



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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C.L. "Butch" Otter, Governor
Toni Hardesty, Director

Dr. Joan Cloonan
Chairman
9038 W. Beachside Lane
Boise, ID 83714

MEMBERS OF THE BOARD

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

August 30, 2007

Marti Calabretta
Vice-chairman
P.O. Box 784
Osburn, ID 83849

The Board of Environmental Quality convened on April 30, 2007 at 9:10 a.m. at:

Craig D. Harlen
Secretary
684 W. Harborview Dr.
Coeur d'Alene, ID 83814

**Red Lion Hotel Canyon Springs
Conference Center
1357 Blue Lakes Blvd. N.
Twin Falls, Idaho**

Donald J. Chisholm
P.O. Box 1118
Burley, ID 83318

Kermit V. Kiebert
P.O. Box 970
Ponderay, ID 83852

ROLL CALL

BOARD MEMBERS PRESENT

Dr. John R. MacMillan
P.O. Box 712
Buhl, ID 83316

Dr. Joan Cloonan, Chairman
Marti Calabretta, Vice-chairman
Kermit V. Kiebert, Member
Donald J. Chisholm, Member
Dr. John R. "Randy" MacMillan, Member
Nick Purdy, Member

L. Nicholas "Nick" Purdy
Box 686
Highway 20
Picabo, ID 83348

LEGAL COUNSEL

Douglas M. Conde
Harriet A. Hensley

BOARD MEMBERS ABSENT

Craig Harlen, Secretary

MANAGEMENT ASSISTANT

Debra L. Cline
(208) 373-0465

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Toni Hardesty, Director
Martin Bauer, Administrator, Air Quality Division
Carl Brown, Air Quality Toxics Analyst
John Brueck, Hazardous Waste Regulation & Policy Coordinator
Barry Burnell, Administrator, Water Quality Division
Debra Cline, Management Assistant to the Board
Douglas Conde, Deputy Attorney General
Orville Green, Administrator, Waste Management & Remediation Division
Doug Howard, Administrator, Twin Falls Regional Office
Mike McIntyre, Surface Water Program Manager
Robert Wilkosz, Mobile & Area Source Program Manager

OTHERS PRESENT:

Clif Amundsen, Keep Magic Valley Magic (KMVM)
Pat Barclay, Idaho Council on Industry & the Environment (ICIE)
Dave Barneby, private citizen

Phyllis Beard, TASCO
Gil Biggerstaff, KMVM
Barb Biggerstaff, KMVM
Bill Block, KMVM
Sharon Block, Idaho State Representative, District 24
Leslie Bradshaw, Blaine County Citizens for Clean Energy
Peter Bremmen, private citizen
Harry Bruenback, M.D., retired surgeon
Rich Carlson, Idaho Rural Council
Bill Chisholm, private citizen
Cheri Condie, Citizens Protecting Resources (CPR)
Jared Daniels, McClure Eng.
Robbin Finch, Boise City
Mitch Hart, Mountain Island Energy, LLC
John Hathaway, Idaho Dept. of Health & Welfare
Aaron Houston, Family Health Services
Bob Humphries, private citizen
Wendy Jaquet, Idaho State Representative, District 25
Cole Kleinkopf, KMVM
Del Koltz, Idaho Water Co. LLC
Linda Lemmon, Idaho Aquaculture Assn.
Charlie Leukuer, private citizen
Jack Lyman, Idaho Mining Association
Stephen Mantgen, private citizen
Dan McClusky, KMVM
David Mead, KMVM
Carl H. Nellis, CPR
Sean Nichols, ICIE
Laird Noh, private citizen
Jim Patrick, Idaho State Representative, District 23
Lew Pence, Middle Snake Regional Water Resource Commission (MSRWRC)
Donna Pence, Idaho State Representative, District 25
V.C. Prudek, private citizen
Peter Remmren, Coalition for Healthy Idaho
Dr. Peter Rickards, private citizen
Brian Ross, A.N.G.U.S.
James Schroeder, Family Health Services
Jill Skeem, KMVM
Wayne and Arlene Skeem, private citizens
Betty Slifer, private citizen
Jim Syfer, private citizen
Kathleen Tanaka, CPR
Wid Tanaka, CPR
Roger Turner, Shoshone-Bannock Tribes
Courtney Washburn, Idaho Conservation League
Xenia Williams, CPR
A. Winifield, Family Health Services

- ❖ 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 called the meeting to order at 9:10 a.m. She thanked Doug Howard, Administrator, DEQ Twin Falls Regional Office, for hosting the Board on an educational tour of regional issues including the Glanbia wastewater treatment plant, Bettencourt Dairy, Clear Springs Foods fish process processing facility, and the Twin Falls Canal Company LQ/LS Project.

PUBLIC COMMENT PERIOD

No comments were received.

AGENDA ITEM NO. 1: ADOPTION OF BOARD MINUTES

- a. April 18, 2007 meeting minutes

➤ **MOTION:** Dr. MacMillan moved the Board adopt the April 18, 2007 meeting minutes.

SECOND: Don Chisholm

VOICE VOTE: Motion carried. 6 Ayes (Calabretta, Chisholm, Kiebert, Purdy, MacMillan, Cloonan); 0 Nays; 1 Absent (Harlen).

- b. Action Items

There are no pending action items.

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Toni Hardesty updated the Board on the following issues:

- The Governor issued an Executive Order on greenhouse gas emissions which charges DEQ with several tasks: 1) complete a statewide emission inventory to determine a baseline; 2) conduct an emission inventory for state agencies to determine a baseline; 3) take a lead role in asking all state agencies to develop plans to reduce greenhouse gas emissions within state government; 4) act as a clearinghouse to collect information and a central point of contact to coordinate efforts; and 5) make recommendations to the Governor on the most appropriate next steps regarding greenhouse gas emissions. Efforts are already underway to develop the emission inventory.
- Idaho has become the 38th state to join the Climate Registry, which was formed to create a single consistent accounting practice so all states are using a uniform method to count greenhouse gas emissions.
- Governor Otter asked DEQ to develop models for state government regarding telecommuting. This ties in with energy efficiency efforts and mitigation efforts for vehicle emissions. DEQ is collaborating with other state agencies to develop telecommuting options while still providing good government service.
- DEQ does not plan to move any legislation forward in the upcoming session, but a number of rules will be proposed.
- Crop residue disposal burning remains illegal in Idaho. DEQ is working on another public information campaign. Negotiations continue to see if a program can be developed to meet everyone's needs that could go through the state implementation process.

- DEQ and the Idaho Council on Industry and Environment will be co-hosting a Practical Paths to Climate Change workshop on October 30-31 in Boise. Information will be distributed to Board members and they are encouraged to attend.

AGENDA ITEM NO. 3: UPDATE ON REVIEW OF IDAHO’S EXISTING RULES RELATED TO MERCURY

Orville Green, Administrator, Waste Management and Remediation Division, presented an overview of state and federal rules and programs regarding waste management and remediation of mercury. He also explained the forms of mercury and how it can be toxic to human health and the environment. (See Attachment 1.) Mr. Green discussed the need for pollution prevention and public education to help control the problem. Additional information on mercury effects is available at www.epa.gov/mercury/effects.htm.

Barry Burnell, Administrator, Water Quality Division, presented an overview and slide show of Idaho ground water quality rules, public drinking water system rules, and surface water quality rules pertaining to mercury. He also discussed the 2007 DEQ study on surface waters and mercury. The legislature provided additional funding to conduct a mercury and fish tissue statewide assessment in lakes and reservoirs. DEQ prepared a quality assurance and protection plan to outline how the study would be conducted. The Idaho Department of Fish and Game worked in conjunction with DEQ to perform the fish tissue sampling. Of the 225 lakes within Idaho, a random and stratified survey was conducted to select 50 sites and draw conclusions. Results are expected by late-fall or early-winter. The fish advisories are issued by the Idaho Department of Health and Welfare and are available on its Web site at http://healthandwelfare.idaho.gov/portal/alias_Rainbow/lang_en-S/tabID_3391/DesktopDefault.aspx

Martin Bauer, Administrator, Air Quality Division, provided an overview of national and regional regulatory programs regarding mercury in the air. Dr. Carl Brown, DEQ Air Quality Toxicologist, explained the technical portion of the presentation. He discussed the national and regional sources of mercury air emissions, DEQ mercury monitoring, and the science behind those issues.

Mr. Bauer provided an update on what other states are doing regarding mercury and the federal mercury cap and trade program (CAMR). He briefly explained two major federal programs, the New Source Performance Standards (NSPS) and the National Emission Standards for Hazardous Air Pollutants (NESHAPs), as they relate to mercury. These programs do not regulate all sources of mercury, only very large national sources of mercury. Individual states must address local sources not regulated by federal programs. Some states have been highly critical of the CAMR program (which is part of the NSPS) and the fact that mercury, which is listed as a NESHAP, is now being regulated under a completely different program. Several states have filed lawsuits asserting that it is illegal to regulate mercury under the NSPS. Mr. Bauer believes that if EPA loses the lawsuits, EPA may vacate the CAMR program and impose a Maximum Achievable Control Technology (MACT). This would mean that in the future a power plant would not have to decrease its emissions over time as the NSPS requires; it would merely have to employ the greatest control possible. This could allow facilities to be built anywhere.

Mr. Bauer explained when Idaho opted out of the NSPS CAMR Program, it also had to prove it could meet the zero emission cap assigned to Idaho. To do this, Idaho installed a prohibition on coal-fired power generation, as required by EPA in order to opt out. Therefore, he believes that regardless of what

happens with the lawsuit or the moratorium against building coal-fired power plant,; coal-fired power generation plants will be prohibited in Idaho until that rule is changed.

Mr. Bauer explained the CAMR program and presented a slide comparing the CAMR program to mercury regulations in the 22 states that have implemented more stringent standards than the CAMR program. Most states believe CAMR is not sufficiently stringent and that EPA's assessment of availability and cost control is too pessimistic.

Mr. Bauer concluded by saying Idaho needs to continue its mercury monitoring and research programs to better understand the impacts of mercury in Idaho. Many states are in the process of developing rules that are more stringent than CAMR, and the future of the CAMR program is unknown due to the lawsuits.

The slide presentation and attachments of the mercury presentations are posted on the Board's Web page on DEQ's Web site at http://www.deq.idaho.gov/about/board/mercury_presentation_to_board.pdf

Chairman Cloonan opened the floor to questions from the Board. The Board discussed the development of technology to capture mercury, the cost of the technology, the amount of mercury coming into Idaho from gold mines and power plants in neighboring states, and mercury sources within Idaho. Mr. Bauer also reviewed how Idaho received the zero mercury cap and how the cap and trade program works.

Nick Purdy said he recalled about a year ago the Board indicated it wanted to start the negotiated rulemaking process by directing DEQ to conduct research and report back with options and recommendations to consider whether Idaho should opt back into the CAMR program or create regulations to further limit coal-fired power plants. Mr. Bauer confirmed that was the direction from the Board and the reports today are the beginning of that process—to educate the Board and public on the current mercury rules in Idaho, report on what other states are doing, and provide an update on the current status of the CAMR program so the Board can provide further direction.

Don Chisholm questioned whether the Board adopted a rule that explicitly prohibited emissions from coal-fired power plants, although it may have been implicit when deciding to opt out of the CAMR cap and trade program. Mr. Bauer confirmed the Board did adopt a rule that specifically prohibits coal-fired power generation in Idaho. The action was required to meet the zero mercury cap. The two options were to opt out of the program, which required proof Idaho could stay below the zero cap, or to opt into the program.

Chairman Cloonan emphasized that no matter what happens with the litigation, the legislative moratorium, or EPA changes to the CAMR rule, in Idaho, the rule prohibiting coal-fired power generation remains in effect until it is changed through a rulemaking process or by the legislature. She believes the next step should be to further investigate the issue and decide whether the rule should be changed to provide the potential to opt into the CAMR program. She feels the question remains whether Idaho has a regulatory structure that when applied to a new facility would be protective of public health and the environment, which is the statutory mission of DEQ, and if Idaho should opt back into the CAMR program. She thinks the information presented today provides a good basis, but more information is needed to answer those questions.

Chairman Cloonan opened the floor to testimony from the public. She noted that over 22 people signed up to present testimony and asked that each person limit his/her comments to three minutes to insure adequate time for everyone to speak.

Dr. Dave McClusky, a physician from Twin Falls, discussed the health issues of mercury. He read a petition signed by 128 of the 138 physicians in the area expressing their concern about mercury in the environment. The Idaho Medical Association supported the physicians' petition, and Dr. McClusky believes the physicians in other Idaho communities would as well. He testified on behalf of the physicians and stated no level of mercury is safe in humans; methylmercury is of particular importance to public health because approximately 95% will be absorbed if it gets into the gastrointestinal tract.

Dr. McClusky said "situational science" cannot be used to come up with results in this case. He defined situational science as science that says you must respect both sides of the scientific argument—not just the one that is supported by facts. He believes that saying the science is just too controversial and doesn't consider the political and money side of the issue is wrong. The science (that mercury is dangerous to human health) is there, and as far as the health providers are concerned, is a damage to human beings. In closing he read the following excerpt written 31 years ago in a special edition of *Idaho Tomorrow*:

The consequences of energy consumption—a new conscience. One of the key elements in determining Idaho's tomorrow will be the way in which the state uses and supplies energy. Decisions about energy will be critical in charting the future. The people in Idaho are ready for significant changes in their approach to energy, resulting from an *Idaho Tomorrow* statewide survey indicating that most Idahoans place a high priority on shifting to new sources of energy such as solar, wind, and geothermal; and not enthusiastic about coal-fired power plants (preferred by only 3%), or more dams (preferred by only 11%), or nuclear plants (preferred by only 23%). Most of them, 58%, prefer wind, solar, and geothermal.

He believes these opinions hold true today, particularly in the medical field. He said, "We must be the conscience, mind, and soul of the environment. The environment has no choice; whatever we do to it, happens to it. We must also make the healthy lifestyle choices for our environment so it can stay well." He reiterated that there is no safe, healthy, or good place for mercury released in our environment or in human beings.

David Barneby, a Twin Falls citizen, formerly lived in Nevada and worked for the Nevada Power Company for 35 years and Sierra Pacific Resources for two years. His job included responsibilities for the engineering, operation, construction, and environmental compliance of a large fleet of power plants including four coal-fired power plants. Based on his experience with environmental regulation of plants in Nevada and Arizona, he urged the Board to give careful thought in its approach to environmental regulations for all potential industries in Idaho and to be proactive. He discussed damage to the environment, public health, and financial losses due to reactive regulation versus proactive, preventative regulation.

Mr. Barneby said he read the Idaho Conservation League's (ICL) August 23, 2007 letter regarding mercury regulation and stated his strong support for Justin Hayes' recommendations in that letter. He also recommended the Board consider the cumulative impacts from all mercury sources on the ambient mercury levels in Idaho's air, water, and soil as well as fish and waterfowl tissue. He summarized by encouraging the Board to take the broadest possible view of the mercury issue, be proactive, learn from

the experience of other states, and aggressively seek to reduce the threat that mercury currently represents to Idaho.

Law Pence, resident of Gooding, Idaho, testified against opting into the CAMR cap and trade program. He believes the citizens of Idaho spoke loudly and clearly against allowing coal-fired power plants in Idaho during the Sempra debate and when the state last decided to opt out of the CAMR program. He believes the presentations today show that Governor Risch made the right decision in opting Idaho out of the cap and trade program. DEQ has documented that the watershed in the Salmon Falls Creek drainage already exceeds EPA mercury standards. Mr. Pence feels Idaho should not consider action that would allow more mercury in the state and should consider pursuing legal action against adjacent states for creating pollution that is depositing in Idaho. He fears the legislature will not pass the regulations needed to protect the public health of Idaho's citizens because of the stringency law and supports changing the stringency law.

Chairman Cloonan commented she believes current stringency laws would allow adoption of more stringent rules in certain circumstances

Roger Turner, representing the Shoshone-Bannock Tribes, testified the Tribes have been very supportive of Idaho's concerns about mercury. The Tribes submitted comments to the state of Nevada suggesting it tighten up the regulations on gold mines and develop better plans for emissions that may be coming into Idaho. Those comments were shared with other tribes to encourage them to take action for stricter regulations. The Fort Hall Reservation includes the American Falls Reservoir that is under the fish consumption advisory.

Mr. Turner said one of the main concerns is that the EPA's CAMR rule would not eliminate hot spots caused by local or regional pollution. Facilities may actually be able to increase pollution by buying credits in the cap and trade program, thereby making hot spots worse. He also expressed concern that the valley systems in Idaho, such as the Pocatello and Portneuf Valleys are vulnerable to pollution. These valleys were in nonattainment for particulate matter for over 25 years. He feels this is an example of how difficult it is to clean up an airshed after it has been opened up to pollution before adequate protection has been set in place.

Many states, he continued, have demonstrated that the federal standard is considered weak in respect to protecting citizens. He noted that EPA's own Office of Research and Development supported the more stringent MACT standard. While federal law allows states to have a stricter standard, Idaho laws may prevent a more stringent standard. Given these concerns, the Shoshone-Bannock Tribes request that the Board continue its recommendation to opt out of the cap and trade program. Questions need to be answered about what is causing fish advisories in Idaho and whether existing mercury standards are adequate to protect public health and environment.

David Mead, former chairman of the Idaho Board of Health and Welfare, testified in support of extending the moratorium against building coal-fired power plants in Idaho. He believes no intelligent decision can be made until more monitoring and research is done. Many legislators and the public have expressed the same belief. He asked for the Board's support in extending the moratorium until a decision is made on mercury.

Sherry Conde, resident of the Magic Valley, urged the Board to continue opting Idaho out of the CAMR cap and trade program. She believes the ongoing studies and more research need to be completed on

existing mercury pollution before Idaho considers opening the door to more mercury. She discussed concerns about the aquifer and water bodies and favored using alternative energy resources and power conservation measures promoted by Idaho Power Company instead of bringing more mercury into the state.

Courtney Washburn, Idaho Conservation League, testified in support of establishing a mercury working group as an interim step to negotiated rulemaking. (See Attachment 2 for ICL's August 23, 2007, letter with full written comments). Many processes regarding mercury are unresolved and ongoing in Idaho. ICL believes concrete and complete information to initiate rulemaking is lacking at this time.

Peter Bremmen, Hagerman, testified in support of keeping the current law in Idaho that prevents coal-fired power plants to be built in the state. He supports continuing the data analysis on mercury depositions currently in the state and investigating how to clean up existing mercury. He does not support reconsidering allowing coal-fired plants in the state. He thinks that issue has already been settled and believes the focus should now be on cleaning up existing contamination.

Carl Nellis, Jerome, representing the group Citizens Protecting Resources (CPR), testified in support of keeping Idaho out of the CAMR cap and trade program. He cited concerns about the fish consumption advisories, the questionable future of the federal program, and health risks of mercury. He asked the Board not to take action to reverse its previous rule of less than a year ago and to keep mercury out of Idaho.

Bill Block, Twin Falls, President of Keep Magic Valley Magic, submitted a white paper he and Dr. Cliff Amundsen, Ph.D, prepared on their findings on mercury depositions south of the Snake River (Attachment 3). Their study used data from DEQ and the Utah State University to estimate pounds of mercury deposited in the area from gold mining activities in Nevada. Mr. Block feels it is unacceptable for another state to have this kind of impact on Idaho and asked the Board to consider this information and keep Idaho's mercury cap at zero.

Gale Kleinkopf, Professor Emeritus, University of Idaho, encouraged the Board to continue to support the type of evaluations that Mr. Clyde Lay produced for Salmon Falls. He believes Idaho needs to develop a statistical trend line to understand whether or mercury is increasing or decreasing in that area, which cannot be done without this type of study. He encouraged the Board to continue with its survey, but noted the survey data does not tell anything about trends that are happening long-term or short-term.

Dr. Cliff Amundsen, ecologist, discussed the need to expand fish tissue studies to include ducks, other wildlife, and livestock that are feeding in wetlands areas. Reservoirs and lakes, he noted, are not the only places that support the conditions for elemental mercury to become methylated; wetlands are equally vulnerable. He agrees that fish monitoring was a practical way to begin, but said it is not enough because it is not just the reservoirs and lakes we have to worry about; it is the entire ecosystem.

Leslie Bradshaw, Blaine County Citizens for Clean Energy, urged the Board to maintain its decision of last year to keep Idaho out of the CAMR cap and trade program and prevent coal-fired power plants from coming into the state. She discussed the need to complete ongoing studies on mercury in Idaho and was concerned about mercury deposits not only on water, but also on the land. Her father, an avid hunter and fisherman in Idaho, is suffering with mercury contamination at levels ten times what is considered healthy. He is dealing with many serious health issues from the contamination, and Ms. Bradshaw believes it is a result of his consumption of so many fish, waterfowl and other game from

southern Idaho. She pointed out that no significant changes have occurred since the Board's last decision to opt out of the program, other than additional evidence that the mercury problem is even bigger than initially thought. She feels the only prudent decision would be to do more research, follow up on current studies, and ensure we have all the facts necessary to protect public health.

Brian Ross, resident of Blaine County, testified against allowing any mercury or coal-fired power plants in Idaho. Mr. Ross, who has a master's degree in marine biology, discussed the toxicity of mercury and its dangers to public health and the environment. He noted a recent study by the University of Texas Health Sciences Center reported a strong correlation may exist between mercury releases in the air and autism in children. Children in 1200 school districts across Texas were tested in 254 counties. These findings suggested that children exposed to high levels of environmental mercury correlated with higher incidences of autism—the closer to the power plants, the higher the autism rates.

Mr. Ross noted that last year, Idaho's education budget was \$964 million. He said it did not make sense to spend this much money to educate our children and then allow coal-fired power plants in the state that would pump the neurotoxin, mercury, into our food supplies and into our children's bodies and brains. Mr. Ross said extensive scientific information exists about health risks of mercury and he is prepared to be called upon at any time to share this information.

Dr. Peter Rickards, a podiatrist from Twin Falls, testified against opting into the federal cap and trade program. He believes the program would allow old coal-fired power plants to continue to pump mercury into the environment and enable a trading scheme that would continue to bring mercury pollution from other states into Idaho. He suggested the Board recommend a national program funded by the federal government for the top ten mercury polluters to help them install aggressive mercury control systems.

Bill Chisholm, resident of Buhl, Idaho, testified against opting Idaho into the CAMR cap and trade program. Mr. Chisholm is a long-time environmental activist and submitted a paper he authored for the Board's consideration, "Methanomics – Investing in Problems, not Solutions" (Attachment 4). Mr. Chisholm believes it is not necessary to allow coal-fired power plants in Idaho to produce more energy; instead, he suggested Idaho pursue energy conservation measures and develop renewable energy sources. He fears making decisions about the future of Idaho based on economic and political factors would create more problems than it would solve in the long-term. He discussed the importance of considering the cumulative impacts of mercury and how it can react with different chemical elements that may exist in the environment. He recommended two books for educational background: *A World Without Us* and *Our Stolen Future*.

Sharon Block, Idaho Representative, District 24 and Chairman of the Health & Welfare Committee in the House of Representatives, discussed the health care crisis being faced by Idaho and the rest of the nation. She has attended many meetings and believes the most effective way to make the health care system sustainable is to promote the health and safety of the people with healthier living and healthier behaviors. Representative Block feels it is the responsibility of government to protect public health and the environment from health risks due to contamination. She discussed the health risks of elemental mercury and methylmercury and the impact they could have on the health care system. She reminded that 8,100 people in the Magic Valley area signed petitions opposing a coal-fired power plant in the area. She thinks the Board's previous decision to opt Idaho out of the federal cap and trade program was a good decision, and in view of DEQ's recent research showing significant deposition of mercury in

Idaho, it is even a better decision today. She urged the Board to address mercury in Idaho by retaining the rule prohibiting coal-fired power plants in place and keeping Idaho's mercury cap at zero.

Laird Noh, former Idaho State Senator and resident of Kimberly, Idaho, testified in support of recommendations made by the ICL in its August 23, 2007, letter to the Board regarding the mercury issue. He feels the proposals made in the letter are practical and thoughtful. Mr. Noh submitted his written comments along with an article from the *Wall Street Journal* (Attachment 5) which he believes provides further evidence of the unusually dynamic changes—political, economic, legal, and scientific—which are unfolding in this area of regulatory and economic activity. He believes this is a time to engage all interests and expand communication with the public, the legislature, and the scientific community.

Mr. Noh discussed the stringency issue and the need for Idaho citizens to exercise their options to restore balance to government. He said Idaho has always taken pride in its independence, and the concept that the federal government always knows best is outdated. In this age of larger international industrial organizations and the ability of some electrical generators to operate outside of the authorities of state public utility commissions, many states have already moved to protect their economies and their citizens with rules that are more stringent than the federal rules. In Idaho, he commented, the deck is stacked against the public through Idaho Code § 38-118B, coupled with the arcane, duplicative system of legislative review of executive branch rules. He believes changes must be made to address these issues and restore balance.

Mr. Noh discussed the concern he and others have about pollution coming into Idaho from Nevada. His conversations with others, such as Mr. Barneby, who spent his life working in the power industry in Nevada, indicate strong circumstantial evidence that the political clout of the Nevada congressional delegation has had some influence on the enthusiasm with which EPA has exercised its regulatory actions in the gold mining situation. Mr. Noh believes this places an obligation on Idaho to work extra hard with its congressional delegation to better protect Idaho's interests that are being affected by activities in Nevada.

Wendy Jaquet, Idaho State Representative, District 25, commended the Board and the Idaho Legislature on passing the rule last session opting Idaho out of the CAMR cap and trade program. She supports extending the moratorium against coal-fired power plants in Idaho while the research and work continues. Representative Jaquet is pleased with the Governor's directives and the work DEQ is doing and supports establishing a mercury working group to bring all interests together.

Representative Jaquet said it would be helpful to have a fact sheet in laymen's terms explaining how Idaho's stringency law works and how it could be changed. Chairman Cloonan agreed it would be helpful for citizens, legislators, and the Board to have a fact sheet on the stringency law and how it applies to different issues. Nick Purdy suggested Don Chisholm give Representative Jaquet a copy of the article he prepared on the stringency issue. Mr. Chisholm said he would send Representative Jaquet a copy of the article. He said he interprets some nuances of the stringency law (Idaho Code § 39-107 D) about numeric standard versus narrative standards differently, but feels his article is a good starting point to understand the this issue.

Marti Calabretta briefly discussed the history of how the stringency issue evolved in Idaho. She said she is sad that the Board holds back over concerns about the limitations of the stringency law. Perhaps the Board should be taking those actions and letting the challenge come back, she said.

Chairman Cloonan discussed concerns that led to development of the stringency law in Idaho. She agreed the language is very difficult to interpret as to what is more stringent. She asked DEQ to work with the Attorney General's Office to develop a fact sheet regarding stringency issues.

Linda Lemmon, Executive Secretary for the Idaho Aquaculture Association, testified in support of ICL's proposal to form a mercury working group to allow an intermediate step in discussions about mercury. She feels one of the questions the working group should address is, "Does Idaho have the regulatory structure in place to adequately protect Idaho citizens and the environment?" She believes if other states with more experience with coal than Idaho are saying no, then Idaho needs to make its rules more stringent than just the federal program. It may be a challenge with the stringency law, but she thinks Idaho must take on this challenge. She suggested it would be a better use of resources to look at the stringency rules now and focus on collecting data to be able to answer the questions. She asked the Board what information it needed before it would be ready to initiate rulemaking and if a timeline existed.

Chairman Cloonan said she does not think the Board is ready to make any decisions today and did not believe a timetable was in place. This educational presentation is a first step in answering the question, "What is our regulatory structure, what do we know, what do we have, what is out there?" She said she favors the idea of a mercury work group. She emphasized that the issue is broader than just a power plant here or anywhere else in the state. She opened the floor to debate of the idea by the rest of the Board and Director Hardesty.

Nick Purdy questioned the difference between negotiated rulemaking and the working group. He pointed out that negotiated rulemaking has a clear goal to accomplish and a set process and timeline. He thinks it is premature to attempt anything until we look at all mercury in Idaho and neighboring states. He feels the mercury problem should be addressed on a regional basis and suggested the Board ask the Governor and DEQ about uniting with these other states to solve the mercury problem.

Don Chisholm wondered why ICL would want to take a "wait and see" approach rather than getting a rule in place. If the final decision of the courts on the CAMR rule is the trigger point to initiate negotiated rulemaking, it may take a long time because that issue will likely be before several courts. He believes Idaho should quit looking to EPA and just do what is appropriate for Idaho without regard to what is going on nationally. Rather than follow the flip-flops in national policy, he thinks Idaho needs a consistent environmental protection plan that people and industry in Idaho can rely upon and not always look to external sources. Negotiated rulemaking would provide a focus and a deadline. He fears a working group could have people who would manipulate the process and extend it because they don't want regulation.

Mr. Chisholm pointed out that while the Magic Valley has a very strong lobby against coal-fired power plants, that isn't necessarily true statewide. A comprehensive rule is needed that will apply statewide and still recognize regional hot spots. He agreed that all sources of mercury should be studied in the process. He is concerned that a mercury work group would not have a definite form or definite deadlines. He said he could support a mercury work group if it had a set period of time to operate and then progressed to negotiated rulemaking after two or three months.

Chairman Cloonan thinks the goal of the working group should be to determine what additional regulation is needed in the state. She questioned how DEQ could start negotiated rulemaking for a

regulation on mercury without some concept of what was needed. She thinks DEQ could bring together interested parties, with or without a timeline, and set a goal of answering the question, “Does Idaho have the regulatory structure in place to adequately protect public health and the environment?” It is not clear if that question can be answered at this time, she said.

Nick Purdy restated his belief that the mercury problem must be tackled regionally. He said it wouldn’t matter how stringent Idaho’s rules were as long as mercury continues to drift into Idaho from other states. We have no control over it, he said.

Chairman Cloonan agreed that mercury is a regional, as well as a very broad worldwide issue, and perhaps the Governor can work through the Western Governor’s Association and Director Hardesty can work with environmental agencies in other states to develop regional compacts. She asked Director Hardesty to comment on the suggestions.

Director Hardesty said she has already been working with Nevada and Utah on this matter. All three states are working on this issue and are looking at signing a memorandum of understanding among the three states to share information and research. Nevada is aware of how concerned Idaho is about the mercury issue. She said the executive branches among the three states are dealing with this mercury issue and work is ongoing.

Dr. MacMillan said he is perplexed about what action the Board could take at this time. From a practical standpoint, until someone presents a petition or the Governor presents a proposal for Idaho to opt in or create a program in Idaho to allow coal-fired power plants to come in or keep coal-fired power plants out, there is no request or direction.

Don Chisholm commented that when the Board has directed DEQ to initiate negotiated rulemaking in the past, the result was not preordained. The process is to study the issue and determine an appropriate level of regulation to be protective of human health and the environment in the Idaho. If the Board directs the Department to bring interested parties together, make a determination, and bring back a rule—that’s the way the negotiated rulemaking process should work. He said that is exactly where it ought to begin. The participants can negotiate what they believe is necessary, and the Department can then eventually make a recommendation to the Board.

Director Hardesty explained that typically when the agency enters into a negotiated rulemaking, a rule or framework has been proposed. In the absence of that, she believes the mercury issue probably does lend itself better to some sort of working group or discussion to narrow down the issues into a proposed rule to move forward into a negotiated rulemaking.

Marti Calabretta pointed out the other way to approach and initiate rulemaking is when an outside party makes it clear what his/her interest is through a petition to the Board; that does give some parameters and guidance. Idaho has a rule in place that prohibits coal-fired power plants. She is not comfortable knowing where we are going without some request or action clarifying what changes are being proposed to the mercury standards and how it would apply to all industries and all parts of the state. She questioned whether a mercury working group would be responsive to how people feel statewide.

Doug Conde commented on a similar experience DEQ had with the nonmunicipal solid waste rules. It started with this type of a broad concept without a clear objective, and the product of that was a

negotiated rulemaking that went on for five or six years. It is possible to get a product, but it's not easy, he said.

Nick Purdy suggested the mercury working group develop a petition for rulemaking so DEQ can start the rulemaking with a target. There is no rush because a rule is currently in place.

Dr. MacMillan excused himself from the Board meeting at 2:25 p.m. due to a schedule conflict.

Marti Calabretta expressed concern that a working group might not be sufficient in terms of public input. A rulemaking process with public comment is in place that provides the structure necessary to ensure broad public participation. She is concerned about giving away control of this process to a working group and then making DEQ duplicate the effort in a negotiated rulemaking.

Chairman Cloonan said it was her understanding it would be DEQ's working group, it would be open to the public, and all interested parties would be invited. The group would support and work with DEQ, and DEQ would report back to the Board. Ms. Calabretta said it would take care of part of her concern if a Board member were on the working group.

Chairman Cloonan asked Director Hardesty for her recommendation. Director Hardesty said DEQ could come back to the Board with recommendations on the best way to proceed, how to include people, keep them informed, and receive information. DEQ can start zeroing in on the issues, including regional, and work through that part of the process. She can give updates to the Board as DEQ moves through that process so the Board will be fully aware. She envisions a process that would be open to whoever would like to participate. It would not be a selective group of people, and no one would be excluded from participating.

Don Chisholm expressed concerned about a sense of false comfort because a rule is in place prescribing zero emissions in Idaho. That rule was adopted as part of Idaho opting out, but it wasn't based on an analysis of the science or the reasons; it was just part of the reaction against the federal CAMR Rule. No rule has been written on mercury emissions from coal-fired power plants that takes into account the different geographic areas of the state. He thinks the current zero emissions rule is not based on the kind of rational approach to rulemaking that is sustainable either before the legislature or perhaps even before a court of law if the rule were challenged as overly broad or not having been based on good science. Mr. Chisholm supports initiating negotiated rulemaking to secure this protection.

Kermit Kiebert supported Director Hardesty working with other states on a compact or MOU, but wants to include Oregon and Washington in those discussions. He agrees the existing rule might not provide what the Board thinks it does. He favors having DEQ research the issue and bring back a proposal for the Board's for consideration. He believes it is a much bigger issue than just coal-fired power plants in Idaho and supports starting a process to move toward negotiated rulemaking.

Chairman Cloonan agreed with Mr. Kiebert's comments and suggested the Board ask DEQ to go forward with determining whether the current regulatory structure adequately protects public health and the environment, recognizing that the prohibition on coal-fired power plants was really put in place to allow time to look at the whole public health and environment issue, and to ask the agency to propose a process that will ensure adequate public input on the whole mercury issue. Whether it is called a working group or some other term, the intent is to go forward with the process that has already started and ensure public involvement along the way.

Don Chisholm suggested the matter be placed on the Board's October meeting agenda to consider whether DEQ will initiate negotiated rulemaking on the mercury issue. The Board discussed the issue further and concurred that the issue of regulation of mercury in the environment in Idaho will be placed on the Board's October 2007 meeting agenda for an update and recommendations from DEQ on how to proceed with the regulation whether it is to initiate a mercury working group, negotiated rulemaking, or some other interim step.

AGENDA ITEM NO. 4: OVERVIEW OF TMDL PROGRAM AND UPDATE ON IMPLEMENTATION, SCHEDULE, AND TRANSITION TO 5-YEAR REVIEW

Mike McIntyre, Surface Water Program Manager, presented an overview and status report on the Total Maximum Daily Load (TMDL) program (Attachment 6). He explained the program structure and process, opportunities for public input, House Bill 145 which relates to how Watershed Advisory groups (WAGs) are involved in the TMDL process, major TMDL issues, strategies for dealing with temperature TMDLs, and recent TMDL challenges including Pristine Springs and American Falls Reservoir. He detailed the next steps planned for the program including finishing the 2002 TMDL settlement schedule, establishing the process for five-year reviews, beginning five-year reviews, and continuing implementation and monitoring.

AGENDA ITEM NO. 5: PRESENTATION ON POSSIBLE REVISIONS TO THE RULES FOR ADMINISTRATIVE PROCEDURE BEFORE THE BOARD AND THE EPHA

Doug Conde, Deputy Attorney General, presented possible alternatives for the contested case process for the Board's review and consideration (Attachment 7). He believes the current process for contested cases does not fit well with a permitting program. Mr. Conde consulted with the Board's hearing officers and then developed the following options:

1. Make appeals of permits, certifications, or other similar authorizations based solely on the record developed during the public notice and comment period.
2. Require that DEQ initiate a contested case prior to issuing any permit, certification, or other form of authorization.
3. Revise current contested case rules to provide that if new evidence is presented that was not before the agency at the time of the permit decision, then the hearing officer must remand the case to the agency to consider the new evidence.

Mr. Conde asked for the Board's approval to take these options to the regulated community and interested parties for discussion. The Board directed Mr. Conde to proceed with informal discussions with the stakeholders and report his findings to the Board for future consideration.

AGENDA ITEM NO. 6: CONSIDERATION OF HEARING OFFICER APPLICATION FOR BOARD APPROVAL

Doug Conde presented a request from Lance J. Schuster, attorney with the firm of Beard, St. Clair, & Gaffney, P.A. in Idaho Falls, to serve as a hearing officer for the Board's contested cases (Attachment 8). Mr. Schuster meets the Board's requirements of having at least five years' experience and a background in administrative and environmental law. He has over ten years' experience and has served as a hearing officer when filling in for another attorney at his law firm. Mr. Conde recommended Mr. Schuster be added to the list of approved Board hearing officers.

- **MOTION:** Don Chisholm moved the Board add Lance J. Schuster to the list of approved Board hearing officers.
SECOND: Marti Calabretta
VOICE VOTE: Motion carried. 5 Ayes (Calabretta, Chisholm, Kiebert, Purdy, Cloonan); 0 Nays; 2 Absent (Harlen, MacMillan).

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

Doug Conde provided a brief update on pending contested cases. Two old cases have been dismissed due to lack of action for an extended time. The Potlatch Corp. Petition for Review of Air Quality Tier I Operating Permit, St. Maries Facility, and the Tim Gordon/Michael Ashby Petition for Review of the Permit to Construct for Fiberglass Systems in Kuna have both been dismissed. DEQ did not receive an objection to either dismissal.

The Neighbors for a Healthy Gold Fork Petition for Review of the Section 401 Water Quality Certification for Lake Cascade is scheduled for hearing in October.

Mr. Conde discussed the rule dockets scheduled for the October and November Board meetings. Chairman Cloonan asked for a status report on the negotiated rulemaking process on the ground water rule at the October Board meeting. The rule is set to be presented to the Board for approval at the November 2007 meeting.

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

Nick Purdy suggested Chairman Cloonan draft a letter to Governor Otter to report on today's meeting, express the Board's concern about mercury levels in Idaho water bodies, and suggest that Idaho consider a regional approach to the problem. He believes the Governor might be interested in pursuing a compact or similar arrangement to gain cooperation from a regional standpoint.

Marti Calabretta agreed it was a good idea to let the Governor know the Board heard extensive comment on the mercury issue, discussed the matter, and believes there is some validity in these concerns based on the data received and that it is a priority.

Director Hardesty assured the Board that the Governor is very aware of this issue and understands the concern related to mercury levels. He has requested information on DEQ's fish tissue sampling analysis plan for the summer to ensure it is aggressive enough, and has requested additional information about future sampling plans and impacts of the forest fires on the mercury levels in the state. She believes the Governor understands the full concern of the issue and the importance of properly characterizing and understanding the extent of the mercury issue. She has not discussed a formal consortium approach to the issue with the Governor, but has discussed the Nevada situation and the relationships Idaho has with Nevada and Utah and what is being done to share research and information. They have not discussed taking it to the next level of formally getting other states on board as a compact other than the MOU among the three states to share information.

Marti Calabretta asked if Director Hardesty could foresee any problem or ill will with the Board expressing its concern beyond letting him know what's going on. Director Hardesty said no, she did not see any problems with the Board expressing its concern.

Kermit Kiebert said he knew Director Hardesty kept the Governor well informed on this and all environmental issues, but felt it would be a good idea to let him know on a more formal basis that the Board has followed through and is working with due diligence on coming up with a satisfactory solution to this difficult issue and to offer him the opportunity to provide direction or share advice on the problem.

Chairman Cloonan said if the Board wanted to put this discussion in the terms of a motion, she would prepare a letter to the Governor to convey both that the Board is working on this issue and the concern that it is a regional problem.

Mr. Kiebert commented the letter could also express the Board's appreciation that Director Hardesty is already working with the other two states and, hopefully, eventually Washington and Oregon as well.

➤ **MOTION:** Nick Purdy moved the Chairman prepare a letter to the Governor regarding today's Board meeting summarizing the comments expressed by the public and the new data received on mercury, expressing the Board's concern that mercury appears to be coming into Idaho from out of state, and urging the Governor to consider seeking out the cooperation of adjacent states in forming a compact to address mercury, not just from power sources, but from all sources, in a regional manner.

SECOND: Don Chisholm.

DISCUSSION: Nick Purdy suggested the letter also mention that the Board would welcome any advice or input the Governor has on this issue, or he may want to attend the October meeting.

VOICE VOTE: Motion carried unanimously. 5 ayes; 0 nays; 2 absent (Harlen, MacMillan).

The meeting adjourned at 4:30 p.m.

/s/

Dr. Joan Cloonan, Chairman

/s/

Debra L. Cline, Management Assistant and Recorder