



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 18, 2007

The Board of Environmental Quality convened on April 18, 2007 at 9:40 a.m. at:

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

ROLL CALL

BOARD MEMBERS PRESENT

Dr. Joan Cloonan, Chairman
Craig Harlen, Secretary (via conference call)
Donald J. Chisholm, Member
Dr. John R. "Randy" MacMillan, Member
Nick Purdy, Member (via conference call)

BOARD MEMBERS ABSENT

Marti Calabretta, Vice-chairman
Kermit V. Kiebert, Member

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Toni Hardesty, Director
Barry Burnell, Administrator, Water Quality Division
Debra Cline, Management Assistant to the Board
Douglas Conde, Deputy Attorney General
Nancy Bowser, Senior Water Quality Analyst
John Brueck, Hazardous Waste Regulation & Policy Coordinator
Ed Hagan, Lead Ground Water Hydrogeologist
Darrell Early, Deputy Attorney General
Don Essig, Water Quality Standards Lead
Orville Green, Administrator, Waste Management & Remediation Division
Bill Jerrel, Loan Program Manager
Tim Wendland, Grants & Loans Lead Officer
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Mike Puett, MSE Environmental
Roy Eiguren, Attorney-at-Law, Givens Pursley, Representing U.S. Ecology
Simon Bell, U.S. Ecology

❖ 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.

Chairman Joan Cloonan announced the meeting agenda had been amended to move agenda item No. 8 Petition for Initiation of Rulemaking from U.S. Ecology to agenda item No. 7. The change was made due to a schedule conflict of a Board member and was necessary to maintain a quorum.

PUBLIC COMMENT PERIOD

No comments were received.

AGENDA ITEM NO. 1: ADOPTION OF BOARD MINUTES

a. February 22, 2007 meeting minutes

➤ **MOTION:** Don Chisholm moved the Board adopt the February 22, 2007 meeting minutes as amended (minutes were amended to clarify when Dr. MacMillan recused himself from the contested case hearing).

SECOND: Dr. Randy MacMillan

ROLL CALL VOTE: Motion carried. 5 Ayes (Chisholm, Harlen, Purdy, MacMillan, Cloonan); 0 Nays; 2 Absent (Calabretta, Kiebert).

b. Action Items

There are no current action items and none were presented at this meeting.

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Toni Hardesty provided a brief legislative wrap-up. She reported the Idaho Legislature approved all 13 rules and the three pieces of legislation that DEQ presented. The Legislature added \$60,000 to the DEQ budget for mercury monitoring to ensure adequate funding for robust sampling in the state's major rivers and streams. She said the Legislature emphasized this was an important issue that it wanted DEQ to focus on. She cited another piece of legislation that will impact DEQ—the Energy Facility Site Advisory Act, which is modeled after the CAFO Advisory Act. It allows county commissioners and officials to solicit input from DEQ and other state agencies when siting a major energy facility in their county. This process is already taking place; the legislation just formalizes it.

Director Hardesty reported DEQ has assembled a task force to standardize document management throughout the agency. An update on the project will be presented at the June Board meeting.

Director Hardesty distributed draft revisions to the Board's compensation policy for consideration (Attachment 1). The revisions are proposed to address questions raised regarding compensation for time spent reviewing lengthy contested case records and large rulemaking activities. Director Hardesty asked Board members to review the proposed changes and provide comments. The matter can be put on a future Board agenda for action.

Nick Purdy asked if DEQ planned to expedite the Pristine Springs review. Director Hardesty responded it was her understanding from the conversation at the last meeting that it was agreed it would be best for

DEQ to conduct the five-year review on the original schedule. Chairman Cloonan confirmed that was her understanding also. Mr. Purdy asked about Pristine Springs' suggestion that the compliance point for Warm Creek be moved to the river. Chairman Cloonan responded it is her understanding the compliance point for Warm Creek is at the river; and that it was the points of all the other dischargers that were questioned. She believes Pristine Springs and Blue Lakes are in negotiations over this issue. Harriet Hensley is drafting the Board's opinion for this contested case and will rely on the transcript and meeting minutes to accurately reflect the Board's decision. The opinion is expected to be finished by the end of May.

AGENDA ITEM NO. 3: FY2008 STATE WASTEWATER LOAN PRIORITY LIST

Barry Burnell recognized Bill Jerrel, Loan Program Manager, who will be retiring tomorrow after 30 years of service to the state of Idaho. Mr. Burnell thanked Mr. Jerrel for his dedicated service as an integral part of the Loan and Grant Program. The Board congratulated Mr. Jerrel and thanked him for his service.

Tim Wendland, Grant & Loan Lead Officer, presented the FY2008 State Wastewater Loan Priority List, FY2008 State Wastewater Planning Grant Priority List, FY2008 State Drinking Water Loan Priority List, and FY2008 State Drinking Water Planning Grant Priority List. Mr. Wendland explained the ranking process for each of the priority lists and discussed the issues reviewed to determine the priority of the projects.

Board members discussed the difference between the fundable list and the priority list and whether the fundable list required Board approval. Chairman Cloonan believed it was the Board's responsibility to approve the priority list, leaving the discretion to DEQ to use the fundable list as a management tool to determine which projects to fund. Mr. Wendland explained the fundable list and priority list are both published and the applicants receive a letter explaining the dynamics of how the two lists are managed to utilize available funding.

Doug Conde, Deputy Attorney General, agreed it was appropriate for the Board to approve the priority list with the recognition that DEQ also uses the fundable list and it is dynamic.

- **MOTION:** Dr. Randy MacMillan moved the Board approve the Fiscal Year 2008 State Wastewater Loan and Priority List as presented by the Department of Environmental Quality.
- SECOND:** Craig Harlen
- ROLL CALL VOTE:** Motion carried. 5 Ayes (Chisholm, Harlen, Purdy, MacMillan, Cloonan); 0 Nays; 2 Absent (Calabretta, Kiebert).

AGENDA ITEM NO. 4: FY2008 STATE WASTEWATER PLANNING GRANT PRIORITY LIST

Tim Wendland explained DEQ receives approximately \$250,000 a year from general funds for its planning efforts for both for wastewater and drinking water projects. This program does not have federal oversight. The East Bear Lake Regional Commission submitted written comments voicing support for its project on the priority list. Mr. Wendland said the project was high enough on the priority list that there should be no problem funding it.

- **MOTION:** Dr. Randy MacMillan moved the Board approve the Fiscal Year 2008 State Wastewater Planning Grant Priority List as presented by the Department of Environmental Quality.

SECOND: Don Chisholm

ROLL CALL VOTE: Motion carried. 5 Ayes (Chisholm, Harlen, Purdy, MacMillan, Cloonan); 0 Nays; 2 Absent (Calabretta, Kiebert).

AGENDA ITEM NO. 5: FY2008 STATE DRINKING WATER LOAN PRIORITY LIST

Mr. Wendlend presented the FY2008 State Drinking Water Loan Priority List for the Board's approval. No comments were received on the list.

- **MOTION:** Dr. Randy Macmillan moved the Board approve the Fiscal Year 2008 State Drinking Water Loan Priority List as presented by the Department of Environmental Quality.

SECOND: Don Chisholm

ROLL CALL VOTE: Motion carried. 5 Ayes (Chisholm, Harlen, Purdy, MacMillan, Cloonan); 0 Nays; 2 Absent (Calabretta, Kiebert).

AGENDA ITEM NO. 6: FY2008 STATE DRINKING WATER PLANNING GRANT PRIORITY LIST

Mr. Wendlend presented the FY2008 State Drinking Water Planning Grant Priority List for the Board's approval. He noted the only comments received were in support of the Konkoville Water System's grant request. The request is listed second in the priority list and should have no problem receiving funding.

- **MOTION:** Dr. Randy Macmillan moved the Board approve the Fiscal Year 2008 State Drinking Water Planning Grant Priority List as presented by the Department of Environmental Quality.

SECOND: Don Chisholm

ROLL CALL VOTE: Motion carried. 5 Ayes (Chisholm, Harlen, Purdy, MacMillan, Cloonan); 0 Nays; 2 Absent (Calabretta, Kiebert).

AGENDA ITEM NO. 7: PETITION FOR INITIATION OF RULEMAKING FROM U.S. ECOLOGY, 58.01.10, RULES REGULATING THE DISPOSAL OF RADIOACTIVE MATERIALS NOT REGULATED UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

Roy Eiguren, Attorney with the firm of Givens Pursley, presented the petition on behalf of U.S. Ecology, Inc. (Petitioner). Mr. Eiguren presented a brief background on U.S. Ecology. It is a wholly-owned subsidiary of American Ecology, Inc. which is a publicly traded corporation based in Boise. U.S. Ecology operates the state's only commercial hazardous waste facility located near Grandview in Owyhee County. The corporation also operates similar facilities in Texas, Nevada, and Washington state.

Mr. Eiguren said the Petitioner's purpose in presenting the petition is three-fold:

- 1) U.S. Ecology does not believe current DEQ rules uniformly address all restricted radioactive waste which may be exempted from regulation under the Atomic Energy Act of 1954.
- 2) Under current Idaho rules certain radioactive materials that may be exempted from federal regulation by the Nuclear Regulatory Commission (NRC) are only eligible for disposal at a permitted hazardous waste facility, and then only if DEQ concurs. The Petitioner believes other types of exempt radioactive material may be disposed of at a

sanitary landfill without DEQ review under the existing statutes and rules. Mr. Eiguren said this is the principal reason this rule should be adopted.

- 3) The proposed rule change would provide uniform treatment for all types of radioactive materials that may be disposed of at a commercial facility. The Petitioner believes this was the intent of the Legislature when it amended the Hazardous Waste Management Act in 2001. The Petitioner believes the rule it is proposing concurs with legislative intent expressed in 2001.

Mr. Eiguren said the briefing paper prepared by DEQ on this issue is excellent and is a very concise and succinct definition of what is at issue before the Board. He said the Petitioner's request today is in consensus with a longer-term effort it has engaged in with DEQ to amend the law regarding control of radioactive materials. DEQ was successful in amending Idaho law as it relates to the control of radioactive materials. The Petitioner participated in the drafting and presentation of that legislation. He believes this proposed rulemaking concurs with that legislation, cleans things up, and makes it more precise in terms of the regulatory regimen.

In summary, Mr. Eiguren said the Petition asks simply that one additional element be added to the rules dealing with the types of radioactive materials that will be regulated by DEQ and that it would be:

“Any other Byproduct Materials, Source Materials, or Special Nuclear Materials or devices or equipment utilizing such materials which have been declared exempt or otherwise released from the regulation under the Atomic Energy Act of 1954 as may be provided there at . . .”

Dr. Randy MacMillan asked why these materials were exempt from regulation by the federal government. Mr. Eiguren said the NRC has determined these materials are below regulatory concern because they do not impact public health, safety, or environment. Through enactment of legislation in 2001, the state made a policy choice, which was supported by the Petitioner, that these types of materials not regulated by the federal government should be regulated by the state.

Dr. MacMillan asked if the requested rulemaking would raise a question about stringency and engage the §39-107D rule. Doug Conde noted §39-107D not only requires special notice provisions for something more stringent, but also requires notice for subjects that Idaho proposes to regulate that are not regulated by the federal government. He is not aware of any specific prohibition restricting this rulemaking.

Darrell Early noted the Idaho Legislature, in Idaho Code § 39-4405, specifically delegated authority to the Board of Environmental Quality to pass rules and regulations governing the types of radioactive materials and naturally-occurring radioactive materials that may be disposed of at a hazardous waste management facility. He believes this rulemaking petition is within the scope of that discretionary authority, and does not require pre-approval by the Legislature; it is just subject to later legislative review during the legislative session. He agreed with Mr. Conde's opinion that it would be subject to special notice provisions when it is presented to the Legislature for approval.

Don Chisholm observed it is unusual for an industry to ask to be regulated, and asked if the regulations were needed for liability reasons. Mr. Eiguren stated U.S. Ecology believes it was the intent of the Idaho Legislature that this type of material go to a commercial hazardous waste facility, rather than a municipal landfill facility. This rulemaking will make it explicitly clear this material must go to a

facility like that operated by U.S. Ecology. It is a matter of good public policy, as well as an economic advantage for U.S. Ecology.

Craig Harlen asked how the proposed rules would affect the industries that produce mildly radioactive phosphor slag or phosphor gypsum as a by-product, and if it would impact their ability to store that by-product. Mr. Eiguren replied the existing rules specifically exempt that type of material from the regulations (Section 58.01.10-02 provides these rules do not regulate NORM or TENORM waste from the production of elemental phosphorus or from the production of phosphate fertilizers, which includes the production of wet and purified phosphoric acid). Darrell Early confirmed such waste is specifically exempted from the proposed rule.

Dr. MacMillan asked U.S. Ecology how much waste it expected to process under the proposed rules at its disposal facility, and whether it would be coming from outside or inside the state. Simon Bell, Vice-president of Operations, U.S. Ecology, responded the volume would probably vary because it is generally project driven. He estimated approximately 10,000 to 100,000 tons per year depending on the projects. Spikes are created during decommissioning of a facility. The material could potentially come from out of state. Currently, about 90% of the 500,000 (about one-fourth of this is NORM material) tons per year of material processed by U.S. Ecology comes from outside of Idaho. Mr. Eiguren pointed out the Army Corps of Engineers is generally the party disposing of the material because it has responsibility for decommissioning many of the facilities.

Orville Green, Administrator, DEQ Waste Management and Remediation Division, stated he reviewed the petition for rulemaking and found it consistent with the Board's authority and the statutory purpose. The proposed rule, he explained, restricts NRC and DOE-exempted waste from going into a municipal or non-municipal landfill and, if it is going to be disposed of in Idaho, requires that it be disposed of at a commercial permitted hazardous waste facility. Even if the rule is approved by the Board, goes through negotiated rulemaking, and is adopted by legislature, it does not automatically mean these waste streams will go to the U.S. Ecology facility. A public permit modification process must be conducted to show:

- the public health will be protected
- worker safety will be protected
- the waste acceptance criteria is developed
- appropriate monitoring is done for air, ground water, surface water, and soils; and
- the proper closure plans are in place.

Mr. Green said U.S. Ecology is one of the most closely monitored facilities in Idaho. DEQ has a health physicist who works almost exclusively with U.S. Ecology to study the radiological aspects of the operations at the facility. In addition to the hazardous waste inspections DEQ visits the facility once or twice a month. He believes if these wastes are accepted into Idaho, U.S. Ecology is the environmentally appropriate place for their disposal.

Chairman Cloonan asked if INL would be affected by the proposed rulemaking. Mr. Green responded DOE is permitted to do some disposal of its waste. If INL has exempt waste, this rulemaking may create opportunities for it to dispose of its exempt waste in a different location; however, it should not affect how INL operates.

➤ **MOTION:** Dr. MacMillan moved the Board initiate negotiated rulemaking on the Rules Regulating Disposal of Radioactive Materials Not Regulated under the Atomic Energy Act of 1954, as Amended, IDAPA 58.01.10.

SECOND: Don Chisholm

ROLL CALL VOTE: Motion passed. 5 ayes (Chisholm, Harlen, Purdy, MacMillan, Cloonan); 0 nays; 2 absent (Calabretta, Kiebert).

Mr. Purdy was excused from the meeting at this point due to another commitment.

AGENDA ITEM NO. 8: DISCUSSION ABOUT GROUND WATER SIGNIFICANT DEGRADATION/STATISTICAL DETERMINATION

Ed Hagan, Lead Ground Water Hydrogeologist, presented an update on the status of three major projects the Ground Water Program has been working on the last year (Attachment 2):

- 1) Idaho Ground Water Quality Rule Statistical Guidance – this guidance document was developed to help DEQ determine background water quality and statistically significant degradation.
- 2) Regulatory Significant Degradation Guidance – this document sets out the criteria for DEQ to use in determining regulatory significant degradation. It uses nine questions that are weighted based on impact to human health and the potential for beneficial uses to be impacted.
- 3) New Ground Water Quality Standards for Coliform Bacteria – DEQ proposed adding primary ground water quality standards for fecal coliform and E. Coli. Total coliform is an indicator of potential harmful conditions. Fecal coliform and E. Coli are subsets of total coliform and are better indicators of organisms harmful to humans.

Mr. Hagan said these documents will be released for public comment and meetings will be held as needed to address comments.

AGENDA ITEM NO. 9: CONTESTED CASE AND DOCKET STATUS REPORT

Doug Conde provided a brief update on pending contested cases. Several new cases have been filed and are in the preliminary stage. The parties in the American Falls TMDL contested case recently met to resolve the issues without going to litigation. Additional negotiation meetings are planned. Preliminary motions on the standing issue are expected to be filed soon on the Sand Creek By-way case.

Chairman Cloonan asked Mr. Conde if he thought the Board's rules governing contested cases needed revision, and if it might be helpful to ask for feedback from some of the hearing officers to see if they had any suggested changes. Mr. Conde responded it was a good idea to review the rules from time to time and seek input from the hearing officers. He believes there is a fundamental problem with the contested case procedures because of differences in the EPA process, Idaho's Administrative Procedures Act (APA), and DEQ's permitting process. The procedures allow the petitioner to bring in new information during the contested case, so the Board is reviewing a department decision based upon information that was not in front of DEQ at the time it made its decision. It would take a statutory change to correct the problem.

Mr. Conde discussed possible ways to address the problem. He suggested it would be easier to change the Environmental Protection and Health Act (EPHA) than the APA. Changes to the APA would be much more complicated because it would affect all state agencies, while changes to the EPHA could be targeted to DEQ. Mr. Conde drafted proposed revisions to the EPHA a couple of years ago when this matter was discussed. Another option would be to initiate a contested case in order to produce any order or decision. Many other agencies, such as the Idaho Department of Water Resources, use this process. This process would also require a change in the EPHA.

Director Hardesty suggested Mr. Conde research the matter further to develop options and present his findings to the Board at a future meeting.

Chairman Cloonan suggested Mr. Conde seek input from the hearing officers to include in his presentation. The Board will accept public input on the matter at the presentation and encourages input from the stakeholders.

Chairman Cloonan asked if DEQ planned any actions regarding mercury emissions and if there was a timeframe. Director Hardesty replied the first action DEQ will take is to evaluate the existing rules including air, water, and waste to determine if they are adequate or if action is needed. The next step will be to develop or revise the rules based on the evaluation. Any necessary changes will be conducted through negotiated rulemaking. Status reports will be provided to the Board as DEQ moves through the process.

AGENDA ITEM NO. 10: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

No items were presented.

The meeting adjourned at 12:10 p.m.

Dr. Joan Cloonan, Chairman

Craig Harlen, Secretary

Debra L. Cline, Management Assistant and Recorder