



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
Board of Environmental Quality

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

Dirk Kempthorne, Governor
C. Stephen Allred, Director

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

June 19, 2003

The Board of Environmental Quality convened on June 19, 2003 at 8:30 a.m. at:

Shilo Inn Convention Center
780 Lindsay Blvd.
Idaho Falls, Idaho

ROLL CALL

BOARD MEMBERS PRESENT:

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

BOARD MEMBERS ABSENT:

Marguerite McLaughlin, Member

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

Steve Allred, Director
Jess Byrne, Resource Officer
Debra Cline, Management Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Paula Gradwohl, Administrative Rules Coordinator
Lisa Kronberg, Deputy Attorney General, DEQ
Harriet Hensley, Deputy Attorney General
Jim Johnston, Regional Administrator, Idaho Falls Regional Office
David Mabe, Administrator, Water Quality Division
Alan Stanford, Loan Program

OTHERS PRESENT:

Paul Eater, Idaho Supreme Potatoes
William Eddie, Idaho Conservation League
Jim Graham, BBWI

Justin Hayes, Program Director, Idaho Conservation League
Krista McIntyre, Attorney for J. R. Simplot Company
Suzanne Pyle, BBWI
Alan Prouty, Director of Environmental and Regulatory Affairs, J. R. Simplot Company
Eric Stewart, Stewart Engineering
Stephanie Woolf, U.S. Department of Energy

- ❖ 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.

CONTESTED CASE, J. R. SIMPLOT CO., AIR QUALITY TIER I OPERATING PERMIT AND PERMIT TO CONSTRUCT NO. 077-00006 (DON SIDING PLANT) - ORAL ARGUMENT ON THE PETITION FOR REVIEW OF ORDERS DENYING INTERVENTION FILED BY THE IDAHO CONSERVATION LEAGUE

- **Krista McIntyre, appeared on behalf of J. R. Simplot Company (Simplot).**
- **William Eddie appeared on behalf of petitioners, Idaho Conservation League (ICL).**
- **Lisa Kronberg, Deputy Attorney General, appeared on behalf of the Department of Environmental Quality.**
- **Harriet Hensley, Deputy Attorney General, represented the Idaho Board of Environmental Quality.**

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

Chairman Paul Agidius stated the Board was prepared to hear oral argument on the Petition for Review of Orders Denying Intervention filed by the Idaho Conservation League. The Chairman stated the parties would be allowed 15 minutes each and asked if there were any questions regarding the procedures. No questions were presented and the oral argument proceeded.

William Eddie stated the question before the Board is whether ICL has shown a direct and substantial interest in this proceeding, as is required to intervene in this contested case. Simplot initiated this case to challenge 22 terms and conditions of the new Clean Air Act permit for their Don Siding Plant in Pocatello, Idaho. ICL has requested intervention in the case to protect its interest in ensuring the air quality in Idaho is as clean as possible under existing laws. ICL filed the affidavit of John Schmidt, an affected Pocatello resident and advocate who has been working to clean up the airshed in the area. Mr. Eddie asserted ICL has shown direct and substantial interest in the case and seeks intervention to ensure the opportunity to comment is not weakened any further. Although they believe they meet the higher bar required to achieve standing, ICL has not raised specific challenges to the permit issued by DEQ, and therefore does not seek to show standing in the case. He requested the Board reverse the hearing officer's decision and grant ICL intervention.

Don Chisholm asked if ICL would agree that it would be appropriate, if intervention is granted, that ICL be limited strictly to the issues raised by the petition for review and not be allowed to expand its participation to other issues. Mr. Eddie confirmed ICL would agree to limit its inquiry to those issues raised by Simplot. They did not however feel it would be appropriate for ICL to be limited only to those issues raised in its Petition to Intervene.

Board members discussed the difference between how someone with intervention, standing, and the general public would take part in the matter. The issue of direct and substantial interest was questioned and discussed.

Krista McIntyre stated this hearing was being held because the hearing officer in this case has twice denied ICL's Petition to Intervene. She believed the requests were denied because the quality of the evidence presented in ICL's petition and affidavit were insufficient to show direct and substantial interest, and because their statements do not tie back to the permit action in question. Ms. McIntyre argued that ICL has not clearly established a stake in the matter that the primary parties can work to redress. She pointed out that ICL has numerous opportunities to participate in air quality protection issues through the public participation process, and fails to meet the standards to be granted intervention.

Lisa Kronberg argued in support of the hearing officer's decision denying intervention. She discussed the judicial process and opportunities for public participation used by DEQ. Board members questioned and discussed the advantages of intervention versus the public participation process.

- **MOTION:** Don Chisholm moved the Board go into executive session pursuant to Idaho Code § 67-2345(f) to consider legal advice from its legal counsel, Harriet Hensley, Deputy Attorney General.
- SECOND:** Dr. Randy MacMillan
- ROLL CALL VOTE:** Motion passed. 6 Ayes; 0 Nays; 1 Absent (McLaughlin)

The meeting room was cleared and the Board conducted an executive session for approximately 20 minutes. The public meeting was then reconvened. No votes were taken and no deliberation was conducted during the executive session.

- **MOTION:** Dr. Joan Cloonan moved the Board affirm the hearing officer's decision denying intervenor status to ICL.
- SECOND:** Dr. Randy MacMillan
- DISCUSSION:** Dr. Cloonan believed, after hearing the testimony and reading the extensive briefs in this matter, that ICL has failed to show a direct and substantial interest that could be redressed by the proceeding. She felt the closest they came to showing an interest that could likely be redressed by the proceeding was in their comments regarding odor and odor logs; however, this is a general concern of perhaps anyone in the area and does not reach the level of a direct and substantial interest. The nature of the proceeding (a Title V permit) defines existing compliance obligations and does not add additional substantive emission controls to the permittee. Therefore, it is not likely to change the quality of the air in the area.

Nick Purdy agreed, but wanted the motion or a decision paper to specify why intervention was denied. He felt the affidavit was not specific enough regarding health risks

and problems caused by odor. He also felt the ICL should have specified which terms of the permit they disagreed with.

Craig Harlen felt that since ICL was seeking a higher level of input and participation than the general public, they should demonstrate a direct and substantial reason why it is needed. Chairman Agidius stated this issue would be addressed in the Board's order.

Dr. Randy MacMillan noted that the briefs from Simplot and DEQ clearly articulated why intervention should not be granted and suggested Harriet Hensley use those documents for guidance in preparing the order (should the motion be approved). Dr. Cloonan agreed and commented she particularly appreciated Ms. Kronberg's analysis of the issue.

Don Chisholm commented the Board is articulating policy for the regulated community and the public should be allowed to participate in the process. He believed the Board should not be terribly critical of the pleadings of the ICL at this stage of the case. In the legal process of notice of pleading, one would not normally plead with specificity. He stated it would be his preference to be lenient and grant ICL intervention because the public hearing process did not address the specific issues in Simplot's petition. He stressed the importance of allowing public participation and felt it would be more efficient to allow ICL to have their issues debated and negotiated at this stage rather than waiting and filing a petition for review. Mr. Chisholm was opposed to the motion because he felt it was too restrictive at this early stage and favored keeping the process open to public participation in the early stages, rather than later down the line.

Dr. Cloonan noted ICL had more than one opportunity to refine its pleadings after being rejected by the hearing officer the first time, and should have had an understanding that they needed to clearly show a direct and substantial interest. The permit will be open to public comment again, regardless of what ICL does, and therefore felt the matter of efficiency should not be a reason to grant intervention.

ROLL CALL VOTE: Motion carried: 5 ayes, 1 nay, 1 absent. Mr. Harlen, aye; Mr. Chisholm, nay; Dr. Cloonan, aye; Dr. MacMillan, aye; Ms. McLaughlin, absent; Mr. Purdy, aye; Chairman Agidius, aye.

Chairman Paul Agidius noted that Board members would have an opportunity to review the order drafted by Harriet Hensley to ensure this discussion is incorporated appropriately.

PUBLIC COMMENT PERIOD:

No comments received.

AGENDA ITEM NO. 1: ADOPTION OF NOVEMBER 12 & 13, 2002 BOARD MINUTES

Chairman Agidius suggested adoption of the minutes be delayed until the next meeting to give Board members more time to review the minutes. Board members agreed to delay action until the next Board meeting.

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Steve Allred provided a brief report on department activities. He discussed the budget cut backs and how they will be absorbed. The cutbacks are being made in areas that are not tied to specific federal matching requirements to preserve those funds and maintain delegation of programs. A large portion of the cuts are being made from the Water Quality Program. This puts the department in a position of being reactive rather than proactive in dealing with issues.

The Title V Program preliminary billings have been completed, and it appears the fees will not be adequate to fund the program. The fees are almost \$400,000 below the minimum amount required to operate the program. The current fee structure was recommended by industry and adopted by the Board. The Department has received numerous requests from several companies for extensive documentation and justification for charges. DEQ has had to limit its response to some questions because responding to the requests uses up the limited funds in the program. The regulations require DEQ to go back by July 1, 2003, and reassess the fees based on tons of pollutants to make up the shortfall. The issue presents a difficult balancing act and is expected to be very controversial.

Director Allred congratulated Board Member Nick Purdy on being elected to the Southern Idaho Livestock Hall of Fame. A framed copy of the newspaper article and story were presented to Mr. Purdy to commemorate the honor.

Dr. Randy MacMillan asked if DEQ was experiencing a high turnover rate due to the budget problems. Director Allred confirmed that DEQ is losing valuable employees and having difficulty recruiting quality candidates because the salaries are not competitive. Although all state agencies struggle with this issue, it is particularly problematic for DEQ because it employees the same kinds of positions as the regulated community and the federal government. It is difficult to retain employees when they know they can go to work for the regulated community for such substantial salary increases. He stressed the benefit to the regulated community, as well as the people of Idaho, to have a competent agency with knowledgeable, experienced staff.

AGENDA ITEM NO. 3: DRINKING WATER STATE REVOLVING FUND (SRF) PRIORITY AND FUNDABLE LISTS FOR FISCAL YEAR 2004

Alan Stanford presented the Drinking Water SRF Priority and Fundable Lists for Fiscal Year 2004 for the Board's review and approval.

Dr. Randy MacMillan complimented Mr. Stanford on the issue analysis papers that were prepared for each of the items. He felt they were well prepared and very helpful.

- **MOTION:** Dr. Randy MacMillan moved that the Board approve the Fiscal Year 2004 State Drinking Water Loan Priority and Fundable Lists as presented by the Department of Environmental Quality.
- SECOND:** Dr. Joan Cloonan
- VOICE VOTE:** Motion passed. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 4: DRINKING WATER PLANNING GRANT PROJECT PRIORITY LIST FOR FISCAL YEAR 2004

- **MOTION:** Don Chisholm moved that the Board approve the Fiscal Year 2004 State Drinking Water Planning Grant Project Priority List as presented by the Department of Environmental Quality.
SECOND: Craig Harlen
VOICE VOTE: Motion passed. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 5: WASTE WATER STATE REVOLVING FUND (SRF) PRIORITY AND FUNDABLE LISTS FOR FISCAL YEAR 2004

- **MOTION:** Dr. Randy MacMillan moved that the Board approve the Fiscal Year 2004 Water Pollution Control Loan Priority and Fundable Lists as presented by the Department of Environmental Quality.
SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion passed. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 6: WASTE WATER PLANNING GRANT PROJECT PRIORITY LIST FOR FISCAL YEAR 2004

Bill Jerrel reported the Loan Program has had a banner year. They have awarded \$41 million in loans for waste water facilities and water pollution control, and have applications for another \$23 million, for a total of \$64 million. In the past, \$18 million was the most awarded in one year. The drinking water grant program has also grown dramatically. They have awarded \$11 million in drinking water loans, with \$4.6 in applications, for a total of over \$15 million. This is double what was awarded in the past. However, the program cannot sustain this level of funding for long. There are \$39 million in waste water grants on the fundable list again this year. Once those requests are funded, the program will be out of money and will have to seek additional funding.

Dr. MacMillan asked what caused the increased demand on the program. Mr. Jerrel stated that a number of very large projects completed their permits at the same time, such as the \$11 million project for the city of Pocatello and the \$15 million project for the city of Coeur d'Alene.

Director Allred said the increased demand is expected to continue for some time as water systems try to gain compliance with federal regulations. DEQ has been investigating possible funding sources such as bond issues and the State Bond Bank. A new source of funding for a continuous program is needed other than state or federal appropriations.

- **MOTION:** Dr. Joan Cloonan moved that the Board approve the Fiscal Year 2004 State Waste Water Planning Grant Project Priority List as presented by the Department of Environmental Quality.
SECOND: Don Chisholm
VOICE VOTE: Motion passed. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 7:

IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0303 (TEMPORARY RULE) (ESTABLISH APPLICATION FEE TO COVER EXAMINATION AND PROCESSING COSTS FOR DRINKING WATER OPERATOR CERTIFICATION)

David Mabe, Administrator, Idaho Water Quality Division, presented this rule to provides fee standards for certified drinking water operators. Idaho Code requires that fee standards be included in rule text wherever a fee is going to be imposed. The Drinking Water Operator Certification program has transitioned from a voluntary to a mandatory program to protect the public health and to maintain primacy of the program. The rule that made the transition did not contain fee standards. This rule will set the fees for operator applications, certification exams, certification renewals, and course evaluations for continuing education units. This program operates mostly on the fees collected for testing, and fees were charged for these services when the program was voluntary. Mr. Mabe reviewed the fee schedule and discussed actions DEQ will take to try to keep the fees as reasonable as possible and meet the needs of the operators.

Don Chisholm asked if the certification renewal could be changed from an annual requirement to a three-year renewal to reduce the cost to operators. Mr. Mabe indicated that the negotiated rulemaking for the proposed rule will contain a suggested change to a two-year renewal, or possibly longer if continuing education is being done on an on-going basis.

➤ **MOTION:** Dr. Randy MacMillan moved that the Board adopt, as temporary rules, the Idaho Rules for Public Drinking Water Systems as presented under Docket No. 58-0108-0303 with an effective date of June 20, 2003.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion passed. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 8:

WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0301 (TEMPORARY RULE) (SITE SPECIFIC STANDARD FOR DISSOLVED OXYGEN, DDT, AND DIELDRIN IN THE SNAKE RIVER ALONG THE IDAHO/OREGON BORDER.)

David Mabe explained this docket applies to the Hells Canyon reach of the Snake River. Idaho has developed a TMDL in conjunction with the state of Oregon for this segment of the river. The river defines the border between the two states, so the TMDL was jointly developed to meet the water quality standards of both states. Because the Clean Water Act (CWA) requires that states meet the downstream state's standards, the TMDL was developed to meet the most stringent standard of either Idaho or Oregon. Currently, a mechanism does not exist to allow Idaho to adopt standards based on Oregon's standard (and vice versa), and there is not a process in the Administrative Procedures Act to allow parties to challenge such a standard.

DEQ and stakeholders reviewed a number of options to address the problem including:

- 1) legislation clarifying that Idaho could develop TMDLs to meet downstream standards (this was not supported by stakeholders);

- 2) have EPA adopt the TMDL for both states (DEQ had concerns about how this would be amended and what ability Idaho would have to deal with a federally adopted TMDL); and
- 3) adopt the standards from Oregon needed to legally adopt the TMDL. This process will allow parties an administrative process for submitting comments and challenging the standards.

The third option was selected as the best choice and is brought forward with this request for a temporary rule. A temporary rule is needed so the Brownlee TMDL can be adopted immediately. It was completed almost two years ago, and should have been adopted about 18 months ago according to the federal schedule. This TMDL also needs to be in place before Idaho can write its 401 Certification for Brownlee, Oxbow, and Hells Canyon. Mr. Mabe briefly reviewed each of the proposed standards.

Chairman Agidius asked if it would be appropriate to include a statement in the motion to clarify that part of the reason these standards are being adopted is to meet the requirement of the CWA to comply with the Oregon standards. He wanted to avoid having someone come forward and say that because Idaho adopted these standards that are more stringent, we should now apply them to the rest of the state. Mr. Mabe believed it would be appropriate to make that clarification. He explained that DEQ is requesting approval of these standards to meet the CWA requirement that Idaho must achieve the downstream state standard in the TMDL. They are not trying to do a scientific justification or basis of these standards, it is simply to meet the CWA requirement to meet the downstream state's standards for the TMDL.

Dr. Randy MacMillan asked if it would be a challenge for Idaho to meet Oregon's standards. Mr. Mabe believed that with the nutrient reductions in the TMDL, Idaho should be able to meet the Oregon standards over time. The TMDL was designed to meet these more stringent standards. Idaho is currently in violation of the Idaho standard for dissolved oxygen, and the Oregon standard is slightly more stringent. He stressed that adopting this rule will not change what the stakeholders worked for in the TMDL, it simply provides a basis to adopt it.

Craig Harlen asked if DEQ expected the stakeholders to appeal this matter to the Board. Mr. Mabe said there were some issues to be worked out with the stakeholders in the rulemaking process, but felt there was a very good chance DEQ would be able to bring back a consensus rule package.

Director Steve Allred stressed the importance of getting the TMDL in place both from the water quality aspect and for FERC relicensing efforts.

➤ **MOTION:** Nick Purdy moved that the Board adopt, as temporary rules, the Water Quality Standards and Wastewater Requirements, as presented under Docket No. 58-0102-0301 with an effective date of June 20, 2003 in order to comply with the federal Clean Water Act requirement that Idaho meet a downstream state standard in a TMDL.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion passed. 6 ayes; 0 nays; 1 absent.

AGENDA ITEM NO. 9:

**IDAHO MINING ASSOCIATION'S PETITION FOR INITIATION FOR
RULEMAKING TO MODIFY MERCURY CRITERIA IN IDAHO
WATER QUALITY STANDARDS**

Kevin Beaton, representing the Idaho Mining Association (IMA), presented a petition (Attachment 1) requesting DEQ to initiate rulemaking to make a one-sentence change to the current mercury criteria in Idaho's Water Quality Standards. A change is requested in the aquatic life protection component of the criteria and to the human health component. In addition to those changes, two additional footnotes are proposed.

Mr. Beaton said the requested change is based entirely upon the recognition by EPA that the current mercury criteria in Idaho's Water Quality Standards are based on outdated information and flawed assumptions. Recently, EPA published in its 2002 National Recommended Criteria, a change in the mercury criteria identical to what is proposed in IMA's petition. He observed that it is highly probable that EPA will soon or eventually be requesting that DEQ change its mercury criteria to match the national recommended criteria or provide justification for not doing so. EPA's 2002 guidance is based on most recent science relating to mercury.

Mr. Beaton pointed out that because of the current very low levels for chronic criteria, IMA's members are required to implement expensive and burdensome monitoring protocols to prove that their effluent does not contain the levels of mercury in the standards.

The Idaho Association of Commerce & Industry and the Idaho Water Users Association submitted written comments (Attachment 2 and 3) supporting the petition for rulemaking. The Association of Idaho Cities has also stated support for the petition, but was unable to submit written comments due to time constraints. The

The IMA suggested that after the rule is adopted DEQ draw on the national guidance and, in consultation with stakeholders, develop guidance on how to implement mercury criteria on NPDES permit decisions, water quality listing decisions under the TMDL program, and in developing TMDLs.

Mr. Beaton offered two options for Board action:

- 1) Adopt the rule as a temporary rule today or,
- 2) If there are questions about the mercury criteria, initiate rulemaking by publishing a proposed rule in the Administrative Rules Bulletin identical to the one proposed by the IMA, take public comment, and adopt at the fall Board meeting.

Either course of action is acceptable to the IMA.

David Mabe responded to the petition on behalf of DEQ. From the quick review they have conducted, DEQ feels the mercury petition is a good idea. Unfortunately, they are not able to act on the petition in the quick timeframe requested due to lack of funding and resources. There are also a number of other issues DEQ would like to see resolved before taking the requested action. DEQ requested the Board reject the petition and allow them to work with the petitioners to develop the support necessary to change the mercury standard. The petition has not had wide circulation and there have been few comments from other affected parties. Prior to starting the rulemaking process, DEQ would like to work with the petitioners to develop a full package to circulate and discuss with all stakeholders.

DEQ feels the proposed change should be considered because it would adopt a fish tissue standard that would probably be more protective of human health and the environment than the existing standard. It may be less expensive for the regulated community, but there is not enough known about how compliance will be measured to answer that question at this time. More guidance is needed on how to measure compliance with the fish tissue standard, and protocols must be developed for determining whether someone is causing a change in fish tissues. These issues must be worked out in a guidance approach before saying that adoption of this new mercury criteria is going to result in a lower cost of compliance or testing methodologies.

Mr. Mabe cited the following additional reasons for delaying the requested action:

- The petition as drafted does not follow the federal guidelines. Footnote f. references the current water quality standards that state the criteria should be expressed as a total recoverable unfiltered concentration. This is the methodology used with the current mercury standard. The new criteria, as developed, looks only at the dissolved fraction of mercury. So if the petition were adopted today as a temporary rule or proposed rule, it would not correctly follow the federal standard and would result in a more stringent standard than the new federal requirement.
- The petition asks for more than just a rule change. It asks for a method to implement the criteria immediately and references a proposed method, 245.7. DEQ has not had the opportunity to verify that EPA has finalized method 245.7 as a protocol to test compliance. As a general rule, DEQ does not reference proposed methods due to problems with credibility and acceptability with EPA.
- The petition asks DEQ to implement a program to generate valid and representative fish tissue results where a weighted average of those results is compared to the human health criterion to ensure defensible § 303d listings and TMDLs. This would be a very significant and high cost step for DEQ to take because they do not currently have a statewide mercury monitoring program for fish tissue. They rely primarily on results from other types of information and studies. DEQ will have to develop such a program at some point, but does not have monitoring dollars to implement it at this time.

Mr. Mabe discussed what expectation there should be of entities bringing such requests for rulemaking to DEQ. It was his hope that when someone petitions the Board for a standards change, that they submit a package DEQ could use to go through the rulemaking process, seek approval from EPA, and then go through the consultation phase with the services. At a minimum this will require a literature search, a review and summary of that literature, and to the extent that it needs to, be specifically adjusted to Idaho based on its species or concerns. DEQ would like to see this become a part of the request for rulemaking package that is submitted to the state. If not, DEQ is left to perform the work and support it through the EPA process. The fact that EPA adopts something at the national level does not guarantee that it will be adopted at the Region 10 level. EPA will have questions regarding how the national criteria was developed and the differences that may exist in Idaho. The consultation step also requires a biologic opinion, and DEQ must have the appropriate data and studies to support the package through that phase as well. This is a significant workload on the Department if the information is not included in the package with the petition.

DEQ already has a significant workload in its standards program, and unfortunately does not have staff at this time. DEQ would not receive additional funds to act on this petition, and

there are a number of other priority issues that staff must complete including the natural background standards that are needed for the Brownlee TMDL, the Clearwater River TMDL, and for the Potlatch NPDES permit; the Bulltrout temperature criteria; gaining EPA approval of the seasonal cold water criteria; other variance packages and changes; and numerous other time sensitive projects. DEQ would have to push back these activities to take on the requested rulemaking.

Mr. Mabe felt the petition did not meet a reasonable expectation for DEQ and would require a substantial amount of work to move forward.

Dr. Joan Cloonan asked if it would be possible to move forward with a negotiated rulemaking with the expectation that the petitioners would provide much of the information necessary for the package to go to EPA. Mr. Mabe felt that was a possibility, but wanted a clear understanding by the parties on the timeline. He felt it would be impossible to bring the rule to the 2004 legislative session.

Director Steve Allred discussed the expense of the rulemaking process to the Department. The average cost is \$100,000, and DEQ is currently operating with \$2.5 million less in funding than in recent years due to budget cuts. He did not disagree with the petition, but was concerned about the cuts that this effort would force on other essential programs. He asked the Board to understand that DEQ does not currently have the capacity to respond to the petition at this time. There is also a gap in the Department's expertise due to the loss of an important employee in the Water Quality Standards program.

Nick Purdy stated he would not be comfortable with denying the petition and favored going forward with negotiated rulemaking with the requirement that the petitioner perform the necessary work identified by DEQ. Craig Harlen supported the idea of having the petitioner do the work, but wondered if that would present a problem. Mr. Mabe felt the only concern might be one of credibility from other parties. It may not be such an issue in this case because it is a federal criteria. The proponents could also use consultants to perform the work.

Dr. Cloonan asked if there were a process that would allow them to begin the negotiated rulemaking, put it on DEQ's priority list, and allow the proponents time to begin working on gathering the needed information without overburdening the Department at this time. Director Allred said the matter could be put in DEQ's plan for next year. He sympathized with the needs of the petitioners and offered to meet with them to identify the necessary components to move forward with the effort. He reiterated his concern about the cost of the rulemaking process and the continuing budget cuts. The Department must be very careful not to spend money it does not have or pull resources away from essential programs. Cuts have to be made very carefully to ensure the state does not lose primacy of important programs. Losses in funding and staff have put DEQ in a situation where there is absolutely no room to add additional projects without pulling resources away from something else.

Don Chisholm thought it would be a more efficient use of everyone's time and resources to deny the petition at this time and ask the petitioners to bring back a new petition as a complete package with the necessary scientific evidence. DEQ could then move forward quickly with the matter, rather than stringing it out over an extended period of time. The end result would be the same. He asked if there was a way DEQ could show their commitment and support for the petition without tying up resources.

David Mabe suggested if the Board desired to see that DEQ was going to take some action on the mercury issue, that it be put in the Performance Partnership Agreement (PPA). The PPA is an agreement the DEQ Water Quality Division has with EPA to lay out the work plan for the coming year. DEQ could include a commitment for the coming fiscal year to develop the strategy for the initiation of rulemaking on the mercury issue.

Kevin Beaton questioned whether it would really cost \$100,000 to conduct the rulemaking. He also felt the scientific support needed for the rulemaking would be very limited because the rule is simply adopting an EPA national recommended criteria. He referred to the toxic rule recently adopted by the Board for 121 constituents. Rigorous scientific data was not required because DEQ was following the national recommended criteria. He acknowledged there would be significant effort involved in the implementation issue, but pointed out that EPA issued national suggested guidance in 2001 with a couple of different methodologies on how to implement this new criteria. There are also more proposals being discussed by stakeholders nationwide on how states and EPA should implement these new criteria. National Marine Fisheries and Fish & Wildlife have been consulting on these standards for almost nine years, and a change in the standard will likely trigger another five or six years of consultation. Mr. Beaton felt this was not a valid reason to delay action on a standard that makes sense scientifically and is probably more protective of human health and the environment.

Mr. Beaton stated the possible error in the footnote reference mentioned by Mr. Mabe could easily be corrected in the negotiated rulemaking process if necessary. He acknowledged DEQ's budgetary constraints, but felt this was an important issue that should go forward. He thought the IMA and other interested parties would be happy to participate in providing whatever additional scientific support or suggestions that might be necessary to implement the new mercury criteria; however, Mr. Beaton clarified he could not make a commitment on behalf of the IMA to devote such resources. This process could take place during the public comment period or negotiated rulemaking.

Dr. Randy MacMillan noted the EPA methyl mercury standard for edible fish is lower than the Food and Drug Administration (FDA) standard. He thought this was curious considering the FDA is the entity charged with protecting the public health through the food supply. This disparity between the two agencies is confusing. There have also been two international studies done that do not agree. The study EPA is relying on used a population that consumed fish with methyl mercury as well as mammals (whales) that contained methyl mercury and PCBs. So there is some real scientific disagreement about the validity of that study.

David Mabe reiterated his offer to put a commitment in the PPA to start the process of gathering information and development of a mercury standard for Idaho to deal with the new federal criteria. This year the expectation would be some communication with stakeholders to identify problems or gaps when applying the national standard to the state of Idaho. This would set the groundwork to begin the negotiated rulemaking process and adopt a new criteria next year.

Nick Purdy asked if the IMA had a preference in how they would like to proceed. Mr. Beaton responded the IMA would like the Board to adopt a temporary rule or take action today to initiate the rulemaking process. He feared putting the issue in the PPA would not be a good

forum to get action on the matter. He thought the rulemaking process would be the best way to gather the necessary information from the interested parties.

Doug Conde discussed the Board's options in proceeding with rulemaking and handling expenses. He advised that it was not possible for the Board to adopt a temporary rule at this meeting.

➤ **MOTION:** Dr. Joan Cloonan moved the Board reject the request to adopt a temporary rule and accept the petition to initiate rulemaking by publication of a notice of intent to initiate negotiated rulemaking with the understanding that this will be a negotiated rulemaking and with the understanding that the petitioner should not have an expectation that this will happen next fiscal year or immediately, and that there is an expectation of participation by the petitioner to provide information.

SECOND: Nick Purdy

DISCUSSION: Dr. Randy MacMillan questioned the cost to DEQ and if it was possible to achieve without changing priorities. Mr. Mabe assumed a relatively low investment this fiscal year, with one or two meetings to scope the issues and decide what is needed to proceed with the rulemaking next fiscal year. The initial cost would be in the hundreds of dollars and would involve several initial scoping meetings amounting to 40 – 50 hours of staff time over the course of a year. He did not anticipate trying to complete the rule in one fiscal year and hoped to be able to work the project in without neglecting other work. Doug Conde noted that the rules require the notice to set a timeline.

ROLL CALL VOTE: Motion passed. 6 ayes; 0 nays; 1 absent (McLaughlin).

Chairman Paul Agidius and Dr. Joan Cloonan left the meeting at 2:05 p.m. due to travel requirements. Dr. Randy MacMillan, Vice-chairman, conducted the remainder of the meeting.

AGENDA ITEM NO. 10: DISCUSSION OF CONTESTED CASE PROCEDURES AND APPEALS OF CONTESTED CASES TO DISTRICT COURT

Doug Conde requested the agenda item be tabled and rescheduled to a future meeting when the full board could be available to take part in the discussion. A number of issues are progressing through the process and will most likely be appealed to the district court, however nothing is pending at this time. Craig Harlen suggested the matter be rescheduled as soon as possible and asked to be provided with any written information or guidance available on the matter. Doug Conde will supply the Board with written information.

Dr. Randy MacMillan asked if there were any objections to the matter being rescheduled. None being heard, the matter was tabled and rescheduled to the August 21, 2003 Board meeting.

Paula Gradwohl briefly reviewed the contested case report and docket status report.

David Mabe asked for clarification on the Board's action on the petition for rulemaking by the Idaho Mining Association. The petition had several sections including one that directed DEQ to develop a statewide monitoring program and other things. Mr. Mabe stated his understanding was that the Board's motion directed DEQ to initiate negotiated rulemaking only, and not necessarily to proceed with the actions set out in Section 4 of the petition. The Board confirmed Mr. Mabe's interpretation.

Dr. MacMillan questioned whether it was necessary for the Board to address each item of the petition since the motion only addressed the rulemaking portion. Doug Conde clarified that a petition to initiate rulemaking required only a response as to whether rulemaking would be initiated. It is not in the proper scope of the petition to direct such action or ask that guidance be developed or adopted.

The meeting adjourned at 2:30 p.m.

Paul C. Agidius, Chairman

Dr. Joan Cloonan, Secretary

Debra L. Cline, Management Assistant and Recorder