deputy Attorney General and counsel to the Board in this matter, recommended the Board limit its questions to procedural issues and not the merits of the case.

Don Chisholm asked for clarification of whether the Board rules would allow DEQ and the applicant to settle the case before the intervenors have had the opportunity to present their case. Mr. Anderson responded that the rules would allow the presiding officer to hear the intervenors' case before approving any settlement agreement.

STATUS CONFERENCE

Peter Anderson called the status conference to order in the matter of *Glanbia Foods vs. Idaho Department of Environmental Quality*, Respondent; and Ben Gnesa, Barry Wood, Travis and Heather Williams, John and Carrie Arkoosh and Bill and Karen Arkoosh, Intervenors; Docket No. 0117-03-05. Notice of this proceeding was properly given to all parties.

- Murray Feldman, Holland & Hart, appeared on behalf of Glanbia Foods
- Doug Conde, Idaho Attorney Generals Office, appeared on behalf of DEQ

- Tom Arkoosh, Attorney at Law, appeared on behalf of Ben Gnesa and Barry Wood
- Joe James, Attorney at Law, appeared on behalf of Travis and Heather Williams, John and Carrie Arkoosh and Bill and Karen Arkoosh

Murray Feldman stated he intended to present a summary of the elements of the settlement proposal being discussed between Glanbia and DEQ. The document was also circulated to the Intervenor for comment.

Don Chisholm suggested the Board should not hear details of the settlement discussion at this point because it might prejudice future proceedings. Peter Anderson requested Mr. Feldman to make his presentation on the status of Glanbia's request for waiver, his assessment of the need for the Board to proceed to a contested case hearing at any point, and his assessment of how close the parties are to resolution of the matter.

Mr. Feldman briefly described the technical and operational conditions that led to the need for the waiver. Glanbia has investigated all other options for handling the wastewater and has not been able to find a solution. Additional property was purchased to use as a land application site, but the permit will not be ready in time to address the current problem. The waiver is needed until the permit process is complete for the new land application site.

The DEQ has proposed a resolution that Glanbia feels would take into consideration the needs of the neighbors, the public, and the environment. The parties have not reached final agreement, but there is a proposal in principle that Glanbia and DEQ are on board with and they just need to work out some of the details.

Mr. Feldman stated the Intervenor still have concerns that will have to be addressed to finalize the agreement. He believed the potential for the matter to proceed to a full contested case before the Board was very limited, but felt it was likely the Board or the Hearing Officer would need to review and approve any final agreement among the parties. Mr. Feldman requested the Board authorize the Hearing Officer to facilitate further discussions and negotiations; and asked for any guidance, direction, or assistance the Board could offer to assist with finalizing the settlement discussions. Mr. Feldman stated he and other Glanbia representatives (Rick Warren, Environmental Manager; Mark Short, Chief Financial Officer; and Gary Burkett, Glanbia's engineering consultant) were ready to respond to questions and take part in negotiations for the rest of the day.

Doug Conde stated that DEQ does not disagree with Glanbia's description of the posture of the parties with respect to settlement, but DEQ does disagree with Glanbia's representation of the background leading to the contested case. Mr. Conde asserted the main point in this proceeding is that a waiver can only be provided if the treatment requirements in the permit are protective of the environment and do not cause any detriment to groundwater quality, protect uses of the resources, and treatment requirements are economically prohibitive. The merits of the case revolve around why Glanbia is in this position and is asking for a waiver.

DEQ has proposed a framework for settlement that attempts to balance Glanbia's need with added protections for the public and the environment in the event that Glanbia's predictions that there will not be any impact on the environment and public health are not accurate. Additional precautions were added that are not required by the existing permit. Mr. Conde felt there was potential to resolve the case with a fair and reasonable solution. DEQ also felt it

would be helpful to have the Hearing Officer assist with the settlement negotiations, perhaps as an intermediary between the parties.

Tom Arkoosh explained that his clients, Ben Gnesa and Barry Wood, live down-gradient from the aquifer. They believe applying more wastewater during the winter season than the permit allows may have a detrimental effect on the aquifer. Mr. Arkoosh asserted that having been granted intervention on the question of whether or not there is economic impact, there cannot be a settlement on the question of economic impact absent their involvement. He requested the parties be allowed to meet following the status conference with the Hearing Officer in an informal mediation session. He also expressed willingness to take part in a more formal mediation process if requested. Mr. Arkoosh stressed his clients' willingness to work out a mutually beneficial solution to solve the problem.

Joe James, Attorney for Intervenors Travis and Heather Williams, John and Carrie Arkoosh and Bill and Karen Arkoosh, discussed his clients' interests in the case. They were apprised of the settlement negotiations, but have not actively participated in them. It appears the settlement being discussed will be more of an enforcement action. Mr. James felt this would be an improper procedure because it limits the issues that can be discussed and does not open up to the broader issues that would be in a proceeding before the Board. His clients' primary concerns are with the environmental degradation around their homes. The aerosol spray of wastewater is carried by the wind over their property and their well water may be contaminated. Mr. James indicated his clients would have no objection to a negotiation meeting with Peter Anderson acting as the facilitator or mediator.

Don Chisholm asked counsel to explain the interrelationship between this proceeding and an enforcement proceeding. He noted that enforcement proceedings do not come before the Board; they are an action by the Director and are appealed directly to the district court. He also discussed the possibility that the petition for waiver might become moot by the time a hearing could be conducted.

Peter Anderson talked with the parties regarding the future role of the Board in the matter.

Doug Conde formally requested, on behalf of DEQ, that Peter Anderson assist with settlement negotiations to take place following the status conference. He explained the enforcement process used by DEQ and the opportunities for settlement. There is no public notice or opportunity for involvement in the process by parties other than the entity who is in violation.

Peter Anderson adjourned the status conference at 10:15 a.m.

➤ **MOTION:** Nick Purdy moved the Idaho Board of Environmental Quality appoint Peter Anderson to act as mediator in settlement negotiations to take place on February 19, 2003 in the matter of *Glanbia Foods v. DEQ*, Docket No. 0117-03-05.

SECOND: Dr. Joan Cloonan

AMENDMENT: Don Chisholm moved the motion be amended to provide that Peter Anderson's actions as mediator are not to include informing the Board of any discussions by the parties, other than to report a final settlement, to ensure that any future proceedings before the Board are not tainted.

SECOND ON AMENDMENT: Nick Purdy and Dr. Joan Cloonan concurred with the amendment.

DISCUSSION: Peter Anderson stated he would accept the appointment as mediator. He will file a written report with the Board following the negotiation meeting reporting whether the matter has been resolved and if there is a need for further proceedings.

VOTE ON AMENDED MOTION: Passed by unanimous vote.

WORKSESSION

DEQ Budget Issues

Director Steve Allred reported on the DEQ budget and how the recent holdbacks and budget cuts are being handled.

Overview of the Rulemaking Process and Recent Developments

Director Allred reported on the status of proposed DEQ rules and other legislation in the current session. He discussed the many public meetings, hearings, negotiated rulemaking meetings, and opportunities for public involvement in the rulemaking process.

Dr. Joan Cloonan discussed problems that may have contributed to the Underground Storage Tank Rules not being adopted. The main concern of the legislators centered on the perception that the rules were more stringent than the federal rules. Although DEQ complied with last years' legislation that requires the Department to identify where a proposed rule might be more stringent or broader in scope, the legislators seemed to feel the information supplied by DEQ was not explicit enough. They wanted more information to clearly show where the proposed rule was more stringent, how it was more stringent, and why it was more stringent. Legislators also wanted to see a copy of the federal law so they could compare it to the proposed rule. Dr. Cloonan pointed out that the rules were supported by industry representatives who took part in the negotiated rulemaking. She expressed disappointment that the rules had not been approved, and felt there was a good environmental reason for the rules.

Chairman Paul Agidius suggested the Board's executive committee meet with the germane legislative committees to clarify and improve the process for the future. Director Allred agreed with the suggestion and felt it was important for the Board to communicate with the legislature.

Board members discussed the importance of having stakeholders participate in the negotiated rulemaking process and Board review of rules so that any problems or concerns can be resolved before the rules go to the legislature for consideration.

The role of the Board in the legislative process was discussed. Director Allred felt it was important for the legislature to recognize the role of the Board and the level of scrutiny it uses in reviewing the rules.

Update on TMDL Statutes and their Relationship to the Program

Dave Mabe, Administrator, Idaho Water Quality Programs, distributed a memo (Attachment 1) with suggested amendments to the TMDL statutes, and a report by the University of Idaho, Wildlife and Range Policy Analysis Group on *Idaho Water Quality Policy for Nonpoint Source Pollution: A Manual for Decision Makers* (Attachment 2). He provided an overview of the Total Maximum Daily Load (“TMDL”) process and discussed how the process is working and some of the challenges it faces.

Report on the 303D List

Michael McIntyre, Surface Water Program Manager, gave a presentation on the 303D List and explained the process used to develop the list (Attachment 3).

Dave Mabe briefly discussed the Wetlands Program. DEQ does not address wetlands in the 303D list because it has not developed a standard due to lack of funding. DEQ performed an analysis regarding gaining primacy for the Wetlands program (a copy of the report will be sent to Board members). After reviewing the issue, DEQ decided not to actively pursue Wetlands primacy. When comparing the Wetlands Program to the National Pollution Discharge Elimination System (“NPDES”), they determined they could achieve more working with the NPDES Program, and it should be the priority.

Update on the National Pollution Discharge Elimination System (NPDES) Program and Proposed Legislation

Dave Mabe distributed a copy of RS12925, the proposed legislation that would have authorized the State to gain primacy of the NPDES Program (Attachment 4). The RS failed to gain approval to be printed as a bill. DEQ prepared the proposed legislation to develop a minimalist approach to adopting the program, gain legislative approval of efforts to gain primacy of the program, and to inform the legislature of the context DEQ is working in to gain primacy of the program. He also handed out and discussed a report, *Decision Analysis Report 2, NPDES Program Review*, which explains the NPDES program and evaluates gaining primacy of the program (Attachment 5). To see a full version of the report, visit DEQ’s Web site at <http://www.deq.state.id.us/water/npdes/DecisionAnalysisReport2.pdf>.

The proposed legislation was developed with input from the stakeholders, and changes and additions were made in response to their comments. A provision was added to allow an additional, final review from the legislature before the Department could enter into a final memorandum of understanding with EPA. There does not seem to be one single reason for the failure of the RS, but it appears a number of economic and political concerns will need to be addressed before the proposal can be successful. Since the legislature clearly does not support seeking delegation of the NPDES program at this time, any efforts DEQ proceeds with will probably be very limited in nature.

Mr. Mabe pointed out that not proceeding with delegation of the program leaves the 401 Certification as Idaho’s only link to NPDES permit issuance. Idaho may want to review its current 401 Certification Program to ensure it is adequate. We may want to add more definition to our rules and statutes on 401 Certification procedures and processes.

Dave Mabe provided a brief overview and discussion of how the state's water quality standards are developed and how they interact with federal requirements.

The Board adjourned at 3:10 p.m.

FEBRUARY 20, 2003

Prior to convening the Board meeting, Board members and staff attended the Senate Health & Welfare Committee for confirmation of the Gubernatorial reappointment of members Marguerite McLaughlin and Donald J. Chisholm to the Idaho Board of Environmental Quality. The Committee confirmed both members by unanimous vote. (A copy of the Committee minutes can be seen in Attachment 6 to these minutes.)

Chairman Agidius called the Board meeting to order at 10:45 a.m.

ROLL CALL

BOARD MEMBERS PRESENT:

Paul C. Agidius, Chairman
Donald J. Chisholm, Member
Dr. Joan Cloonan, Member
Marguerite McLaughlin, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT:

Dr. J. Randy MacMillan, Vice-chairman

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

Jess Byrne, Resource Officer
Debra Cline, Management Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Paula Gradwohl, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Jason Jedry, Administrative Services
Sharon Keene, Customer Resources
Kate Kelly, Administrator, Air Quality Program
Dave Mabe, Administrator, Water Quality Program
Michael McIntyre,, Water Quality Program
Pat Nair, Stationary Source Program Manager, Air Quality Program
Jon Sandoval, Chief of Staff

OTHERS PRESENT:

Martin Bauer, Micron Technology
Beth Baird, City of Boise
Lloyd Knight, Idaho Cattle Assoc.
Richard Simmons, Monsanto

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.

No comments received.

AGENDA ITEM NO. 1: ELECTION OF BOARD SECRETARY

- **MOTION:** Don Chisholm nominated Dr. Joan Cloonan as Board Secretary.
SECOND: Nick Purdy
VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 2: ADOPTION OF OCTOBER 16 & 17, 2002 MINUTES

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the October 16 & 17, 2002 minutes as prepared.
SECOND: Don Chisholm
VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 3: DIRECTOR'S REPORT

Director Allred briefly discussed proposed legislation regarding opacity and field burning, and House Bill 150 regarding stringency and the possible impact they would have on the state.

AGENDA ITEM NO. 4 CONTESTED CASE AND RULE DOCKET STATUS REPORTS

Paula Gradwohl, Administrative Rules Coordinator for DEQ, reported there was no rulemaking activity to discuss at this time. She reviewed the status of a number of contested cases currently before the Board.

a. Update on C. J. Strike and Glanbia Foods Contested Cases

Doug Conde presented a status report on a number of issues regarding the Glanbia Foods contested cases. The court case has been resolved and the process used by DEQ to issue permits was upheld. The process for Glanbia's new wastewater land application permit is proceeding, and DEQ expects to make a decision on the permit in a week or two. The parties to the contested case regarding Glanbia's request to waive the hydraulic loading limits on their existing wastewater land application permit worked all afternoon yesterday to try to reach a settlement. Mr. Conde felt significant progress was made and draft language was exchanged on several points.

Doug Conde briefly discussed the C. J. Strike contested case. The matter will be coming back before the Board.

Pat Nair, Stationary Source Program Manager for the Idaho Air Quality Program, presented an overview of the air quality permitting programs in Idaho. He explained the Permit to Construct Program (PTC), Tier II Program, and Title V or Tier I Program, and how they relate to the Clean Air Act.

There have been 50 Tier I permits issued to date. DEQ has received petitions for contested cases on eight of the permits. Most of the appeals deal with issues specific to a facility. One common issue is operating manuals. DEQ is working with facilities to allow flexibility, while maintaining assurance that equipment will be operated in a manner that minimizes emissions and is in accordance with the rules.

Director Steve Allred discussed the need to streamline the air quality permitting process in Idaho. He has been working with a group of chief executives to identify the needs of industry and government in an equitable process. This is intended to be a first step to gain guidance and direction for a comprehensive reorganization of the laws and rules of the air quality permitting process. The goal is a simplified process with one application that will bring certainty and logic to this program.

Kate Kelly announced she had accepted a new position as regional administrator of the DEQ Boise Region Office. She stated she has enjoyed working with the Board, and expressed her admiration and respect for the Board members and the thought and effort they put into their work. Chairman Paul Agidius thanked Ms. Kelly for the fine work she did to bring the Department and Board through a difficult time. He acknowledged the difficult challenge she faced to balance the requirement to enforce the laws, while allowing flexibility whenever possible. Director Allred joined in thanking Ms. Kelly for the fine work she has done, and acknowledged her outstanding accomplishments in clearing the backlog in the air program and issuing all Title V permits. Her efforts were all the more remarkable because for the first time in ten years, she was able to gain EPA approval for how Idaho was operating its Title V program.

The meeting adjourned at 12:00 p.m.

TOUR OF THE AMALGAMATED SUGAR PLANT IN NAMPA, IDAHO

At 1:30 p.m. the Board, staff and guests traveled to Nampa, Idaho for a tour of the Amalgamated Sugar Plant. A copy of the presentation materials and a complete list of attendees can be seen in Attachment 7 to these minutes.

Paul C. Agidius, Chairman

Debra L. Cline, Management Assistant and Recorder