



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

October 10, 2007

The Board of Environmental Quality convened on October 10, 2007 at 8:30 a.m.
at:

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

ROLL CALL

BOARD MEMBERS PRESENT

Dr. Joan Cloonan, Chairman
Marti Calabretta, Vice-chairman
Craig Harlen, Secretary
Donald J. Chisholm, Member
Dr. John R. "Randy" MacMillan, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT

Kermit V. Kiebert, Member

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Toni Hardesty, Director
Curt Fransen, Deputy Director
Martin Bauer, Administrator, Air Quality Division
John Brueck, Hazardous Waste Regulation and Policy Coordinator
Barry Burnell, Administrator, Water Quality Division
Jess Byrne, Interagency Affairs
Debra Cline, Management Assistant to the Board
Douglas Conde, Deputy Attorney General
Darrell Early, Deputy Attorney General
Orville Green, Administrator, Waste Management & Remediation Division
Susan Hamlin, Deputy Attorney General
Tom John, Microbiology Rules Manager
Lisa Kronberg, Deputy Attorney General
Tim Wendland, Loan Officer
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Pat Barclay, Idaho Council on Industry & Environment
Roy Eiguren, U.S. Ecology Idaho
Mitch Hart, Mountain Island Energy
Justin Hayes, Idaho Conservation League
Jack Lyman, Idaho Mining Association
Steve Romano, U.S. Ecology
Lynn Tominaga, Idaho Water Policy Group

- ❖ 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.

PUBLIC COMMENT PERIOD

No comments were received.

AGENDA ITEM NO. 1: ADOPTION OF BOARD MINUTES

- a. August 30, 2007 meeting minutes

The August 30 minutes will be presented for adoption at the November Board meeting.

- b. Action Items

- 1) Letter to Governor regarding mercury issue

Chairman Cloonan reported she prepared a letter to Governor Otter reporting the concerns expressed about mercury in Idaho at the August Board meeting. The letter asked for guidance from the Governor and suggested collaborating with adjacent states to address the problem using a regional approach. (See Attachment 1 for the letter and the Governor's response of October 2, 2007.)

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Hardesty gave a brief update on the following issues:

- Idaho hosted the Environmental Council of the States (ECOS) in Sun Valley in September. Governor Otter was the keynote speaker. ECOS attempts to identify emerging environmental issues facing state agencies. The focus of this year's conference was children's health, specifically asthma-related issues.
- Other upcoming conferences that may be of interest to the Board are the Association of Idaho Cities conference on Idaho Energy and Green Building on October 25 & 26 (DEQ will provide a presentation on the Governor's climate change initiatives and related DEQ activities) and the Idaho Council on Industry and the Environment Practical Paths 2007: Climate Change and Beyond conference on October 30 & 31 (DEQ is a co-sponsor).
- The Treasure Valley Air Quality Council continues to meet. The Council submitted a plan to the Legislature last year that recommended DEQ initiate negotiated rulemaking for stage one vapor recovery fuel tanks in the Treasure Valley. DEQ started that process

Board directed DEQ to initiate negotiated rulemaking. The purpose of the rulemaking is to further limit the types of radioactive materials that are eligible for unrestricted disposal in Idaho by adding a new category of radioactive materials that must be disposed of at a permitted hazardous waste disposal facility.

Public notice was provided, but no public comments were received. However, during a negotiated rulemaking meeting, the U.S. Department of Energy (DOE) asked that DEQ strike all references in the rule to material released from DOE because it is not exempted from the Atomic Energy Act, and therefore believes it has no materials that are Atomic Energy Act exempt, so the rule does not apply. In response, DEQ revised the rule to only address Nuclear Regulatory Commission case-by-case exemptions.

Mr. Green noted this rule is broader in scope and does regulate an activity not regulated by the federal government, but it is consistent with the legislative directive at Idaho Code § 39-4405 and the 2001 Idaho Session Laws, Chapter 297 (House Bill 192). Mr. Green said these rules will provide the disposal of radioactive materials at a safe, well-regulated site, and DEQ recommends the Board adopt the rules.

Don Chisholm asked if the rules would give U.S. Ecology a monopoly on the disposal of this category of waste. Mr. Green replied that U.S. Ecology is the only RCRA Subtitle C facility in Idaho at this time, but another commercial hazardous waste landfill in Idaho could also accept these wastes. The rule is not company-specific, but it is facility-type specific. He explained that currently no facilities in Idaho generate this category of waste. Waste can come into Idaho from out-of-state and if it is NRC exempt, without this rule, that waste could be put in almost any landfill in Idaho.

Steve Romano, U.S. Ecology, said 18 RCRA hazardous facilities in the United States can accept this category of waste. The closest competition would be the commercial radioactive waste site in Utah. He explained that waste generators seek exemptions because only three sites nationally are authorized to accept NRC regulated radioactive materials. This rule will create a broader range of alternatives for disposal of exempted radioactive materials.

➤ **MOTION:** Dr. MacMillan moved the Board adopt the Rules Regulating the Disposal of Radioactive Materials Not Regulated Under the Atomic Energy Act of 1954 as Amended as presented in the final proposal under Docket No. 58-0110-0701.

SECOND: Craig Harlen

VOICE VOTE: Motion carried by unanimous vote (Kiebert absent).

AGENDA ITEM NO. 6: **IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0701 (PENDING RULE) (UPDATE OF FEDERAL REGULATIONS INCORPORATED BY REFERENCE)**

Tom John, Microbiology Rules Manager, presented this rule to update the Idaho Rules for Public Drinking Water Systems with changes made to federal regulations. This update is needed for Idaho to maintain primacy of the program. The two changes promulgated by the EPA and included in this update are the Stage 2 Disinfectants and Disinfection Byproducts Rule, and the Long Term 2 Enhanced Surface Water Treatment Rule. These are national primary drinking

water regulations. They are being incorporated by reference, so this rule is no more stringent or broader in scope than federal regulations.

DEQ held a negotiated rulemaking meeting, but no members of the public attended the meeting. Public comments were received and the proposed rule was revised as a result of those comments. DEQ also sought public comment on two related guidance documents on implementation of the rule changes. Although not part of this rulemaking, the guidance documents are intended to provide the regulated community an outline of the rule requirements and are a helpful tool for the public. No comments were received on the guidance documents.

Chairman Cloonan suggested a minor correction to maintain consistency with other rules. On Page 162, Section 002.02.a., the address of the superintendent of documents should be deleted. Paula Wilson agreed the address should be deleted. The correction will be made during next year's annual update.

➤ **MOTION:** Craig Harlen moved the Board adopt the Idaho Rules for Public Drinking Water Systems as presented in the final proposal under Docket No. 58-0108-0701.

SECOND: Don Chisholm

VOICE VOTE: Motion carried by unanimous vote (Kiebert absent).

AGENDA ITEM NO. 7: **RULES FOR ADMINISTRATION OF WASTEWATER TREATMENT FACILITY GRANTS, DOCKET NO. 58-0104-0701**
(PENDING RULE) (REQUIREMENTS FOR ENVIRONMENTAL INFORMATION DOCUMENT PREPARATION)

Barry Burnell explained this rule and the following two rule dockets were combined in the negotiated rulemaking process because all three rules have comparable and common elements. Comments were received that were outside the scope of the intended rulemaking, so DEQ re-advertised all three of the rules in the Administrative Rules Bulletin in order to accomplish the recommended changes from the public.

Mr. Burnell said the Rules for Administration of Wastewater Treatment Facility Grants regulate an activity not regulated by the federal government because no federal counterpart to this grant program exists. The purpose of this rulemaking is to provide consistency in the environmental information documents required by the grant and loan programs.

Tim Wendland, Loan Program Manager, presented details of the rule changes. The rule is expected to save the regulated community money because payment of more complex production of environmental information documents that can cost thousands of dollars will no longer be required. He explained the different funding sources available to communities that can be used in combination to pay for projects.

Chairman Cloonan pointed out the definition section of the rule incorrectly defined the Board as the “State Board of Environmental Quality.” She suggested it be corrected to the “Idaho Board of Environmental Quality” since that is the name given to the Board in the Idaho Code. DEQ staff will make the correction wherever it occurs in the rule so it is consistently called the Idaho Board of Environmental Quality. She also suggested a change for clarification to the Idaho Code § 39-107D statement in the rule from, “. . . It is not broader in scope or more stringent than federal law” to “The rule does regulate an activity not regulated by the federal government.” Paula Wilson will make the requested change.

- **MOTION:** Don Chisholm moved the Board adopt the Rules for Administration of Wastewater Treatment Facility Grants as presented in the final proposal under Docket No. 58-0104-0701, with a change to reflect the name correction from State Board of Environmental Quality to Idaho Board of Environmental Quality.

SECOND: Craig Harlen

VOICE VOTE: Motion carried by unanimous vote (Kiebert absent).

AGENDA ITEM NO. 8: **RULES FOR ADMINISTRATION OF PLANNING GRANTS FOR PUBLIC DRINKING WATER FACILITIES, DOCKET NO. 58-0122-0701 (PENDING RULE) (REQUIREMENTS FOR ENVIRONMENTAL INFORMATION DOCUMENT PREPARATION)**

Barry Burnell explained that this rule, like the previous one, amends the language regarding environmental information document preparation in the grant rules to provide consistency in requirements of the grant and loan programs.

Tim Wendland said a change was also made to update the definition of a drinking water system to a new, simpler definition used by EPA.

Chairman Cloonan noted the change needed to be made to the stringency statement in this rule also to read: “The rule does regulate an activity not regulated by the federal government.” Paula Wilson will make the requested change.

- **MOTION:** Dr. MacMillan moved the Board adopt the Rules for Administration of Planning Grants for Public Drinking Water Facilities as presented in the final proposal under Docket No. 58-0122-0701 with a change to reflect the name correction from State Board of Environmental Quality to Idaho Board of Environmental Quality.

SECOND: Marti Calabretta

VOICE VOTE: Motion carried by unanimous vote (Kiebert absent).

AGENDA ITEM NO. 9: **RULES FOR ADMINISTRATION OF DRINKING WATER LOAN PROGRAM, DOCKET NO. 58-0120-0701 (PENDING RULE) (QUALIFICATIONS FOR DISADVANTAGED LOANS)**

Barry Burnell said the purpose of this rulemaking is to revise the conditions and qualifications for disadvantaged loans. This will allow more communities to be considered for disadvantaged loans.

Tim Wendland explained the details of the changes in the rule. He said the intent of the Drinking Water Loan Program was always to have loans that were tailored to assist economically disadvantaged communities. After ten years' experience with the program, DEQ believes an analysis shows the rules should be revised to allow assistance to more economically disadvantaged communities.

➤ **MOTION:** Nick Purdy moved the Board adopt the Rules for Administration of Drinking Water Loan Program as presented in the final proposal under Docket No. 58-0120-0701 with a change to reflect the name correction from State Board of Environmental Quality to Idaho Board of Environmental Quality.

SECOND: Marti Calabretta

VOICE VOTE: Motion carried by unanimous vote (Kiebert absent).

AGENDA ITEM NO. 10: UPDATE ON NEGOTIATED RULEMAKING FOR GROUND WATER QUALITY RULE

Barry Burnell updated the Board on the negotiated rulemaking process currently underway for the Ground Water Quality Rule that is scheduled to come before the Board for adoption at its November 2007 meeting. He provided a brief background on the Ground Water Quality Plan and an outline of the draft rule.

He said the rulemaking was initiated after discussions with the Idaho Mining Association regarding its concern about implementation of the rule. DEQ wanted to provide more clarity in the active mineral extraction provisions in the rule. Negotiated rulemaking with the interested parties began in July 2007. Consensus was not reached by the parties. As a result, DEQ incorporated the various comments, conditions, and positions expressed by the parties into the draft rule.

Mr. Burnell briefly described the primary changes made to four sections of the rule: the definition section, procedures for categorizing and re-categorizing aquifers, site-specific ground water quality levels, and the mineral extraction section. This rulemaking has generated great interest across the state, and many comments have been received. A public hearing was held in Boise on September 26, 2007, where oral testimony was received. The Idaho Conservation League and the Greater Yellowstone Coalition both provided brief testimony opposed to the changes to the Ground Water Quality Rule and indicated that they would submit written comments as well.

Mr. Burnell provided an overview of the comments DEQ received.

- DEQ received 66 pages of comments including 237 postcards from the Sierra Club and the Caribou Clean Water Partnership. In addition, DEQ received 193 e-mails during the public comment period. All of those comments were opposed to the rulemaking and asked DEQ to limit the mineral extraction aspect of the rule.
- The BLM and the U.S. Forest Service submitted written comments asking clarifying questions. Both wanted to know how DEQ intended to implement the rule and how their agencies would be involved.

- The Idaho Conservation League’s written comments asked that DEQ remove the exemption for mining from the Ground Water Quality Rule and pointed out that other policies within the Ground Water Quality Plan have applicability as well.
- The Caribou Clean Water Partnership’s written comments expressed opposition to the changes in the rule that would allow mines to impact existing beneficial uses of ground water and surface water, and referenced a local landowner in the area and the surface water impacts of mining to that landowner.
- The Greater Yellowstone Coalition submitted comments opposing the rule and stating its concern regarding the stringency statement. The Coalition recommended DEQ refer to the Safe Drinking Water Act and the Resource Conservation and Recovery Act as two federal rules to use in evaluating whether the proposed rule is more stringent than federal regulations. The Coalition is also opposed to expanding the potential for mining operations to damaged ground water quality in Idaho.
- Idaho Rivers United submitted comments opposing the rule and stating similar concerns. IRU is also concerned that the impacts to surface waters are not adequately considered in the rule.
- The Idaho Mining Association submitted detailed comments supporting some portions of the rule and opposing others. The IMA’s four main points of concern relate to defining what activities constitute mining.
- J. R. Simplot Company submitted comments in support of the IMA’s comments. Simplot also wants the word “active” removed from segments of the rule because of the concept that after mining has stopped and the reclamation period has started, the term active does not mean active mineral extraction—the facility is in remediation, but is still able to be exempted from certain aspects of the rule. Simplot requested changes to Section 400.06 similar to those submitted by the IMA.
- Comments were received from a resident of Pocatello and a landowner in Wyoming opposing the rule for various reasons involving protection of ground water and surface water.
- The IMA and Simplot comments both favored elimination of DEQ’s discretion in determining what defines mining and how it is applied to mineral extraction areas. (DEQ’s perspective, and the current rule, allow DEQ to make those decisions.)

Mr. Burnell said during the next two weeks, DEQ will prepare its response to public comments and make changes it believes are merited based on the public comments. The revised rule packet will then be submitted to the Attorney General’s Office and Director Hardesty for consideration prior to being sent to the Board. The rule will be presented for the Board’s approval at its November 15, 2007, meeting.

Nick Purdy asked if the rulemaking addressed aquifer recharge. Mr. Burnell said DEQ has worked with the Idaho Department of Water Resources to address aquifer recharge through a

specific guideline for implementation of the Chapter 16 Wastewater Rules that addresses land application of wastewater and recharge water. It is a separate rule outside of the rulemaking.

Dr. MacMillan asked that the public comments and Mr. Burnell's talking points from his presentation be sent to the Board so they can be thoroughly reviewed and considered prior to the next Board meeting. Paula Wilson will send the comments and the presentation to Board members soon after the meeting.

Craig Harlen observed this rulemaking seems to be quite contentious and without much consensus. He asked how the proposed rule would improve DEQ's management versus what is currently in effect. Mr. Burnell said the current rule contains a statement giving DEQ discretion on mineral extraction areas. DEQ's difficulties have been in addressing the "active area" issue and applicable types of mineral extraction activities. DEQ recognizes it can benefit from a process that better defines the affected ground water area, sets triggers for permanent cessation, looks at aquifer reclassification, and has a mineral extraction section. DEQ has also struggled with the total versus dissolved question on constituents and how that should be addressed. Having a section in the rule regarding the use of dissolved methodologies for secondary constituents would help DEQ regions interpret the rule in a consistent manner.

Doug Conde said DEQ has dealt with the question of when active mineral extraction ends with several facilities in the past, and it would be very helpful to have this spelled out in the rule to provide more certainty for DEQ and the regulated community. Craig Harlen agreed that having more definition in the rules provides the certainty companies need to invest assets.

Board members discussed aspects of the rule and questioned DEQ staff about how the rule would be applied to mining and agricultural activities.

Chairman Cloonan concluded the presentation by stating no public comment would be taken at this time because the final rule is not before the Board for consideration. Public comment will be taken when the rule is presented for adoption at the November 15, 2007, Board meeting.

Nick Purdy left the Board meeting due to travel requirements.

**AGENDA ITEM NO. 11: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,
DOCKET NO. 58-0101-0701 (PENDING RULE) (UPDATE OF
FEDERAL REGULATIONS INCORPORATED BY REFERENCE)**

Martin Bauer, Administrator, Air Quality Division, presented this rule to update Idaho's Rules for the Control of Air Pollution with the federal regulations. It is the annual incorporation by reference to include revisions to the federal regulations as of July 1, 2007. Negotiated rulemaking was not conducted, but public comments were taken.

- **MOTION:** Dr. MacMillan moved the Board adopt the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0701.
- SECOND:** Marti Calabretta
- VOICE VOTE:** Motion carried by unanimous vote. 5 ayes; 0 nays; 2 absent (Kiebert, Purdy).

AGENDA ITEM NO. 12: UPDATE ON MERCURY

Chairman Cloonan distributed copies of her September 28, 2007, letter to Governor Otter seeking direction on the mercury issue and his October 2, 2007, response (Attachment 2).

Martin Bauer updated the Board on activities regarding the mercury issue since the last Board meeting. DEQ continues to research the matter and now feels the mercury rule has two specific arms: the CAMR or clean air mercury rule for electric generating units (coal-fired power plants), and the issue of non-EGU sources or existing sources of mercury in Idaho. The CAMR program is still in litigation, and its future is so uncertain that EPA is not planning to develop a trading program until the litigation is finished. Mr. Bauer believes it does not make sense to expend state resources on developing a CAMR rule and a trading rule when EPA has not accomplished that yet. DEQ recommends Idaho continue to watch the litigation closely and take appropriate action after it learns the outcome of the case.

To address the other arm of the mercury issue, Mr. Bauer said DEQ plans to hold a public meeting for all interested parties to discuss the existing sources of mercury in Idaho, current rules and their applicability, if a new rule should be drafted, and what it should look like. DEQ plans to schedule the meeting before the end of the year.

Director Hardesty reported on the Board's suggestion that an interstate compact be created to address mercury problems on a regional basis. She said Governor Otter believes that is a good idea and has directed her to engage additionally with Washington and Oregon to see if they would like to join with Idaho, Nevada and Utah on this issue. She spoke with Oregon and it is very interested. Washington should reply soon to her initial call, and she will continue to update the Board.

Don Chisholm asked if any state or federal regulations could be used to control mercury emissions coming into Idaho from other states. Mr. Bauer replied no regulations in Idaho could be enforced against other states, but Nevada has a mercury rule in place and is regulating the mines. He has discussed the problem with the air quality program director in Oregon and the state is investigating the cement plant in Durkee, Oregon, and taking enforcement action.

Director Hardesty added DEQ recently received a report from Oregon on its actions to reduce emissions from the cement plant in Durkee. DEQ has met with both Oregon and Nevada to express its concern, and the environmental agencies in both states are following up with the sources to reduce emissions.

Mr. Chisholm asked if DEQ had reviewed the Nevada emission standards regulating mines and made a determination that they were adequate to protect waterbodies in Idaho. Mr. Bauer said DEQ was in close contact with Nevada during the rulemaking process and provided comments on the rule. He said no science is available to indicate what level of emissions result in a specific level in the fish, but DEQ continues to work closely with Nevada to provide input and express its concerns.

Dr. MacMillan asked if there were any concerns that Idaho's mercury standards for water or air are insufficiently protective. Mr. Bauer said he could speak only to the air rules, and Idaho has a

standard for new and modified sources; a standard for existing sources will be discussed in the public meeting for interested parties.

Marti Calabretta asked about the goals of the public meeting for interested parties. Mr. Bauer said he envisioned the meeting would be open to the public, but DEQ will specifically invite all facilities that emit mercury. The group will review the standards and activities in other states and compare them to those in Idaho. Discussions will include the issues surrounding the adequacy of Idaho's standards and the science behind them. This will be an opportunity to get everyone to the table for an open discussion of issues surrounding mercury. There will be no limitations on the discussion; and the state energy policy, as well as other rules and standards that could be impacted, will be considered.

Director Hardesty assured that DEQ will continue to have good communications with the Office of Energy Resources, recognizing the link that exists on the mercury issue and a number of other issues.

Ms. Calabretta suggested the Board chairman meet with the new director of the Office of Energy Resources to relate the discussions the Board has heard on the mercury issue. Chairman Cloonan said she would be pleased to meet with him, particularly in conjunction with Director Hardesty.

Mr. Bauer discussed the issues involved in the CAMR rule lawsuit. Don Chisholm expressed concern that the current mercury rule in Idaho could be challenged because it is not based on science. Mr. Bauer believed the structure set in place by the CAMR rule and Idaho's prohibition on building coal-fired power plants would provide adequate coverage. He explained that even if the final outcome of the lawsuit is to repeal the CAMR program, Idaho's prohibition would provide protection until EPA could replace the program with a MACT standard (which Idaho would then adopt).

Mr. Chisholm suggested the Board issue a statement in the form of a press release to let the public know the status of the mercury issue and how the Board is proceeding with the matter. Director Hardesty said she would post information on DEQ's Web site to keep the public informed about the work DEQ is doing regarding mercury issues.

AGENDA ITEM NO. 13: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Doug Conde briefly reviewed the contested case report and discussed rules to be presented at the Board meeting scheduled for November 15 & 16. Board members discussed the agenda and decided the issues could most likely be completed in a one-day meeting. The November meeting was rescheduled to November 15 and, if necessary, any unfinished agenda items will be carried over to November 16. Don Chisholm suggested the Board tour the U.S. Ecology facility in Grandview on November 16.

AGENDA ITEM NO. 14: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

The Board will set its 2008 meeting schedule at the November 15 meeting. Craig Harlen suggested the Board schedule meetings only when needed and not on a bi-monthly basis or just

to conduct training or tours. In the interest of efficiency and conserving DEQ resources, he feels agenda items and training should be combined into one meeting when possible.

Doug Conde discussed the Open Meeting Law and how it applies to email discussions. He pointed out that exchanges of opinions and information via email among the Board members probably fits within the definition of deliberation and is subject to the Open Meeting Law.

Board members discussed different ways of communicating with the public and one another through electronic sources such as email, Web sites, and blogs. Doug Conde will review any proposals thoroughly to ensure compliance with the Open Meeting Law.

The meeting adjourned at 2:10 p.m.

/s/

Dr. Joan Cloonan, Chairman

/s/

Craig Harlen, Secretary

/s/

Debra L. Cline, Management Assistant and Recorder