



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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MINUTES

August 5, 2004

The Board of Environmental Quality convened on August 5, 2004 at 9 a.m.
at:

**Holiday Inn
Jasper Room
1399 Bench Road
Pocatello, Idaho**

ROLL CALL

BOARD MEMBERS PRESENT

Paul C. Agdius, Chairman
Dr. John R. MacMillan, Vice-chairman
Dr. Joan Cloonan, Secretary
Donald J. Chisholm, Member
Craig Harlen, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT

Marguerite McLaughlin, Member

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Toni Hardesty, Director
Jon Sandoval, Chief of Staff
Martin Bauer, Administrator, Air Quality Division
Barry Burnell, Administrator, Water Quality Division
Jess Byrne, Interagency Affairs
Debra Cline, Management Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Mark Dietrich, Administrator, Pocatello Region
Orville Green, Administrator, Waste & Remediation Division
Harriet Hensley, Deputy Attorney General
Tom Hepworth, Wastewater Land Application Coordinator
Stephanie Ebright, Deputy Attorney General
John Kirkpatrick, Engineering Manager, Pocatello Region

OTHERS PRESENT:

Shelby & Aaron Gepford, citizens
Rob Hartman, FMC
M. B. Hinman, North Wind Inc.
Representative Elmer Martinez, Idaho House of Representatives, Dist. 29
Mark Masarik, U.S. Environmental Protection Agency (“EPA”), Boise
Linda Meyer, U.S. EPA, Seattle
Susan Skinner, U.S. EPA, Pocatello
Representative Elaine Smith, Idaho House of Representatives, Dist. 30
Betty & Dale Young, Young’s Septic Service (“Young’s”)
Linda Young, Young’s
Randy Young, Young’s

- ❖ 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.

AGENDA ITEM NO. 1: **CONTESTED CASE HEARING, YOUNG’S SEPTIC SERVICE V. DEQ, DOCKET NO. 0115-03-17, ORAL ARGUMENT ON PETITION FOR REVIEW OF PRELIMINARY ORDER FILED BY YOUNG’S SEPTIC SERVICE**

NOTE: A full transcript of the hearing is available from the DEQ hearing coordinator’s office. Contact Paula Wilson at (208) 373-0418.

Chairman Agidius stated the Board was prepared to hear oral argument in the matter. Each side was allowed 30 minutes to present oral argument.

Appearances

- Margaret Hinman, North Wind, Inc., appeared on behalf of the Petitioner, Young’s Septic Service (“Young’s”).
- Stephanie Ebright, Deputy Attorney General, appeared on behalf of Respondent, Idaho Department of Environmental Quality (“DEQ”).

Margaret Hinman stated Young’s is appealing the hearing officer’s Preliminary Order granting DEQ’s Motion for Summary Judgment and dismissing Young’s appeal of their application to land apply domestic septage on their property. She argued that Young’s were in compliance with federal law and the guidance did not provide sufficient authority to provide requirements for setbacks. She asserted that the guidance does not rise to the level of state law, and the application of the guidance to deny approval was wrong. She also asserted the guidance was more stringent than federal law.

Ms. Hinman asked the Board to reconsider the hearing officer’s decision and send the matter back to the Pocatello Regional Office with instructions that the guidance cannot be applied in such a manner that it is elevated to a rule. The guidance has not undergone public review or the rulemaking process. However, in recent months guidance on solid waste disposal has been developed and is being circulated for public comment.

Stephanie Ebright asked the Board to uphold the hearing officer's decision and finding that DEQ was using its guidance documents in accordance with law. She also defended DEQ's request that Young's perform certain tests to confirm that their method of land application would not harm the public health or environment. Young's asserted that the requested tests would cost at least \$50,000 and were cost-prohibitive. They believed it should not be necessary because they have been following this procedure of land application for many years and there has never been any proof of risk to public health or the environment, so none should be expected.

The floor was opened to questions from Board members. Harriet Hensley, Board counsel, noted that one question, which was outside the scope of this proceeding, that should be addressed at some point was whether DEQ could balance cost versus environmental concerns.

- **MOTION:** Dr. MacMillan moved the Board go into executive session as authorized under Idaho Code § 67-2345(f) to consider and advise and seek advice from its legal counsel in pending litigation.
SECOND: Dr. Joan Cloonan
ROLL CALL VOTE: Motion carried. 6 ayes (Chisholm, Cloonan, Harlen, MacMillan, Purdy, and Agidius), 0 nays, 1 absent (McLaughlin).

The meeting room was cleared at 10:10 a.m. of everyone except Board members, Harriet Hensley, and the Board assistant.

- **MOTION:** Dr. MacMillan moved the Board go out of executive session to begin deliberation.
SECOND: Dr. Joan Cloonan
ROLL CALL VOTE: Motion carried. 6 ayes (Chisholm, Cloonan, Harlen, MacMillan, Purdy, and Agidius), 0 nays, 1 absent (McLaughlin).

The public meeting reconvened at 10:30 a.m. Chairman Agidius opened the floor to deliberation. He noted that Mr. Randy Young had indicated on the meeting sign-in sheet that he wished to present testimony. He explained the decision before the Board was required to be based upon information that was in the record when the hearing officer made his decision, so no additional testimony could be accepted at this time.

Don Chisholm observed that DEQ may want to develop comprehensive regulations that would allow a permit for more than one year to allow septage disposal businesses such as Young's to operate with more certainty. Dr. Cloonan commented that it may be worth looking at five-year permits, but noted such permits usually require a much more rigorous application process in terms of the information that is required.

Board members discussed the three issues alleged in the petition: 1) that Young's application should be considered on the basis of federal law only, and state law should not apply; 2) that DEQ violated its statutory authority by attempting to enforce state regulations in a manner more stringent than federal law; and 3) that DEQ's implementation of the rules and guidance was arbitrary and capricious.

- **MOTION:** Nick Purdy moved the Board uphold the hearing officer's decision and find that the hearing officer correctly granted DEQ's motion; that he correctly found that DEQ may consider federal and state law in deciding whether to approve Young's site; that DEQ did not

violate Idaho Code §39-107(d) regarding stringency, and that DEQ's implementation of DEQ rules and guidance was not arbitrary and capricious.

SECOND: Dr. Joan Cloonan

MOTION TO AMEND: Don Chisholm moved to amend the motion by adding a fourth reason; that Young's did not have a substantial property right in their renewable one-year permit, and therefore, DEQ did not deny them property rights without due process of law and just compensation.

DISCUSSION: Craig Harlen thought the motion to amend was outside the record and should not be addressed in the hearing. Harriet Hensley advised that the issue of property interests was not reached in the original petition for review due to lack of evidence in the records. While it would be helpful to address the matter in the order, the board need not reach the issue or a decision about whether or not there was a property interest in those permits.

MOTION TO AMEND DIED FOR LACK OF SECOND.

Chairman Agidius asked for assurance that the original motion addressed all of the hearing officer's decisions and would allow Ms. Hensley enough latitude to draft an order reflecting the agreements reached by the Board during discussion and include discussions of property rights and retroactivity. Ms. Hensley stated she had received adequate guidance to draft an order that will reflect the decisions made by the Board.

ROLL CALL VOTE: Motion carried. 6 Ayes (Chisholm, Cloonan, Harlen, MacMillan, Purdy, and Agidius); 0 Nay; 1 Absent (McLaughlin).

Chairman Agidius stated Ms. Hensley would work with the Board to prepare the order and it would be distributed to the parties at a later date. The hearing concluded at 11:25 a.m.

AGENDA ITEM NO. 2: PUBLIC COMMENT PERIOD

Randy Young addressed the Board regarding how DEQ applies the guidance for the rules governing wastewater land application. He observed that as long as the guidance does not progress to the level of law, it seems to have the silent power to do whatever it wants and does not fall under Idaho Code § 39-107(d) because it is not law. He questioned how DEQ developed the guidance and what data was used to come up with the assumptions used in the guidance. He pointed out that his business was shut down without any proof, but to start back up, they must show proof. There were no water tests or soil tests performed to show that their (Young's) land application process was an imminent threat to public health or the environment. He commented the guidance, although it is not supposed to have the force of law, seems to be more powerful than law. He asked what action would have been taken against him if he had ignored DEQ's order to quit land applying septage to his property. Would he have been arrested, and if so, what would be the charge? Can a person be charged for not obeying guidance?

Mr. Young pointed out that a developer was recently approved to build a residential subdivision right across the street from the property where Young's land applied the septage. The Health Department gave approval to the project. The developer will build five homes with septic systems on four acres of land. The septic systems will each drain off 250 gallons of wastewater and dissolved sewage per day. This totals 1,250 gallons per day – the same amount averaged by Young's in their land application process. He questioned why it was okay to pump the septage eight foot into the ground, when he was prohibited from land applying the same amount of septage to the ground on the same amount of land and disking it in.

Chairman Agidius thanked Mr. Young for his comments, saying he had brought some good questions to the table. The Board will follow up on them.

AGENDA ITEM NO. 3: ADOPTION OF JUNE 24, 2004 BOARD MINUTES

- **MOTION:** Dr. Joan Cloonan moved the Board approve the June 24, 2004 minutes as presented with the correction of two minor typographical errors.
SECOND: Craig Harlen
VOICE VOTE: Motion carried. 6 ayes; 0 nay; 1 absent (McLaughlin).

Dr. Cloonan suggested it would be helpful to highlight action items in the minutes. Nick Purdy agreed that a system was needed to make sure there is follow-up on action items. Board members concurred and directed the Board's management assistant to make note of action items by highlighting the text or creating a reference list within the Board minutes.

AGENDA ITEM NO. 4: ELECTION OF OFFICERS

- **MOTION:** Dr. Joan Cloonan nominated Dr. Randy MacMillan as chairman.
SECOND: Paul Agidius
VOICE VOTE: Motion carried. 6 ayes; 0 nay; 1 absent (McLaughlin).
- **MOTION:** Nick Purdy nominated Dr. Joan Cloonan as vice-chairman.
SECOND: Paul Agidius
VOICE VOTE: Motion carried. 6 ayes; 0 nay; 1 absent (McLaughlin).
- **MOTION:** Paul Agidius moved the Board elect Craig Harlen as secretary.
SECOND: Nick Purdy
VOICE VOTE: Motion carried. 6 ayes; 0 nay; 1 absent (McLaughlin).

AGENDA ITEM NO. 5: DIRECTOR'S REPORT

Toni Hardesty announced that Barry Burnell had been appointed as the new administrator of the DEQ Water Quality Division.

Director Hardesty updated the Board on environmental issues in the Coeur d'Alene Basin. The draft Coeur d'Alene Lake Management Plan was submitted to the Coeur d'Alene Tribe and the counties for comment. The Tribe is not interested in signing the plan until a funding mechanism has been found. Congressional appropriations, EPA funding, and state funding are being explored as possible sources.

As part of the Coeur d'Alene Basin Commission ("Commission"), DEQ received a grant from EPA to fund an executive director and a clerical support position. This will be a new operational unit within DEQ; however, the executive director will report directly to the Commission. Seven candidates for the executive director position will be interviewed by the Commission on August 16, 2004.

Yard cleanup continues in the Silver Valley communities. The Superfund money for this project is drying up, and the Commission is working with communities and the Technical Review Team to optimize funding sources.

The Department of Energy is moving forward with the selection process to pick a contractor to perform cleanup at INEEL.

TMDLs continue to be developed throughout all the watersheds. Director Hardesty recently met with the Basin Advisory Group (“BAG”) chairmen. At this time there is adequate funding for all the 319 projects, but the chairmen did vote to prioritize the projects within their geographical areas in the event funding is reduced.

Director Hardesty reported a bus diesel engine idling project is being implemented as a pilot project at Timberline High School. The purpose of the project is to educate students about the impacts of idling vehicles on air quality. The students then raise awareness in their parents by asking them to sign a contract to comply with the guidelines of the project by reducing idling.

An ozone PM 2.5 Treasure Valley saturation sampling project is being conducted to collect data to learn whether DEQ’s monitors are located in the spots that have the highest ozone levels.

Director Hardesty informed the Board of an emerging issue in water quality. Development is occurring on 303d listed streams that have a TMDL in place. As land use changes and agricultural fields are sold to developers, new environmental concerns are occurring. In some cases developers want to put in a large number of homes with individual septic systems. These systems would then release nutrients and phosphorus into streams that are already allocated as part of the TMDL process. There can also be impacts to the groundwater. DEQ is working with developers to inform them of the problem and offer options such as mitigation and connecting to sewer systems. DEQ will rely on the TMDL process and the water quality standards as a mechanism to solve the problem.

Doug Conde discussed the authorities of the TMDL process and water quality standards and how they could be utilized to deal with the problem. He added that another component was the county zoning process. He thought the zoning process could be used much more to address this problem. Don Chisholm asked how the counties could be encouraged to use the zoning process to consider the impact of development on currently impaired water bodies and those that might become impaired with new development.

Paul Agidius asked if the issue of development could be addressed in the TMDL implementation plans. Director Hardesty discussed the challenge of accommodating growth and new development on impaired water bodies. DEQ is looking for ways to deal with this issue. Unfortunately, the watershed advisory groups who are working on the TMDLs are all being tasked to reduce, so asking them to accommodate and take a bigger reduction for future development or industry, is going to be a hard idea to sell.

Don Chisholm was concerned that local zoning authorities were more focused on economical growth and development, and the environmental situation would fall further and further behind.

Chairman MacMillan wondered whether DEQ had sufficient regulatory authority to ensure the TMDL plans are put into place. Dr. Cloonan pointed out that the Idaho Legislature approved the Groundwater Plan six years ago. The plan has the “force and effect of law” and has tools regarding groundwater, surface water and the interconnection of the two. It also discusses planning and working with local units of government. She thought the Groundwater Plan might provide some tools that have not been put in place yet. Doug Conde said DEQ looked at how to implement the Groundwater Plan. It contains good policy statements and some

specific direction to DEQ to develop the Groundwater Quality Rule. However, it would be difficult to enforce the policy statements in the Plan. The statements are not made in mandatory or regulatory language. The Plan contains excellent language that reflects state policy of the legislature. It says the state should work with local government and that the groundwater/surface water connection should be evaluated, but there is no specific mechanism to enforce it.

Dr. Cloonan agreed the Plan was not written as an enforceable regulation, but believed there were pieces of the Plan that could be used to direct further agency action. She suggested the Plan be posted on the DEQ website to make it more visible and accessible to local government and the public.

Jon Sandoval reported he had been working with Senator Hal Bunderson, Co-chair of the Joint Legislative Environmental Common Sense Committee (“ECSC”), on land use planning. The Committee appointed a subcommittee about a year ago to look at how infrastructure is built and supported and how we look at fence lines in the growing communities across Idaho. There are a number of conflicts when it comes to sharing resources and protecting groundwater, as well as trying fit all these issues into the Land Use Planning Act. The subcommittee recently agreed on the need to separate a number of issues:

- 1) The Land Use Planning Act needs to be debated and decided between cities and county government.
- 2) A regional authority is needed so development in rural parts of the county can come together with urban planning to take advantage of existing infrastructures and public conveyance systems.
- 3) Tools within DEQ (such as the Groundwater Plan) need to be more available to developers and other agencies who are trying to implement how development occurs.

Mr. Sandoval added that resolving the Land Use Planning Act issues will be a very difficult and complex process. He will update the Board on the actions of the subcommittee.

Director Hardesty reported the issue of whether Idaho should seek primacy of the NPDES program continues to be debated among the regulated community. The Joint Legislative Environmental Common Sense Committee has taken the matter up for evaluation and recommendations. They hope to identify the kind of information that will be needed to make the decision as to whether they want to move forward with primacy in the coming legislative year. It will likely be 2006 before legislation could be brought forward. The committee may make a recommendation during the 2005 legislative session for funding so DEQ can hire one or two FTEs to work on the issue and develop rules and legislation.

Director Hardesty opened the floor to discussion of ways the Board can work with DEQ and bring the concerns and comments of the public forward. Chairman MacMillan stated the Board’s first concern was to not only fulfill the statutory requirements of the Board, but also to foster good environmental quality in the state by working with DEQ, stakeholders, and the communities. The Board will constantly seek feedback from Director Hardesty, the public, and certainly the legislature.

Dr. Cloonan asked Director Hardesty what the Board could do to help DEQ. In the past, the Board attended planning sessions for a long-term strategic plan for DEQ. The meetings were mostly brainstorming sessions with DEQ planning staff. She felt the Board could provide a

different variety of input for future planning efforts when DEQ is ready to take the matter up again.

Craig Harlen commented it was clear during his confirmation hearing before the Senate Health & Welfare Committee that the senators encouraged Board members to be available to, and be a sounding board for, all phases of the regulated community. He felt it was important to be able to bring issues to DEQ from all stakeholders in an open, honest and cooperative forum. He believed that was one of the reasons he was appointed and approved, and takes that direction very much to heart.

Director Hardesty stated she would continue to think about these issues. She welcomed Board members to contact DEQ if there is particular information they would like DEQ to share during board meetings.

Nick Purdy suggested the Board become more active in helping DEQ during the legislative session. He thought it would be valuable to have one or two members attend legislative hearings.

Chairman MacMillan recognized and welcomed Representatives Elaine Smith and Elmer Martinez and thanked them for attending the meeting.

AGENDA ITEM NO. 6: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Doug Conde, Deputy Attorney General, briefly updated the Board on several contested case issues. He suggested a possible change to the Board's contested case process regarding appeals. He has been researching various states' and federal regulations to learn how their administrative appeal process works. The Board may want to change its appeal process so that an appeal would be a record review. In other words, it would be based only on the information DEQ had in front of it at the time it made a decision on a permit. He will continue to gather the information and report his findings to the Board at the next meeting.

AGENDA ITEM NO. 7: REPORT ON THE REDEVELOPMENT OF THE CLOSED FMC SITE

Ray Burstedt, Chairman of the Idaho Optimum Initiative ("Initiative"), was appointed by Governor Dirk Kempthorne for this economic development task to create a productive future for the former FMC Corporation elemental phosphate manufacturing facility near Pocatello. The Initiative hopes to develop new jobs for Bannock and Power Counties, new markets for Idaho commodities, and a new life for an important industrial site. The Initiative is made up of a large number of local officials and legislators, representatives from the Shoshone Bannock Tribe, state and federal agencies, and other experts.

Mr. Burstedt explained that a screening matrix will be developed to consider the four major impacts to the area—economic, environmental, cultural, and health and safety—to grade proposed industries. A master plan will then be developed and the site will be target-marketed to selected industries.

Some demolition is taking place at the site. All contaminated materials, such as asbestos, have been removed from the inside of the buildings. The Initiative hopes to preserve the \$55 million dollar infrastructure (rail, water, and electrical) for the best economic development options. FMC has agreed to leave it in place until 2006. Mr. Burstedt estimated the Initiative

was about six months away from implementation of development of the master plan. They hope to have the master plan written and in place by July 1, 2005. He emphasized the outstanding cooperation and support of the FMC Corporation, EPA, and the Shoshone Bannock Tribe.

Susan Skinner, EPA Pocatello Office, discussed the grant program, One Clean-up, that provided some funding for the Initiative. She distributed charts showing the schedule for Supplemental Remedial Investigation and Supplemental Feasibility Study, RCRA WMU Status, and Plant Decommissioning Status for the FMC site (Attachment 1). Ms. Skinner and the other members of the EPA team working on the FMC cleanup, Mark Masarik and Linda Meyer, discussed the status of the cleanup.

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

Don Chisholm reported he attended a solvents' workshop conducted by DEQ in Twin Falls. He was impressed with how DEQ is out interacting with the regulated community. DEQ did an excellent job of presenting information to help the regulated community comply with environmental regulations. Mr. Chisholm encouraged other Board members to attend such functions to learn how DEQ operates and interacts with the regulated community.

Paul Agidius discussed the meeting of the BAG chairmen on the 319 grant process. He felt this was one of the best meetings they have ever had because of the productive discussion of the 319 process and how the funds are best spent, how grant proposals are viewed in different parts of the state, and how to prioritize projects. The meeting also discussed last year's legislative attempt to change the BAG/WAG process and the role the BAGs could play to address concerns and prevent such legislation. The chairmen talked about ways DEQ could use the BAGs more effectively and the need to increase communication with DEQ.

Craig Harlen asked Doug Conde for his opinion of the recent Idaho Supreme Court ruling against the field burning proponents in North Idaho. Mr. Conde had not had an opportunity to read the decision and will report back at a future meeting.

The meeting adjourned at 2:00 p.m.

/s/

Paul C. Agidius, Chairman

/s/

Dr. Joan Cloonan, Secretary

/s/

Debra L. Cline, Management Assistant and Recorder

ACTION ITEMS

1. Investigate the question of whether DEQ could balance cost versus environmental concerns when making decisions on permits. (Unassigned).....3
2. DEQ Groundwater Plan to be posted on the DEQ website to make it more visible and accessible to local government and the public. (Suggested by Dr. Cloonan).....7
3. Update on the actions of the ECSC Servicing Communities: Planning for the Future Subcommittee and Land Use Planning Act issues. (Jon Sandoval).....7
4. Report on recommendations regarding a possible change to the contested case appeal process to make an appeal would be a record review. (Doug Conde).....8
5. Discussion on the recent Idaho Supreme Court ruling against the field burning proponents in North Idaho by Doug Conde. (Requested by Craig Harlen).....9