



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

July 29, 2009

The Board of Environmental Quality convened on July 29, 2009, at 8:30 a.m. at:

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

ROLL CALL

BOARD MEMBERS PRESENT

Craig Harlen, Chairman
Donald J. Chisholm, Member
Dr. Joan Cloonan, Member
Dr. John R. "Randy" MacMillan, Member
Carol Mascareñas, Member

BOARD MEMBERS ABSENT

Nick Purdy, Vice-Chairman
Kermit Kiebert, Secretary

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
Don Essig, Water Quality Standards Coordinator
Orville Green, Administrator, Waste Management & Remediation Division
Lisa Kronberg, Deputy Attorney General, DEQ
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Elizabeth Criner, Verista Advisor
Dean DeLory, Amalgamated Sugar
Justin Hayes, Idaho Conservation League

Mark Fuller, Attorney at Law, Fuller & Carr (via telephone)
Harriet Hensley, Deputy Attorney General, Natural Resources Division
Jack Lyman, Idaho Mining Association
Lisa Macehio, EPA
Chris Mebane, private citizen
Bruce Pallante, Monsanto
Roxanne Patchell, Court Reporter
Alan Prouty, J. R. Simplot Co.
Christine Psyk, EPA
Jayson Ronk, Idaho Association of Commerce & Industry

- ❖ 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.

PUBLIC COMMENT PERIOD

Chairman Craig Harlen 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:

- American Reinvestment and Recovery Act (ARRA) stimulus money has arrived and is being disbursed throughout the state through both the Clean Water and the Drinking Water State Revolving Fund programs. ARRA money was also received for:
 - Bunker Hill cleanup
 - Underground leaking storage tank cleanup
 - Diesel school bus retrofits
 - Brownfield redevelopment projects
- DEQ continues to work toward reducing ozone levels in the Treasure Valley. The Stage 1 Vapor Recovery rules were approved by the Board. Fifteen gas stations have taken advantage of 50% matching funds to retrofit gasoline storage tanks; 40 more applications are in process. The Idaho Board of Transportation funds the match for the retrofits to encourage gas stations to complete the retrofits before the regulatory deadline of May 2010. Director Hardesty requested and received an extension from IBT on the funding program deadline to allow more gas stations to take part in the discount. This will allow the Treasure Valley to benefit from the lower pollution levels provided by the retrofits this year, rather than next year when the regulatory deadline requires the retrofits.
- Vehicle emissions testing plans or an alternative plan are due from Canyon and Ada counties and the cities by August 20, 2009. Canyon County is expected to file an alternative plan.
- The crop residue burning program is working very well this summer. DEQ continues to do a large amount of public outreach and education, especially in southern Idaho and the Magic Valley, where the program is new to the public.
- Efforts continue to select a new repository site in northern Idaho. All current repository spaces are filled, and a new site must be selected for contaminated material so the

cleanup can continue. DEQ is working to educate the public on the suitability of the East Mission Flats site.

- No date has been heard for when EPA will appoint a new Region 10 administrator. At this time, none of the regions have administrators appointed. It is hoped those appointments will be made within the next six months.
- The Idaho State Department of Agriculture has given notice it intends to initiate a rulemaking on storing animal waste from CAFOs and similar locations. DEQ will participate in the rulemaking to ensure coordination with DEQ's solid waste rules.

Dr. MacMillan asked if DEQ has been able to maintain its programs at a satisfactory level with all the budget cuts and if additional cuts are expected in the coming year. Director Hardesty said the budget situation is very difficult for DEQ, and steps have been taken to reduce costs by temporarily suspending some programs and using employee furloughs. In addition, over 20 vacant positions are being held open. If the budget problems continue next year, DEQ will have to make some tough decisions regarding programs. She noted that stimulus dollars are passed on directly to the communities and others and are not part of DEQ's budget.

Chairman Harlen asked for clarification whether the new repository site must be within the boundaries of the cleanup area. Director Hardesty confirmed that EPA prohibits the repository from being located on uncontaminated property.

Don Chisholm asked if DEQ is moving forward with efforts to gain primacy of the federal NPDES program. Director Hardesty responded that DEQ is not taking any action to gain primacy of the NPDES program at this time. She said the Association of Idaho Cities recently approved a resolution stating it would like to again pursue state primacy of the NPDES program. Since no state funding is available, it would have to be a fee-based program. The matter has been considered numerous times, but funding continues to be an issue.

AGENDA ITEM NO. 2: ADOPTION OF MEETING MINUTES

a. April 21, 2009

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt the minutes for the April 21, 2009, meeting as presented.

SECOND: Dr. MacMillan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 3: CONTESTED CASE - *In the Matter of Sunnyside Park Utilities'* Application for Sewage Disposal Permit, Contested Case No. 0103-07-02

Chairman Harlen said the matter before the Board today is the Oral Argument on Sunnyside Park Utilities' Motion for Enlargement of Time to File Notice of Intention to Submit Amended Application and the Department's Response to Motion for Enlargement of Time; and Oral Argument on Objection to Transcript Per I.R.C.P. 84(j). On the advice of its legal counsel, the Board will begin with an executive session to receive legal guidance on the limits and authority it has in respect to various aspects of the case.

➤ **MOTION:** Dr. MacMillan moved the Board go into executive session as authorized by Idaho Code § 67-2345(f) to communicate with legal counsel to discuss the legal ramifications of and legal options for pending litigation or controversies not yet being litigated but eminently likely to be litigated.

SECOND: Dr. Joan Cloonan

ROLL CALL VOTE: Motion carried. Chisholm, aye; Cloonan, aye; MacMillan, aye; Mascareñas, aye; and Harlen, aye. Kiebert, absent; Purdy, absent.

The Board went into executive session at 8:55 a.m. and the room was cleared of everyone except the Board members and its staff. The Board received guidance from its legal counsel, Harriet Hensley, and asked questions regarding numerous legal issues and options. The executive session adjourned at 9:37 a.m., and the open meeting reconvened at 9:40 a.m.

Mark Fuller, Attorney at Law representing Sunnyside Park, joined the meeting via conference call at 9:37 a.m.

Chairman Harlen opened the floor to oral argument from the parties. He requested the representatives from each party limit their oral arguments to 15 minutes. He said a corrected transcript has been distributed and asked if the parties had any objections to the corrected transcript.

Courtney Beebe, Deputy Attorney General, representing DEQ, said DEQ had no objections to the corrected transcript.

Mark Fuller, representing Sunnyside Park, said Sunnyside Park had no objections to the corrected transcript.

➤ **MOTION:** Don Chisholm moved the Board approve the corrected transcript.

SECOND: Dr. MacMillan

VOICE VOTE: Motion carried by unanimous voice vote.

Mark Fuller said two matters are pending before the Board. Sunnyside's motion for award of attorney's fees and costs, filed under Idaho Code § 12-117, has been withdrawn as a result of a June 1, 2009, ruling by the Idaho Supreme Court in *Rex Rammell vs. Idaho State Department of Agriculture*. The Court ruled that an administrative agency such as this Board cannot award attorney's fees under § 12-117, so that matter does not require further action from the Board.

Mr. Fuller said the only remaining matter for this hearing is the motion for enlargement of time, filed by the petitioner, Sunnyside, in order to file a notice of intention with DEQ to file an amended application for a sewage permit. He reported that no objection has been made by DEQ to this enlargement of time. Sunnyside requests an enlargement of time from April 21 to April 22, thereby recognizing that appropriate notice was provided. DEQ does not dispute that it received the notification on April 22. Mr. Fuller asked the Board to grant 90 days from the order enlarging time to allow Sunnyside to file an amended application which can then be considered by DEQ.

Mr. Fuller noted a hearing is scheduled for tomorrow in the proceedings before the district court on the appeal to stay all proceedings before the Board during that court appeal. If the court enters a stay, an amended application will be filed by Sunnyside when ordered by the court after the stay is lifted. He said we do not know if the court will enter a stay, so Sunnyside is requesting a one-day extension and then a 90-day timeframe to file an amended application.

Courtney Beebe confirmed that DEQ does not oppose the request for enlargement of time, but pointed out that Sunnyside has never submitted an application and has continually asked for extensions of time. DEQ also does not object to giving Sunnyside more time to submit an application, but it is very concerned that if the Board grants the additional time to file an application, the matter will be delayed for several years in the district court and this meeting and process will be for naught. Ms. Beebe asked Mr. Fuller if he would be willing to withdraw his motion to stay tomorrow morning in the district court if the Board grants the motion for extension of time and gives him 90 days to submit an application.

Chairman Harlen opened the floor to questions from the Board and deliberation.

- **MOTION:** Don Chisholm moved the Board grant the motion of Sunnyside to extend the time to file its notice of intent to submit an amended application to April 22, 2009, if the district court determines that the Board was not divested of jurisdiction to do so when Sunnyside filed its petition for review to the district court on May 1, 2009.

SECOND: Dr. MacMillan

DISCUSSION: Mr. Chisholm believes this is a logical way to deal with Sunnyside's concerns, and DEQ does not appear to object to it. He thinks this jurisdictional issue is one that needs to be cleaned up in the administrative process, as far as how appeals from the agency are handled. He feels his motion is a good, efficient way to deal with the matter and let the district court decide now whether the Board has jurisdiction. Mr. Chisholm said it is important to recognize that the Board is separate from DEQ when it is acting in this quasi-judicial capacity. The Board is not setting policy for DEQ—it is ensuring fair treatment for citizens. The Board is not managing DEQ or telling it how to run its affairs on a day-to-day basis.

Dr. Cloonan agreed with Mr. Chisholm and said the Board has no information on which to judge whether 90 days is a reasonable time period for submitting the application, and it is best negotiated between the parties.

ROLL CALL VOTE: Motion carried. Chisholm, aye; Cloonan, aye; MacMillan, aye; Mascareñas, aye; and Harlen, aye. Kiebert, absent; Purdy, absent.

Mr. Fuller asked if the motion set the timeframe for submitting the amended application. He said DEQ did not appear to object to the 90-day timeframe and asked if the order would identify a 90-day timeframe. Chairman Harlen responded that the motion made no mention of the timeframe. Mr. Fuller asked if that motion would be considered by the Board. Mr. Chisholm suggested Sunnyside seek resolution of its jurisdiction issue by the district court tomorrow. The Board will not try to manage the agency by setting a timeframe; Sunnyside is free to negotiate a reasonable timeframe with DEQ.

Courtney Beebe offered to send a letter today to Mr. Fuller accepting Sunnyside's amended application in 90 days. If Mr. Fuller has a counter-offer, she is willing to accept it in writing and work out when DEQ will accept the application. Ms. Beebe said she hopes Mr. Fuller will

consider, based on the generosity of the Board, revoking and withdrawing his motion to stay before the district court tomorrow so DEQ can receive and process the amended application.

AGENDA ITEM NO. 4: WATER QUALITY STANDARDS, DOCKET NO. 58-0102-0801 (PENDING RULE) (Rulemaking to protect human health from adverse effects of elevated arsenic and protect sensitive aquatic life from cadmium toxicity in low hardness waters.)

Barry Burnell, Administrator, Water Quality Division, presented this rulemaking to protect human health from adverse effects of elevated arsenic and protect sensitive aquatic life from cadmium toxicity in low hardness waters. DEQ is also initiating this rulemaking in an effort to forestall pending legal action against EPA that would force EPA to disapprove Idaho's arsenic standards and low-end hardness cadmium water quality standards.

He explained this rule proposes to change Idaho's arsenic human health criteria from 50 micrograms per liter to 10 micrograms per liter and to lower the low-end hardness cap used in calculating cadmium aquatic life criteria from 25 mg/L to 10 mg/L. These standards are not broader in scope or more stringent than the federal regulations and do regulate an activity that is regulated by the federal government. These proposed standards have been negotiated with EPA to address the notice of intent to sue.

Don Essig, Water Quality Standards Coordinator, provided greater explanation and detail of the rulemaking. He summarized the comments and issue summary DEQ prepared in response to the comments received from the Idaho Conservation League, EPA, and the U.S. Geological Survey.

Mr. Essig said the proposed standards have been a matter of controversy over the years and proposals have failed in the past. These standards are the product of negotiation and are significantly less stringent than what EPA would adopt for Idaho if it were compelled to do so by a lawsuit.

Christine Psyk, Associate Director, Office of Water and Watersheds, EPA Region 10, spoke in support of the proposed rule (see Attachment A for full written comments). EPA has long supported these revisions and is pleased that DEQ has moved forward with this rule. EPA encourages the Board to adopt the proposed revisions as a pending rule and forward them on to the 2010 Idaho Legislature for approval. EPA is committed to leaving to the states primary responsibility and authority to develop and implement state-specific water quality standards; however, the Clean Water Act imposes on EPA a mandatory duty to review and approve or disapprove a state's water quality standards. EPA has not approved Idaho's current arsenic and cadmium criteria, which were submitted to EPA in 1999 and 2006 respectively. EPA has expressed its concerns and provided potential remedies and has given DEQ time to develop arsenic and cadmium criteria that are suitable for and protective of resources and public health of Idaho and that EPA could approve.

Ms. Psyk asked the Board to bear in mind that EPA is prepared to act expeditiously on either the proposed criteria, if approved by the legislature, or on the existing criteria. EPA would prefer that Idaho set its own water quality standards; however, it is prepared to take action if those criteria are inadequate to protect the waters and people of Idaho.

Mr. Essig responded to Board questions regarding the biological consequences of the current criteria and the economic impact of the proposed criteria.

➤ **MOTION:** Dr. MacMillan moved the Board adopt the Water Quality Standards as presented in the final proposal under Docket No. 58-0102-0801.

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: PETITION FOR INITIATION OF RULEMAKING TO LIMIT AND CONTROL MERCURY EMISSIONS FROM CERTAIN FACILITIES, FILED BY THE IDAHO CONSERVATION LEAGUE AND P4 PRODUCTION, LLC

Debra Cline, Management Assistant to the Board, reported that Vice-Chairman Nick Purdy had intended to take part in this portion of the meeting via telephone, but when contacted, was in a location where his telephone reception made it impossible. Mr. Purdy said he realized he would not be able to vote on this matter because he could not hear all the testimony, but he did want the Board to know that he supports the petition.

Justin Hayes, Idaho Conservation League, said the ICL is bringing this matter forward because its members are keenly interested in ensuring that Idaho water bodies, and water bodies across the West, are full of fish that are safe for our families to catch and eat. ICL recognizes there are many sources of mercury; the human-caused sources are just a component of a larger subset. As stated in the petition (Attachment 2), 22 waterbodies in Idaho currently have mercury-related fish consumption advisories and a statewide advisory for bass is now in place. ICL believes the petition, and anything that we can do to reduce mercury emissions that may affect Idaho or the global pool, will be a step in the right direction.

Mr. Hayes stated while there are still issues that ICL and P4 do not agree on, there was enough agreement on steps that they can and should be taking that they can work together on this issue in a way that meets both of their needs. He believes that we should not “let the perfect be the enemy of the good.” The petition is very solid and allows for a very honest and thoughtful dialog in the negotiated rulemaking process where interested parties can bring their concerns to the table.

Bruce Pallante, Vice-President of Operations for P4, LLC and Plant Manager of Monsanto in Soda Springs, spoke in support of the petition. He said Monsanto is the only industrial operation in Idaho currently subject to the regulatory petition under consideration before the Board today. Mr. Pallante detailed the events leading to initiation of the petition. He commended the Board for reviewing such an extensive amount of information on mercury and Rocky Barker of the Idaho Statesman for showing interest in the issue and attending the information sessions.

Mr. Pallante said much was learned from Dr. Steve Lindberg of Oakridge National Laboratories, one of the world’s top mercury transport and deposition experts. We learned that the rising levels of mercury in the global atmospheric pool are cause for international concern and that his recommended solution was that best available control technology (BACT) be required on mercury sources around the world, whether they are in India, China, or Idaho. Idaho currently has no regulations to prevent increases to the global pool, either expansions of existing major

facilities or new industries wanting to move into Idaho. This is a regulatory gap, which in Monsanto's opinion, warrants closure. With the rule anticipated by this petition, Idaho would be joining other states and countries in leading by example. While Idaho may be a small contributor compared to the other states and countries, Monsanto believes, as Dr. Lindberg suggested, it should do its part to address the global mercury concerns. The science says this is the right thing to do. Mr. Pallante requested the Board direct DEQ to enter into negotiated rulemaking pursuant to the petition.

Alan Prouty, Director of Environmental Affairs for the J. R. Simplot Company, and Dean DeLory, Director of Environmental Engineering for Amalgamated Sugar, distributed the written comments of Simplot, Amalgamated Sugar, and Agrium (Attachment 3). The three companies are concerned the petition would affect other existing companies and not just Monsanto. They fear existing companies may face additional costs for testing mercury emissions from sources and have to go through additional process requirements and associated costs for any modifications that require an air quality permit to construct. Such requirements may not provide any meaningful improvement to the environment and also may result in economic harm to Idaho businesses that will also have to comply with EPA regulations associated with the control of mercury emissions. The companies believe the Board should deny the petition and approve Monsanto's request for a rulemaking by initiating action specific to elemental phosphorus plants.

Mr. Prouty said the three companies believe that instead of using resources on the rulemaking requested in this petition, it should devote resources to study specific watersheds where elevated concentrations of mercury in fish exist to determine the source of the mercury. Such studies would be valuable in determining potential actions that would have a measurable effect on the environment.

Dean DeLory reiterated that industrial sources account for only a small fraction of the overall mercury in the environment. Amalgamated Sugar opposes the petition in part because it believes a comprehensive analysis is needed before trying to address the problem of mercury in fish. He also suggested a stakeholders meeting be held with all potential interested parties before pursuing additional regulations. Also, a review should be conducted to study the effectiveness of all environmental regulations at the state and federal level.

Martin Bauer, Administrator, DEQ Air Quality Division, responded to questions from the Board and discussed the impact the proposed rulemaking would have on DEQ. He said the petition would not require a great deal of resources for DEQ to implement. Once the rulemaking is completed, it would be necessary to deal with only one source through the permitting process which is already in place. He believes it would be a very cost-effective way of regulating mercury and DEQ would have no problems implementing it. Monitoring, recording, and reporting would be the responsibility of the permittee. He said doing a comprehensive analysis would be very expensive, and DEQ would not have funding for such an undertaking, particularly during the current budget cutbacks.

Alan Prouty asked the Board to keep in mind that Simplot competes on a national and international level and every time regulations raise the cost of doing business in Idaho that its competitors in other states or in China do not have to pay, it is an issue.

Director Hardesty explained that standards and threshold levels for pollutants are often set through a combination of processes. Some pollutants are considered significant enough to warrant control technology evaluation. The number is determined through both science and policy-setting to determine a level significant enough to warrant the extra level of scrutiny. So there are some parallels and similar scenarios in existing regulations to the proposal for a mercury BACT.

A question and answer session and full discussion of numerous issues took place.

Martin Bauer noted that the petition is only a petition to negotiate a rule. The parties need to go through the rulemaking to figure out whether they can develop a rule that is the most efficient use of resources. That rule would come back to the Board for discussion of the science and other issues.

Craig Harlen asked if the rule would be more stringent than federal regulations. Lisa Kronberg, Deputy Attorney General, reviewed the stringency rule as it would apply to the proposed rulemaking. She believes Idaho Code § 39-118B would not apply, but § 39-107D, in her conservative opinion, would apply because it may be broader in scope than the federal regulation. DEQ would need to follow the procedures set out in § 39-107D, but it would not require legislative approval in advance.

➤ **MOTION:** Dr. Joan Cloonan moved that the Board accept the petition from Idaho Conservation League and P4 Production, LLC to move forward with negotiated rulemaking, and that a wide variety of stakeholders be invited and urged to participate in the rulemaking.

SECOND: Carol Mascareñas

DISCUSSION: Dr. MacMillan commented that the parties must recognize many hurdles must be faced. Some skepticism clearly exists, partly because of the science and partly because of concern about the impact on business. He is concerned about whether a rule can be developed that will be defensible on a scientific and policy basis and approved by the legislature.

Dr. Cloonan believes the public wants some assurance that Idaho is not going to have a large mercury emitter come into the state without tools to deal with it. She feels the rule should have a fairly high threshold, but should provide some protection so that a facility cannot come into the state and not be examined from the perspective of mercury emissions. She thinks Idaho should be trying to not add additional mercury to the global load, and at the same time, recognize the economics and what can and should be done. A BACT analysis recognizes economics as well as technical feasibility. She said she is skeptical in some ways, but thinks from a policy and political aspect, it is good to have this tool in place.

Don Chisholm stated his support for the motion. He thinks the parties will be able to study the issue more deeply through the negotiated rulemaking process and craft a rule that will be beneficial without inhibiting growth or burdening industry.

Chairman Harlen believes it is not just the concern that a large mercury emitting facility will come into the state. Idaho is a large mining and manufacturing ore processing state, and existing industries may need to change their processes. He is concerned that the rule that is crafted be cognizant that we do not know what a safe or good number would be and what we do may have large impact.

ROLL CALL VOTE: Motion carried. Chisholm, aye; Cloonan, aye; MacMillan, aye; Mascareñas, aye; and Harlen, aye. Kiebert, absent; Purdy, absent.

AGENDA ITEM NO. 6: CONSIDERATION OF HEARING OFFICER APPLICATION FOR BOARD APPROVAL – JOHN C. LYNN, BOISE

Paula Wilson presented an application from John C. Lynn, Attorney at Law, to be added to the list of Board-approved hearing officers. She briefly reviewed the selection process used for appointing hearing officers to contested cases. The selection is based on the location of the case and the attorney's expertise in the matter, as well as trying to rotate through the list.

Lisa Kronberg noted that the Board's contested case rules allow the parties one disqualification of a hearing officer without cause.

➤ **MOTION:** Don Chisholm moved the Board approve the addition of John C. Lynn to the hearing officer list.

SECOND: Dr. Cloonan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 7: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Paula Wilson reviewed the current contested case and rule docket status report. A new contested case has been filed, Lee Centers Petition for Review of Compliance Agreement Schedule Issued by DEQ to Meridian Heights Water & Sewer Association, allowing the land application of sewage effluent to a site owned by Lee Centers. A hearing officer has been appointed and a prehearing conference was held on July 22, 2009.

Ms. Wilson said all the rules on the current rule docket status report will be brought to the Board at its October 2009 meeting. At this time, it does not appear that a November meeting will be necessary.

AGENDA ITEM NO. 8: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

No items were presented.

The meeting adjourned at 2:15 p.m.

/s/

Craig D. Harlen, Chairman

/s/

Kermit V. Kiebert, Secretary

/s/

Debra L. Cline, Management Assistant and Recorder