



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
Board of Environmental Quality

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Dirk Kempthorne, Governor
C. Stephen Allred, Director

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

August 21, 2003

The Board of Environmental Quality convened on August 21, 2003 at 9:00 a.m. at:

University Inn Convention Center
Empire & Palouse Rooms
1516 Pullman Road
Moscow, Idaho

ROLL CALL

BOARD MEMBERS PRESENT:

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

BOARD MEMBERS ABSENT:

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

Steve Allred, Director
Jon Sandoval, Chief of Staff
Martin Bauer, Administrator, Air Quality Division
Debra Cline, Management Assistant to the Board
Kerby Cole, Administrator, Lewiston Regional Office
Doug Conde, Deputy Attorney General
Paula Gradwohl, Paralegal and Administrative Rules Coordinator
Harriet Hensley, Deputy Attorney General
Jason Jedry, Community Affairs
David Mabe, Administrator, Water Quality Division
Hudson Mann, Lewiston Regional Office

OTHERS PRESENT:

Justin Hayes, Program Director, Idaho Conservation League

Alan Prouty, Director of Environmental and Regulatory Affairs, J.R. Simplot Company
Dick Rush, Idaho Association of Commerce and Industry
Mark Soloman, private citizen

- ❖ All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality. To obtain a copy, contact the Board assistant.

PUBLIC COMMENT PERIOD:

Mark Soloman discussed the upcoming state certification of the Potlatch wastewater discharge permit. He expressed concern regarding the seepage from Potlatch's secondary treatment aeration pond. Potlatch, EPA, and the state have been aware that the pond has substantial leakage problems for a number of years. In the past, EPA has proposed including the estimated seepage from the pond as part of the total amount of effluent allowed to enter into the rivers through the discharge point. The proposed permit now proposes to instead simply ignore it unless the state has an issue with allowing the seepage. Mr. Soloman discussed a number of studies that have been done on the matter. The conclusion of the studies show that the seepage is going into the ground water, and is probably at some point, entering the river. There is a significant discharge of a number of materials that are regulated by the Clean Water Act (CWA), and can potentially be regulated under the toxics regulations of both RCRA and CERCLA, entering directly into the ground water of the state of Idaho.

Mr. Soloman believed the situation required some level of direction from the Board to DEQ staff to examine the problem. He felt it was appropriate to ask staff to review options such as best management practices at the pond to reduce leakage, or other options that may be available to deal with the situation. The problem should be dealt with before it becomes a source of both contamination and potential litigation under the RCRA statutes.

Mr. Soloman believed that as a minimum, DEQ has an obligation under the 401 Certification process for the permit to require in the interim that EPA include the estimated seepage in the total amount of effluent that is allowed to be discharged to the rivers and receiving waters of the state of Idaho, instead of simply not accounting for it. Mr. Soloman stated that evaporation studies indicate an average of 5.6 million gallons per day are unaccounted for.

Dr. Randy MacMillan asked Mr. Soloman if he had provided comments on the NPDES permit and 401 Certification. Mr. Soloman confirmed that he had supplied comments on both the NPDES and the 401 Certification to EPA raising this concern. Dr. MacMillan noted that there are protocols that must be followed before any action can be taken.

AGENDA ITEM NO. 1: ADOPTION OF BOARD MINUTES

- a. November 12 & 13, 2002

Don Chisholm requested a change to Page 3, Paragraph 1, to clarify that representatives of the Board will meet with the Governor.

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the November 12 & 13, 2002 minutes as amended.
- SECOND:** Don Chisholm Alan

VOICE VOTE: Motion passed unanimously.

b. February 19 & 20, 2002

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the February 19 & 20, 2002 minutes as presented.
SECOND: Nick Purdy
VOICE VOTE: Motion passed unanimously.

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Steve Allred updated the Board on a number of issues. He introduced Martin Bauer, the new Administrator for the Air Quality Division. Mr. Bauer has a degree in civil engineering and previously worked for Micron in their environmental group. He also worked for DEQ and so is very familiar with both industrial issues in the state and DEQ. He will be a real asset to the Department and the Board.

Director Allred discussed budget issues. DEQ's budget is down by about \$2.5 million from two years ago. The impact is primarily on the water programs because that is where most of the discretionary funding (funding not required to maintain primacy of federal programs) is located. He feared further significant cuts in the water program would affect primacy issues and compliance with the court agreement on TMDLs. There are a number of programs where efforts are substantially reduced due to lack of resources. DEQ will not be undertaking any major rulemaking efforts due to the expense. They plan to conduct only rulemaking needed to maintain primacy of programs.

The Director expressed concern that the budget problems have put DEQ in a position of being reactive instead of proactive in handling matters. The above-ground storage tank program is an example. DEQ has had a proactive program in the past, but they are now able only to react if there is a spill. This could prove costly in the future. Underground storage tanks also present a difficult situation. The EPA has authority for the underground storage tank program, but DEQ has responsibility for them when they start leaking. DEQ has discussed the matter with EPA in hopes that they will be proactive in dealing with the matter on the front end, so that DEQ will not have to bear the expense when problems develop.

Chairman Paul Agidius asked if Director Allred was comfortable with the action EPA has taken with recent cases. Director Allred stated he would prefer to see a continuous program, rather than large public cases. He felt the key to operating a successful program was performing inspections to get ahead of problems. There is a significant enforcement initiative going forward at EPA for underground storage tanks. A consistent approach to ensure that tanks are adequately installed and maintained by conducting spot checks would help. DEQ deals with many situations where there is not a responsible party to perform the cleanup. DEQ must then use its emergency funds, which are very limited, to take minimal action to try to protect the environment and public health.

Director Allred briefly discussed a number of other issues including:

- the Smoke Management Program in Idaho
- air quality problems in the Treasure Valley and exceedances of the PM 2.5 and ozone standards (wildfires are one issue contributing to the problem)

- water quality issues in the Snake River due to high algae concentrations
- Idaho National Engineering & Environmental Laboratory (INEEL) issues and the removal of transuranic waste

Dr. Joan Cloonan asked if there had been any follow-up on the Board's meeting with the Governor on the long range environmental plan for Idaho. Director Allred was unaware of any additional actions on the long-range environmental plan. He felt it was important for the state to go forward and decide what it wants to accomplish in some comprehensive manner. DEQ will brief the Board on the Department's strategic plan later in the meeting.

Dr. Cloonan asked if it would make sense to take the underground storage tank rules (to allow the state to gain primacy of the program) back to the legislature with a more comprehensive explanation. Director Allred believed it would be good to reintroduce the rules. If the state had primacy of the program, it would be easier for the regulated community. They would be able to work with local DEQ offices to resolve issues, rather than dealing with the EPA Seattle office. It would also give the state a means to deal with issues proactively before problems become serious. It is very frustrating for DEQ to have to deal with leaking tanks and clean ups when they have no control over the front end. Current statistics indicate that one in four tanks in Idaho is leaking. Director Allred discussed the considerable expense associated with rulemaking. DEQ does not have the resources in staff or dollars to conduct the negotiated rulemaking at this time. He expressed willingness to go back to the legislature if the regulated community clearly indicates they will support the effort.

Nick Purdy asked if it would be appropriate for the Board to take action on, or formally acknowledge, the request from Mr. Mark Soloman regarding the seepage from Potlatch's secondary treatment aeration pond. Chairman Agidius indicated the matter should be placed on the agenda and proper notice given before the Board takes action. Don Chisholm felt it would be appropriate to ask DEQ for a report to gain more information on the matter. Doug Conde confirmed that it would be appropriate for the Board to ask for information related to the issue for discussion.

David Mabe, Administrator of the Water Quality Division, discussed the 401 certification process and NPDES permit process and how they are progressing at the Potlatch facility. DEQ has been looking at the discharges from the ponds for quite some time. Although their understanding of the discharges has improved over the years, they still do not have an exact answer on the disposition of all water going out of the ponds. There do not appear to be major impacts directly to the river. The permit does consider all of the volume going to the river. The question is whether the discharges should be divided into separate out falls. There has been a lot of discussion about the volume of water that ends up in the river, so they can make sure the amount of effluent or discharge going into both the Snake and Clearwater Rivers is accurately reflected.

Another question, that is somewhat separate from the NPDES permit, is what is happening from a ground water standpoint. Three separate studies have been done as part of the permitting of the facility. There are separate ground water rules, and it is appropriate for DEQ to look at any impacts to the ground water that may be occurring from this facility so they can be dealt with separately (from the NPDES permit). DEQ is now at the point where it can separate

the ground water impacts from the NPDES permit issues, and they are embarking on that approach.

The comment period for the 401 certification just closed, and DEQ has not had an opportunity to review and respond to the comments. DEQ will give all comments serious consideration and review and then make a determination about the appropriate way to proceed in evaluating and determining what if any ground water impacts are occurring from the operation of the waste pond.

Hudson Mann, Air and Waste Manager for the DEQ Lewiston regional office, discussed the monitoring, studies, and risk assessment that have been done. He has been working with Potlatch to develop a facility-wide ground water monitoring plan. Chairman Agidius asked if the location of the test wells at the landfill and ash pond would have detected any problems from the pond. Mr. Mann responded that the ash pond study could have picked up some of the water that was coming from the ponds, but DEQ found nothing of concern.

Dr. MacMillan asked about the possible flow path of the water leaking from the ponds. Mr. Hudson responded that the ponds are adjacent to the Lewiston levy system, and some of the water could be going into the river. He thought most of the water from the ponds was flowing down gradient from the ponds through the facility and into the Corps of Engineers drain system. All of the site water goes into the Corps of Engineers levy drain system. That water has been monitored and no contaminants of concern have been found. The next step is to pull all of the information into a comprehensive analysis.

Kerby Cole discussed the contaminants of concern such as volatile organic chemicals (VOCs), total suspended solids (TSS), and dioxins. He noted that the NPDES permit has a stipulation that additional monitoring will be done for the quantity and quality of what might be coming out of the ponds. More work also needs to be done to study possible impacts to the ground water. DEQ believes there is no threat to the public health.

Director Allred pointed out that Potlatch has an extensive monitoring procedure. It is possibly the most heavily monitored industrial facility in the state, and DEQ has yet to identify a ground water problem.

CONTESTED CASE, SOLOMON V. DEQ, CONTESTED CASE DOCKET NO. 0101-03-01, CONSIDERATION OF IDAHO ASSOCIATION OF COMMERCE & INDUSTRY'S PETITION TO SUBMIT AMICUS BRIEF ON REVIEW OF A PRELIMINARY ORDER ON STANDING AND IN SUPPORT OF DEQ AND POTLATCH CORPORATION'S MOTIONS TO DISMISS FOR LACK OF STANDING

Chairman Paul Agidius stated IACI had withdrawn its amicus brief in this matter; therefore, no issues are before the Board on this agenda item.

Don Chisholm observed that one of the issues in this case involves what the state can or cannot do within the context of a Title V permit as far as proposing additional conditions. This seems to be an issue in a number of other cases. He wondered if it would be beneficial to all the parties who have this issue in common, for the Board to take action to address the matter, so it does not keep coming up. Chairman Agidius suggested the matter be added to Agenda Item 4 for discussion.

Chairman Agidius added the following three items for discussion: Exparte contact and discussion, Consolidation of cases with the same legal issue, and Conflict of Interest in Contested Cases.

a. Role of the Board Regarding Appeals

Doug Conde stated the intent of this item is to discuss how the Board would like to address cases, particularly cases with intervenors, where a Board order is appealed to the district court. Should the Board participate fully in the appeal and defend its decision? Or should the Board act like a trial level district court (when a decision is appealed to the Supreme Court), and simply let the two parties make their arguments and not actively advocate for the agency decision? Mr. Conde believed this was in part a policy decision that should be made on a case-by-case basis.

Mr. Conde observed that it was important to remember that in these cases, the Board makes the final decision for DEQ. He believed the agency should participate in any challenge to defend its decision. They can determine on a case-by-case basis how strongly they want to advocate for their position. He thought it was appropriate and legally consistent with the Board's role, for the Board to actively participate and argue for its position, even if there are two parties arguing the case.

Harriet Hensley, DAG and legal counsel for the Board, stated she was in total agreement with Mr. Conde's comments. She was concerned that if the Board does not defend its decisions, a remedy at the district court or Supreme Court level could be fashioned by the other two parties, and the Board would not have a role in that process or the final court decision.

Don Chisholm agreed the matter should be addressed on a case-by-case basis. In cases where the Board and DEQ positions are perfectly aligned, one representative would be sufficient; however, there may be some cases where the Board feels it should have separate counsel to properly represent its interests.

Director Allred noted that once the Board makes a decision in a case, it becomes the decision of DEQ, and would be defended by DEQ without regard to its position in the previous proceeding. He understood that the Board may be more comfortable being represented by its own counsel in some cases, but assured that DEQ would defend the decision of the Board. Once the Board makes a decision, there is no difference between the DEQ position and the Board position and no conflict exists. Doug Conde agreed and felt if the Board prefers to have separate counsel for an appeal, that could be discussed.

Harriet Hensley felt a case could be argued by DEQ counsel or Board counsel, depending on a number of issues. The matter should be resolved on a case-by-case basis depending on what remedy is expected. If the case might be remanded back to DEQ and their legal counsel would have to handle the case again, the Board counsel might want to argue the case before the court.

Dr. Randy MacMillan asked what process was used to determine whether the Board hears a case or a hearing officer is appointed. Doug Conde explained that as a routine matter, the

Board is notified when a case is filed and a hearing officer is appointed (on a rotating basis). It then requires action by the Board if they want to hear the case.

Craig Harlen asked if individual Board members could attend hearings conducted by a hearing officer, and have the opportunity to ask questions or provide input. Doug Conde replied that individual Board members could attend hearings to hear testimony. One or more Board members can also act as the hearing officer to determine the case. In these situations the attorney, who would normally act as the hearing officer, acts as a presiding officer and handles the procedural matters of conducting the hearing, and the Board member(s) decide the case. If the Board or a member wishes to hear a case in this manner, notice must be given to all the parties so they know who will be making the decision.

Director Allred believed there were some cases where it would be beneficial for the Board to hear a case. He encouraged the Board to hear cases where the issue is primarily a policy decision. He thought it was important for the Board to observe the arguments and testimony in person and make the decisions in such cases. If the matter is a legal issue, a hearing officer is adequate, but he did not think it was necessarily the role for a hearing officer to determine policy for the Department.

Nick Purdy questioned whether the Board should take a more active role in contested cases, so they can be more informed as they make decisions. The time commitment would obviously not allow the full Board to hear all the cases. He wondered if one or more Board members could hear cases on a rotating basis.

Doug Conde believed the Board could effectively make decisions on cases without acting as the hearing officer. Members receive a full record of the case and all documents, evidence, and testimony presented. The only thing they will miss is the ability to look at a witness in person and judge the believability of their testimony. Nick Purdy noted that the Board would not be able to have input into making the decision. Mr. Conde pointed out that the Board still has the final decision. Also, if a Board member(s) hears a case and there is not a quorum, the order would be a recommended order or preliminary order and the full Board would still have the final decision.

Chairman Paul Agidius clarified that if a decision comes to the Board (from a hearing officer), either as a recommended or preliminary order, the Board views it on a de novo basis and can disregard anything the hearing officer decided and make its own decision.

Mr. Purdy asked if a step could be added to the current process to ask if a member or the full Board wants to act as hearing officer in a case before it is appointed to a hearing officer.

Craig Harlen noted that if the Board is not present at a hearing, they do not have the opportunity to ask for clarification or ask questions of witnesses. They have only the written record. If their question is not brought up by someone at the hearing, there is no way for them to get the information. He agreed with Director Allred's comments regarding the importance of having the Board hear cases regarding policy decisions. He thought it would be especially important for the Board to be able to ask questions in such cases.

Chairman Agidius asked if the Board could be notified whenever a case was filed involving a policy decision. Director Allred assured the Board they would be notified if a contested case is filed that involves a policy issue.

Doug Conde stated an additional, more formal step could be added to DEQ's procedures to require a decision from the Board not to act as hearing officer on a case before one is appointed, if the Board so chooses. The Board has the ability to hear additional information on a case that has been decided by a hearing officer. If the Board feels it needs additional information or wants to ask a question that is not addressed in the hearing record, they simply need to remand the matter back to the hearing officer to gather the information, or they could then participate at that level if needed.

Chairman Agidius asked that a sentence be added to the letter notifying the Board that a contested case has been filed, stating that if a member wants to participate, please contact DEQ by a certain date or a hearing officer will be appointed. Paula Gradwohl will make the requested change.

Don Chisholm thought it would be valuable to have Board members attend hearings when they have scientific expertise in the field at issue in the case. Hearing officers do not always have knowledge of the areas at issue, and the Board member could ask pertinent questions and make the process more efficient.

Harriet Hensley questioned whether a Board member who had participated in the evidentiary hearing as the hearing officer would be able to take part in the deliberation when the matter came before the Board. She believed they would have to recuse themselves from the proceeding to avoid a due process challenge. Doug Conde also believed a Board member who has participated as a decision maker in an evidentiary hearing could not take part in the deliberations when the matter came before the full Board. It is a due process issue. The member would have already made a decision, and that decision would then be debated before the Board.

If a quorum of the Board participates at the evidentiary hearing, there would be no further proceeding. The final decision of the Board would be made at the evidentiary hearing level. He added that a Board member may attend a hearing to observe the process (and not take part in the decision making) and still take part in the deliberation when the matter comes before the Board.

Don Chisholm believed it would be appropriate for a Board member who had participated as a hearing officer to also take part in the deliberation when the matter came before the Board. Director Allred took part in drafting the statute, and indicated it was his intent that a Board member could take part as a hearing officer and also as part of the Board. Doug Conde and Harriet Hensley will research this matter further and report their findings and recommendations to the Board.

b. Exparte Contact and Communication

Doug Conde briefed Board members on appropriate communication with parties when there is a contested case before the Board. As a general matter, there should not be any communications regarding the case or relevant issues between the hearing officer or the Board and just one party to a proceeding. Both parties to the case must be properly notified before any discussion can take place.

c. Conflict of Interest in Contested Cases

Doug Conde briefly discussed the Ethics in Government Act that governs conflict of interest. The general rule is that a conflict of interest exists if the decision maker in a matter stands to gain a private pecuniary benefit from the action. If there is an issue before the Board that involves a company a Board member works for, but the action would affect that company the same as it would affect any other company that is part of the industry, then there is no conflict. There must be a private pecuniary benefit to the individual. Conflict of interest must be determined on a case-by-case basis, and Board members will seek legal review whenever there is a question or appearance of a conflict. He noted that Board members may abstain from taking part in any action before the Board if they are uncomfortable, regardless of whether an actual conflict exists. If a conflict exists, Board members may still participate in the issue; state law simply requires that they identify the conflict to the public.

Director Steve Allred commented that even an appearance of a conflict of interest can damage public confidence in the Board and urged members be diligent in identifying possible problems.

Harriet Hensley advised that another challenge that could be brought against a Board decision is a due process challenge where proof of bias or prejudgment could invalidate a decision. Although it is a difficult challenge to prove, it could make the Board's decisions vulnerable down the line. She also recommended avoiding even an appearance of conflict of interest.

Nick Purdy questioned whether membership in associations or groups such as IACI or the Idaho Conservation League would create an appearance of conflict. Mr. Conde reiterated the need to review issues on a case-by-case basis. He felt it was not necessary for Board members to give up memberships in such organizations. While it certainly does not rise to the level of a technical conflict, members should consider how their memberships might be viewed on each case. The degree of involvement in the organization should also be considered.

d. Consolidation of Cases with the Same Legal Issue

Doug Conde explained there is a procedure in the rules to consolidate cases, but there must be a duplication of facts and law involved in the cases. It would be difficult do this with appeals because they do not seem to have exact duplication of issues. After the Board has made a decision on one case, that decision may be applied to future cases with the same legal issue. The Board may also wish to request a briefing on the issue separate from the contested case proceeding.

Don Chisholm suggested that when there are a number of parties with the same issue, they could be invited to file amicus briefs in the first case, so the matter could be disposed of efficiently. Doug Conde stated if all the parties agreed, such a process could be used. Another process would be to petition DEQ to ask for a declaration as to the application of law in certain circumstances.

e. General Issues Regarding Contested Case Procedures

Doug Conde reported a number of changes are being proposed for the contested case rules. The significant changes include:

- A process for notification to the public that a contested case has been filed
- Set a timeline for filing a motion to intervene in a contested case
- Clarifies that if a motion to intervene is denied by a hearing officer, it can be appealed to the Board.

f. Contested Case and Rule Docket Status Report

Board members briefly reviewed and discussed the current contested case status report.

AGENDA ITEM NO. 5: RULES REGULATING THE DISPOSAL OF RADIOACTIVE MATERIALS NOT REGULATED UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, DOCKET NO. 58-0110-0301 (TEMPORARY RULE) (NOTIFICATION REQUIREMENTS)

Director Steve Allred explained this rulemaking is undertaken to close a loophole in the law that was discovered recently when someone tried to illegally dispose of radioactive material at a municipal landfill. This rule adds a requirement that any person who has knowledge of radioactive materials being transferred for disposal to a prohibited location must notify the authorities. The change is needed to avoid the potential for radioactive material being introduced into the environment by indiscriminate disposal.

- **MOTION:** Don Chisholm moved the Board amend the Rules Regulating the Disposal of Radioactive Materials Not Regulated Under the Atomic Energy Act of 1954 as follows:
Any person with knowledge of the transfer or proposed transfer of radioactive materials for disposal to any location other than a location authorized by Section 020 to receive radioactive materials for disposal shall notify the Department of the transfer as soon as the transfer takes place or as soon as the person learns of the transfer or proposed transfer, whichever is sooner.

SECOND: Dr. Randy MacMillan

VOICE VOTE: Motion passed unanimously.

- **MOTION:** Don Chisholm moved the Board adopt, as temporary rules, the Rules Regulating the Disposal of Radioactive Materials Not Regulated Under the Atomic Energy Act of 1954, as Amended, as presented under Docket No. 58-0110-0301, and as amended in the Board meeting on August 21, 2003, with an effective date of August 22, 2003.

SECOND: Dr. Randy MacMillan

VOICE VOTE: Motion passed unanimously.

AGENDA ITEM NO. 6: BRIEFING ON WATER QUALITY 303(d) LIST

David Mabe, Administrator of the DEQ Water Quality Division (Division), briefed the Board on the 303(d) list. The 303(d) list is one of the major activities of the Division and it guides the work that will take place over the next several years. The 303(d) list is a report that is prepared for EPA and is required by the Clean Water Act. The comment period on the list recently closed. In the past, the list was mainly a single category of impaired waters; however,

significant changes have been made to the process. The 305(b) report, which is a general report on the status of waters in the state, has been incorporated into the 303(d) list. This combined report really gives a good overall picture of the status of all the waters in the state of Idaho. The water body assessment guidance DEQ used to assess the data collected and to make decisions was also updated.

The 303(d) list must be approved by EPA. In the past, DEQ had great difficulty getting approval of the list. EPA would often disapprove the list, then add a substantial number of streams. DEQ believes the changes in the process will result in a faster, more successful approval process.

A few minor issues need to be resolved before the current list is submitted to EPA for approval. DEQ has assessed 53% of the waters in the state. The remaining 47% should be sampled and assessed within the next five years. Of the 53% that have been assessed, 56% are impaired, and 44% are fully supported. These findings are not surprising because these waters are in areas that have good access and are therefore most heavily used. Most of the waters that have not been assessed are likely to be fully supported.

TMDLs have been completed on 25% of the impaired waters. DEQ expects to have TMDLs completed on the remaining 75% by 2008. TMDLs have been completed on most of the controversial waters such as the Mid Snake River, Boise River, and Portneuf River.

Mr. Mabe discussed some of the comments received on the 303(d) list. DEQ hopes to submit the final list to EPA within 30 days. The draft list was recently presented to EPA and they said it was one of the best lists in the nation in using the new guidance to create a comprehensive document that describes what work has been done, what needs to be done, and what problems still exist and need monitoring.

AGENDA ITEM NO. 7: WATER QUALITY TMDL – 401 CERTIFICATION FOR HELL’S CANYON COMPLEX DISCUSSION

David Mabe reported DEQ has submitted the Hells Canyon Complex TMDL to EPA for approval. Idaho Power has submitted its relicensing request for all three facilities (Brownlee, Oxbow, and Hell’s Canyon Dam). DEQ now has one year to submit the 401 Certification for those facilities.

AGENDA ITEM NO. 8: FY 2004 STRATEGIC PLAN

Director Allred distributed copies of DEQ’s FY 2004 Strategic Plan. He briefly discussed key issues including underground storage tanks, integrated watershed management, funding sources for DEQ loan programs, reductions in spending, security issues, and issues at the INEEL. He asked Board members for suggestions on how to most effectively gain their input in the strategic planning process.

AGENDA ITEM NO. 9: UPCOMING LEGISLATIVE SESSION: BUDGET/ISSUES DISCUSSION FOR FISCAL YEAR 2004

Director Steve Allred briefly discussed the upcoming legislative session. DEQ expects to have very few issues before the legislature this session. He will report on budget issues as the budget planning process proceeds.

AGENDA ITEM NO.10 : LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

Chairman Paul Agidius reported on the July 7, 2003 meeting of the Senate Health and Welfare Committee (“Committee”). Chairman Agidius attended the meeting along with Board members Dr. Joan Cloonan, and Dr. Randy MacMillan; Director Steve Allred and other DEQ staff were also in attendance. Discussion focused on communication issues and how to improve the rulemaking/legislative process.

Dr. MacMillan observed there seems to be a need to more clearly identify why certain rules are needed. Other issues discussed included increasing input from all levels of industry affected by a rule, rural/urban issues, primacy issues, stringency, and consensus.

Dr. Cloonan added that there seems to be confusion with the written rules that are given to the legislature. Legislators are given different versions of the rule (the proposed rule, and the final rule that incorporates changes made in response to comments). Many of the comments and complaints made by Legislators were about the proposed rule, not the final rule. So, there appears to be some confusion and uncertainty about what changes have been made and what version is actually before them for approval.

Board members discussed ways to address the suggestions discussed at the meeting. Chairman Agidius stated he would like to report to the Committee and let them know any actions that have been taken by DEQ or the Board in response to their suggestions.

Director Allred noted there was an attempt to have a paperless presentation of rules to the legislature last session. Problems with computers caused a lot of confusion and delay, and DEQ was eventually allowed to present written rules. Doug Conde added that DEQ is now providing a separate § 39-107(d) statement regarding stringency that clearly spells out how and why a rule is more stringent than federal law. The stringency statement is also published in the administrative bulletin.

Several Board members commented that it seemed unnecessary to identify whether a rule had full consensus when it came before the Board. The Board acts as a unit and once it has acted on an issue, that is the decision of the Board. The Board minutes clearly reflect the deliberation and action of the Board.

Dr. Randy MacMillan felt the meeting with the Committee was very helpful and suggested Board representatives meet with the House Environmental Affairs Committee.

Board members discussed sending a letter to the chairman of the Committee, with a copy to the chairman of the House Environmental Affairs Committee, to let them know how the Board will respond to the issues discussed in the meeting. Several Board members suggested the letter

might be a good opportunity to encourage the committees to educate their constituents to use DEQ's negotiated rulemaking process and the Board to resolve their concerns with rules instead of waiting until the rule is before the legislature. When constituents are allowed the latitude to ignore the rulemaking process and wait until the end to block rules in the legislature, the resources of the state are wasted. Chairman Agidius favored working on the issue through DEQ and the Board to provide an ongoing effort to increase participation from stakeholders in the rulemaking process. Chairman Agidius will work with staff to draft a letter to the chairman, then circulate it to the Board members for review and comment.

Marguerite McLaughlin stressed the importance of developing trust, credibility, and a good working relationship with the germane committees. She felt continued meetings and communication would be the key. Director Allred felt it was important for the Board to have more of a presence in the legislature early in the session. He encouraged the Board to meet with key members of the legislature and educate them regarding the rulemaking efforts of the Board and upcoming issues.

Craig Harlen commented on the public comment period of the Board meeting. Although he favored the Board hearing from the public, he was concerned that asking DEQ staff to respond to issues without prior notification would not allow them to be prepared to present the best, most accurate information. He also questioned the role of the Board in responding to comments, since the Board's authority is limited to approving rules and hearing contested cases.

Chairman Agidius suggested when an issue requiring action or a response is brought to the Board during the public comment period, a motion be made to put it on the agenda for the next meeting. This would allow staff time to properly prepare for discussion, provide proper notice, and allow a more orderly meeting.

Don Chisholm felt there may be times when the Board would simply need to ask DEQ staff to provide a written report or memo. He noted that Director Allred uses the Board as an advisory body and seeks its input on a broad range of issues; so, it seems an appropriate role for the Board to hear public comments.

Dr. Joan Cloonan agreed that in most cases it is not appropriate to try to respond to an issue during the public comment period. She felt the Board should consider it on a case-by-case basis, then ask for appropriate action. Nick Purdy commented it was common for boards and other entities, such as the county commissioners, to receive public comments during meetings. He felt it was appropriate for the Board to acknowledge the comments, then determine how to respond to each case.

a. Election of Officers

- **MOTION:** Marguerite McLaughlin moved the Board reelect its current officers; Paul Agidius as chairman, Dr. Randy MacMillan as vice-chairman, and Dr. Joan Cloonan as secretary.
SECOND: Craig Harlen
VOICE VOTE: Motion passed unanimously.

Director Steve Allred requested the Board go into executive session as authorized by Idaho Code § 67-2345(1)(b.) to consider the evaluation, dismissal or disciplining of, or to hear

complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student.

- **MOTION:** Don Chisholm moved the Board go into executive session as authorized by Idaho Code § 67-2345(1)(b)
- SECOND:** Craig Harlen
- ROLL CALL VOTE:** Motion passed. 7 ayes (Chisholm, aye; Cloonan, aye; Harlen, aye; MacMillan, aye; McLaughlin, aye; Purdy, aye; Agidius, aye); 0 nays; 0 absent.

The meeting room was cleared of everyone except Board members and Director Allred. The Board reconvened its open meeting approximately 15 minutes later. There was no action taken by the Board during the executive session.

The meeting adjourned at 2:30 p.m.

Paul C. Agidius, Chairman

Dr. Joan Cloonan, Secretary

Debra L. Cline, Management Assistant and Recorder