



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
Board of Environmental Quality

1410 North Hilton, Boise, ID 83706-1255, (208) 373-0502

Dirk Kempthorne, Governor
C. Stephen Allred, Director

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

September 10, 2002

The Board of Environmental Quality convened on September 10, 2002 at 10:00 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
Dr. J. Randy MacMillan, Vice-chairman
Marti Calabretta, Secretary
Donald J. Chisholm, Member
Dr. Joan Cloonan, Member
Marguerite McLaughlin, Member (via conference call)
Nick Purdy, Member

BOARD MEMBERS ABSENT:

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

Jon Sandoval, Chief of Staff
Debra Cline, Management Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Keith Donahue, Deputy Attorney General, DEQ
Paula Gradwohl, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Harriet Hensley, Deputy Attorney General
Jason Jedry, Administrative Services
Dave Mabe, Administrator, Water Quality Program
Stephen West, Regional Administrator, DEQ Boise Region

OTHERS PRESENT:

Bill Eddie, Land and Water Fund
Bill Sedivy, Idaho Rivers United
Norm Semanko, Idaho Water Users Assoc.
Travis Thompson, Barker, Rosholt & Simpson for Idaho Power Company

Jim Tucker, Idaho Power Company

- ❖ 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.

AGENDA ITEM NO. 1: ADOPTION OF JUNE 20, 2002 MINUTES

- **MOTION:** Dr. Randy MacMillan moved the Board adopt the minutes of the June 20, 2002 Board meeting as prepared and distributed.
SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion passed unanimously

AGENDA ITEM NO. 2: ORAL ARGUMENT IN THE MATTER OF SECTION 401 WATER QUALITY CERTIFICATION FOR RELICENSING OF THE C. J. STRIKE HYDROELECTRIC FACILITY, DOCKET NO. 0102-01-06

Chairman Paul Agidius stated that each party would be allowed 30 minutes for argument including rebuttal.

- **William Eddie appeared on behalf of petitioners, Idaho Rivers United and American Rivers.**
- **Travis Thompson, attorney with the firm of Barker Rosholt & Simpson, appeared on behalf of Idaho Power Company.**
- **Doug Conde, Deputy Attorney General, appeared on behalf of the Department of Environmental Quality.**
- **Harriet Hensley, Deputy Attorney General, represented the Board of Environmental Quality.**

Doug Conde indicated DEQ has argued that in addition to the standing issue, they would also like the Board to address the merits of the appeal in its decision. William Eddie asserted that it would be inappropriate at this time to address the merits of the case. He felt there was an incomplete record because the hearing officer has not rendered a decision on the merits of the case. Mr. Eddie requested the Board enter a ruling strictly focused on standing and send the case back to the hearing officer for a decision on the merits.

Marti Calabretta asked what communication had indicated the Board would be asked to address the merits of the case. Doug Conde responded that DEQ requested the action in its exceptions to the Recommended Order of the hearing officer. In that document, DEQ objected to the fact that the hearing officer did not address the merits and requested that the Board address those issues. Mr. Conde asserted that the appeal could be disposed of without addressing the standing issue because DEQ believes it acted in accordance with the law and appropriately in issuing the 401 certification.

Ms. Calabretta asked if DEQ made the request to expedite the matter and avoid an additional hearing. Mr. Conde explained it was DEQ's position that they have fully briefed the issue and

presented on both sides that there is an agreement as to the undisputed facts, and the case can be decided as a matter of law. Therefore, the matter is ready for a decision. The Board delegates its authority to the hearing officer, so it is the Board's authority ultimately to decide the issue, and it is ready to be decided.

Don Chisholm felt in fairness to the parties the only issue they should be expected to address is the matter of standing. He suggested the Board reserve judgment on whether to send the matter back to the hearing officer for hearing on the merits. If the Board decides the petitioner does have standing, it may wish to schedule a hearing on the merits before the full Board.

➤ **MOTION:** Don Chisholm moved the Board only consider the issue of standing at this time and not entertain a hearing on the merits of the underlying application.

SECOND: Marti Calabretta

VOICE VOTE: Motion passed unanimously

William Eddie argued on behalf of the petitioners, Idaho Rivers United and American Rivers. He asked that the Board determine the petitioners meet the requirements for organizational standing, and that their members also have distinct injury from water quality violations in the Snake River and DEQ's decision to basically allow those violations to continue indefinitely injures their interests, and therefore they have representational standing.

Mr. Eddie asked that the Board reverse the hearing officer's decision, holding that proof of economic injury is not required to show standing before DEQ and finding that the petitioners have proven standing in this case. He further requested that if the Board finds that the petitioners are required to prove economic injury, that the matter be remanded back to the hearing officer for the development of more facts on that issue. It was the petitioners belief from the opening rounds of the case that they did not have to show economic damage. If the Board believes they do have to show economic injury, Mr. Eddie requested they be allowed to do so before the hearing officer.

Travis Thompson argued on behalf of the Idaho Power Company. Idaho Power Company supports the hearing officer's decision and requested the Board uphold the decision and deny standing to the petitioners.

Doug Conde argued on behalf of the Idaho Department of Environmental Quality in support of granting standing to Idaho Rivers United. He believed American Rivers had not shown the same level of interest. He stressed that DEQ does not support restricting standing only to those who suffer economic injury.

➤ **MOTION:** Dr. Randy MacMillan moved the Board go into executive session to have legal questions answered by its legal counsel, Harriet Hensley, Deputy Attorney General.

SECOND: Marti Calabretta

VOICE VOTE: Motion passed unanimously

The meeting room was cleared of everyone except the Board members, Harriet Hensley, and the Board's management assistant at 1:40 p.m. No deliberation took place and no votes were taken. The meeting reconvened and was opened up to the public at 1:55 p.m.

Board members deliberated the case and discussed how the final order should be developed. Chairman Agidius took an informal poll to determine if members felt petitioners had standing in the case. A show of hands indicated a majority of members supported a finding that petitioners had standing: Marti Calabretta, Don Chisholm, Dr. Joan Cloonan, and Dr. Randy MacMillan in support of standing; Paul Agidius, Marguerite McLaughlin, and Nick Purdy against standing.

- **MOTION:** Dr. Randy MacMillan moved the Board go into executive session to have legal questions answered by its legal counsel, Harriet Hensley, Deputy Attorney General.
SECOND: Don Chisholm
VOICE VOTE: Motion passed unanimously

The meeting room was cleared of everyone except the Board members, Harriet Hensley, and the Board's management assistant at 2:15 p.m. No deliberation took place and no votes were taken during the executive session. The meeting reconvened and was opened to the public at 2:30 p.m.

- **MOTION:** Marti Calabretta moved the Board table the action on the Matter of the Section 401 Water Quality Certification for Relicensing of the C. J. Strike Hydroelectric Facility, Docket No. 0102-01-06 until the next Board meeting on October 16 & 17, 2002. The Board is unable to reach a decision at this time. Two opinions will be drafted, and the Board will review the opinions and make a decision on October 16, 2002.
SECOND: Don Chisholm
VOICE VOTE: Motion passed unanimously

AGENDA ITEM NO. 3 DIRECTOR'S REPORT

Jon Sandoval, Chief of Staff, reported the final Record of Decision for the Coeur d'Alene Basin has been issued and signed by Governor Kempthorne. In his letter of concurrence, the Governor identified a number of remaining concerns including EPA's decision to move forward. A copy of the letter will be provided to Board members as soon as it is available.

Mr. Sandoval also discussed the latest 3.5% budget holdback and how it will affect DEQ. The latest \$550,000 reduction in DEQ's budget will be absorbed by not filling positions, postponing some projects, reducing operating costs, and contracts. Air Program permits are a priority and will not be affected by the holdback. Department staff have been asked to reduce spending and find new efficiencies wherever possible. No personnel layoffs are planned at this time. All merit increases and bonuses are frozen and the Department is trying to find creative non-monetary ways to recognize employee performance. There is concern that it may be difficult to maintain employee morale and retain quality staff in the long term if the budget problems continue. Mr. Sandoval asked for the Board's help finding ways to reduce costs and be more efficient.

Mr. Sandoval distributed copies of a letter from the Idaho Association of Commerce & Industry requesting that the Environmental Common Sense Committee meet to discuss issues with the State Air Quality Program. The issues to be discussed included a report completed by the Office of Performance Evaluations regarding the Title V Program; DEQ rulemaking activities including the rules to set a standard for hydrogen sulfide, rules to clarify and streamline

the permitting process, and the fee rule for the Title V Program. The requested meeting has been scheduled for October 3, 2002.

Kate Kelly, Administrator of the State Air Quality Program, commented that the study by the Office of Performance Evaluations has been and will continue to be heard in the appropriate forum. DEQ will continue to meet and report to the committee that commissioned the study. Ms. Kelly noted that all three of the rules IACI requested the ECSC to review were currently in the public comment process and it seemed an inappropriate or awkward time to bring them to a different forum. DEQ staff took great care to ensure that adequate research and public outreach were conducted for these rulemakings. Director Allred has been closely involved in the process. She expressed her appreciation for the Board's support and asked for its continued support as these rulemakings go forward.

Dr. Randy MacMillan and Marti Calabretta wondered what IACI's intent was in bringing the rules to the ECSC. Ms. Calabretta felt the rules were part of the Board's responsibility and questioned the ECSC's authority at this stage. Dr. Joan Cloonan briefly discussed the history of the ECSC and the types of issues they discuss.

Paul Agidius presented former Chairman Don Chisholm with a plaque and a letter commemorating his service as the first chairman of the Board of Environmental Quality. Mr. Chisholm thanked Chairman Agidius and the Board members for the honor of working with them and stated he looked forward to working with them in the future.

Kate Kelly briefed the Board on the two active lawsuits regarding the field burning issue in Northern Idaho and discussed the Smoke Management Program. The lawsuit filed under the solid waste law as an illegal disposal of waste was dismissed in federal court has been appealed to the 9th Circuit Court. The other case filed in state court requested class action asking for damages as a result of either a nuisance or trespass. They also asked for a preliminary injunction to stop field burning. The judge has been extremely interested in what the environmentalists and health officials had to say. An injunction was issued to prevent burning in Kootenai and Benewah counties by the defendants unless they post a \$100,000 bond and bale the straw to reduce the smoke.

Ms. Kelly reported that weather conditions this summer have caused very poor smoke dispersion, which resulted in very few burning days being declared. DEQ is working closely with the Department of Agriculture, the EPA and the tribes on the Smoke Management Program.

Kate Kelly reported odor issues seem to have settled down this summer. There is a great deal of interest in the proposed rule to set a hydrogen sulfide standard. The Department of Agriculture is expending an increasing amount of resources to deal with odor problems. Ms. Kelly urged Board members to contact her if they needed additional information regarding any of these issues.

AGENDA ITEM NO. 4 LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

No issues were presented.

The meeting adjourned at 3:50 p.m.

Paul C. Agidius, Chairman

Marti Calabretta, Secretary

Debra L. Cline, Management Assistant and Recorder