



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

February 23, 2006

The Board of Environmental Quality convened on February 23, 2006 at 9:00 a.m. at:

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

ROLL CALL

BOARD MEMBERS PRESENT

Dr. John R. "Randy" MacMillan, Chairman
Dr. Joan Cloonan, Vice-chairman
Craig Harlen, Secretary (via telephone)
Marti Calabretta, Member
Donald J. Chisholm, 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
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
Orville Green, Administrator, Waste & Remediation Division
Phyllis Heitman, Rules Coordinator, Air Quality Division
William Jerrel, Loan Program Manager
Lisa Kronberg, Deputy Attorney General
Bruce Louks, Monitoring, Modeling, and Emission Inventory Manager, Air
Mike Simon, Stationary Source Program Manager, Air
Tim Wendland, Loan Officer, Water Quality Division
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Carl Ellsworth, City of Boise
Justin Hayes, Idaho Conservation League (ICL)
Dick Rush, Idaho Association of Commerce & Industry (IACI)
Ron Sheffield, University of Idaho
Courtney Washburn, ICL

- ❖ 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. November 16 & 17, 2005 meeting minutes

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt the minutes for the November 16 & 17, 2005 meeting.

SECOND: Marti Calabretta

DISCUSSION: Dr. Cloonan asked if a process could be formalized for adding action items to the minutes when they are not called out during the meeting. She suggested the following items be added for follow-up:

- Update on the CAMR rule and mercury toxicity issues
- Regional Haze Update
- Report on the results of December 5, 2005 hearing on House Bill 230 and Senate Bill 1228 (Air rule No. 58-0101-0503 Regulated Air Pollutants)
- Comparison of DEQ fees to other state's fees
- Review of water temperature issues
- Report on how the new Drinking Water Point of Use Treatment Device Rule is working.

AMENDMENT TO MOTION: Don Chisholm moved the motion be amended to add the action items identified by Dr. Cloonan.

SECOND ON AMENDMENT: Marti Calabretta

VOICE VOTE ON AMENDMENT: Motion carried: 6 ayes; 0 nays; 1 absent.

VOICE VOTE ON AMENDED MOTION: Motion carried. 6 ayes; 0 nays; 1 absent.

- b. Review of Action Items

- 1) Update on actions of the ECSC Servicing Communities Subcommittee

No report was presented. Jon Sandoval will provide an update at the next meeting.

Marti Calabretta stated she was still interested in a briefing on tribal law, sovereignty, issues of treatment as a state (TAS), and tribal regulatory rulemaking authority. The Board needs to understand what outreach is made with the tribes in terms of their rulemaking and how DEQ and the Board interface with the decision makers in the tribes. She thought the Board should

understand how their system is set up, what resources they bring to the task, and if there is a sharing of resources.

Director Toni Hardesty stated the tribal law briefing was scheduled for the Board's June meeting in Coeur d'Alene. She suggested the Board schedule a one-day workshop to cover the issues she has been tracking and the additional action items. It is a fairly lengthy list and will require a significant amount of time and resources. The Board agreed to the suggestion and will work with DEQ staff to schedule the workshop in April or May. The meeting will be open to the public.

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Hardesty provided brief updates on recent legislative actions, budget issues, and NPDES primacy issues. DEQ recently submitted a report to the Idaho Legislature detailing what actions would be needed for Idaho to gain primacy of the NPDES program. The report outlined three different funding scenarios for taking over the program. Discussions are continuing and DEQ is monitoring a number of issues taking place in other states and at the national level. Funding continues to be a major concern.

DEQ and the Department of Health and Welfare have provided several joint presentations to the Legislature on mercury issues. The presentations focused on the mercury advisories that are occurring statewide for some water bodies and the studies DEQ is doing on potential regional and global impacts of mercury.

Director Hardesty briefly discussed the new lower standards for PM_{2.5} and PM₁₀ being proposed by EPA. If the new standards are adopted as proposed, it could result in increased nonattainment areas in Idaho. Based on historical monitoring, the communities that could be impacted include St. Maries, Salmon, Pocatello, Franklin/Preston area, and Boise.

Dr. Cloonan commended Director Hardesty on her budget presentation to the Legislature and noted the committee chairman was quite complimentary of DEQ and its relationship with the Legislature.

AGENDA ITEM NO. 3: RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-0601 (TEMPORARY RULE) (MERCURY CONTAINING EQUIPMENT TREATED AS UNIVERSAL WASTE)

Orville Green, Administrator, Waste Management and Remediation Division, presented this temporary rule to adopt by reference the federal Mercury Containing Equipment Universal Waste Rule. EPA promulgated the rule on August 5, 2005 to add mercury containing equipment to the federal list of universal wastes regulated under the RCRA hazardous waste regulations.

This rule is needed to maintain consistency with EPA's federal regulations implementing RCRA as directed by the Idaho Hazardous Waste Management Act. The rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than federal law. There is no increased cost to the regulated community. The rule simplifies the handling, recycling, and management of mercury containing equipment. Adopting it as a temporary rule will allow Idaho businesses to use the rule a year sooner than the regular rulemaking process would allow.

There were no controversial issues in the rulemaking. Mr. Green clarified the rule applies to equipment that originally contained mercury as an integral part, such as thermostats, thermometers, and pressure gauges. It does not apply to mercury contaminated equipment. The rule is intended to encourage the appropriate handling and disposal of mercury containing equipment by taking it out of the waste stream of municipal landfills and diverting it to RCRA Subtitle C facilities.

Mr. Green responded to Board questions regarding the details of the rule and how the waste will be handled. He explained there will be a public education and outreach component to the process.

➤ **MOTION:** Marti Calabretta moved the Board adopt as temporary rules the Rules and Standards for Hazardous Waste as presented under Docket No. 58-0105-0601 with an effective date of April 5, 2006.

SECOND: Craig Harlen

VOICE VOTE: Motion carried by unanimous vote.

AGENDA ITEM NO. 4: **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,**
DOCKET NO. 58-0101-0502 (TEMPORARY RULE) (RULES FOR THE
CONTROL OF AMMONIA FROM DAIRY FARMS)

Martin Bauer, Administrator, Air Quality Division, explained this rule was initiated by the Idaho Conservation League and the Idaho Dairymen's Association to address permit to construct issues based on the outcome of a lawsuit and court ruling requiring dairies that emit greater than 100 tons per year of emissions to obtain a Permit to Construct. Negotiated rulemaking was conducted and included the ICL, Advocates for the West, the Idaho Dairymen's Association, Idaho Milk Producers, Idaho State Department of Agriculture (ISDA), DEQ and the public.

The rule is expected to affect 40 – 50 dairies, and about half of them will be required to upgrade or install adequate best management practices (BMPs) to be in compliance with the rule. The cost to comply will depend on the type of BMPs needed and the extent and amount of BMPs needed to achieve compliance. The cost will be minimal for some dairies, but may be very expensive for others.

The rule establishes a numeric value for compliance, based on individual numeric values assigned to each BMP. The numeric values of the individual BMPs were discussed, adjusted, and defined without much contention; however, when the overall numeric value of compliance was discussed there was contention from one side that the number was too low, and the other side that the number was too high.

This rule will regulate an activity that is not regulated by the federal government; therefore, Idaho Code § 39-107D, sections 1, 2, 5, and 6 apply. The notice of proposed rulemaking clearly specified that the rule is broader in scope than the federal law. The negotiated rulemaking group reached consensus that the ammonia control numerical point value associated with the various BMPs is based on the best available, peer reviewed science and supporting studies conducted in accordance with sound and objective scientific studies. The rule is based on and establishes requirements for best management practices (BMPs) to limit or control the amount of ammonia emitted from dairies, and does not propose a standard necessary to protect human health and the environment. Therefore, Idaho Code § 39-107D Section 3 and 4 do not apply to this rule.

The federal government is currently involved in amassing information and studies that may eventually result in a regulation of confined animal feeding operations (CAFOs) including dairies, but as of yet, has not developed a rule; therefore, Idaho Code § 39-118B does not apply to this rulemaking.

As part of the settlement of the lawsuit, experts employed by DEQ, ICL, and the Idaho Dairyman's Association agreed on the amount of dairy cows needed to trigger ammonia emissions of 100 tons per year. Ammonia is the air contaminant emitted in the largest quantity from a dairy. This rule addresses only the control of ammonia emissions utilizing BMPs from dairies. It does not address odor or any other air contaminant. As a result of implementing some of the BMPs; however, there will likely be a co-benefit for the control of other air contaminants.

The University of Idaho assisted with the development of the BMPs, and is in the process of finalizing a BMP definition and assumptions document that outlines how the values were assigned to the individual BMPs. This document will go through the University of Idaho peer review process and be published. DEQ will voluntarily put this document out for public comment, and it will be used as a guidance document for this rule. The guidance document will be submitted to the Board when the proposed rule goes before the Board for approval.

Mr. Bauer continued to explain the rule in more detail. Dairies that are subject to this rule must employ BMPs sufficient to total at least 27 points to comply with the rule. The BMPs are listed in the table in Attachment 1 to these minutes. Compliance and compliance assistance will be conducted by the ISDA through a memorandum of understanding with DEQ. The MOU is in the process of being developed. Ultimate enforcement authority will remain with DEQ. This will allow ISDA to work with dairies to attain compliance, but if or when a dairy is recalcitrant in obtaining compliance, the case will be referred to DEQ for enforcement.

The participants in the negotiated rulemaking have agreed to revisit the rule each year for the next three years to review the effectiveness of the rule, any new technologies, the numerical values of the BMPs, new studies or science developed regarding emission factors, and the total compliance value of the rule and make appropriate changes.

Mr. Bauer responded to questions from the Board regarding timeframes, BMPs, and how emissions are determined. Nick Purdy asked if the ISDA inspection reports would be sent to DEQ for monitoring so they could be informed of developing problems. Mr. Bauer stated ISDA will maintain copies of all inspection reports and DEQ will work closely with them to avoid surprises. DEQ had not planned to receive copies of the reports, but that requirement could be added to the MOU. His only concern was that it would create a substantial amount of paperwork and filing. Mr. Purdy thought it would be a good idea for DEQ to monitor the reports for trends so proactive action could be taken before problems developed.

Mr. Purdy asked if there was a way to measure the success of the program and the amount of ammonia emissions reduced by the BMPs. Mr. Bauer replied that compliance with the program could easily be measured by ISDA. As far as determining the success of the program, it was not designed with a specific goal or value in ammonia emissions in mind because it does not set an ambient standard. The rule is strictly designed to implement BMPs that will decrease ammonia emissions.

Don Chisholm noted there was no fee included in the program and asked how the cost of implementing the program would be funded. Mr. Bauer explained this Permit by Rule program will generate very little work for DEQ because it uses a different process than most permit programs and most of the work will be done by the dairies. The compliance component will be incorporated into existing ISDA activities and no additional expense is expected. A rule change will be needed to exempt this program from the fee requirement in Section 800, and that change will come before the Board before the pending rule is presented for adoption.

Don Chisholm asked for a copy of the explanation of how the stringency rule, Idaho Code § 39-107D, applies to the rule. Mr. Bauer will provide the information to the Board members.

Marti Calabretta stated she supported the rule, but was concerned it might be viewed as simply an effort to pacify complaints from the public because it does not set a standard or have a goal, and there is no funding for oversight. Martin Bauer explained this is not an Idaho-specific issue; it is occurring in all states. EPA is putting a lot of effort into developing the science behind the numbers of the emission factors before they put a rule out. Mr. Bauer believed EPA was very interested in this rule and would look at it closely when they develop their own rule. The intent of this rule is to decrease the amount of ammonia being put into the air. There is no numeric goal for the reduction because there is no standard at this time. It is important to reduce the amount of ammonia in the air because when it mixes with other gases in the air it can cause a PM_{2.5} problem. So this is a proactive rule to try to decrease the amount of non-attainment areas that might develop in the future. It is another tool to address pollutants of concern and deal with non-attainment issues in a proactive way.

Nick Purdy asked for a clarification of the definition of dairy farm. There are feedlots used to fatten up to 50,000 dairy animals (replacement heifers). He asked if the rule would apply to those feedlots. Mr. Bauer explained the rule defines a dairy farm as a one that ships milk for human consumption.

Justin Hayes, Program Director, ICL, testified in support of the rule. They do not think the rule is perfect, and that is why a review process was built into the rule. ICL was hoping for more concrete standards for ammonia either as total emissions or concentrations in the air, but after reviewing existing rules and code and changes the Idaho Legislature made to the code last year, it appears those goals are beyond the reach of this program at this time. The ICL would look very favorably on the Board directing DEQ to establish those sorts of standards. Mr. Hayes looked forward to implementation of the rule and future adjustments to fit the needs of the communities affected by large dairies and to ensure it is a program that can be implemented without being overly burdensome to industry.

Marti Calabretta noted there was no oversight built into the rule and questioned how the reviews could be conducted without data and oversight. Mr. Hayes agreed this was not a perfect component of the rule. This was one of the most contentious issues in the negotiated rulemaking. Industry is very sensitive to additional regulation. ICL will depend on its members and the local communities to gain an informal understanding of whether their needs are being addressed. ICA will also rely on the ISDA and DEQ monitoring and record keeping to ensure BMPs are being met. Mr. Hayes felt this rule was a good faith effort by both sides and they would have to wait and see how it worked.

Don Chisholm asked if ICL was comfortable with the ISDA handling the compliance component of the rule. Mr. Hayes stated while ICL would be more comfortable with DEQ handling all aspects of the rule, they thought it was not a rational request based on staff loads and resources. ICL is much more comfortable with the section of the ISDA that deals with dairy issues than they are with the section that deals with feedlots. ICL's review of the dairy section found a track record that indicates they take their role as regulators much more seriously.

Ron Sheffield, University of Idaho, stated the University is very excited about this program and has worked very closely with the parties through the whole process. He explained the education component of the rule. The ISDA database will be used to identify dairies that will be affected by the rule, and they will receive training on the rule and how to best achieve compliance. The inspectors and technical specialists for the ISDA and private consultants will also receive training on the rule, how to determine compliance, and coordination with compliance with nutrient management plans and other permits they might have. Mr. Sheffield will be monitoring the inspection records and doing an analysis of the costs and benefits of the program.

Mr. Sheffield said EPA has invited him to Washington, DC to discuss the work he has done on this rule and other educational programs he is involved in regarding this issue. He discussed the possibility of a federal standard for ammonia and challenges they will face structuring the rule. He believed the rule before the Board would provide guidance for new dairies being built above and beyond the requirements in the rule. He stressed that although this rule was not designed to address odor, there will be odor benefits if dairies implement the BMPs.

Nick Purdy congratulated the parties for entering into negotiations and accepting compromises to try to develop a solution to a difficult problem.

- **MOTION:** Nick Purdy moved the Board adopt as a temporary rule the Rules for the Control of Air Pollution in Idaho as presented under Docket No. 58-0101-0502 with an effective date of July 1, 2006.
- SECOND:** Don Chisholm
- VOICE VOTE:** Motion carried by unanimous vote.

AGENDA ITEM NO. 5: **IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0601 (PENDING RULE) (POINT OF USE TREATMENT DEVICES)**

Barry Burnell, Administrator, Water Quality Division, stated this rule was approved by the Board as a temporary rule in November 2005. No public comments were received. The rule is needed to allow as much flexibility as possible for small water systems as they deal with the new more stringent arsenic standard. Point of use treatment devices are not appropriate for acute contaminants such as bacterial contaminations or nitrates in community water systems. Mr. Burnell further explained the details of the rule and how the devices will be used. He responded to questions from the Board regarding the cost and maintenance of the devices and what communities might be able to use them.

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the Idaho Rules for Public Drinking Water Systems, as presented in the final proposal under Docket No. 58-0108-0601.
- SECOND:** Marti Calabretta
- VOICE VOTE:** Motion carried by unanimous voice vote.

AGENDA ITEM NO. 6: RULES FOR ADMINISTRATION OF WATER POLLUTION CONTROL LOANS, DOCKET NO. 58-0112-0501 (PENDING RULE) (STATE REVOLVING FUND PROGRAM LOAN FEE)

Barry Burnell presented this rule to provide funding for the administration of the State Revolving Fund (SRF) program. The rule was adopted by the Board as a temporary rule in November 2005. A funding mechanism is needed due to decreasing federal funding. The rule proposes a fee of up to 1% based on the unpaid balance of a loan. The fee will be charged on new loans. The interest rate will be decreased by up to 1%, making the fee fiscally neutral for the loan recipients. As more loans are issued, the percentage charged will decrease so only the actual cost to administer the program will be collected. Negotiated rulemaking was conducted and no adverse comments were received.

After discussions with Don Chisholm, the following change was made: Section c.03. Effect on Loan Interest Rate. The loan interest rate, as described in Subsection 050.05, will be reduced by the ~~amount~~ **corresponding percentage** of the loan fee. The revised wording more accurately reflects how the process will work.

Dr. Cloonan asked if EPA was satisfied with the funding mechanism. Mr. Burnell stated EPA auditors had reviewed the matter and their recommendation was that DEQ adopt a loan fee. They had no adverse comments on the process.

Don Chisholm was concerned about the language in Section 032.02 regarding the determination of the loan fee. He suggested the wording “. . . on all loan interest payments to be received during any one fiscal year” be added. Mr. Chisholm was concerned the existing language would result in lower revenue in certain situations, such as when a loan is prepaid. Board members discussed the suggested change with staff and determined the language should not be revised.

Paula Wilson advised the temporary rule would need to be revised with the same changes as the proposed rule.

➤ **MOTION:** Marti Calabretta moved the Board adopt the Rules for Administration of Water Pollution Control Loans, as presented in the final proposal under Docket No. 58-0112-0501 and revised at Subsection 032.03. She further moved the Board adopt the revision included in the final proposal as an amendment to the previously adopted temporary rules, with the amendment becoming effective February 24, 2006.

SECOND: Dr. Joan Cloonan

DISCUSSION: Don Chisholm asked if the protocol DEQ writes for the rule would include a provision that states the remaining loan fee will be forgiven in the event of a prepayment. Barry Burnell thought it would be part of the policy statement for the interest rate.

VOICE VOTE: Motion carried unanimously.

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

Paula Wilson briefly reviewed the contested case report. A new case was filed in late December by Rick Oneida to petition for review of DEQ’s proposed revocation of the site approval for a landfill located in Lincoln County. A petition to intervene was granted to Senator Clint Stennett.

A joint motion to stay the case was also granted; however, a prehearing conference is planned for March.

Ms. Wilson announced the rulemaking for the regional haze rule will begin in February. She noted the contested case and rule docket status reports are available on the DEQ Web site.

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

Director Hardesty distributed copies of the DEQ JFAC budget presentation. She asked Board members to review their calendars for available dates in April and May so the Board workshop could be scheduled.

Dr. Joan Cloonan discussed a possible change to the honorarium received by Board members. The Board currently receives compensation under Idaho Code § 59-509(h), which provides \$50 per day as salary and includes membership in the Public Employee Retirement System of Idaho (PERSI). As members of PERSI, Board members are not allowed to take a tax deduction for money they put in an individual retirement account (IRA). If the Board were to change its compensation to Idaho Code 59-509(n), the \$50 per day would be strictly an honorarium, not salary, and no taxes would be deducted and they would not be part of PERSI. They would, however, be able to take part in an IRA and take a tax deduction for money they put in an IRA. The Idaho Petroleum Fund is currently pursuing legislation to change their compensation from salary to an honorarium so they will be able to receive tax deductions for their IRA contributions.

Don Chisholm questioned whether the change might have adverse effects on some members and suggested possible options to changing the code. He asked if PERSI would allow board members to invest in the PERSI IRA or 401K account in lieu of individual IRA accounts. Marti Calabretta asked about other implications of changing the code. If board members are not considered employees, will it affect liability and insurance coverage? Doug Conde believed that in terms of liability, it would not matter whether board members received salary and were considered employees or simply received an honorarium, they would still be part of a state agency and would be covered by the State Insurance Fund and the Idaho Tort Claims Act.

Director Hardesty said staff will follow-up with the Department of Administration to answer some of the questions raised by Board members. She noted it may be too late in the legislative session to make any changes this year. Dr. Cloonan and Mr. Chisholm will contact PERSI to discuss possible options.

Dr. Cloonan mentioned EPA has just published the latest national Air Toxics Assessment on the Internet. The assessment shows air toxics county-by-county for the whole country.

Don Chisholm reported he attended a presentation in Twin Falls on the Regional Haze issue. He thought the matter looked like a major undertaking with questionable results. He asked how DEQ was budgeting this very expensive program. Director Hardesty replied DEQ is funding the current rulemaking effort with its existing staff. At this point in time, it is not known what kind of resources will be required of the agency in the future. The long-term financial impact to DEQ will not be known until the rulemaking process proceeds and they get a better idea of the resources that will be required of the agency.

The meeting adjourned at 11:50 a.m.

/s/

Dr. John R. MacMillan, Chairman

/s/

Craig Harlen, Secretary

/s/

Debra L. Cline, Management Assistant and Recorder

ACTION ITEMS

1. Update on the actions of the ECSC Servicing Communities: Planning for the Future Subcommittee and Land Use Planning Act issues. (Jon Sandoval)
2. Update on the CAMR rule and mercury toxicity issues
3. Regional Haze Update
4. Report on the results of December 5, 2005 hearing on House Bill 230 and Senate Bill 1228 (Air rule No. 58-0101-0503 Regulated Air Pollutants)
5. Comparison of DEQ fees to other state's fees
6. Review of water temperature issues
7. Report on how the new Drinking Water Point of Use Treatment Device Rule is working.