



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
Board of Environmental Quality

1410 North Hilton, Boise, ID 83706-1255, (208) 373-0502

Dirk Kempthorne, Governor
C. Stephen Allred, Director

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

February 4, 2004

The Board of Environmental Quality members attended the Senate Health and Welfare Committee at 8:30 a.m. in the Capitol Building. Dr. Randy MacMillan and Nick Purdy went before the Committee for confirmation of their gubernatorial reappointments to the Board of Environmental Quality. The Committee stated they would vote on the reappointments at a later meeting. The minutes from the Senate Health and Welfare Committee are available on the Internet at <http://www2.state.id.us/legislat/2004%20Session/04sstcomm.html> and are Attachment 1 to these minutes.

The Board of Environmental Quality convened on February 4, 2004 at 10:30 a.m. at:

Idaho Department of Environmental Quality
Conference Rooms A & B
1410 North Hilton
Boise, Idaho

ROLL CALL

BOARD MEMBERS PRESENT:

Paul C. Agidius, Chairman
Dr. J. Randy MacMillan, Vice-chairman
Dr. Joan Cloonan, Secretary
Donald J. Chisholm, Member
Craig D. Harlen, Member
Marguerite McLaughlin, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT:

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

Steve Allred, Director
Jon Sandoval, Chief of Staff
Martin Bauer, Administrator, Air Quality Division
John Brueck, Hazardous Waste Regulation Program Manager
Jess Byrne, Intergovernmental Affairs

Debra Cline, Management Assistant to the Board
Doug Conde, Deputy Attorney General
Darrell Early, Deputy Attorney General
Paula Gradwohl, Administrative Rules and Hearing Coordinator
Orville Green, Administrator, Waste and Remediation Division
Toni Hardesty, Administrator, Water Quality Division
Harriet Hensley, Deputy Attorney General
Lisa Kronberg, Deputy Attorney General
Pat Nair, Stationary Source Program Manager, Air Quality Division

OTHERS PRESENT:

Don Haagensen, Safety-Kleen Systems, Inc.
Joe Miller, Safety-Kleen Systems, Inc.
Dick Rush, Idaho Association of Commerce and Industry (IACI)
Suzanne Schaefer, SBS Associates/Monsanto

- ❖ 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.

PUBLIC COMMENT PERIOD:

No comments were received.

AGENDA ITEM NO. 1: ADOPTION OF BOARD MINUTES

a. June 19, 2003

Don Chisholm suggested a change to provide clarification to Page 4, Paragraph 4, to read “Simplot’s petition” instead of “their” petition.”

- **MOTION:** Don Chisholm moved the Board adopt the June 19, 2003 minutes as circulated with the suggested change.
SECOND: Dr. Randy MacMillan
VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 2: DIRECTOR’S REPORT

Director Steve Allred discussed House Bill 544 which gives Watershed Advisory Groups new authority over the approval of TMDLs, and the modification of beneficial uses. The Director expressed concern that the bill would reduce the amount of information available to the public at some phases of the process, and would create deadlocks in the approval process that could result in EPA making the final decision.

Director Allred briefly discussed budget matters, and other legislative issues.

AGENDA ITEM NO. 3: CONTESTED CASE HEARING

SAFETY-KLEEN SYSTEMS, INC. V. DEQ, CONTESTED CASE DOCKET NO. 0105-03-15
ORAL ARGUMENT ON RESPONDENT'S PETITION FOR REVIEW OF PRELIMINARY ORDER DENYING
MOTION TO DISMISS OR ALTERNATIVELY PRELIMINARY ORDER GRANTING REVIEW

- **Darrell Early, Deputy Attorney General, appeared on behalf of Respondent, DEQ**
- **Don Haagensen of Cable, Huston, Benedict, Haagenson & Lloyd appeared on behalf of Petitioner, Safety-Kleen Systems, Inc.**
- **Joe Miller, McDevitt & Miller, appeared on behalf of Petitioner, Safety-Kleen Systems, Inc.**

NOTE: A FULL TRANSCRIPT OF THE HEARING IS AVAILABLE THROUGH THE DEQ HEARING COORDINATOR'S OFFICE, CONTACT (208) 373-0418.

Chairman Paul Agidius stated the Board was prepared to hear oral argument in this matter. Each party was allowed 20 minutes to present oral argument.

Darrell Early argued in support of reversing two orders of the Board's hearing officer regarding the Safety-Kleen facility permit under the Hazardous Waste Management Act. He urged the Board to reverse the hearing officer's decision on the two orders at issue, order that DEQ properly withdrew the permit and thus DEQ's Motion to Dismiss should have been granted, and remand the case for further proceedings. He also requested that the Board revisit the issue of the interplay between the Administrative Procedures Act (APA) and the Hazardous Waste Management Act permit appeals process in a negotiated rulemaking or a temporary rulemaking to allow this issue to be resolved in rules and to clarify this issue.

Don Haagensen argued in support of the two orders issued by the hearing officer. He explained why Safety-Kleen agrees with the orders, and explained the process at question in the permit. He requested the Board either deny the Petition for Review or affirm both orders.

Chairman Agidius opened to floor to questions from the Board. Members questioned the chemical analysis, environmental and public safety issues, and had multiple questions regarding the cleaning solvent Continuous Use Program (CUP).

Harriet Hensley, Board Counsel, discussed the procedural issues of the case.

- **MOTION:** Dr. Randy MacMillan moved the Board go into executive session to consult with its legal representative on pending litigation as authorized by Idaho Code § 67-2345(f).

SECOND: Nick Purdy

DISCUSSION: Chairman Paul Agidius stated the Board would conduct no deliberation nor take any action during the executive session. He announced the open meeting would resume immediately following the executive session.

ROLL CALL VOTE: Motion carried. 7 ayes; Chisholm, Cloonan, Harlen, MacMillan, McLaughlin, Purdy, Agidius; 0 nays; 0 absent.

The meeting room was cleared at 1:35 p.m. for the executive session. The open meeting reconvened at 2:35 p.m. Chairman Agidius opened the floor to questions and deliberation.

Don Chisholm commented this issue has brought to light the need for the Board to revisit its own procedural rules as to how the APA applies and interrelates to the Board's rules. Legal guidance is needed on whether the APA rules apply to the Hazardous Waste Management Act.

➤ **MOTION:** Don Chisholm moved the Board rule as follows: 1) that the decision of the hearing officer became moot before it became final because DEQ withdrew the objectionable permit conditions relating to the CUP dumpster before the order became final; 2) this decision is based on the fact that the hearing officer gave DEQ the option of withdrawing the permit conditions before the decision became final; 3) under the law of the case doctrine, DEQ is entitled to rely on the hearing officer's statement that the conditions could be withdrawn; 4) it is not reasonable to conclude that the permit conditions had to be withdrawn and a new draft permit be issued within the time allowed. Withdrawal of the permit conditions before the decision became final is all that was required. This decision is limited to the facts presented by the procedural posture of this case.

SECOND: Dr. Joan Cloonan

DISCUSSION: Chairman Agidius pointed out this action would not be setting a precedent for any other case unless it had the same procedural posture regarding the action of the hearing officer. Mr. Chisholm said that was his intent as stated in the last sentence of item 4) of his motion. Perhaps a hearing officer should not venture into such areas in the future. It raises a number of issues the Board may want to address in its procedural rules. Mr. Chisholm felt the motion would provide a fair result for all parties, and would result in a final decision as expeditiously as any other procedure.

Nick Purdy commented that all parties must be very frustrated by the last two and a half years of proceedings, and urged the parties to cooperate and resolve the issue as quickly as possible.

Craig Harlen agreed, stating it was difficult for him to understand some issues in this case, such as why Safety-Kleen is reluctant to come forth with their information. He felt Safety-Kleen should not be penalized because their process is going to cause the state difficulty dealing with other waste generators. He did not feel that should be Safety-Kleen's problem – if their process is permissible, they should be given a permit. He also encouraged the parties to quickly discuss the real issues so this matter does not come before the Board again.

Dr. Joan Cloonan added that DEQ had stated its intention to move forward with the withdrawn portion of the permit in an expeditious manner, and the proposed motion may result in the quickest resolution to the case

ROLL CALL VOTE: Motion carried. 7 ayes; Chisholm, Cloonan, Harlen, MacMillan, McLaughlin, Purdy, Agidius; 0 nays; 0 absent.

Chairman Agidius thanked the parties for their excellent presentations and encouraged them to work towards resolution of the matter. The hearing concluded at 2:58 p.m.

AGENDA ITEM NO. 4: WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0303 (PENDING RULE)

Toni Hardesty, Administrator of the Water Quality Division, explained this rule is to address additional corrections to Section 210. Specifically, it removes the selenium conversion

factor which is not part of the federal toxics rule and was inadvertently added when the state republished its toxics rules in 2003.

- **MOTION:** Nick Purdy moved the Board adopt the Water Quality Standards as presented in the final proposal under Docket No. 58-0102-0303. He further moved that the Board adopt the revisions included in the final proposal as amendments to the previously adopted temporary rules, with the amendments becoming effective February 5, 2004.

SECOND: Dr. Randy MacMillan

VOICE VOTE: Motion carried. 7 ayes; 0 nays; 0 absent.

AGENDA ITEM NO. 5

RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,
DOCKET NO. 58-0101-0302 (PENDING/TEMPORARY RULE)

Martin Bauer, Administrator of the Air Quality Division, presented this rule to align the state rules with the federal rules regarding compliance certification. EPA requires that this change be in place by June 28, 2004, so the rule is being brought forward as a temporary rule. The rule is no more or less stringent than the federal rules.

- **MOTION:** Dr. Randy MacMillan moved the Board adopt, as temporary and pending rules, the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal under Docket No. 58-0101-0302, with the temporary rules becoming effective February 5, 2004.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried. 7 ayes; 0 nays; 0 absent.

AGENDA ITEM NO. 6

RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,
DOCKET NO. 58-0101-0304 (TEMPORARY RULE)

Martin Bauer explained this rule regarding new source review has been in development for several years. It changes how the prevention of significant deterioration (PSD) program and the non-attainment major sources are handled. Specifically, it changes who gets in the program and who does not. It addresses and applies only to very large sources (of emissions).

In the past, minor changes or even decreases in emissions could trigger a source to fall into the program. This resulted in a facility having to deal with a major program for very little environmental benefit. This rule docket would provide a more common sense method of determining who participates in the program. It allows sources to make small changes that in some cases may be beneficial to the environment.

The changes to the rule were made by incorporating by reference the federal rules to make the state rules consistent with the federal rules. The rule is no more or less stringent than the federal rules. It is being brought forward as a temporary rule because it confers a benefit to the regulated community and possibly the environment. It will come back to the board as a pending rule after it has gone through the regular process of public comment and hearings.

- **MOTION:** Marguerite Mclaughlin moved the Board adopt, as temporary rules, the Rules for the Control of Air Pollution in Idaho, as presented under Docket No. 58-0101-0304, with an effective date of February 5, 2004.

SECOND: Dr. Joan Cloonan

DISCUSSION: Chairman Agidius asked if there was any public comment on the matter. Dick Rush, Idaho Association of Commerce and Industry, testified in support of the rule on behalf of a number of his members who were interested in the rule. He noted that when the EPA announced the new source review rules last year, they said the rule would clarify an otherwise subjective standard and allow plants to modernize more easily leading to greater efficiency and potentially lower consumer costs. Mr. Rush stressed that the rule does not lower environmental protection. The regulated community thinks the rules are still very strict and will still require substantial investment to meet air quality compliance. They believe there will be no reduction in air quality in Idaho as a result of this rule.

Mr. Rush said the negotiated rulemaking went very smoothly and efficiently and was well supported by the regulated community. DEQ moved forward on a fast pace, and all interested parties were allowed an opportunity to provide meaningful input. Environmental groups were represented at all of the meetings. IACI is very pleased with how the process moved forward and the results. He complimented Martin Bauer and the DEQ Air Quality staff on their efforts and encouraged the Board to adopt the rule.

Director Steve Allred advised the Board that these rules were under appeal at the federal level. This portion of the federal rules has not been stayed. The appeal may take many years to resolve, and DEQ supports adoption of the rules at this time.

VOICE VOTE: Motion carried. 7 ayes; 0 nays; 0 absent.

AGENDA ITEM NO. 7

CONTESTED CASE AND RULE DOCKET STATUS REPORT

- a. Hecla Mining Company v. DEQ, Docket No. 0102-03-13, Scheduling of Idaho Conservation League's Request for Expedited Review

Paula Gradwohl reviewed the contested case and rule docket status reports. The Idaho Conservation League (ICL) filed a petition to intervene in Hecla Mining Company's appeal of DEQ's 401 water quality certification of Hecla's NPDES permit for the Lucky Friday Mine. The petition to intervene was denied by the hearing officer, and ICL has appealed that decision to the Board and requested an expedited review.

Chairman Paul Agidius stated a policy needs to be determined for how the Board responds to requests for expedited review. There have been discussions in the past, but no process was put in place. Paula Gradwohl explained the current policy for scheduling hearings is to put it on the agenda for the next meeting. If the next meeting is too far out (two months or more), she will request a special Board meeting to hear the matter. If the petitioner files a request for an expedited hearing, a Board meeting is scheduled for the Board to consider the request for an expedited hearing, then a second meeting must be scheduled to hear the appeal. Many times, it turns out the expedited process is only a few days sooner than the regular process.

Don Chisholm suggested the Board schedule a hearing for early March 2004. Board members discussed the legal and procedural issues regarding how requests for expedited hearing should be handled. They felt criteria should be established to determine what qualifies a case to be expedited. There was concern that granting expedited review without specific qualifications would set a precedent and encourage parties to routinely request expedited review. The Board has not had the opportunity to review the brief filed by ICL.

- **MOTION:** Dr. Randy MacMillan moved the Board set the hearing on ICL's request for review of the hearing officer's decision denying intervention in the matter of Hecla Mining Company v. DEQ, Docket No. 0102-03-13 for March 10, 2004 at 10:00 a.m.
SECOND: Dr. Joan Cloonan
DISCUSSION: Chairman Agidius suggested a notice of hearing be sent to the parties stating that oral argument can be scheduled if requested by the parties.
VOICE VOTE: Motion carried. 7 ayes; 0 nays; 0 absent.

AGENDA ITEM NO. 8: CONSIDERATION OF HEARING OFFICER APPLICATIONS FOR BOARD APPROVAL

Paula Gradwhol presented applications from three attorneys from the Boise law firm of Eberharter-Maki & Tappen. Board members were supplied with resumes for the applicants.

- **MOTION:** Marguerite McLaughlin moved the Board approve the addition of Diane Tappen, Roseanne Hardin, and Elaine Eberharter-Maki to the hearing officer list.
SECOND: Craig Harlen
VOICE VOTE: Motion carried. 7 ayes; 0 nays; 0 absent.

The meeting adjourned at 4:45 p.m.

/S/

Paul C. Agidius, Chairman

/S/

Dr. Joan Cloonan, Secretary

/S/

Debra L. Cline, Management Assistant and Recorder