



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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Toni Hardesty, Director

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IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

April 21, 2009

The Board of Environmental Quality convened on April 21, 2009, at 9:00 a.m.
at:

**Department of Environmental Quality
Conference Center
1410 N. Hilton
Boise, Idaho**

ROLL CALL

BOARD MEMBERS PRESENT

Craig Harlen, Chairman (via telephone)
Nick Purdy, Vice-Chairman
Kermit Kiebert, Secretary (via telephone)
Donald J. Chisholm, Member
Dr. Joan Cloonan, Member
Dr. John R. "Randy" MacMillan, Member
Carol Mascareñas, Member (via telephone)

BOARD MEMBERS ABSENT

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Toni Hardesty, Director
Curt Fransen, Deputy Director
Courtney Beebe, Deputy Attorney General, DEQ
Martin Bauer, Administrator, Air Quality Division
Barry Burnell, Administrator, Water Quality Division
Jess Byrne, Intergovernmental Affairs Coordinator
Debra Cline, Management Assistant to the Board
Douglas Conde, Deputy Attorney General, DEQ
Jack Gantz, Water Quality Engineer, Boise Regional Office
Orville Green, Administrator, Waste Management & Remediation Division
Mike May, Associate Engineer, Boise Regional Office
Tim Wendland, Loan Program Manager
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Carlene Herring, Region IV Development
Justin Hayes, Idaho Conservation League
Harriet Hensley, Deputy Attorney General, Natural Resources Division, representing the Board
Bill Jerrel, Idaho Municipal Bond Bank
Lynn Tominaga, Idaho Rural Water Association (IRWA)

- ❖ 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 Management Assistant at (208) 373-0465.

Chairman Harlen participated via telephone and asked Vice-chairman Nick Purdy to act as presiding officer at this meeting.

PUBLIC COMMENT PERIOD

Vice-chairman Nick Purdy opened the floor to public comments on topics not specifically included on the agenda. No comments were presented.

AGENDA ITEM NO. 1: DIRECTOR'S REPORT

Toni Hardesty, Director, updated the Board on the following issues:

- Coeur d'Alene Lake Management Plan – The plan has been finalized and signed by Governor Otter and Chief Allen of the Coeur d'Alene Tribe and submitted to EPA.
- DEQ Budget – The House of Representatives passed a motion to take an additional 5% from all agencies' personnel budgets. It will be very challenging for DEQ to meet this additional reduction. DEQ will receive federal stimulus money, but those dollars will be passed on to other entities. DEQ employees will take on additional work to manage these funds to assist communities with drinking water and wastewater projects, leaking underground storage tanks, diesel retrofits, and Bunker Hill cleanup. Total stimulus funds may be as high as \$70 million.

Chairman Harlen commended Director Hardesty for moving the Coeur d'Alene Lake Management Plan forward.

AGENDA ITEM NO. 2: ADOPTION OF MEETING MINUTES

a. November 12 & 13, 2008

- **MOTION:** Dr. Randy MacMillan moved the Board adopt the minutes for the November 12 & 13 meeting as presented.
- SECOND:** Dr. Joan Cloonan
- VOICE VOTE:** Motion carried by unanimous voice vote.

b. February 11 & 12, 2009

➤ **MOTION:** Dr. Randy MacMillan moved the Board adopt the minutes for the February 11 & 12 meeting as presented.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 3: CONTESTED CASE - In the Matter of Section 401 Water Quality Certification, Wetland Fill and Boat Docks along Lake Cascade, Contested Case Docket No. 0102-07-04, Oral Argument on Motions Regarding Attorney Fees and Costs

Vice-chairman Purdy asked Doug Conde, Deputy Attorney General, DEQ, to provide an update on the case. Mr. Conde stated both the intervenor, Wildwood Development, and DEQ asked for attorney fees and expenses to be awarded pursuant to Idaho Code § 12-117. A recent Idaho Supreme Court decision found that if a party intervened on the side of the state or county, attorney fees could not be awarded under Idaho Code § 12-117. Based on this decision, Wildwood Development withdrew its motion for attorney fees and costs. DEQ discussed the matter with the petitioner, Neighbors for a Healthy Gold Fork; they offered to settle the attorney fees and expenses, and DEQ accepted the offer. The attorney fees and expenses matter is resolved and no oral argument is needed. The Gold Fork contested case is now over, and no other appeals will be filed.

Mr. Conde said the remaining issue before the Board is how settlement of the attorney fees and expenses will be documented. Either DEQ will withdraw its motion or a stipulation will be signed and the board will issue an order.

Don Chisholm said he thinks having a stipulation signed by the parties would provide the best record of how the case was resolved.

Harriet Hensley, Deputy Attorney General, said she could prepare a brief document noting that a stipulation had been entered into, the hearing was vacated, and no further action was required by the Board. Doug Conde will discuss the matter with Director Hardesty and the petitioner to determine the best method to memorialize resolution of the issues.

Ms. Hensley discussed a change in the time requirements for filing an appeal of an agency decision to the district court. The Board's orders state it is 28 days from service of the order. The Supreme Court issued an opinion on March 5, 2009, involving the Board of Registration of Professional Engineers, which held that the time requirements for filing an appeal are set forth in the Administrative Procedures Act (APA). The APA states that the timeframe for filing an appeal to the district court on an administrative decision begins on the date the final order is issued—not on the service date of the final order. The APA was revised in 1992 (it previously said "from the date of service"); however, the Attorney General's rules were not revised and agencies continued to use the language of the Attorney General's Rules of Procedure.

In view of the Supreme Court decision, Ms. Hensley recommended the Board notify the parties in the Sunnyside contested case of the change in the time requirement for filing an appeal. The Board will also need to amend its rules for contested cases so they will be consistent with the APA.

Don Chisholm suggested the Board's rules be amended to be consistent with the process used by the judicial system, which uses the date all signatures are affixed and the order is file-stamped into the file. Doug Conde agreed with the suggestion.

Harriet Hensley will draft a letter to Sunnyside parties to notify them how this Supreme Court ruling will affect the case.

AGENDA ITEM NO. 4: FY2010 STATE WASTEWATER LOAN PRIORITY LIST

Barry Burnell, Administrator, Water Quality Division, distributed a PowerPoint presentation (Attachment 1) explaining the background of the State Revolving Fund (SRF) program, provisions of the American Reinvestment and Recovery Act (ARRA) stimulus money, and two public comments received during the last week from entities requesting funding for projects.

The SRF Program will receive \$70 million in ARRA stimulus monies, plus an additional \$15 million from the Governor's discretionary funds from ARRA. The additional funds resulted in an increase in requests for assistance from the loan programs. The Wastewater Loan Priority List for FY2010 has 105 projects; last year there were 25. The Drinking Water Loan Priority List for FY2010 has a similar increase, with 99 projects this year compared to 41 last year.

Mr. Burnell reviewed the process used to develop the priority lists and the intended use plan. A peer review of all the ratings was conducted to ensure consistency, and DEQ worked with EPA through the whole process. EPA has oversight of the SRF program and the stimulus money.

The additional requirements associated with the ARRA funds include:

- 20% of the funds must be used for "green" infrastructure.
- 50% of the funds must be used for principal forgiveness for disadvantaged communities (this does not apply to the \$15 million from the Governor's discretionary funds (\$10 million for wastewater and \$5 million for drinking water); that money will be used as fundable dollars for the SRF program).
- Contractors must comply with Davis-Bacon Wage Act requirements.
- Additional reporting to EPA and some Congressional committees is required.
- Buying American-made equipment is required (some exemptions are available).
- Strict milestone and completion timelines for projects must be met (final date is February 2010).

He explained that because the SRF program funds do not have the same requirements, it is important the funds not be commingled with ARRA funds. Separate loans will be issued as needed.

Tim Wendland, Loan Program Manager, reviewed the issue analysis, fundable list, and intended use plan and responded to questions from the Board. He said a total of \$69.6 million in projects would be funded, representing only about a tenth of the requests for funding assistance this year.

Mr. Burnell presented a letter from the city of Greenleaf (Attachment 2) requesting that DEQ consider revising the expected loan terms to \$3.3 million in principal forgiveness and a loan with 0.0% interest for a 20-year term. Initial discussions with Greenleaf indicated the city would not be ready for ARRA funding. Because Greenleaf was not going to be ready, or committed to being ready very late and was requesting a substantial portion of the ARRA money, DEQ determined it would be a bad risk to put so much ARRA money into one project that might fail and leave DEQ unable to commit ARRA money to another project. DEQ continues to have concern because Greenleaf has not changed its willingness to be contracted by the January 2010 deadline.

Mr. Burnell said it is at the discretion of the Board to advise DEQ on how to deal with Greenleaf's request. Greenleaf is currently on the fundable list to receive a loan at 1.75% interest for 20 years. If the Board were to direct DEQ to provide principal forgiveness for the Greenleaf project, it would result in DEQ not being able to provide principal forgiveness for the Bliss, Melba, and Murtaugh projects.

Board members discussed the matter and concurred it was very important to ensure the ARRA funds were invested quickly and to the fullest extent. The Board was not comfortable with recommending changes to DEQ's proposal when so much work had gone into analyzing and ranking the projects.

Tim Wendland said the city of Murtaugh recently notified DEQ that it wanted to lower its initial request for \$2.6 million principal forgiveness to \$900,000. These funds will now be available for the city of Bliss for principal forgiveness.

Carlene Herring, Region IV Development Association in Twin Falls, addressed the Board on behalf of the city of Bliss's request for funding. The Association is the planning district for the eight counties in south central Idaho. Ms. Herring said she has been working with the city of Bliss for the last 23 years in its efforts to put in a sewer system. Efforts have been unsuccessful, and the cost of construction continues to climb. The current estimated cost of \$6.8 million is higher than some other systems of this size because the city is built on a large mass of lava rock. The city has sought other types of funding such as a Community Block Grant and direct appropriation funding, but has not been successful and it does not appear to be promising in the future.

Ms. Herring said this small community of 275 people (135 connections including the school and some small local businesses) is partially served by a privately-owned lagoon. The lagoon is not lined and recently changed ownership. The new owners would like to either sell the property to the city for \$5 million or close the lagoon down.

The city believes this loan is its only chance for an affordable system. The city council called a special meeting, declared an emergency, and scheduled a bond election for next Tuesday. The city is ready to move forward and meet the timeline requirements.

Mr. Burnell said if additional funds become available for loan forgiveness, via bypassing or in the case of Murtaugh where the dollar amount of the loan request was lowered, the funds will be reallocated to the city of Bliss. He will contact the city of Bliss as soon as he knows how much additional money might be available for principal forgiveness. The city will need the

information for the bond election so it can determine whether the project will be affordable for residents.

- **MOTION:** Don Chisholm moved the Board approve the FY2010 State Wastewater Loan Priority List as presented by the Department of Environmental Quality.
SECOND: Dr. Joan Cloonan
ROLL CALL VOTE: Motion carried. Chisholm, aye; Cloonan, aye; Kiebert, aye; MacMillan, aye; Mascareñas, aye; Purdy, aye; and Harlen, aye.

AGENDA ITEM NO. 5: FY2010 STATE WASTEWATER PLANNING GRANT PRIORITY LIST

Mr. Burnell presented the FY2010 State Wastewater Planning Grant Priority List. The program provides grants for facility planning work.

Mr. Wendland discussed the issue analysis report and priority list. The final draft priority list has 44 projects. All projects on the list have received thorough review by DEQ Regional Office staff. The public has been given ample opportunity to review the projects on the list, and comments from the public, DEQ's engineering staff, and consulting engineers have been considered in preparing the final priority list. DEQ will be able to fund the first ten projects on the priority list, for a total of about \$230,000. The program has a total of \$250,000 to loan, and the remaining \$20,000 will be held in reserve for grant increases during the year.

Nick Purdy asked about written comments submitted by the Kirk Group (Attachment 3). Mr. Burnell said the letter from the Kirk Group was in support of the Willow Creek Complex nonpoint source watershed restoration project which is ranked 82 on the priority list. The project is to implement controls to ensure agriculturally produced sediment is not carried into surface waters. It is partially funded through a Clean Water Act 319 grant. Mr. Burnell explained that SRF Program funds can be used for nonpoint source pollutants on private property; however, the project is too far down on the priority list to be funded this year. DEQ would like to investigate the situation further to ensure the project is eligible under the program rules.

- **MOTION:** Dr. MacMillan moved the Board approve the Fiscal Year 2010 State Wastewater Planning Grant Priority List as presented by the Department of Environmental Quality.
SECOND: Dr. Joan Cloonan
ROLL CALL VOTE: Motion carried. Chisholm, aye; Cloonan, aye; Kiebert, aye; MacMillan, aye; Mascareñas, aye; Purdy, aye; and Harlen, aye.

AGENDA ITEM NO. 6: FY2010 STATE DRINKING WATER LOAN PRIORITY LIST

Mr. Burnell presented the issue analysis, intended use plan, fundable list, and the FY2010 State Drinking Water Loan Priority List for the Board's consideration. The list contains 99 projects requesting a total of \$280 million; only \$48 million is available to loan.

Mr. Wendland reviewed the details of each of the documents and responded to Board questions. Vice-chairman Purdy asked if cost-benefit ratio analyses were conducted on the projects as part of the ranking process. Mr. Burnell said one objective of the facility plans is to evaluate the least cost alternative for projects.

- **MOTION:** Dr. Cloonan moved the Board approve the FY2010 State Drinking Water Loan Priority List as presented by the Department of Environmental Quality.
SECOND: Dr. MacMillan
ROLL CALL VOTE: Motion carried. Chisholm, aye; Cloonan, aye; Kiebert, aye; MacMillan, aye; Mascareñas, aye; Purdy, aye; and Harlen, aye.

AGENDA ITEM NO. 7: FY2010 STATE DRINKING WATER PLANNING GRANT PRIORITY LIST

Mr. Burnell presented the issue analysis, intended use plan, fundable list, and the FY2010 State Drinking Water Planning Grant List for the Board's consideration. The list has 58 projects requesting a total of over \$1.3 million. DEQ receives \$250,000 from the legislature as its appropriation to fund the Drinking Water Planning Grant Priority List.

Mr. Wendland reviewed the details of the issue analysis and gave an overview of the priority list. He said the fundable list includes the first 16 projects, for a total of \$234,000. The remainder of the \$250,000 appropriation will be held in reserve for grant increases during the year.

Dr. MacMillan asked if the state was complying with the new lower drinking water standard for arsenic and if there was a deadline for compliance. Mr. Burnell reported DEQ has over 20 compliance agreement schedules with small communities to develop strategies and plans to bring their public drinking water systems in compliance with the arsenic criteria. A few have completed their projects and are using point-of-use treatment. The city of Castleford has a new treatment facility. For the most part, the primary choice for small communities that have a larger public water system adjacent to them is to connect with the larger public water system. The small homeowner association systems with 50 or fewer connections will typically go to point-of-use systems for each house. Systems with more than 50 connections must decide whether to use a centralized system or point-of-use systems. DEQ works with these systems to help them select the best option. The compliance agreement schedules contain deadlines, depending on the individual circumstances, but most are about three years from the time DEQ discovers the problem.

- **MOTION:** Dr. MacMillan moved the Board approve the FY2010 State Drinking Water Planning Grant Priority List as presented by the Department of Environmental Quality.
SECOND: Dr. Cloonan
ROLL CALL VOTE: Motion carried. Chisholm, aye; Cloonan, aye; Kiebert, aye; MacMillan, aye; Mascareñas, aye; Purdy, aye; and Harlen, aye.

Vice-chairman Purdy complimented Mr. Burnell, Mr. Wendland, and DEQ Regional Office staff for their excellent work in responding to the increased workload created by the stimulus money and their extra effort to include all requests and meet the deadlines.

AGENDA ITEM NO. 8: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Paula Wilson reviewed the current contested case and rule docket status report. Negotiated rulemaking meetings on the air quality rule to establish minimum requirements for a vehicle inspection and maintenance program have finished and the final draft rule has been issued for comment. The rule will come before the Board in October 2009. The first negotiated rulemaking session rulemaking on a rule to allow fuel-burning sources to use higher sulfur

content fuels so long as there is no additional environmental impact has been completed and a first draft issued. The rule may be ready to publish in the July 2009 Administrative Rules Bulletin.

Ms. Wilson said the water quality standards rule to protect human health from adverse effects of elevated arsenic and protect sensitive aquatic life from cadmium toxicity in low hardness waters is the only rule DEQ plans to bring to the July 29, 2009, Board meeting.

Dr. MacMillan asked if any action has occurred on a mercury rule. Ms. Wilson said she has received no information or filings on the matter. Vice-chairman Purdy said Justin Hayes, Idaho Conservation League, has been discussing a possible rule with industry representatives. Dr. Cloonan said it was her understanding ICL has been working with industry representatives on the mercury issue and may bring another petition to initiate negotiated rulemaking to the Board in July 2009.

AGENDA ITEM NO. 9: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

Don Chisholm recommended a book he recently read entitled "Getting Green Done." The author is Auden Schendler, Director of Sustainability for the Aspen Skiing Company, and he has very interesting insights on what does and does not work in the environmental arena.

Kermit Kiebert said questions have been asked in Sandpoint regarding DEQ rules on residential backflow devices. Director Hardesty said she would forward Mr. Kiebert a letter that was recently prepared to clarify this matter.

Carol Mascareñas reported that more than \$400 million in cleanup projects at the INL will be funded by federal stimulus money. DEQ staff are working closely with the INL to get the projects started.

The meeting adjourned at 12:00 p.m.

/s/

Craig D. Harlen, Chairman

/s/

Kermit V. Kiebert, Secretary

/s/

Debra L. Cline, Management Assistant and Recorder