



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
June 22, 2006

The Board of Environmental Quality convened on June 22, 2006 at 8:30 a.m.
at:

**Best Western Coeur d'Alene Inn
Conference Center
506 W. Appleway Avenue
Coeur d'Alene, Idaho**

ROLL CALL

BOARD MEMBERS PRESENT

Dr. John R. "Randy" MacMillan, Chairman
Dr. Joan Cloonan, Vice-chairman
Craig Harlen, Secretary
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, Administrator, Environmental Management
& Information Division
Martin Bauer, Administrator, Air Quality Division
Barry Burnell, Administrator, Water Quality Division
Jess Byrne, Interagency Affairs
Debra Cline, Management Assistant to the Board
Douglas Conde, Deputy Attorney General
Curt Fransen, Deputy Attorney General
Gwen Fransen, Administrator, Coeur d'Alene Region Office
Orville Green, Administrator, Waste Management & Remediation Division
Lisa Kronberg, Deputy Attorney General
Glen Rothrock, Watershed Coordinator, Coeur d'Alene Region
Robert Steed, Water Quality Technical Lead, Coeur d'Alene Region
Mark Stromberg, Coeur d'Alene Basin Project Manager, Kellogg Office
Ed Tulloch, Water Quality Manager, Coeur d'Alene Region
Tim Wendland, Grants and Loans Officer
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Honorable James E. Risch, Governor of Idaho
Representative Sharon Block, Idaho House of Representatives, District 24
Neil Colwell, Avista Corporation
Bill Eddie, Advocates for the West
Senator John Goedde, Idaho State Senate, District 4
Rog Hardy, Citizen
Toni Hardy, Citizen
Justin Hayes, Idaho Conservation League (ICL)
Carla Lundwig, Hecla Mining
Hank Nelson, Avista Corporation
Dick Rush, Idaho Association of Commerce & Industry (IACI)
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 MINUTES

a. February 23, 2006

- **MOTION:** Nick Purdy moved the Board adopt the February 23, 2006 meeting minutes as presented.
SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion carried. 6 ayes; 0 nays; 1 absent.

b. April 25, 2006

- **MOTION:** Don Chisholm moved the Board adopt the April 25, 2006 meeting minutes as presented.
SECOND: Marti Calabretta
VOICE VOTE: Motion carried. 6 ayes; 0 nays; 1 absent.

c. Review of Action Items

Jon Sandoval reported the Environmental Common Sense Committee's Land Use Planning Subcommittee has not met recently, so no update is available at this time.

All other action items were addressed at the April Board meeting.

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Toni Hardesty updated the Board on the air permit streamlining program initiative that DEQ is conducting to improve the efficiency and timeline for issuing air permits. Two additional engineers have been hired to help with the workload. Other issues being reviewed

include looking at expanding permit-by-rule and general permit opportunities and internal efficiencies. Internal listening sessions are being conducted to gather input from DEQ staff on ways to improve the process. External listening sessions will be conducted soon with stakeholders. A consultant that specializes in process improvement will be hired to work with DEQ on the project. DEQ plans to have a streamlined permit program in place by December 2006.

DEQ is working on an initiative passed by the Idaho Legislature last session to look at when, where, and how it makes sense to promote regionalization of wastewater facilities. DEQ will meet with interested parties throughout the state to take comment on the issue and will submit a report with its recommendations to the legislature in January 2007.

A new federal energy bill requires states to administer both parts of the underground storage tank program (the preventative program and the program to address leaking underground storage tanks) in order to have primacy. Currently, Idaho administers only the portion dealing with leaking underground storage tanks. To maintain primacy of the program, Idaho will have to develop a preventative program. DEQ is working with EPA to get grant money to assume primacy of the underground storage tank program. DEQ sent letters to all underground storage tank owners and will meet with them to explain the new regulations and discuss primacy. Letters were also sent to all Idaho legislators to update them on this issue.

Director Hardesty reported the memorandum of understanding for dairy water quality between DEQ, the Department of Agriculture, EPA, and the dairy industry is due to expire. A meeting was held with the parties, and it was agreed the MOU would be extended as is for six months, but should probably be changed at the end of that time. There is some confusion with the public regarding who is in charge of what. Another issue needing discussion is third-party land application of waste, which is currently not regulated.

AGENDA ITEM NO. 3: FY2007 STATE WASTEWATER LOAN PRIORITY LIST

Bill Jerrel, DEQ Loan Program Manager, presented the Fiscal Year 2007 State Wastewater Loan Priority List, Wastewater Planning Grant Priority List, Drinking Water Loan Priority List, and Drinking Water Planning Grant Priority List for the Board's approval. He explained the priority selection process used by the DEQ Loan and Grant Program and briefly reviewed the comments received on the lists.

Marti Calabretta asked if any of the projects on the lists would be using reclaimed wastewater or if any such projects are expected in the future. Mr. Jerrel replied there were not any on the lists, but it is possible with the new technology for wastewater treatment. Ms. Calabretta wondered if it would be helpful to have some kind of incentive through the loan program to encourage the reuse and conservation of water. Mr. Jerrel agreed this was an option the loan program should consider and believed there would be some projects in the future interested in taking advantage of such a program. The question would be how to rank the priority of such a project against one that has a serious problem with an NPDES permit or TMDL compliance.

Ms. Calabretta voiced her support for further investigation into how Idaho could be proactive and do its part in reclaiming water for reuse. She suggested an action item for DEQ staff to investigate whether it makes sense to provide incentives or encouragement for wastewater reuse for projects through the grant and loan program.

Dr. Joan Cloonan commented this topic fits in well with the wastewater regionalization discussion. There are two directions to go: the larger regional wastewater treatment or the smaller high-tech systems. She believes there is a lot of potential in the new technology and feels this is a good topic to consider in conjunction with the regionalization issue.

Director Hardesty agreed the question of adding incentives or encouragement for wastewater reuse in the loan and grant program fits in well with the discussions taking place regarding regionalization of wastewater. She feels the action item could be addressed in conjunction with the initiative on regionalization of wastewater facilities and asked that the timeline for the action item be set to correspond with the DEQ report to the legislature in January 2007.

- **MOTION:** Dr. Cloonan moved the Board approve the FY2007 State Wastewater Loan Priority List as presented by DEQ.
SECOND: Marti Calabretta
VOICE VOTE: Motion carried. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 4: FY2007 STATE WASTEWATER PLANNING GRANT PRIORITY LIST

- **MOTION:** Dr. Cloonan moved the Board approve the FY2007 State Wastewater Planning Grant Priority List as presented by DEQ.
SECOND: Craig Harlen
VOICE VOTE: Motion carried. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 5: FY2007 STATE DRINKING WATER LOAN PRIORITY LIST

- **MOTION:** Dr. Cloonan moved the Board approve the FY2007 State Drinking Water Loan Priority List as presented by DEQ.
SECOND: Nick Purdy
VOICE VOTE: Motion carried. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 6: FY2007 STATE DRINKING WATER PLANNING GRANT PRIORITY LIST

- **MOTION:** Dr. Cloonan moved the Board approve the FY2007 Drinking Water Planning Grant Priority List as presented by DEQ.
SECOND: Nick Purdy
VOICE VOTE: Motion carried. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 7: INDIAN LAW PRESENTATION

Curt Fransen, Deputy Attorney General, presented an overview of Indian law and how it interacts with state and federal laws. He reviewed the history of Indian law and how environmental policy on the reservations has changed over the last 200 years. Mr. Fransen discussed jurisdiction and treatment as a state (TAS) issues.

Chairman MacMillan asked about any current conflicts between the tribes and Idaho citizens. Mr. Fransen replied he did not understand all the concerns, but stated the recent action by EPA granting TAS status to the Coeur d'Alene Tribe had raised questions and concerns about how the stricter standards of the Tribe would affect TMDLs on upstream bodies of water.

Toni Hardy, a private citizen whose family owns lands on the reservation that were homesteaded, testified regarding her concerns about a number of issues on the Coeur d'Alene and Nez Perce reservations. She believes preferential and exceptional treatment has been given to the tribes to the detriment and exclusion of the rights of the private landowners, and these issues have become ripe for litigation. She commented the TAS issue was pushed through without public knowledge, and there were many unanswered questions. She thinks the checkerboard ownership of the lands on the reservation make it a poor candidate for TAS. She feels the concerns of the private landowners are not being addressed by the state or federal agencies. Ms. Hardy offered to meet with the Board to present her documentation.

Rog Hardy, private citizen and practicing geologist, testified regarding his concerns about the rights of private land owners on reservation lands. Mr. Hardy is a volunteer appointee from Benewah County to the technical leadership group of the Coeur d'Alene Basin Commission. He believes the conversion of the Union Pacific Railroad right-of-way to a bicycle trail is an issue of real concern because 85% of that property is private property. He also voiced his concerns about the encroachment policy the tribe has issued for the Coeur d'Alene Lake and the dock fees being charged since the Supreme Court decision finding that the federal portion of the lake was held in trust for the tribe. Prior to the court decision, the Idaho Department of Lands administered dock fees and regulations for the entire lake. He asked what document directed the DOL to stop administering the federal portion of the lake, and what document gave the tribe the authority to administer an encroachment program on the lake. He believes the entire lake should have one encroachment policy and one fee schedule.

AGENDA ITEM NO. 8: COEUR D'ALENE LAKE MANAGEMENT PLAN

Glen Rothrock, Watershed Coordinator for the DEQ Coeur d'Alene Region, presented a slideshow on the Chronology of Events for a Coeur d'Alene Lake Management Plan 1991 – 2006 (Attachment 1) and discussed the future challenges for the plan. The primary objective of the plan is to maintain a lake environment that minimizes the potential for remobilization of mining-associated hazardous substances (as well as nitrogen and phosphorus) from lake bed sediments. The goal of DEQ and the Coeur d'Alene Tribe in finalizing and implementing a joint lake management plan is to produce a successful, long-term plan that is developed through community awareness and involvement and results in acceptance of stewardship actions to preserve and protect the lake. One major future challenge is rapid growth and development in the Coeur d'Alene Basin.

AGENDA ITEM NO. 9: IDAHO CONSERVATION LEAGUE'S PETITION FOR INITIATION OF RULEMAKING 58.01.01, RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, (OPTING IDAHO OUT OF THE FEDERAL MERCURY CAP AND TRADE PROGRAM

Governor James E. Risch thanked the Board members for their service to the people of Idaho. He expressed confidence in Director Hardesty and acknowledged the fine job she does keeping him informed.

Governor Risch briefly discussed the background of the federal mercury Cap and Trade program leading up to this decision before the Board. He stated although he has listened closely to the arguments on both sides of the issue, reviewed extensive material, and visited with many people, he is still not ready to make a decision on this very serious matter. The Constitution and statutes of the state vest the supreme executive power of the state in the Governor and also state that the

Governor is the sole official organ of communication between the government of this state and the government of any other state or territory or the United States. He takes this responsibility very seriously and fully understands the importance of this decision for the State of Idaho, particularly in some areas of the state. As a result, Governor Risch asked the Board to put on hold any actions in this matter to give him time to fully study this issue and make a decision that will be the best policy for the State of Idaho. He will be prepared the last week of August or the first day or two of September 2006 to state what the policy of the State of Idaho will be. He asked for the Board's comments and input on the matter.

Don Chisholm asked how the Idaho Legislature fit into this complex decision-making process. Governor Risch agreed it is a complex process involving the different bodies functioning together to formulate policy. He believes the Idaho Legislature is a very good representation of the cross-section of people in the state. According to the Constitution, the power of the state truly rests in the hands of the legislature. However, when the legislature does not act, the matter falls to the executive branch. The Idaho Legislature had the opportunity during the last session to adopt a resolution or statute to act on this matter, but it did not. It now moves to the executive branch for action by the governor, the director, and the board. He envisions making a decision in August to set the policy which will then be carried out by DEQ through rulemaking for adoption by the Board in October.

Dr. Joan Cloonan discussed the rulemaking mechanism and how it could be used to best address the issue. It is a complicated issue, and the timeframes and deadlines involved in the rulemaking process can really pose a challenge. She wondered whether it might be helpful to start the rulemaking process now, without any foregone conclusion as to whether the state would opt in or opt out of the Cap and Trade program, just to begin the process to examine the issues so that the process can be completed within the necessary timeframe.

Governor Risch stated he wanted all the information he could get on the matter and has invited anyone who is interested to submit information. As far as the mechanics of how the Board proceeds, he will leave that to the Board to decide how to best accommodate it. The timetable he proposed was suggested by the director to allow sufficient time for the rulemaking process within the timeframe allowed by EPA. Governor Risch emphasized he wants to act affirmatively, to make a decision one way or another and not allow a decision to be made by default.

Marti Calabretta commented the Board has received a tremendous amount of public input on this issue from one area of the state. She believes the Board has an assertive responsibility and should not fail to take action on issues because it believes the legislature will undo it. She also appreciates the Governor's intent to make a clear stand on the issue. The Board's concerns, collectively and individually, and how they view energy development in Idaho in the future, are one source to consider. Ms. Calabretta noted this is one of the few areas where Idaho is on the top of the list and does not have a problem; a trading program or business development could open the door to new problems.

Governor Risch acknowledged the legislature has reserved for itself the right to have final review and approval of the rules adopted by the Board. He reiterated that in this case, the legislature had the opportunity to make a decision last session and the job now falls to the executive branch. He believes the decision needs to be made based on the best independent judgment without reference to what the legislature might or might not do. The legislature may choose to act on the issue in the future; however, the Governor believes he and the Board should rise to this duty and

do what they have the power and authority to do and move forward. Marti Calabretta thanked Governor Risch for this important clarification.

Don Chisholm asked if the Board would have any discretion after the Governor announced his decision. Governor Risch responded he could not order the Board to do something; the Board should perform its authorized duties. He clarified his intent, as the chief executive of the state, is to set the policy of the state and request the Board to take the appropriate steps necessary to enact that policy. If the Governor and Board make opposite decisions, the court will most likely make the decision as to which has the prevailing authority, or the legislature may step in and take action. He asked the Board members to give him their input for consideration before he makes a decision. The Governor will then fulfill his obligation to set the state policy, and the Board can then fulfill its obligation to review that decision and request and act as it feels appropriate.

Don Chisholm noted the Board could not pass a temporary rule without the Governor's approval and asked how that would factor into the process. If a temporary rule cannot be passed after the Governor issues his decision in September, would that force Idaho into the automatic opt-in provisions of the EPA program? Governor Risch emphasized he thinks it would be more appropriate, either way we go, to take affirmative action and not sit back and just let something happen by default. He stated he has an open mind on this issue and intends to do what is best for the people of Idaho.

Nick Purdy discussed a letter received by Board members from a group of Idaho senators urging the Board to opt out of the mercury Cap and Trade program now, pointing out that Idaho can opt in at a later date if necessary. He asked why this would not be a wise course to follow. The Governor stated, while the Board could initiate the rulemaking now, he is asking them to wait until he has had time to catch up on this issue. He has discussed this matter with many of those senators and intends to speak with them again next week to tell them about his request. He suspects the senators will be receptive to the request he is making to the Board. He again invited Board members to send him their thoughts and comments after the discussion on this issue takes place later in the meeting.

Chairman MacMillan thanked the Governor for his comments and said the Board looks forward to working with him again on this important issue. Governor Risch reiterated his confidence in Director Hardesty and welcomed Board members to contact him directly or through the chairman or director so she can gather the comments for his review.

Governor Risch left the meeting upon completing his testimony.

Chairman Randy MacMillan announced the Board would proceed with the presentation of the petition by the ICL, followed by questions from the Board, a discussion about the rulemaking process by Deputy Attorney General Doug Conde, and public testimony.

Justin Hayes, Program Director, ICL, presented the Petition for Initiation of Rulemaking filed before the Board by the Idaho Conservation League, Citizens Protecting Resources, Idaho Rivers United, Idaho Rural Council, Coalition for Healthy Idaho Communities, Snake River Alliance, Keep Magic Valley Magic, Conservation Voters for Idaho, NW Energy Coalition, Lincoln County Concerned Citizens, Blaine County Citizens for Clean Energy, Idaho Aquaculture Association Inc., ("Petitioners") (Attachment 2). Mr. Hayes stated the Petitioners represent tens of thousands of people from across the state.

Mr. Hayes stated the petition contains two main requests of the Board:

- Request a temporary rule
- Initiate negotiated rulemaking for the temporary rule and negotiated rulemaking with the intent of opting out of the federal Cap and Trade Program.

Mr. Hayes distributed two recent editorials, one from the Idaho Statesman and one from the Times News (Attachment 3). He commented the articles were thoughtful pieces that represent the views of editorial boards with diverse memberships who spent a lot of time reviewing this issue. Both editorials caution rushing into a decision that will affect our environment and quality of life for generations. He added that editorial boards and citizens around the state are looking to the Board for action today.

Mr. Hayes discussed the significant mercury problems already facing the state. The Idaho Department of Health & Welfare has issued mercury-related fish advisories on the American Falls Reservoir, Brownlee Reservoir, C. J. Strike Reservoir, Lake Coeur d'Alene, Lake Lowell, Lake Pend Oreille, Priest Lake, and Salmon Falls Creek Reservoir. The decision the Board chooses to make about the mercury Cap and Trade Program with regard to coal-fired power plant emissions needs to be made in the context of the already existing mercury problem in the state of Idaho. In considering allowing utilities that would increase mercury emissions in Idaho, he urged the Board to consider we are not starting with a blank slate—there is a fairly significant problem already. Every water body in the state that has ever been tested for mercury has demonstrated a need for a fish advisory for mercury. There is probably a need to gather significantly more information in the state about Idaho's current mercury problem. Hopefully, Idaho will not find itself in a position with the Cap and Trade Program where we have foreclosed options and cannot address our mercury problem because we are part of a federal program.

Mr. Hayes feared the Cap and Trade Program could work as a “shell game” moving pollution around and bringing pollution problems from other states into Idaho. He further discussed the effects of mercury pollution, how hot spots are created, how it travels, and how it impacts the local environment. He noted that 16 other states have opted out of the program and are suing the federal government because they think the CAMR rule is seriously flawed in a number of ways and, if it were to go forward, would enshrine a mercury management program across the United States that would actually perpetuate the problem instead of solving it. Their intent is to overturn the CAMR program because they believe its very existence threatens their constituents.

Mr. Hayes continued that the State and Territorial Air Pollution Program Administrators (of which Idaho is a member) and the Association of Local Air Pollution Control Officials have issued a number of reports on the CAMR rule and other options for controlling mercury. They are very critical of the CAMR rule and are urging their members to adopt a more stringent rule that will be more protective. The Office of the Inspector General of the EPA has also issued several reports that are highly critical of the CAMR rule, both of the way it was formulated and the rule itself, and the implications it might have.

In conclusion, Mr. Hayes urged the Board to grant the petition and ask the Governor for a temporary rule. If the Board makes this request during the last week of August, it will be consistent with the Governor's request. He asked the Board to grant the petition and move forward with the rulemaking for this very complicated and controversial issue. He believes it would be a mistake for the Board not to act on this petition that so many groups have put so much effort in. It is incumbent upon the Board to move forward and begin the negotiated rulemaking. If the Governor makes a different decision, it can be addressed through the

rulemaking. Mr. Hayes feels it would be a good idea to follow Dr. Cloonan's suggestion to initiate an "open-ended" rulemaking just to begin the process. He stressed the importance of opting out of the program until more is learned about the unique situation in Idaho. If Idaho opts into the program, it cannot get out. The prudent course of action is to opt out of the program until it is fully understood how it will affect Idaho.

Nick Purdy asked what scientific data was available to support the claim that Idaho has a significant mercury problem. Justin Hayes replied he would be happy to supply additional data on the issue. He gave a presentation to the Board in the past on the mercury monitoring done in Nevada on air emissions coming into Idaho. DEQ has also briefed the Board on this issue. A number of other studies are underway by DEQ, EPA, and others, and hopefully they will provide conclusive information. The fact that there are a significant number of official state advisories by the Department of Health & Welfare cautioning women and children about eating fish caught in Idaho water bodies indicates there are elevated levels of mercury in Idaho. While there is no scientific proof as to the exact cause of the elevated mercury, there is great certainty that we do have a mercury problem.

Dr. Cloonan commented she is struggling with the concept of the program and how everything fits together. She is concerned that since Idaho currently has no coal-fired power plants, it would have a zero ceiling and could not build any in the future. She continued it is her understanding that any new coal-fired power plants would have to meet stringent new source performance standards in addition to being subject to the CAMR rules. Justin Hayes responded one would hope any new coal-fired power plants would be built with best available control technologies; however, it would not be required by EPA. EPA has ruled that coal-fired power plants and the mercury they emit will not be regulated under Section 112 of the Clean Air Act. That has a host of implications, one of them being that dirty coal-fired power plants can still be built in the United States. The new plants will have to meet stringent new source standards for non-mercury pollutants such as SO_x and NO_x, but new plants will not be required to have the new mercury abatement technologies until 2018.

Dr. Cloonan stated she was uncomfortable with an "all or nothing" approach and asked if it would be acceptable to have a state regulation that allowed Idaho to opt into the program but placed restrictions such as strict emission limits, ambient levels, or siting requirements to address hot spots. Mr. Hayes thought that was an excellent idea, and it has been discussed. Most of the states who opted out of the CAMR program have developed their own rules to guide the development and management of new and existing plants. Idaho could opt out now and then take the time needed to develop its own rules to allow it to opt into the program in the future. However, this would take time and could not be done before the EPA deadline in November. The way to create an opportunity for Idaho to develop a unique set of rules that allow for the future development of coal-fired power plants in the state—but not under someone else's rules—would be to opt out.

Dr. Cloonan agreed and thought that made sense, but asked if conversely, Idaho could also opt into the program and then develop its own rules. Mr. Hayes explained if Idaho opted into the program at this time, it would be committing to operate under the existing framework of the CAMR program and would not be allowed to change it. Dr. Cloonan asked for confirmation that if Idaho did opt out of the program, it would be able to opt into the program later. Mr. Hayes said he would be happy to provide the confirmation and some examples.

Craig Harlen agreed with Dr. Cloonan's comments and said he would hate to close the door on a highly efficient, very needed, low-cost, productive coal-fired plant in the state of Idaho that emitted little or no mercury. He is concerned that opting out of the program would put Idaho in the position of having a standard stricter than EPA and asked for a legal opinion on the stringency issue. Mr. Hayes noted that because it is an optional program, opting out is no more stringent; however, if Idaho were to develop its own rules, they might be considered more stringent. The stringency law does not preclude having a more stringent rule; it just requires it to be identified as being more stringent.

Chairman MacMillan asked Doug Conde, Deputy Attorney General, to brief the Board on its options for acting on the petition. Mr. Conde stated it was the Board's decision on what to do with the petition and ultimately, what to do with the rule. The Board serves a legislative function by doing the rulemaking. A legislative function is a creature of the legislature, so that power and authority comes from the legislative action in creating the Environmental Protection and Health Act and the Administrative Procedures Act. Therefore, it is the Board's decision to make today and with whatever rule it chooses to adopt.

Mr. Conde continued that the petition gives two main choices (as set out both in Idaho Code and in the Board's procedural rules): the Board can either deny the petition or initiate rulemaking. The Board cannot fail to act or simply say it is not going to take any action at this time. There are however, a number of different ways the Board could go about granting or denying the petition. The options include:

- Deny the petition completely for various reasons, one of which could be more time is needed to gather information to make a decision on a rule.
- Take action that would be consistent with the petition in one of various forms. The petition asks for a temporary rulemaking and for initiation of negotiated rulemaking. The Board would have to give direction to the DEQ Director to ask the Governor for authorization to proceed with a temporary rule. A temporary rule cannot go forward without the Governor's approval. The temporary rule could be requested immediately or several months from now. Or, the Board could direct DEQ to initiate a negotiated rulemaking as soon as possible, and the end result of that might be a temporary rule.

In summary, Mr. Conde said the Board could grant the petition in a way that would be consistent with the Governor's request to allow him time to make a decision and still have a temporary rule in place in November 2006. He reminded that the Board's rules require a petition to contain a suggestion for how the rule should look; however, the Board does not have to accept the suggestion. The Board can act consistent with the petition and start a negotiated rulemaking starting with opting out, or at any starting point it chooses, including beginning with negotiated rulemaking with no predetermined conclusion. The Board could also begin a regular rulemaking process and have it completed with a rule for adoption in November 2006.

Don Chisholm asked about the timeline for opting out of the program. Lisa Kronberg explained the state has until November 17, 2006, to submit a plan to EPA explaining how Idaho will meet its emissions budget (which is zero for Idaho) and how it will be monitoring and recording its mercury emissions. DEQ has been in discussion with EPA regarding how the state will meet the requirements. DEQ requested an extension of the November 17 deadline to allow more time to work through the issue, but EPA did not respond and has kept the deadline at November 17. DEQ hopes to satisfy the requirements by having a proposed rule in place for the Board to adopt at its November meeting.

Dr. Cloonan asked if the plan submitted to EPA could state that Idaho is temporarily opting out of the program or that it may opt in at a later date. Ms. Kronberg said this question was specifically asked of EPA, and DEQ has verbally been told that it can opt out and then choose to opt into the program at any time. She read a letter from EPA to DEQ Director Toni Hardesty that was written in response to this question stating:

Since the CAMR is implemented through state specific plans, there is no restriction on how a state can revise its plan in the future providing its plan continues to ensure compliance with its budget and otherwise compliance with CAMR. Of course there would be some transition issues the state would need to address to ensure that both sources and EPA would be prepared to shift to a new program, but we do not see any insurmountable issues with respect to such a transition. Please note that we have verified this with the Clean Air and Markets Division at EPA headquarters.

Ms. Kronberg advised that a state can indeed opt out of the CAMR program, take the time to study and develop a specific state program, and then opt into the program at a later date.

Dr. Cloonan asked if there was a chance EPA would change Idaho's budget from zero at some point in the future. Ms. Kronberg stated that was totally outside the realm of this rule because it is a new source performance standard rule. She explained there are two parts to the federal rule: the new source performance standard, which is the emission limit new sources must meet; and the Cap and Trade program, which is the emission budget each state must meet. Idaho is still subject to the new source performance standards no matter what it does regarding the Cap and Trade program.

Board members deliberated the matter at length and questioned many aspects of the federal rule, the options, and how they might affect future sources and the environment in the state.

Dick Rush, Vice-president of Natural Resources, Idaho Association of Commerce and Industry (IACI), testified against the petition (Attachment 4). IACI supports opting into the CAMR Cap and Trade program and believes Idaho needs a consistent supply of affordable electrical energy to fuel its economy and provide jobs for its citizens. Mr. Rush stated opting out of the program would reject a federal EPA program designed to reduce mercury emissions by almost 70% in the United States. Cap and trade programs benefit human health and the environment and address transport by significantly reducing emissions over large geographic areas. The Acid Rain Program has produced outstanding results in reducing emissions. Mr. Rush emphasized the need to keep Idaho's options open and not preclude building energy plants in Idaho in the future. Growth projections are predicting a shortage of electrical power in Idaho within the next ten years or sooner. Because of EPA regulations, the only way Idaho can build a coal-fired electrical plant is for Idaho to participate in the Cap and Trade program. Since Idaho has a zero emission allocation, which is impossible to meet, adoption of the ICL petition would forever prohibit all coal generated electricity production in Idaho, including even new or "cutting edge" coal-fired power plant technologies such as coal gasification with carbon sequestration.

Mr. Rush feels the petition sends a strong anti-economic development message and is an attempt to obtain by rule an action rejected by the 2006 Idaho Legislature. He believes it could unnecessarily enter the Board into a controversial issue already rejected by the Idaho Legislature. He also discussed concerns with the stringency issue. He urged the Board to reject the ICL petition.

Dr. Cloonan asked if IACI would be willing to take part in a work group to create a statute regarding siting or more general issues to consider the environmental impact of new sources if Idaho were to choose to opt into the Cap and Trade program. Mr. Rush said he would have to take that question to the IACI membership.

Don Chisholm asked if IACI had conducted a vote of its members to determine how many supported the position it has taken on this issue. He wondered whether there might be some members from the Magic Valley who were ambivalent about IACI's position. Mr. Rush acknowledged that many people from the Magic Valley had signed petitions opposing building coal-fired power plants in Idaho, but said no IACI members had contacted him personally stating their support for the petition. He believed IACI members were very concerned about any proposal to reduce additional electrical power, whether it is hydro or coal. Looking at the growth in the state, Idaho must have power for the future.

Neil Colwell, representing the Avista Corporation, testified against the petition, stating it opposes the request for a temporary rule. (See Attachment 5 for full written testimony.) Avista provides natural gas and electric services to approximately 100,000 customers in Idaho. By law, it must provide service to new customers that locate in its service area. It plans for customer growth through an integrated resource plan. The 2005 plan estimates an energy deficit by 2010. To meet these growing needs, Avista's plan calls for a mix of wind, coal (nearly 30%), biomass, plant upgrades, and conservation. The ICA petition would preclude the possibility of any kind of coal facility being located in Idaho. Avista believes such a decision at this juncture is exceptionally premature and contravenes not only with the actions of the last legislative session, but also ignores the work already underway by the legislative Interim Committee on Environment, Energy, and Technology to create a state energy plan. Mr. Colwell urged the Board to reject the petition and perhaps embark on some kind of rulemaking to determine whether Idaho wants to allow anything at all.

Sharon Block, State Representative, District 24 Twin Falls County, testified in support of the ICL petition. Representative Block stated she serves as chairman of the Health and Welfare Committee in the House of Representatives, and as such has a responsibility to protect the health and well-being of the people of the State of Idaho. She requested the State of Idaho opt out of the federal mercury Cap and Trade program. The Department of Health and Welfare has done extensive research at the Committee's request about the contaminants of coal-fired power plants, mercury being one of those and, according to its data, mercury is harmful to human health and animals, both domestic and wildlife. Mercury gets into the food chain and is particularly harmful to expectant mothers and small children, affecting the development of the nervous system and brain.

Representative Block discussed her concerns about the effects of mercury contamination on Idaho water as demonstrated by the existing fish advisories on nine bodies of water that are contaminated with mercury. The water bodies are located in north, west, south central, and eastern Idaho. She pointed out the new clean coal technology uses scrubbers to take more of the contaminants out of the air emissions, but those contaminants do not disappear. Matter can neither be created nor destroyed and those contaminants go into the waste. In an area such as the Magic Valley, that waste would be buried above the aquifer. The fractured basalt geology in this area does not hold water and it immediately goes through into the aquifer. In addition to mercury, coal-fired power plants also emit arsenic, cadmium, lead, and radioactive material.

Representative Block submitted petitions to the Board signed by approximately 8,000 people from the Magic Valley (Jerome County, Lincoln County, Twin Falls County, Cassia and Minidoka County, and Gooding County) who oppose the building of coal-fired power plants. The signatures also include people from Boise, Mountain Home, and even North Idaho. She emphasized these people want to protect their health as well as the environment and keep their children and grandchildren safe. The signatures are from people of both political parties and all walks of life—businessmen, farmers, ranchers, dairymen, mothers, fathers, grandparents, teachers, and physicians. She noted there are separate petitions which contain 110 signatures from all physicians from the Magic Valley. They are concerned about the health of the people. The people are also concerned about how the contaminants from a coal-fired power plant would affect their businesses in agriculture, livestock, recreation, and fisheries.

Representative Block learned at a recent seminar on energy development and climate change in the Pacific Northwest that other states in the area which have a hydro base like Idaho are addressing their growing energy needs with renewables and are moving away from coal-fired power plants; they are even discussing putting caps on carbon dioxide emissions. On behalf of the health and well being of the people of the State of Idaho, she asked that Idaho opt out of the federal Cap and Trade program.

William Eddie, Attorney at Law, testified on behalf of the ICL and responded to a number of issues discussed in the previous presentations. He noted the ICL petition acknowledges that Idaho can opt back into the Cap and Trade program if it chooses to opt out; that is not something ICL is asking for, but they recognize it is an eventuality that could happen in the future.

Mr. Eddie pointed out the federal rule sets standards for new sources under the NSPS requirements, and that has been a major point of controversy because the standards for creating an emission standard or limitation for new sources under the NSPS, Section 111 of the Clean Air Act, are not nearly as strict as creating standards under Section 112, particularly for new units. He noted the standards do not require use of the cleanest type of production available (IGCC), but allow the option to use the less efficient, dirtier types of production such as pulverized coal which can have an emission limit five times higher.

Mr. Eddie commented EPA does not seem to be doing a very good job of respecting states' interests on this rule. Idaho asked EPA to extend the deadline on the rule and was rebuffed, as were 16 other states. He urged Idaho to make a decision and meet the November 17 deadline and not allow EPA to make a permanent choice for the state. There are much broader discussions about energy policy going on statewide in the interim committee of the legislature, the Public Utilities Commission, and others. They will all continue to make energy policy choices about what is best for the public, the economy, and the various stakeholders. We do not want to choose an energy resource that is unnecessarily dirty and will harm other interests such as farming, aquaculture, and recreation. Oregon, Washington, and Montana are all in the process of considering more stringent limitations than EPA created. He urged the Board to do the same.

Chairman Randy MacMillan opened the floor for deliberation and called for a motion to use as a basis of discussion.

- **MOTION:** Dr. Joan Cloonan moved the Board grant the ICL Petition to Initiate Rulemaking with the understanding the Board was not automatically accepting the language in the Petition for rulemaking, but would: 1) commence negotiated rulemaking with the goal of having a temporary rule to go to the Governor to opt out of the CAMR Cap and Trade

Program, and 2) develop a state rule on mercury emissions protective of health and the environment to allow the state to potentially opt in in the future.

SECOND: Marti Calabretta

DISCUSSION: Ms. Calabretta asked for a legal opinion on whether the motion was within the latitude of granting the petition but not accepting the language. Doug Conde opined it was. It varies in some respect from what the Petition asks for, so it could be argued that is a partial denial which could be appealed to the District Court. The Board's action on this rulemaking is final agency action that could be appealed in District Court. If the motion's intent is to take action to initiate rulemaking to opt out with a temporary rule and then initiate a negotiated rulemaking, then that is reasonably consistent with what the Petition asks for. Ms. Calabretta voiced her support for the motion if that is its intent.

Craig Harlen was concerned that the motion addressed all uses of coal, such as cement plants that use coal for backup fuel, and not just coal-fired power plants. If the mercury rule is inclusive of all uses, it may take much longer. He questioned whether the motion and rule should be limited to coal-fired electrical generation only. Dr. Cloonan clarified it was her intent that the first part of the motion regarding the temporary rule was to be limited to only coal-fired electrical generation. She left the second step of negotiated rulemaking open because mercury is a broad issue in the state and did not want to make the decision to narrow it at this time. She does not have any preconceived notions on how the rulemaking should go or what things should be specifically addressed. The negotiated rulemaking group or DEQ may want the discretion to make that decision.

Don Chisholm favored having DEQ draft a temporary and proposed rule to opt out of the Cap and Trade program for the Board's consideration at its October, rather than November meeting. A temporary and proposed rule is needed because the temporary rule will sunset at the end of the legislative session in 2007, so both a temporary and proposed rule are needed. Negotiated rulemaking can then be conducted to determine what Idaho's mercury emission control standards should be. Mr. Chisholm believed this action would be in line with the Governor's request and let him know the Board's position.

Dr. Cloonan agreed with Mr. Chisholm's comments and stated she would amend her motion to add: 1) commence negotiated rulemaking with the goal of having a temporary and proposed rule for the Governor's approval to opt out of the CAMR Cap and Trade Program for the Board's consideration at its October 2006 Board meeting.

Marti Calabretta asked whether DEQ staff could have a proposed rule which covers the protective issue by October. Dr. Cloonan clarified the motion's intent was to have only the first portion of the goal, the temporary and proposed rule, by the October 2006 Board meeting.

Paula Wilson explained the rulemaking timelines and said a temporary rule does not require previous notice and would easily have time to be ready for the Board's October meeting if it were approved by the Governor. The first step in the rulemaking process is to get the Governor's approval, whether it is a temporary or proposed rule. A temporary rule would go out for public comment after it is adopted by the Board—not before. It would be possible to have a proposed rule to opt out ready for the Board's November meeting if the language was very simple and straightforward and was ready to publish in the Administrative Rules Bulletin by August 23.

Marti Calabretta noted the August 23 date was about a week sooner than what the Governor requested, but the rulemaking timelines do not allow enough time to wait and still take action before the EPA deadline in November.

AMENDMENT: Dr. Cloonan amended her motion to read: I move the Board grant the petition of ICL et al. in the following respects: 1) to commence rulemaking to opt out of the EPA Mercury Cap and Trade CAMR Program, and 2) to commence negotiated rulemaking to

develop a state rule on mercury air emissions that is protective of health and the environment to allow the state to potentially opt into the CAMR Program in the future, and denying the petition in all other respects.

SECOND ON AMENDMENT: Marti Calabretta agreed to the amendment.

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

AGENDA ITEM NO. 10: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Doug Conde reported there have been few new developments on the contested case status report. The Mid-Snake Aquaculture TMDL litigation continues. Motions are currently before the hearing officer to resolve the case.

AGENDA ITEM NO. 11: REGIONAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

Dr. Cloonan commented it may be worthwhile for the Board to revisit the possibility of having a long-range strategic plan for environmental issues in the state and possibly state legislation on an environmental siting act. Director Hardesty noted the Interim Energy Committee has formed a small subcommittee on siting and is looking for volunteers to be on the subcommittee.

Don Chisholm suggested the Board invite the candidates for Governor to its next meeting to discuss their positions on environmental issues.

The meeting adjourned at 3:30 p.m.

/s/

Dr. John R. MacMillan, Chairman

/s/

Craig Harlen, Secretary

/s/

Debra L. Cline, Management Assistant and Recorder